The aim of this chapter is to articulate a conception of justice that can be applied to massive reparations efforts. The task is particularly urgent because if there is such a thing as a ‘common’ or ordinary understanding of reparations, it is heavily influenced by a ‘juridical’ understanding of the term. While I have absolutely no interest in launching a critique of legal approaches to transitional problems, the juridical approach to reparations is problematic; it is so not because of its juridical nature per se, but because it is an understanding that has been developed, for good reasons, with an eye to the resolution of relatively isolated cases. By contrast, the aim of this chapter—and of this research project as a whole—is to think about what is fair, proper, and efficient in the resolution of massive and systematic cases of abuse.

Hence, I will start with a modest effort to establish some semantic clarity, at least by trying to distinguish between two different contexts of use of the term ‘reparations’ (Section 1). I then proceed to a brief discussion of what justice in reparations may mean when the idea is to repair a large number of cases, as opposed to individual, isolated cases. I discuss some of the problems with merely transplanting the ideal of compensation in proportion to harm from its natural home in the resolution of individual judicial cases, and using it as a standard of justice for massive reparations programs. I argue instead in favor of thinking about justice in the context of massive cases in terms of the achievement of three goals, namely, recognition, civic trust and social solidarity—three goals that, as it turns out, are
intimately related to justice (Section 2). Finally, without ever pretending that a blueprint for a program of reparations can be designed from a purely theoretical perspective, I try to shed light on the basic trade-offs that accompany some of the choices that have to be made in the process of constructing a comprehensive and coherent reparations program (Section 3).

1. Conceptual Clarification: The Meaning of the Term

I start by concentrating on a fact that, surprisingly, has not received sufficient attention in discussions of reparations thus far, namely, that there are two different contexts of use of the term ‘reparations’ (and that within each of them the term is used in different ways). The first context is the juridical one, particularly, the context of international law, in which the term is used in a wide sense to refer to all those measures that may be employed to redress the various types of harms that victims may have suffered as a consequence of certain crimes.\(^2\) The breadth of the meaning of the term ‘reparations’ in this context can be seen by considering the diversity of forms reparations can take under international law. These include:

- **Restitution**, which refers to those measures that seek to reestablish the victim’s *status quo ante*. These measures can range from the restorations of rights such as citizenship and liberty, to the reinstatement of job and benefits, to the restitution of property.
- **Compensation**, which refers to those measures that seek to make up for the harms suffered through the quantification of harms, where harm is understood to go far beyond mere economic loss, encompassing physical and mental injury, and in some cases moral injury as well.
- **Rehabilitation**, which refers to measures that provide social, medical, and psychological care, as well as legal services.
- **Satisfaction and guarantees of nonrecurrence**, which are especially broad categories that include such dissimilar measures as the cessation of violations, verification of facts, official apologies and judicial rulings that establish the dignity and reputation of the victim, full public disclosure of the truth, searching for, identifying, and turning over the remains of dead and disappeared persons, along with the application of judicial or administrative sanctions for perpetrators, and institutional reform.\(^3\)
The other context in which the term ‘reparations’ is frequently used is in the design of programs (i.e. more or less coordinated sets of reparative measures) with massive coverage. For example, Germany, Chile, and Argentina can be said to have established ‘reparations programs’. In this context, and despite the relations that each one of those programs may have with other efforts to achieve justice, the term is used in a narrower sense. Here ‘reparations’ refers to the attempts to provide benefits directly to the victims of certain types of crimes. In this sense, programs of reparations do not take truth-telling, criminal justice, or institutional reform, for example, as parts of reparations.

The categories used in the context of the design of programs in order to analyze reparations are different from those proposed by international law. In this context the two fundamental distinctions are between material and symbolic reparations, and between the individual and the collective distribution of either kind. Material and symbolic reparations can take different forms. Material reparations may assume the form of compensation, that is, of payments in either cash or negotiable instruments, or of service packages, which may in turn include provisions for education, health, and housing. Symbolic reparations may include, for instance, official apologies, rehabilitation, the change of names of public spaces, the establishment of days of commemoration, the creation of museums and parks dedicated to the memory of victims, etc.

There are, then, two different contexts of use of the term ‘reparations’, and they differ significantly from one another. In the sphere of definitions, the fundamental question is not so much about the correctness of a particular definition, but rather, about the relative advantages of understanding a term in a particular way. In the case at hand, the advantage of the breadth of the legal understanding of the term consists in the fact that it provides an incentive to design programs of reparations that cohere with other measures of justice, a topic to which I will return shortly. Nevertheless, the breadth of this understanding also carries a price: a program of reparations can hardly be designed from the beginning so as to include, as parts of a single whole, all the measures which international law takes to be forms of reparations.

The more restricted use of the term characteristic of discussions about the design of programs also has advantages and disadvantages. One of the advantages is that it suggests certain limits to the responsibilities of those in charge of designing such programs, which in principle makes their task satisfiable. However, this narrower use also poses the risk that the program of reparations will be completely unrelated to other justice measures. Although I insist on the importance of preserving the links between the program of reparations and other measures of justice in times of transition, I defend the use of the term ‘reparations’ in the narrower sense described above, that is, to refer to measures that provide benefits to victims directly. This use contrasts with measures which may have reparative effects, and which may be very important (such as the punishment of perpetrators, or institutional reforms), but which do not distribute a direct benefit to victims themselves.
Reparations as a Political Project

Now, these differences in use are of course motivated and not simply arbitrary. Part of the underlying motivation is functional in nature; in the juridical context, the meaning of the term is tied to the specific aim pursued in judicial settings, that is, the achievement of justice for individuals, where the means of achieving justice, namely, the trial of isolated cases, has an impact on the concrete content of justice. This approach to the concept of justice differs significantly from that which those who are responsible for the design of reparations programs may and should adopt. Courts do not have an option but to consider each case in its own terms. By contrast, whoever is in charge of designing a massive program of reparations has to respond to a much wider and complex universe of victims, and has to employ, per force, methods and forms of reparation suitable to these circumstances.

Although reparations are well-established legal measures in different systems all over the world, in transitional periods reparations seek, in the last analysis, as most transitional measures do, to contribute (modestly) to the reconstitution or the constitution of a new political community. In this sense also, they are best thought of as part of a political project.

There are two fundamental reasons that justify thinking about reparations in relation to a broader political agenda rather than in terms of a narrowly conceived juridical approach. In the first place, and from a negative perspective, a massive program of reparations cannot reproduce the results which could be obtained in the legal system, because all legal systems work on the assumption that norm-breaking behavior is more or less exceptional. But this is not the case when programs of reparations are being designed, for such programs attempt to respond to violations that, far from being infrequent and exceptional, are massive and systematic. The norms of the typical legal system are not devised for this sort of situation. It is worth pointing out that this problem is not limited to national jurisdictions. Most human rights treatises are conceived and configured to respond to violations in an individualized fashion, and not through massive programs. General international law has not formulated clear norms or principles on this matter either. In any case, the capacity of the state to redress victims on a case-by-case basis is overtaken when the violations cease to be the exception and become very frequent. I will return to this point shortly.

