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Volume **SIX** • Section **TWO** • Chapter **ONE**

**Report of the Reparation &  
Rehabilitation Committee**

**INTRODUCTION**

# Report of the Reparation and Rehabilitation Committee

## ■ INTRODUCTION

1. In 1998, the Reparation and Rehabilitation Committee (RRC) reported on its work and presented its policy recommendations to the President.<sup>1</sup> This formed part of the Final Report of the Truth and Reconciliation Commission (the Commission), which was handed to the President of South Africa on 28 October 1998. In that chapter, the RRC discussed the need for reparation and the moral and legal obligation to meet the needs of victims of gross human rights violations. The RRC also outlined the nature and progress of the urgent interim reparation (UIR) programme and submitted a comprehensive set of proposals for final reparations. The present chapter needs to be read in conjunction with that earlier chapter.

## MANDATE OF THE REPARATION AND REHABILITATION COMMITTEE

2. The RRC received its mandate from the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (the Act)<sup>2</sup>, which made provision for reparations for those who had suffered human rights violations.
3. As stated in the Final Report of the Commission, the Preamble to the Act stipulates that one of the objectives of the Commission was to provide for:  
*the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; ...*
4. As an integral part of the Commission, the RRC was required to draw up a set of recommendations to the President with regard to:
  - (i) *the policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims;*

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<sup>1</sup> See Volume Five, Chapter Five.

<sup>2</sup> Sections 25 and 26 of the Act.

(ii) *measures which should be taken to grant urgent interim reparation to victims; ...*<sup>3</sup>

5. Furthermore, section 25(b)(i) of the Act stipulates that the RRC may:

*make recommendations which may include urgent interim measures as contemplated in section 4(f)(ii), as to appropriate measures of reparation to victims; ...*

6. The Act also provides for referral to the RRC by the other Committees of the Commission. Thus:

*When the Committee [on Human Rights Violations] finds that a gross violation of human rights has been committed and if the Committee is of the opinion that a person is a victim of such violation, it shall refer the matter to the Committee on Reparation and Rehabilitation for its consideration in terms of section 26.*<sup>4</sup>

7. Similarly:

(1) *Where amnesty is granted to any person in respect of any act, omission or offence and the [Amnesty] Committee is of the opinion that a person is a victim in relation to that act, omission or offence, it shall refer the matter to the Committee on Reparation and Rehabilitation for its consideration in terms of section 26.*<sup>5</sup>

(2) *Where amnesty is refused by the Committee and if it is of the opinion that –*

(a) *the act, omission or offence concerned constitutes a gross violation of human rights; and*

(b) *a person is a victim in the matter, it shall refer the matter to the Committee on Reparation and Rehabilitation for consideration in terms of section 26.*

## **THE COMMISSION'S REPARATION AND REHABILITATION POLICY**

8. The policy recommendations submitted to the President by the Commission consisted of five basic components. Following internationally accepted approaches to reparation and rehabilitation, the RRC stressed the following principles:

a Redress: the right to fair and adequate compensation;

b Restitution: the right to the restoration, where possible, of the situation existing prior to the violation;

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<sup>3</sup> Section 4(f) of the Act.

<sup>4</sup> Section 15(1).

<sup>5</sup> Section 22.

- c Rehabilitation: the right to medical and psychological care, as well as such other services and/or interventions at both individual and community level that would facilitate full rehabilitation;
  - d Restoration of dignity: the right of the individual/community to an acknowledgment of the violation committed and the right to a sense of worth, and
  - e Reassurance of non-repetition: the right to a guarantee, by means of appropriate legislative and/or institutional intervention and reform, that the violation will not be repeated.
9. These principles provided a basic framework from which to elaborate the specific proposals outlined below:<sup>6</sup>

### **Urgent interim reparation**

10. UIR is defined as assistance for people in urgent need, with a view to providing them with access to appropriate services and facilities. In this regard, the Commission recommended that limited financial resources be made available to facilitate such access where necessary.

### **Individual reparation grants**

11. This is an individual financial grant scheme. The Commission recommended that each victim of a gross human rights violation receive a financial grant, based on various criteria, to be paid over a period of six years.
12. It was proposed that individual reparation grants be paid to victims (if alive) or relatives/dependants (where victims were deceased). The amount to be paid should be calculated according to three criteria: an amount that acknowledges the suffering caused by the violation; an amount that enables access to requisite services and facilities, and an amount that subsidises daily living costs according to socio-economic circumstances. As the cost of living is higher in rural than in urban areas, it was recommended that victims living in the rural areas should receive a slightly higher grant. The amount also varied according to the number of dependants (up to a maximum of R23 023 per annum). It was recommended that the annual amount be paid twice a year for a period of six years and be administered by the President's Fund, which is located within the Department of Justice and Constitutional Development.

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<sup>6</sup> See Volume Five, Chapter Five.

## **Symbolic reparation and legal and administrative measures**

13. Symbolic reparation encompasses measures that facilitate the communal process of remembering and commemorating the pain and victories of the past. Such measures aim to restore the dignity of victims and survivors.
14. Commemorative aspects include exhumations, tombstones, memorials or monuments, and the renaming of streets or public facilities.
15. Legal and administrative measures include matters such as the issuing of death certificates or declarations of death in the case of people who have disappeared, expunging criminal records where people were sentenced for politically related offences, and expediting outstanding legal matters.

## **Community rehabilitation programmes**

16. The establishment of government-led community-based services and activities is aimed at promoting the healing and recovery of individuals and communities affected by human rights violations. As many victims were based in communities that were subjected to systemic abuse, the RRC identified possible rehabilitation programmes and recommended a series of interventions at both community and national level. These included programmes to demilitarise youth who had been involved in or witnessed political violence over decades; programmes to resettle the many thousands displaced by political violence; mental health and trauma counselling, as well as programmes to rehabilitate and reintegrate perpetrators of gross violations of human rights into normal community life.

## **Institutional reform**

17. Institutional reform included legal, administrative and institutional measures designed to prevent the recurrence of abuses of human rights. The Commission drew up a fairly substantial set of recommendations aimed at the creation and maintenance of a stable society – a society that would never again allow the kind of violations experienced during the Commission's mandate period. These included recommendations relating to the judiciary, security forces and correctional services as well as other sectors in society such as education, business and media.
18. The RRC, focusing on the need to implement these recommendations, proposed that a structure or body be set up in the office of the State President or Deputy President and headed by a national director of Reparation and Rehabilitation.

Further, the RRC recommended that reparation desks be established at provincial and municipal levels to ensure effective delivery and monitoring.

## **DELAYS IN THE IMPLEMENTATION OF REPARATION THUS FAR**

19. Since the submission of the Final Report of the Commission with its proposals for reparation, there has been a considerable delay on the part of government in setting forth its vision for the Reparation and Rehabilitation programme. Indeed, government's only response thus far has been to challenge the individual reparation grant component of the Commission's recommendations.
20. This delay has led to ongoing public debate and widespread criticism. Much of this criticism has been directed at the Commission, as public perception, frequently fuelled by the media, has continued to see reparation as the responsibility of the Commission rather than of the government.
21. The fact that this delay has taken place against the background of the amnesty process is also unfortunate. The fact that victims continue to wait for reparations while perpetrators receive amnesty has fuelled the debate about justice for victims<sup>7</sup> within the Commission process.
22. It needs to be strongly emphasised that giving victim evidence before the Commission was not simply a question of reporting on the past. It was intended to change peoples' views and experiences of their own pain and suffering. It was intended, moreover, to play an important role in reconciling the nation. This exposure and exploration of past experiences – this reconciliation – needed to be accompanied by reparation and rehabilitation-related services and the meeting of financial and other needs. Without this important component, the work of the Commission remains essentially unbalanced.
23. It should be noted further that, while the public debate has tended to focus on individual financial grants, the reparation policy proposed by the RRC was much broader in intent. In other words, it did not focus simply on financial compensation.

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<sup>7</sup> The Commission's use of the term 'victim' was explained in its Final Report on the grounds of the original wording of the Act. The RRC acknowledges the connotations associated with the term as a multiplicity of experiences, or engendering notions of the 'victim' having being vanquished or conquered in some way. The alternative, 'survivor', is open to a more fluid interpretation, but still fails to represent the variations of that survival. In the context of the Commission, it is a definition based on the specific violation experienced by the individual – that is, killing, abduction, torture or severe ill-treatment. It is not a term based on the individual's current state or understanding of himself or herself. This 'violation-based' definition is unsatisfactory to the Commission in that it promotes a homogeneous grouping of those who approached the Commission and has the potential to stifle creative approaches to the issue of reparative interventions.

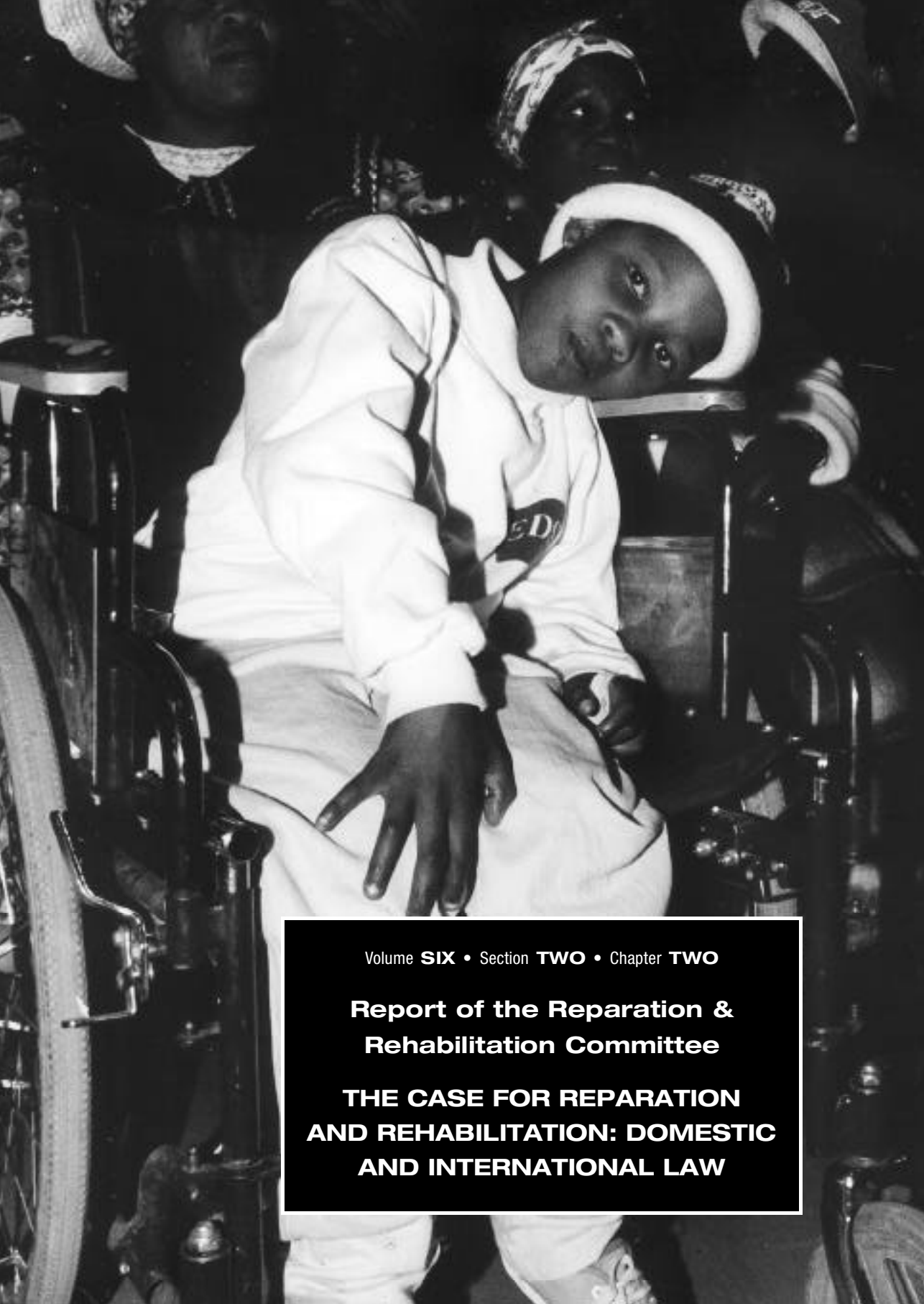
It catered not only for the individual needs of those who suffered from past abuses, but had implications for communities that had been targeted for abuse as well as those requiring fundamental institutional transformation.

## **THE FOCUS OF THIS REPORT**

24. The purpose of these chapters is to re-emphasise the urgency and importance of the recommendations for reparation and rehabilitation. This section also focuses on the work undertaken by the RRC since 29 October 1998. At that time, the RRC had processed seventy applications and sent them to the President's Fund. As of 30 November 2001, when the RRC closed down, a total of 17 016 forms for UIR grants had been submitted to the President's Fund, of which some 16 855 payments had been made, totalling R50 million. The processing of forms and data in respect of UIR has formed the bulk of the RRC's work since October 1998.
  
25. In addition to the above, the RRC has been responsible for considering victims referred to it by the Amnesty Committee for purposes of reparations.<sup>8</sup> Further, the Committee on Human Rights Violations has continuously referred new victims to the RRC as it completed its findings and dealt with appeals against earlier negative findings. As a result of these two processes, victim referrals were still being made to the RRC up to the time of finalising this report.

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<sup>8</sup> In terms of section 22 of the Act.



Volume **SIX** • Section **TWO** • Chapter **TWO**

**Report of the Reparation &  
Rehabilitation Committee**

**THE CASE FOR REPARATION  
AND REHABILITATION: DOMESTIC  
AND INTERNATIONAL LAW**



# The Case for Reparation and Rehabilitation: Domestic and International Law

1. In its broadest sense, the mandate of the Reparation and Rehabilitation Committee (RRC) was to affirm, acknowledge and consider the impact and consequences of gross violations of human rights<sup>9</sup> on victims, and to make recommendations accordingly. In doing so, the RRC had access to a rich source of information about reparations, drawn from domestic and international law and opinion.

## DOMESTIC LAW AND DEMOCRATIC ACCOUNTABILITY

### Domestic Law

2. The obligation to institute reparations is enshrined in South African law itself.
3. The Constitution of the Republic of South Africa Act No. 200 of 1993<sup>10</sup> (the Interim Constitution) recognised the principle that the conflicts of the past had caused immeasurable injury and suffering to the people of South Africa and that, because of the country's legacy of hatred, fear, guilt and revenge: 'there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation'.<sup>11</sup> This view was given concrete expression in the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (the Act), which mandated the Commission to develop measures for the provision of reparation to those found to have been victims of gross violations of human rights.
4. Through the Act and in unambiguous language, the legislature made clear its intention that 'reparations' of some kind or form should be awarded to victims.

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9 Killings, torture, severe ill-treatment and abduction. A number of violations were reported to the Commission which did not fall into these categories. These were described as 'associated violations'.

10 Constitution of the Republic of South Africa Act No. 200 of 1993, 'National Unity and Reconciliation', Chapter Fifteen.

11 Constitution of the Republic of South Africa Act No. 200 of 1993.

This reaffirms the belief that the Act created rights in favour of victims. For example:

*[T]he Commission shall – ...*

*(f) make recommendations to the President with regard to –*

*(i) the policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims [section 4];*

*Any person who is of the opinion that he or she has suffered harm as a result of a gross violation of human rights may apply to the Committee for reparation in the prescribed form ... [section 26(1)].*

*The recommendations referred to in section 4(f)(i) shall be considered by the President with a view to making recommendations to Parliament and making regulations [section 27(1)].*

5. Entitlement to reparation therefore arises from the provisions of the Act itself. The only qualification is that the recipient must be a victim of a gross violation of human rights as defined in section 1 of the Act,<sup>12</sup> and as further elaborated in subsequent promulgated regulations.

## **Legitimate expectation**

6. The general statutory obligations imposed upon the Truth and Reconciliation Commission (the Commission) created a legitimate expectation on the part of victims of gross violations of human rights that the Commission would fulfil this part of its mandate. This legitimate expectation gave rise to legally enforceable rights in terms of section 26 of the Act. According to this section, persons are entitled to apply for reparations by virtue of having been referred as a victim to the RRC either by the Amnesty Committee<sup>13</sup> (the Committee) or the Human Rights Violations Committee<sup>14</sup> (HRVC).

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<sup>12</sup> Section 1(xix) of the Act defines ‘victims’ as – (a) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights – (i) as a result of a gross violation of human rights; or (ii) as a result of an act associated with a political objective for which amnesty has been granted; (b) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in paragraph (a) who were in distress or to prevent victimization of such persons; and (c) such relatives or dependants of victims as may be prescribed.

<sup>13</sup> Section 22 of the Act.

<sup>14</sup> Section 15(1).

7. The principle of legitimate expectation has been accepted in our law<sup>15</sup> and has since been enshrined in the South African Constitution. Victims, therefore, have a legitimate expectation that they are entitled to reparations once the RRC has considered their applications for reparation and referred them to the President's Fund and/or relevant government department in the proper manner.

## **Amnesty and reparations: Achieving a balance**

8. The argument that the case for reparations is well founded in the Constitution and in the Act is also supported and underpinned by a majority judgment of the Constitutional Court.<sup>16</sup> The judgment emphasises the obligation on the state to meet the 'need for reparations' as enshrined in the Constitution.
9. The Act requires that, once a perpetrator has been granted amnesty, the right of the victims and/or their families to institute criminal and/or civil proceedings is extinguished.<sup>17</sup> In 1996, the Azanian People's Organisation (AZAPO) and several relatives<sup>18</sup> of persons killed by the security forces challenged the constitutionality of the amnesty provisions.<sup>19</sup> The Constitutional Court dismissed the application in a majority judgment. Affirming the constitutionality of the provisions, the Court<sup>20</sup> noted that the notion of amnesty was a cornerstone of the negotiated settlement and was enshrined in the 'postamble' to the Interim Constitution<sup>21</sup>. However, the judgment noted that the 'postamble' made provision not only for amnesty, but also for a reparations process:

*The election made by the makers of the Constitution was to permit Parliament to favour 'the reconstruction of society' involving in the process a wider concept of 'reparation' which would allow the state to take into account the competing claims on its resources, but at the same time, to have regard to the 'untold sufferings' of individuals and families whose fundamental human rights had been invaded during the conflict of the past.<sup>22</sup>*

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15 Administrator of the Transvaal and Others v Traub and Others 1989 (4) SA 731 (A) at 761 D.

16 Constitutional Court Case No. CCT 19/96.

17 See section 20(7) of Act No. 34 of 1995.

18 Ms NM Biko, wife of Mr Steven Bantu Biko who died in detention in October 1977; Mr CH Mxenge, brother of Mr Griffiths Mxenge who was killed in November 1981 by a Security Branch hit squad; and Mr C Ribeiro, son of Dr Fabian and Ms Florence Ribeiro who were killed in a joint Security Branch and SADF Special Forces operation in December 1986.

19 See Volume One, Chapter Seven, pp. 175–8.

20 Constitutional Court Case No. CCT 19/96.

21 The Interim Constitution provided the framework for the transition to a democratic order.

22 See AZAPO judgment per Judge Mahomed at p. 40 para 45.

10. The Court offered some examples of such reparations, including: bursaries and scholarships for the youth; occupational training and rehabilitation; surgical intervention and medical assistance; housing subsidies, and tombstones and memorials.<sup>23</sup>
11. Thus it may be seen that the Act as passed by Parliament includes provisions for both amnesty and reparations, and embodies and endorses the spirit of the Interim Constitution.
12. Mr Justice Didcott, a Constitutional Court judge, issued a separate judgment in which he considered various constitutional matters and questions of law. In this judgment, which in no way disagrees with the majority view, Judge Didcott expressed the following opinion on the phrase 'need for reparation', which appears in the postscript of the Interim Constitution:

*Reparations are usually payable by states, and there is no reason to doubt that the postscript envisages our own state shouldering the national responsibility for those. It therefore does not contemplate that the state will go scot-free. On the contrary, I believe, an actual commitment on the point is implicit in its terms, a commitment in principle to the assumption by the state of the burden. What remains to be examined is the extent to which the statute gives effect to the acknowledgment of that responsibility. The question arises because it was said in argument to have done so insufficiently.*

*The long title of the statute declares one of the objects that it promotes to be: '... the taking of measures aimed at the granting of reparation to, and the rehabilitation and restoration of the human and civil dignity of, victims of violations of human rights'.*

*Section 1 defines 'reparation' in terms that include – '... any form of compensation, ex gratia payment, restoration, rehabilitation or recognition'.<sup>24</sup>*

13. Judge Didcott discussed the effects of granting amnesty and the award of reparations as follows:

*The statute does not, it is true, grant any legally enforceable rights in lieu of those lost by claimants whom the amnesties hit. It nevertheless offers some quid pro quo for the loss and established the machinery for determining such alternate redress.<sup>25</sup>*

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<sup>23</sup> See [AZAPO judgment per Judge Mahomed](#) at p. 40 para 45.

<sup>24</sup> See [AZAPO judgment per Didcott I](#) paras 62–4.

<sup>25</sup> See [AZAPO judgment per Didcott I](#) at pp. 55–6, para 65.

14. Whilst the granting of reparations to victims whose rights to criminal prosecution and civil claims have been destroyed by the granting of amnesty to perpetrators may conceivably be described as a *quid pro quo*, it must be noted that the proportion of victims emerging from the amnesty process is relatively small compared to the total number of persons declared to be victims by the Commission. It must be stressed, however, that any reparation policy that attempted to make a distinction between these two categories of victims would be divisive and counter-productive.

## **THE INTERNATIONAL ARGUMENTS**

15. In its Final Report,<sup>26</sup> the Commission made it clear that its position with regard to reparations was consistent with well-established international principles. The following section re-states and elaborates this position.

