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Arturo Carrillo
acarrillo@law.gwu.edu

Jason Palmer

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Transnational Mass Claim Processes (TMCPs) in International Law and Practice

Arturo J. Carrillo*  
Jason S. Palmer**

I. INTRODUCTION

Mass claims processes implicating transnational issues have traditionally been inter-state. The modern era of international mass claim processes, or “IMCPs,” began with the Iran-US Claims Tribunal in 1981 and reached an institutional milestone when the United Nations Compensation Commission (“UNCC”) was set up in 1991.1 With the exception of the Iran-US Claims Tribunal, IMCPs are usually created to redress losses suffered as a consequence of international or internationalized armed conflict and tend to focus primarily on compensation and restitution for property claims.2 In parallel fashion, several

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* Professor of Clinical Law and Director, International Human Rights Clinic, The George Washington University Law School. B.A, Princeton University; J.D. The George Washington University Law School; LL.M. Columbia Law School. Senior Henkin Fellow and Deputy Director, Transitional Justice Program, Human Rights Institute, Columbia Law School (2001-03). The author wishes to thank Deans Fred Lawrence, Phyllis Goldfarb and Paul Butler for their support, as well as Sean Murphy and Dinah Shelton for their detailed feedback on an early draft of this article. Special thanks are due to Courtney Hague for her research assistance.

** Assistant Professor of Legal Skills at Stetson University College of Law. B.A. University of Virginia; J.D. The George Washington University Law School. Former Attorney-Adviser in the Office of the Legal Adviser, United States Department of State. Representative of the United States before the Iran-U.S. Claims Tribunal. Claims Judge for the Claims Resolution Tribunal for Dormant Accounts in Switzerland. Coordinator of Palestinian “Late Claims” against Iraq at the United Nations Compensation Commission. The author would like to thank Dean Darby Dickerson and Dean James Fox for their support, Lucy Reed for her guidance and suggestions, and R. Dallan Bunce and Chase Hattaway for their research assistance.

1. See John R. Crook, Mass Claims Processes: Lessons Learned over Twenty-Five Years, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES 41, 54-55 (Permanent Court of Arbitration ed., 2006) [hereinafter REDRESSING INJUSTICES]. By “mass claims processes” in this context, we mean simply “the resolution of an enormous volume of claims arising out of a similar event or circumstance…” Tjaco T. van den Hout, Introduction, in REDRESSING INJUSTICES, at xxix.

2. Inter-state mass claims procedures are not an invention of the 21st century. Early examples
intra-state experiences involving mass claims type processes in the form of domestic reparations programs have taken place since the early 1980s. These programs have been directed at redressing gross violations of international human rights law involving thousands of victims of internal conflicts and/or political repression. The Argentine experience is one well-known example; South Africa’s is another. Such programs can be viewed as mass claims procedures that take place in the human rights or transitional justice context, which we call transitional justice claims processes, or “TJCPs.” Though co-existing, these two currents in the field of mass claim processing – IMCPs and TJCPs – have over the past quarter century evolved separately, in relative isolation from one another.

Only recently have the two currents begun to converge. On the one hand, IMCP experts have started to acknowledge the rise of domestic human rights related reparations programs as a practice connected to their field. An example is the book published by the Permanent Court of Arbitration (“PCA”) entitled Redressing Injustices Through Mass Claims Processes. Although it focuses mainly on analyzing typical IMCPs, this publication somewhat disjointedly dedicates a final part to transitional justice issues. Entitled “Reparations: Recourse to Justice,” this section contains chapters that examine the role of civil society actors in promoting domestic reparations legislation in Germany, Argentina and South Africa; the rights of victims of gross human rights and serious humanitarian law violations to reparations under international law; as well as the reparations provisions for victims pursuant to the Rome Statute of the International Criminal Court. The Introduction to Redressing Injustices nominally justifies including the unorthodox chapters on the grounds that the book covers “mass claims programs [...] created in the aftermath of war, revolution, terrorist attacks, and other atrocities,” and that “reparations are often important components of settlement and emotional closure for victims.”

Yet TJCPs, as essentially intra-state experiences, do not sit easily alongside conventional mass claim processes in either theory or practice. The minimalist rationale given by the PCA editors of Redressing Injustices for including them include the United States-Mexican Claims Commission in the late 19th century and the United States-German Mixed Claims Commission after World War I. For a short history of earlier mass claims processes, see Crook, supra note 1, at 41-43.

3. By intra-state transitional justice we mean “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoing of repressive predecessor regimes.” Ruti Teitel, Transitional Justice Genealogy, 16 HARV. HUM. RTS. J. 69 (2003). The transitional justice context, therefore, is one of radical political transformation in which state institutions move away from autocratic and/or repressive practices and towards greater acceptance of liberal democratic principles and practices such as elections and the rule of law.

4. REDRESSING INJUSTICES, supra note 1.

5. Id. § III.

6. T. van den Hout, supra note 1, at xxxii (emphasis added). As will be discussed infra, an important distinction should be made between the traditional remedy of restitution in IMCPs and the notion of reparations in TJCPs.
seems strained and out-of-place in light of the traditional focus of most IMCP literature, which as a rule does not contain such references or comparisons.\(^7\) For instance, another leading treatise in the field published by the PCA, *International Mass Claims Processes: Legal and Practical Perspectives*, tellingly makes no reference to the well-known TJCPs in Argentina and South Africa, or to any other domestic reparation programs for victims of grave human rights abuses.\(^8\) More to the point, *Redressing Injustices*’ editors and authors simply assume that IMCPs and TJCPs are substantially similar. In his chapter on past and current mass claim processes, for example, John Crook comments only that “[o]ther comparable claims processes have been established at the national level in many countries, aimed at identifying and compensating large numbers of individuals who suffered human rights deprivations or other types of injuries from past government actions.”\(^9\) But there is no reference anywhere in the book to the significant contextual, legal, political, philosophical, and economic differences between mass claims procedures occurring in the domestic human rights context and the international mass claims processes analyzed in the first two-thirds of the volume.\(^10\)

The same phenomenon appears in the TJCP field, where important transitional justice studies hail the apparent synergies that exist with international mass claims processes, but fail to actually address, much less analyze, the precise nature of the presumed compatibility. An example is *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, a tome dedicated entirely to reparations issues and TJCPs.\(^11\) The authors of the principal section in the book make a passing, but significant reference, to international arbitral tribunals and claims commissions. They succinctly observe that

> the practice developed in this [traditional IMCP] context [. . .] is highly relevant for our purpose, to the extent it provides principles and precedents that may be applicable or useful in addressing similar issues in the context of human rights law.\(^12\)

The accuracy of this statement notwithstanding, the point here is that despite

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7. See, e.g., *INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS* (International Bureau of the Permanent Court of Arbitration ed., 2000) [hereinafter *INSTITUTIONAL AND PROCEDURAL ASPECTS*].


9. Crook, supra note 1, at 55 (emphasis added). However, he does not mention any TJCP in particular, nor does he provide any explanation as to how or why these national claims processes are comparable.

10. See T. van den Hout, supra note 1, at xxxii-xxxiii.


their cited significance, no effort is made to explain which principles and precedents those are, or just how they should be determined, analyzed, and applied to the formulation of reparations policies and programs in the transitional justice or human rights framework.\(^\text{13}\)

The trend, in other words, is to assume the existence of significant parallels between IMCPs and TJCPs without examining them in any detail. Oxford University Press’s landmark *Handbook of Reparations* focuses expressly on domestic reparations programs created by a country in response to human rights atrocities.\(^\text{14}\) But the book contains case studies of the September 11 Victims’ Fund as well as the United Nations Claims Commission, despite the fact that admittedly neither is “a typical [domestic] reparations program.”\(^\text{15}\) Tellingly, the *Handbook*’s editor explains in the Introduction that the common denominator unifying the volume is a focus on compensation for victims, and “in particular on measures of material compensation.”\(^\text{16}\) A number of additional similarities are assumed to exist between the IMCPs selected and TJCPs generally.\(^\text{17}\) And though the IMCPs studied in the *Handbook of Reparations* may indeed offer insights to domestic policymakers working in the transitional justice context, the methodological approach chosen in this respect seems to miss the forest for staring at the trees: important parallels between IMCPs and TJCPs are presumed to exist at a fundamental level while the myriad, substantive differences reigning between the two realms of mass claims experiences are minimized or ignored.

The literature analyzing IMCPs and TJCPs clearly reveals a growing convergence.\(^\text{18}\) The central question that remains un answered – indeed,  

\(^\text{13}\) A couple of points are leisurely flagged, such as observing that a “salient and unprecedented” feature of the Ethiopia-Eritrea Claims Commission is that it was charged with establishing liability and awarding compensation for violations of international humanitarian law. *Id.* at 418.


\(^\text{15}\) *Id.* at 4. De Greiff is referring specifically to the 9/11 Commission here, but the same is certainly true of the UNCC. At least one prominent commentator, Professor Dinah Shelton, considers the UNCC through the lens of redress for gross and systematic human rights violations. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 404-05 (2d ed. 2005). Most experts, however, view the UNCC as an inter-state mechanism designed to provide compensation for property “loss” and personal “injury” resulting from Iraqi aggression in Kuwait, without explicit reference to or grounding in international human rights law. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991); see also HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 56-60.


\(^\text{17}\) *Id.* at 4-5 (pointing to the risks of individualizing procedures and assuming shared principles of reparations).

\(^\text{18}\) See, e.g., *REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY* (Carla Ferstman, Mariana Goetz and Alan Stephens eds., 2009) (combining parts on the “internationalized” context of mass claims and Holocaust claims resolution experiences with parts dedicated to ‘national’ domestic reparations programs) [hereinafter *REPARATIONS FOR VICTIMS*]. According to the editors, “[t]his book explores the practice of governments, national and international courts and commissions in applying, processing, implementing and enforcing a variety
unaddressed – is to what extent are these two types of experiences truly comparable? A number of related inquiries arise as well. Which IMCP principles and precedents are most relevant to domestic reparations programs, how are they to be identified, and just how transferable are they? When comparing the two, to what extent are the seemingly shared elements in claims processing procedures, or other basic characteristics, such as monetary payments, functionally interchangeable? And is this a two-way street? Are there principles and precedents from the TJCP context that might nourish ongoing or future IMCP initiatives? When drawing such parallels, regardless of the direction in which they flow, what limitations or caveats exist? In other words, to what extent are IMCPs and TJCPs different? What is the nature of these differences, and what do they tell us about the underlying compatibility of the experiences and mechanisms contrasted? In our view, a new framework for thinking about mass claims processes is required to answer these threshold questions, one that can apply to situations arising in either the inter-state or transitional justice contexts.

The pressing need for a different approach to the comparative study of these experiences is underscored by the prescriptive nature of the above referenced publications and their normative agenda. In their writings many commentators assume a degree of kinship between international and transitional justice mass claims mechanisms that ostensibly gives rise to “common trends, best practices and lessons learned.”19 In addition, most observers have heretofore suggested or presumed that the potential “lessons” flow primarily from the realm of IMCP experience to that of TJCPs.20 However, as noted already, none have engaged in a systematic study of the nature of this convergence, thus limiting the scope, depth and – as this Article will demonstrate – accuracy of their comparative suggestions. Underlying these well-intentioned initiatives is the desire to improve upon the design and implementation of new mass claims mechanisms in novel settings. Since such mechanisms are intended to benefit tens if not hundreds of thousands of victims and their families who have suffered terrible abuses at the hands of state agents (and sometimes private actors), it is important that any comparative analyses of reparations awards.” Id. at 7. This convergence is evidenced in earlier publications as well, such as Professor Shelton’s treatise on remedies in international human rights law. While neither a text on IMCPs or transitional justice per se, her book addresses both types of mass claims processes side-by-side in chapters dedicated to analyzing remedies for “Gross and Systematic Human Rights Violations” and “Reparations for Historical Injustices.” SHELTON, supra note 15, chs. 13, 14. Thus, in the former, Professor Shelton canvasses claims procedures focusing on compensation by starting with the war reparations paid by Germany after the Second World War before turning to a detailed overview of the UNCC. She then proceeds to conduct a survey of “National Compensation Schemes” such as those TJCPs in Argentina, Chile and Hungary.

19. Carla Ferstman et al., Introduction, in REPARATIONS FOR VICTIMS, supra note 18, at 7.
20. See, e.g., De Greiff, supra note 14, at 1-5 (recognizing expressly that a pathway of enlightenment flows in the direction of TJCPs), and T. van den Hout, supra note 1, at xxxix-xxxiii (implying a pathway of insight).
offered as guidance be well-structured and constructive. In other words, the “best practices” and “lessons” implied or recommended by such studies must truly translate from one context to another, or their instructiveness as a practical matter will surely be minimal.

The Article’s objective is to generate constructive debate around the study of what we will call TMCPs or “transnational mass claims processes” – IMCPs, TJCPs, as well as other internationalized mass claims mechanisms – with a view to reorienting the normative discussion in a more productive direction. The TMCP rubric we employ is an analytical tool derived from our respective experience working on contemporary IMCPs and TJCPs.\(^{21}\) It is premised on a framework of core characteristics resulting from the systematic scrutiny of both international and national mass claims experiences. We have utilized this framework to isolate and evaluate several of the basic differences between IMCPs and TJCPs; this in turn has facilitated our ability to map more accurately the extent to which these two types of claims processes can be said to be comparable in practical terms. Without disregarding the issue of substantive redress, this Article favors a more innovative focus on exploring the procedural dimensions of reparations in the comparative study of mass claims processes. In so doing we seek to better bridge the IMCP and TJCP divide and enable more effective comparisons across differing contexts.

The TMCP methodology we propose can also be applied to dissecting other novel initiatives in mass claims processing. The International Criminal Court (ICC), whose “victim-focused” approach to international justice is currently as undefined as it is unprecedented, presents one such challenge.\(^{22}\) Unlike any of its forerunners, the ICC is mandated to create a reparations regime for victims, “including restitution, compensation, and rehabilitation.”\(^{23}\) To this end, the Rome Statute also establishes a special Trust Fund for victims.\(^{24}\) Several of the international crimes that could be prosecuted, such as genocide or crimes against humanity, will typically create victims numbering in the thousands if not tens of thousands, thus requiring a mass claims process to provide redress. For these reasons, as the ICC proceeds to lay the groundwork for its as yet unrealized reparations program, it is widely “advised to closely examine the approaches and solutions developed by modern international and national mass claims programs that have faced similar challenges.”\(^{25}\) But just how should the ICC go

\(^{21}\) We are grateful to Professor Sean Murphy for his assistance in defining this new proposed category. For a detailed exploration of the concept of “transnational law,” see PHILLIP JESSUP, TRANSNATIONAL LAW (1956).


\(^{24}\) *Id.* art. 79.

about “examining” these programs, given their wide diversity? Which will be relevant and why? What “approaches and solutions” should it be looking to in light of its unique mandate?

To answer these queries as well as those posed regarding the compatibility of IMCPs and TJCPs, this Article offers a new perspective on the subject of mass claims processing that draws from both the traditional and human rights contexts. It proceeds as follows. Part II paints a spectrum of contemporary mass claims processes by examining seminal experiences in both the international and domestic arenas. Part III then engages in a systematic comparative analysis of these experiences to contrast key characteristics and identify areas common to mass claim type procedures. In Part IV we provide a working definition of TMCPs and, drawing from the prior discussion, outline an applied framework for the effective study of such procedures. We conclude that despite fundamental differences, there is a cache of experience on each side of the IMCP-TJCP equation that, when properly contextualized, can enrich the design and implementation of transnational mass claim processes in any setting. At the same time, we highlight new opportunities that exist to promote enlightened cross-fertilization between them.

II.
A SPECTRUM OF MASS CLAIMS EXPERIENCES

The first challenge in setting up a discussion of transitional mass claims processes, TMCPs, was to identify paradigmatic examples of IMCPs and TJCPs from which to create the respective baselines. While recognizing that no claims process in either field is exactly like any other, our experience suggested that a handful of examples could be selected from the international and transitional justice contexts that would lend themselves usefully to the type of comparative analysis we sought to carry out. Accordingly, this section contains six case studies, comprised of three influential international mass claims processes alongside three historic political transitions that produced domestic reparations programs. The former are the Iran-United States Claims Tribunal (1981-present), the United Nations Compensation Commission (1991-2005), and the Holocaust-era Claims Resolution Tribunals (CRT I and CRT II) (1999-2002, 2001-present); the latter are the reparations programs adopted in Argentina (1984-present), South Africa (1994-2004), and Hungary (1991-present). They are presented below in rough chronological order, to better illustrate the parallel development of experiences in both fields.26 While the subsequent

26. This approach may strike some readers as unusual or unorthodox. Our purpose in breaking with tradition to present these case studies in sequential order rather than group them thematically was to integrate them temporally and highlight the overlap that in reality existed among them. This chronological integration, we think, de-emphasizes the domestic/international divide and allows the reader to better focus on the convergences and divergences between both types of claims processes.
discussions in Parts III and IV rely to a great extent on these case studies, we will draw from other significant mass claims processes in both areas as necessary to complement the analysis.27

Before turning to the case studies, a word about the criteria employed to select them is in order. Each IMCP is widely considered to be a successful mass claim process that broke new ground.28 Together they represent the quintessential mass claims processes through their use of arbitration principles to resolve a “large number of claims arising from common circumstances”29 and to compensate victims for losses suffered.30 These three case studies reflect a range of settings, goals, procedures, methods, and other characteristics typical of IMCPs, thus providing a spectrum of contemporary experience from which to draw useful lessons. Similarly, the TJCP examples were selected from a broader pool of domestic reparations programs because they offer a variety of widely consulted perspectives on the question of how mass claims processes are created and carried out entirely within a state.31 The three case studies are from Latin

27. Primary among these are the Ethiopia-Eritrea Claims Commission (EECC) (2000–present), the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) – Bosnia and Herzegovina (1996–2003), and the reparations program in Chile (1990–2003). Similarly, we will refer to ongoing TJCP experiences in Colombia and Peru. A related area that we do not draw upon is that of lump sum settlements under international law, under which countries resolve international claims of injured nationals by paying a fixed sum to the claimant state. Richard B. Lillich & Burns H. Weston, Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims, 82 AM. J. INT’L L. 69, 69–70 (1988); see also BURNS H. WESTON, RICHARD B. LILLICH & DAVID J. BEDERMAN, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENT (1975-1995) 21 (1999) (providing that ‘Settlement Agreements expressly state that the distribution of the negotiated lump sum falls within the ‘exclusive’ or occasionally ‘sole’ jurisdiction of the claimant state”); These lump sum payments tend to be bilateral and unidirectional, as when a defeated country pays reparations to injured states. Id. at 65 (discussing payments by West Germany to countries such as The Netherlands, Greece, and Switzerland, as a result of claims arising from World War II and Nazi persecution). The main difference, of course, is that the recipient of such payments is the State, which has the discretion to make payment to its nationals, and not strictly speaking the individuals themselves. Jennifer Bodack, International Law for the Masses, 15 DUKE J. COMP. & INT’L L. 363, 367 (2005).

28. These enterprises figure prominently in the roster of 10 select IMCPs analyzed by Holtzmann, Kristjansdottir, and the PCA Steering Committee on Mass Claims Processes. See HOLTZMANN & KRISTJANSDOTTIR, supra note 8. The others are Commission for Real Property Claims of Displaced persons and Refugees, Housing and Property Claims Commission, Holocaust Claims Processes administered by the International Organization of Migration (IOM), Eritrea-Ethiopia Claims Commission, and the International Commission on Holocaust Era Insurance.


30. The three IMCPs discussed, the Iran-U.S. Claims Tribunal, the United Nations Compensation Commission, and the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT I), had a significant volume of claims, ranging from approximately 4,000 filed at the Iran-U.S. Claims Tribunal, to almost 10,000 claims at the CRT and over 2.6 million at the United Nations Compensation Commission. See Hans Das, Innovations to Speed Mass Claims: New Standards of Proof, in REDRESSING INJUSTICES, supra note 1, at 7; HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 25.

31. Perhaps the most substantial reparation programs not included are those enacted by
America, Africa, and Eastern Europe, respectively, each illustrating to a certain extent the regional experience in transitional justice. A defining characteristic of each transitional justice case study is that large numbers of victims were actually awarded reparations, including compensation, a fact that limited the field of possibilities. In sum, while one may reasonably point to other IMCPs or TJCPs, omitted due to space limitations, as pertinent case studies, we are confident of the significance and utility of those selected given the goals of this Article.

A. Seminal Mass Claims Processes

1. Iran-United States Claims Tribunal

The Iran-United States Claims Tribunal was established as a result of the conflict between the Islamic Republic of Iran and the United States of America that began with the 1979 taking of the U.S. Embassy hostages. These two countries, with the assistance of the Government of Algeria, developed this dispute resolution mechanism to “promote the settlement of... claims.” It was established in 1981 to decide contract and expropriation claims that United States citizens asserted against the Islamic Republic of Iran, as well as to resolve contract disputes between the two governments.

Even though the Iran-U.S. Claims Tribunal was the direct and intended result of the agreement negotiated between Iran and the United States, the Tribunal’s method of creation was unique. Unlike its predecessors, the Iran-U.S. Claims Tribunal was not the result of direct bilateral negotiations between the Islamic Republic of Iran and the United States to foster and develop Germany after World War II to compensate Holocaust survivors as well as forced and slave laborers. See ARIEL COLONAMOS & ANDREA ARMSTRONG, German Reparations to the Jews after World War II: A Turning Point in the History of Reparations and J. Authers, Making Good Again: German Compensation for Forced and Slave Laborers, in HANDBOOK OF REPARATIONS, supra note 14, respectively. Other TJCPs of note include those in Brazil, Malawi, the United States (Japanese-American Internment), and Rwanda. Excluded from the definition of TJCPs (infra Part II) are internationalized reparations regimes like these created by the Rome Statute for the International Criminal Court, or by the Dayton Peace Accords with respect to the Human Rights Chamber for Bosnia-Herzegovina. See GILBERT BITTI & GABRIELA GONZALEZ, The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court, in REDRESSING INJUSTICES, supra note 1, at 299 and MANFRED NOWAK, Reparation by the Human Rights Chamber for Bosnia and Herzegovina, in OUT OF THE ASHES, supra note 11, at 245, respectively.

32. Transitional justice scenarios where reparations programs have not been created or substantially implemented include El Salvador, Guatemala, Haiti, East Timor, Sierra Leone, and Poland.