In the second place, and from a positive perspective, to assume a political perspective on reparations opens up the possibility of pursuing ends through the reparations program that would be more difficult to pursue if the sole aim of the
program could be victims’ redress in accordance with a legal formula. Some of these ends, as it will be argued below, have to do with a broad conception of justice that goes beyond the satisfaction of individual claims, and that involves recognition, civic trust, and social solidarity.  

The most general aim of a program of reparations is to do justice to victims. The question, of course is, what should victims in fairness receive?

Perhaps, rather than approaching the question in a vacuum, it would be easier to start by examining what international law and jurisprudence have to say about the issue. Needless to say, here I can only do so in the most cursory manner. There seems to be growing consensus among international lawyers that victims of human rights abuses are entitled to reparations. This emerging consensus is grounded, in part, on the general principle that all violations of international law entail some responsibilities. But responsibilities to do what? Here is what some international human rights instruments say: Article 8 of the Universal Declaration of Human Rights talks about ‘effective remedies’. Article 10 of the American Convention, about ‘adequate compensation’, Article 63 about ‘fair compensation’, and Article 68 talks about ‘compensatory damages’. Article 9 of the International Covenant on Civil and Political Rights includes vocabulary about ‘an enforceable right to compensation’, Article 14 of the Convention against Torture speaks about ‘fair and adequate compensation including the means for as full rehabilitation as possible’, and Article 50 of the European Convention about ‘just satisfaction to the victim’.

This, of course, does not settle the issue. What do the expressions ‘effective remedies’, ‘fair and adequate compensation’, and ‘just satisfaction’ mean, precisely? Once again, perhaps it is easier to approach the subject by examining what different bodies responsible for interpreting these norms have said about the subject. Both the Inter-American and the European human rights systems have dealt extensively with the issue, the courts in both systems having decided well over one hundred cases involving reparations. Although there are important differences between the decisions in the two systems, I will not deal with these here. In general, it can be said that they agree on the following interpretation of ‘fair and adequate compensation’ and other cognate terms: the ideal behind reparations is ‘full restitution’ (restitutio in integrum), that is, the restoration of the status quo ante. In cases where this is impossible, for example, when a death has occurred, compensation is required, and this means, for the Inter-American Court, for instance, that material and moral damages are called for. To pay material and moral damages means to
cover ‘any damages of economic value such as physical or mental damages, psychological pain or suffering, opportunity cost, loss of wages and the capacity to earn a living, reasonable medical and other expenses in rehabilitation, damages to goods and trade; including loss earnings; damages to reputation or dignity and reasonable expert fees’. Procedurally, the Court has calculated these damages by projecting the victim's actual income, multiplying it by whatever was left of his or her professional life (based on national professional and life expectancy averages), and subtracting 25 percent of this amount (assuming that this was the portion of income that the victim would have consumed for personal use, and therefore not available to relatives). In cases where it is difficult to estimate the victim's income, the Court has used national minimum wages, and in at least one case, where it determined that the national minimum wage was too low, it went as far as using the average of regional minimum wages. To this amount, the Inter-American Court has then added its calculation of subjective, or ‘moral’, damages, which try to compensate for pain and suffering. In sum, decisions by the Court have typically required payments of between $150,000 and $200,000 per victim.

Now, in an isolated case of a human rights violation, this ideal of complete reparation (restitutio in integrum) understood in terms of the restoration of the status quo ante or of compensation in proportion to the harm suffered, is unimpeachable. Its justification should be obvious: from the perspective of victims and survivors, it attempts to neutralize the consequences of the violation they have suffered. From another perspective the ideal hopes to prevent perpetrators from enjoying any benefit they may have derived from their criminal actions, or to obligate the state to take responsibility for having allowed, by act or omission, certain violations to occur.

But there are circumstances in which this ideal is unrealizable, either due to insurmountable constraints such as the impossibility of bringing someone back to life, or due to constraints that although not absolute, are still severe, such as real scarcity of resources of the sort that makes it unfeasible to satisfy, simultaneously, the claims of all victims and of other sectors of society that in fairness, also require the attention of the state.

Let me illustrate with a concrete example some of the problems generated by the prevalent interpretation of ‘adequate compensation’. I want to say that it not only fails to provide guidance, but may actually have some pernicious effects.

As the Peruvian Truth and Reconciliation Commission discussed its reparations recommendations, the Inter-American Commission and the Court kept deciding cases of torture and disappearances in the country, making the familiar sorts of awards, involving sums between $100,000 and $200,000 per victim. These decisions formed the backdrop against which the TRC was articulating its position on reparations, which naturally awakened expectations that it would recommend a reparations plan featuring similar measures. But, of course, it could not possibly do that. If the plan aspired to follow the Inter-American Court’s criteria, assuming
that it would give each of the families of the more than 69,000 victims of death $150,000, not counting any of the additional services that the Court usually requires, this would have consumed more than $10 billion. Now, Peru’s total national budget for 2003 was around $9 billion. This is to say that this part of the reparations plan alone would have consumed more than the entire national yearly budget. Clearly, this was completely unfeasible for the country, even if the costs could have been spread over a number of years, and even if the reparations plan had enjoyed unconditional political support (which it did not, for different reasons, including the generalized perception that the plan would give benefits to a large number of people who are deemed not to deserve them, namely former insurgents, people who do not have ‘clean hands’). For a long while there was a very strong probability that given these expectations, whatever the TRC proposed it would have been a huge disappointment. And, given the impact that perceptions concerning reparations have on people’s assessment of the success or failure of the general work of a truth commission, this is no insignificant matter. In South Africa, for example, the failure to implement the TRC’s recommendations on reparations has affected the overall perception of its success, despite the fact that the South African TRC was not at all responsible for the implementation of the plan!21

But the fact that there is no transitional or postconflict reparations program that has managed to compensate victims in proportion to the harm they suffered, that the very quantification of these harms is problematic, and that even the idea that this should be attempted might generate unfulfillable expectations, are not the only problems that accompany the effort to import this criterion of justice to the domain of massive programs. Ultimately, I think that there is a difference between, on the one hand, awarding reparations within a basically operative legal system of which, in the relatively isolated case of abuse, it can be said that it should have and could have fared better, and, on the other hand, awarding reparations in a system that in some fundamental ways, precisely because it either condoned or made possible systematic patterns of abuse, needs to be reconstructed (or, as in some countries, built up for the very first time). In the former case it makes sense for the criterion of justice to be exhausted by the aim to make up the particular harm suffered by the particular victim whose case is in front of the court. In the case of massive abuse, however, an interest in justice calls for more than the attempt to redress the particular harms suffered by particular individuals. Whatever criterion of justice is defended must be one that has an eye also on the preconditions of reconstructing the rule of law, an aim that has a public, collective dimension.