### **The right to reparation**

16. The protection of human rights is widely recognised as a fundamental aim of modern international law, which holds states liable for human rights violations and the abuses they or their agents commit. For some considerable time now, the minds of the international legal community have been preoccupied with the issue of compensation for injuries arising from human rights violations and the formulation of effective reparation policies. Although no consistent reparations policy has evolved in international human rights law, there is nevertheless reasonable consensus about the obligations of states to make reparations for violations of human rights.
17. A survey of international law institutions, bodies and tribunals at both global and regional level, taken together with the many treaties, declarations, conventions and protocols in respect of the protection of civil liberties and human rights, provides overwhelming proof of the moral and legal support the Commission's reparations policy finds in international law. Indeed, as will be shown, the reparation policy proposed by the RRC is in many respects framed by the policy positions of the international human rights community.
18. The Universal Declaration of Human Rights of 1948, the founding document on international human rights, states that: 'Everyone has the right to an effective

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<sup>26</sup> Volume Five, Chapter Five.

remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws'. The declaration further states that any person unlawfully arrested, detained or convicted has an enforceable right to compensation.<sup>27</sup>

19. Further examples of support for reparation can be found in the International Covenant on Civil and Political Rights (1966); the International Convention on the Elimination of All Forms of Racial Discrimination (1966); the Convention on the Prevention and Punishment of Genocide (1948); the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1984); the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985); the United Nations (UN) Security Council Resolution on the Establishment of the UN Compensation Commission (1991), and the study by the United Nations High Commission on Human Rights (UNHCHR) concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (1993).
20. In the Commission's Final Report, reference was made to the last-mentioned study, in which the UNHCHR argued that, where a state or any of its agents is responsible for killings, torture, abductions or disappearances, it has a legal obligation to compensate victims or their families.
21. Subsequent to the publication of the Commission's Final Report, the UN authorised a further study on the subject of reparations. On 18 January 2000, a UNHCHR working group, headed by international human rights scholar M Cherif Bassiouni, drew up a report that incorporated the UN 'Draft Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law' (the Draft Principles). The report confirms that, in order to comply with their international human rights and humanitarian law obligations, states must adopt *inter alia*:
  - a appropriate and effective judicial and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice; and
  - b measures to make available adequate effective and prompt reparation.
22. In terms of these Draft Principles, the expression 'access to justice' is not limited to access to ordinary courts of law, but also includes equal and effective access to justice in the form of adequate reparations. In order to give effect to

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<sup>27</sup> Articles 9(5) and 14(6) United Nations Declaration of Human Rights.

these principles, states must provide victims with appropriate mechanisms for accessing and receiving reparations.

## **Nature of remedy or reparation offered**

23. As the right to a remedy for victims of human rights abuse has increasingly been accepted in international human rights and humanitarian law, reasonable consensus has begun to emerge as to what such reparation should entail. Significantly, in almost every instance, the remedy envisaged goes far beyond individual monetary compensation.
24. The UNHCHR, established to ensure state compliance with the International Covenant on Civil and Political Rights, has recommended that a state that is in violation of the Covenant should:
  - a pay financial compensation to the victim;
  - b provide appropriate care where necessary;
  - c investigate the matter; and
  - d take appropriate action, including bringing the perpetrator to justice.
25. Article 14 of the Convention against Torture states that:

*Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as the result of an act of torture, his dependants shall be entitled to compensation.*
26. In 1998, the Working Group on Involuntary or Enforced Disappearances issued a similar declaration. However, it extended the right of redress to the family of the victims and stipulated that, in the case of enforced disappearances, it was the primary duty of the state to establish the fate and whereabouts of the disappeared. In considering what could be regarded as adequate reparation, the Working Group stated that it should be 'proportionate to the gravity of the human rights violations (that is the period of disappearance, the conditions of detentions and so on) and to the suffering of the victim and the family'. In determining compensation, the Working Group noted that consideration should be given to the following:
  - a physical and mental harm;
  - b lost opportunities;
  - c material damages and loss of earnings;

- d harm to reputation; and
- e legal costs incurred as a result of the violation.

27. In the event of the death of a victim, additional compensation should be awarded.
28. Additional measures to ensure rehabilitation (such as physical and mental services) and restitution (restoration of personal liberty, family life, citizenship, employment or property, return to the place of residence) should be provided. Finally the victim and her/his family should be guaranteed the non-repetition of the violation.
29. The Draft Principles (as drafted by Professor M Cherif Bassiouni) give fairly detailed guidance on the possible forms of reparation. These are worth setting out in full, as the recommendations made by the Commission exemplify these principles in many respects, demonstrating the extent to which the recommendations the Commission proposes are in line with those proposed internationally.

*Article 22: Restitution should, wherever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty; legal rights; social status; family life or citizenship; return to one's place of residence; restoration of employment and return of property.*

*Article 23: Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as: physical or mental harm, including pain, suffering and emotional distress; lost opportunities, including education; material damages and loss of earnings, including loss of earning potential; harm to reputation or dignity; costs required for legal or expert assistance, medicines and medical services, and psychological and social services.*

*Article 24: Rehabilitation should include medical and psychological care as well as legal and social services.*

*Article 25: Satisfaction and guarantees of non-repetition should include, where applicable, any or all of the following: cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses or others; the search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities; an official declaration or*



*a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of the persons closely connected with the victim; apology, including public acknowledgment of the facts and acceptance of responsibility; judicial or administrative sanctions against persons responsible for the violations; commemorations and tributes to the victims; inclusion of an accurate account of the violations that occurred of international human rights and humanitarian law in training and in educational material at all levels.*

*Preventing the recurrence of violations by such means as (1) Ensuring effective civilian control of military and security forces; (2) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces; (3) Strengthening the independence of the judiciary; (4) Protecting persons in the legal, media and other related professions and human rights' defenders; (5) Conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials; (6) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises; (7) Creating mechanisms for monitoring conflict resolution and preventive intervention.*

## **Decisions of international human rights bodies supporting the right to reparation**

30. The creation of numerous bodies and procedures within the UN system has created a powerful mechanism for (amongst other things) the investigation of reported violations of human rights, the holding of public hearings, and recommendations on international policy. Yet none of the UN's permanent treaty or internal bodies is legally empowered to give concrete effect to reparations or the bringing of perpetrators to book.
31. Despite this, several regional bodies established to promote and protect human rights do have such competence. European and Inter-American bodies in particular have developed a rich jurisprudence around international human rights and humanitarian law generally, as well as on specific issues such as reparation.
32. The Inter-American Commission on Human Rights (IACHR) is, for example, empowered to investigate complaints and to effect the amicable settlement of disputes. In two well-publicised cases, the IACHR brokered a settlement where

damages were claimed from Ecuador for the disappearance of two young men. Ecuador admitted liability and agreed to implement the following reparations:

- a payment of a lump sum US\$ 2 000 000 settlement without prejudice to civil remedies against the perpetrators;
  - b an undertaking to conduct a definitive and complete search of the area where the boys allegedly disappeared and to provide all necessary and reasonable logistical support to carry out the search, including training men to recover the bodies;
  - c an undertaking not to interfere with any ceremonies commemorating the deaths of the youths;
  - d an undertaking to rehabilitate the reputation of the family by publicly affirming that the young men were not guilty of crimes under Ecuadorian law or morality;
  - e an undertaking properly to investigate, prosecute and punish the perpetrators of the violation of the human rights of the deceased and their families.
33. This case study is a good example of how a package of recommendations (such as the RRC has proposed in South Africa) can be holistically combined rather than quantifying the violations committed against the victims or their families to a sum of money alone.
34. The IACHR has made important contributions to the growing body of jurisprudence with respect to formulating reparation policy as an alternative to monetary compensation. It has, in a number of cases, recommended the reform of the military court system, methods of investigation (Columbia), prosecution and the punishment of violators (Tarcisso Meduna Charry v Colombia), the adoption or modification of offending legislation, and guarantees for the safety of witnesses. Similarly, the South African Commission has made many recommendations in respect of institutional reform.<sup>28</sup>
35. The IACHR has been particularly concerned with an important area of international jurisprudence relating to the issue of impunity: not only as it concerns past violations, but also to the prospect of violations that may take place in the future. This has a direct bearing on the kinds of reparation needed to remedy the situation. In its report on the *Ley de Caducidad* in Uruguay, the IACHR concluded that the impunity granted to officials who had violated human rights during the

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<sup>28</sup> See Volume Five, Chapter Five, 'Recommendations'.

period of military rule was in breach of the American Convention on Human Rights. A similar finding was made in respect of Argentina's *Ley de Punto Final* (the 'full-stop law') and Presidential Pardon No. 1002. In this respect, the South African Commission's recommendations in relation to prosecution<sup>29</sup> need to be seen as being an important part of reparation policy in that they address the issue of the non-repetition of violations by seeking to put an end to a culture of impunity.

36. Where settlement is not possible, the IACHR refers disputes to the Inter-American Court on Human Rights. In Valesquez Rodriguez v Honduras 1988 and Godinez Cruz v Honduras 1989, the Inter-American Court of Human Rights found the government of Honduras responsible for the disappearances of two young men at the hands of the military. Despite the argument by Honduras that the Court was limited to awarding the most favourable benefit under Honduran law for accidental death, the Court decided that international law required restitution of the *status quo ante* (before the violation occurred) where possible. Another case where full compensation was required was in the Barrios Altos case.<sup>30</sup> In Loayza Tamayo v Peru, the Court agreed that reparations could be granted, based on identifiable damage suffered as a result of a violation that included lost opportunities (*proyecto de vida* or 'enjoyment of life'). It should be noted that compensation proposed by the RRC does not include the notion of 'lost opportunities' addressed in this and other international human rights instruments and law. In this respect, the individual compensation proposed by the RRC is a far more modest amount.
37. The former European Court of Human Rights gave a more restrictive interpretation to Article 50 of the European Convention for Human Rights and Fundamental Freedoms, which provided, *inter alia*, for adequate compensation for human rights violations. This hampered the evolution of remedies in the European system. However, since the creation of the new European Court of Human Rights on 1 November 1998, the Court has expressed its opinion<sup>31</sup> that, in terms of the Convention, the state should do more than financially compensate the victim. Rather it should effect restitution so that the victim is restored to the position s/he held before the violation.
38. More recently, the Organisation of African Unity (OAU) established a system designed to ensure adherence to human rights. In 1986, the OAU issued an African Charter on Human and People's Rights. This Charter established an

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29 See recommendation on 'Accountability', Volume Five, Chapter Eight, p. 309.

30 Judgment March 14 2001, Inter-American Court on Human Rights Sec. C No 75 2001.

31 In cases like Papamichalopoulos and Others v Greece.

independent African Commission on Human and People's Rights, which was entrusted with, *inter alia*, the promotion and protection of human rights in African states as well as interpretation of the Charter.

39. In June 1998, the OAU went on to adopt a draft protocol for the establishment of an African Court on Human Rights. Article 26(1) provides that, if the Court should find that a violation of a human or people's rights has been committed, it should make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

## **Amnesty and reparation in international law**

40. The aim of restorative justice internationally is to restore the balance in favour of the victim to whom wrong has been done. The intention is to provide compensation for loss, to make victims whole and to sanction perpetrators and ensure that they are deterred from engaging in future misconduct.<sup>32</sup> The Final Report offers a definition of restorative justice as a process that satisfies the following criteria:<sup>33</sup>
- a It seeks to redefine crime: it shifts the primary focus of crime from the breaking of laws or offences against a faceless state to a perception of crime as violations against human beings, as injury or wrong done to another person.
  - b It is based on reparation: it aims for the healing and the restoration of all concerned – of victims in the first place, but also of offenders, their families and the larger community.
  - c It encourages victims, offenders and the community to be directly involved in resolving conflict, with the state and legal professionals acting as facilitators.
  - d It supports a criminal justice system that aims at offender accountability, full participation of both the victims and offenders, and making good or putting right what is wrong.
41. International law has been hostile to blanket amnesties and to amnesty provisions that deprive victims of their civil law rights. The granting of amnesty undermines victims' rights to justice through the courts by removing their rights to pursue civil claims against perpetrators, who thereby escape liability. In a 1998 ruling,

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<sup>32</sup> See, for example, York, K, and Bauman, J, Remedies: Cases and Materials, 1979.

<sup>33</sup> Volume One, Chapter Five, p. 126, para 82, from South African Law Commission, 'Sentencing Restorative Justice' Issue Paper 7, p. 6.

the IAHRRC condemned the 1993 El Salvadorean amnesty law because it 'expressly eliminat[ed] all civil liability (article 4) ... Prevent[ing] the surviving victims and those with legal claims ... from access to effective judicial recourse'.

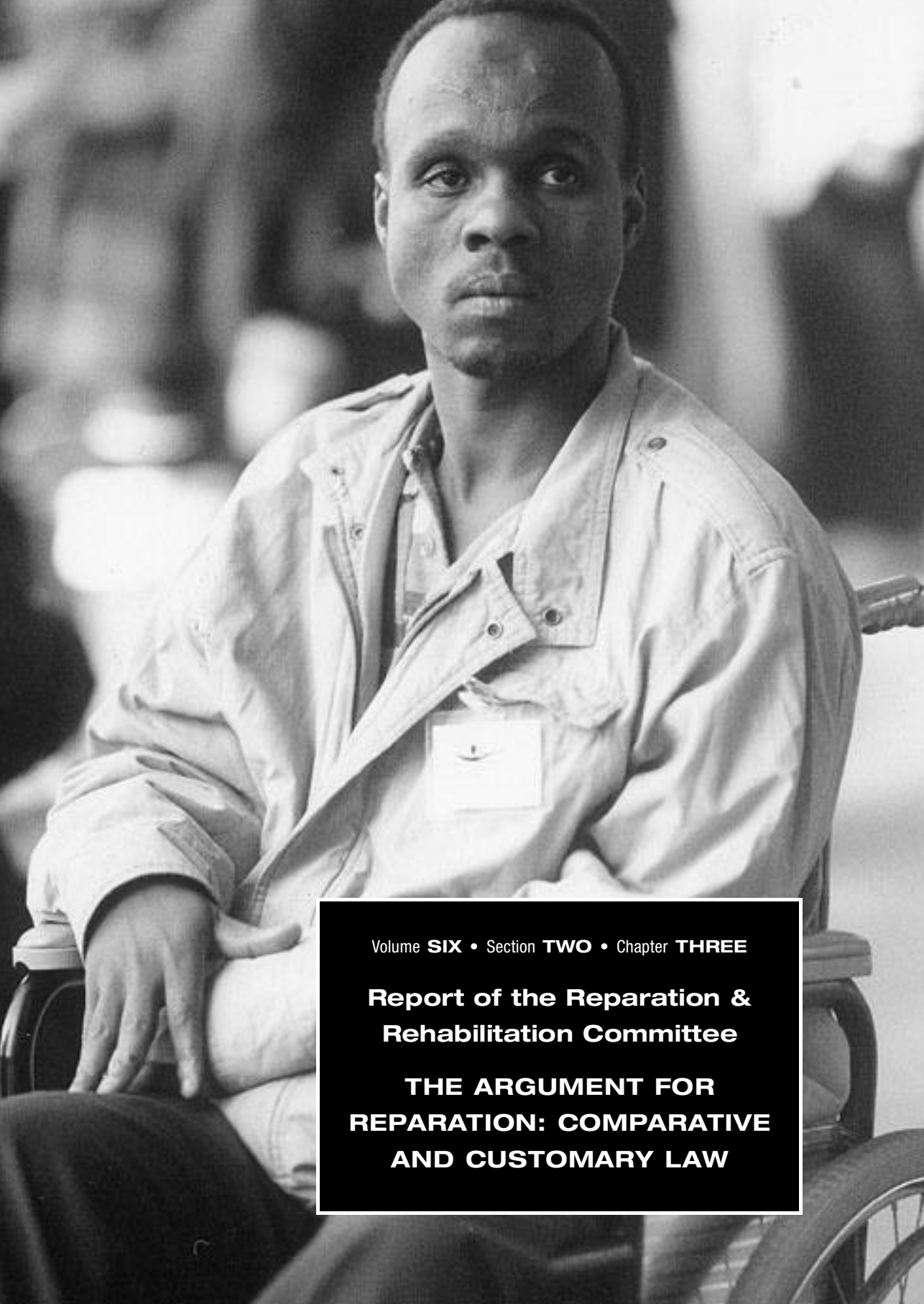
42. This implies that amnesty in respect of civil liability for human rights violations can be reconciled with international law only where the state has simultaneously furnished some mechanism of investigation and some form of reparation for victims. Thus the 'Draft Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' prepared for the UNHCHR's Sub-Commission on Prevention of Discrimination and Protection of Minorities in October 1997 stipulates that:

*Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds. They shall be without effect with respect to the victims' right to reparation ...*

43. Repeated references in international human rights instruments and treaties, echoed by state practice and expert opinion, to the obligation of states to respect and ensure respect for rights, right of access to justice and the right to remedy, provide strong evidence of a customary obligation. Such obligation implies that victim reparations are a minimum requirement where ordinary access to the courts is limited.
44. Therefore, because the South African amnesty process deprives victims of access to the courts, its international legitimacy depends on the provision of adequate reparations to the victims of gross violations of human rights. Making good the injuries to victims of gross violations of human rights where their ability to seek reparation has been taken away from them is thus an inescapable moral obligation on the part of the post-apartheid democratic state.
45. In short, amnesty coupled with an adequate and effective provision for reparation and rehabilitation meets government's obligation to ensure justice to the victims of the past. Stated differently, amnesty without an effective reparations and rehabilitation programme would be a gross injustice and betrayal of the spirit of the Act, the Constitution and the country.
46. It can be seen from the above discussion that the reparation policy proposed by the RRC is well within the bounds determined by international human rights law.

Indeed, as suggested above, the policy proposed by the RRC is, in many respects, an attempt to take seriously international consensus on developing a defensible and sound reparations programme.

47. Finally, it must be noted that the former government was not a party to any of the major international human rights treaties during the Commission's mandate period – that is, the period during which violations of human rights were perpetrated on a large scale. This does not, however, render the current South African government immune from the obligation to make reparation for gross violations committed during the mandate period. As indicated above, South Africa is bound by customary international law for violations committed during the apartheid era.



Volume **SIX** • Section **TWO** • Chapter **THREE**

**Report of the Reparation &  
Rehabilitation Committee**

**THE ARGUMENT FOR  
REPARATION: COMPARATIVE  
AND CUSTOMARY LAW**

# The Argument for Reparation: Comparative and Customary Law

1. Most of the many advances made over recent decades with respect to reparation policy have taken place at the level of global bodies and individual case law. More recently, however, the issue of reparations has become a matter of national significance in countries that have experienced transitions to democracy after years of repression.<sup>34</sup> For example, first in Argentina and then elsewhere in South America, a series of truth commissions were established by transitional governments with the aim of investigating human rights violations and abuses committed by predecessor regimes. The issue of reparations emerged strongly from the work of such commissions.
2. It needs to be noted that some South American governments have accepted and implemented recommendations for reparation in countries that, in many respects, face similar economic constraints to those of South Africa. Their commitment to reparation is thus of particular significance.

## Argentina

3. In May 1987, the Law of Due Obedience (Law No. 23521) created a presumption that low- and middle-ranking officers as well as most officers of higher rank acted under superior orders and duress and could not, therefore, be prosecuted for human rights abuses.<sup>35</sup> This was widely viewed as compromising the initiatives of the Argentine National Commission on the Disappeared.<sup>36</sup> In October 1989 the new President, Carlos Menem, decreed a general pardon<sup>37</sup> of military personnel and civilians convicted of military or politically-motivated crimes, and senior officers facing charges for abductions. Initially the pardon excluded certain named leaders, but it was extended in December 1989 to cover all those convicted.

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<sup>34</sup> See also this volume, Section One, Chapter Two.

<sup>35</sup> Kritz, NJ (ed), *Transitional Justice*, Vol II: Country Studies. Washington,DC: United States Institute of Peace, 1995, p. 363.

<sup>36</sup> Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001,pp. 233,258.

<sup>37</sup> Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001, p. 161.



4. However, such amnesties did not preclude the possibility of victims and families of victims instituting civil claims. In addition, a number of laws were passed providing for reparations to compensate victims of human rights violations.<sup>38</sup>
- a Law No. 24 411 (Argentina, 7 December 1994) provided for monetary reparations for families of the disappeared and killed. Victims had to have been listed in the report of the National Commission on the Disappeared or have been subsequently reported to the government's Human Rights Office (which requires verification through mention in the media, a human rights report or court documents). The amount of the award was a one-time payment to the family of \$220 000 paid in state bonds. The amount was determined with reference to the civil service pay scheme and equivalent to 100 months at the salary level of the highest-paid civil servant.
  - b Law No. 23 466 (Argentina, 1987) granted a pension of \$140 per month to children of the disappeared (until they reached the age of 21 years). The estimated cost to the state of these reparations is between \$2 and \$3 billion.
  - c Law No. 24 043 (Argentina, 11 May 1994) provided monetary reparations for those imprisoned for political reasons or forced into exile. The law applied to political prisoners held without trial; those who had been 'temporarily disappeared', and whose case was reported to the media, to the truth commission or to a human rights organisation at the time, and to those arrested and sent into exile by the authorities. The award amounted to the equivalent of the daily salary rate of the highest-paid civil servant for each day the victim spent in prison or in forced exile. The award was made in a one-time payment of state bonds and could not exceed \$220 000. If the victim had died while in prison, his or her family was entitled to the same daily rate up until the date of death plus the equivalent of five years at the same rate up to a total of \$220 000. If the victim had been seriously wounded while in prison, his or her family was entitled to the daily rate plus the equivalent of 3.5 years at the same rate, up to a total of \$220 000. The estimated cost of these reparations to the state was approximately \$500 million.

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38 Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001,pp. 316–17.

- d Non-monetary reparations consist of:
  - i. the creation of new legal category of 'forcibly disappeared', which holds the legal equivalent of death for purposes of the law (allowing the processing of wills and closing of estates) while preserving the possibility of a person's reappearance (Law No. 24 321, Argentina, 11 May 1994);
  - ii. a waiver of military service for children of the disappeared, and
  - iii. housing credits for children of the disappeared.
  