34. See supra note 1 and accompanying text.
improved economic and diplomatic relations.\textsuperscript{35} Rather, indirect negotiations through the Government of Algeria, complicated by an increasingly dramatic U.S. political stage\textsuperscript{36} and an intense international standoff,\textsuperscript{37} led to the Tribunal’s birth. This conflux of domestic and international events required the negotiators to develop a distinctive protocol, which would allow the two Governments to successfully satisfy their varied constituencies at home.\textsuperscript{38}

The United States and the Government of Iran reached an agreement memorialized in two Declarations of the Government of the Democratic and Popular Republic of Algeria, known as the Algiers Accords, on January 18, 1981, after four months of intense and often frustrating negotiations.\textsuperscript{39} The two Declarations - the General Declaration and the Claims Settlement Declaration - addressed the obligations of the two governments vis-à-vis one another.\textsuperscript{40}

\textsuperscript{35} The two principals involved in the negotiations – Iran and the United States – never signed an agreement or treaty between them. The Government of Algeria reported to the United States that Iran refused to sign any document that the United States signed. This recalcitrance on the part of Iran “led to the idea of separate, parallel, mutually reinforcing promises to the Algerians by both the United States and Iran.” Warren Christopher, \textit{Introduction, in American Hostages in Iran – The Conduct of a Crisis} 21 (Paul H. Keisberg ed., 1985) [hereinafter American Hostages in Iran].

\textsuperscript{36} Public opinion regarding the Iranian hostages was so intense that \textit{Time} Magazine posited that the handling of the hostage situation would be the dispositive factor in the 1980 Carter-Reagan election. George J. Church et al., \textit{Battling Down the Stretch, Time}, Nov. 3, 1980, available at http://www.time.com/time/magazine/article/0,9171,924482,00.html.

\textsuperscript{37} The United States, on November 29, 1979, filed a case before the International Court of Justice demanding that Iran release the U.S. hostages. U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 5 (May 24). Moving quickly, in early December of 1979, the ICJ ruled that Iran’s seizure of the Embassy and taking of hostages was a clear violation of international law. Id. at 6. The United Nations also weighed in on Iran’s illegal actions. On December 4, 1979, the Security Council unanimously joined in demanding that Iran immediately release the hostages. see Warren Christopher, \textit{Introduction, in American Hostages in Iran}, supra note 35, at 9.

\textsuperscript{38} Two of the most important issues to be resolved during the negotiations between the two countries for the release of the U.S. hostages were how to deal with the Iranian assets that were frozen in the United States and how to address the many thousands of claims that U.S. citizens had against Iran in an appropriate forum. See R. Owens, \textit{The Final Negotiation and Release in Algiers, in American Hostages in Iran}, supra note 35, at 301.


The General Declaration provided that Iran would release the hostages and that the United States would perform a series of actions and financial transactions, including releasing and returning the assets frozen by President Carter and nullifying judicial attachments against Iran obtained by litigants in U.S. courts. The General Declaration also specified that U.S. branches of U.S. banks would transfer U.S. $1 billion of Iranian assets to a Security Account to secure and pay the claims against Iran adjudicated at the Tribunal. Paragraph 7 of the General Declaration specified that Iran would replenish the Security Account to a minimum balance of $500 million, whenever it fell below this level, until all arbitral awards against it were paid.

The Claims Settlement Declaration provided for the creation of the Iran-U.S. Claims Tribunal. This declaration provided that a Tribunal would be “established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States…[which arose] out of debts, contracts, … expropriations or other measures affecting property rights ….” It could also adjudicate “any counterclaim which [arose] out of the same contract, transaction or occurrence that constitute[d] the subject matter of that national’s claim ….” Additionally, the Tribunal had jurisdiction over claims of the two governments against each other arising out of contractual arrangements between them for the purchase of goods and services, and over disputes as to the interpretation or performance of any provision of the Algiers Accords. However, the Tribunal decided that it did not have jurisdiction over direct claims brought by one government against the nationals of the other government. Similarly, claims by the hostages as a result of their illegal

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42. General Declaration, supra note 40.
43. Id. pt. 2, ¶ 7.
44. Id. However, in November 1992, the Iranian Government balked on its commitment to shoulder the burden of maintaining the Security Account at the required minimum amount. Sean D. Murphy, Obligation to Replenish Iran-U.S. Claims Tribunal Security Account, 95 AM. J. INT’L L. 414, 415 n.3 (2001). In response, the United States Government filed a claim with the Tribunal demanding that Iran replenish the account pursuant to the Claims Settlement Agreement. U.S. v. Iran (Iran-U.S. Claims Tribunal), Case No. A/28 ¶¶ 1-2 (1993) (Statement of Claim). Nearly eight years after the infraction, the Tribunal ruled in favor of the United States and ordered Iran to replenish the Security Account. U.S. v. Iran (Iran-U.S. Claims Tribunal), Decision No. 130-A28-FT ¶ 95 (2000).
45. Claims Settlement Declaration, supra note 33, art. II, ¶ 1.
46. Id.
47. Id.
48. Id. ¶¶ 2-3.
49. Jurisdiction over Claims Filed by Iran Against U.S. Nationals (Iran-U.S. Claims Tribunal), Case No. A/2 (1982). As a result of this case brought by Iran and the decision by the Tribunal, Iran withdrew approximately 1,400 claims filed with the Tribunal. David P. Stewart and Laura B. Sherman, Developments at the Iran-United States Claims Tribunal: 1981-1983, 24 VA. J. INT’L L. 1,
captivity were specifically excluded from the Claims Settlement Declaration. This decision was subsequently ratified through Executive Order and has been upheld consistently by the judiciary, despite numerous cases filed by the former hostages.

The beginnings of the Tribunal were not without controversy in the United States. Upon the approval of the Algiers Accords, President Reagan suspended all lawsuits in United States courts against Iran that were within the Tribunal’s jurisdiction. When U.S. claimants decided to challenge the constitutionality of this Executive Order, the United States Supreme Court, in expedited proceedings, upheld the President’s authority to suspend lawsuits in the U.S. in favor of the alternative forum of the Iran-U.S. Claims Tribunal. After this ruling, U.S. citizens and corporations filed several thousand claims with the Tribunal.

In order to adjudicate the claims filed at the Tribunal, the Claims Settlement Declaration provided that the Tribunal have nine arbitrators, with the United States and Iran each appointing three. The six party-appointed arbitrators selected the three remaining non-party arbitrators. The nine arbitrators were divided into three panels (chambers). Each chamber was comprised of one U.S. arbitrator, one Iranian arbitrator, and one non-party arbitrator.


50. Claims Settlement Declaration, supra note 33, art. II, ¶ 1; General Declaration, supra note 40, ¶ 11.

51. Prohibition Against Prosecution of Certain Claims, 31 C.F.R. § 535.216(a) (1976). The exclusion was necessary in order to successfully implement the Algiers Accords. Exec. Order No. 12,294, supra note 41. The focus of the Claims Settlement provisions were solely on property issues, specifically expropriation claims and contract losses. Claims Settlement Declaration, supra note 33, art. II, ¶ 1

52. See, e.g., Persinger v. Iran, 729 F.2d 835, 843, (D.C. Cir. 1984); Ledgerwood v. Iran, 617 F. Supp. 311, 316 (D.D.C. 1985). The United States Government agreed to bar claims by the hostages because it concluded that, since the 1976 Foreign Sovereign Immunities Act would likely preclude United States courts from hearing claims of that nature, these claims would be valueless. The Iran Agreements: Hearings Before the S. Comm. on Foreign Relations, 97th Cong. 32 (1981). However, to ensure that the hostages were not left empty-handed, Congress passed two statutes – the 1980 Hostage Relief Act, 5 U.S.C. § 5561 (1998) and the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 803, 100 Stat. 853 (1986). The hostages, despite the commitment of the United States in the Accords and the explicit waiver by the United States of their lawsuits, have filed claims against Iran for monetary damages. To date, all of these lawsuits have been unsuccessful. Most recently, the plaintiffs sought compensatory and punitive damages in the amount of 33 billion dollars. Roeder v. Iran, 333 F.3d 228, 230 (D.C. Cir. 2003). However, the United States Court of Appeals for the District of Columbia held that, since Congress did not expressly indicate a clear intent to abrogate the Algiers Accords with amendments to the Foreign Sovereign Immunities Act, the court had to uphold the commitments that the United States made to the Islamic Republic of Iran in order to secure the freedom of the hostages in 1981. Id. at 237.

53. See Exec. Order No. 12,294, supra note 41, ¶ 1.


55. Claims Settlement Declaration, supra note 33, art. III, ¶ 1.
arbitrator, who was designated as the presiding arbitrator for that chamber. All of the private claims were assigned to one of the three chambers. The Full Tribunal heard contract disputes between the two governments and disputes related to the interpretation and application of the Algiers Accords.

The Algiers Accords specified that the UNCITRAL Arbitration Rules would govern procedural matters. In addition, the Algiers Accords provided that the UNCITRAL Rules could be modified by the Tribunal or the Parties. Once appointed, the arbitrators undertook extensive deliberations to determine the necessary modifications, such as the publication of decisions. The Tribunal accepted the modifications to the Rules by majority vote, after consultation with the Agent of the United States and the Agent of the Islamic Republic of Iran, and then issued its “Tribunal Rules,” which were modified as required by continuing circumstances.

The Claims Settlement Declaration determined how the Tribunal was to be funded. It required that the Governments of the United States and the Islamic Republic of Iran would bear the “expenses of the Tribunal . . . equally” unless the parties agreed otherwise. The Tribunal set its own salaries, expenses, and other budgetary amounts, and the two governments had only an advisory role in the process. Once the budget was set, requests were made to the two governments to deposit equal amounts as advances for costs on a quarterly basis,

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56. Id.; see also Iran-U.S. Claims Procedure, Final Tribunal Rules of Procedure art. 7 (1983), reprinted in Annex I to INSTITUTIONAL AND PROCEDURAL ASPECTS, supra note 7, at 81-82 [hereinafter Procedural Rules].


59. Id.

60. Procedural Rules, supra note 56, art. 32, ¶ 5. The UNCITRAL Rules do not contemplate the publication of decisions. The Tribunal modified this article to ensure that its decision would be available to the public.

61. H. Holtzmann, Drafting the Tribunal Rules, in Caron & Crook, supra note 57, at 76. “Each government shall designate an agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.” Claims Settlement Declaration, supra note 33, art. VI, ¶ 2. The U.S. Agent’s primary functions included presenting the U.S. government’s position to the Tribunal, consulting with claimants, reporting developments at the Tribunal to the Department of State, and conducting settlement negotiations. See A. Rovine, The Role of the Agent, in Caron & Crook, supra note 57, at 19.

62. Claims Settlement Declaration, supra note 33, art. VI, ¶ 3.

63. Procedural Rules, supra note 56, art. 41; Claims Settlement Declaration, supra note 33, art. III, ¶ 2.

64. Christopher Pinto, Institutional Aspects of the Tribunal, in Caron & Crook, supra note 57, at 107.
with both governments paying those costs simultaneously.\(^6^5\)

While the two governments established the Tribunal, claimants filed their own statements of claim, statements of defense, and rebuttals, setting forth legal arguments, witness statements, and documentary evidence, directly with the Tribunal.\(^6^6\) The parties were then represented by their own attorneys at a hearing before a panel of three Tribunal arbitrators. Each side presented its legal arguments and produced witnesses and experts who testified on its behalf.\(^6^7\) These witnesses were subject to cross-examination, not only from the opposing side, but also from the arbitrators.\(^6^8\) After each side had presented its case-in-chief, the Tribunal allowed rebuttal arguments by each party.\(^6^9\)

Article 24 provided the applicable rule for the burden of proof for evidentiary submissions: “Each party shall have the burden of proving the facts relied onto support his claims or defence.”\(^7^0\) It further provided that the Tribunal “shall determine the admissibility, relevance, materiality and weight of the evidence offered.”\(^7^1\) As is typical of arbitral proceedings, these rules gave the Tribunal broad discretion in evaluating the parties’ evidentiary submissions and did not bind the Tribunal to any specific rules of evidence. The Tribunal’s decisions, however, demonstrate that it preferred that the parties provide contemporaneous documentary evidence to support their claims.\(^7^2\)

The Claims Settlement Declaration also specified that “[a]ll decisions and awards of the Tribunal shall be final and binding”\(^7^3\) and that “[a]ny award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.”\(^7^4\) By design then, once the Tribunal issued an award, no appeal from that decision was possible. Payment of all awards issued against Iran was paid from the Security Account created pursuant to the Algiers Accords.\(^7^5\) Upon rendering an

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65. Id.
66. Procedural Rules, supra note 56, art. 15, ¶ 2.
67. Id.
68. Id.
69. Id. One category of claims did not follow this claims processing model. The United States filed approximately 2,300 claims of less than $250,000 on behalf of U.S. citizens at the Tribunal. Rather than individualized dispute resolution of each of these claims, the claims were settled en masse by the two governments for U.S. $105,000,000. Claims of Less than US $250,000, 25 Iran-U.S. Cl. Trib. Rep. 327 (1990) (Case Nos. 86, B38, B76 and B77).
70. Procedural Rules, supra note 56, art. 24, ¶ 1.
71. Id. art. 25, ¶ 6.
72. See, e.g., Avco Corp. v. Iran Aircraft Industries, AWD 377-261-3 (July 18, 1988), reprinted in 19 Iran-U.S. Cl. Trib. Rep. 200, 209 (1998) (finding that the testimony of claimant’s officers, supported by an audit of the evidence, but not by the documentary evidence itself, inadequate to prove unmitigated losses).
73. Claims Settlement Declaration, supra note 33, art. IV, ¶ 1.
74. Id. art. IV, ¶ 3.
75. Id. art. II, ¶ 7.
award the Tribunal notified the Escrow Agent (Banque Centrale d’Algerie), which then instructed the N.V. Settlement Bank to make the payment to the intended recipient.  

As of April 2009, 3,936 claims were finalized by award, decision, or order, including the lump sum settlement of 2,388 claims for less than $250,000, as well as 92 government-to-government claims. The Tribunal has awarded more than $2.5 billion to the United States and U.S. nationals and more than $900 million to Iran and Iranian nationals. The decisions on these claims have been reported in the Iran-U.S. Claim Tribunal reporter and most are available on the Tribunal’s official website. Over the years, the Tribunal’s published awards and decisions resolving these disputes have contributed significantly to the expansion of international law in this field. The Tribunal decided that making its decisions public was essential to ensure uniformity for the parties and to guarantee that the jurisprudence would be accessible for its precedential value in developing principles of international law.

77. Communiqué from the Office of the Secretary-General, No. 09/2 (Apr. 22, 2009) [hereinafter Communiqué of Apr. 22, 2009].
78. Yulia Andreeva et al., International Legal Developments in Review: 2007 Disputes - International Courts Committee, 42 INT’L LAW 345, 358 (2008). According to the Communiqué issued by the Secretary-General of the Tribunal, the “total amount awarded to United States Parties and notified to the Escrow Agent to date: US$2,166,998,515.43 and the US equivalent of £303,196.00, DM297,051.00 and Rls.97,132,598 (excluding any interest to be calculated) of US$1,013,716,179.13 and the U.S. Dollar equivalent of $900 million to Iran and Iranian parties . . . .” Communiqué of Apr. 22, 2009, supra note 77. Additionally, “a total amount (excluding any interest to be calculated) of US$1,013,716,179.13 and the U.S. Dollar equivalent of Rls. 7,977,343 was awarded or ordered to be paid to Iran and Iranian parties . . . .” Id.
80. Judge George Aldrich, a long-standing arbitrator of the Iran-U.S. Claims Tribunal, stated that he “never doubted that the hundreds of awards and decisions made by the Tribunal would be recognized for their lasting value as legal precedents in international law and perhaps in a nascent lex mercatoria.” George Aldrich, Book Review, 102 AM. J. INT’L L. 213, 214 (2008) (reviewing THE IRAN-U.S. CLAIMS TRIBUNAL AT 25: THE CASES EVERYONE NEEDS TO KNOW FOR INVESTOR-STATE & INTERNATIONAL ARBITRATION (Christopher R. Drahozal & Christopher S. Gibson eds., 2007)).
81. As explained by one of the Agents of the United States, Lucy Reed, the transparency of publication assisted “literally hundreds of US claimants and their counsel” in that “the availability of procedural precedents allowed parties to write better memorials and conduct better hearings.” Lucy Reed, The Iran-United States Claims Tribunal, in THE PERMANENT COURT OF ARBITRATION/PEACE PALACE PAPERS: INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS 9, 13 (Kluwer Law Int’l ed., 2000). The decisions to these claims are reported in the Iran-U.S. Claim Tribunal reporter and are available on the Tribunal’s official website at www.iusct.org. The decisions focused on a variety of international and commercial law issues. These issues included, inter alia, interpretation and application of the Vienna Convention and other principles of treaty law, the application of the International Monetary Fund, expropriation, breaches of contract, interest on awards, rights of dual nationals, and force majeure. Warren Christopher & Richard M. Mosk, The Iranian Hostage Crisis and the Iran-U.S. Claims Tribunal: Implications for International Dispute Resolution and Diplomacy, 7 PEPP. DISP. RESOL., L.J. 165, 173 (2007).
2. Argentina

Argentina’s transition to democracy is most often recalled for the work of its groundbreaking truth commission and the trials of high-level officers responsible for the “dirty war” (guerra sucia) that took place between 1976 and 1983 under a succession of military juntas. During that period of severe repression, state security forces forcibly disappeared at least twelve thousand persons.82 State forces also created many more thousands of victims through systematic killings, torture, and arbitrary detention.83 Once democracy was restored, the country and its civilian leadership began to grapple with this devastating legacy of atrocities. Economic reparations for victims were among the measures pursued. The administrations of presidents Raúl Alfonsín (1983-89), Carlos Menem (1989-99), and Néstor Kirchner (2003-2007) each enacted laws to provide redress to victims of the dictatorship.

Although we refer to this patchwork of legislation compensating victims as Argentina’s reparations program, it more closely resembles a cumulative series of domestic policies that evolved over two decades. The different stages of this development are summarized below. But a denominator common to nearly all the policies enacted is that they were (i) legally anchored by legislation and (2) implemented administratively by a specialized executive agency of the Argentine Ministry of the Interior.84 Though hampered by economic hardship, among other obstacles, the resulting program continues to represent one of the most comprehensive and generous reparatory efforts in the transitional justice context.85

82. Carlos H. Acuña, Transitional Justice in Argentina and Chile: A Never-Ending Story, in RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY 206, 208-09 (Jon Elster ed., 2006). In 1984, the Committee on Disappeared Persons (CONADEP) documented the disappearance of 8,963 persons and estimated that the number of forced disappearances exceeded 9,000 cases. From 1984-1999, the Under-Secretariat of Human Rights in the Ministry of the Interior confirmed an additional 3,000 cases.

83. See generally id.

84. Exec. Decree No. 3090, Sept. 20, 1984; see also María José Guembe, Economic Reparations for Grave Human Rights Violations: The Argentine Experience, in HANDBOOK OF REPARATIONS, supra note 14, at 21, 23, 44. Initially, this was the Subsecretaría de Derechos Humanos y Sociales [Under-Secretariat for Human and Social Rights]. When the structure of the Ministry of the Interior changed, the Under-Secretariat was renamed Dirección Nacional de Derechos Humanos [National Directorship for Human Rights] in 1991 before eventually returning to its original name in 1996. In 1999, the Under-Secretariat was transferred to the Ministry of Justice and Human Rights by Executive Decree No. 20, Dec. 13, 1999. Finally, in 2002 it became the Secretaría de Derechos Humanos y Sociales [Secretariat of Human and Social Rights], its current name.

85. See De Greiff, supra note 14, at 13. Argentina’s reparations program was especially munificent in the sense that its individual awards were, relatively speaking, very substantial. But the Argentine transition has been rightfully criticized on other grounds, particularly its early penchant for impunity. See, e.g., Instrucciones a los fiscales militares [Instructions to Military Prosecutors] (1986) (requiring Military Prosecutors to exempt from liability those human rights violators who could demonstrate that they were acting according to orders); Ley de Punto Final [Full Stop Law],
The foundation for reparations was set almost immediately once President Alfonsín took office in December 1983. The first set of remedial measures adopted in 1984 and 1985 resulted in the reinstatement of public servants who had been dismissed from their posts during the dictatorship for political or arbitrary motives. Among those who benefited were public employees of state owned banks and companies, Foreign Service officers, and teachers. At the same time, the Commission on the Disappearance of Persons or “CONADEP,” established by presidential decree only days after Alfonsín’s inauguration, was charged with investigating the practice of forced disappearances. It recommended in 1984 that “economic assistance” be provided to the next of kin of persons disappeared, including “scholarships, social assistance and job positions.”

In 1986, the Alfonsín government passed a law granting pensions to the spouses and children of persons who had been disappeared. To establish a claim, beneficiaries had to point to a judicial or administrative “accusation” or complaint made in response to the forced disappearance of their loved one, which included those collected from victims by CONADEP. Under Argentine law, where documentary or other evidence was lacking, the sworn testimony of two or more persons would be sufficient to establish the claim. Once the claim was established, beneficiaries of the pension regime received payments equivalent to the “minimum ordinary amount received by a retired public

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86. See Guembe, supra note 84, at 23-24 (citing Law 23505, Feb. 22, 1984 (reincorporating into the Foreign Service those diplomats who were dismissed during the dictatorship); Law 23117, Sept. 30, 1984 (reincorporating into State-controlled entities those employees who were dismissed because of their political views or affiliation with trade unions); Law 23238, Sept. 10, 1985 (reincorporating teachers who were dismissed during the dictatorship because of their political views or affiliation with trade unions); Law 23252, June 24, 1988 (reincorporating bank workers who were dismissed for political motives); Law 23278, Sept. 28, 1985 (aimed at individuals who were dismissed or forced to quit their public or private positions because of their political views or affiliation with trade unions)). In some cases, they received back pay and benefits.


89. Law 23466, Oct. 30, 1986. Under certain circumstances such as disability or unemployment, parents and siblings could be eligible as well.