In such contexts, some additional difficulties with the attempt to import the received criterion of reparative justice to the massive cases are worth highlighting. These difficulties stem from the procedure that would have to be implemented if the criterion of restitutio in integrum were to be satisfied. This criterion calls for procedures that individualize the treatment of cases, for the criterion defines justice in terms of rendering each victim whole. Again, there is nothing objectionable
about this in the sporadic, isolated case of abuse. For massive cases of abuse, and of abuse that comes about as the result of a deliberate policy, however, a case-by-case procedure generates the following two complex problems: first, such procedure would disaggregate victims (in at least two ways), and second, it would disaggregate the reparations efforts (again, in at least two ways).

A case-by-case procedure for settling reparations claims disaggregates victims because of unequal access to courts, and of the unequal awards courts make. Even legal systems that do not have to deal with massive and systematic crime find it difficult to ensure that all victims have an equal chance of accessing the courts, and even if they do, that they have a fair chance of getting similar results. The more frequent case is that wealthier, better-educated, urban victims have not only a first, but also a better chance of obtaining justice through these case-by-case procedures.

Furthermore, since doing justice to victims on a case-by-case basis inevitably involves trying to assess individual harms and compensating accordingly, and this, in turn naturally leads to awards of different magnitude for different victims, the difference in the awards may send a message that the violation of the rights of some people is worse than the violation of the same rights of others, thereby undermining an important egalitarian concern and resulting in a hierarchy of victims. Notice that while in general equity does not require equal treatment, in cases of systematic abuse in which people feel that they are victims of the same system and in which they are being redressed through the same procedure and more or less simultaneously—which makes them particularly likely to compare the outcomes—this becomes a serious issue.

Even in the rare case in which respect for the equality of rights is not the real concern, disparities in the magnitude of the awards has a deeply divisive effect on the victims. The divisive effect obtained regardless of the high baseline of the awards. ($2.1 million was the average award for families of the deceased. The median was $1.7 million. The awards were made on the basis of sophisticated calculations of the victims’ expected income.)

The second problem entailed by the effort to apply the case-by-case procedure that the satisfaction of the criterion of *restitutio in integrum* requires is that it ends up disaggregating not only the victims, but also the reparations efforts. Part of the difficulty here has to do with issues of publicity: due to reasons of privacy, case-by-case approaches might find obstacles to full disclosure of facts needed to treat like cases alike. Moreover, the piecemeal nature of the process makes it comparatively more difficult to provide a comprehensive view of the nature and magnitude of the reparations efforts. Compounded by the disparity in the magnitude of the awards mentioned before, headlines are usually grabbed by the largest awards, to the detriment of the overall efforts.

Finally, because it is easy, in employing a case-by-case approach, to conclude that justice is exhausted by the satisfaction of the criterion of full restitution (what is it,
after all, that victims could want in addition to this?), benefits distributed in this manner tend not to be coordinated with other justice measures that are also important. In purely procedural terms, case-by-case approaches tend to produce a certain amount of frustration among beneficiaries, who complain that the proceedings concentrated on financial considerations alone, that whereas they wanted to talk about the experiences of victimization, program officials concentrated on evidence regarding income and assets.²⁵

Despite these complications, the state cannot simply ignore the claims of victims with the argument that there are no resources to cover the corresponding costs, or alleging that there is simply no way to overcome the problems described. This would be tantamount to acknowledging that it is in no position to sustain a fair regime. Part of the aim of this project, in fact, is to block the inference from premises regarding how difficult it is to establish fair and effective reparations programs to a conclusion claiming the impossibility of doing so. The state's responsibility consists in designing a program of reparations of which it might be said that it satisfies conditions of justice, even though its benefits are not the same as those that would be determined by a court resolving infrequent or at least isolated suits. But what is involved in 'satisfying conditions of justice' if one cannot rely upon the standard of compensation in proportion to harm?²⁶

Before addressing the question directly, it is worth making a preliminary remark. Mere disparities in the awards distributed by courts relative to those distributed by mass programs do not necessarily manifest a flaw, let alone a lack of fairness, in mass programs. For this reason, reparation programs need not to be considered simply as second best alternatives to judicial procedures. Reparation programs at their best are administrative procedures that, among other things, obviate some of the difficulties and costs associated with litigation. These include long delays, high costs, the need to gather evidence that might withstand close scrutiny (which in some cases may be simply unavailable), the pain associated with cross-examination and with reliving sorrowful events, and finally, the very real risk of a contrary decision, which may prove to be devastating, adding insult to injury. A well-designed reparations program may distribute awards which are lower in absolute terms, but comparatively higher than those granted by courts, especially if the comparison factors in the faster results, lower costs, relaxed standards of evidence, nonadversarial procedures, and virtual certainty that accompanies the administrative nature of a reparations program.

In the second place, it is important to keep in mind that most programs of reparations are designed in the context of a transition to democracy.²⁷ This in my mind has an impact on how justice—and the different measures applied to achieve it—should be understood. There are three specific aims, closely related to the notion of justice, but particularly salient during times of transition, that I think can help structure an answer to the question of what is fair in terms of reparations. These aims are simultaneously necessary conditions and consequences of justice.
Recognition

One of the main aims of transitional justice is to return (or, in some cases to establish anew) the status of citizens to individuals. To the extent that a reparations program aims to contribute to the achievement of justice, and that recognition is both a condition and a consequence of justice, this links reparations and recognition. In order to recognize individuals as citizens it is necessary to recognize them as individuals first. That is to say, it is necessary to recognize them not only as members of groups (as important as this might be), but also as irreplaceable and unsubstitutable human beings. Citizenship in a constitutional democracy is a condition that individuals grant to one another, each one of whom is conceived as having value on his or her own.

One of the ways of recognizing another person as an individual, in addition to recognizing the peculiarities of his or her chosen form of life (which is to recognize the person’s agency), is to recognize the ways in which the person is affected by the environment, that is, to recognize that the person is not only the subject of his or her own actions, but the object of the actions of others. In other words, there is a form of injustice that consists, not in illegitimately preventing her from exercising her agency through, say, the deprivation of liberty, but in depriving her of the sort of consideration which is owed to whoever is negatively and severely affected by the actions of others. A minimum condition for the attribution of moral standing, without which individuals cannot be recognized as such, is the acknowledgment that my actions impinge on them. The denial of this sort of standing, of this sort of consideration, reveals clearly that I have failed to recognize that I am dealing with individuals.

As if this were not enough, in a constitutional democracy it matters that members recognize one another not only as individuals, but also as citizens. To withhold from victims the type of consideration we are talking about makes the mutual attribution of this status impossible. In a democracy, citizenship is a condition that rests upon the equality of rights of those who enjoy such status. And this equality of rights determines that those whose rights have been violated deserve special treatment, treatment that tends towards the reestablishment of the conditions of equality.