5. While the law sought to compensate for the injuries suffered by unlawfully detained persons, a number of constraints prevented many individuals from benefiting in practice. For example, victims were required to corroborate a period of detention by producing an arrest order and an order of liberty (issued by the executive). However, the military government refused to acknowledge the abductions and the new government failed to obtain disclosure of many of the necessary facts required to corroborate such cases.

## CHILE

6. A National Commission on Truth and Reconciliation (the Chilean Commission) was set up in 1990 to account for the dead and disappeared in Chile during the period 11 September 1973 to 11 March 1990. This corresponds to the period during which the Pinochet regime ruled Chile.<sup>39</sup>
  
7. The Chilean Commission envisaged three aspects to reparation, namely:
  - a disclosure of the truth and the 'end of secrecy';
  - b recognition of the dignity of victims and the pain suffered by their relatives, and
  - c measures to improve the quality of the lives of victims.
  
8. While the Chilean Commission largely fulfilled the first objective of reparations – namely that of 'ending secrecy' and establishing the fate of victims – the third objective remained unfulfilled and the Chilean government accepted the Chilean Commission's recommendation that specific measures be taken to compensate victims and their families. As a consequence, a National Corporation for Reparation and Reconciliation (the Chilean Corporation) was established in 1992 to see to the unfinished business of the Chilean Commission and to implement recommendations, including reparations.<sup>40</sup>

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<sup>39</sup> Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001,pp. 293 & 35.

<sup>40</sup> Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001, p. 293.

9. The Law Creating the National Corporation for Reparation and Reconciliation (Law No. 19, 123, Chile, 31 January 1992) established the following benefits:<sup>41</sup> monthly pensions for the relatives of those killed or disappeared; fixed-sum payments for prison time and lost income of dependants of those who died or disappeared, health and educational benefits.<sup>42</sup>
  - a Monetary reparations included a monthly pension paid by cheque to family members of those killed or disappeared (as determined by the Chilean Commission or Corporation). If only one family member survived, the pension amounted to \$345 per month. If more than one family member survived, the pension amounted to \$481 per month, to be distributed amongst immediate family members. Family members were entitled to the pension for their lifetimes, except for children, whose pensions ended at the age 25 years. In addition to the monthly pension, family members were entitled to a one-time start-up payment of the total annual sum. The total cost to the state was \$13 million per year.
  - b Medical benefits to the families of the disappeared and killed included a monthly medical allowance (calculated at 7 % of the pension mentioned above) as well as free access to special state counselling and medical programmes. The total cost to the state was \$950 000 per year.
  - c Educational benefits to the children of the disappeared and killed included full coverage of tuition and expenses for university training up to the age of 35 years. The total cost to the state was \$1.2 million per year.
  - d Children of victims were exempted from mandatory military service.
  - e Those who had lost a state job for political reasons could reinstate their retirement pensions with lost years credited with the assistance of a special state office.
  - f Those who returned from exile abroad were eligible for a waiver of re-entry tax for vehicles.
10. The total cost of the reparations programme in the years when the greatest numbers of survivors were still alive was approximately \$16 million per year.
11. With respect to symbolic reparations, former Chilean President, Patricio Aylwin, issued a formal apology to the victims and their families on behalf of the state and requested the army to acknowledge its role in the violence.

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41 Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001, p. 317, and Kritz, NJ (ed), *Transitional Justice*, Vol III: Country Studies, Washington,DC: United States Institute of Peace, 1995,pp. 683–95.

42 Hayner, PB, *Unspeakable Truths*. New York: Routledge, 2001,pp. 314–15.

12. Despite what are generous measures by comparison with the recommendations of the South African Commission, critics of the Chilean initiative pointed out that compensation would have been greater under Chilean civil law had this course not been precluded by the 1978 amnesty decree. In terms of the decree, the former military regime headed by General Augusto Pinochet promulgated an amnesty that had the effect of awarding itself a self-imposed and unconditional immunity for criminal offences committed between 1973 and 1978. This amnesty granted to itself by the former regime – and not repealed by its successor civilian government – survived for over 20 years.<sup>43</sup>
13. Moreover, as the Chilean Commission/Corporation's mandate was confined to investigating cases of deaths and disappearances, reparations – aside from a little-known medical assistance programme – did not include survivors of imprisonment and torture.

## **HAITI, EL SALVADOR AND GUATEMALA**

14. Truth commissions in Haiti, El Salvador and Guatemala all drew up proposals for reparation.
15. In its final report, delivered in February 1996, the National Truth and Justice Commission in Haiti recommended the creation of a reparations commission to determine the 'legal, moral, and material obligations' due to victims, and suggested that funds come from the state, from national and international private donations and from voluntary contributions by the United Nations member states.<sup>44</sup>
16. The Commission on the Truth in El Salvador, established in 1992, recommended:
  - a the creation of a special fund to award 'appropriate material compensation to the victims' to be funded by the state and substantial contributions from the international community (the El Salvadorian Commission suggested that not less than 1 % of all international assistance reaching El Salvador be set aside for reparations);
  - b the creation of a national holiday in memory of the victims;
  - c the construction of a monument bearing the names of all the victims of the conflict, and
  - d recognition of the 'good name of the victims' and the 'serious crimes of which they were victims'.<sup>45</sup>

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43 See further this volume, Section One, Chapter Two.

44 Hayner, PB, *Unspeakable Truths*. New York: Routledge, 2001, p. 179.

45 Hayner, PB, *Unspeakable Truths*. New York: Routledge, 2001, pp. 179–80, 311–12.

17. The Commission for Historical Clarification in Guatemala recommended:
  - a a declaration by Congress affirming the dignity and honour of the victims;
  - b the establishment of a day of commemoration of the victims;
  - c the construction of monuments and parks in memory of the victims, and
  - d the creation of a National Reparations Programme, to be overseen by a broadly representative board, to provide moral and material reparations, psycho-social rehabilitation and other benefits.<sup>46</sup>
  
18. However, these recommendations were not taken seriously by the respective governments, nor have foreign agencies pursued recommendations that they contribute towards such reparation programmes.

## **BRAZIL AND MALAWI**

19. While neither Brazil nor Malawi instituted truth commissions following the transition from dictatorship to democracy, both countries have subsequently recognised the need to provide some form of compensation to victims of human rights abuse.
  
20. In Brazil, a reparations commission was established in 1995 to provide between US\$100 000 and US\$150 000 to the families of 135 disappeared individuals. The vast majority of the families decided to accept the money. No other benefits (pensions, health services and so on) were offered. About US\$18 million was spent by the Brazilian Commission.
  
21. Malawi's National Compensation Tribunal was established in 1996 after the 1994 multi-party elections that followed the 30-year despotic regime of Kamuzu Banda. Although the Tribunal has received over 15 500 claims, only 4566 victims had been fully compensated as of July 2001.<sup>47</sup>

## **OTHER REPARATION PROGRAMMES**

22. Payment of reparations as a consequence of war has long been a customary and/or legal obligation, generally extracted by the winning party. While historically such reparations or compensation tended to be based on collective claims, the twentieth century brought an increasing recognition of the rights of individual

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<sup>46</sup> Hayner, PB, *Unspeakable Truths*. New York:Routledge, 2001,pp. 312–13.

<sup>47</sup> Africa News, 31 August,1999; *Agence France Presse*, 25 July, 2001.

victims to compensation. In 1977, one of the additional protocols added to the 1949 Geneva Convention recognised the obligation of belligerent parties to pay reparations for acts committed by members of their armed forces.<sup>48</sup>

23. This obligation should be borne in mind when considering the countries in Southern Africa, whose citizens suffered extensive violations of their human rights as a consequence of the South African conflict and whose economies were devastated by South Africa's destabilisation policy during the 1980s.

## **Reparations arising from World War II**

24. Possibly the most extensive and costly reparations programme ever was borne by the Federal Republic of Germany (West Germany) following World War II. Reparations were paid both to victims of state violence (German citizens who suffered human rights abuse at the hands of the Nazi state) and to nationals of occupied territories, the latter assuming the form of both collective and individual compensation. A Reparations Conference in Paris at the end of 1945 agreed on the principle of compensation to victims of Nazi atrocities. Since then, literally billions of Deutsche Mark (DM) have been paid.
25. Inside Germany, for example, a Federal Law on Reparation awarded damages to victims of Nazi persecution according to a range of categories. These categories included dependants of those who died as a result of political persecution, those who suffered lasting physical or mental impairment, those imprisoned or held in concentration camps and those for whom persecution resulted in loss of earning power.
26. A 1952 treaty concluded with Israel acknowledged, 'that Israel had assumed the burden of resettling many Jewish refugees'<sup>49</sup> and thus awarded Israel an amount of DM 3 000 million. Agreements with Western European nations between 1959 and 1964 provided for compensation, 'for the injury to life, health and liberty of their nationals'<sup>50</sup>. Lesser amounts were paid to Eastern European countries, including compensation for victims of pseudo-medical experiments conducted by the Nazis. Given the extensive displacement of persons as a consequence of the war, West Germany also made a contribution to the United Nations High Commission for Refugees.

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48 Geneva Convention, Article 91 of Additional Protocol 1 of 1977.

49 Shelton, D, *Remedies in International Human Rights Law*. Oxford University Press, 2001, p. 335.

50 Shelton, D, *Remedies in International Human Rights Law*, p. 335.

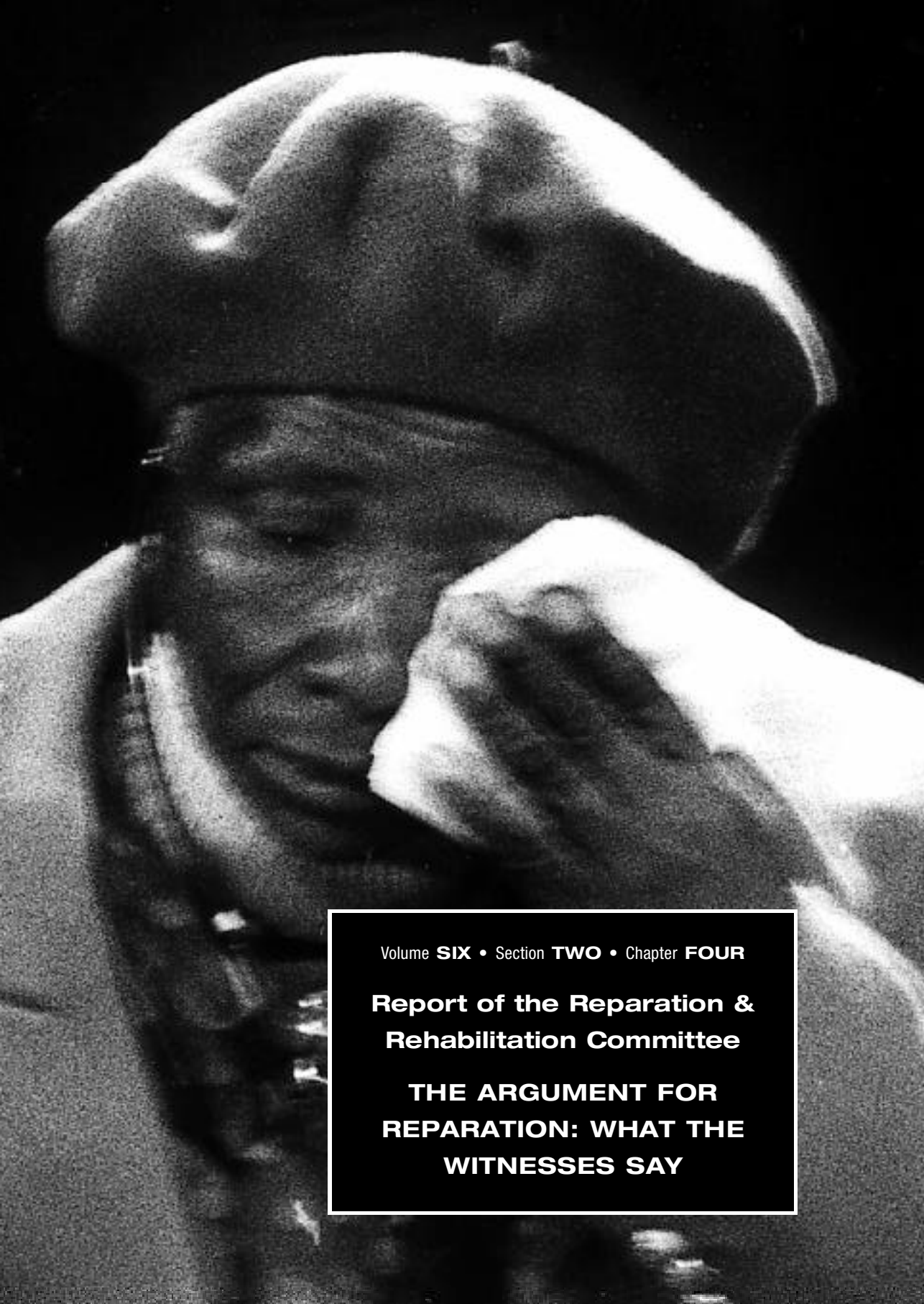
27. By 1988, the total sum paid by West Germany in reparations was DM 80.57 billion. Nor is this process complete, as is evidenced by the recent demand and agreement to pay compensation to victims of Nazi forced labour camps.
28. The former German Democratic Republic (GDR) has also paid reparations. While it is not known to what extent East German victims were compensated, in 1990 the GDR offered compensation to the World Jewish Congress. Japan also agreed to pay reparations, in terms of the 1951 Peace Treaty with the Allied Powers, including reparations to former prisoners of war.
29. More recently, however, reparations have been offered or demanded not just from those countries that emerged defeated, but also for those victims who suffered at the hands of the Allied Forces or even other parties. In 1988, the United States (US) agreed to compensate its own citizens and permanent residents of Japanese descent whose rights had been violated by being interned during the war. Symbolic reparations were also offered by way of an apology from the US President and Congress. Swiss banks have agreed to pay compensation to people of Jewish descent whose assets were unjustly misappropriated.

### **Other examples of reparation**

30. The following are other recent examples of reparation or calls for reparation:
31. As a result of the Gulf War in 1990, the United Nations Compensation Commission has already paid out billions of dollars in reparation to victims, including corporations and foreign governments. The revenue was obtained from levies on Israeli oil production.
32. In the Philippines, the victims of human rights abuses brought a class action suit against the estate of former President Ferdinand Marcos.<sup>51</sup> The US Federal Courts awarded compensation amounting to millions of dollars to victims of disappearances, torture and unlawful detention, for which the former President was held personally liable.
33. There was a call for reparations for the African slave trade and the consequences of European colonialism at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance at Durban in September 2001.

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<sup>51</sup> Hilao v Marcos, 103 F.3d p. 767 (9 April 1996).



Volume **SIX** • Section **TWO** • Chapter **FOUR**

**Report of the Reparation &  
Rehabilitation Committee**

**THE ARGUMENT FOR  
REPARATION: WHAT THE  
WITNESSES SAY**



# The Argument for Reparation: What the Witnesses say

1. Any broad process such as that undertaken by the Truth and Reconciliation Commission (the Commission) must necessarily summarise and generalise vast amounts of information to allow for presentation in a useful and accessible format. Yet, as we are all so acutely aware, behind each statistic lies a unique human story. It is the essence of this experience that the following section seeks to capture.
2. The stories below have not been chosen because they represent specific categories of the consequences of human rights violations and the issues they raise for reparation and rehabilitation. They are not and cannot be representative. They simply try to offer a context, a way to bring us back to what sometimes risks being obscured in the process of amassing and interpreting so vast a body of material. In so doing, they provide an opportunity to remember why we began this long and difficult journey into our past ... a chance to hear once again the voices of some of those who spoke to us along the way.

## THE STORY OF THE MZELEMU FAMILY

3. On 2 April 1994, members of the Inkatha Freedom Party (IFP) attacked the Mzelemu family home at Port Shepstone. On that day, Ndukuzempi William Mzelemu lost almost his entire family: his 84-year-old mother, Cekise, his first wife Doris and seven of his daughters, Gugu, Hlengiwe, Joyce, Khululekile, Lindiwe, Phelelisile and Phindile, aged between five months and 18 years. His second wife, Ntombifuthi Mildred Mzelemu, survived but was injured, shot and stabbed. The reason for the attack was simply his son's alleged involvement with the African National Congress (ANC).
4. On that fateful day, Mr Mzelemu heard a terrible knocking at his front door. He refused to open up but his attackers persisted, threatening to shoot if he refused to open up. Jumping out of the window, he ran to get help, with his attackers in hot pursuit.
5. Mr Mzelemu managed to evade the men and eventually got help from the chief's son. Together they went to the police station and arranged for members

of the security forces to accompany them to his homestead. On the way, Mr Mzelemu saw his second wife, Ntombifuthi, crawling towards the main road, carrying their five-month-old baby girl on her back. When he saw that his wife had been stabbed and was covered with blood, he asked the soldiers to stop and help him take her to hospital. At the hospital, he was shocked to discover that the baby had also been stabbed. She was certified dead on arrival.

6. When Mr Mzelemu returned home, he found that eight members of his family had been hacked to death.
7. Mr Mzelemu was employed at the time of the attack. The area in which he lived was tense due to violent political conflict and people were afraid to help him arrange for the funeral of his family members. As a result, he had to make the burial arrangements himself and had little time to mourn or grieve.
8. After the funerals, Mr Mzelemu's life became unbearable. He received constant threats from the people who had killed his family and was forced to resign from his job because of repeated anonymous telephone calls at work.
9. He finally fled the area to escape those who threatened to hunt him down. As a result, he was separated from the remaining members of his family, whom he was forced to leave behind in Port Shepstone. Then his daughter Elizabeth disappeared during violence in the area and he lost contact with her as well. Although he reported her disappearance to the police, to this day he has not heard from them. He has no idea where she is or whether she is still alive. This is a source of great concern to him.
10. Although he reported the killings to the police station, he was later told that the docket had gone missing. The police also tried to persuade him not to proceed with the case, telling him that he would get nothing out of pursuing the matter but his own death. He was told that people holding high positions in the 'previous system' were involved.
11. Mr Mzelemu settled in KwaMashu where he now lives with his married son. Both he and his wife are unemployed. In an interview with the Commission<sup>52</sup>, Mr Mzelemu said that he always carries a picture of his children in his mind and that he does not know how he survived the ordeal. He raised a number of concerns,

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52 Interview conducted with deponent by the Commission, 2000.

including the fact that he cannot forget the brutal killing of his family members or his missing daughter and that his wife is finding it difficult to adjust to township life, which she finds very violent. He made the following requests:

- a He would appreciate it if the Commission could help him to find a place of his own.
- b He would like assistance in finding his daughter Elizabeth, who is still missing.
- c The family is facing a terrible financial situation.
- d His children's educational needs need to be addressed.
- e The experiences have been very traumatic for the entire family and they would appreciate some form of counselling.

## THE DEATH OF GEORGE AND LINDY PHAHLE AND JOSEPH MALAZA

12. This is the story Hilda Phahle told the Commission about the South African Defence Force (SADF) raid on Gaborone in 1985:<sup>53</sup>

*I will start from 'is hulle dood, morsdood'?<sup>54</sup> These are the words of the SADF members after killing our children on lot 15717 in Gaborone, Botswana, on that fateful night of June 13/14 1985.*

*It all began on 10 December 1976, when police from John Vorster Square raided and ransacked our home. They did not have the decency to tell us what they were looking for. Their language was spiced with the violence of words. Yes, this was the beginning of the rest of our beloved son George's life, which ended when he, his wife Lindy née Malaza and her cousin Joseph Malaza were brutally massacred in their home by the SADF in Botswana in Gaborone on the 14th of June 1985.*

*Our children fled this oppression of this country. They went into exile, fighting for their rights, for the land of their birth, the land of their forefathers. They were tortured beyond reason and fled. The enemy followed them and brutally massacred them, 'morsdood', (stone-dead) – yes, 'morsdood'.*

*It is now time and it is their right to rest in peace on the soil where they were born, the soil they died for. It is time they were brought home to be buried where we can visit them at our convenience.*

*The victims, George Phahle, our son, who tried to make ends meet by running a transport business on a hired permit in Botswana; Lindi, BA Social Sciences, his wife, employed as a social worker by the Botswana government; Joseph Malaza,*

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<sup>53</sup> Evidence of H Phahle to the HRV hearing in Alexandra, 30 October 1996.

<sup>54</sup> 'Are they dead, stone-dead?'

*Lindi's cousin who was just visiting there for the night. Survivor: Levi, our younger son who lived to tell the story and was adversely affected.*

*He tells the gruesome story of how the SADF arrived swearing and behaving like people well-drugged and drunk, ordering George to open the door. The door was blown open. Instead of opening, George and Lindi ran into his bedroom, locked the door, and pushed his portable piano against it. Lindi threw herself face down in a corner. George fell over her as a sign of protection. There was nothing impossible with these murderers. They blew the door open, pushed it and the piano fell against Levi's bed under which he was hiding. God spared him to tell the story.*

## **THE STORY OF MRS ELSIE LIZIWE GISHI**

13. On 26 December 1976, Mrs Gishi was shot in Nyanga, Cape Town, during a conflict involving riot police, hostel-dwellers and township residents. On the same day, her children went out to look for her husband, who they feared had been attacked by the hostel-dwellers. Mrs Gishi explained:<sup>55</sup>

*When my children got to the house, they found their father full of blood, the house on fire, and he was dead. The hostel-dwellers had killed him, and threw him outside. They had cut his ears. And then my children called people. God gave them strength. This time my son who was 16 years old was put inside a van with his dead father, to save him. The men decided that at least the son should survive so that the father has someone remaining to take his place. This is how they explained to me when I came back from hospital. The vans were transporting people; children were dead; houses burning, and I was taken to Tygerberg Hospital.*

14. Mrs Gishi's husband died in hospital and she describes herself as 'never physically well' since the shooting. It proved impossible to remove some of the bullets in her body due to the risk of damaging vital organs. Mrs Gishi complained of paralysis on the one side of her body and said she was unable to undertake various everyday tasks like buttoning her clothes due to brain damage. She has to take sleeping pills and said she would end up in 'Pinelands' (Valkenberg Hospital, a psychiatric hospital) were she not to do so. She described what happened when she tried to manage without the pills:

*Once I did not take the sleeping pills. I was tired of taking pills; my body is always sore because of all this medication. Just when I was beginning to fall*

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<sup>55</sup> Interview conducted with deponent by the Commission, 2000.