91. Id.
They also received state sponsored health care benefits. They also received state sponsored health care benefits. The reparations regime in Argentina entered its most active phase from 1989 through 1999 during President Carlos Menem’s back-to-back administrations. As a former political prisoner, Menem was sympathetic to the cause of other victims, especially those who had been detained and/or disappeared. His interest in redressing victims directly flowed also from a desire to counter-balance the intensely controversial measures he and Alfonsín, his predecessor, championed vis-à-vis the perpetrators. While Alfonsín sponsored legislation that ensured immunity from prosecution for most members of the armed forces, Menem pardoned the convicted junta members and other high-ranking military officers still on trial. In 1992, the Inter-American Commission on Human Rights found these measures to be incompatible with the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. The Commission urged Argentina to devise a reparations program for the victims of state terrorism, as well as to prosecute the perpetrators. As a result, the Menem government tried to “reduce[e] political costs by moving forward in a series of human rights aspects... namely, reparation for the victims and the search for kidnapped children.”

Additionally, largely in response to the cases brought before the IACHR, Menem issued a presidential decree in 1991, granting economic reparations for persons detained during the dictatorship, where they or their next of kin had filed a lawsuit for damages before December 10, 1985. Many applicants had received either a non-appealable judgment on the grounds that the two-year statute of limitations had expired on their claim or had claims that were still pending when the decree was issued. The latter could relinquish their judicial claims and accept the benefit or continue to litigate. Under this decree,

92. *Id.* 
93. *Id.* 
94. See *id.* at 46-47. 
95. *Id.* at 27; Acuña, *supra* note 82, at 209, 214-15. 
99. Exec. Decree No. 70/91, Jan. 10, 1991. This date represents the cut-off date based on a two-year statute of limitations, which started to run on the date the dictatorship was deemed to have ended. Menem issued this executive decree when a draft law on the subject presented to Congress became bogged down. 
100. Former political prisoners and their relatives had filed numerous suits starting in 1983. Some courts had allowed them; others dismissed them on statute of limitations grounds. This inconsistent treatment generated pressure for an equitable resolution to the issue. See Guembe, *supra* note 84, at 24, 28. 
101. Guembe, *supra* note 84, at 30. These litigants could still apply for administrative
compensation was calibrated according to the amount earned on a daily basis by the highest category of national civil servants; this amount was then paid for each day the claimant spent in detention. In addition, the equivalent of five years in detention was paid in cases of death; where severe injuries occurred the victim was entitled to 70% of this amount. These benefits were payable in cash within 60 days of approval by the Ministry of the Interior. Argentine authorities calculate that 227 persons benefited from this decree, a small percentage of the estimated 10,000 detained during the state of emergency by the security forces.

Shortly thereafter, the Argentine Congress passed a law extending economic reparations to all victims who (i) were detained by military tribunals or as a result of executive authority pursuant to the state of siege before December 10, 1983, and (ii) had not already received compensation for the same violations by a judicial ruling. Even though implementation began in 1992, the first payments did not issue until 1994. The economic reparations were paid out in the form of government bonds, though there are no statistics on the actual amounts disbursed under this program. The period for filing claims ended in September 1998, during which time about 13,600 individuals claimed the benefit. In the end, some 7,800 former detainees received compensation. Under this law, as under the Presidential Decree, the Ministry of the Interior processed applications.

reparations if they lost their cases. Exec. Decree No. 70/91, art. 11, Jan. 10, 1991. However, acceptance of reparations under the decree was contingent upon the renouncement of additional rights to indemnification. Id.

102. Guembe, supra note 84, at 30-31. Individuals received $27 Argentine pesos for each day they spent in detention.

103. Id. at 31. Individuals who died in detention were entitled to $49,275 Argentine pesos plus $27 per day spent in detention. Individuals who suffered severe injuries under the meaning of Article 91 of the Penal Code (those causing a “physical or mental illness, certainly or probably incurable, permanent work disabilities, the loss of one sense, an organ, a member, the use of an organ or a member, loss of speech, or the capacity to beget or conceive”) were entitled to $34,492 Argentine pesos plus $27 per day spent in detention.

104. Id. Claimants had to file applications for benefits with the Ministry of the Interior, which in turn had to verify the duration of detentions and the corresponding payment. Claimants had a right of appeal to the courts if rejected. Further, if payments were not made in the time allotted, beneficiaries could claim the payments through the normal judicial process for executing sentences.

105. Id. at 28, 31. No information is available on the actual amounts paid out, though the decree itself did charge the expense to the State directly. Exec. Decree No. 70/91, art. 12, Jan. 10, 1991.

106. HAYNER, supra note 87, at 175.

107. Guembe, supra note 84, at 34.

108. Id. at 33. The bonds had nominal values, paid interest, and could be exchanged at any time for their market value, or exchanged for their total value at the date of their expiration, in this case in 2010, 16 years after they were issued.

109. Id. at 33.

110. See id. at 30-31.
it authorized substantially higher payments. As with the decree, the amounts under the new law were calibrated according to the projected daily income of persons in the highest category of national civil servants, but the daily rate came out to be nearly three times higher due to delays in the law’s implementation. Further, in cases of death while in detention, as under the decree, the law paid the equivalent of five years in detention, and where severe injuries occurred, paid the victim 70% of this amount.

When filing a claim, claimants had to declare under oath “that they had been detained under the conditions established by the law between November 6, 1974 and December 10, 1983.” As to evidence required to substantiate claims, “the guidelines [established by the law and its implementing decrees] were broad and took into account the conditions in which detention occurred and the difficulties in proving them.” Accordingly, judicial, administrative, and other official records like those compiled by CONADEP could be complemented by press accounts or documentation compiled by international human rights bodies such as the Inter-American Commission. Claims of serious injury in relation to detention were verified by the reviewing agency in the Ministry of the Interior based on court-validated medical records from the detention facility, a victim’s medical history, or, if necessary, the evaluation from a medical meeting at a hospital conducted for this purpose. Under both the reparations law and the presidential decree it expanded, unsuccessful claimants could appeal to a court of law.

The most controversial component of Argentina’s reparations program was the enactment of a group of laws, beginning in 1994, aimed at repairing victims of forced disappearances and state-sponsored assassinations (extrajudicial executions). The first law, enacted in part to respond to inconsistent judicial

111. Id. at 33.
112. Id. at 32. The rate was $74 per day, as the pertinent salary scale, set in 1994 after some controversy, had risen substantially since the payments under the decree were issued. In 1994, Argentina offered bonds in the national currency (pesos) or in U.S. dollars. In 2002, all of the bonds that were issued in U.S. dollars were converted to pesos, and the foreign currency option no longer exists for those who have not yet received benefits. Id. at 40-41.
113. Id. at 32-33.
114. Id. at 32; Exec. Decree No. 1023/92, June 24, 1992.
115. Guembe, supra note 84, at 32.
116. Id.
117. Id.
118. Id.
119. Law No. 24411, Dec. 7, 1994 (granting economic reparations for victims of forced disappearance and the successors of victims of extrajudicial execution); Ley Parche [Mending Patch Law], Law No. 24823, May 7, 1997 (added to Law No. 24411, establishing the order in which benefits should be paid out to successors (i.e. to descendants, spouse, ancestors, and relatives to the fourth degree) and applying the law to common law marriages, among other things); Ley de Ausencia por Deaparición Forzada [Law of Absence by Forced Disappearance], Law No. 24321, May 11, 1994 (forcing the State to recognize victims who were illegally kidnapped by agents of the
decisions awarding relatives of victims amounts ranging from $250,000 to $3,000,000 Argentine pesos, required a judicial finding or presumption of death for successors to qualify for benefits.\footnote{120} Eventually, however, additional norms had to be promulgated to create a new legal status for victims of forced disappearance under Argentine law, and to allow the next of kin to claim redress on their behalf without first presuming the victim’s death, which many were loathe to do.\footnote{121} Under the modified regime, a close relative would first bring a claim in court to have a judge declare the victim “absent by forced disappearance.”\footnote{122} Upon receiving an application for the corresponding benefits, the Ministry of the Interior validated the claim before making payment to the victim’s “assignees.”\footnote{123}

Under the series of laws enacted starting in 1994, the assignees of the nearly 9,000 victims of forced disappearance whose cases were documented by the CONADEP were automatically entitled to the compensation.\footnote{124} In other cases, judges could employ a broad evidentiary perspective like the one the reparations regime for arbitrary detention adopted. “This is of particular importance because repression in Argentina took place under clandestine conditions and no exhaustive investigation had been carried out, which made many of these cases quite difficult to prove.”\footnote{125} Thus, cases reported after CONADEP could be corroborated “either through a mention in the press or a report to a national or international human rights body at the time, or evidence that a habeas corpus petition had been submitted to the courts . . . .”\footnote{126}
Significantly, the new law shifted the burden of proof from the claimants to the state, which had the effect of greatly expanding eligibility criteria.\footnote{127} The benefit awarded for extrajudicial execution and forced disappearance was the same: \$244,000 Argentine pesos payable in government bonds.\footnote{128} In addition, the children of victims of forced disappearance were exempt from military service,\footnote{129} received housing credits, and were entitled to a monthly pension of \$140 per month until they reached age 21.\footnote{130} By 2004, the Ministry of the Interior’s specialized agency had received 8,200 claims for economic reparations for cases of forced disappearance and assassination, 8,000 of which were approved.\footnote{131} It is estimated that the Government of Argentina paid \$1,912,960,000 to beneficiaries of this reparations regime. When added to the \$1,117,000,000 paid out under the rubric established for victims of arbitrary detention, the total for just these two initiatives came to \$3,082,960,000.\footnote{132}

The Argentine government has initiated two much smaller programs since 2004. The first program resulted when then-President Néstor Kirchner and the Argentinean Congress passed a law extending substantial economic benefits to minors who were victims of state terrorism. These victims included children born to mothers the military detained as political prisoners, minors who remained imprisoned due to the detention or disappearance of their parents for political reasons, and victims of identity substitution.\footnote{133}

The second program was directed at covering persons forced into exile

\footnote{127}{Andrea Armstrong, \textit{The Role of Civil Society Actors in Reparations Legislation, in REDRESSING INJUSTICES, supra note 1, at 254.}}
\footnote{128}{Guembé, \textit{supra} note 84, at 40. Payable in U.S. dollars or Argentine pesos, \textit{see supra} note 112. Using government bonds as a method of payment was also controversial, especially in light of Argentina’s precarious economic situation. \textit{See} Christina Marie Wilson, \textit{Argentina’s Reparations Bonds: An Analysis of Continuing Obligations}, \textit{28 FORDHAM INT’L L.J.} \textit{786} (2005); Guembé, \textit{supra} note 84, at 41. Given the magnitude of the atrocities addressed, the economic reparations represented a significant financial burden on the state. Bondholders could sell the bonds at market price to obtain approximately 75% of face value or wait until maturity, about sixteen years after issuance. During the first six years, the State did not have to pay financial services or amortization for the bonds, an obligation that began in 2001 and was set to run through the date of maturity in 2011. In the wake of the economic crisis, the State declared the cessation of all public debt titles in December 2001. However, in May 2002, the State exempted from the cessation of payments all bonds that were issued under the laws redressing forced disappearances that were in the possession of their original holders. It also converted all bonds issued in U.S. dollars to Argentine pesos and denied others the option to request foreign currency bonds.}}
\footnote{129}{At the time, military service was mandatory. \textit{Hayner, supra} note 87, at 330-31.}}
\footnote{130}{Law No. 23466, Oct. 30, 1986.}}
\footnote{131}{Guembé, \textit{supra} note 84, at 41.}}
\footnote{132}{\textit{Id}. All amounts are in Argentine pesos pegged to the U.S. dollar.}}
\footnote{133}{\textit{Id}. at 42. \$244,000 Argentine pesos, the same amount paid under Law No. 24411 for forced disappearance or extrajudicial execution, but after the devaluation of the peso.}}
during the dictatorship. In October 2004, the Argentine Supreme Court held that the situation of a person persecuted by the dictatorship and forced into exile was analogous to that of a victim of arbitrary detention, and thus should be repaired accordingly under the existing reparations laws. In 2005 a bill providing compensation for those persons forced into exile was introduced and passed in the Senate; the Commission of Human Rights in the Chamber of Deputies approved it later that same year. However, three additional legislative commissions must still approve the legislation.

3. United Nations Compensation Commission

The United Nations Compensation Commission (UNCC) was established in 1991 to resolve claims against Iraq as a result of its invasion and occupation of Kuwait, after a determination of Iraq’s liability under international law by the United Nations Security Council. Over the course of its lifetime, the UNCC processed over 2.6 million claims from 96 different countries. In order to review such an extraordinary number of claims, the UNCC developed novel methods for processing mass claims, such as statistical sampling, that greatly contributed to the techniques available in the field. While these methodologies were unprecedented in international practice, the UNCC’s application of legal principles were still firmly rooted in the international

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134. Hayner, supra note 87, at 176.
135. See Hugo Alconada Mon, Ordenan indemnizar a exiliados por la dictadura, LA NACIÓN, Oct. 15, 2004; Guembe, supra note 84, at 43-44.
136. Guembe, supra note 84, at 43-44; Laura Serra, Avanza el plan para compensar a exiliados, LA NACIÓN, Apr. 8, 2005.
137. Serra, supra note 136. While the members of the Comisión de Ex Exiliados Políticos de la República Argentina (COEPRA) favor the legislation, some former exiles are opposed to the idea of economic reparations on the moral ground that exile does not compare to torture and disappearance suffered by other victims of the military regime. General polémica el proyecto oficial para indemnizar exiliados, LA NACIÓN, Mar. 28, 2005.
140. Due to the enormous number of Category C claims submitted, the UNCC developed a mass processing methodology containing criteria for evaluating, verifying and compensating each loss element in the Category “C” claim. The computer software was coded so that answers to questions would result in the claim being grouped or sub-grouped, as appropriate. Using this methodology, “the Panel found that an ‘aggregate picture’ of the claims – presented often through a review of many sample claims and the respective claimed losses, statistical analyses of claimed amounts and evidentiary patterns, and common socio-economic characteristics of claimants – provided it with a level of comfort concerning its general criteria and conclusions, and allowed certain general presumptions to be made, that would not have been possible in the context of resolving claims on an individual basis.” Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages Up To USS100,000 (Category “C” Claims), S/AC.26.1994/3 (Dec. 21, 1994).
tribunals that preceded it; most notably, the Iran-U.S. Claims Tribunal. However, the UNCC was not an arbitral body or an international court. Rather, as the former chief of the Legal Services Branch of the UNCC noted, it was “an administrative body which perform[ed] an essentially fact-finding function of examining claims, verifying their validity, evaluating losses and making payments of compensation.”

The UNCC was established as a subsidiary organ of the UN Security Council as a result of Iraq’s invasion of Kuwait. The United Nations adopted Resolution 687 on April 3, 1991, five weeks after the suspension of the military operations against Iraq. Specifically, the resolution stated that Iraq was “liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals, and corporations, as a result of its unlawful invasion and occupation of Kuwait.”

Three days after the Security Council adopted Resolution 687, Iraq accepted its terms. In doing so, Iraq accepted liability for all losses incurred as a result of its invasion and occupation of Kuwait.

Not only did Resolution 687 codify Iraq’s liability for the losses suffered due to its unlawful actions, but it also established the mechanism for redressing those losses. The Security Council created an entity that would process claims and pay compensation for losses resulting from Iraq’s invasion and occupation of Kuwait. Specifically, Paragraph 19 directed the Secretary-General to develop and present to the Security Council for decision, no later than 30 days following the adoption of the present resolution, recommendations for the fund to meet the requirement for the payment of claims established in accordance with paragraph 18... and for a programme to implement the decisions in paragraph 16, 17, and 18... In May of 1991, as required by Resolution 687, the Secretary-General...
presented the report to the Security Council. In the report, the Secretary-General recommended that the proposed Compensation Commission would resolve claims filed by countries on behalf of their citizens for losses suffered as a result of Iraq’s invasion of Kuwait. On May 20, 1991, the Security Council adopted Resolution 692, which established the UNCC and located the Commission at the UN office in Geneva.

The UNCC consisted of three parts: 1) the Governing Council, 2) the Secretariat, and 3) the panels of commissioners. The Governing Council was comprised of the same countries that made up the Security Council. The Governing Council was responsible for promulgating the UNCC Rules of Procedure, establishing the criteria for claims and deadlines for claims, creating the sequence of priority for deciding claims and distributing payment of awards, considering reports on various aspects of the Commission’s work, and approving the recommendations made by the panels of Commissioners, who acted as the primary decision makers on individual claims.

The Secretariat was headed by the Executive Secretary, who was appointed by the UN Secretary-General after consultation with the Governing Council. The Secretariat was responsible for the technical, legal, and administrative support of the UNCC. Among those working for the UNCC Secretariat were lawyers who reviewed the claims and worked with the Commissioners in drafting the reports and recommendations to the Governing Council, accountants and loss adjusters who assisted in verifying and valuing the claims, and information technology specialists who developed programs that allowed for the mass processing of millions of property loss claims.

The Commissioners were individuals the Executive Secretariat recommended and the Secretary-General approved. The function of the commissioners was to verify and evaluate claims, and, in so doing, to determine

149. The Secretary-General reiterated Iraqi culpability for “any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.” Id.
154. Id.
156. HOLTMAN & KRÍSTJANSDÓTTIR, supra note 8, at 302.
157. Id. at 183-84. During the life of the UNCC, 59 Commissioners were appointed to Panels to resolve claims. The United Nations Compensation Commission, The Commissioners, http://www.uncc.ch/commiss.htm (last visited Feb. 11, 2009).
whether they were directly related to Iraq’s invasion and occupation of Kuwait.\footnote{158} In nominating individuals as commissioners, the UNCC Provisional Rules for Claims Processing required the Secretary-General to take into account the need for geographical representation, experience, and integrity.\footnote{159} Additionally, the commissioners were required to be experts in “fields such as finance, law, accounting, insurance, environmental damage assessment, oil, trade, and engineering.”\footnote{160}

Governments filed claims on behalf of their citizens for compensation as a result of death, injury, loss of or damage to property, commercial losses, and environmental damages that occurred due to Iraq’s invasion of Kuwait.\footnote{161} Claimants who were eligible to have their governments file claims for them included citizens of Kuwait, citizens of foreign countries, corporations, the governments themselves and international organizations.\footnote{162} Iraqi citizens were specifically prohibited from filing claims, unless they were also nationals of another country.\footnote{163}

The Governing Council identified six categories of claims (categories “A” through “F”).\footnote{164} Four of the categories were created for claims for individuals (Categories “A” through “D”),\footnote{165} one was created for corporations (Category “E”),\footnote{166} and one was created for governments and international organizations (Category “F”).\footnote{167} Category “A” claims were those submitted by individuals who were forced to depart from Iraq or Kuwait during the period of August 2, 1990 to March 1991.\footnote{168} The Governing Council established fixed sums of US $2,500 for individual claimants and US $5,000 for families. However, if claimants only filed a category “A” claim, the fixed sum was increased to US $4,000 for individuals and US $8,000 for families.\footnote{169} Approximately US $3.2

\footnote{158} The United Nations Compensation Commission, supra note 157.  
\footnote{160} Id. art. 19, ¶ 2.  
\footnote{161} S.C. Res. 687, supra note 138. Individuals and corporations who suffered losses could not file claims on their own behalf before the UNCC. Rather, claims had to be filed by the country of their nationality or citizenship. UNCC Provisional Rules, supra note 159, art. 5.  
\footnote{162} UNCC Provisional Rules, supra note 159, art. 5.  
\footnote{166} Id. ¶ 16.  
\footnote{167} Id. ¶ 30.  
\footnote{168} Id. ¶ 10.  
billion was approved for category “A” claims.\(^{170}\)

Category “B” claims were submitted by individuals who suffered “serious personal injury” or “whose spouse, child, or parent died.”\(^{171}\) The Governing Council established fixed sums of US $2,500 for individuals and up to US $10,000 for families.\(^{172}\) Approximately US $13.5 million was approved for category “B” claims.\(^{173}\) Category “C” and “D” claims were submitted by individuals for 21 different types of losses, including losses of income, support, housing, personal property, medical expenses or costs of departure.\(^{174}\) Category “C” claims were capped at $100,000.\(^{175}\) Approximately 1,800,000 Category “C” claims were filed and around US $5.2 billion was approved in payment for those claims.\(^{176}\) Category “D” claims were for claims above $100,000.\(^{177}\) Approximately 14,000 Category “D” claims were filed and around US $3.4 billion was approved in payment for those claims.\(^{178}\) Category “E” claims were claims filed by corporations, private legal entities, and public sector enterprises.\(^{179}\) Approximately 6,500 category “E” claims were filed seeking approximately US $79 billion in compensation.\(^{180}\) Finally, approximately 300 category “F” claims were claims filed by governments and organizations seeking US $236 billion in compensation.\(^{181}\)

The UNCC required claimants to file a claim through their government, each of which had its own internal processes for collecting and reviewing claims.\(^{182}\) However, the UNCC did mandate some uniformity in the procedures.

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170. Id.
173. Id.
175. Id.
178. Id.
182. For instance, the Office of the Legal Adviser, Office of International Claims and Investment Disputes, provided the claim forms to potential claimants, received the completed claim forms, and submitted them to the UNCC for review.
For instance, the UNCC mandated that claimants submit their claims on the official claim form that the UNCC provided. Claim forms were accepted in any of the official languages of the U.N. However, as English was the working language of the claims procedure and computerized database, if claims were not submitted in English, the Rules of Procedure required an English translation. Claim forms and documents in Categories B through F had to be submitted in paper, with the option of a duplicate computerized submission, while Category A claims had to be submitted in the computerized format required by the UNCC Secretariat.

In order to process claims, the UNCC Provisional Rules established a minimal evidentiary threshold. For the expedited Category A, B, and C claims, the claimant only had to show “appropriate evidence of the circumstances and amount of the loss” and the evidence had to be the “reasonable minimum.” For instance, in claims for departure from Iraq or Kuwait (Category A claims), simple documentation that demonstrated the departure, such as a plane ticket or passport stamp, would suffice. For the Category D, E, and F claims, a stricter standard was applied: claimants had to provide “documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the loss.” This standard was subject to interpretation by the panels reviewing the claims and varied depending upon the type of claim presented.


183. UNCC Provisional Rules, supra note 159, art. 6.

184. Id.

185. Id. art. 7.

186. Id. art. 35(2)(c). The appropriate evidence of the circumstance included the difficult conditions claimants faced in making quick departures from Kuwait and Iraq, which resulted often in loss of their personal property, passports, and other documents. Wühler, supra note 139, at 20.