From my standpoint, the various transitional mechanisms can be usefully seen through the lens of recognition. That is, all of them can be interpreted as efforts to institutionalize the recognition of individuals as citizens with equal rights. Thus, criminal justice can be interpreted as an attempt to reestablish equality between the criminal and his or her victim, after the criminal severed that relationship with an act that suggested his superiority over the victim. Truth-telling provides recognition in ways that are perfectly familiar, and which are still probably best articulated by the old difference proposed by Thomas Nagel between knowledge and
acknowledgment, when he argued that although truth commissions rarely disclose facts that were previously unknown, they still make an indispensable contribution in acknowledging these facts. The acknowledgment is important, precisely because it constitutes a form of recognizing the significance and value of persons—again, as individuals, as citizens, and as victims. Finally, institutional reform is guided by the ideal of guaranteeing the conditions under which citizens can relate to one another and to the authorities as equals.

The exact way in which reparations contribute to justice is complex. On the one hand, it is one aspect of the close relationship that binds the different elements of transitional justice together, and specifically, of the ways in which reparations complement other transitional justice processes. Let me illustrate. Truth-telling in the absence of reparations can be seen by victims as an empty gesture, as cheap talk. The relation holds in the opposite direction as well: reparations in the absence of truth-telling can be seen by beneficiaries as the attempt, on the part of the state, to buy the silence or acquiescence of victims and their families, turning the benefits into ‘blood money’. The same tight and bidirectional relationship may be observed between reparations and institutional reform, since a democratic reform that is not accompanied by any attempt to dignify citizens that were victimized can hardly be understood. By the same token, reparative benefits in the absence of reforms that diminish the probability of the repetition of violence are nothing more than payments whose utility, and furthermore legitimacy, are questionable. Finally, the same bidirectional relationship links criminal justice and reparations: from the standpoint of victims, especially once a possible moment of satisfaction derived from the punishment of perpetrators has passed, the punishment of a few perpetrators without any effective effort to positively redress victims could be easily seen by victims as a form of more or less inconsequential revanchism. In summary, reparations contribute to justice not only because they complement transitional justice measures generally, but because they do so in a particular way, namely by helping to keep those other measures from fading into irrelevance for most victims.

On the other hand, reparations can play this ‘supportive role’ precisely because they constitute, in themselves, a form of recognition. They are, in a sense, the material form of the recognition owed to fellow citizens whose fundamental rights have been violated.

Civic Trust

Another legitimate aim of a program of reparations as an instrument of justice is the formation or the restoration of trust among citizens.
Needless to say, whether the hypothesis is reasonable and testable depends on what ‘civic trust’ means. Thus, some explanation is in order. First, let us start with a broad understanding of trust: trust in general, as a disposition that mediates social interactions, ‘is an alternative to vigilance and reliance on the threat of sanctions, [and] trustworthiness… an alternative to constant watching to see what one can and cannot get away with, to recurrent recalculations of costs and benefits’.33

Still by way of indirection, it can be said that while trusting someone involves relying on that person to do or refrain from doing certain things, trust is not the same thing as mere predictability or empirical regularity. If that were so, the paradigm of trust would obtain in our relationship with particularly reliable machines. That reliability is not the same as trustworthiness can be seen in our reluctance to say that we trust someone about whose behavior we feel a great deal of certainty but only because we both monitor and control it (e.g. through enforcing the terms of a contract), or because we take defensive or preemptive action.34 Trust involves an expectation of a shared normative commitment. I trust someone when I have reasons to expect a certain pattern of behavior from her, and those reasons include not just her consistent past behavior, but also, crucially, the expectation that among her reasons for action is the commitment to the norms and values we share. In this sense, although trust does not involve normative symmetry—trust is possible within largely asymmetrical relationships including those within deeply hierarchical institutions—it does involve normative reciprocity: trust develops out of a mutual sense of commitment to shared norms and values. This explains both the advantages of trust and the risks it always involves: in dispensing with the need to monitor and control, it facilitates cooperation immensely, and not only by lowering transaction costs; but as a wager (no matter how ‘safe’), that at least in part for normative reasons those we trust will not take advantage of our vulnerabilities, we risk having our expectations defeated.

Now, the term ‘civic’ in ‘civic trust’, I understand basically as a limiting qualifier. Trust can be thought of as a scalar relationship, as one that allows for degrees. The sense of trust at issue here is not the thick form of trust characteristic of relations between intimates, but rather, ‘civic’ trust, which I take to be the sort of disposition that can develop among citizens who are strangers to one another, and who are members of the same community only in the sense in which they are fellow members of the same political community. True, the dimension of a wager is more salient in this case than in that of trust towards intimates, since we have much less information about others’ reasons for actions. However, the principles that we assume we share with others and the domain of application of these principles are much more general. To illustrate, the loyalty that binds me to intimates is significantly thicker than the loyalty (e.g. to a common political project) that binds me to fellow citizens.

Just like recognition, civic trust is at one and the same time a condition and a consequence of justice. There are myriad ways in which a legal system relies on the
trust of citizens. At the broadest level, a legal system works only on the basis of the citizens’ generalized norm-compliance. In other words, the legal system can cope with norm-breaking behavior only when it is exceptional. This means that most social interactions are not directly mediated by law, but rather, at some level, by trust between citizens. Closer to home, however, all legal systems rely not just on the trust that citizens have towards one another but on the trust that they have in the systems themselves. In the absence of total surveillance, criminal legal systems must rely upon the citizens’ willingness to report both crimes that they witness and crimes that they suffer. And this willingness to report, of course, rests upon their trust that the system will reliably produce the expected outcomes. This is actually a complex sort of trust: in police investigations, in the efficiency of the court systems, in the honesty of judges, in the independence of the judiciary (and therefore on the executive’s willingness to protect and promote that independence), in the at least minimal wisdom of the legislature, and in the strictness (but perhaps also the simultaneous humaneness) of the prison system, etc. Needless to say, each of these objects of trust can be further analyzed.

On the other hand, it is not just that legal systems rely upon the trust of citizens both among one another and in the system itself. Legal systems, when they operate well, also catalyze trust, once again, both among citizens themselves, and in the system itself. Indeed, Rawls takes the rule of law’s ability to generate social trust—which he understands in terms of the reliability of expectations—as a definitional aspect of the rule of law:

A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled.

To the extent that law helps to stabilize expectations, and that it helps to diminish the risks involved in trusting others, especially strangers, it contributes to the generation of trust among citizens.

As for the catalytic role of law in generating trust in legal institutions, the underlying argument should be clear: legal institutions, insofar as they are reliable, provide further reasons for citizens to rely upon them for the resolution of their conflicts. This simply follows from the fact that trust is something that is earned, rather than arbitrarily bestowed, and this is true just as much for institutions as it is for individuals. The easier way of seeing this is by noticing attitudes towards law in societies where the legal system is perceived as inaccessible or otherwise unreliable.