*asleep, I experienced a sharp pain, I woke up; the pain moved to the head, I felt like my head was on fire. I screamed and then collapsed. My children came and found me unconscious. The first time was '77, my children could not see any fire and they called the neighbours, who also came and said they couldn't see anything. So since '77 I have been taking these pills.*

15. Mrs Gishi's physical incapacity, emotional difficulties and ongoing financial struggles form the backdrop of everyday life for the family. 'I lost my health, my life, my husband and my furniture, and I was a worker', she said.
16. Mrs Gishi has five children. Her only son was stabbed at a party some time ago and he lost the use of one of his hands. Her youngest daughter has experienced emotional difficulties and abuses alcohol as a result. Although it could be argued that these problems with her son and youngest daughter cannot be directly linked to the events of 1976, there is little doubt that the circumstances in which she was shot and partially disabled, and the manner in which she was traumatically widowed and had her home burnt down, impacted on her children's experiences while growing up.
17. Mrs Gishi's son, Bonisile, who accompanied his dying father to hospital, must have been affected by this event and his mother's shooting that same day. The daughters in the family must also have been affected by these tragic events. Any family undergoing these experiences and the ongoing difficulties they cause needs both practical and emotional resources to help them deal with these issues over time. Mrs Gishi's ability to provide or seek out these resources was traumatically interrupted many years ago and her own mental and physical condition has become a burden for herself and her family over the years.
18. Mrs Gishi reported that she spent the R2000 given to her after she testified before the Commission mainly on furniture. She asked, however: 'Where is my husband's share? What is R2000?' She has, however, had some acknowledgment of what happened to her and her family, as is the case with most of those who received a financial grant of interim reparation.
19. Mrs Gishi's case raises the recurring question as to whether interim reparation is sufficient.

## THE STORY OF MRS LEONILLA TENZA

20. Early in Mrs Tenza's interview<sup>56</sup> she said, 'Hmm! I have been really traumatised in life.' Born in 1932, she described being bitten by police dogs while 'we were toyi-toying for our freedom'. She said that she fell while running away from police dogs and consequently lost a child. At the time, Chief Mangosuthu Buthelezi was still a member of the ANC. Subsequently, when the ANC was banned, 'we all joined IFP-Inkatha'. Her brother divorced his first wife when their infant son, Eugene Xolisani Tenza, was seven months old, and Mrs Tenza took the child in and raised him. When her nephew grew up, there were few employment opportunities and she recommended that he join the KwaZulu Police (KZP).
21. On 13 June 1989, during a period of great tension between the ANC and IFP in KwaZulu/Natal, Xolisani was murdered. This incident formed the basis of Mrs Tenza's testimony to the Commission.
22. According to Mrs Tenza, she was made to witness her already injured nephew being axed to death. For some time she was also in danger and had to remain on the run until a community member finally arranged a meeting at which ANC 'comrades' were persuaded not to kill her and to allow her to return home.
23. Among other difficulties, Mrs Tenza now had sole responsibility for her slain nephew's two-year-old child. She claimed that her own children were not killed because, 'they were ANC members to avoid being killed'. Her business as an indigenous healer or *inyanga* was severely affected, as clients were afraid to consult her because of her alleged political leanings. She has subsequently lost a daughter to AIDS, and this daughter left four children 'of whom I do not know their fathers'. One of these grandchildren is apparently mentally handicapped, and is in Grade I at the age of fourteen. One of her sons also died of a stroke 'while they were *toyi-toying*'. Another child was laid off from work for reasons she did not specify.
24. Currently, Mrs Tenza is struggling to support her various dependants. She feels emotionally unable to continue her *inyanga* practice and is helping the health authority with health education issues, specifically in relation to HIV/AIDS. She says that she has a heart condition and must take medication for this. Her participation in the local health forum has been compromised by her health:

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<sup>56</sup> Interview conducted with deponent by the Commission, 2000.

*They called me recently for a Forum since I have not been able to attend them because I was sick for a long time last year. I underwent an operation because my intestines were burst due to my low blood flow. The organisers of these Forums were surprised of my behaviour because we were working well. They were the ones who referred me to the hospital. My behaviour was so odd: I used to have outbursts and did not wait for my turn to talk, and confabulated when asked questions. I did not know what was happening in my head and these people came to my house to beg me to come back to the Forum. I then got better because I used to cry every day before.*

25. At the outset of the interview, Mrs Tenza seemed robust and full of humour. As she began to relate her story, she became tearful and deeply upset. Although she claimed to be 'better' than in the previous year (1999), her distress was very apparent.
26. As we have seen with other cases, the particular event Mrs Tenza reported to the Commission was little more than a punctuation mark in a life of ongoing difficulties. Both she and her family made political decisions at times influenced at least as much by attempts to survive violence and poverty as by ideological persuasions. The tone throughout is of a long struggle to eke out a meagre existence in a violent world. Mrs Tenza's life story paints a vivid picture of the convoluted political history of KwaZulu/Natal and the human consequences. The awful experience of seeing her nephew murdered in front of her is just one example of a broader tragedy.
27. It is very difficult to separate out the complex mixture of physical and emotional complaints and distress suffered by Mrs Tenza. The distinction between mind and body that remains intrinsic to much of western biomedicine does not make any sense to her. She does not experience physical and emotional sensations separately.
28. Mrs Tenza's experience points to important issues to be considered when planning services. One of the most significant is that commonly held distinctions between the physical and the emotional may not apply to all those who need assistance. Other distinctions – for example, between financial, educational, and emotional needs – may also prove problematic. Emotional issues can play a decisive role in the extent to which a person is able to learn or earn a living; conversely, success or failure in learning impacts not only on economic well being, but also on emotions.

## **‘THIS IS MY FATHER AND LOOK WHAT THEY HAVE DONE TO HIM’: THE STORY OF SERGEANT RICHARD MOTHASI**

29. Richard Mothasi was a police sergeant based at the Hammanskraal Police College. An assault by a white fellow officer left him with a burst eardrum. After he had laid a charge of assault, several unsuccessful efforts were made to pressure him into withdrawing charges. On 30 November 1987, operatives of the Northern Transvaal Security Branch shot Sergeant Mothasi dead, allegedly at the request of the then Divisional Commissioner of Police in the Northern Transvaal. His wife, Mrs Busisiwe Irene Mothasi, was also killed in the incident.
30. Some of those responsible for the killing applied for amnesty and testified that they had been told that Sergeant Mothasi was suspected of having made contact with the ANC.
31. Mrs Mothasi’s mother, Mrs Gloria Hlabangane, told the Amnesty Committee (the Committee) of the circumstances surrounding the deaths of her daughter and son-in-law:<sup>57</sup>

*I received a telephone call in the morning as I was just preparing myself to go to town, and they said I should go to Hammanskraal ... And I started to panic because at the time I knew that something had happened ... I sat down and I begged [to be told] what had happened so that I may be able to gather enough courage to face the truth. Then [I heard] that my son-in-law had died as well as Irene had died.*

*We went to Irene’s home ... I got out of the car ... When I got out of the car there was a hearse, and when I went into the kitchen, I came across somebody pushing a stretcher and I had a look. I saw that it was my daughter, Irene, and I discovered that my daughter had died and she had one wound on the forehead. And I left her because I realised that she had died. I went into the dining room ... When I got there I discovered that Mothasi was laying in a pool of blood. And he had also been shot. And the spent cartridges were on the floor, his brains were also splattered, as well as certain pieces of the skull were on the floor, scattered all over the place and I looked at his ear, something whitish was coming out of his ears – I don’t know whether it was his brains – and he was also dead.*

*And from there I ran. I went into the bedroom. That is their son’s bedroom, or their child’s bedroom. I looked for the child, but I couldn’t find the child. I*

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<sup>57</sup> Evidence by G Hlabangane at a hearing before the Committee, Pretoria, 5 March 1997.



*looked in all the other rooms without any success, and I started getting very confused at this stage because I didn't know where the child was. And when I went outside, I heard – I could feel somebody grabbing me and it was the child. I took the child ... He was five years old. I took the child. I lifted [him] to my chest and the parents were taken in the hearse...*

32. Asked where the child had been during the murders, Mrs Hlabangane testified:

*When I asked my neighbours, they told me that the child was inside the house at that time, but nobody knows as to how he survived, because he escaped unscathed, but they heard the child screaming throughout the night asking for help, saying 'help me, help me'. He realised that something was happening, probably he hid somewhere, but people were woken up by the screams of the child inside the house. And my next-door neighbour came into the house in the morning to fetch the child and they stayed with the child ... He stayed with the corpses of his parents and he was running from pillar to post trying to wake his parents up, but there was no help coming at that particular moment.*

33. While still at the house, three policemen arrived. Mrs Hlabangane thought that they had come to express sympathy about a fellow colleague's death. Instead they demanded Sergeant Mothasi's uniform. After removing the insignia, they threw the uniform back at her, telling her to give it to her 'old man'. One of them, a white police officer, then brandished a gun:

*Do I know what a gun is used for ... do you see what the gun has done to Mothasi and his wife. He said 'if you talk too much, this is what you get' and at the time he was pointing the gun at my forehead.*

34. Since the death of Richard and Busisiwe Mothasi, Mrs Hlabangane and her husband, a pensioner, have cared for their grandson. They receive R500 for child maintenance from Richard Mothasi's pension, so they are able to pay for transport, groceries and schooling. However, her grandson requires ongoing psychological support:

*My grandson didn't care throughout, he didn't show any signs of being disturbed. But when he grew up, there were certain signs, even when he gets a newspaper where there is something about a person who has died, he always came with the newspaper clipping and showed it to me. At some stage he got a **Tribute** magazine that had his father's photo and he showed it to me and he said: 'This is my father and look what they have done to him'. And since then he has been very disturbed,*

*I had to seek medical attention for him ... I ... take him to the clinic, but now I am facing a difficulty because where he is attending they want medical aid and I don't have a medical aid and that is the problem that I am facing at this juncture.*

35. While Mrs Hlabangane and her husband struggle to care for their grandson, three<sup>58</sup> of the perpetrators responsible for the killing received amnesty.

## **UNFINISHED BUSINESS: THE 'NIETVERDIEND TEN' AND SIYABULELA TWABU**

36. Whilst the Commission process did unearth a significant amount of new information with regard to the causes, nature and extent of gross human rights violations, its processes inevitably also produced important information that could not be brought to an absolute conclusion or closure.
37. Perhaps the most painful scenario that arose from the limitations of the process was that the families of deceased victims learnt of the fate of their loved one(s), but did not learn of the whereabouts of their remains. One such example of this is the 'Nietverdiend Ten', the case of ten youths killed in a joint SADF and Security Police operation. The youths, aged between 14 and 19 years, had been 'recruited' by Security Branch agent, Joe Mamasela, purporting to be an Umkhonto we Sizwe (MK) operative.
38. The youths left their Mamelodi homes on 26 June 1986, accompanied by Constable Mamasela, believing they were being taken to Botswana for military training. Instead, Mamasela drove them to a spot close to the Botswana border where a team of SADF Special Forces operatives surrounded them and injected them with a chemical substance, rendering them unconscious. A Special Forces operative then drove the vehicle towards an embankment, leapt out and left the vehicle to careen into a tree where it burst into flames, killing all of them.
39. The families of these youths spent ten years in ignorance of their children's fate. Many waited eagerly for their homecoming in the early 1990s when most exiles were returning to the country. Only in 1996, following investigations by a special unit set up by the Attorney-General, did the families learn that their children were dead. The circumstances surrounding their death remained sketchy, however, and it was another three years before they were to witness the amnesty hearings of the perpetrators of these killings.

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<sup>58</sup> A fourth person involved in the incident, Constable Joe Mamasela, did not apply for amnesty.

40. The families appealed for the remains of their children. Mrs Martha Makolane, the mother of 17-year-old Abraham, testified:<sup>59</sup>

*I don't have the [reconciliation] as they have taken them from my place to the place where they have killed them. I want them to go and fetch them where they've left them to bring them home so that we will be able to bury them peacefully. Yes, we want those bodies as they have taken them from Mamelodi. They have got to go back and fetch them from that place and bring them back to Mamelodi so that we will be able to bury them.*

41. Mrs Phiri, the mother of 21-year-old Thomas, testified<sup>60</sup>:

*Let them tell us the full story so that we can – we are deeply hurt. If they tell the story, we will be okay. We want to know where these children were buried because we were never told the truth of where they were buried.*

*I want to enquire from the killers: yes, they told us that they killed them, they told us that they injected them with drugs and they are buried, but I want them to know that their graves are open and even in heaven they will not get forgiveness at all because they killed minor children. Had these children killed people before, we would have understood that, yes, it was their turn to be killed. But I want to tell them today that they will never get forgiveness from God at all. Their graves are waiting for them, waiting open.*

42. Further investigations revealed that the youths had been buried in pauper's graves in Winterveld cemetery. After three visits to the cemetery, the families made contact with two workers who remembered burying the remains. They were, however, unable to locate the exact sites.
43. The most recent attempt to exhume the remains was carried out on 3 March 2001. However, the areas indicated by the cemetery staff did not produce anything. Fourteen years after the youths disappeared, the search has now been reduced to an area the size of half a football field – seemingly so near, yet so far away from the sort of ceremony that the families need traditionally, culturally and emotionally for closure. All those who applied for amnesty for this incident have had their applications granted.

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<sup>59</sup> Evidence heard at hearing of the Committee in Johannesburg in the application of J Cronje and others, 21–31 October 1996.

<sup>60</sup> Evidence heard at hearing of the Committee in Johannesburg in the application of J Cronje and others, 21–31 October 1996.

## THE CASE OF SIYABULELA TWABU

44. While the families of the 'Nietverdiend Ten' and others still search for the remains of their children who died inside South Africa, other families live with the pain of knowing their children are buried in foreign lands. Siyabulela Twabu was 19 years old when he left his Transkei home and went into exile. His mother told the Commission how she learnt of his fate:<sup>61</sup>

*Time and time again the police would come. Sometimes I would be at work: I am a teacher. I requested politely that they should not come to my workplace because the people from the village are against the police. They were going to be under the impression that I was liaising with the police. After a while I was called; there was a meeting, a teachers' meeting and I was called outside. Mr Sifuma was outside. I got into the car, he drove a bit, gave me a newspaper. There was an article about Siyabulela's death – apparently he had been shot.*

45. Siyabulela was one of six Azanian Peoples' Liberation Army (APLA) members killed in a shoot-out with Transkei and Lesotho security forces at Quacha's Nek on the Transkei–Lesotho border in March 1985. Their bodies were found several days later, decomposing in a forest. Siyabulela was buried in a grave in Lesotho, without his family being present:

*We went to the funeral. We got there; he was already buried. Because we were travelling on the gravel road, we were trying to escape from the police. When we got to Maseru, it was too late. The police took us to where he was staying. I came back from the funeral and I continued with my life.*

46. Mrs Twabu made the following plea to the Commission:

*I request that my child's body be exhumed from Lesotho because he is buried next to a river. The riverbanks are quite big and it is not safe. Could the Commission help me with medical aid, I am mentally ill, I am also – my heart also is ailing. His father died in 1983, then my son in 1985. After that, I – my health started deteriorating.*

47. These scenarios illustrate the kind of unfinished business raised at the Commission that will be impossible to follow through without the necessary resources and skills.

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<sup>61</sup> Evidence by Mrs N Twabu at HRC hearing, Lusikisiki, 26 March 1997.

48. In many cases, the mere fact that information emerged at the Commission did not lead to a quick and easy solution. In too many instances, this resulted in a protracted and painful search that, for many, may never reach conclusion.

## **THE STORY OF MAGISENG ABRAM MOTHUPHI**

49. Mr Magiseng Mothuphi was 21 years old when he, his brother, his sister and seven others stopped at a roadblock between Krugersdorp and Ventersdorp in 1993. This was not a police roadblock but was manned by a group of heavily armed Afrikaner Weerstandsbeweging (AWB) members. The occupants were forced out of the vehicle:

*[They] took us out of the car and they said we should raise up our hands. Then they searched us. After they searched us, they showed us where we should stay. We sat down in a line. Whilst we were sitting there in a line, they were asking us questions as to ... where do we come from and where do we go, about our work situations, as to whether are we employed or not. At the time when we were questioned, they were hitting us with the gun butts on the head. I was bleeding at the time with my nose. Then I was bending my head ...*

*[After] that then they told us that we were members of the ANC. Simon Nkompone said that we are not members of the ANC and we don't know anything about the ANC. Again they started to hit us [and] told us that we are not telling them the truth. ...*

*[Then] they were conniving amongst themselves. After that they came back and then I heard a gun shot; I didn't know what happened. Then I woke up. I was bleeding and when I looked at myself on the mirror of the car, I was bleeding and injured. Next to me was Simon Nkompone. Then the young [girl] who is my [niece], was crying.<sup>62</sup>*

50. Mr Mothuphi's brother and sister and two other passengers were killed in the shooting and his nose was destroyed. For seven years, the young man covered the hole in his face with an 'Elastoplast' bandage. In 1998, Mr Mothuphi was invited to attend the amnesty hearing of the AWB members involved in this incident. At the time of the hearing, Mr Mothuphi had not been declared a victim of a gross violation of human rights by the Commission, as he had not made a statement to the Committee on Human Rights Violations (HRVC).

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<sup>62</sup> Evidence by M Mothuphi heard at hearing of the Committee in the amnesty application of AWB members for the 'Rodora Crossing' incident in Johannesburg, 12 June 1998.

51. The sight of Mr Mothuphi in the television coverage of the hearing sparked the interest of Greg Bass, head of the department of dental technology at Natal Technikon, which specialises in the construction of facial prostheses. Mr Bass contacted the Reparation and Rehabilitation Committee (RRC) to offer assistance. He said that his department had funds for charity work and would be in a position to pay for the treatment. This proactive response from the doctor was unusual, compared with the usual passive witnessing of victim testimony that characterised the attitude of the majority of viewers.
52. A lengthy wait ensued until the Committee had finalised the matter and referred Mr Mothuphi to the RRC as a victim, whereupon he became eligible for reparation. Thereafter, the RRC arranged for the Technikon to make a prosthetic nose for Mr Mothuphi. His transport to Durban was donated by Transnet and he used his interim reparation grant to pay for his stay while he was having treatment.
53. After having the prosthetic nose fitted, Mr Mothuphi was asked if his life had changed:
- My life has changed very much. Before this operation I was afraid even to go to the shops because many people looked at me and stared. Since I got this nose, I'm free. I want to go somewhere I can study so that I can get a job but it's hard because I have no money. After the accident [violation], I lost my girlfriend because of my face; but since the treatment I have found a new girlfriend, I'm very, very happy now.<sup>63</sup>*
54. Months after the medical procedure, Mr Mothuphi approached the Commission with a request that may be seen as a symbolic and instructive metaphor. He telephoned the Commission to ask for the contact details of the Technikon as he had run out of the special surgical glue needed to attach the prosthetic nose to his face. Although undoubtedly an oversight, such a situation highlights the crucial importance of the sustainability of any reparation intervention and the potential for counter-productive and traumatic side effects from quick fix solutions. This example also demonstrates clearly that one intervention, however significant, is insufficient to address the wide-ranging consequences of a particular violation.
55. At the same time, unique as it is in terms of the usual experiences of victims and the Commission, Mr Mothuphi's story is important because it illustrates the potential benefit that interventions from a number of sectors can have. It also shows how the amnesty process identified victims who would not otherwise have entered into the Commission process.

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<sup>63</sup> From communication with the RRC.

## **‘LEFTOVERS FROM THE STRUGGLE’: THE STORY OF MR XOLILE DYABOOI**

56. In 1987, Mr Xolile Dyabooi was detained by the Bophuthatswana Police. He was tortured in Mmabatho and held in solitary confinement in Brandvlei prison, before being convicted of terrorism and jailed for five years. He was released as part of the indemnity process in December 1990.
57. In Mr Dyabooi’s view, reconciliation can only effectively be achieved when those who have suffered are given an opportunity to participate in rebuilding society. As a person who fought on the side of what became the present government, he told the Commission:<sup>64</sup>

*What I am saying is that we contributed a lot to the struggle: our contribution can never be necessarily only paid on money, there are many things. But now after all these things I feel the other people tend to forget our role. There are those who might benefit from our victories. So now feel that we are people who are leftovers from the struggle.*

*Because we were supposed to be given an opportunity, like of using the skills we got from our times in the struggles, in terms of building reconstruction, I mean in terms of building reconciliation, because I don’t believe reconciliation can only come through Mandela or Thabo Mbeki’s speeches. I believe that people on the ground, who experienced those things, must be able to be given opportunities, like opportunities in terms of work, bursaries and all those things. But I strongly believe that the contribution we can be, like we need to be on the ground, and all that, to do something. But now our skills instead of being used, they are wasted, you see. Because after the whole thing you don’t feel comfortable in this situation, ja.*

*I am still suffering. I’m still at my home. My life is in ruins. I don’t have hope for tomorrow. Maybe I will survive. I don’t know. I am just a human that goes up and down like a zombie. Although there are some sung heroes who are there. So I believe that we are unsung heroes. We contributed to the struggle, then we were banned until the new order came and even the new order banned us. Don’t talk, maybe someone from above will come and address these things. We waited until now.*

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64 Interview conducted with deponent by the Commission, 2000.