188. UNCC Provisional Rules, supra note 159, art. 35(3). Further, Decision 15 required that the claim contain “detailed factual descriptions of the circumstances of the claimed loss, damage or injury.” Compensation for Business Losses Resulting from Iraq’s Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause, U.N. Doc. S/AC.26/1992/15, ¶ 5 (Jan. 4, 1993).

189. Kazazi, supra note 187, at 222. For instance, one Category D Panel interpreted the standard to require that “the level of proof the Panel . . . considered appropriate [was] close to what has been called the ‘balance of probability’ as distinguished from the concept of ‘beyond reasonable doubt’ . . . .” Report and Recommendations Made By the Panel of Commissioners Concerning Part One of the First Instalment of Individual Claims for Damages Above US$100,000 (Category “D” Claims), U.N. Doc. S/AC.26/1998/1, ¶ 72 (Feb. 3, 1998). This panel also gave significant weight to and reliance upon a clear explanatory statement in support of the losses claimed in the claim form. Id. ¶ 74. “An explanatory statement “must clearly state the nature and extent of the loss . . . make clear that the loss was a direct result of the Iraqi invasion and occupation, and . . . clearly explain the
The Security Council mandated that the Secretary-General create a method for funding the operation and paying the claims. The Secretary-General recommended that the compensation to be paid by Iraq should not exceed 30% of the value of its oil exports. On August 15, 1991, the Security Council adopted Resolution 705, which formally accepted the Secretary-General’s recommendation. Under Resolution 706, adopted in conjunction with Resolution 705, funding for the UNCC and compensation to pay claims was to be derived from oil exported from Iraq. In 1995, funding to pay UNCC awards was achieved through the sale of Iraqi oil under the Oil-for-Food Program. Resolution 986 authorized this sale of oil and permitted the United Nations to take 30% of Iraqi oil proceeds, the resolution also required regular reviews of the Oil-for-Food Program. The 30% originally agreed upon was subsequently lowered to 25% in 2000 and then to 5% in 2003.

Approved category “A”, “B”, and “C” claims were given priority in receiving compensation. The Governing Council ordered “successful claims in categories ‘A’, ‘B’ and ‘C’ [to] receive all funds available in the Compensation Fund for paying claims, until each has received payment of the initial amount [of US $ 2,500].” Governments, corporations, and international organizations were the last groups to receive compensation. Because claims were filed by countries on behalf of their citizens, payments for successful claims were distributed en masse to the filing countries and international organizations and those entities were then directed to distribute the funds to individuals.

reasons, regarded as credible and sufficient by the Panel, for the absence of any additional documentary evidence. . . .” Id. ¶ 75.

190. The Secretary-General, Report of the Secretary-General recommending procedures for the sale of Iraqi oil and transmitting estimates of humanitarian requirements in Iraq, para. 57(d), U.N. Doc. S/23006 (Sept. 4, 1991), reprinted in UNITED NATIONS, supra note 143, at 300.


193. Id. ¶ 8(c).

194. Id. ¶ 8(a).

195. Id. ¶ 4.


199. Id. After the initial US$2,500 was paid to each claimant within categories “A,” “B,” and “C”, the balance was then paid to the remaining successful claimants in the other categories.

200. Id.

distribute the funds to successful claimants within six months of receiving payment and to report on the payments made to claimants within three months. Any Government that received payments on behalf of claimants was required to submit reports to the Governing Council describing the mechanisms employed to pay the claimants and detailing the amount and date of each payment. After distributing all payments received from the Compensation Commission, each Government was to produce a final summary of payments made, including who was paid, the exact amount received by each claimant, and the date of each payment, as well as a report on amounts not distributed.

In June 2005, the Governing Council approved the Commissioners’ last report and recommendation, marking the end of the Commissioners’ work. Throughout its 12 years of operation, the Commissioners approved U.S. $52 billion in claims for approximately 1.5 of the 2.6 million claims filed. Of that $52 billion in claims, approximately $27.6 billion has been made available to claimants. While the UNCC Commissioners’ legal work is complete, the UNCC itself is still in operation to correct duplicate awards and to make additional payments.

4. Hungary

The reparations process in Hungary differs in many respects from that experienced by other countries with histories of mass human rights violations. The Soviet occupation of Hungary for over four decades complicated attempts

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202. Id.

203. U.N. Compensation Commission, Decision Concerning the Return of Undistributed Funds taken by the Governing Council of the United Nations Compensation Commission at its 75th meeting, held on 2 February 1998 at Geneva, U.N. Doc. S/AC.26/Dec. 48 (Feb. 3, 1998). Money that is not distributed within twelve months (for example when a Government cannot locate a claimant within twelve months of the receipt of award funds) must be returned to the Commission. Id. The UNCC was authorized to suspend payments to Governments and international organizations when those entities failed to report on distribution of funds or failed to return undistributed funds on time. U.N. Doc. S/AC.26/Dec. 18, supra note 201. When funds were returned to the UNCC, it held the returned amounts until the claimant was located, at which time the Government could request that the money be returned for distribution to the claimant. U.N. Doc. S/AC.26/Dec. 48.

204. Id. note 201.


206. Id.


208. Id. After awards have been approved by the Governing Council, the Provisional Rules require the Executive Secretary to inform the Governing Council of any computational, clerical, typographical, or other errors made in the awards. UNCC Provisional Rules, supra note 159, art. 41, § 1. The Governing Council must then direct the Secretary General as to how the error shall be corrected, if it decides to correct it. Id. art. 41, § 2.
to address the unlawful state takings of property, the deprivation of life and liberty, and the other state sponsored abuses that affected millions of citizens. Starting in 1989-90 the new Hungarian authorities struggled to find a balance between promoting justice and maintaining the rule of law in the fledgling democracy. Ultimately, Hungary’s Constitutional Court upheld laws adopted by Parliament to hold human rights perpetrators responsible for committing violations of international norms, to partially compensate individuals whose property was unlawfully seized by the state, and to indemnify individuals who were deprived of life or liberty.209 The effects of this process were far-reaching: “[b]y mid-1992, nearly one million people – some 10% of the population – had [already] applied for compensation” for communist-era abuses.210

A focal point of reparations for victims of gross human rights abuses in Hungary arose as a result of the widespread killings committed during the October 31, 1956 popular revolution against the dictatorship. Abetted by the Communist Hungarian Socialist Worker’s Party’s leaders, the Soviet Army carried out mass shootings of unarmed demonstrators throughout the country, leaving thousands dead.211 Almost four decades later, after the Soviet Union’s collapse, the Hungarian Parliament sought to hold the individuals who participated in quelling the 1956 uprising responsible.212 Many were arrested and charged with treason for their collaboration with the Soviets during the occupation.213 In 1991, the Hungarian Parliament enacted legislation that revived related offenses for which the statute of limitations had already passed, permitting the prosecution of crimes state agents and their collaborators committed during the 1956 uprising.214 But in 1992, the Hungarian Constitutional Court held that this legislation with its retroactive effects was an unconstitutional ex post facto law.215 The Hungarian Parliament subsequently


211. RUTI G. TEITEL, TRANSITIONAL JUSTICE 95 (2000).


213. TEITEL, supra note 211, at 38.


enacted a new statute that authorized the prosecutions but limited it to prosecutions for war crimes and crimes against humanity committed in contravention of Hungary’s international obligations, which are imprescriptible.216 Although Hungary’s Constitution is silent on the precedence of international law over domestic law, the Constitutional Court upheld the latter statute, declaring in relation to the statute of limitations issue, that “Hungary [would] respect the universally accepted rules of international law, and . . . ensure . . . the accord between [its international] obligations . . . and domestic law.”217

During this time the Hungarian Parliament also promulgated two laws that indemnified victims for certain abuses of the previous regime. The first provided compensation for property that the state had unlawfully seized; the second granted compensation to individuals who were deprived of their rights to life and liberty for political reasons.218 With the transition to democracy following the Soviet collapse, the Hungarian Government recognized the importance of protecting private property, and its responsibility to indemnify individuals whose property was wrongfully seized.219 The purpose of the Act on Partial Compensation for Damages Unlawfully Caused by the State to Properties Owned by Citizens in the Interest of Settling Ownership Relations (the “Property Act”) was to settle ownership relations and to provide incentives for investment.220 To qualify for compensation, beneficiaries were required to submit a claim within ninety days of the enactment of the Property Act.221 Originally, only individuals whose property was forcibly nationalized after 1949 were eligible for reparations under the Property Act.222 But for reasons of equality, the Hungarian Constitutional Court extended the scope of the law back to 1939 to ensure that victims of Nazi-era takings were also indemnified.223 Compensation was based on the value of the seized property.224 Farmland was

216. Prosecution Law, supra note 209; see also Kritz II, supra note 209, at 646.
218. Act XXV, Act XXXII, supra note 209. It should be noted that in 1992 the Parliament further adopted legislation voiding the convictions of persons jailed for crimes committed against the state and political order. See Kritz II, supra note 209, at 691.
219. TEITEL, supra note 211, at 130.
220. SHELTON, supra note 15, at 413-414.
221. Id. at 414.
222. TEITEL, supra note 211, at 136.
223. Id. (citing Alkotmánybíróság [Constitutional Court], Land Reform Decision (1991) (Hung.).)
224. SHELTON, supra note 15, at 414.
valued based on special gold crown value. If beneficiaries were unable to produce a deed to establish the value of the expropriated land, the land was valued using average gold crown data of the village where it was located.

Once the value of the land was established, property owners were compensated in interest-bearing coupons. Individuals who owned property valued at 200,000 Hungarian forints or less (approximately US$2,000) were entitled to the entire amount in compensation. But as the value of the expropriated property increased, the percentage of compensation the propertyholder was entitled to decreased. The total amount of compensation was capped at HF 5,000,000 (approximately US$50,000) per property owned per former owner. The interest-bearing coupons could be used in three principal ways: to purchase property sold during the privatization of state property, to buy farmland, or to receive a life annuity in the social security system. In 1993, Hungarian nationals challenged the Property Act and its voucher system, asserting that it violated Article 26 of the International Covenant on Civil and Political Rights because it did not distinguish between such cases where the expropriation was the consequence of breaches of the Covenant [as in the case of the petitioners] and the majority of cases where the expropriation had been the result of the nationalization of private property.

The United Nations Human Rights Committee found, however, that the Property Act did not violate the claimants’ right to equal protection under the law.

In addition to the Property Act, Hungary promulgated the Act on Compensation to Persons Unlawfully Deprived of their Lives or Liberty for Political Reasons (“Human Rights Violations Act”). The Human Rights Violations Act provided redress to individuals who were unlawfully deprived of their life or liberty between March 11, 1939 and October 23, 1989. Potential beneficiaries initially had four months to file claims under the Human Rights Violations Act, although the deadline was subsequently extended through 2006. Individuals were considered to be deprived of liberty under the

225. Id. One gold crown equals 1,000 Hungarian forints.
226. Id.
227. Id.
228. Id. For losses over HF200,000, individuals were entitled to HF200,000 plus fifty percent of the excess up to HF300,000; for losses over HF300,000, individuals were entitled to HF250,000 plus thirty percent of the amount in excess of HF300,000; for losses over HF500,000, individuals were entitled to HF310,000 plus ten percent of the amount in excess of HF500,000.
229. SHELTON, supra note 15, at 414.
230. Id.
232. Id. § 10.
233. Act XXXII, supra note 209.
234. Id. This covered the period from the beginning of World War II until the Soviet collapse.
235. SHELTON, supra note 15, at 415. See Separate Compensation and Documentation
meaning of the Human Rights Violations Act if they were subjected to political condemnations, preventive detention, forced medical treatment, internment in camps, forced labor, forced resettlement, and deportation.\textsuperscript{236} Individuals who suffered serious restrictions on personal liberty of longer than thirty days were eligible for an indemnification that increased depending upon the length of their detention. Significantly, the law specified that an individual identified as a human rights perpetrator would be ineligible for compensation, “unless it can be proved that he has suffered serious prejudice in consequence of criminal procedure due to his activity displayed in the interest of democracy after the violation of basic rights.”\textsuperscript{237}

Once beneficiaries or their heirs had established that they were subjected to qualifying human rights abuses, they were compensated depending upon the nature of the violations that they suffered and the identities of their successors.\textsuperscript{238} The successors of individuals who were killed for political reasons were originally entitled to lump sum payments of HUF1,000,000,\textsuperscript{239} though this sum was substantially reduced in later years due to budgetary restraints.\textsuperscript{240} Individuals who were deprived of their personal liberty for more than thirty days but less than six months received a lump sum, payable in two installments.\textsuperscript{241} Beneficiaries received the baseline amount of HUF11,000 for each two months of detention, up to a total of six months.\textsuperscript{242} Victims detained for longer than six months received an annuity that was calculated by dividing the duration of the detention by an official life expectancy schedule and multiplying by the baseline amount.\textsuperscript{243}

According to the department within the Hungarian Central Office of Justice charged with implementing the Human Rights Violations Act and other relevant norms, it received a total of 97,600 claims by the extended cut-off date of

\textsuperscript{236} SHELTON, supra note 15, at 415.

\textsuperscript{237} Id.

\textsuperscript{238} SHELTON, supra note 15, at 414-15. All reparations were tax-exempt.

\textsuperscript{239} Id. at 414. This comes to about US$10,000. The amount was divided equally among the victim’s living spouse, parents, and children. Or, if none of these were present, siblings could claim half the prescribed sum, or HUF500,000, to be divided among them.


\textsuperscript{241} SHELTON, supra note 15, at 415.

\textsuperscript{242} Id.

\textsuperscript{243} Id.
December 31, 2006. As of July 31 2009, the 41 agency “decision-makers” had adopted a total of 57,438 final resolutions and orders. The total compensation the Hungarian government paid by mid-2009 was HUF 2,109,174,689 (about US$ 9,153,450.00); a monthly life annuity had been awarded in 190 cases, with additional compensation paid for claims arising from unlawful deprivations of liberty reaching HUF 18,117,000 (approximately US$ 78,625.00). Difficulties slowing the process include the high number of claims, the advanced age of most claimants, and the fact that many are “aliens” residing outside of Hungary. Moreover, despite flexible and straightforward evidentiary standards, petitioners apparently have experienced difficulty in properly documenting their claims. The goal of the Hungarian Office of Justice is to resolve all outstanding compensation claims by the middle of 2011.

5. South Africa

Although unique in many respects, prior transitional experiences, most notably those in Argentina and Chile, shaped the creation of the South African Truth and Reconciliation Commission (“TRC”). It is perhaps best known for offering individual perpetrators amnesty conditioned upon full disclosure of their politically motivated abuses during the apartheid regime. Indeed, a pervasive criticism of the TRC process is that perpetrators received amnesty relatively quickly, while monetary payments promised to their victims were repeatedly delayed. While many viewed the payment of reparations as a counterweight to amnesty, the clear emphasis of the TRC was on truth telling.

244. Compensation Information, supra note 235.
245. Id. The US figures are calculated based on the exchange rate in 2009.
246. Id.
247. Id. As for evidentiary standards, requisite criteria such as the loss of life or liberty, or family relationship to the victim, could be established through a fairly flexible range of official documentation or its functional equivalent. For instance, to prove loss of life an official death certificate or its equivalent (e.g from the Hungarian Red Cross) would suffice. Where such documents were not available, the loss of life might be established by notarized testimony to the same effect provided “it is based on direct knowledge.” Likewise, a family relationship to the victim could be established through a range of official documents like birth or marriage certificates or, in their absence, “contemporary” sources attesting to it, such as school records. See Central Office of Justice, Frequently Asked Questions, available at http://www.kih.gov.hu/english_pages/Compensation/FAQ (last visited Aug. 13, 2009).
248. See Compensation Information, supra note 235.
“in the search for reconciliation and unity.”

By some accounts the TRC succeeded in revealing the truth, but was less effective in promoting reconciliation.

The TRC was established to facilitate a peaceful transition from apartheid to a new democratic system. Secret negotiations between the ruling National Party (“NP”) and the outlawed African National Congress (“ANC”) culminated in the 1990 dismantling of the apartheid regime under President de Klerk. During subsequent talks between the legalized ANC and the NP government, the ANC proposed the creation of a truth commission along with other transitional measures aimed at promoting accountability for past abuses. Ultimately, both sides reached a compromise reflected in the Interim Constitution and Postamble, which called for the creation of mechanisms that would promote reconciliation primarily by “offering the opportunity for storytelling by victims and truth telling by perpetrators.”

Amnesties figured prominently in the transitional formula prescribed by the Interim Constitution. Reparations, on the other hand, scarcely received a mention.

The issue of reparations fared only slightly better in the debates on the Promotion of National Unity and Reconciliation Act (“Act” or “TRC Act,” since its principal function was to create the Truth and Reconciliation Commission) preceding the law’s enactment by newly elected President Nelson Mandela in 1995. Despite the highly participatory nature of the drafting process, which included public hearings and extensive consultations with NGOs on the proposed Act, the specific question of how to design a reparations program as part of the ongoing transitional process was never fully discussed. One reason cited for this is the fact that the subject of reparations generally, and compensation in particular, had become controversial within the victim community active in the process.


252. *See Ronald W. Walters, THE PRICE OF RACIAL RECONCILIATION* 60 (2008). “[A] common criticism [at the time was] that the Commission had been strong on truth and had little or no contribution to reconciliation.” *But see* Boraine, *supra* note 249, at 315-16.


256. Colvin, *supra* note 251, at 178. “The decision to opt for a Truth and Reconciliation Commission was an important compromise . . . [because otherwise], a bloody revolution sooner rather than later would have been inevitable. The Truth and Reconciliation Commission is therefore a bridge from the old to the new.” Boraine, *supra* note 249, at 302 (quoting Judge Richard Goldstone).


258. Id. at 179-80.

259. Id. at 180.

continued to be overshadowed by other priorities defined by the parties to the political negotiation. Thus the first two TRC priorities as defined in the final Act were the need (1) to establish an historical account of apartheid, including the first-hand perspectives of the actors involved; and (2) to promote truth telling by perpetrators through the exchange of amnesties for confessions. The third goal was to

promote national unity and reconciliation [by] making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them.\textsuperscript{261}

In this regard it is important to note that the Act defined reparations as “include[ing] any form of compensation, ex gratia payment, restitution, rehabilitation or recognition.”\textsuperscript{262} However, in contrast to the authority it had to directly realize the first two objectives, with respect to the third, the TRC was authorized only to

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 reparations to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims; (ii) measures which should be taken to grant urgent interim reparation to victims\.\textsuperscript{263}

The TRC Act defined victims as persons who “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.”\textsuperscript{264} Close relatives or dependents of such persons, as determined by South African law, were also recognized as victims.\textsuperscript{265} Under the Act, the definition of “gross violation of human rights” was drawn narrowly. It was defined as

(a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit

\footnotesize{\textsuperscript{585} TEMPS Moderne 394 (1996), available at http://www.csvr.org.za/wits/papers/papgspv.htm. “The whole area of compensation/reparation in relation to the Truth Commission has become fairly controversial. This is because the compensation that will be offered to victims by the government will be considerably less than if they brought a civil action against the responsible perpetrator. Certain activists who were assassinated may well have filled top-level government positions if they were alive today. In such cases, their wives/husbands and their dependants would be entitled to civil claims of hundreds of thousands, if not millions, of rands. Once amnesty is granted to a perpetrator then these claims are extinguished—and there is simply no way that a new government will be able to offer a comparable compensation package to such victims.”

262. Id. ch. 1.
263. Id. ch. 2, ¶ 4(f)(i).
264. Id. ch. 1.
265. Id.}
an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive.266

The TRC Act came into effect once the members of the TRC were appointed.267 Though the Act empowered President Mandela to appoint the commissioners directly, he declined to do so. Instead, he created a committee comprised of representatives from major political parties and civil society to review nearly 300 nominations.268 It conducted public hearings, eventually narrowing the list of nominees to twenty-five names.269 In December 1995, President Mandela chose fifteen of the appointment committee’s twenty-five nominees; he named Archbishop Desmond Tutu as the Commission’s Chairperson and Alex Boraine as its Deputy Chairperson.270 The resulting TRC was racially representative of the South African population; it included seven women, ten men, seven Africans, two bi-racial individuals, two Indians, and six whites.271 The TRC was given two years to fulfill its mandate as stipulated in the Act.272

To implement its mandate, the TRC relied on three committees defined in the Act: the Committee on Human Rights Violations Committee (“CHRVC”), the Amnesty Committee (“AC”), and the Committee on Reparations and Rehabilitation Committee (“CRR”).273 The CRR, comprised of a chairperson, a

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266. Id.
268. Id. at 71-72.
270. Boraine II, supra note 267, at 73.
271. Id. at 75.
272. TRC Act, supra note 261, ch. 2, ¶ 3(1). The objectives of the TRC were to “promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past” by investigating the causes and extent of the gross violations of human rights that were committed, granting amnesty to human rights perpetrators in exchange for full disclosure of their actions, establishing the fate and whereabouts of victims, giving victims an opportunity to tell their story, devising a plan to make reparations to the victims, and compiling a comprehensive report on its activities and findings. Boraine, supra note 249, at 304. An additional three months was added in order to complete the Final Report.
273. Promotion of National Unity and Reconciliation Act 34 of 1995 chs. 3, 4, 5 (1995) (S. Afr.). For detailed descriptions of the HRVC and the AC, see LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA [hereinafter LOOKING BACK, REACHING FORWARD] (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000). These committees investigated and, in a sense, “adjudicated” cases of gross human rights violations by establishing the responsibility of perpetrators for historical and amnesty purposes, respectively. In this regard, they employed standards and techniques similar to those used
vice chairperson, and five other members selected by the Commission at large, was charged with implementing the TRC Act’s directives regarding reparations as described above; it was also tasked with recommending urgent interim measures.\textsuperscript{274} In addition to setting forth the CRR’s powers and duties, the Act provided a general framework for processing applications for reparations.\textsuperscript{275} It further outlined the political procedure whereby the CRR’s recommendations would be submitted to the President for subsequent consideration and approval by Parliament.\textsuperscript{276} The Act also provided for the creation of a President’s Fund, to consist of all funds appropriated by Parliament or contributed from other sources for the payment of reparations.\textsuperscript{277}

In discharging its functions, the CRR first had to determine who qualified as a victim. According to the Act, “[a]ny person who [was] of the opinion that he or she [had] suffered harm as a result of a gross violations of human rights [could] apply for reparation.”\textsuperscript{278} Because presenting the Government with an open-ended list of victims was impractical, the CRR limited the possible reparation recipients to those individuals who had made victim statements before the CHRV prior to December 15, 1997, when the process ended.\textsuperscript{279} The final list of victim applicants the CRR compiled for the TRC numbered 22,000.\textsuperscript{280} Of these, over 14,000 received cash payments ranging from US$250 to US$750 as beneficiaries of the Urgent Interim Reparations (“UIR”) Program which began in July 1998.\textsuperscript{281} In a departure from the terms of the TRC Act, the CRR was authorized to distribute the compensation directly to those claimants it

\textsuperscript{274} Promotion of National Unity and Reconciliation Act 34 of 1995 s.25(1)(a) (S. Afr.).