The fundamental point, of course, is to clarify the relationship between reparations and civic trust. Again, for victims, reparations constitute a manifestation of the seriousness of the state and of their fellow citizens in their efforts to reestablish relations of equality and respect. In the absence of reparations, victims will always
have reasons to suspect that even if the other transitional mechanisms are applied with some degree of sincerity, the 'new' democratic society is one that is being constructed on their shoulders, ignoring their justified claims. By contrast, if, even under conditions of scarcity, funds are allocated for former victims, a strong message is sent to them and others about their (perhaps new) inclusion in the political community. Former victims of abuse are given a material manifestation of the fact that they are now living among a group of fellow citizens and under institutions that aspire to be trustworthy. Reparations, in summary, can be seen as a method to achieve one of the aims of a just state, namely, inclusiveness, in the sense that all citizens are equal participants in a common political project.

**Solidarity**

Finally, another legitimate aim of a program of reparations, considered once again as one of the forms of promoting justice, may be the strengthening or the generation of another attitude which—like recognition and civic trust—is also a condition and a consequence of justice. This is the attitude of social solidarity.\(^38\)

Just like civic trust, solidarity also comes in different types and degrees. Social solidarity is the type of empathy characteristic of those who have the disposition and the willingness to put themselves in the place of others. That this attitude is a condition of justice may be seen in the following way: an impartial perspective, an indispensable requisite of justice, is not achievable unless the person that judges is prepared to assume the place of the contesting parties. Moreover, in a democratic system which distinguishes legitimacy from mere balances of power, the only way to assure that the legitimacy of a law has been attained is by making sure that the law incorporates the interests of all that are affected by it. And this implies having an interest in the interests of others.\(^39\) This is precisely what social solidarity is.

Reparations can be seen as an expression of this type of interest, and, at the same time, as generators of this form of solidarity. In societies divided and stratified by the differences between the urban and the rural, by ethnic, cultural, class, and gender factors, reparations manifest the interest of the traditionally most advantaged in the interests of the least favored. Although it cannot be assumed that the former will immediately support a reparations program, this is a point at which the relations between reparations and other transitional mechanisms, especially truth-telling, may play an important role, for historical clarification can awaken empathy with victims. On the other hand, to the extent that victims feel that a new 'social
contract’ in which their dignity and their interests are amply recognized is being offered, they will have reasons to take an interest in common interests, contributing in this way to the strengthening of the basis of a just society.

Here it is particularly important not to overstate the case; it is unlikely that a reparations program, on its own, can generate a sense of social solidarity where there is none. In this sense, it becomes obvious that reparations manifest, that is, rest upon, preexisting commitments. Nevertheless, a well-crafted reparations program can play a (modest) role catalyzing solidarity. It is true that transitional moments are periods of heightened normative sensitivity, where both institutions and individuals have strong incentives to articulate the principles, norms, and values to which they commit themselves. However, they are also moments still marked by the signs of social bonds strained and broken by conflict or authoritarian rule, and of bankrupt and largely unreliable institutions. Complexity beyond a certain threshold can undermine social virtues not so much by undermining the virtues of individuals, at least initially, as by leaving clear no avenue of action that expresses those virtues. Over time, commitments may weaken. Under such circumstances, normative talk, including talk about solidarity with victims, may turn into nothing more than talk, unless it receives adequate and effective institutional expression. A carefully designed and well-implemented reparations program may catalyze social solidarity precisely by giving concrete expression to commitments that, if they remain free floating, are always at risk of dissipating.

Notice, to conclude this section, three additional advantages of thinking about the aims of reparations in these explicitly political terms rather than in the more judicial terms of compensation in proportion to harm. First, this way of thinking about reparations, although based on principled normative considerations, permits crafting reparations in a way that attends to contextual features in two important senses: as I have pointed out before, it suits the peculiarities and the needs of transitional situations, taking advantage of the aspects of such contexts that call for a ‘constitutional moment’. However, it is not just that in thinking about the aims of reparations in terms of recognition and the reconstitution of civic trust and social solidarity important transitional goals are explicitly assumed as guides for the design of an important transitional tool, thereby helping to guarantee the success of both the reparations program and the transitional policy, but that taking these as the main goals of the reparations program gives it a beneficial forward-looking character. One of the main sources of dissatisfaction with most reparations awards is the fact that beneficiaries frequently consider them insufficient compensation. In this, they are usually correct, independently of the magnitude of the award, for reasons that have to do with the difficulty—and ultimately, the impossibility—of quantifying great harm; there is no amount of money that can make up for the loss of a parent, a child, a spouse. There is no amount of money that can
adequately compensate for the nightmare and the trauma of torture. In my view, reparations programs, not least because of the financial difficulties that arise in cases with massive numbers of claimants, should not even attempt, and should always avoid using the vocabulary of, proportional compensation. There should not be anything in a reparations program that invites either their designers or their beneficiaries to interpret them as an effort to put a price on the life of victims or on the experiences of horror. Rather, they should be interpreted as making a contribution to the quality of life of survivors. Thinking about reparations in terms of recognition and of the promotion of civic trust and social solidarity invites the assumption of this forward-looking perspective.

Second, there is another sense in which taking the more political aims of granting recognition, and promoting civic trust and social solidarity, allows for a healthy form of contextualism: for instance, what in a given society is sufficient to provide adequate recognition to victims is largely a matter of context. What US citizens expect by way of recognition may differ widely from what the potential beneficiaries in different contexts may expect. And satisfying those different expectations, despite their differences, is obviously not a bad thing.

Another advantage of thinking about reparations in explicitly political terms, rather than in terms of judicial considerations, is that it places another thorny issue in the design of reparations programs in its proper context. I am talking about the question of finances. A political perspective on reparations introduces some clarity in discussions about financing strategies. Basically, this happens because it takes the question of finances out of the exclusive domain of technicians and lawyers and returns it where it should properly lie, namely, in the domain of competing social priorities. Most governments respond to recommendations concerning reparations with one of two responses. Either ‘reparations are too expensive and we cannot afford them’, or, ‘if we repair, let’s do it collectively’. To the first response, the adequate reaction is to point out that questions about what can and cannot be afforded at public expense are always questions about priorities. Perhaps, unless there is a budget surplus, nothing can be afforded by leaving everything else untouched. The question is about what is deemed urgent, and this is always a matter of politics. To the second response, which usually accompanies the preference of governments for folding reparations into development programs, the proper reaction is to point out that the bias in favor of the collective is nothing more than that; the collective can be quite expensive, more expensive than the individual (in fact, given the generally dismal record of development programs, these, in particular can be very expensive).
3. Structural Considerations

Integrity or Coherence

Up to this point I have said virtually nothing about the characteristics of reparations programs. Part of the reason is that, needless to say, I do not think that their design follows deductively from matters of principle. Nevertheless, I am prepared to make two general points.