58. Mr Dyabooi expressed anger at the present government and at the Commission, which he sees as working closely with the government:

*Ja, when I went to the TRC I hoped for better life. I thought I would get better life in terms of – in terms of – like I asked for education, I asked for – I mean, how can I say now – I asked for accommodation and whatsoever. Although those people promised that they will consider my request, I waited until now, nothing has happened. I just hoped each and every month and years. I waited and waited but today, now, I won't wait.*

*In the beginning the government promised to give us reparation, but at the end the government now is trying to play hide and seek. They don't give us a opportunity to express our views. They don't call us into their commissions, to present our ideas or our feelings about the whole thing – they just sum up, and go and take decisions on their own.*

*So therefore I am saying, there can't be reconciliation without taking those people who were victims into their board.*

## **CONSEQUENCES OF GROSS VIOLATIONS OF HUMAN RIGHTS: DISCUSSION**

59. It must be stressed once again here that the stories presented in this section are not representative either in terms of violations or the experiences of victims. Each of these stories has its own individuality and texture, and this must be borne in mind when considering the special needs and circumstances of each victim.
60. What is, of course, representative about these stories is that they are about ordinary men and women whose lives were irrevocably changed by the violations they suffered during the course of political conflict.
61. Some of the arguments politicians have raised in response to calls to implement the recommendations of the Commission's RRC have caused concern. They make the point that the majority of victims were political activists who, in one way or another, made a conscious decision to engage in a political struggle against apartheid. The argument is often expressed thus: 'we were not in the struggle for money'. While the Commission understands the grounds upon which this statement is made, in terms of international human rights law on reparations and rehabilitation even political activists who decided to become involved in the struggle against apartheid should be compensated if they became casualties of the conflict.



62. The Reparation and Rehabilitation policy raises far-reaching and complex questions concerning individuals who have been victims of gross violations of human rights. How can we assess the impact of an abuse of human rights on the life of any one individual? Is it possible to separate that abuse from other aspects of a person's life? Is it possible to make an accurate assessment of the impact without understanding the full context of that person's life? How can we conclude what a person's life would have been like had the violation not occurred?
63. The simplest model (and one that is commonly used) is of a single negative event having a single negative consequence for the person involved. It would be convenient if we could simply draw up a list of negative things that happen to people, assign a weighting to them and from there determine accurately the impact of event X on person Y. This would certainly simplify the issues and administration of reparations and rehabilitation.
64. However, in many cases, people affected by what are defined as gross violations of human rights have been living lives in which other, ongoing stressors have played their part. These stressors include living with poverty, discrimination, lack of access to the resources the country has to offer and the experiences of humiliation and disrespect that many black South Africans have borne for generations. Moreover, oppression, humiliation and racism have serious consequences not only for individuals but for the social fabric as well. Thus, although the Commission is bound by its mandate to consider only certain kinds of violations, it is necessary to describe the context within which these violations took place.
65. This leads to a further question to be considered: how do we understand the consequences of social injustice and human rights violations for individuals, for their families and for communities?
66. Compounding the matter even further is the fact that the effects of trauma appear to be felt by succeeding generations. For example, studies on children and grandchildren of survivors of the Holocaust in Europe in the middle of the twentieth century show clearly that these now-distant events continue to impact on the course of people's lives, their patterns of attachment and the quality of their relationships. Arguments about financial compensation from that now-distant calamity also continue unabated.
67. Thus, it is not only the case that events occur in context, as we have already mentioned, but that the consequences of events impact on the way people

continue with their lives, their relationships, their child-rearing practices and those of their children and grandchildren for decades after the traumatic event.

68. Another complexity in understanding human rights violations lies in the fact that the same people have, in different events, been both victims and perpetrators. One reasonably common consequence of abuse is that abused people have a greater likelihood of becoming perpetrators of abuse. Many people who have perpetrated what are defined as gross violations of human rights have themselves been affected by abuse, poverty and discrimination.
69. Furthermore, the consequences of human rights abuse and political oppression may at times cross the boundaries of public and private life. For example, a person who has been abused and humiliated in the context of a political struggle may be more likely to perpetrate abuse and humiliation in the context of family life. It has also been well established in many contexts that people who have been oppressed may be at risk of emulating their oppressors – and of taking on the oppressor role in the future. Active intervention in this cycle is often necessary in order to break it.
70. White South Africans who were protected by the state bear scars of a different kind. Although there is no question that being a target of discrimination generally has far more serious consequences than being a beneficiary of it, social injustice has consequences for all who live in the society. If the Commission is to fulfil its role of contributing to the rehabilitation not only of individuals but of the nation as a whole, South Africa must look seriously at the social consequences of allowing the beneficiaries of an unjust system to reproduce discrimination at a cost to themselves and future generations. A nation that turns its back on these social realities places itself at serious risk of an ongoing cycle of injustice and violence.

## **REPARATIONS AS A VEHICLE FOR RECONCILIATION AND HEALING**

71. There are examples worldwide of noble agreements aimed at resolving bloody conflicts that have proved unsustainable beyond the lifetimes of the peacemakers. Talks about reconciliation that fails to emphasise justice for victims seem doomed to fail in their promise of national unity and reconciliation. This is why calls for reparation and rehabilitation urge South Africans to dismantle the ‘conspiracy of silence’ that often characterises the ongoing experience of victims and survivors of violations of gross human rights.

72. Dr Yael Danieli, director of the Group Project for Holocaust Survivors and their Children and director of the Centre for Rehabilitation of Torture Victims in New York, suggests that silence is the most common way society responds to the survivors of trauma. Because most people find trauma overwhelming, they choose to avoid dealing with it. Unfortunately such avoidance further isolates the individual or the community, entrenching the feeling of alienation and vulnerability often experienced by those who have been in the hands of torturers and killers. The silence may leave the ‘sufferers’ with no option but to repress their pain, thereby delaying the desired complex healing process from being initiated.
73. The Commission’s Final Report discussed in some detail the enormous importance of reconciliation as ‘a goal and a process’ of the Commission.<sup>65</sup> It highlighted the different levels at which reconciliation needs to take place in South Africa and the complexity of the links between them.

*Many years ago, Albert Luthuli, the first South African recipient of the Nobel Peace Prize, articulated a vision of South Africa as ‘a home for all her sons and daughters’. This concept is implicit in the Interim Constitution. Thus, not only must we lay the foundation for a society in which physical needs will be met; we must also create a home for all South Africans. The road to reconciliation, therefore, means both material reconstruction and the restoration of dignity. It involves the redress of gross inequalities and the nurturing of respect for our common humanity. It entails sustainable growth and development in the spirit of **ubuntu** ... It implies wide-ranging structural and institutional transformation and the healing of broken human relationships. It demands guarantees that the past will not be repeated. It requires restitution and the restoration of our humanity – as individuals, as communities and as a nation.<sup>66</sup>*

74. The policy proposed by the RRC and described in the Final Report<sup>67</sup> encompasses the spirit of this paragraph. Urgent interim reparation seeks to provide assistance for people in urgent need. Individual reparation grants seek to ‘transform abject poverty into modest security’.<sup>68</sup> Symbolic reparation and legal and administrative measures seek to assist communities and individuals in commemorating the pains and victories of the past. Community rehabilitation programmes seek to establish community-based services in order to aid the

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65 Volume One, Chapter Five, p. 106.

66 Volume One, Chapter Five, p. 110, para 26.

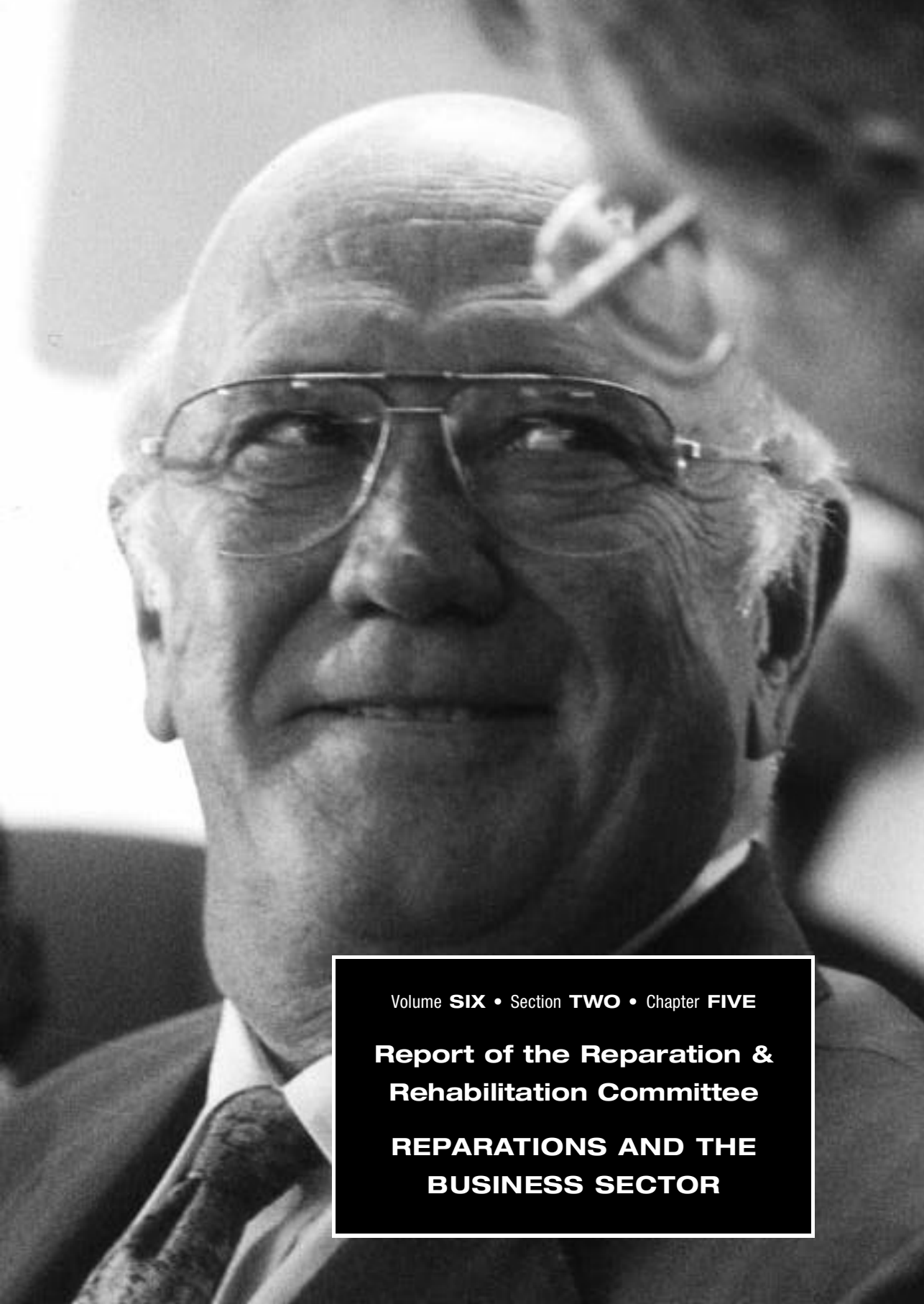
67 Volume Five, Chapter Five.

healing and recovery of individuals and communities. Institutional, legal and administrative reforms are designed to prevent the recurrence of human rights abuses.

75. Speaking at a series of workshops hosted by the Commission in Gauteng, KwaZulu-Natal and the Western Cape, Dr Danieli warned that failure to act will cause South Africans to pay for the legacy of political violence in the future. She proposed that healing and reparation in South Africa should be prioritised as a cornerstone for transformation beyond the life of the Commission, and should take place at individual as well as community (school, church, workplace) and national levels. In the words of Wole Soyinka:

*As the world draws closer together – the expression ‘global village’ did not come into currency for no just cause – it seems only natural to examine the scoresheet of relationships between converging communities. Where there has been inequity, especially of a singularly brutalizing kind, of a kind that robs one side of its most fundamental attribute – its humanity – it seems only appropriate that some form of atonement be made, in order to exorcise that past.*

*Reparations, we repeat, serve as a cogent critique of history and thus a potent restraint on its repetition ... It is not possible to ignore the example of the Jews and the obsessed commitment of survivors of the Holocaust, and their descendants, to recover both their material patrimony, and the humanity of which they were brutally deprived.*



Volume **SIX** • Section **TWO** • Chapter **FIVE**

**Report of the Reparation &  
Rehabilitation Committee**

**REPARATIONS AND THE  
BUSINESS SECTOR**

# Reparations and the Business Sector

## ■ INTRODUCTION

1. Information received from the business and labour hearings indicated that: 'Business was central to the economy that sustained the South African state during the apartheid years'.<sup>69</sup> The Truth and Reconciliation Commission (the Commission) noted that the degree to which business maintained the status quo varied from direct involvement in shaping government policies or engaging in activities directly associated with repressive functions to simply benefiting from operating in a racially structured society in which wages were low and workers were denied basic democratic rights.<sup>70</sup>
2. While numerous submissions by business to the Commission argued that apartheid harmed business, sometimes resulting in reduced profits and distortions and restrictions on the labour market, the Commission noted further that such business opposition to apartheid as there was came very late in the day and was weak and indecisive.
3. The final position and finding of the Commission was that business generally benefited financially and materially from apartheid policies. Some examples illustrating this finding emanate from points made during submissions:
  - a White-owned large-scale agricultural, farming and agri-business enterprises benefited from the colonial-era restrictions on black land ownership that were maintained during apartheid, and the extremely low wages such enterprises were able to pay to the landless.
  - b Those enterprises involved in extracting and exploiting the mineral wealth of the country benefited from the provision of a relatively cheap migratory labour force, which was brought into being by land expropriation, forced removals, apartheid pass laws and influx controls.
  - c Those businesses with an industrial workforce benefited from the existence of a reserve of unemployed workers resulting from enforced landlessness.

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<sup>69</sup> Volume Four, Chapter Two, p. 58

<sup>70</sup> Volume Four, Chapter Two, p. 18

They also made use of state suppression of trade union activity, which would otherwise have exerted upward pressure on wages.

- d Those enterprises involved in manufacturing processes that depend heavily on energy inputs such as electricity benefited from the relatively cheap power that was generated through the exploitation of cheap labour on the coal mines.
  - e The arms industry benefited substantially from the military requirements of the apartheid regime, which resulted from its internal repression and external destabilisation.
  - f Those banks and financial institutions that bankrolled the military–industrial complex and the minerals–energy complexes in South Africa benefited vicariously from all the above conditions.
  - g Those banks and financial institutions that lent directly to the apartheid regime during the 1980s benefited from the relatively high interest rates they were able to charge as a consequence of the difficulty Pretoria encountered in borrowing during the imposition of sanctions internationally.
  - h White residents generally benefited from the discrepancies in public investment between white towns and black townships and rural areas – in everything from health and education to water and sanitation – and from the existence of cheap domestic labour to be employed in the home.
4. Noting that the ‘huge and widening gap between the rich and poor is a disturbing legacy of the past’ and given this historic benefit enjoyed by business, the Commission made specific recommendations regarding the responsibility of business in the area of restitution ‘to those who have suffered from the effects of apartheid discrimination’.<sup>71</sup>
5. Implicit in this and other recommendations relating to business was the notion of the involvement of business in a wider project of reparation, relating not simply to those identified as victims by the Commission, but to all those South Africans whose normal development was impaired by the system of apartheid. The desirability of such involvement was reinforced by the socio-economic reality of South Africa. Although South Africa is a middle-income economy, about half of South Africa’s population lives in poverty. Half of the African population is homeless or lives in informal accommodation, such as shacks. More than half of Africans aged twenty or more have no secondary education, compared to 2 per cent of whites. As many as 42 per cent of Africans are unemployed or have given up

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71 Volume Five, Chapter Eight, p. 318.

looking for employment, compared to 5 per cent of whites. The poverty of Africans in relation to whites is also reflected in the huge disparities in services: for example, three quarters of Africans lack running water in their homes, compared to 2 per cent of whites.

6. On the other side of the divide, a small section of the population, mainly from the white community, enjoys a higher standard of living than most residents of high-income developed countries. These sharp divisions in our society are evidenced in the high South African crime rate and other expressions of popular dissatisfaction. These factors militate against national unity and reconciliation and led the Commission to consider reparative measures to the very large majority who remain victims of South Africa's past.
7. It is for this reason that the Reparation and Rehabilitation Committee (the RRC) approached organised business and individual business leaders with the aim of encouraging them to contribute to the President's Fund.

## **THE REPARATION AND RECONCILIATION COMMITTEE AND THE BUSINESS TRUST**

8. At a consultative forum between business and the Commission, business leadership referred to the Business Trust as the vehicle through which business, in agreement with government, would honour its responsibility to the victims of apartheid. Some trustees of the Business Trust expressed great concern that there seemed to be no real relationship between the objectives of the Trust and the recommendations of the Commission. Another trustee seemed concerned that, on the whole, the majority of organised business was not committed, or had not shown serious commitment, to the Trust.
9. The Business Trust, established for the purpose of reparations, has to date received a total of some R800 million from the South African private sector. This is a paltry amount when one considers the massive amount needed to repair the inequities and damage caused to entire communities. A recent fund established in Switzerland to contribute to reconstruction and development in South Africa secured a commitment of less than 0.02 per cent of the profits made by Swiss banks and investors in South Africa each year during the 1980s.<sup>72</sup>

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<sup>72</sup> See the section on the role of Swiss banks during the apartheid years, later in this chapter.



## REITERATION OF PROPOSALS

10. In these disappointing circumstances, it seems essential to restate the proposals made by the Commission for ways in which business could generate funds for this broader project of reparation and restitution. These were:
  - a a wealth tax;
  - b a once-off levy on corporate or private income;
  - c each company listed on the Johannesburg Securities Exchange to make a once-off donation of 1 per cent of its market capitalisation;
  - d a retrospective surcharge on corporate profits extending back to a date to be suggested;
  - e a surcharge on golden handshakes given to senior public servants since 1990, and
  - f the SASRIA (SA Special Risks Association) Fund (contributed to by business and individuals as insurance against material loss arising from political conflict).
  
11. The Commission further suggested that repayment of the former government's 'odious debt' be reconsidered and that money released from this could potentially be used to fund both reparations and programmes of reconstruction and development.
  
12. It was also recommended that a 'Business Reconciliation Fund' be established that 'could provide non-repayable grants, loans and/or guarantees to business-related funding for black small entrepreneurs in need of either ... skills or capital for the launching of a business'.<sup>73</sup>
  
13. Further ways in which funding could be generated could include:
  - a a restructuring of the state pension fund to release assets for social development;
  - b a restructuring of service charges on parastatals such as the South African Energy Supply Commission (Eskom) to ensure that subsidies for white-owned large-scale businesses are replaced by subsidies for the poorest black consumers;
  - c A claim for reparations lodged against the lenders who profited illegitimately from lending to apartheid institutions during the sanctions period.
  
14. The Commission reiterates its finding that business benefited substantially during the apartheid era either through commission or omission and has, at the

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<sup>73</sup> Volume Five, Chapter Eight, p. 319.

very least, a moral obligation to assist in the reconstruction and development of post-apartheid South Africa through active reparative measures. While individual businesses may well have contributed to individual projects falling under the general rubric of restitution or reparation, it is the Commission's view that business, possibly through the Business Trust, needs to commit itself to a far more focused programme of reparation.

## **SWISS BANKS AND OTHER LENDERS**

15. As noted above, it is the aim of a recently established reconstruction and development fund established in Switzerland to persuade those who benefited substantially from doing business with Pretoria during the 1980s to contribute to the fund. It is estimated that the amount pledged by Swiss banks and investors currently totals less than 0.02 per cent of profits generated by Swiss banks and investors each year during the 1980s, during which period gross violations of human rights were committed on a wide scale.
16. This section examines the role of Swiss banks in South Africa during the apartheid era and the case for making a significant reparation claim against these banks.
17. The major Swiss banks were important partners of Pretoria during apartheid. Both *Credit Suisse* and the predecessor of UBS opened offices in South Africa within a few years of apartheid being institutionalised in 1948, and played a central role in marketing South African gold. They also invested in apartheid-era infrastructure in South Africa and in the homelands.
18. After the Sharpeville massacre in 1960, the chairman of the largest Swiss bank, UBS, was asked: 'Is apartheid necessary or desirable?' His response was: 'Not really necessary, but definitely desirable.'
19. In 1968, the Swiss banks formed the Zurich Gold Pool and Zurich became the most important gold market in the world. In 1969, the Swiss banks imported over 1000 tons of gold – half the world's annual production. Three quarters of this came from South Africa. The Swiss banks encouraged their customers to buy gold from South Africa and to buy shares in the gold mines.

20. After the 1976 Soweto uprising, the United Nations (UN) condemned apartheid as a crime against humanity and expelled South Africa. This was the time of the gold boom. In 1980, the gold price reached an all-time high of US\$850 an ounce, filling Pretoria's coffers. Soon afterwards, the gold price fell dramatically, the economy plunged into crisis and the apartheid government was forced to look for financial help from around the world. In 1984, President PW Botha visited Switzerland. In that year, his government took seven international loans, four of which were arranged by the Swiss banks. After the British, the Swiss banks were the most important lenders to the apartheid government at this time.
  
21. During the debt crisis of 1985, the Swiss banks played an especially important role. After Chase Manhattan, an American bank, cut back its lending facility, there was crisis in Pretoria. In a sudden loss of confidence, banks refused to lend money to South Africa and the government was unable to pay its debts. With pressure from the masses and internationally, there seemed no way to save apartheid. Swiss banks came to the rescue. Mr Fritz Leutwiler, former President of the Swiss National Bank, negotiated with the world's banks on behalf of South Africa and secured an agreement to give South Africa a two-year break from paying its debts and 15 years to make the repayments. Despite international pressure, he refused to use the deal to force Pretoria to dismantle apartheid. Mr Leutwiler gave the South African regime a breathing space during one of its most violent and repressive periods – the late 1980s. While many countries were imposing sanctions against apartheid gold and the United States (US) had banned the direct import of gold bars, the Swiss banks continued to import over half the gold produced in South Africa.
  
22. South Africa was discussed repeatedly in the Swiss Parliament. Over 100 calls for sanctions were rejected. Despite this, there was recognition that the policy of the banks was dangerous. One parliamentarian declared: 'Let's be honest. Our businessmen just want to do business in South Africa at any price. And this policy is not a sound policy for our country internationally. One of these days it's going to come back and haunt us.'