\textsuperscript{275} Id. at s.25, 26. The rules stipulated by the TRC Act in respect of the CRR were few and fairly broad, especially when compared to the extensive and detailed procedures explicitly dictated to govern the Amnesty Committee’s more politically charged work.

\textsuperscript{276} Id. at s.27. Under the Act, the President was responsible for issuing the regulations to implement Parliament’s resolution on reparations. See Colvin, supra note 251, at 183.

\textsuperscript{277} Promotion of National Unity and Reconciliation Act 34 of 1995 s.42 (S. Afr.).

\textsuperscript{278} Id. ch. 5, ¶ 26.

\textsuperscript{279} Orr, supra note 250, at 243. Dumisa Ntsebeza, The Struggle for Human Rights: From the UN Declaration of Human Rights to the Present, in LOOKING BACK, REACHING FORWARD, supra note 273, at 2, 6-8. The CHRV determined whether individuals were victims of gross human rights violations under the meaning of the TRC Act by an elaborate statement-taking process generally followed by fact-finding by the Investigative Unit. All of the CHRV’s findings had to be based on verified or corroborated evidence and were required to meet the standard of proof employed by the TRC – proof on a balance of probabilities.

\textsuperscript{280} Colvin, supra note 251, at 192.

\textsuperscript{281} Id. at 188-89. See also Oupa Makhalemele, Still not Talking: The South African Government’s Exclusive Reparations Policy and the Impact of the R30,000 Financial Reparations on Survivors, in REPARATIONS FOR VICTIMS, supra note 18, 547 (noting that “[b]y the end of 1999, the President’s Fund had paid out R16,754,921 in urgent interim reparations to 15,078 survivors.”).
determined had “urgent medical, emotional, educational, material and/or symbolic needs.” 282 For example, beneficiaries included individuals who were not expected to outlive the TRC and claimants who had no fixed home or shelter. 283 The UIR process was complete by 2001, with payments totaling US$5.5 million. 284

To design a general reparations policy to recommend to the government, the CRR relied heavily on nationwide consultations with victims, though it looked to international sources and experiences as well. 285 Most victims surveyed requested monetary or other forms of compensation; second on their list of desired reparations were official investigations into the violations suffered. 286 A lawsuit filed soon after the creation of the TRC challenged its legality on the grounds that the amnesty provisions contravened the new Constitution by foreclosing criminal and civil remedies, including compensation, for victims of persons the TRC granted amnesty. 287 The Constitutional Court, however, disagreed. It found that the amnesty provisions were a necessary means for securing greater truth telling, which was essential to advancing the constitutional goals of reconstruction and reconciliation. 288 In other words, because Parliament was authorized to balance competing goals in the national interest, “the abrogation of victims’ rights to civil and criminal redress was . . . constitutionally certified.” 289

Several other issues arose during the CRR process. One was a conflict in the perceptions of pecuniary versus non-pecuniary or symbolic measures, reflecting the tension between individual and collective reparations. 290 A related concern was whether compensation should consist of monetary payments to victims, or whether a package of social services represented a better approach. 291 In the end, after consulting with an economist, the CRR decided to recommend the payment of “individual reparations grants” over a six-year

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282. Measures to Provide Urgent Interim Reparation to Victims, GN R545 of 3 April 1998, in GOVERNMENT GAZETTE 18822; 5 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, ch. 5, ¶ 56 (Oct. 29, 1998) [hereinafter TRC REPORT]; see also Colvin, supra note 251, at 187-89. Direct compensation was permitted because of the delays experienced in responding to victims with urgent needs, and the desire to avoid further obstacles to the implementation of the UIR.
283. Colvin, supra note 251, at 188.
284. Id. at 189.
286. Id.
287. Colvin, supra note 251, at 185.
289. Colvin, supra note 251, at 185.
291. Orr, supra note 250, at 244-45.
period to victims on the final list compiled with input from the CHRV. The suggested amount was based on the median annual household income for a family of five in South Africa in 1997, with the amount increased for beneficiaries in rural areas to facilitate access to services.

The CRR’s recommendations on reparations were published in October 1998 as part of the TRC’s “Interim” Report. In addition to the individual grants, the TRC’s recommended reparations policy included symbolic measures to be adopted at the individual (e.g. issuing death certificates), community (e.g. erecting memorials), and national levels (e.g. establishing a day of remembrance). It recommended community rehabilitation (e.g. resettlement of displaced persons) and institutional reform aimed at preventing the recurrence of human rights violations in the future. The TRC also advocated for the establishment of an elaborate governmental entity under the President’s direction to implement the program. The TRC Report affirms that reparations play an important role in the process because they concretize the state’s recognition of its responsibility for past abuses, help to restore the dignity of victims, and raise public awareness of the need to reconcile past wrongs to ensure future reconciliation as a nation.

After years of foot-dragging in the face of intense pressure from victims’ organizations, the South African government under President Thabo Mbeki finally decided in April 2003 to announce its final reparations program. Rejecting the TRC’s recommendation of a grant program, it instead provided a one-time payment of R30,000, or roughly US$4000, to each of the 18,000 survivors named by the TRC.

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292. Colvin, supra note 251, at 194; see also Ntsebeza, supra note 279. See supra note 31 for a brief description of the process employed by the CHRV.

293. TRC REPORT, supra note 282, vol. 5, ch. 5, ¶¶ 69-70; Colvin, supra note 251, at 194. The CRR’s final recommendation called for yearly individual reparations grants ranging from R17,029 (US$2,129) to R23,023 (US$2,878) to be paid out in six-month installments over a six year period.

294. Brandon Hamber, Reparations as Symbol: Narratives of Resistance, Reticence and Possibility in South Africa, in REPARATIONS: INTERDISCIPLINARY INQUIRIES 252, 254 (Jon Miller & Rahul Kumar eds., 2007) [hereinafter Hamber II]; Colvin, supra note 251, at 193. The Final Report was submitted in 2003 after the work of the Amnesty Committee was complete.

295. Colvin, supra note 251, at 195.

296. Id. at 195-96.

297. Id. at 196-97.

298. TRC REPORT, supra note 282, vol. 5, ch. 8.

299. Hamber II, supra note 294, at 256-57. See TRC Act: Regulations Regarding Reparation to Victims, REGULATION GAZETTE 7821 of 12 November 2003, 461 GOVERNMENT GAZETTE 25695, available at http://uscdn.creamermedia.co.za/assets/articles/attachments/00932_regulation1660.pdf. The regulations granted reparations to those victims and beneficiaries of victims who were identified as eligible by the CRR based on the CHRV’s statement-taking process. The reparations were paid out of the President’s Fund, which was administered by an appointed accounting officer. The final reparations were available to the identified victims or their beneficiaries by request only.

300. Makhalemele, supra note 281, at 542. It is important to note that in 2003, President Mbeki charged the South African Department of Justice and Constitutional Development with
“community reparations and assistance through opportunities and services,” and to advance with measures to establish national holidays and memorials in remembrance of this legacy.\(^{301}\) The President’s Fund established for this purpose began making the promised cash payments in November 2003; within a year it had distributed most of them, totaling approximately US$80 million, or one-fifth of the reparations amount originally recommended by the TRC.\(^{302}\) As noted at the outset, the South African reparations process has been criticized as “too little, too late” in regard to both the urgent interim reparations and the final reparations programs.\(^{303}\) It is evident that the government’s emphasis on truth telling, amnesty and reconciliation in the TRC process dampened the impact of the reparations component to a significant degree.\(^{304}\)

6. **Swiss Banks Dormant Accounts (CRT-I, CRT-II)**

While the Claims Resolution Tribunal for Dormant Account in Switzerland (CRT-I) and the Claims Resolution Tribunal (CRT-II) provide classic examples of mass claims processing to provide restitution for property losses, i.e. Swiss bank accounts that have been dormant since the end of World War Two, their creation is overlaid with a modern day human rights goal of correcting an historical wrong perpetrated by Nazi Germany.\(^{305}\) Prior to and during World War II, many subsequent victims of the Nazi regime sought to move their assets to safety in neutral or allied countries.\(^{306}\) Due to Switzerland’s geographic proximity to Axis and Axis-occupied countries and its bank secrecy laws, many victims opened accounts with the Swiss National Bank and various other Swiss banks, implementing these and other TRC recommendations. In 2005, a specialized unit, the TRC Unit, was created within this Department to complete the work. *Id.* at 544.


302. Hamber II, *supra* note 294, at 257. The TRC’s projected budget for its proposed reparations program was US$460 million. The Accounting Office of the President’s Fund reported that by March 2007, nearly 16,000 applicants for reparations approved by the TRC had received the one-off payment. See Makhablemele, *supra* note 281, at 544, 558.


304. See generally Orr, *supra* note 250; Colvin, *supra* note 251. “Economic justice and the restoration of the moral order should be seen as two sides of a single coin. Whereas the focus of the Commission was on truth seeking in the search for reconciliation and unity, serious delays in delivering social services could bring into disrepute any talk of reconciliation.” Boraine, *supra* note 249, at 300.

305. See Alfonse D’Amato, *Justice, Dignity and Restitution of Holocaust Victims’ Asset*, 20 CARDozo L. REV. 427, 431 (1988). Senator D’Amato explained that in meeting with Edgar Bronfman, who was negotiating with the Swiss banks regarding the dormant accounts, Bronfman told D’Amato that it was not a question of settling for a specified amount of money. Rather, it was “a question of getting an accounting and getting justice.” *Id.*

However, as many account holders perished in the Holocaust and their heirs were unable to prove ownership of the accounts, the assets in the banks remained unclaimed.

The effort to resolve assets held in Swiss banks resulted in two distinct processes to adjudicate claims for dormant Swiss bank accounts. In July 1997, due to pressure on the Swiss Bankers Association (SBA) and the Swiss Federal Banking Committee (SFBC), the SBA published the names of account holders whose accounts were opened prior to World War II and had been dormant since the end of that war. In October 1997, the SBA published additional names in a second list. From 1997 until 2001, CRT-I resolved claims to these accounts. Beginning in 2001, CRT-II was established under a new set of procedures and utilizing new rules to resolve claims to an additional 21,000 accounts. These CRT-II accounts were published in 2001, after an independent audit of the Swiss Banks that the Independent Committee of Eminent Persons (“ICEP”) initiated in November 1996, which concluded that these accounts possibly or probably belonged to victims of Nazi persecution.

The CRT-I was created as a result of negotiations between Jewish groups and the major Swiss banks to rectify the denials by those banks of access to the accounts held by victims of the Nazi government who died during the Holocaust. In May 1996, the Swiss Bankers Association entered into a Memorandum of Understanding (MOU) with the World Jewish Restitution Organization (WJRO) to establish an independent investigation of the bank accounts that had been dormant since the end of World War Two and their rightful ownership by victims of Nazi persecution. To conduct this


310. *Id.*

311. *Id.* at 260.

312. Sylvain Beauchamp, *The New Claims Resolution Tribunal for Dormant Accounts in Switzerland – Distribution Organ, Mass Claims Adjudicative Body or Sui Generis Entity?*, 3 J. OF WORLD INVESTMENT 999 (2002). Paul Volcker, former Chairman of the Board of Governors of the United States Federal Reserve System, was the chair of ICEP, and as a result, ICEP was also referred to as the “Volcker Committee.” *HOLTZMANN & KRISTJANSDOTTIR*, supra note 8, at 24. The report issued by the Volcker Committee at the end of the four-year audit is referred to as the “Volcker Report.” See supra note 306.


investigation, the Memorandum of Understanding established ICEP, which was tasked to conduct an investigative audit to determine the existence of dormant accounts, financial instruments, and other assets of the victims of Nazi persecution that were deposited in Swiss Banks before and during the Second World War. After conducting audits of the dormant Swiss banks and building databases of the names of victims of Nazi persecution, ICEP and the Swiss Federal Banking Commission (SFBC) jointly organized a foundation, the “Independent Claims Resolution Foundation”, to monitor a Claims Resolution Tribunal (CRT-I).

Like the Iran-U.S. Claims Tribunal, the CRT-I operated as an international arbitral tribunal. As Lucy Reed, one of the principal architects of CRT-I, aptly stated “the basic principles of international commercial arbitration provided certain foundation stones of this unique multiple claims resolution process.” The CRT-I was comprised of seventeen arbitrators, which included a Chairman and Vice-Chairman. Article 30 of the Rules of Procedure established a secretariat, which a Swiss law firm staffed and then supplemented with additional foreign lawyers, paralegals and secretaries. Sole Arbitrators or Claims Panels, comprised of three arbitrators, issued the CRT-I decisions. If a Claims Panel decided the claim, the panel consisted of one Swiss and two non-Swiss arbitrators.

The CRT-I’s mandate was to adjudicate all claims pertinent to the dormant accounts. In July and October 1997, the Swiss Bankers Association published in the world press and on the Internet the names and last known domiciles of account holders that held accounts prior to the end of the Second World War and that have been dormant since that time. The two lists included approximately 5,570 bank accounts. Approximately 9,900 claims related to these account

317. Id. at 80.
319. Buergenthal, supra note 316, at 80.
320. Lucy Reed, Arbitration Principles in Resolving Holocaust Bank Claims, in INSTITUTIONAL AND PROCEDURAL ASPECTS, supra note 7, at 61.
321. See Shai Wade, Mass Claims Arbitration: The Experience of The Claims Resolution Tribunal for Dormant Accounts in Switzerland, 14 MEALEY’S INT’L. ARB. REP. 1, Annex 1, for a list of the arbitrators and their brief biographies.
323. Hans Van Houtte et al., Winning the Parties’ Hearts and Minds, POST-WAR RESTORATION OF PROPERTY RIGHTS UNDER INTERNATIONAL LAW, VOLUME 1: INSTITUTIONAL FEATURES AND SUBSTANTIVE LAW 73, n.89 (2008) [hereinafter Hans van Houtte et al.].
324. CRT-I Rules of Procedure, supra note 322, arts. 3-5.
325. Id.
were received for adjudication.\textsuperscript{328} Once a claimant submitted a claim, it was forwarded to the bank holding the account. Due to Swiss bank secrecy laws, the bank’s name and the amount in the account were not disclosed to the public.\textsuperscript{329} The bank would then review the claim, decide whether it wanted its name and the amount in the account disclosed to the claimant and have the claimant sign a Claims Resolution Agreement, or it would deny the claim.\textsuperscript{330} In either case, the claim was transmitted to CRT-I, either to proceed in arbitration if the bank had disclosed its name and the amount in the account to the claimant, or for an initial screening by the CRT-I if the bank had denied disclosure of the information.\textsuperscript{331}

The Initial Screening process was "an admissibility proceeding with a very low threshold."\textsuperscript{332} Its purpose was to screen out claims that had no merit in order to simplify and quicken the claims process. The sole arbitrator, after reviewing the claim, would order that the name of the bank and the amount in the account be disclosed to the claimant, unless it was determined that "(i) the claimant has not submitted any information on his or her entitlement to the dormant account, or (ii) if it apparent that the claimant is not entitled to the dormant account."\textsuperscript{333} A written Initial Screening decision was mailed to the claimant and if the claimant disagreed with the decision of the sole arbitrator, the claimant could, within 30 days, re-submit the claim for an additional Initial Screening by a Claims Panel of three arbitrators, which would consider the claim \textit{de novo}.\textsuperscript{334}

Once the bank or the Tribunal determined that the claimant should receive the pertinent bank information, the claim proceeded in arbitration – either as a “fast track”\textsuperscript{335} or “ordinary” procedure.\textsuperscript{336} The “fast track” procedure was used when a bank believed the claimant was entitled to the assets in the account and the bank was willing to pay the amount pursuant to an award or via a settlement agreement between the bank and the claimant or claimants.\textsuperscript{337} In addition to claims that were subject to “fast track” procedures by the bank, another expedited procedure was developed by the CRT-I and SBA to deal with small

\begin{enumerate}
\item \textsuperscript{328} Buergenthal, \textit{supra} note 316, at 81.  
\item \textsuperscript{329} Hans Van Houtte et al., \textit{supra} note 323, at 73.  
\item \textsuperscript{330} Wade, \textit{supra} note 321 at 3; see also R. Alford, \textit{Federal Courts, International Tribunals, and The Continuum of Deference}, 43 \textit{Va. J. Int’l L.} 675, 713-14 (2003) (noting that one of the fundamental tenets of arbitration is that the parties submit to the jurisdiction of the arbitral panel).  
\item \textsuperscript{331} CRT-I Rules of Procedure, \textit{supra} note 322, art. 10.  
\item \textsuperscript{332} Buergenthal, \textit{supra} note 316, at 83.  
\item \textsuperscript{333} CRT-I Rules of Procedure, \textit{supra} note 322, art. 10(3).  
\item \textsuperscript{334} \textit{Id.}  
\item \textsuperscript{335} \textit{Id.} Arts. 11-12.  
\item \textsuperscript{336} \textit{Id.} Arts. 14-15.  
\item \textsuperscript{337} Wade, \textit{supra} note 321, at 12; Hans Van Houtte et al., \textit{supra} note 323, at 74; \textit{Holocaust Claims Against Swiss Banks}, \textit{supra} note 308, at 261.
\end{enumerate}
amount claims on accounts that had a balance of less than 100 Swiss Francs, and where the bank was willing to pay ten times the reported amount in full and final settlement of the claims.\textsuperscript{338}

All claims that were not resolved in either Initial Screening or “Fast Track” proceedings were resolved in Ordinary Procedure.\textsuperscript{339} This procedure required “a full review of the claim and all available evidence in an expedited procedure.”\textsuperscript{340} It was used when multiple unrelated claimants filed claims to the same account or when the claims to the account presented difficult inheritance or conflict of laws questions.\textsuperscript{341} The procedure itself was governed by Article 17 which provided that the Claims Panel “conduct the proceedings in an informal manner and under relaxed procedural rules that are convenient for the claimants and take into account their age, language and residence.”\textsuperscript{342} Most important, the rules gave the arbitrators full discretion in conducting the proceedings to ensure “an expeditious and equitable determination of all claims to dormant accounts.”\textsuperscript{343} The CRT-I proceedings as a result were mostly document only proceedings, with the arbitrators basing their decisions on law and equity.

In reviewing the claim, entitlement was to be established in accordance with the relaxed standards of proof provided in Article 22.\textsuperscript{344} Article 22 of the Rules of Procedure provided that “[t]he claimant must show that it is plausible in light of all of the circumstances that he or she is entitled, in whole or in part, to the dormant account.”\textsuperscript{345} This plausibility standard was balanced against the circumstances that faced the claimants at the time as reflected by the fact that CRT-I decision makers were instructed to “bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long time that has elapsed since the opening of these dormant accounts.”\textsuperscript{346} Even with this low standard of proof, claims were difficult to prove as heirs often had little or no evidence to establish familial connections to the account holder and the banks, for the most part, had very little biographical information about the account holder.\textsuperscript{347} The relaxed standard of proof as applied by CRT-I meant that information known to the claimant is often used as a substitute for documentary evidence of a familial relationship.\textsuperscript{348} Specifically, if a claimant provided biographical information about his or her relative that

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338. Hans Van Houtte et al., \textit{supra} note 323, at 74-75.
340. \textit{Id.}
342. CRT-I Rules of Procedure, \textit{supra} note 322, art. 17.
343. \textit{Id.} art. 15.
344. \textit{Id.} art. 15.
345. \textit{Id.} art. 22 (emphasis added).
346. \textit{Id.}
347. Buergenthal, \textit{supra} note 316, at 94.
\end{footnotes}
matched unpublished information about the account holder, such as date of birth, occupation, or address, this information likely was sufficient to establish entitlement to the account.\textsuperscript{349}

If the CRT-I determined that the claimant was entitled to the account, it would render a Partial Award that directed the bank to distribute the assets to the claimant.\textsuperscript{350} Once the Independent Claims Resolution Foundation issued the Rules on Interest, Charges and Fees,\textsuperscript{351} the CRT-I determined whether the claimant was entitled to an upward adjustment of its award to reflect unpaid simple interest on the account since 1945 and to compensate for bank fees deducted from the account for the same period.\textsuperscript{352} The claimant would receive the adjustment in a Final Award if the account holder was determined to be a victim or target of Nazi persecution.\textsuperscript{353}

Through its process of initial screening and fast track and ordinary procedure, CRT-I reviewed over 9,900 claims.\textsuperscript{354} Upon finishing this review in September 2001, the CRT-I had awarded 49 million Swiss Francs (approximately $30 million) to claimants who claimed “non-Victim” accounts and 16 million Swiss Francs (approximately $10 million) to claimants who were awarded accounts owned by victims of Nazi persecution.\textsuperscript{355}

CRT-II, as a successor entity to CRT-I, continued to adjudicate claims to dormant bank accounts on a case-by-case basis to determine if the claimant was plausibly entitled to the claimed account. CRT-II was tasked with resolving claims to dormant Swiss accounts as part of the implementation of a Settlement Agreement reached in a consolidated class action lawsuit brought in the United States District Court for the Eastern District of New York against major Swiss banks.\textsuperscript{356} The lawsuits were settled in 1999, with the banks agreeing to fund a $1.25 billion settlement.\textsuperscript{357} The court then appointed a special master to determine the appropriate allocation of the settlement fund among the different