The first is a remark about a desirable characteristic that I think all programs should have. Reparations programs should display what I call integrity or coherence, which I analyze into two different dimensions, internal and external. **External coherence** expresses the requirement that the reparations program be designed in such a way as to bear a close relationship with the other transitional mechanisms, that is, with criminal justice, truth-telling, and institutional reform. This requirement is both pragmatic and conceptual. The relationship increases the likelihood that each of these mechanisms be perceived as successful (despite the inevitable limitations that accompany each of them), and, more importantly, that the transitional efforts, on the whole, satisfy the expectations of citizens. But beyond this pragmatic advantage, it may be argued that the requirement flows from the relations of complementarity between the different transitional justice procedures that I sketched before.

Reparations programs ought to display integrity or coherence in another dimension: a program of reparations, if it is to attain its proper goals, must always be a complex program that distributes different benefits, and the different components of the plan ought to be mutually coherent. That is, the program ought to be **internally coherent**. Most reparations programs distribute more than one kind of benefit. These may include symbolic as well as material reparations, and each of these categories may include different measures and be distributed individually or collectively. Obviously, in order to reach the desired aims, it is important that benefits be part of a plan whose elements internally support one another.

Forms of Reparations and Their Trade-offs

The second set of points about the structure of reparations programs that can be safely made from a relatively abstract perspective is the following. Although the final details of a program for a particular country will depend on heeding many contextual features, the trade-offs between different measures can be clarified in very general terms. So although I do not think that theorists can properly get into the business of writing up blueprints of such programs—at least not in their
capacity as mere theorists—there is a great deal of work that can be done in the clarification of the advantages and disadvantages that may accompany different design choices. The following scheme illustrates the basic orientation:

1. **Symbolic Measures**
   
   **Individual** (personal letters of apology, copies of truth commission reports, proper burial for the victims, etc.)
   
   (a) Advantages
   
   - Constitute a way to show respect for individuals.
   - Express recognition for the harm suffered.
   - Low cost.
   
   (b) Disadvantages
   
   - May create the impression that by themselves they constitute sufficient reparations for the victims.

   **Collective** (public acts of atonement, commemorative days, establishment of museums, changing of street names and other public places, etc.)
   
   (a) Advantages
   
   - Promote the development of:
     - Collective memory;
     - Social solidarity; and
     - A critical stance toward, and oversight of, state institutions.
   
   (b) Disadvantages
   
   - May be socially divisive.
   - In societies or social sectors with a proclivity toward feeling victimized, this feeling may be heightened.
   - May create the impression that they alone constitute sufficient reparations for the victims.

2. **Service Packages**

   Service packages may include medical, educational, and housing assistance, etc.
   
   (a) Advantages
   
   - Satisfy real needs.
   - May have a positive effect in terms of equal treatment.
   - May be cost-effective if already existing institutions are used.
   - May stimulate the development of social institutions.
(b) Disadvantages
- Do not maximize personal autonomy.
- May reflect paternalistic attitudes.
- Quality of benefits will depend on the services provided by current institutions.
- The more the program concentrates on a basic service package, the less force the reparations will have, as citizens will naturally think that the benefits being distributed are ones they have a right to as citizens, not as victims.

3. Individual Grants
(a) Advantages
- Respect personal autonomy.
- Satisfy perceived needs and preferences.
- Promote the recognition of individuals.
- May improve the quality of life of the beneficiaries.
- May be easier to administer than alternative distribution methods.

(b) Disadvantages
- If they are perceived solely as a way of quantifying the harm, they will always be viewed as unsatisfactory and inadequate.
- If the payments fall under a certain level, they will not significantly affect the quality of life of the victims.
- This method of distributing benefits presupposes a certain institutional structure. (The payments can satisfy needs only if institutions exist to ‘sell’ the services that citizens wish to purchase.)
- If they are not made within a comprehensive framework of reparations, these measures may be viewed as a way to ‘buy’ the silence and acquiescence of the victims.
- Politically difficult to bring about, as the payments would compete with other urgently needed programs, may be costly, and may be controversial as they would probably include ex-combatants from both sides as beneficiaries.

There are those who think that reparations can also take the shape of development programs. I do not agree with that option, but to complete the analysis, the following may be said.

4. Development and Social Investment
(a) Apparent Advantages
- Gives the appearance of being directed toward the underlying causes of the violence.
Would appear to allow due recognition to be given to entire communities.

Gives the impression of making it possible to reach goals of justice as well as development.

Politically attractive.

(b) Disadvantages

- Has very low reparative capacity, as the development measures are too inclusive (are not directed toward the victims) and they are normally focused on basic and urgent needs, which make the beneficiaries perceive them as a matter of right and not as a response to their situation as a victim.
- In places characterized by a fragmented citizenry, these measures do nothing to promote respect for people as individuals rather than as members of marginal groups.
- Uncertain success: development programs are complex and long-term programs. This threatens the success of the institutions responsible for making recommendations regarding reparations, which may lead to questions regarding the seriousness of the transitional measures in general.
- Development plans easily become the victims of partisan politics.

In principle, there is no conflict at all between the distribution of symbolic and material reparations. In fact, ideally, these benefits can lend mutual support to each other, something that will be especially important in contexts characterized by scarce resources, where symbolic reparations will surely play a particularly visible role. Nor is there any conflict at all, in principle, between individual and collective measures. As long as there is a substantial individual component, the exact balance between the two kinds of measures should be established taking into consideration, among other factors, the kind of violence sought to be redressed. In those places where the violence was predominantly collective, it makes sense to design a program that also places special emphasis on these kinds of methods.

Having said this, it should be obvious from considerations under point 4, above, that I am skeptical of the effort to turn a program of reparations into the means of solving structural problems of poverty and inequality.

Strictly speaking, a development program is not a program of reparations. In fact, development programs have a very low reparative capacity, for they do not target victims specifically, and what they normally try to achieve is to satisfy basic and urgent needs, which makes their beneficiaries perceive such programs, correctly, as ones that distribute goods to which they have rights as citizens, and not necessarily as victims. In the second place, development programs are affected by a very high degree of uncertainty, for development aims are both complex and
long-term. This threatens the success of the institutions responsible for making recommendations concerning reparations, and may raise questions about the seriousness of the transitional process in general. Given the importance of reparations in a transitional process, to propose a program with a very uncertain or very extended horizon of success could generate questions about the commitment to democratic renewal.

Here it is worth distinguishing between reparations in their strict sense, and the reparative effects of other programs. Development, just like criminal justice, for example, may have reparative effects. Nevertheless, this does not make either of them part of the domain of responsibility of those who design programs of reparation. Naturally, we may reiterate here that the latter must cohere with other aspects of the transitional policy. That is to say, the program must be internally and externally coherent, and it must avoid reproducing and perpetuating unjust social structures. In the last analysis, a transitional government in a poor country will most likely propose a development plan, and ideally, the program of reparations must also cohere with that plan. But the point I have emphasized is that it is important to set boundaries of responsibilities between different policies, for strictly speaking, the responsibilities of a program of reparation are not the same as that of a development or social investment plan.

4. Conclusion

The conception of justice in reparations presented here takes as its starting point the difference between the requirements of fairness in isolated cases and those requirements in the design of massive programs. It tries to spell out some legitimate aims of these programs, heeding the constraints under which they usually operate. It has insisted on the importance of individual reparations, allowing all the while that there are situations in which a collective dimension is perfectly proper. It has defended both the differentiation of benefits and the need for both external and internal coherence.