## THE SWISS BANKS AND OTHER LENDERS: THE CASE FOR REPARATIONS

23. The case for reparations from the banks is based on three arguments:
- a As Pretoria's key partner in the international gold trade, Swiss banks benefited over several decades from the exploitation of the black mineworkers, whose human rights were violated by (amongst other apartheid policies) the pass laws, the migrant labour system and suppression of trade union activity.
  - b The banks ignored the call for sanctions against Pretoria initiated by the UN and continued to enrich themselves through the gold trade and lending.
  - c The banks played an instrumental role in prolonging apartheid from the time of the debt crisis in 1985 onwards.
24. It can be argued that there are legal grounds for instituting a claim for reparation. The law governing the enforcement of contracts such as bank loans is heavily influenced by public policy considerations. The common thread is that contracts concluded contrary to public policy are unenforceable. In South African contract law, these agreements may fall into one of two possible categories – those that are tainted with criminality or those that are *per se* immoral.
25. Hence a contract that is contrary to the community's sense of justice is not capable of being enforced in a court of law. A significant date in this regard is 18 July 1976, the date on which the UN Apartheid Convention came into effect. Article 1 of the Convention reads:
1. *The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.*
  2. *The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid.*
26. According to this, any credit institution or private money-lending corporation that financed the apartheid state ought to be targeted as a profiteer of an immoral and illegal system. It is also possible to argue that banks that gave

financial support to the apartheid state were accomplices to a criminal government that consistently violated international law.

27. Arguments also exist based on the doctrine of 'odious debt'. The principle is that debts incurred for illegitimate purposes by illegitimate parties are unenforceable. Debts incurred in the furtherance of apartheid would fall under the principle. The fact that the General Assembly of the UN did not recognise the apartheid government's delegation as the legitimate representatives of the state of South Africa from 1965 onwards lends even more credibility to the argument. There are several precedents for the doctrine, including a 1923 arbitration case between the Costa Rican government and the Royal Bank of Canada. In this case, the US repudiated a debt incurred by Cuba and owed to Spain in its peace treaty after the US had taken sovereign control of Cuba at the end of the Spanish–American war. Similarly, the Soviet government repudiated the debts incurred by the Tsar in the previous Russian regime. An article in a professional journal written by lawyers at the First National Bank of Chicago in 1982 warns lenders of the potential risks of making loans that infringe the doctrine.
28. Swiss banks are not the only lenders whose support for and enrichment under apartheid may provide grounds for reparations. British, German, French and North American banks are amongst those that financed Pretoria during the 1970s and 1980s. In addition, in 1976 and 1977 the IMF granted South Africa balance of payment loans totalling US\$464 million, which helped to cover the increased expenses needed for the South African Defence Force (SADF) and were used to fuel the apartheid machine. More research is required on these matters.

## **THE CASE OF THE PARASTATALS**

29. The parastatal sector sheds further light on the role and responsibility of business in the apartheid era, particularly in view of the way the apartheid government used the parastatals to further its own objectives. Eskom is used here as an example without prejudice. In using this example, we need to acknowledge the many changes Eskom has made in the last decade in relation to the racial identity of its employees and the pioneering role it has played among South African industrial giants in investing in building infrastructure in poor black neighbourhoods. This does not, of course, dilute the critique of its apartheid-era practices and its deep collusion with the political and economic structures of apartheid.

30. Between 1950 and 1980, international financial institutions and foreign private banks granted loans to Eskom amounting to at least US\$7.5 billion. British banks contributed 26 per cent, banks in France almost 24 per cent, West Germany about 17 per cent and Switzerland more than 12 per cent. Substantial amounts were also granted by the World Bank, public export credit agencies and parastatal banks. Loans to public sector corporations and business enterprises were the economic lifelines of the apartheid economy. This point is reinforced by correspondence between Swiss banks and the Finance Ministry in Pretoria: foreign banks would grant loans to Eskom only on condition that central government signed a declaration of guarantee or a warrant to the creditor banks.
31. During the sanctions years (1986 to 1989), foreign debt represented between 44 and 56 per cent of Eskom's total net debts. During the 1980s, Eskom's capital investments at current prices amounted to R35 billion. A fairly large part of these investments involved the importation of capital goods and services. The South African Reserve Bank provided long-term forward cover, especially in the US\$/Rand market. From April 1981 to the end of January 1998, a total loss of R26.4 billion was recorded on the Forward Exchange Contracts Adjustment Account. Of this amount, R19.1 billion was directly attributable to long-term forward cover granted directly to the erstwhile parastatals, primarily Eskom, in the late 1970s and early 1980s. Such losses had to be paid for by the taxpayer.
32. As a parastatal within the apartheid system, Eskom produced extremely cheap energy, making the exploitation of the rich mineral endowment the foremost 'comparative advantage' in South Africa's relations with global markets.
33. At least until the mid-1980s, the minerals-energy complex produced more value added per worker employed than any other economic sector. It was here that most capital accumulation took place, where most of South Africa's exports and a sizeable part of its gross domestic product were produced. Historically, the production of electrical energy served mainly the needs of the mining industry.
34. Like mine workers, black electricity workers were mainly migrants, housed in the same controlled single-sex compounds and receiving the same low wages (which disregarded the needs of the workers' families back in the labour reserves). For the 58 years between 1911 and 1969 there was no increase in the real wages of black miners and electricity workers.

35. Eskom also had to promote the political objectives of the ruling National Party. Since the Broederbond<sup>74</sup> influenced the selection of Eskom's chief executive officers, there was seldom a conflict of interests. Thus, Eskom:
- a offered preferential employment to poor whites as guard labour;
  - b did not recognise independent, non-racial trade unions until 1987;
  - c replaced the racial job colour bar with security concerns in the 1980s, requiring black employees to get clearance from the security police;
  - d offered long-term supplier contracts to Afrikaner coal mining companies;
  - e used Afrikaner financial institutions to issue and market Eskom public bonds in the domestic market, to procure foreign exchange on its behalf and administer its bank accounts;
  - f supported the implementation of apartheid's Bantustan policy by offering extra cheap tariffs for industries settling in 'border areas', like Alusaf in Richards Bay;
  - g buttressed the state's claim to regional hegemony by controlling the development of electricity generation and distribution in occupied Namibia;
  - h propped up the colonial empire of Portugal in Angola and Mozambique by supporting the building of the Cahora Bassa and the Gove and Calueque dams, as well as the hydro-electric power stations at Ruacana in the Cunene river basin and at Cahora Bassa on the Zambezi, and
  - i followed the state's guidelines in response to the threat of economic sanctions by establishing a mammoth oversupply capacity of electricity generation.
36. Because of its strategic importance, Eskom, its power stations, substations and control centres were declared national key points in 1980. All senior security officers and senior personnel at key points had to obtain security clearance. Eskom established its own counter-intelligence unit, which worked closely with the security police and military intelligence. Eskom also created its own militia force, procured a substantial number of firearms and established its own armoury.
37. Evidence was presented under oath to the Commission that, during the twilight years of the apartheid system, high-ranking members of Eskom attempted to make available or sell a portion of this armoury to Inkatha. According to the evidence, this was authorised and done with the knowledge of the Commissioner of Police.

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<sup>74</sup> A secret society composed of Afrikaners holding key jobs in all walks of life.

38. Eskom co-financed the South African Uranium Enrichment Corporation and financially supported research into the development and manufacture of apartheid's nuclear bombs.
39. During its rapid expansion period between 1950 and 1980, Eskom had no particular interest in supplying the households of black people with electrical energy. The Group Areas Act of 1950 separated the administration of black urban areas from that of white cities. This often meant that black areas were without electricity services altogether. White municipal areas normally had industrial as well as residential demand. This could be used to balance the load factor, resulting in lower overall costs for industrial as well as residential users. As black townships were electrified, there were no industrial users to balance the peak load, with the result that consumers in black townships paid a very high demand charge whilst using considerably less electricity. Thus, in effect, electrified black townships subsidised neighbouring white municipal areas.
40. It was estimated in 1992 that about three million black households had no access to electricity – this after a history of electricity generation in South Africa of more than 85 years; equally some 19 000 schools and 4000 clinics serving black communities had not been linked to the national electrical grid.
41. The politics of racial segregation and apartheid suppressed for decades both the human rights and the consumer demands of South Africa's black people. People living in low-income black residential areas, both urban and rural, persistently faced high environmental costs. Energy sources other than electricity (low-quality coal and wood burning in open indoor fires without proper stoves and chimneys, paraffin and candles) have constantly polluted the air and endangered their users. Accidental fires and burns, paraffin poisoning and chronic bronchitis were all too common. On winter evenings, dense smog with high concentrations of sulphur dioxide, carbon dioxide, airborne ash particles and dust was found hanging low over black residential areas, leading to respiratory diseases and even circulatory disorders, and severely reducing the quality of life for young and old.



## ESKOM AND OTHER PARASTATALS: THE CASE FOR REPARATIONS

42. In summary, the case for reparations in relation to parastatals such as Eskom is based on the following two factors:
- a The role of foreign lenders in supporting key institutions of apartheid. Debts incurred by Eskom and other parastatals during apartheid should also be considered 'odious' insofar as the new political dispensation is concerned.
  - b The failure of the parastatals to invest in infrastructure and services for the majority of the population, despite being financed by public means. Hence there is a case for highly subsidised investments in electricity and other services for the poor black majority today.

## THE MINING CORPORATIONS

43. Again, as it is not possible to develop case studies on each private corporation, reference will be made to the Anglo American Corporation, without prejudice.
44. Through punitive taxes in rural reserves and through land dispossession (the Land Act of 1913 and 1936), the black male worker was dislodged from agricultural subsistence farming and forced to work at the underground rock faces. This influx of a large black population instigated early stirrings of *swart gevaar* ('black danger') – and more broadly a fear of the threat posed not only to frontier political control but also to the stability and profitability of diamond and gold mining.
45. Migration control regulations were first drafted by the Chamber of Mines' Native Labour Department in 1895 as a response to perceived state reluctance to organise a stable and constant labour supply. The President of the Chamber of Mines enthused: '... a most excellent law ... which should enable us to have complete control over the Kaffirs'. In its submission to a 1944 commission on 'native wages', the Chamber of Mines argued openly for the 'subsidiary means of subsistence' that migration back to homelands guaranteed. This would subsidise the cost of labour and the costs of reproducing that labour. This zeal for population control on the part of the mining houses set a precedent for the pass laws of the apartheid government.
46. The mines' thirst for migratory labour led them to establish recruiting agencies in distant rural areas and neighbouring countries, originally opened to capital by

military conquest. In this way 'native reserves' evolved into labour reserves. Offering financial inducements to the Swazi monarch, the Native Recruiting Commission set up by the Chamber of Mines was able to diminish the severe labour shortage in the post-World War II economic boom, while migrant work assured the King of his subjects' annual repatriation to fulfil tributary labour 'loyalties'. Tribalism on the Rand originated in recruitment strategies and bargain-hunting by the mines. It was perpetuated by a closed compound system of hostels that fostered separate identity and anticipated the conflicts within the hostels and with permanent township residents. Thus the blueprint for 'grand apartheid' was provided by the mines and was not an Afrikaner state innovation. The mines' instigation of tribalism in employment and housing practices is admitted in their submission to the Commission.

47. The single-sex hostels, moreover, eroded family structures. Women who had accompanied their male partners and husbands to the compounds were 'endorsed out' or sent back to the homelands. A corollary to the slave-like conditions of work on the mines, women were left to rear children and cultivate fields ultimately on behalf of the mine owners. When occupational hazards ejected invalid workers, the social security of homesteads helped absolve companies of providing adequate compensation and/or pensions.
48. In mitigation of its housing policy, the Anglo American Corporation contends that it was frustrated in its attempts to develop an 'urban model for black South Africans' by the apartheid regime. The Corporation argued that Sir Harry Oppenheimer appealed to the Verwoerd government in the 1950s to be allowed to house 10 per cent of black workers with their families at the Free State gold mines. These appeals were rejected by the state, but they cannot atone for the cellblock structures and systems the company provided for each of its armies of black miners.
49. Harsh conditions on the mines were enforced by state repression which employers – and Anglo American – did nothing to discourage. Strikes were unheard of during the booming 1960s. When the upsurge of worker resistance began with the wave of strike actions in Durban in 1973, state security forces became almost permanently resident on production sites to maintain and restore order. From the outset, Anglo American did not hesitate to use the services of the apartheid security apparatus to curb working-class militancy during this period. A strike at its Western Deep mine was dealt with by government forces and resulted in the deaths of twelve miners. Worker resistance to the state-led

'total onslaught' campaign led to the detention of five executive members of the National Union of Mineworkers (NUM).

50. The consensus between business and the apartheid government was given institutional expression in an array of joint committees at the interface of private capital and the state. 'Total strategy' was quickly sold to business South Africa at the government-convened Carlton Conference in 1979. Harry Oppenheimer promoted the 'new era' of business and state détente. Joint Management Centres (JMCs) were set up to gather intelligence about trade union activity. Their reports to the State Security Council (SSC) effectively drafted business leaders into the state apparatuses.
51. The renting of Waterloo farm to security force agents by Tongaat Hulett, a sugar-producing company with a majority Anglo American shareholding, represents one example of such collusion. Business, moreover, directly financed the SADF through its participation in the Defence Manpower Liaison Committee structures. These were designed to facilitate the least disruptive conscription of white men to the armed forces by supplementing the income of soldiers during their stints in the army.
52. Outsourcing the function and/or costs of national security to private interests was accomplished by the 1980 National Keypoints Act of the Botha regime. 'Keypoints' of national interest, usually production sites, were identified as possible targets. Protection was supplied by the SADF and paid for by the business concerned.
53. By 1976, the Anglo American group enjoyed a shareholding interest of 20 per cent in Barlow Rand. Through a number of its subsidiaries, Barlow Rand was a major producer of defence electronics, dividends from which were paid to Anglo American. Three members of the Barlow Rand board of executives (including the chairman) were also members of PW Botha's Defence Advisory Board. Anglo American chairman Gavin Relly himself served intermittently on the Armscor board. The sinews of the military-industrial complex were firmly enmeshed with the mine-based economy.
54. The high level of accidents on the mines went far beyond anything that can be excused by the ordinary hazards of working underground. Here again it was the mines themselves that must take responsibility for ignoring the most basic safety standards applied by the International Labour Organisation (ILO). By 1993, the

mortality rate on the gold mines as a result of accidents stood at 113 for every 100 000 miners. This does not take into account the delayed deaths and disability resulting from the occupational hazards of work underground. The migratory labour system allowed employers to repatriate miners suffering from injury, silicosis, pulmonary tuberculosis and other work-related ailments to their distant homes, where they would often die slow and painful deaths, living on meagre pensions and without the necessary medical treatment. Even though a curative treatment for pulmonary tuberculosis was available by the 1950s, mines continued to send sick miners home, with the result that up to 60 per cent would die within two years, and families became infected. By the 1980s, only 10 per cent of these workers – effectively retrenched – received the necessary treatment.

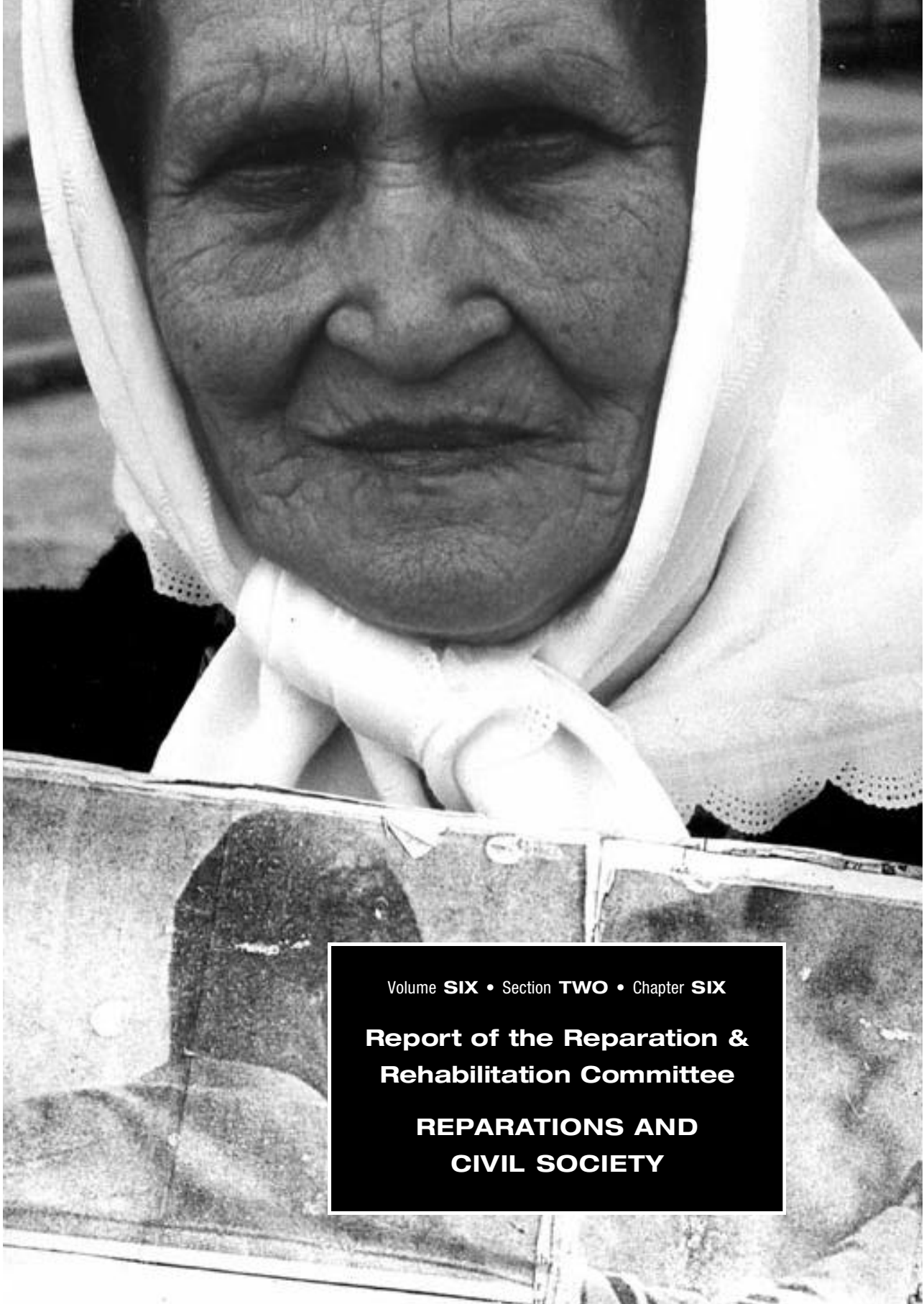
55. Apartheid also affected how workers were recompensed by the state, and can be seen in the inadequacy and racial differentials of lump sums paid out. The structure of the Workmen's Compensation Fund cleared mine owners of liabilities stemming from whatever civil claims could have been brought against them. Thus deference to the state made good business. As late as the early 1990s, permanently disabled black workers were paid only R2000, with a 1:13 compensation ratio between black and white workers.
56. In 1974, 'Harry Oppenheimer made a public call to review South Africa's labour laws' and was 'amongst the first to grant independent black unions access, recruiting and collective bargaining rights'. The Anglo American submission to the Commission attributes this to Oppenheimer philanthropy. Yet his sudden concern about the absence of union organisation amongst black workers cannot have been coincidental: his call was stoked by the fear of disruption of production schedules when industrial relations are not mediated by union representation. Despite the orderly bargaining framework that union recognition brought to industrial relations, apartheid employers did not take this to imply that legally striking workers ought not to be dismissed. Anglo American cut the biggest swathe through workers' ranks when it dismissed 50 000 workers who were on strike for a living wage.
57. Nor did the recognition of black trade unions preclude security cordons around mines and the control of union meetings. An NUM report on repression at Anglo American mines described how meetings had to be approved by mine management. The significance of union recognition was further downplayed by the spread of Anglo American companies throughout the Bantustans. Unions enjoyed legal status only if the labour laws upheld by the homeland puppet states allowed

this. Rustenburg Platinum, owned by the Anglo American subsidiary, Johannesburg Consolidated Investments, adopted schizophrenic policies that saw the company recognise NUM representatives in South Africa but not on the other side of the Bophuthatswana border.

58. When Botha's reforms of apartheid only elicited increased labour unrest, and economic sanctions looked set to force the regime to default on its debt, business leaders broke ranks with the government, and a delegation, including Mr Gavin Relly, flew to Lusaka to meet with African National Congress (ANC) leaders. Yet just two years later, in 1987, after the declaration of the second state of emergency, Mr Relly described the national alert as 'necessary'. 'Open minds' closed again once mass detentions brought a modicum of quiet to the townships and factory floors, and once debt payments had been successfully rescheduled by agreement with the International Monetary Fund.
  
59. The extent of Anglo American's 'real and permanent contribution to the well being of the people of southern Africa' and its founding 'economic nationalism' must be judged according to its deeds. Nor can its 'deeds' be represented by cases of its magnanimity when these stand out as exceptions against a general rule of profiteering based on racist systems of exclusion, indignity, manslaughter and expropriation. Even in terms of the modernisation thesis the corporation propounds in its literature – 'the slow march to modernity' – Anglo American fails. The basic premise that a modern, non-racial capitalist economy will engender full democratic rights for all South African citizens presumes the necessity of coerced labour and racist employment policies, because it is precisely on these practices that its empire was built. The estimated R20 billion that the corporation 'exported' in offshore investments between 1970 and 1988 cannot have benefited the modernisation project it claims to cherish.