\textsuperscript{349} Id.; Buergenthal, supra note 316, at 94.
\textsuperscript{350} CRT-I Rules of Procedure, supra note 322, arts. 31-33.
\textsuperscript{351} See www.crt-ii.org/ crt-i/rules_interest.html for the complete text of the Rules on Interest, Charges and Fees for Arbitral Decision of the Claims Resolution Tribunal [hereinafter Rules on Interest].
\textsuperscript{352} HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 284. See also Holocaust Claims Against Swiss Banks, supra note 308, at 263 for a fuller discussion of the four-step process for calculating the interest and fees.
\textsuperscript{353} Rules on Interest, supra note 351, art. 4B. A victim of Nazi persecution was defined in the Rules on Interest as “[a]ny individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah’s Witness, homosexual, or physically or mentally disabled or handicapped.” Id. art. 21.
\textsuperscript{354} Hans Van Houtte et al., supra note 323, at 75.
\textsuperscript{356} HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 25.
classes that composed the class action.\textsuperscript{358} Once drafted and approved by the court, the Plan of Allocation and Distribution\textsuperscript{359} constituted the CRT-II as the entity to “decide claims to assets deposited with Swiss banks by victims or targets of Nazi persecution in accounts that were open or opened during the period 1933 to 1945.”\textsuperscript{360}

While CRT-I was designed as an international arbitration process and functioned as such, the CRT-II was “a court-sponsored alternative dispute resolution process.”\textsuperscript{361} It was not an arbitral tribunal as the banks no longer had an interest in the proceedings. All payments to successful claimants from dormant accounts of victims of Nazi persecution, whether already paid or pending payment, were credited against the allocated $800 million in the Settlement Fund.\textsuperscript{362} Thus, while retaining the nature of an international tribunal, CRT-II’s function was to act as a class action settlement distribution body.\textsuperscript{363} The CRT-II was not instructed to adjudicate claims between the bank and claimants; rather, it applied a series of presumptions contained in the CRT-II Rules of Procedure to determine whether the claimant was entitled to the dormant account.\textsuperscript{364}

The CRT-II’s Rules of Procedure, instead of implementing the Initial Screening process of CRT-I, provided for standards of admissibility based on whether the claimant presented any information that provided a reasoned and satisfactory basis for further examination of the claim.\textsuperscript{365} In order for a claim to be admissible, Article 18 of the Rules Governing the Claims Resolution Process (the “Rules”) required that the claim be sufficiently detailed about the account holder to provide enough information to determine eligibility for entitlement.\textsuperscript{366} Additionally, claims were inadmissible if a victim or target of Nazi persecution did not hold the account.\textsuperscript{367}

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\textsuperscript{358} Holtzmann & Kristjansdottir, supra note 8, at 26.
\textsuperscript{360} Holtzmann & Kristjansdottir, supra note 8, at 26.
\textsuperscript{361} Holocaust Claims Against Swiss Banks, supra note 308, at 265.
\textsuperscript{362} T. Buergenthal, supra note 316, at 101.
\textsuperscript{363} For a discussion of the legal nature of the CRT-II, see Beauchamp, supra note 312, at 1026-34.
\textsuperscript{365} Id. art. 18.
\textsuperscript{366} Id.
\textsuperscript{367} Id. art. 14 (providing “[t]he CRT shall have jurisdiction to resolve claims to Accounts of Victims open or opened in Swiss banks during the Relevant Period and to certify to the Court for payment of the value of Accounts.”); art. 46(4) (stating that the Tribunal does not have jurisdiction}
If the claimant successfully passed this admissibility requirement, eligibility for an award of the claimed account was now determined by computerized matching of account holders to claimants.\textsuperscript{368} This step, referred to as “matching” in Article 19 of the CRT-II Rules, occurred when one or more accounts in the computerized Account History Database was the same or similar to the name of the relative of the claimant asserting the claim.\textsuperscript{369} In the case of a successful match, the CRT-II then made a determination under Article 22 using a relaxed standard of proof\textsuperscript{370} that the claimed owner and the actual owner of the account were the same individual.\textsuperscript{371} Article 28 of the CRT-II Rules provided a number of presumptions that the Tribunal was to apply to the claim explaining why the account holder did not receive the proceeds of the account that would justify an award of the account, absent plausible evidence to the contrary.\textsuperscript{372}

Once a determination was made that the Account Holder never received the proceeds of the account, the CRT-II determined distribution. CRT-I, in making this determination, relied upon the inheritance laws applicable between the account holder and the individuals claiming the account.\textsuperscript{373} Under the CRT-II Rules, Article 23 provided rules of distribution for the amounts awarded, in the absence of a will or other inheritance documents.\textsuperscript{374}

Since 2001, when CRT-II began, it has received over 33,000 claims for accounts held in Swiss banks since the Second World War. As of March 2010, the CRT-II had awarded 2,902 claims for a total of approximately $472 million.\textsuperscript{375}

III. COMPARATIVE ANALYSIS OF SELECTED IMCPs AND TJCPs

We now turn to a comparative analysis of the two types of claims procedures illustrated in the previous section. Contrary to the approach of most

\begin{itemize}
  \item 368. Id. arts. 19-21.
  \item 369. Id.
  \item 370. Id. art. 17. CRT-II adopted the same relaxed standard as CRT-I. Article 17 provides that “[e]ach Claimant shall demonstrate that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the claimed Account.” Id.
  \item 371. Id. art. 22.
  \item 372. Id. art. 28.
  \item 373. CRT-I Rules of Procedure, supra note 322, art. 16.
  \item 374. CRT-II Rules of Procedure, supra note 364, art. 23.
  \item 375. See www.crt-ii.org/_awards/index.htm. Despite the fact that it has placed a premium on speed and efficiency due to an elderly Holocaust survivor claimant community, the CRT-II has been in operation for over nine years and is still processing claims today. Id.; Holocaust Claims Against Swiss Banks, supra note 308, at 277.
\end{itemize}
commentators, we start by looking at the differences between the two types of claims procedures, before addressing the parallels. The most obvious difference, of course, is the context in which each takes place: most IMCPs play largely on the field of international law and international relations, while TJCPs are shaped primarily by powerful social-political forces in the domestic realm. Not surprisingly, from the dissimilar political contexts involved, a number of other significant divergences between the two types of claims procedures are derived. Foremost among these is the distinct nature of the constituting legal norms underpinning each set of procedures. IMCPs are generally framed by international agreements by, between, or among states, or by agreements to arbitrate internationalized issues between parties; TJCPs, on the other hand, are exclusively a product of domestic executive and legislative legal processes. Since the settings and foundations of these two types of claims procedures are so different, it is not surprising that the divergences outnumber the convergences.

For these reasons, we start by examining a number of basic differences between the two types of mass claims processes, beginning with the distinct goals and values promoted by each. Other differences involve key issues like determinations of liability; the nature of the parties and the claims processes; the types of decision makers employed; the remedies offered; and the mechanisms established for the payment and enforcement of awards. It is also instructive to contrast the degree to which the lessons learned from a given mass claims process can benefit subsequent efforts; such “transferability” varies greatly between the institutionalized “recycling” of IMCP experiences and the inherent

376. See supra Introduction.

377. A necessary caveat to this approach is to recognize that the IMCP and TJCP categories are neither homogenous nor static. On the one hand, there are significant variations between and among types of IMCPs as well as TJCP experiences as we have defined them. Each claims process, regardless of context, is a dynamic response to the particular circumstances within which it arises. Moreover, the two fields are in flux, so there are few absolutes in either direction. That said, it is equally clear that the categories as defined either mirror accepted terminology or reflect widely shared understandings in the international mass claims and transitional justice fields, respectively. In addition, the methodical analysis of paradigmatic TJCPs and IMCPs in Part II further substantiates our reliance upon a broad set of widely accepted definitional parameters for each category, which are based on past and current practice. Our intention is not to circumscribe these processes to artificial boundaries or ignore the significant variations that may exist between them. Rather, we seek to capture the essence of each process’ evolution to enable constructive comparative analyses in the future.

378. Domestic actors or forces within state parties may influence the development of IMCPs, and TJCPs may be susceptible to international law’s influence on internal processes. See supra Part II. However, the essential nature of each is undisputedly anchored in the distinct arenas described, despite some overlap.

379. See infra Part III.A.3; Holtzmann & Kristjansdottir, supra note 8, at 17.

380. See infra Part III.A.3; see also Richard Falk, Reparations, International Law, and Global Justice: A New Frontier, in HANDBOOK OF REPARATIONS, supra note 14, at 498; Shelton, supra note 15, at 400.
uniqueness of every TJCP. The objective of this sub-section, then, is to bring to the fore several of the key contextual, conceptual, structural and practical differences that distinguish traditional IMCPs from their home-grown cousins, the TJCPs.

After exploring these dissimilarities, we will engage in a more informed study of apparent and actual parallels between the two mechanisms viewed in light of the preceding analysis. Any contemplation of similarities between IMCPs and TJCPs is substantively affected when conducted after careful study of the myriad differences that separate them. By applying this methodology, we are inevitably drawn to a number of operational aspects of these claims processes that, upon closer examination, share a functional equivalency in either context. The best examples are provided by those operational principles and procedures inherent in any mass claims process, regardless of context, such as establishing credibility or identifying and screening claimants. On the other hand, some frequently cited characteristics that appear to be shared, and thus, comparable, including those relating to the remedial nature of both IMCPs and TJCPs, turn out upon closer examination not to be as substantially equivalent as generally presumed. But, this conclusion can only be fully appreciated after a thorough examination of the differences that reign between the two.

A. IMCPs and TJCPs: How are they different?

1. Divergent Goals and Values Promoted

IMCPs and TJCPs exist on different planes and arise within different normative frameworks. What is perhaps less obvious is that, because the institutional goals pursued by each are shaped by the distinct contexts involved, these goals and the underlying values they promote can be substantively different. By contrasting the prevailing definitions for each type of claims process, one can begin to look past nominal similarities to discern just how dissimilar the two can be in function as well as purpose.

As a rule, IMCPs are established as an alternative to judicial and other dispute resolution mechanisms, often in the interest of promoting international peace and stability. It is no coincidence that modern day IMCPs grew out of the evolution of international arbitration procedures and corresponding institutions such as the Permanent Court of Arbitration. Indeed, in several notable instances, such processes have been charged with

381. See infra Part III.A.3. See also Falk, supra note 380, at 498; SHELTON, supra note 15, at 400.
382. Crook, supra note 1, at 55; see also Das, supra note 30, at 5; HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 1, 6; see also infra note 420 et seq. and accompanying text.
383. See Holtzmann, Forward, in REDRESSING INJUSTICES, supra note 1, at v.
384. Id.
adjudicating the liability of a state or other party before establishing the arbitral award or granting compensation. This variation notwithstanding, the overarching goal of any IMCP is to provide “effective remedies for numerous individuals who suffered losses, damage or injuries as a result of an armed conflict or a similar event causing widespread damage.” These remedies, as Howard Holtzmann points out, are generally limited in practice to monetary compensation or restitution because they are most often directed at redressing property claims. With few exceptions, the compensation of personal injuries has traditionally taken a back seat to property losses in the international context. On the other hand, IMCPs are generally successful at achieving elevated degrees of “completeness,” understood as the “ability of a program to cover [the] universe of potential beneficiaries.”

Another defining characteristic of IMCPs is the creation of an adjudicatory and/or administrative organ, called “a tribunal, a commission, or other dispute resolution body,” which is charged with implementing the specific mandate defined by the parties to the underlying agreement. In this key respect, “[IMCPs] are usually self-contained ad hoc regimes . . . driven by the administrator rather than the parties.” The primary challenge faced by these claims processing bodies is resolving the tension between individualized justice, on the one hand, and efficiency and speed, on the other . . . [In other words, a] balance must be struck between the traditional requirements of fairness [in individual cases] and the imperative to provide justice quickly to all claimants.

The emphasis, however, is clearly on efficiency: IMCPs are usually judged on their ability to advance procedural goals such as “speed of process, cost-effectiveness, and consistency in the handling of claims and decision making.” Hans Das, quoting from a study of the UNCC, summarizes: “The guiding principle . . . is one of ‘practical justice: that is, a justice that would be

385. See infra Part III.A.2.
386. Das, supra note 30, at 5.
387. HOLTZMANN & KRISTJANSFOTIR, supra note 8, at 72-73. See infra Parts III.A.3, III.A.5.
388. All eleven of the international mass claims processes analyzed in HOLTZMANN & KRISTJANSFOTIR, supra note 8, deal with property or contractual claims, among others; only two – UNCC and EEC – contemplate compensation for personal injuries resulting from violations of international law. See infra Part III.A.3.
389. De Greiff, supra note 14, at 6. The taxonomy of terms used to describe the effectiveness of reparations programs from which this concept is drawn is discussed in greater detail, infra. A good example of the comprehensiveness achieved by IMCPs on the whole is the UNCC, which processed US$ 2.6 million claims. See Das, supra note 30, at 7.
390. HOLTZMANN & KRISTJANSFOTIR, supra note 8, at 6.
391. Id. at 17-19, 37-38.
392. Das, supra note 30, at 10. A notable exception to this general rule is the Iran-U.S. Claims Tribunal. See supra note 376 and accompanying text.
393. Id.
394. T. van den Hout, supra note 1, at xxx.
swift and efficient, yet not rough.***395

Now, contrast international mass claims processes with those taking place in the transitional justice context. TJCPs, as previously noted, are best defined as domestic programs enacted by government authorities through legislation and other legal means to provide reparations to citizens or residents who were victims of gross and often systematic human rights abuses that occurred in the country.396 As we have seen, these programs are generally comprised of legislatively driven administrative regimes that can overlap with existing procedures under domestic law for providing state granted benefits or redressing related types of harm.397 Or, they may require the creation of specialized mechanisms to fulfill their mandate,398 or both.399 Regardless of the actual configuration, state practice over the past several decades confirms the existence of what Ruti Teitel calls “a paradigm of transitional reparatory justice associated with transitional times”400 involving radical political change:

[This paradigm] is a complex conception, as it does work advancing multiple purposes mediating and constructing the transition. Transitional reparations publicly recognize and instantiate individual rights that are, in a sense,

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396. See Argentina, South Africa and Hungary case studies supra Part II. See also SHELTON, supra note 15, at 400; Pablo de Greiff, Justice and Reparations, in HANDBOOK OF REPARATIONS, supra note 14, at 453 [hereinafter De Greiff II]. These abuses are usually attributable to the state directly, but may sometimes include abuses committed by non-state actors such as paramilitary groups acting in concert with state agents (Colombia) or armed opposition groups (Peru). For general background on the Colombian conflict and recent reparations processes, see Julian Guerrero Orozco and Mariana Goetz, Reparations for Victims in Colombia: Colombia’s Law on Justice and Peace, in REPARATIONS FOR VICTIMS, supra note 18, at 435-58. For an overview of the Peruvian experience, see Julie Guillebot & Lisa Magarrell, Memorias de un Proceso Inacabado: Reparaciones en la Transición Peruana (ICTJ/OXFAM/PRODEH 2006).

397. See, e.g., Argentina case study, supra Part II (illustrating the use of administrative law and procedure to disburse pensions, compensation and other benefits. This was likewise the model employed in Chile, where social benefits were administered through pre-existing government ministries or agencies). Elizabeth Lira, The Reparations Policy for Human Rights Violations in Chile, in HANDBOOK OF REPARATIONS, supra note 14, at 59 (pensions), 68-69 (health benefits). Similarly, in Hungary, the Executive’s justice office has been charged with implementing the administrative schemes created by the post-transition compensation. See supra notes 217-47 and accompanying text.

398. See South Africa case study, supra Part II (discussing mandate of the Truth and Reconciliation Commission in relation to reparations); see also Lira, supra note 397, at 60 (describing the National Corporation for Reparations and Reconciliation created to implement the recommendations of the Chilean Truth and reconciliation Commission). A good example of recent reparatory initiatives that required the creation of new institutions is from Colombia, where the National Reparations and Reconciliation Commission was created as part of the so called “Justice and Peace” process with demobilized paramilitary groups. See Arturo Carrillo, Truth, Justice, and Reparations in Colombia: The Path to Peace and Reconciliation?, in COLOMBIA: BUILDING PEACE IN A TIME OF WAR 133, 145 (USIP Press 2009).

399. See Argentina and South Africa case studies supra Part II; see also Lira, supra note 397, 55-71 (describing different components of Chile’s reparations program).

400. Teitel, supra note 211, at 146.
predominantly symbolic. Often they are not truly compensatory, bearing little or no relation to the material loss, exemplified in the Latin American “moral reparations” or the post-communist rehabilitations. Transitional reparations may take many forms: They can be in kind, as in property restitutions, monetary payments, or nonconventional redress, such as education vouchers or other collective public benefits, such as memorials, legislative rehabilitations, and apologies.401

Even so, redressing the harm suffered by victims of human rights abuses is not the only goal of such reparatory polices nor, some would argue, the most important one. In the transitional justice context, reparations programs are one of several initiatives linked to a broader political strategy aimed at promoting national reconciliation and consolidating democratic institutions.402 Such programs are part and parcel of the transformative policies adopted by transitional governments. At the same time, however, they are subject – and sometimes subordinated – to other priorities. South Africa provides a stark example where an emphasis on truth telling facilitated by amnesties eclipsed the government’s minimal efforts to adequately compensate or otherwise redress victims.403 In part, this tension is due to competing political demands on limited resources in hard times; it is one of the threshold challenges facing domestic decision makers. But, it also reflects the fact that “[t]he reparatory projects of societies in the extraordinary context of political flux [must] advance purposes related to radical political change other than those conventionally considered remedial, such as societal reconciliation and economic transformation.”404

Policymakers in countries undergoing such transformations therefore must grapple with the conundrum of providing a viable degree of “justice” for multitudes of individual human rights victims while ensuring the overarching social, political, and economic objectives of the transition.405 In addition, as numerous commentators have observed, honoring the concept of “justice” in the strictly reparatory sense is itself fraught with difficulties.406 In countries transitioning from repressive authoritarian regimes to liberal democratic ones,
like Eastern European nations formerly under communist rule or like South Africa under Apartheid, the challenge is determining who should be redressed if, in effect, “everyone suffered.”\textsuperscript{407} Even where state-sponsored atrocity has produced distinct classes of victims, as is typical in Latin America, it is not always clear where to best draw the line; domestic decision makers must make hard choices about which types of victims (and violations) will be covered by their reparatory measures and which ones will be excluded.\textsuperscript{408}

Finally, policymakers must strive to determine what constitutes “justice” for the victims selected, as well as how to achieve it. In other words, “what should victims in fairness receive?”\textsuperscript{409} This question alone has generated endless debate in the literature.\textsuperscript{410} It suffices for our purposes to emphasize that, regardless of the actual policy adopted, decision makers in transitional regimes generally have a range of possible reparatory strategies available to them,\textsuperscript{411} as well as an extensive array of remedial measures – pecuniary and non-pecuniary, or symbolic – all of which can be combined and calibrated to achieve the objectives selected to varying degrees.\textsuperscript{412} One of the issues and challenges inherent in this exercise is to reconcile the conflict that can arise between reparations for individual victims and the goal of promoting collective redress for groups or communities of victims.\textsuperscript{413} Given the zero-sum nature of financial and, often, political capital, to what extent does an emphasis on the former (reparations for individual victims) come at the expense of achieving the latter (collective or communal redress), thereby undercutting the overarching goal of reconciliation?

\textsuperscript{407}. 	extsc{Teitel}, supra note 211, at 132 (emphasis added) (quoting V. Havel).

\textsuperscript{408}. See De Greiff, supra note 14, at 9 (describing how different reparations programs at different times have excluded certain classes of victims due to political or other factors). The classic example is Chile, which omitted political prisoners and victims of torture from the original purview of its compensation policies. See Lira, supra note 397, at 77.

\textsuperscript{409}. De Greiff II, supra note 396, at 455.

\textsuperscript{410}. See generally OUT OF THE ASHES, supra note 11; HANDBOOK OF REPARATIONS, supra note 14.

\textsuperscript{411}. See supra note 399 and accompanying text.

\textsuperscript{412}. See De Greiff II, supra note 396, at 467-71 (outlining the range of possible pecuniary and non-pecuniary reparations measures). See also infra Part III.A.5.

\textsuperscript{413}. This paradigmatic debate tends to pit the focus on monetary compensation for individuals against the goal of “collective and symbolic reparation” for groups or communities of victims more broadly. Colvin, supra note 251, at 191. South Africa provides an enduring example of this dilemma operating at different levels, that is, not only within the design of a reparations program, but also in terms of transitional justice policy more generally. See id. at 184-86 (describing lawsuit brought by individual victims challenging the amnesty provisions of the TRC Act as unconstitutional because it foreclosed their rights to pursue judicial remedies). A recent example of this contraposition is Peru, where legislators removed the figure of individual compensation from the reparations proposal submitted by the TRC, opting instead to focus exclusively on collective reparations in the form of social benefits and development aid to communities. See Decreto Supremo No. 015-2006-JUS, Reglamento de la Ley No. 28592, Ley que crea el Plan Integral de Reparaciones, July 6, 2006 [initial regulations to Reparations Law defining modalities of reparations], available at http://www.registrodevictimas.gob.pe/normas.html (last visited Aug. 14, 2009).
2. Issues of Liability

How IMCPs and TJCPs respectively approach the issue of liability is further illustrative of the dynamic of difference between the two. By liability we refer to the process of determining whether a legal duty to compensate or otherwise redress the claimant exists through arbitration or some other dispute resolution mechanism that takes place as an integral part of the mass claims process. Deciding questions of liability is a pre-condition to the awarding of benefits in a regime that adopts this approach. As it happens, IMCPs can address liability issues; TJCPs do not.

IMCPs can be erected as the arbiters of legal responsibility with respect to state parties to the constituting agreements, or the nationals of state parties, as well as provide the mechanisms to ensure that successful claims are compensated. The first IMCP of modern times, the US-Iran Claims Tribunal, is a perfect example. It was charged with deciding contractual and property related claims by nationals of the United States or Iran brought against the other state, as well as adjudicating disputes between the two states themselves. Another recent experience is the Ethiopia Eritrea Claims Commission, which adjudicated *inter alia* the responsibility of each state party for the harm unlawfully inflicted on the nationals of the opposing state and their property during the course of the war between them. An arbitral approach to claims between private parties as opposed to states can be seen in the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-1), which had “arbitrators acting pursuant to arbitration law, with the power to issue final and binding [judgments and] awards.” And, even where an IMCP is engaged in a systematic sampling of claims for the purpose of extrapolating to the general claimant population, examining the merits of the sampled claims implicate decision making of an administrative and quasi-judicial nature.

414. See Norbert Wühler, *The Different Contexts in which International Arbitration is Being Used: International Claims Tribunals and Commissions*, 4 J. OF WORLD INVESTMENT 379, 379-97 (June 2003) (noting the rise of claims tribunals and arbitration commissions in a variety of settings and examining their similarities and differences); see also HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 97-98.