None of this offers a formula that embodies what justice in reparations requires—one of the reasons why the principle of *restitutio in integrum* continues to be appealing in the domain of massive programs despite its patent inapplicability. The three goals around which I have defined the requirements of justice for these cases require the exercise of political judgment, understood in the broad sense of a judgment about what is both in the common good and feasibly achievable. This type of judgment is never in plentiful supply. However, there is no substitute
for it—not even legalistic abstractions, for in the domain of massive reparations, experience shows that even these are unavailable. We do well, then, in asking ourselves seriously what justice in reparations requires.

Notes

I gave a first expression to some of the ideas presented here in a document prepared for the ICTJ in association with the Asociación Pro Derechos Humanos (APRODEH) for discussion in Peru, Parámetros para el diseño de un programa de reparaciones en el Perú, September, 2002. Since then, this conceptualization of reparations has been adopted—and adapted—in the chapter on reparations of the Peruvian Truth and Reconciliation Commission (see Comisión de la Verdad y Reconciliación, Informe Final (Lima, 2003), vol. 9, ch. 2), by the recent Commission on Illegal Detention and Torture in Chile (see Comisión Nacional Sobre Prisión Política y Tortura (Santiago, 2004), ch. 9), by the Truth and Reconciliation Commission for Sierra Leone (see Report of the Truth and Reconciliation Commission for Sierra Leone [presented to the President of Sierra Leone on 5 October 2005], vol. 2, ch. 4), and by various international documents, for example, the ‘Independent Study On Best Practices, Including Recommendations, To Assist States In Strengthening Their Domestic Capacity To Combat All Aspects Of Impunity’, by Diane Orentlicher, UN Doc. E/CN.4/2004/88, February 27, 2004.

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1. Despite the difficulties associated with the effort to transplant the juridical approach to the resolution of massive cases, reparations litigation before both national and regional jurisdictions such as the Inter-American Court or the European Court can play a tremendously important role in massive reparations. First, such litigation can act as a catalyst for the adoption of reparations programs. Arguably, this happened in Argentina, Peru, and might happen in Guatemala as well. Second, notwithstanding the near impossibility of fulfilling the juridical criterion of justice in reparations in massive cases, this criterion may be used by victims and their representatives to exercise pressure for large benefits. Given the usual reluctance of governments to establish reparations programs in the first place, this leverage becomes particularly important.

2. In this collection, see Falk (Chapter 13) and Carrillo (Chapter 14). See also the papers in State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights, Albrecht Randelzhofer and Christian Tomuschat, eds. (The Hague: Martinus Nijhoff Publishers, 1999).

4. In my ‘Reparations Efforts in International Perspective: What Compensation Contributes to the Achievement of Imperfect Justice’, in To Repair the Irreparable: Reparation and Reconstruction in South Africa, Erik Doxtader and Charles Villa-Vicencio, eds. (Claremont, South Africa: David Philip, 2004), I distinguish between ‘reparations efforts’ and ‘reparations programs’ more precisely; the latter term should be reserved to designate initiatives that are designed from the outset as a systematically interlinked set of reparations measures. Most countries do not have reparations programs in this sense. Reparations benefits are most often the result of discrete initiatives that come about incrementally rather than from a deliberately designed plan. When no harm is done I will use the terms interchangeably.

5. Except, of course, when dealing with mass claims. There are interesting parallels between mass claims and reparations programs, including a similar shift in the understanding of what is fair to particular claimants. I cannot pursue the parallels here.

6. When it is claimed that reparations are part of a political project it is assumed that the ‘political’ refers to, among other things, the (ideally deliberative) exercise of power in the distribution of public goods and benefits for the good of all, rather than to the partisan exercise of power for the good of a few. A strong defender of the constitutive role of truth commissions and their recommendations—including those on the issue of reparations—is Andre du Toit. See his ‘The Moral Foundation of the South African TRC’, in Truth v. Justice, Robert Rothberg and Dennis Thompson, eds. (Princeton, NJ: Princeton University Press, 2001), 122–40.

7. It goes without saying that in arguing in favor of a ‘political’ approach to reparations I am not denying that there is a legal right to reparations. The target of my criticism is the attempt to transplant the juridical criterion of full restitution—and the procedures that accompany the application of this criterion—from the domain of the resolution of individual cases to that of programs that deal with a massive number of cases. It should also be obvious that nothing in my argument raises questions about the need to give legal expression to reparations measures.


9. The move involved in attributing these goals to reparations programs is not so much descriptive as ‘reconstructive’. So, my claim is not that these are the goals that reparations programs have in fact pursued, but rather, that it makes sense to think that these are goals that they may be said to pursue, or, in any case, that given the close relationship between these goals and the goal of achieving justice, these are aims that reparations programs should pursue.
Incidentally, the possibility that reparations programs may make a modest contribution to the attainment of broader political goals explains some of my initial reservations concerning the tendency to juridify discussions about reparations. The discussion about reparations for African-Americans in the US is part of a long series that demonstrates the increasing tendency to juridify political issues (not just) in the US. Of course, the motivation to do so is unobjectionable, especially considering the obstacles that would have to be overcome in order to gain a political solution to this issue. Nevertheless, the case both illustrates and entrenches what in the end is a suspicious attitude about politics, an attitude that is not a positive symptom in a democracy. For a very useful analysis of this issue, see Thomas McCarthy, ‘Vergangenheitsbewältigung in the US: On the Politics of Memory of Slavery’, *Political Theory* 30 (2002): 623–48, and ‘Coming to Terms with Our Past, Part II: On the Morality and Politics of Reparations for Slavery’, *Political Theory* 32 (2004): 750–72.

The papers by Falk and Carrillo in this collection address this issue, specifically.


Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/RES/39/46 of December 10, 1984.


See the following cases: *El Amparo, Panel Blanca, Castillo Puéz, Niños de la Calle, Ricardo Baena, Bámaca Velásquez, Barrios Altos*. In *Neira Alegría* the Court decided to use the average of Latin American wages, considering the Peruvian minimum wage too low.

Arturo Carrillo, in his paper in this volume, examines thoroughly the criteria and procedures employed by the court.