## **THE MINING COMPANIES: THE CASE FOR REPARATIONS**

60. A reparations claim against corporations like Anglo American would be based on the extent to which decades of profits were based on systematic violations of human rights. In legal terms, this could be based on the principle of 'unjust enrichment'. 'Unjust enrichment' is a source of legal obligation. Actions based on 'unjust enrichment' are common to most modern legal systems. These kinds of claims give rise to an obligation in terms of which the enriched party incurs a duty to restore the extent of his/her enrichment to the impoverished party. Put differently, the impoverished party acquires a legal right to claim that the extent of the other's enrichment be restored to him/her if it was acquired at his/her expense.



Volume **SIX** • Section **TWO** • Chapter **SIX**

**Report of the Reparation &  
Rehabilitation Committee**

**REPARATIONS AND  
CIVIL SOCIETY**

# Reparations and Civil Society

1. The Truth and Reconciliation Commission (the Commission) seized the imagination of many South Africans and, from the start of its work, initiatives aimed at healing and reparation sprang up all over the country. They provide an example of the enormous value of the role of civil society in the work of bringing about the healing and reconciliation our society so urgently needs. They also demonstrate the fact that reparation is a multi-faceted process and can be approached from many sides by many people. In other words, it needs to be seen as a national project to which we are all committed as South Africans.

## CREATIVE APPROACHES TO REPARATION AND HEALING

2. There are many examples of organisations, individuals, artists and events that have used creative approaches to begin to address the issues of healing and reparation. That they have seldom been given the same amount of publicity as the Commission itself does not detract from their importance. It would be true to say that some of the most profound experiences of reconciliation, acknowledgment and healing happened in intimate spaces away from the public gaze. This is as it should be, since it is in those intimate spaces that peoples' most powerful emotions reside. Many of these initiatives have a great impact on peoples' lives because details of the victim's experience and interactions between participants can be freely expressed.
3. This chapter outlines some such forums or creative expressions by various civil society groups and individuals.

### The story I'm about to tell

4. One such example is a theatrical play called *The story I'm about to tell*. This was (and still is) an initiative using acting, audience participation, real-life recollections of violations and an improvised script that was true to life events.
5. The actors are survivors of gross human rights violations, and indeed only act in the sense that they are on a stage engaged in a performance of their experiences. Their role changes to that of facilitators when, importantly, the play does not end, but moves on to include the audience in an interactive debate and discussion.

6. An individual who gave testimony at Commission hearings, Mr Duma Khumalo (a former death row prisoner), says that audiences seem to open up more and travel much further into the past than occurred at the formal Commission hearings. Members of audiences have expressed their difficulties about opening up and speaking of the past, which they had often kept secretly to themselves.
7. One such powerful encounter occurred whilst performing the play in Germany. The widow of a man killed by the South African Defence Force (SADF) approached the actors, saying that she had always felt that she would die in unresolved pain. However, through experiencing the stories retold in the play, she found herself able to forgive and let go.
8. The play was staged at the Grahamstown Arts Festival, one of South Africa's major arts festivals. After the play, an elderly white South African man approached one of the players, Ma Mlangeni, embraced her, sobbing, and then left without saying a word. For the actors, no words were necessary: such was the power of this intimate encounter.
9. In another instance, an audience member asked Duma Khumalo: 'How did you feel when you were about to die?' Mr Khumalo recalls being shocked that no one had previously felt able to ask him this. He attributes this to the unique power of the play. He summed up his experiences of performing in the play as 'a piece of delicious cake'.
10. Far from being simply a forum for profound moments of healing, the play has also proved a catalyst for expressions and questions that were often not articulated in the context of the Commission, especially those that were conflictual or anti-reconciliatory. While performing in South Africa, a youth expressed his sense of injustice at having to witness lies by perpetrators, asking, 'How do they expect us to feel?' In some instances, when the play was touring London and Great Britain, there were exchanges and debates between members of the audience about who had benefited from apartheid.
11. *The story I'm about to tell* is an ongoing initiative and many requests have been made for it to be staged in township contexts. Importantly, the play has received sponsorship from the Department of Arts, Culture, Science and Technology.



## **The Healing of Memories Project**

12. The Healing of Memories Project is based in Cape Town and was established to facilitate the healing process of individuals and communities. It originated as the Chaplaincy Project of the Trauma Centre and is now the Institute of Healing of Memories.
13. One of the main techniques used by the project is workshops. The workshops were developed by the Religious Response to the Commission, now the Centre for Ubuntu and the Healing of Memories.
14. Each workshop is an individual and collective journey aimed at exploring the effects of the apartheid years. The emphasis is on dealing with these issues at an emotional, psychological and spiritual – rather than at an intellectual – level. Time is given for individual reflection, creative exercises and opportunities to share in a small group. Typical themes that arise are anger, hope, hatred, joy, isolation, endurance and a discovery of the depths of common humanity shared. The workshops end in a liturgy/celebration.
15. The collective and uniquely spiritual focus of this initiative marks it as one of the more profound treatments of the challenge of healing.

## **The Khumbula Project**

16. Khumbula was launched in Mbekweni, Paarl on 16 December 1998. A non-governmental organisation registered as a Section 21 Company, Khumbula aims to address the conditions under which ex-combatants of the South African liberation struggle find themselves. It has also recently launched an educational initiative.
17. Driven by volunteers, Khumbula's main aim is the exhumation of former Umkhonto we Sizwe (MK) cadres who died outside the borders of South Africa and assisting families to rebury the remains of their loved ones. A significant number of witnesses who approached the Commission requested assistance in locating and reburying their loved ones in a culturally appropriate way.

## **Khulumani support group**

18. The Centre for the Study of Violence and Reconciliation played a significant role in the establishment of the victims' support group commonly known as

Khulumani. The philosophy behind this initiative is a belief that the violations of the apartheid era not only left deep psychological wounds in peoples' minds, but also left people with a sense of isolation and feelings of disconnectedness. Being part of a victims' support group was seen by many as having a therapeutic effect.

### **The Northern Province and Mpumalanga branches of the South African Council of Churches**

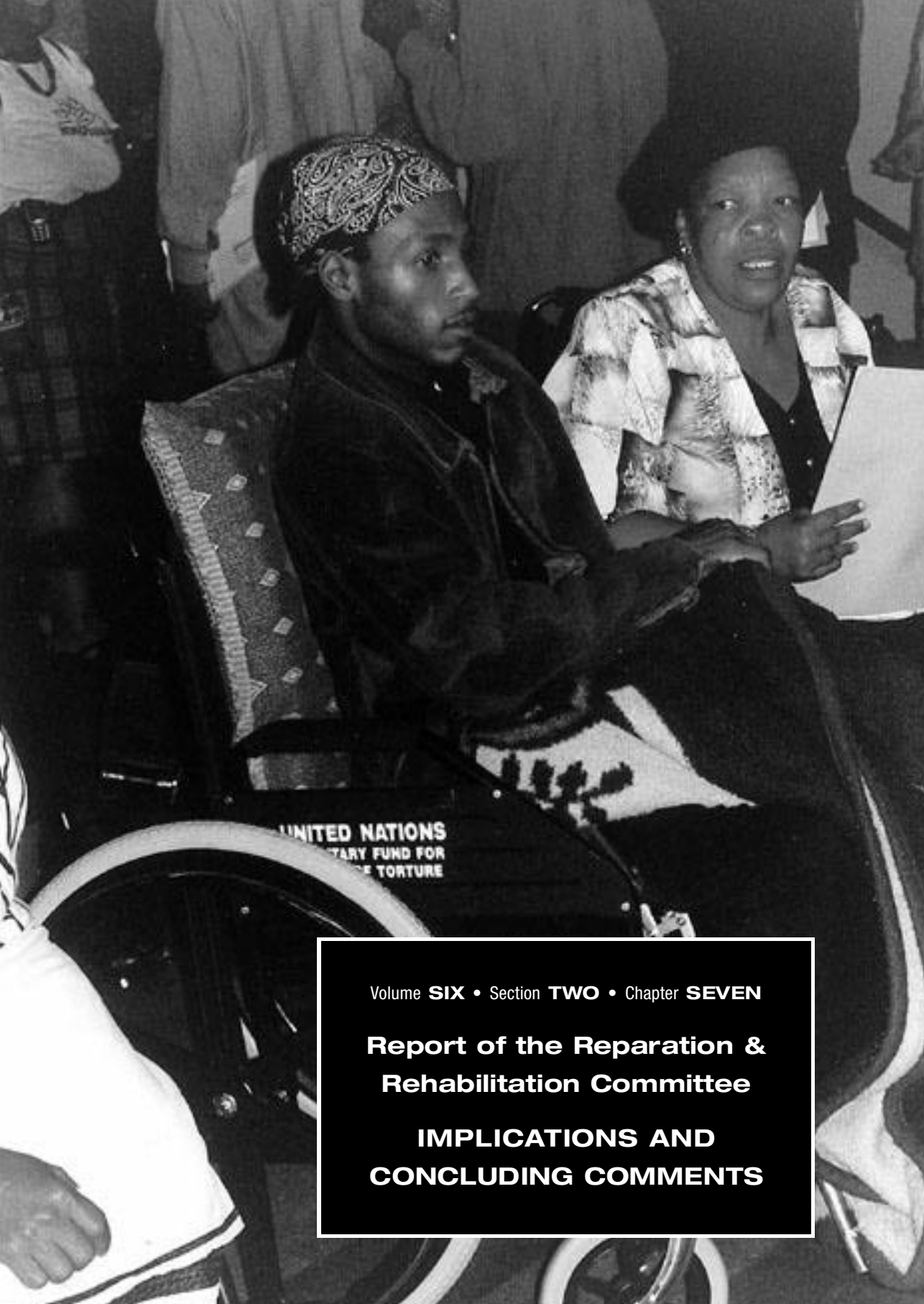
19. The Mpumalanga Provincial Chapter of the South African Council of Churches played a significant role in providing emotional and spiritual support, especially during the hearings.

### **CIVIL SOCIETY AND THE CAMPAIGN FOR REPARATION**

20. Khulumani and some representatives of the faith community have publicly campaigned for the implementation of the Commission's Reparation and Rehabilitation policy.
21. Khulumani has not only mobilised the South African government and local business but has, in consultation with sister organisations such as Jubilee 2000, continued to emphasise the responsibility of local business and international governments and banks in respect of reparation and rehabilitation.
22. The Northern Province branch of the South African Council of Churches, under the leadership of Reverend Mautji Pataki, has also continued to play a significant role in campaigning for the restoration of the dignity of witnesses through a government-led reparation and rehabilitation programme. Their focus has been on mobilising government support at a provincial level, and exerting pressure on it to spearhead service delivery.
23. It is the Commission's view that, while government is both legally and morally obliged to pay reparation to individual victims, the responsibility for reparations goes far wider. With regard to the financial cost of reparation, the Commission believes that business, in particular, should bear some of the burden.<sup>75</sup> More broadly, however, other institutions of civil society, and indeed all South Africans, should be part of a national project of reparation and rehabilitation.

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<sup>75</sup> See this section, Chapter Five.



Volume **SIX** • Section **TWO** • Chapter **SEVEN**

**Report of the Reparation &  
Rehabilitation Committee**

**IMPLICATIONS AND  
CONCLUDING COMMENTS**

# Implications and Concluding Comments

*If you saw me at a distance, you would think I was an ordinary person. Even if you get closer, you still couldn't tell. Maybe if you observed me very carefully, you might notice that I seem somehow alone, even in the middle of a crowd.*

*You would be right. But you would also be wrong. For I am never truly alone. Thousands of people are always with me. My head is so crowded with ghosts I sometimes think it will burst. My ears ring with cries from the voices of the dead.*

*My dreams flame with horror. My memories are grey with ash.*

*The Survivor, Jack Eisner*

1. The issue of reparation and rehabilitation is real for every victim, though to varying degrees. As history takes the country further and further away from the historical moment of the negotiated settlement in South Africa, and as other challenges, especially that of HIV/AIDS, press ever more insistently on the national consciousness, it may become more and more tempting to deal dismissively with the issue of reparation and rehabilitation. There may be those who feel that there are things that cannot be repaired or rehabilitated. This too may discourage further consideration of the issue. Moreover, it may be argued that there is something very positive about a country that wishes to move forward.
2. Although we may currently be experiencing fatigue about the consequences of the past, it remains true that if we do not deal with the past it will haunt and may indeed jeopardise the future. We need to remember that the Truth and Reconciliation Commission (the Commission) was established in large part because of the dangers of inappropriate forgetting. We acknowledged then and must remember now that moving forward requires acknowledgement of the past, rather than denial. To ignore the suffering of those found by the Commission to be victims would be a particular kind of cruelty. After all, it was the testimony of these victims that gave us a window onto how others saw the past and allowed us to construct an image of the future.
3. There has been a tendency to dismiss those declared as victims by the Commission as an 'elite victim group'. It needs to be borne in mind that, given

the systemic abuse committed during the apartheid era, virtually every black South African can be said to be a victim of human rights abuse. By using the fact that they testified as evidence of their 'elite' character, these critics are in essence propounding the astounding argument that these victims should be punished (denied legitimate expectations) for having come forward.

4. There were very many victims of apartheid and, certainly, those who came before the Commission are only a subset of a much larger group. This is why, when balancing individual and socially oriented reparations, the Commission sought to address the specific needs of those who came before it in order to contribute to the wider truth about the nation's history, whilst at the same time addressing the broader consequences of apartheid. It is almost impossible to design a reparation programme without leaving some gaps. Nevertheless, the fact that not all victims will receive individual financial grants cannot be allowed to prevent at least some clearly deserving victims from getting such awards.
5. The reality is that a specific group of victims was identified via a legislated and broadly accepted process. While their circumstances are possibly more representative than otherwise, their uniqueness lies in the fact that they chose to engage in the process.
6. There are major challenges for the reparation and rehabilitation process. As indicated in earlier chapters, it is often difficult to distinguish victims from non-victims and even to isolate key events that caused subsequent problems in people's lives. It is not always possible to draw a clear line between a gross violation of human rights and the more general features of oppression. It is difficult to know where, in the ongoing development of individuals, families and communities, one could measure the effects of human rights abuses, even if such measurement were theoretically possible. Given the very limited resources in South Africa, very little of this work can be done.
7. Besides, even if South Africa had unlimited resources at its disposal, much of the damage that has taken place is irreparable. Human development in the context of abuse and violation is not infinitely reparable, and part of the task for healing in South Africa lies in accepting what cannot be done.
8. The acceptance of limitations, however, does not mean the abdication of responsibility, but rather a sober assessment of what can and cannot be achieved.

9. It is this assessment that must form the basis of our future growth as a nation. Poverty and the economic implications of the AIDS epidemic make economic considerations important in the rehabilitation process. The line between victims and non-victims is often obscure; hence it may be ethically problematic to provide victims with preferential access to services such as education, housing and employment. It is, moreover, common knowledge that many public sector services – such as health, welfare and education – are woefully under-resourced in South Africa. Wishing that things were different will not make these problems go away. Again, attempts to give preference to victims in these services could potentially meet with resistance because there is not, in any case, enough to go around.
10. Despite this, preferential opportunities on the basis of need for victims across the political spectrum may be important symbolic acts: they would communicate that the current leadership takes seriously what South Africans have endured, and signal a commitment to establishing a just and humane society in which human rights are respected.
11. Given resource constraints, creative ways of generating funds earmarked for rehabilitation services should be considered. These could include tax incentives to encourage private sector businesses to contribute to a specific post-Truth and Reconciliation Commission Fund. The economic and social implications of a time-limited taxation levy on wealthier South Africans' earnings also need to be considered.
12. However funds are generated or redirected from other budgets, it is important that we do not forget the high levels of emotional pain in our country and the fact that we need to build up services to deal specifically with these. Public sector mental health provision is inadequately resourced at present and there is insufficient training and ongoing support for frontline helpers across a range of sectors including education, labour, safety and security, defence, health, and welfare. Resourcing is an issue, and there is a lack of creative thinking about making services physically, linguistically and culturally acceptable to communities. Professional mental health and welfare organisations should be encouraged to share information on successful projects, on methods of assessing impact and on improving the cost-effectiveness of such endeavours. Professional services should act in concert with community-based services. The combination of professional expertise and community-driven support is likely to provide the most cost-effective, helpful and culture-friendly mix.

13. Within the public health sector, dedicated posts for working on rehabilitation and reparation issues need to be established countrywide. The reparation and rehabilitation aspects need to be emphasised for a limited period, after which time these posts could become part of the general public mental health pool. It is important to attract talented and energetic people to such posts. In this respect, the secondment of personnel from other sectors (the health system, the non-governmental organisation (NGO) sector, higher education and the private sector) should be considered.
14. Symbolic reparations such as monuments and museums are important but should ideally be linked with endeavours that improve the everyday lives of victims and their communities. One way of combining the two aims is to involve victims prominently in the design and/or manufacture of monuments and in the running of museums. There are already good examples of this in the country.
15. There is much to do, and not all our ideals can be realised. But the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (the Act) gave an undertaking that something would be done and, for the sake of the future, steps must be taken to take the process forward. Furthermore, much of the current order's legitimacy rests on a fair and appropriate response. The issues, problematic though they are, cannot be ignored.
16. It cannot and must not be forgotten that the Act allowed for reparations for those who testified before the Commission and were subsequently identified as victims. While the recommended reparations are not and cannot ever be proportionate to the harm suffered, reparations may be understood at least as an act of good faith and a serious attempt to alleviate some of the material and psychological trauma that victims endured. Today, when the government is spending so substantial a portion of its budget on submarines and other military equipment, it is unconvincing to argue that it is too financially strapped to meet at least this minimal commitment.
17. In this context, the argument that individual reparations come at the cost of social reparations is hardly persuasive; the two are not mutually exclusive within the context of broader budgetary priorities.

18. As we showed earlier in this section, the legal and normative arguments are unassailable. It may be recalled, too, that the overarching goal of reconciliation and national unity, as expressed in the Constitution and the founding Act, was born of a fragile balance with consequences that go far beyond the Commission itself.
  
19. The challenge to decision makers is how to acknowledge those who actively engaged with the legal framework of the Act and were found to be victims of gross human rights violations. They must honour the social contract in which these victims engaged, while at the same time adequately acknowledging those who did not or were not able to engage in the process, without overvaluing or undervaluing either party.
  
20. The Reparation and Rehabilitation Committee (the RRC) believes that its recommendations – which emphasise both individual and collective reparations – represent a blueprint for a workable solution to this pervasive tension.
  
21. The challenge to us all is to honour the process and to take responsibility for shaping our future. If we ignore the implications of the stories of many ordinary South Africans, we become complicit in contributing to an impoverished social fabric – to a society that may not be worth the pain the country has endured.





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Volume **SIX** • Section **TWO** • Chapter **EIGHT**

**Report of the Reparation &  
Rehabilitation Committee**

**ADMINISTRATIVE  
REPORT**

# Administrative Report

## ■ INTRODUCTION

1. Unlike the other statutory Committees of the Truth and Reconciliation Commission (the Commission), the Reparation and Rehabilitation Committee (RRC) began the bulk of its administrative work at the tail end of the processes of both the Human Rights Violations Committee (HRVC) and the Amnesty Committee. The RRC received its first list of victims'<sup>76</sup> findings from the HRVC in September 1998, a month before the Commission went into suspension. Since then its work has increased progressively as more victims have been referred to it.
2. To date, the RRC has processed and submitted to the President's Fund 17 088 of the total of 19 890 victim claims received.<sup>77</sup> This chapter focuses on the administrative and management aspects of the RRC and its functions.

## THE REHABILITATION AND REPARATION COMMITTEE

3. With the handover of the Final Report in October 1998, the Commission was suspended and the activities of the RRC statutorily placed under the auspices of the Amnesty Committee in accordance with an appropriate amendment to the Commission's founding Act, the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (the Act). Once that Committee had completed its work, the Commission and its three Committees reconvened on 1 June 2001.
4. At this stage, the RRC consisted of a chairperson, an executive secretary, co-ordinators based in satellite offices, victim consultants and an administrative co-ordinator and staff. The three satellite offices were based in the Eastern Cape (East London), Gauteng (Johannesburg), and KwaZulu-Natal (Durban). Regional staff represented a crucial point of access for victims, enabling them to interact directly with the RRC. Because the Commissioners and RRC members had now departed the scaled-down Commission, members of staff in charge of processing claims became the public face of the Commission.

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<sup>76</sup> See discussion on use of the term victim, this section, Chapter One, footnote 7.

<sup>77</sup> See section on 'Interim Reparation Statistics' below.

5. Following negotiations between the government and the Commission, it was agreed that the RRC would be given an extended mandate to initiate the delivery of urgent interim reparations (UIR) on behalf of government. This became the primary function of the RRC after the finalisation of the drafting of the Reparation and Rehabilitation policy document. UIR entailed the promulgation of regulations (3 April 1998); the distribution of the promulgated reparation application form to all those witnesses who had been found to be victims; the determination of harm suffered, and recommendations to the President's Fund on appropriate reparations on a case-by-case basis.
6. As explained in the Final Report, the Act provided for the granting of UIR as a means of fast-tracking assistance to victims urgently in need of immediate intervention as a consequence of the violation(s) they had suffered. Although the legislators had initially conceived of this measure as applying only to a small fraction of victims, an analysis of the impact of the violations in the current lives of victims showed that this category was far larger than had been anticipated. This, together with delays in finalising a final reparations package, as well as a substantial allocation to the President's Fund, undoubtedly broadened the notion of 'urgent' and gave momentum to a more inclusive approach to UIR.
7. The following sections describe the implementation of UIR and the challenges that arose during this process.

## **IMPLEMENTATION OF URGENT INTERIM REPARATIONS**

### **Administration**

8. Once the HRVC had referred its victim findings to the RRC, the RRC notified each victim of the findings and sent her or him an individual reparation application form, as required by the Act. The Commission had earlier decided not to elicit the required information at the initial statement-making stage for two reasons. First, the human rights violation statement did not constitute a sworn affidavit. Second, the Commission was reluctant to raise expectations concerning reparations before a finding had been made, in order to avoid disappointment in those instances where it might make a negative finding or where it might be unable to make a finding because of insufficient corroboration.
9. Moreover, because only declared victims were eligible for reparation, the RRC eventually decided to limit access to reparation application forms to those who

had been declared 'victims' by the Commission. The risks and benefits of making application forms available at public offices such as post offices or municipal structures were considered at length by the RRC. Again it was eventually decided that public access would create confusion and lead to raised expectations on the part of those who did not make human rights violation statements to the Commission.