415. See Iran-U.S. Claims Tribunal case study supra Part II.


417. HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 99-100. Even though the arbitration was between private parties, the participation of the Swiss and United States governments was critical to the establishment of the Claims Resolution Tribunal. See CRT case study, supra Part II.

418. The UNCC Panel of Commissioners decided the claims and issued reports that recommended payments to compensate for losses suffered. The Commissioners would review the factual details of the claims and apply the appropriate international legal principles to resolve the disputes. The UNCC Commissioner was vested with full discretion in reviewing the facts and applying the appropriate law. HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 183. In this regard, the role of the UNCC Commissioner in issuing its decision was closer to what an administrative law
In contrast, transitional justice reparations programs in have been characterized primarily by domestic administrative procedures for the disbursement of reparations to persons who qualify as victims. Liability for the underlying violations is not at issue in these claims processes; it is generally pre-established or presumed. The primary questions are whether a given individual qualifies as a victim and whether he or she can establish a recognized claim to the benefits offered. In most cases, state responsibility for the harms redressed is established beforehand, often by a government-sponsored truth commission, or acknowledged by the successor regime implementing the reparations program. The newly democratic government in Hungary, where no truth commission operated, exemplifies the latter process in that it recognized expressly that it had a legal obligation to redress the abuses committed by the predecessor communist regime. Regardless of the approach, in the transitional justice context, it is the reparations program’s place among various other interlocking government policies, including those that address the issue of liability separately that explains this division of labor.

3. Nature of Parties and Claims Process

Additional differences between the two processes can be discerned by looking to the nature of the parties involved and the claims processes they create. In this section, we examine the instrumentalities that establish a claims process and the role its creators play in the development thereof. As we have seen, government actors tend to create IMCPs through the negotiation and execution of international instruments. The principal effort emanates from the executive who implements international agreements through his or her role as head of state. In contrast, TJCPs rely almost exclusively on individual political actors operating in the domestic arena. National legislatures develop statutory schemes that explicitly detail the workings of the reparatory programs. These legislative efforts tend to be sponsored, supported, and implemented by the executive acting in a role very different from the one he or she plays when negotiating, establishing and supporting an IMCP.

judge does than the decision-making role of officials in the Argentine or Chilean ministries, who were merely charged with distributing benefits pursuant to a fixed statutory scheme to persons who managed to prove the violation and their relation to the victim. See United Nations Compensation Commission and Argentina case studies supra Part II.

419. Of course, this can happen with IMCPs as well. See SHELTON, supra note 15, at 405 (“The decision of the Security Council to establish the UNCC has been analogized to “what is tantamount to a summary judgment holding Iraq responsible for a whole series of breaches of international law.””) (quoting Stanley J. Glod, International Claims Arising from Iraq’s Invasion of Kuwait, 25 INT’L LAW. 713, 715 (1991)). Even so, this approach did not completely remove liability issues from the Commissioners’ purview. See supra note 415 and accompanying text.

420. See, e.g., Argentina and South Africa case studies, supra Part II.

421. TEITEL, supra note 211, at 15-17.

422. See supra notes 401-04 and accompanying text.
In IMCPs, the state *qua* state is the engine behind the process, whether acting individually or collectively. The instrumentalities that are developed to resolve disputed claims result from state acquiescence to the principles of international law, specifically the concept of state responsibility.\(^\text{423}\) Treaties, international agreements, or United Nations actions are frequently the conduits through which states enforce a party’s responsibility for its wrongdoing. Third party mediation between Iran and the United States created the Iran-U.S. Claims Tribunal which adjudicated claims of expropriation and breach of contract resulting from Iran’s wrongful seizure of the U.S. Embassy. Negotiated peace agreements to adjudicate claims of property losses that were the result of hostilities between the parties resulted in the Commission for Real Property Claims of Displaced Persons (CRPC) in Bosnia and Herzegovina and the Eritrea-Ethiopia Claims Commission.\(^\text{424}\) State responsibility was also clearly implicated when the United Nations Security Council unanimously adopted Resolution 687 imposing a duty on Iraq to provide reparations for the losses suffered as a result of its invasion and occupation of Kuwait.\(^\text{425}\) Thus, the willingness of states to submit to international agreements or instrumentalities in resolving the disputes between them is the *sine qua non* for the existence of most IMCPs.

Unlike the establishment of an international mass claims process, where the state must act vis-à-vis another state or states pursuant to international law to resolve disputes between them. In a TJCP, domestic authorities within a state (e.g., the legislature, executive, and judiciary) act vis-à-vis each other in more starkly political terms to provide remedies to a sector of the domestic population harmed by prior governments. In South Africa and especially Argentina, the crucial role played by the newly elected presidents and their governments in promoting reparations as part of their transitional policies cannot be overstated.\(^\text{426}\) Similarly, the Hungarian Parliament, like the Argentine Congress, was the legislative motor behind the compensation schemes enacted during the democratic transition period. The judiciary in South Africa and Hungary also

\(^{423}\) See generally International Law Commission, Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, U.N. Doc A/CN.4/L.602/Rev.1 (July 2001). States recognize that “[e]very internationally wrongful act of a State entails the international responsibility of that State.” Id. art. 1. The corresponding precept is that a party injured due to an internationally wrongful act must be repaired. See Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 27, 28 (Sept. 13, 1928). In order to make these reparations, dispute resolution mechanisms are usually (although not exclusively) established by multilateral or bilateral government-to-government negotiations. See, e.g., supra notes 39-48 and 143-150 and accompanying text.

\(^{424}\) See HOLTZMANN & KRISTJANSODOTTIR, supra note 8, at 23, 33 for fuller discussion of the constituting method of these two institutions. Note that even though the CRPC was ultimately a domestically oriented procedure like those typical of TJCPs, e.g. Hungary, it was conceived and constructed as an IMCP, hence its inclusion as a case study in the Holtzmann & Kristjansdottir treatise on international mass claims processes.

\(^{425}\) S.C. Res. 687, supra note 138; see also SHELTON, supra note 15, at 405.

\(^{426}\) The same can be said of Chile. See Lira, supra note 397, passim.
played a central part in ensuring the viability of the respective governments’ reparations plan. And, one cannot forget that domestic non-state actors, including other parties to internal conflict or regime change, can also be critical to the development of TJCPs. South Africa presents just such a case in that negotiations between the African National Congress (ANC) and the National Party (NP) government resulted in the dismantling of the apartheid regime and the proposal of reparations for the wrongs committed. In almost all cases, however, TJCPs are designed, adopted, and implemented by government and state officials on behalf of the domestic victims of massive or widespread abuses committed by their predecessors.

The difference in the nature of the two types of claims processes is perhaps best reflected in the role played by international law in advancing the respective objectives of each. With respect to IMCPs, as noted, international law is the normative bedrock upon which such processes are erected; it generally provides not only jurisdiction as a function of state responsibility, but also governs the instrumentalities (treaties, agreements, and UN resolutions) that create them. The IMCPs’ rules of procedure emanate from established international norms and practices and, in some instances, their decisions possess legal authority beyond the confines of the claims process itself, forming an integral part of the corpus of international law. Conversely, domestic law entirely governs TJCPs, even where reference to the state’s international obligations is present. Procedurally, they are as much creatures of national legislatures as

427. See South Africa and Hungary case studies, supra Part II.
428. See South Africa and Argentina case studies, supra Part II. Victims groups and their NGO allies have also influenced the design and implementation of reparations programs, most notably in Argentina and Chile. See case studies supra Part II. Certainly non-state actors can also be important to IMCPs, as was the case with the CRT-I proceedings, but in the main such actors play a lesser role in the IMCP context than that of TJCPs.
429. Important recent exceptions include the Justice and Peace process in Colombia which provides for reparations to victims of the demobilized paramilitary groups. See Carrillo, supra note 398, at 143-48. In Peru, reparations programs benefit victims of the Shining Path guerrillas as well as state agents. In Peru, the definition of “victim” in the law creating the Reparations Plan refers to all persons who during the 20-year reference period suffered any of a series of listed abuses in the course of the internal armed conflict, regardless of whether the perpetrator was a state or private actor. Ley No. 28592, 20 July 2005, Congreso de la Republica, Ley que crea el Plan Integral de Reparaciones – PIR, available at http://www.registrodevictimas.gob.pe/normas.html (last visited Aug. 14, 2009).
430. Richard Falk distinguishes three scenarios involving reparations under international law: “disputes between states, and increasingly other actors,” “war/peace settings in which the victorious side imposes obligations on the losing side,” and “transitions to democracy setting in which the prior governing authority is held accountable for alleged wrongs.” See Falk, supra note 380, at 480.
431. Examples include the awards made by the Iran-U.S. Claims Tribunal and the judgments handed down by the EECC.
432. It is widely accepted that states have an obligation under international law to provide remedies and reparations to victims of gross and systematic violations of human rights and serious violations of humanitarian law. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious
IMCPs are of international law and relations. Thus, in the TJCP context, to the extent that international law is relevant at all, it is to provide legal arguments or jurisprudential background useful for representatives and advocates of victims’ rights in domestic political arenas to the effect that victims are legally entitled to reparations, and that the domestic system is obliged to make this right tangible by providing meaningful procedures.\(^{433}\)

4. Decision Makers

Issues related to the “macro” decisions about whether and how to create a mass claim process, as well as to the role of the parties that shape them, were addressed in prior sections.\(^{434}\) Here we focus exclusively on the “micro” component of decision making in the process of resolving individual claims once a mass claim procedure has been established. By “decision makers” we refer to those officials within a mass claims regime authorized to hear and/or resolve the legal issues leading to the decision to recognize a particular claim and award the corresponding benefits.\(^{435}\) What interests us here, however, is not so much what is decided as who decides it and how. Again, major differences are apparent.

All IMCPs require “a body that considers the merits of the claims.”\(^{436}\) As a rule IMCPs are divided into two kinds: those in which the body charged with examining claims – called a tribunal or commission – makes the final decision on the merits, and those in which the body “makes recommendations or rulings that subject to approval by a supervisory organ.”\(^{437}\) Examples of the former include the Iran-US Claims Tribunal, and the EECC, while the UNCC is a perfect illustration of the latter approach. Moreover, as noted, IMCPs often grapple with questions of liability, which can be central to the kind of decision maker selected.\(^{438}\) Thus, regardless of the type of IMCP chosen, the individuals selected to make final determinations tend to be persons of various nationalities with extensive prior experience in the field of international arbitration and/or

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\(^{433}\) Ruti Teitel agrees, viewing international law as a “mediating concept” that transcends domestic law and politics, thereby providing constructive and constitutive elements to the political debates that shape domestic transitional justice policies. See supra note 211, at 20; see also id. at 213-25 (describing a theory of transitional justice and the “transformative” role of law.).

\(^{434}\) See supra Parts III.A.1 and III.A.3.

\(^{435}\) See supra Parts III.A.1 and III.A.3.

\(^{436}\) HOLTZMANN & KRISTJANSDOTTIR, supra note 8 at 179.

\(^{437}\) Id.

\(^{438}\) See supra Part III.A.2. In some cases, policy making, executive and administrative function, such as setting the IMCP’s budget fall on the main decision makers as well. HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 299 et seq.; see, e.g., Iran-U.S. Claims Tribunal; see also EECC.
mass claim processing. Such experts, whether they are called “Judge” or “Commissioner” or any other of the terms applied to IMCP decision makers, are always appointed through a carefully balanced selection process that, while allowing for each party’s input, emphasizes impartiality and expertise.

In stark contrast to the experience expected of IMCP decision makers, TJCP decision makers are not required to have experience in transitional justice to carry out the compensation or other redress provided to domestic victims of human rights abuses. The “decision makers” in the transitional justice context are generally charged with determining the eligibility of individual claimants within a pre-established procedure. They tend to be government officials operating in an administrative capacity to implement a legislatively supported reparations scheme or program. As noted already, specialized institutions or procedures are sometimes created within the executive branch to implement such programs; other times, existing state or government agencies are called upon to execute the new regime (or parts of it), just as they would any other legislative or executive act. The question of implementation is separate, of course, from the issue of defining reparations policy, which may involve the participation of civil society and international experts on the subject, as in South Africa during the TRC experience, or in Argentina through victims’ organizations.

On a related note, it is telling that a defining characteristic of the IMCP field is the extensive “recycling,” in the constructive sense, of experienced international arbitrators and experts in mass claims commissions from one IMCP to another. The list of dignitaries who have comprised the PCA’s Steering Committee on Mass Claims Processes illustrates this fact: several members have served on two or more IMCPs, and some on three or more. This profile is intentional; the idea is that institutional knowledge has been and should be passed from IMCP to IMCP, not least through those individuals who are primary actors or decision makers. In other words, international mass claims processing is a field dominated, in the positive sense, by a reduced number of eminent persons, and by institutions like the Permanent Court of Arbitration with which they are affiliated. Obviously, no such dynamic exists.

439. HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 5, 7, 375 (indicating the multiple IMCP experiences of the PCA Steering Committee on Mass Claims Processes members).
440. See id. at 180.
441. See, e.g., case studies supra Part II; see also De Greiff, supra note 14, at 17 n.22.
442. See supra note 392 and accompanying text.
443. See HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 5, 7, Annex A (indicating multiple IMCP experience of the PCA Steering Committee on Mass Claims Processes members).
444. Id. at Annex A.
445. Id. at 7.
446. For example, Lucy Reed was the Agent at the U.S-Iran Claims Tribunal, an arbitrator on the EECC panel, and one of the co-directors of the CRT-I. Howard Holtzmann was a judge for the Iran-U.S. Claims Tribunal, the CRT-I and the CRT-II. Hans van Houtte was a judge for the CRT-I.
in the TJCP context; nor could it. Such an approach would be wholly out of place in the respective domestic arenas in which local elected officials debate, design, adopt and implement domestic policies on reparations through administrative and other legal channels.  

5. Remedies

Perhaps no other issue is as critical to the analysis underway than that of the remedies awarded by the two types of claims processes. Indeed, the prevailing wisdom depicted in the introduction holds that these restitutionary processes are “comparable” precisely because they appear to do similar things, i.e. provide relief to persons who have suffered some sort of harm. Nonetheless, as we have seen, there is a great deal more to contrast in these claims processes than meets the eye. Unsurprisingly, the significant variations that exist in the form, focus and purpose of the remedies provided within their respective contexts mirror the substantial divergences between IMCPs and TJCPs already described in terms of goals, function, and composition.

It is helpful to recall the nature of the claims processes analyzed to highlight once more that IMCPs often serve an arbitral function entailing the adjudication of claims to establish liability for losses suffered at the hands of a specific party. These claims processes provide declaratory relief to the parties before them as well as remedies. Moreover, they often offer the added benefit of influencing subsequent decisions in similar cases where decisions are made public. Because transparency is generally considered a virtue, arbitral awards and other IMCP decisions are regularly published. The Iran-US Claims Tribunal Rules require all awards and decisions to be made public. Those of the Ethiopia Eritrea Claims Commission are available on its website. The publication of such findings within a given international claims process is

and an arbitrator on the EECC panel.

447. This is not to say that there is no expertise accumulated or shared in the transitional justice area among domestic actors and international experts. It exists, but on a different order of magnitude. For a detailed discussion of the differences involved, see infra Part III.A.8 (discussing the transferability of experiences).

448. Crook, supra note 1, at 55; see also OUT OF THE ASHES, supra note 11, at 417-18.

449. See supra notes 411-15 and accompanying text.

450. See SHELTON, supra note 15, at 34 (stating “[c]ourts [and tribunals] have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. A declaratory judgment is the least coercive form of remedy and is often used for resolving uncertainty in legal relations.”).

451. See HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 116-117, 122-23 (describing the practice of de facto precedent by the Iran-U.S. Claims Tribunal and the EECC).

452. See id. at 369.

453. Iran-U.S. Claims Tribunal Rules, supra note 56, art. 32, ¶ 5; see also supra note 81.

Important because it allows decision makers to “refer to past cases in the interest of fostering uniformity, and [at the same time] submissions by parties and awards [will] typically include references to earlier decisions which, while not binding, are often influential.” In addition to promoting internal consistency, the publication of arbitral decisions and awards can also contribute to the development of international law more broadly. This contribution has certainly been seen with the Iran-US Claims Tribunal’s jurisprudence and that of the Ethiopia-Eritrea Claims Commission.

Regardless of whether an IMCP is constituted as an arbitral tribunal or an administrative proceeding, the primary remedy awarded to successful claimants is limited to either monetary compensation or restitution of property or assets. Of the ten international mass claims processes examined by Howard Holtzmann and Edda Kristjansdottir in their landmark comparative analysis for the Permanent Court of Arbitration, every one provided predominantly, if not exclusively, for compensation or restitution as a remedy for property loss. In the few instances where personal injuries were also addressed (e.g., UNCC), monetary compensation was the sole remedy. Notably, the EECC, while emphasizing monetary compensation as the “appropriate” remedy for successful claims, left the door open to “other types of remedies in appropriate cases,” though it did not specify what those remedies might be or under what circumstances they would be available. Nonetheless, it is plain that the IMCP framework, premised as it is on state responsibility principles under international law, is characterized by a marked remedial focus on monetary compensation: “Of the various forms of reparations, compensation is perhaps

455. HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 118. The same influence can be true of quasi-administrative bodies such as the UNCC, which published all of its decisions online as well. See United Nations Claims Commission Website, available at http://www.uncc.ch (last visited Apr. 29, 2009).

456. The arbitral decisions are frequently cited in international law and have made notable contributions to its development. See JAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 19-20 (5th ed. 1998).

457. See supra note 80 and accompanying text.


459. See HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 72-82. This general practice is, of course, reflected in the IMCP case studies in Part II. Other remedial measures contemplated in rare instances are injunctions and specific performance, as ordered by the Iran-US CT. See id. at 74.

460. EECC Decision No. 3: Remedies (July 24, 2001) available at http://www.pca-cpa.org (last visited Apr. 29, 2009). Apparently there was concern on the part of the Tribunal that other types of remedies might be necessary to redress aspects of the social and economic chaos caused by the brutal armed conflict between Ethiopia and Eritrea. See HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 81.

461. See supra Part III.A.3; see also Draft Articles on Responsibilities of States for Internationally Wrongful Acts, supra note 423, arts. 31, 34-36.
the most commonly sought in international practice."462 This is especially true
where restitution of property or assets is not available, 463 or where personal
injury is the harm redressed.464 In short, keeping in mind their potential arbitral
function, IMCPs are created through the operation of international law primarily
to compensate successful claimants for losses or harms incurred.465

Countries form TJCPs in order to provide reparations, which can include
compensation, to eligible victims for past human rights violations. Three
fundamental principles underlie the differences in practice between IMCPs and
TJCPs. First, TJCPs, as a rule, do not engage with issues of liability and thus
afford no declaratory relief to individual claimants.466 Unlike IMCPs, TJCPs are
never adversarial in nature.467 The exclusive purpose of domestic reparations
programs is to resolve the claims of qualified victims of selected human rights
abuses for whom certain entitlements have been recognized. Such was the case
in each of the three TJCP case studies summarized in Part II, and this continues
to be the common practice.468 There are no decisions or awards in the
adjudicatory sense, since the only “decision” to be made is an administrative
determination as to which applicants claiming reparatory benefits are eligible
according to pre-determined criteria.

Second, TJCPs can do much more than just provide monetary
compensation to victims. As we have seen, “[t]ransitional reparations may take
many forms: They can be in kind, as in property restitutions, monetary
payments, or nonconventional redress, such as education vouchers or other
collective public benefits, such as memorials, legislative rehabilitations, and
apologies.”469 The transitional governments in South Africa, Argentina and
Chile sought to combine compensation with other types of redress including
enhanced social benefits and state efforts aimed at victim dignification.470 This
multifaceted approach to construing remedies for victims of mass political

462. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE
463. Id. at 218-19.
464. See SHELBON, supra note 15, at 103 (noting “[i]t appears from the law of state
responsibility for injury to aliens that restitution is often impossible due to the nature of the injury
and that compensation for material and moral harm therefore constitutes the general form of
reparation.”).
465. See supra note 378 and accompanying text.
466. See supra note 419 and accompanying text. The Colombian Justice and Peace Process is
arguably a notable deviation from this otherwise uniform practice, despite the fact that it represents a
sui generis approach to a unique and complex situation. See Carrillo, supra note 398, at 133-51.
467. See supra note 420 and accompanying text.
468. A current example is provided by the Peruvian reparations process. See supra note 396-97
and accompanying text.
469. TEITEL, supra note 211, at 146.
470. See Argentina and South Africa case studies supra Part II; Lira, supra note 397, at 55-101
(discussing Chile’s various programs providing pensions, military service exceptions, as well as
health and educational benefits to surviving victims of the political repression).
violence is the prevalent one today.\textsuperscript{471} International human rights law recognizes a diverse array of reparatory measures available to those designing domestic reparations programs,\textsuperscript{472} each configured to address a different dimension of the profound personal harm inflicted by serious human rights violations.\textsuperscript{473} Monetary compensation is but one such measure, and increasingly not the preferred one in the transitional justice context.\textsuperscript{474} The ongoing reparations programs in Peru, for instance, omit individual payments altogether, and focus instead on providing health and educational benefits to the Andean communities most affected by the brutal conflict with Sendero Luminoso.\textsuperscript{475}

Third, even where compensation is central to a domestic reparations program, it is but one of various means adopted to reach a variety of transitional justice ends. In addition to the role that indemnification can play within the broader reparatory calculus, when combined with other remedial measures to maximize effective redress to individual victims, it must also complement national reconciliation policies that preoccupy transitional governments.\textsuperscript{476} In other words, just as compensation is inherently part of a larger reparations program, these programs are themselves inextricably linked to other transitional

\textsuperscript{471} When the government in Colombia attempted to implement transitional justice type legislation that did not fully recognize the rights of victims to reparations, among others, international and domestic pressure obliged law-makers to reform the law to ensure that the reparations regime complied with Inter-American and other legal standards to which Colombia had adhered. See Carrillo, supra note 398, at 133-58.

\textsuperscript{472} See G.A. Res. 60/147, supra note 432. See also Velasquez-Rodriguez, Inter-Am. Ct. H.R., (Ser. C) No. 4 (1988); TEITEL, supra note 211, at 124-29 (describing the influence of the Velasquez-Rodriguez Judgment and subsequent Court practice on development of reparations policy and practice in Latin America). For a recent analysis of the influence of the Court on the development of reparations under international human rights law, see Thomas Antkowiak, Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond, 46 COLUM. J. TRANSNAT'L L. 351 (2008).