The idea of compensation in proportion to harm ignores three very real problems. First, the quantification of harm. The ideal of making victims whole assumes harms can be measured in some reliable way. It should be obvious that this is not so easy. To illustrate, one of the relevant questions here is how to assign values to different sorts of harms. What is more ‘costly’: the loss of a limb, or of an eye, for example, or the psychological trauma of torture? How can the relative costs of physical and psychological harms be compared? And those stemming from the loss of a relative? How can these ‘costs’ be sensibly assessed? The second challenge arises from difficulties stemming from interpersonal comparisons. This challenge comes about, ultimately, because there is a fundamental difference between losses and harms; two persons who suffer the same loss are not necessarily equally harmed, for harms depend to some degree on the
individual’s reactions to circumstances. For example, not everyone who loses a hand reacts in the same way. Even if having both hands is equally important for two persons—say, because both are manual laborers—it is possible that the experience will sink one of them into depression, while the other may live the experience as a challenge, a painful one of course, but one that she is determined to overcome. Finally, in order to show that even seemingly precise reparations based on calculations of past income and earning potential have some degree of arbitrariness to them, consider that they must rely both on generalizations and on questionable assumptions; the most questionable assumption is that the world remains in a steady state; when a lifetime income is calculated, it is taken for granted that there will be no sharp economic cycles, that the demand for professionals in a given career will remain steady (the use of an ‘unemployment risk factor’ in calculations of potential lifetime earnings does not neutralize the need to make assumptions about general economic stability or demand), that the person in question would not have died before the expected average age, that he or she would not have become an alcoholic, a failure, etc. The generalizations refers to among other things, calculations about average projected incomes for different professions, which are notoriously sensitive to, for example, geographical location. I cannot deal with these difficulties here. But they are certainly worth flagging. Debra Satz at the conference at the University of California, Riverside, where I presented an initial draft of this chapter, discussed the last set of complications.

21. See Colvin on the South African case (Chapter 5, this volume).

22. This is true both of court procedures (in national or international courts) and of administrative procedures that adopt a case-by-case approach. To illustrate these claims: the report of the Guatemalan Commission of Historical Clarification contains a detailed analysis of how courts in that country were traditionally inaccessible to rural, and particularly to indigenous, populations. See Comisión de Esclarecimiento Histórico (CEH), Guatemala Memoria del Silencio, ‘Denegación de Justicia’, vol. 3, ch. 16 (UN Office for Project Services: June 1999). Ten years after the signing of the peace accords, and five years after the CEH produced its report, no one in Guatemala considers courts a viable mechanism for the distribution of reparations benefits. Similarly, the cases that end up reaching the Inter-American Court tend to be those that largely urban human rights NGOs decide to pursue during the years-long winding process leading to the regional system. Finally, the Arbitration Commission established in Morocco in 1999 to redress mostly victims of ‘disappearance’ (illegal detention) during the reign of Hassan II was subject to criticism for, among other reasons, the order in which it took cases.

23. This set of considerations, i.e. that equity does not require equal treatment, but that in the context of massive abuse people are bound to make comparisons and are likely to view differential treatment with (justified) suspicion, is what explains why I speak about the ‘disaggregation’ of victims, rather than claiming that the procedure is actually unfair (although it frequently is, as when equal access to courts is not guaranteed). The tendency to make comparisons under these circumstances seems to me to be well grounded, and not merely a psychological curiosity; when the violations result from the implementation of a policy, people who have suffered similar violations are not unreasonable in expecting similar benefits. For a contrasting view of this issue, see Malamud-Goti and Grosman (Chapter 15, this volume).

24. On this case, see Issacharoff and Mansfield (Chapter 8, this volume).
25. See, for instance, Cammack (Chapter 6, this volume).

26. Some people defend the idea that for massive cases, at least, international law should not try to set criteria for determining the magnitude of awards, but rather criteria that would have to be satisfied by the processes used to determine the magnitude of awards. More concretely, the idea is that international law should give some impetus to deliberative, consultative processes at the national level, processes that would lead to the choice of award levels. This, presumably, would consist mainly in ensuring that victims and victims groups have a say in the determination of award levels. See, for instance, Heidy Rombouts, 'Reparation for Victims of Human Rights Violations: A Socio-Political Approach,' Paper presented at the Expert Seminar on Reparation for Victims of Gross and Systematic Human Rights Violations in the Context of Political Transitions, Katholieke Universiteit, Leuven, Belgium, March 10, 2002. In general, I am supportive of this idea, but with the following cautionary note. In the end, and for reasons that are very easy to understand, victims will always want more benefits. Although I do not mean this derogatorily at all, victim groups will in the end behave like other interest groups—this one with a cause that is particularly compelling to me. In order for this proposal to make sense, one would have to include victim groups in discussions not just about the reparations plan, but about the national budget, so that they have an adequate perception of the other legitimate projects (such as health, education, justice, and development, to mention only a few) reparations always competes with.

27. There are of course important exceptions. Some so-called ‘well-established democracies’ have instituted reparations programs. These include the US (for Japanese-American internees during World War II), Canada (for mistreatment of indigenous groups), and others. See Yamamoto and Ebesugawa on US reparations for Japanese-American internees (Chapter 7, this volume).


31. Nagel argues that there is ‘a difference between knowledge and acknowledgment. It is what happens and can only happen to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene.’ Quoted in Lawrence Weschler, ‘Afterword,’ in State Crimes: Punishment or Pardon (Washington, DC: Aspen Institute, 1989).

32. The fact that recognition is one of the aims of reparations programs invites the participation of victims in the process of designing and implementing such programs, for recognition is not something that can merely be given, as if the views of those to be
recognized did not matter! Participatory processes may themselves provide useful forms of recognizing not just the status of victims as victims, but also, importantly, as agents. Stating this, however, does not detract from the force of the caveats stated in n. 26 above.


34. Laurence Mordekhai Thomas illustrates the point with a telling example: ‘Trust does not amount to prediction: if I put everything under lock and key and invite you into my home, I can quite confidently predict that you will not steal anything, yet nothing is clearer than that I do not trust you.’ See his ‘Power, Trust, and Evil’, in Overcoming Racism and Sexism, Linda Bell and David Blumenfeld, eds. (Lanham, MD: Rowman and Littlefield, 1995), 160.

35. For a closer analysis of this issue and of how truth-telling efforts, in particular, can contribute to the rule of law in transitional situations precisely by fostering civic trust, see my ‘Truth-Telling and the Rule of Law’, in Telling the Truths: Truth Telling and Peacebuilding, Tristan Anne Borer, ed. (Notre Dame, IN: University of Notre Dame Press, 2005).

36. From the perspective of well-ordered societies it is hard to conceive of circumstances in which people would not bother reporting even serious crimes like murder. But this indeed happens. In Colombia, for example, during the late 1980s more than 35 percent of murders were never even reported. See Mauricio Rubio, Crimen e Impunidad (Bogotá: TM Editores, 1999).


40. Perhaps the best illustration of this point comes from South Africa where efforts to restart the stalled discussions of reparations at one point were taking place with the government arguing that there was no money for the program while at the same time it was proposing the purchase of two new submarines. See Brandon Hamber and Kamilla Rasmussen, ‘Financing a Reparations Scheme for Victims of Political Violence’, in From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence in South Africa, Brandon Hamber and Thloki Mofokeng, eds. (Johannesburg: Centre for the Study of Violence and Reconciliation, 2000), 52–9.

41. Of course, placing reparations in the political arena rather than in the judicial sphere puts a premium on an effective strategy of effective coalition building in favor of reparations.