10. Individualised application forms greatly limited the possibilities of such confusion and disappointment, and this route was encouraged and approved by the Auditor-General's office as the safest and most controllable approach. Each form was given an individualised 'TRR' identification number in order to prevent the unauthorised distribution or submission of applications by persons other than the victims, which would allow fraudulent claims to be made.
11. These and other security measures were deemed necessary in order to reduce potential abuse of the process and the misspending of taxpayers' money.
12. The reparation form (in the form of a sworn affidavit) gathered information related to the harm<sup>78</sup> and suffering endured as a result of the gross human rights violations, under the categories of housing, health, mental health or emotional state, education and an 'other' category. In addition to completing the form, victims were required, where possible, to submit additional corroborative documentation. The administrative and security measures that had to be put in place and the submission of extensive corroborative documentation established a tension between the need for speedy implementation (in the face of pressing trauma-related needs) and the necessity to maintain strict and unavoidable administrative control in order to ensure accuracy and financial accountability. This tension affected both the RRC – keen to deliver as soon as possible – and those applicants who had completed application forms, who often perceived requests for additional information and documentation as superfluous and overly bureaucratic.

## **Outreach and assistance to victims**

13. Each regional office received batches of notifications and reparation application forms and was responsible for the co-ordination and dissemination of forms to victims.

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<sup>78</sup> Categories of harm were derived from the Act's definition of 'victim' (section 1(1)(xix)). They were: physical or mental injury, emotional suffering, pecuniary loss, or a substantial impairment of human rights.

14. In line with the Commission's policy of pursuing a victim-centred approach in its work, the RRC attempted to find ways of dealing with what might be seen as a bureaucratic and potentially alienating process in as humane a way as possible. Consequently, rather than expecting applicants to approach what consisted of no more than four small offices based in city centres, the RRC employed field-workers – or what were called Designated Reparation Statement Takers (DRSTs) – as a way of reaching out to applicants in their communities. Another reason for employing DRSTs was to promote the speed and efficiency of the process. A return rate of 92 per cent of application forms is testimony to the success of this approach.
  
15. The importance of the reparation application in assessing the needs of victims and the desire to provide as much back-up as possible for applicants required that DRSTs be responsible for:
  - a locating the recipient, especially where the address given was limited;
  - b assisting with any language and translation difficulties encountered;
  - c explaining, where necessary, what was meant by each question on the form;
  - d assisting in the gathering of any statutory supportive documentation that was required to process the application;
  - e assisting in the location of a Commissioner of Oaths to sign the application;
  - f being a supportive presence during what was usually an emotionally difficult time, when the victim recounted the consequences of the violation.
  
16. The desired profile of a DRST was that s/he be community-based, know the locality in which s/he would be working and possess the know-how to access basic facilities such as photocopying, Commissioners of Oaths, the required documentation and so forth. An international funding agency, USAID, funded the salaries and training of the DRSTs.

## **Assessing applications and the President's Fund Process**

17. Once the forms were completed, they were forwarded to the relevant regional office where they were checked for completeness and then forwarded to the national office in Cape Town. On receipt they entered a systematic information flow involving numerous checks to avoid duplication, clarify discrepancies and rectify any omissions. After this, each form was assessed and individual recommendations were made on the basis of the responses made by each applicant. Prior to the suspension of the Commission, the assessment of applications was the responsibility of RRC members. Subsequently, it became the responsibility chiefly of the chairperson of the RRC.

18. The assessment established what harm and suffering had taken place, who the beneficiaries were, how many dependents were involved and who they were, and the consequences of the violation in terms of housing situation, emotional state, medical state, educational situation and other aspects.
19. The assessor then made a broad recommendation for (a) service intervention(s), categorising evident needs and monetary grants according to the schedule set out in the Final Report.<sup>79</sup>
20. This assessment, together with the application form, was then forwarded to the President's Fund.

### **The RRC's relationship to the President's Fund and Department of Justice**

21. The RRC enjoyed an interdependent relationship with the President's Fund. The mandate of the Act, as well as the regulations governing interim reparations, clearly demarcated each body's responsibilities.<sup>80</sup>
22. The RRC was responsible for making individualised recommendations, both for a required service and a monetary grant, and the President's Fund was responsible for implementing those recommendations – that is, making the payments and informing recipients of the RRC's recommendations and of the name of the government official in their province who would act as a conduit through which they would gain access to services in the relevant department or departments.

### **False perceptions about the role of the RRC**

23. Both victims and the public developed a perception that reparation matters (administration *and* implementation) began and ended within the domain of the Commission. As far as they were concerned, if the other two Committees of the Commission dealt with their affairs, so too did the RRC. This perception led inevitably to the belief that the RRC had reparation funds under its direct control, leading to many direct approaches for assistance.

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<sup>79</sup> Volume Five, Chapter Five, paragraphs 54–66.

<sup>80</sup> Sections 4(f)(ii); 25(b)(i) and 42 of the Act, and the regulations to the Act.

24. This misperception was further perpetuated by inaccurate media reportage. Media campaigns were directed at the Commission, charging it to speed up the delivery of reparation awards.
25. This ongoing misperception left the RRC and the President's Fund with the responsibility of correcting and responding to the many complaints and enquiries it received from victims. In the face of extremely scarce human resources, this made working conditions extremely difficult. From the outset, the Fund employed three people, including the Director. Given the administrative responsibilities of processing all forthcoming applications and preparing them for payment, in addition to fielding the many enquiries that came in, a considerable burden was placed on already severely strained resources. Complicated enquiries were referred back to the RRC's offices, which employed two enquiry secretaries to deal with problems of this kind.

### **The process followed by the President's Fund**

26. Once forwarded to the President's Fund, application forms were registered and prepared for payment and service recommendation. Victims were sent a letter from the President and a letter from the President's Fund. This included the amount of the financial grant they were to receive and the name of an official in the Department of Welfare who would assist them in accessing the services recommended by the RRC. This usually meant referring the individual to the relevant government department.

### **Interim reparation referral**

27. This referral process lay at the heart of the interim reparation process in that it emphasised a reparative intervention based on the reported consequences of a gross human rights violation and did not focus merely on making a financial grant. The fact that this aspect of the programme has so significantly failed to deliver so far is extremely disappointing. The Commission's policy recommendations published in its Final Report depended on a carefully balanced reparation package.
28. The referral process was discussed and formulated in conjunction with the Inter-Ministerial Committee on Reparation, chaired by the then Minister of Justice, Mr Abdullah Omar. Minister Geraldine Fraser-Moleketi, then Minister of Welfare and Population Development, volunteered that her Ministry would serve as the conduit through which victims could be channelled to other government departments. This offer was not in line with the initial policy direction of the RRC, which preferred the location and responsibility of the referrals to be in an office like the Presidency, so that it would command co-operation from all government ministries.

29. Despite its reservations, the RRC decided to co-operate with this suggestion. In October 1998, Minister Fraser-Moleketi provided the framework for the following referral process through her Director-General's Office. The following memorandum, dated 14 October 1998 and written to the Minister of Welfare by the Director General of Welfare, Ms Luci Abrahams, outlined the Department's planned approach. It was forwarded to the RRC with the names of allocated officials by province.

*1. The Department of Welfare in Provinces should be the focal point for referrals.*

*The President's Fund refers the victim to Provincial Head of Department for Welfare and the victim's application form is forwarded to the HOD. A copy of such a referral is sent to the Provincial Director General and the National Department of Welfare.*

*The President's Fund informs the victim that the Provincial Government has been requested to render services.*

*The Provincial Head of Department of Welfare constitutes an Inter-Departmental Committee (sanctioned by the office of the Premier and Provincial Director-General) comprised of senior representatives at provincial line function department.*

*The Inter-Governmental Committee decides which provincial department/s should render services to the victim.*

*Departmental services offices or institutions to give service to the victim.*

*Reports on services rendered to be given to the Provincial Head of Department of Welfare for channelling to the Commission and the President's Fund with copies to Provincial Director-General and the National Department of Welfare.*

*There should be a two-week turn around period for processing of applications and referrals.*

*The period within which the process is to be finalised will be four to six weeks.*

*2. Services provided should include the following:*

*Trauma Counselling and support even if the event happened a long time ago*

*The National Victim Empowerment programme makes provision for assistance to victims of all forms of crime and violence*

*Provincial victim empowerment forums should be set up and engaged as a contact point with service providers in government and NGO sector*

*Provincial networks on violence against women co-ordinate related services to abused women*



A list of contact persons in the provinces is attached

3. Information on records of individuals and communities should be made available by the TRC.

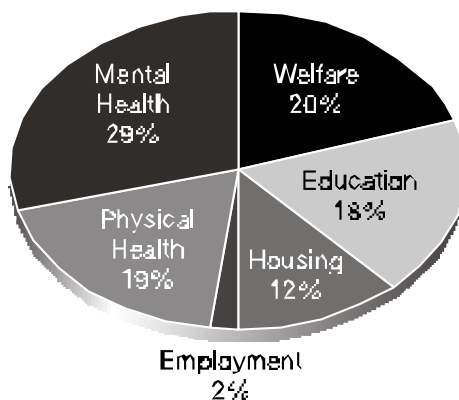
## Services recommended by the RRC

30. As of 5 May 2001, the President's Fund compiled statistics reflecting which services were being recommended by the RRC, using a sample of 14 160. The following picture emerged:

### Totals of recommended service interventions according to provinces, as of 06.11.01

Province	Education	Housing	Employment	Physical Health	Mental Health	Welfare
Gauteng	1697	569	194	2154	3101	1897
Eastern Cape	1219	380	136	1398	2154	1298
Northern Cape	36	6	7	73	81	30
Free State	133	67	27	217	292	148
Northern Province	225	271	27	199	303	376
Mpumalanga	347	169	45	381	606	381
North West	259	70	40	425	564	361
Western Cape	411	153	71	488	719	388
KwaZulu-Natal	4675	4184	281	4273	6596	4822
<b>Totals</b>	<b>9002</b>	<b>5869</b>	<b>828</b>	<b>9608</b>	<b>14416</b>	<b>9701</b>

### National Interventions



31. These tables and graphs represent what the RRC officially recommended. However, the RRC has not been given reports on the actual implementation or assistance rendered to individual applicants. Information has been requested on many occasions from the Ministries of Justice and Constitutional Development, Welfare and Population Development, as well as the Social Cluster under the leadership of Dr Ayanda Ntsaluba, Director-General of Health. Up to the time of finalising this report, the Commission has been unable to establish how many approaches were made by victims and to what degree assistance was facilitated.
32. The failure of the responsible government bodies to provide the required information, combined with the fact that victims return constantly to the President's Fund and the RRC empty-handed, points to a complete breakdown in the agreement forged between government (the Inter-Ministerial Committee on Reparation) and the RRC, as recorded in the quoted memorandum of 14 October 1998.
33. The appalling failure to meet the basic urgent needs of victims partly affirms the Commission's recommendations that the implementation of the reparation and rehabilitation policy should be facilitated through the office with the highest authority, so as to ensure co-operation and accountability on the part of government departments.

## **CHALLENGES IN PROCESSING APPLICATIONS**

### **Uneven flow**

34. The uneven flow of application forms being received by the RRC meant that, when there was an increase in the forms received, the time it took to process them also increased. This was especially true of the period May 1999 to July 1999.
35. Four extra application form administrators were employed for the RRC, and the President's Fund was also obliged to employ additional staff. This enabled applications to be processed within a six-week period (three weeks at the RRC and three at the President's Fund).
36. At the same time, it is important to highlight that the Reparation and Rehabilitation process was at all times desperately under-resourced. The Commission's position was that the role of the RRC should be to help initiate reparation processes. Because the process would ultimately be finalised within

government, this is where full capacity should be developed. The result of uncertainty regarding the locus of responsibility for the reparation process meant that the RRC operated on an *ad hoc* basis and was, given the task at hand, ever under-resourced.

## **Distribution of awards**

37. In addition to prioritising the speedy delivery of payment to victims, it was also necessary to synchronise the receipt of payment with an official communication from the President's Fund, informing victims of the outcome of their applications.
38. Payments were, in the main, made directly into individual banking accounts, using an electronic banking system (the BDB Data Bureau System). Whilst this was the quickest and most secure way of effecting payment, one had to ensure that the letter from the President's Fund reached the recipient by post before the money was transferred into the individual's account. Postal delays were potentially problematic in that a recipient might be unaware that a payment had been made, or might spend the money without realising where it came from or what it was intended for (for example, to facilitate access to a recommended service). This early warning system is essential and should be maintained for the future, even where the payment is sent by registered post (in this case by the Department of Justice). Pressure to deliver should not compromise providing such crucial information to recipients.

## **Challenges relating to payment**

39. The President's Fund reports two major problems with effecting payment:
  - a Invalid account numbers: The RRC, lacking the authority to check the validity of account numbers with banks, was unable to pick up errors in this respect at the application form checking stage. Where an account number turned out to be invalid, the President's Fund would try to contact the recipient by post or telephone and request that a valid bank account be submitted.
  - b Valid accounts that had closed down: As a result of the pervasive poverty of most victims, accounts that had been opened for the purpose of receiving payment quickly became dormant in the absence of funds being transferred. Although special arrangements had been made with the Banking Council of South Africa to avoid this frustrating situation, many banks were not flexible.

In the event of the transaction being rejected due to closed bank accounts, the President's Fund would contact the recipients and inform them of the situation.

## **Alternative methods of payment**

### ***Requests for cheques***

40. Some recipients would request that the payment be made by cheque. This practice was agreed to only in exceptional cases, and only after the President's Fund had made direct contact with the requesting individual.

### ***Postbank payments***

41. The Postbank is not on the BDB (electronic banking) system. Requests made to deposit into post office accounts were forwarded to the post office head office. Composite cheques were made out to batches of recipients – usually about ten at a time – and the funds were then paid into their accounts.

### ***Special banking arrangements for victims***

42. The RRC set up meetings with the General Manager of the Banking Council of South Africa to propose an arrangement whereby recipients of reparation, already of limited income, might encounter an 'account friendly' service that would accommodate minimal financial traffic or activity. The dilemma, as indicated above, was that, if the time between opening an account and being paid interim grants exceeded a certain number of days, the automatic banking system of any given bank would close down the account.
43. In November 1998, the Banking Council informed the RRC that a number of banks had responded positively to its request and were willing to use special savings accounts to assist victims of gross human rights violations. This positive response must be qualified, as the banks in question, although helpful in bringing the RRC's direct attention to existing products, did not initiate any new or tailor-made banking products. The banks that indicated their co-operation were: ABSA, First National, Cape of Good Hope, Meeg Bank Limited and Mercantile Lisbon, Saambou and Standard banks.
44. In retrospect, the most positive aspect of these discussions with banks through the Banking Council was that the RRC was furnished with a list of contact personnel in the banks. These lists were distributed to regional offices, enabling regional

co-ordinators to contact the personnel in the event of a reported problem. The banks' official 'co-operative' stance provided the necessary leverage to get bank accounts re-opened without resistance. In the main though, victims were obliged to use the banking products of various banks without special arrangements being made.

## **Disputes over the guardianship of funds**

45. The RRC was very careful to make sure that all parties concerned agreed on the name of the account into which the interim grant would be paid. This assurance was certified by means of an affidavit. However, it was occasionally brought to the attention of the RRC that a person failed to behave in good faith in respect of an agreement that had been reached. In such cases, the RRC made clear how seriously it viewed such breaches and, as far as possible, facilitated fair conduct and adherence to the original commitments.

## **Problems and challenges encountered by regional offices**

### ***Victims who approached the Commission after the cut-off date for making the initial human rights violation statement***

46. The fact that that only those declared to be victims by the HRVC or Amnesty Committee were eligible for reparation was constantly brought to the RRC's attention. The cut-off date for submissions of human rights violations (HRV) statements (December 1997) presented a number of difficulties, as many people felt they had been unable to make a statement for a number of legitimate reasons. This was especially true in KwaZulu-Natal, where many victims had been advised – either by their political party or by their traditional leadership – not to approach the Commission. The initial statement cut-off date was extended in an attempt to accommodate this group, and as many as 3000 statements were submitted at the eleventh hour.
47. The challenge for regional RRC staff was to explain the Commission's closed-list policy, often in the face of a situation where individuals who were clearly victims of political violence had missed the opportunity to make an HRV statement.

### ***Difficulty locating victims***

48. Regions and the respective fieldworkers struggled to locate victims who had moved after making their initial statement to the Commission; whose recorded

addresses were incomplete or inaccurate, or who lived in remote and inaccessible areas. This was especially marked in the Northern Province and northern KwaZulu-Natal.

49. Local radio and press were used on many occasions to call on victims either to approach regional offices or to meet at local venues where they could be assisted in completing application forms. This produced only sporadic results, but did have the effect of encouraging a number of people to make contact. *Radio Zulu, Lesedi FM, Ilanga* and the *South Coast Herald* in KwaZulu-Natal and the Free State were generous in their allocation of free air time and column space.

### ***Providing documentation***

50. Supplying the necessary supporting documentation with the application form proved to be one of the biggest delaying factors in the application process. Many individuals simply did not have original birth or marriage certificates. They then had to produce affidavits as official proof of the relevant information.

### ***Accessing commissioners of oaths***

51. Because the application form was itself an affidavit, each application had to be attested to by a commissioner of oaths. This proved to be a major, recurrent problem in rural areas, and further delayed the process. In some regions it was reported that police officers who were commissioners of oaths were reluctant to assist. Their attitude was perceived as a political or personal reluctance to support the process.

### ***Copying documentation***

52. Many people were approached in domestic situations where no photocopying facilities were available. Again, this meant delays in processing applications. Though the RRC purchased a mobile photocopier for each region, this did not solve the problem.

### ***Inaccessible roads***

53. The RRC experienced great difficulty in accessing victims in the Northern Province during the months of March to July 2000, owing to flood damage. Four-wheel drive vehicles had to be used to reach applicants.

## **Mistrust of the process**

54. For a number of reasons, some victims felt that the Commission's mandate was a pretence that would inevitably fail to deliver anything constructive. As a result some identified victims, on receiving application forms, would send the field-worker away, presumably waiting to see if delivery seemed likely before inviting the fieldworker to return. This further delayed the process.
55. Another difficulty was that many individuals associated the Commission with the ruling political party. This issue was often raised directly with staff, whom were regularly accused of delaying or pushing forward the applications of certain individuals because of some perceived political or personal bias.

## **Increasing efficiency of application form recovery**

56. A number of factors enabled the RRC to improve its processing times. Regional co-ordinators monitored the efficiency of DRSTs, and the analysis of performance indicators enabled the RRC to identify those who regularly took longer than the two-week turn-around period to deliver completed application forms. The contracts of these DRSTs were not extended. In this way, the national DRST team was right-sized, leading to a better quality of assistance and reducing the number of forms that had to be referred back for further information. The added incentive of a higher remuneration rate when assessing applicants helped consolidate improved performance levels.

## **Negotiating assistance to those who visited regional offices**

57. Many victims approached regional offices directly. Staff had to exercise a great deal of creativity in limiting expectations of direct assistance from the Commission while, at the same time, providing adequate support.
58. It should be noted that the idea that the Commission would assist and support victims was founded in the spontaneous commitments made by Commissioners serving on panels during the human rights violations hearings. Although such commitments were understandable in the traumatic environment of the time, these declarations were made before a reparation policy was in place, and left the RRC with a legacy of perceived undertakings that could not possibly be met and which, in turn, led to a great deal of frustration from victims.

## **CAPTURING REPARATION APPLICATION FORM INFORMATION**

59. When the interim reparations regulations were promulgated, it became clear to the RRC that the information submitted by applicants should be captured onto its database. This was discussed with the President's Fund, as the RRC had neither the staffing resources nor the mandate to proceed with this. Although the President's Fund undertook to carry out this responsibility, it later emerged that this information had never been captured.
60. In November 2000, the Department of Justice approached the Commission with a request that applications be captured. Cabinet had concluded that the information on the application forms should be available in a more user-friendly format. The Department allocated R350 000 for this purpose, of which the RRC used R150 000 to contract a data-capturing company. The capture of all forms currently on hand was completed by February 2001.
61. The value of this project was that any number of variables related to an individual victim or applicant could now be isolated. For example, it is now possible for the Department of Housing to request all the names, identification numbers, addresses and verbatim comments related to a housing recommendation made by the RRC. This applies equally to other departments and reparations areas: education, medical, mental health, symbolic, welfare and employment.

## **INTERIM REPARATION STATISTICS**

62. In the three and a half years since the adoption of the regulations for interim reparations, the RRC completed the following:
  - a As at 30 November 2001, 22 274 victim finding notifications with reparation application forms had been sent out via regional offices and field workers to survivors and/or their relatives.
  - b Of these, 20 389 applications were returned (representing a 92 per cent return rate).
  - c The RRC was able to access, process and make recommendations on 17 016 of these returned applications. These were then forwarded to the President's Fund in the Department of Justice and Constitutional Development.
  - d Interim grants to the value of R50 million were awarded by the President's Fund to assist individuals to access the recommended services.



- e The unreturned applications (1821) were re-sent to identified recipients, using alternative addresses if provided. Where possible, the voters' role was used (under the auspices of the Independent Electoral Commission (IEC)) to find new addresses. If and when these are returned, they will be processed by the President's Fund.
- f The RRC has been unable to trace 1770 identified victims, for whom no identifiable addresses or identity numbers were provided. Their names are on record and will be given to the Presidents' Fund. Unidentified victims mentioned in amnesty hearings make up 20 per cent of the untraceable potential recipients. Their names are unknown to the Commission.
- g The RRC believes that the four years of collecting detailed profiles of the consequences of gross human rights violations for identified victims will assist in the costing and development of an acceptable final reparation policy.