\textsuperscript{474} In domestic reparations practice, as opposed to that derived from the adjudication of individual cases under international human rights law, reparatory measures can be generally organized as follows: (1) symbolic measures, both individual and collective in nature; (2) service or benefits packages, including medical, educational and housing assistance; and (3) individual grants or monetary compensation. See De Greiff II, supra note 396, at 467-71. In South Africa, a form of symbolic compensation was made only after intense national and international pressure was brought to bear on the ANC government. See Colvin, supra note 251, at 200-2009 (describing the ‘fight for reparations’ after the TRC’s recommendations were published).

\textsuperscript{475} See supra note 413 and accompanying text. Concerns about the strain that “full” compensation can place on the state’s resources has led numerous commentators to disfavor anything more than mere symbolic compensation in the context of mass reparations programs. See, e.g., Falk, supra note 380, at 492.

\textsuperscript{476} See supra note 399 and accompanying text. One perceived conflict is that which arises when emphasis is placed on individual grants at the expense of collective reparations promoting reconciliation. See, e.g., De Greiff II, supra note 396, at 467.
policies writ large. In South Africa, victims challenged the Truth and Reconciliation Commission’s authority to expend amnesties through its truth-telling process on the ground that the Commission unconstitutionally curtailed the victims’ right to pursue not only criminal justice vis-à-vis perpetrators, but also civil remedies (damages). The judgment upholding the South African Parliament’s prerogative to subordinate individual victims’ rights in this respect to the overarching constitutional aims of reconstruction and reconciliation had important implications for the underlying issue of reparations. Advocates read the judgment as confirming the legal basis for a substantial reparations program because “by immunizing itself and those individuals responsible for human rights violations, the State... assumed the burden of responsibility to compensate those victims whose right to criminal and civil redress was denied.” Although the formal trade-off envisioned by this interpretation was neither explicitly recognized in the judgment nor borne out by subsequent events, the intense polemic it generated illustrates the interrelated nature and inherent tensions between parallel transitional policies regarding truth, justice and reparations.

6. Claimant Participation

Significant differences also exist between IMCPs and TJCPs with respect to the roles that the communities of persons affected by the claims processes play. One could expect that potential claimants should have an influence on the formation, development, and implementation of those processes. As it happens, such claimant participation is virtually unheard of in the IMCP context, but significant with respect to most TJCPs. Given the predominantly interstate nature of IMCP formation, parties behind such an initiative tend to act on behalf of claimant communities that have little or no impact on the negotiations or implementation of the claims mechanism. In comparison, the victim communities who ultimately benefit from TJCPs are often actively involved in

477. For a discussion of the overlapping and at times competing goals of reparatory and transitional justice, see supra Parts III.A.1 and III.A.3.


480. In relevant part, the prevailing interpretation of the judgment seems to be that “a reparations program could take any number of forms and need not necessarily be tied down to the specific question of the loss of rights of redress of particular individuals.” Colvin, supra note 251, at 187.

481. Notable exceptions to this general practice are the CRT processes, as well as other Holocaust-related claims processes, which due to their unique nature benefitted from the influence of well-organized and politically powerful Jewish claimant communities. See HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 91.
the discussions that drive government actions to create and guide such processes.

Due to the exclusive role of the executive branch in negotiating the instrumentalities governing IMCPs, individuals in claimant groups have little or no input into the development of these entities. IMCPs exist because governments make binding international obligations that create them. In so doing, the executive exercises the sovereign right to negotiate treaties under international law, thereby eliminating the citizens’ ability to provide meaningful input into the formation of the dispute resolution mechanism. When the Iran-US Claims Tribunal was created, tens of thousands of U.S. citizens who had claims against Iran were impacted by the United States’ exercise of its sovereign authority. Yet there was no claimant participation in the negotiation of the Algiers Accords. In the negotiation, the U.S. agreed to nullify the opportunity for U.S. citizens to litigate such claims in U.S. courts; instead the aggrieved parties were required to bring their claims exclusively to the Iran-U.S. Claims Tribunal. Indeed, since states are the constituting parties behind most IMCPs, they often play the role of formal claimant on behalf of their citizens who have suffered losses or injuries. At the UNCC, for instance, eligible governments filing claims on behalf of their citizens had to distribute the awards received to the individual beneficiaries.

Unlike IMCPs, TJCPs like those in Argentina and South Africa and elsewhere, saw victims and civil society organizations play instrumental roles in the development of the reparations programs eventually adopted. “The most general aim of a program of reparations is to do justice to the victims.” Thus, within the newly democratic institutions characteristic of most transitional societies, victim communities and local civil society organizations tend to play active roles in the debates that lead to the creation of TJCPs. For instance, in

482. See supra Part III.A.3.

483. For instance, only officials of the United States and Iran, through Algerian government officials, negotiated the Algiers Accords, with no expectation of a role for individual claimants in either the formation of the Tribunal’s policy or procedure. See Owens, supra note 38, at 297-324.

484. Id.; see also HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 19-21.

485. See supra Iran-U.S. Claims Tribunal case study, Part II.

486. See supra notes 198-202 and accompanying text.

487. Andrea Armstrong defines these local organizations as “civil society groups.” Broadly speaking, these groups include informal traditional associations, voluntary religious, ethnic, and professional entities, and formal non-governmental organizations. Armstrong, supra note 127, at 245. For a historical perspective on the role of civil society actors in the first successful individual reparations program, see id. at 247-51 (discussing the role of Jewish advocacy organizations, including the Conference on Jewish Material Claims Against Germany, in negotiating Germany’s reparations laws implemented to compensate victims of the Nazi government).

488. De Greiff II, supra note 396, at 455.

489. Local organizations often play an important role in the “origin, design, and implementation of reparation legislation within the context of transitional justice.” Armstrong, supra note 127, at 245.
Argentina, thanks to the judicial cases brought by or on behalf of the persons detained during the dictatorship, the Argentinean government decided to grant economic reparations to all persons detained during the dictatorship. Further, due to the adamant advocacy of relatives of persons who were “disappeared”, Argentina enacted a series of laws in which the assignees of the nearly 9,000 victims of forced disappearance automatically had a right to compensation without having to first declare their loved ones dead, as under the previous rules. Similarly, in South Africa, the disenfranchised and victimized communities of the apartheid regime provided the impetus for the notion that any reparations program must include a compensatory component. In designing a general reparations policy to recommend to the government, the Committee on Reparations and Rehabilitation, appointed by the Truth and Reconciliation Commission, relied heavily on its nationwide consultations with these victims, incorporating their preference for monetary compensation in the broader reparations strategy it recommended.

7. Payment and Enforcement of Decisions

One of the more notable differences that exist between IMCPs and TJCPs is the role of funding for the claims process. This issue, both in terms of operational funding, as well as that available for compensation, is a function of the political strength of the constituting entity or entities. It is also a function of their capacity to obtain and implement monies to finance the process. With regard to IMCPs, compensation for claimants’ property losses or personal harm suffered is the *raison d’être* for the establishment of the claims process under international law. Accordingly, either the governments that have created the IMCP or independent sources that have a vested interest in insuring the IMCP’s

490. See supra notes 99-116 and accompanying text.

491. See Guembe, supra note 84, at 38. However, victims’ groups were not uniform in their support of reparations for “forced disappearances”. Mothers of Plaza de Mayo Association believed that accepting economic reparations was akin to prostituting themselves, while Mothers of Plaza de Mayo – Founding Group asserted that the decision to accept or reject reparations was a choice that had to be made by the affected individual. See also id.

492. See Argentina case study, supra Part II. Prior to this, the Ecumenical Movement for Human Rights lobbied for the creation of the legal status of “disappeared” that did not presume death and drafted the first version of Law 24,321, which was adopted in May 1994. See Armstrong, supra note 127, at 253 (citing Guembe, supra note 84).

493. In order to develop a final reparations policy, the Commission on Reparations and Rehabilitation (CRR) consulted with individual victims and victim advocacy groups. Orr, supra note 250, at 242; see also Colvin, supra note 251, at 191 (discussing that most victims when asked in private by the CRR about their needs listed money or compensation as their first priority). In 1997 and 1998, the CRR also held a series of public meeting throughout the country seeking input from victims, NGOs, community-based organizations, and churches. Id. Due to the active role played by the TRC and CRR, local organizations found it difficult to exist independently and were more reactive than proactive, unlike the civil organizations in Argentina. See Armstrong, supra note 127, at 259, 262.
success usually guarantee the availability of funds for both the operation of the institution as well as payment of its awards.\textsuperscript{494} In contrast, funding for TJCPs tends to be more difficult as resources are often scarce in the developing countries that tend to undergo radical transitions. At the same time, there are always competing social-political interests that vie for the limited resources available to compensate the massive human rights violations at issue. For all of these reasons, among others, many transitional countries with legacies of human rights abuses forego pursuing reparations programs.\textsuperscript{495}

Sources for funding an IMCP are often quite divergent and depend upon the type of mechanism that the constituting instruments have created. “Each arrangement is largely the result of political circumstances, as well as the relative financial abilities and bargaining strengths of the parties funding the particular [p]rocess.”\textsuperscript{496} In the IMCP context, governments, as sovereign actors, are usually creating institutions to resolve property disputes between them. As a result, they tend to possess the political will and financial wherewithal to achieve the successful funding. In addition, IMCPs are often structured such that the party-governments fund the operating expenses of the institution. For example, the Algiers Accords explicitly set forth the funding for the Iran-U.S. Claims Tribunal, providing that each government would pay one-half of the expenses of the Tribunal.\textsuperscript{497} Likewise, the Eritrea-Ethiopia Agreement provided that the two governments were to fund the EECC Claims Process.\textsuperscript{498}

Other IMCPs have had their expenses paid from a settlement funded by one party whose obligations for funding the IMCP were explicitly delineated or imposed by the party-governments establishing the mechanism. At the UNCC, pursuant to UN Security Council Resolution 687, Iraq had to pay all expenses for the operating costs of the UNCC.\textsuperscript{499} Similarly, the Swiss banks (with the tacit approval of the Swiss government) paid all expenses for the Claims Resolution Tribunal.\textsuperscript{500} In the latter two circumstances, the party that had to pay the operating expenses had the economic capacity to comply with this obligation. As a rule, however, the lack of funding will not usually affect the day-to-day operations of an IMCP. Regardless of the method by which the IMCP was constituted, state parties recognize their international legal

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\textsuperscript{494} This observation is not suggesting that the financing of IMCPs is necessarily straightforward or non-contentious. States and other administering bodies involved in such initiatives can struggle to ensure availability of sufficient resources, as has been the case with the Iran-U.S. Claims Tribunal. See C. Pinto, supra note 64, at 108. But the difference is nonetheless palpable vis-à-vis national governments seeking to implement a domestic reparations policy, especially one that includes compensation.

\textsuperscript{495} See supra note 32 and accompanying text.

\textsuperscript{496} HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 357.

\textsuperscript{497} See supra notes 62-64 and accompanying text.

\textsuperscript{498} Ethiopia-Eritrea Agreement, supra note 416, art. 5, ¶15.

\textsuperscript{499} See supra notes 188-95 and accompanying text.

\textsuperscript{500} HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 360.
obligations and tend to ensure suitable funding exists for the payment of awards.

In contrast, funding for TJCPs is often elusive since *domestic* social and political realities create impediments to effective funding of both operations and remedial measures. Two models exist for funding reparation programs: national and international resources financing the creation of special funds, and direct financing of the reparations program using funds from the public budget. Experience shows that governments that support the direct financing of reparations programs through the public budget, such as those in Chile, Argentina, and Brazil, are likely to enjoy more stable and adequate financing of their reparations programs. However, governments internally are not subject to the types of pressures that states face internationally, making it more difficult to guarantee funding adequate to effectuate the recommendations made by truth commissions or otherwise established in relation to reparations. Transitional governments with scant financial resources in particular have often to choose between funding programs for reparations or other important social programs.

In the transitional justice context, financing is “fundamentally a political process that requires considerable mobilization of public financial resources, achieved by either a reorientation of existing resources and/or obtaining additional resources.” The challenges in both respects are substantial. Not surprisingly, some transitional governments prefer to fund social programs that appear to address structural problems, such as poverty, inequality, and exclusion, over reparations programs that directly compensate victims and their families for human rights abuses. Ultimately, the decision to fund such programs depends on the existence of adequate political will or the ability of proponents to forge that will in the branches of the transitional government. Guatemala is a clear example of inadequate political will. Despite the recommendations in the Peace Agreements to compensate victims, in practice, state responsibility principles, especially the duty incumbent upon states to repair the harm caused by their wrongful acts, which often consists of compensation, likely play an important role in ensuring that many IMCPs receive funding. See supra note 423 and accompanying text. In other words, states are most likely to produce funds, voluntarily or involuntarily, when they have engaged in serious violations of international legal obligations and are subject to the types of pressures that states face internationally, making it more difficult to guarantee funding adequate to effectuate the recommendations made by truth commissions or otherwise established in relation to reparations. Transitional governments with scant financial resources in particular have often to choose between funding programs for reparations or other important social programs.

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503. Id.

504. Id. at 651. Segovia posits that governments in this situation are not willing “to risk their political capital for seeking a mobilization of those resources.” Id. See also supra notes 433, 500-02 and accompanying text, to the effect that international law plays more of an indirect role in guiding domestic political debates and decisions than it does internationally between states.

505. Segovia, supra note 502, at 655.

506. Id. at 654, 673 n.13.
the state has advanced very few reparation measures; a circumstance that the
government attributes to a lack of financial resources to fund such a process.\textsuperscript{507} Sometimes even political will is not enough; though Argentina was largely
successful in implementing a series of compensation schemes,\textsuperscript{508} payment was still halted during Argentina’s financial crisis.\textsuperscript{509}

Generally speaking, reparations programs that include compensation for
victims have been feasible only when the political parties or coalitions in power
are committed to adopting the necessary measures and making the promised
payments.\textsuperscript{510} States that have looked to the international community for support
have often disappointed in the response.\textsuperscript{511} Ultimately, a strong political
incentive in favor of such efforts accompanied by support from the executive,
legislative, and judicial branches of government must exist to mobilize the fiscal
resources necessary for a functional TJCP.

8. Transferability of Experiences

As noted earlier, IMCPs tend to share institutional and personnel resources
in ways that facilitate the accumulation of expertise over time.\textsuperscript{512} The
identification of a handful of international experts who sit on multiple IMCPs is
clear evidence of this dynamic, one that ensures the beneficial and desirable
outcome of maintaining continuity of experience in the field.\textsuperscript{513} It was no
coincidence that when the parties were choosing their candidates for the EECC,
persons with prior experience in the Iran-US Claims Tribunal, the UNCC and
CRT I were at the top of the list. Institutions like the Permanent Court of
Arbitration have become repositories for this specialized knowledge and have
strived to capitalize on it through successful efforts at systematization and
comparative analysis.\textsuperscript{514} The model rules of procedure that the PCA crafted, for

\begin{footnotesize}
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\item Segovia, supra note 502, at 662. Until recently a similar situation existed in El Salvador.
\item Id.
\item Guembe, supra note 84, at 45. “The Argentinean experience stands outs among these
transitions for its efforts regarding truth telling, prosecution of the military juntas and economic
reparations for victims.” Id.
\item Crook, supra note 1, at 57 (citing Larry Rohter, In Argentina, A New Injustice, INT’L
\item Segovia, supra note 502, at 666. For instance, Chile’s reparation program was directly
financed from the public budget without any major opposition since the political parties that came to
power post-Pinochet supported reparations. Id.
\item Id. at 659.
\item See supra notes 443-46 and accompanying text.
\item Id.
\item The PCA in particular created the Steering Committee on Mass Claims Procedures for this
purpose, building on a prior body of work to publish new and more comprehensive studies of the
field, most notably International Mass Claims Process. See the PCA’s website for more information
\end{enumerate}
\end{footnotesize}
instance, are often the first stop for decision makers developing a new IMCP.\footnote{515} In light of these practices, it is easy to see why the assumption that the PCA and others have actively promoted that many of the lessons that a given IMCP taught will be relevant, if not directly transferable, to subsequent mass claims processes of a similar nature\footnote{516} Almost by definition, IMCPs today are to be built upon the foundation provided by the structural, procedural, and substantive legacies of their predecessors.

Despite similar efforts to systematize the TJCP experience,\footnote{517} nothing approaching the high degree of “transferability” which characterizes the IMCP practice exists with respect to the development of domestic reparations programs. Any country undergoing a radical political transformation will have to obey primarily domestic forces, even while recognizing the relevance of other TJCPs that have gone before. In South Africa, where input from Argentina and Chile was key to informing the process, the government arrived at a different blend of truth, justice and reparations than these predecessors.\footnote{518} Similarly, in Colombia, state, government and civil society actors have exhaustively studied the transitional justice experiences in those and other countries such as Northern Ireland and Sierra Leone, but have innovated an entirely new approach tailored to the particulars of its transitional process.\footnote{519} This is not to say that expertise is not accumulated or shared in the transitional justice field. Organizations like the International Center for Transitional Justice (ICTJ), along with experts from other countries that have undergone such transformations, are actively involved in advising policy-makers and other key actors, including civil society, in places where such processes are underway.\footnote{520} But the transference and implementation of “lessons learned” between domestic actors in the TCJP context do not, and arguably cannot occur to nearly the same degree as in the IMCP setting.\footnote{521}

B. IMCPs and TJCPs: How are they comparable?

The Article now turns to a review of actual and apparent similarities identified in light of the preceding analysis. To facilitate the discussion, this section is organized into two sub-sections, the first addressing “true” parallels, the second dedicated to exploring a number of “partial” parallels suggested by

\begin{itemize}
\item \footnote{515.} Holtzmann & Kristjansdottir, supra note 8, at 205.
\item \footnote{516.} See, e.g., Holtzmann, supra note 383, at vi.
\item \footnote{517.} See, e.g., Handbook of Reparations, supra note 14; Out of the Ashes, supra note 11.
\item \footnote{518.} See South Africa case study, supra Part II.
\item \footnote{519.} See Carrillo, supra note 398, at 133-58.
\item \footnote{520.} The ICTJ website provides a good account of its advisory function and other activities throughout the world. International Center for Transitional Justice, http://www.ictj.org (last visited Mar. 29, 2010). In Colombia, the ICTJ has an office in Bogota headed by the former executive secretary of the Peruvian Truth and Reconciliation Commission.
\item \footnote{521.} See infra Part III.C.
\end{itemize}
our exploration of the divergences above. The former looks at traits or mechanisms shared by IMCPs and TJCPs possessing functional equivalencies. The partial parallels consist of characteristics that are ostensibly shared by the two, but that, when viewed in close context, are not as operationally compatible or interchangeable as they may first appear. By distinguishing between true and partial parallels, we hope to set the stage for a better method of evaluating and applying the lessons learned from transnational mass claim processes: the subject of Part IV.

1. True Parallels

The true parallels between IMCPs and TJCPs are best viewed as procedural mechanisms and techniques that share a high degree of operational interchangeability. We define true parallels for purposes of our analysis as functionally comparable principles and procedures inherent in any mass claims process, regardless of context. One such principle is that of credibility: all mass claims processes struggle in similar ways to establish their legitimacy in the eyes of beneficiaries, as well as those of the parties and societies responsible for their creation. The best examples of functionally comparable procedures are those that define the process of mass claims processing: outreach; identifying and screening claimants; collecting and evaluating evidence; as well as, more recently, techniques for handling large numbers of mass claims. These principles and procedures provide a better basis for comparative analysis of mass claims type processes than other aspects because: 1) they are largely impervious to the social, legal and political context within which they operate; and 2) their basic content, form and function will not vary substantially from context to context.

One of the hallmarks of any successful claims process is credibility. A claim process, whether IMCP or TJCP, must not only be legitimate and fair, but also perceived as such to establish credibility.522 Legitimacy in either context is established by the exercise of recognized authority through established legal procedures, as when TJCPs are created and operated through coordinated executive, legislative and judicial action,523 or when state parties reach agreements under international law defining the IMCP.524 But such origins are themselves insufficient to definitely establish the credibility of an IMCP or TJCP; any claims process must also ensure that legitimate outcomes are achieved in a manner that is fair and is perceived as such. Generally speaking, a number of basic elements go into making a claims process fair; these include the trustworthiness of the implementing institution or mechanism, decision-maker neutrality, the opportunity for claimants to be actively involved in the procedure,

522. See, e.g., Van Houtte et al., supra note 323, at 107; De Greiff II, supra note 396, at 471.
523. See Argentina, South Africa and Hungary case studies, Part II supra.
524. Van Houtte et al., supra note 323, at 107; see also supra Nature of Parties and Claims Processes, Part III.A.3.
and, of course, the treatment of claimants with dignity and respect.\footnote{525} Also essential to fairness is the principle of non-discrimination – in other words, that similar cases be treated in a similar manner.\footnote{526} These factors are critical to establishing credibility, itself a prerequisite to ensuring the successful implementation of any mass claims process. Because of their ability to guarantee the presence of several, if not all, of these factors, all of the IMCPs and most of the TJCPs described in Part II have enjoyed high degrees of credibility.\footnote{527}

But perhaps the strongest parallels exist at the level of the functionally comparable procedures that make up the mechanics of mass claims processing. These are like the basic parts of a car – fan belts, spark plugs, tires, etc. – that tend to be interchangeable between similar makes and models of automobile, year after year. Such basic mass claim component “parts” include procedures for determining claimant eligibility, carrying out outreach to claimant communities, conducting initial screening of potential claimants, as well as collecting, processing and evaluating evidence in thousands of cases, and sometimes more. Regardless of the constituting method employed or context at issue, each of these elements embodies a fundamental dynamic of mass claim processing that, at some level, must be present. The functional interchangeability and similarity in form of these basic components guarantee not just the relevance, but the utility as well of the parallels they represent to the comparative analysis of IMCPs and TJCPs.

What follows is a brief introduction to these process-based parallels, focusing on those that we believe offer the best opportunities for productive cross-referencing between mass claim types. This survey is by no means exhaustive, nor is it intended to provide a definitive statement of each component. Rather, our goal is to shift the focus of debate in this area to those elements of mass claims processes that best lend themselves to fruitful comparative analysis.

\textit{a. Claimant eligibility and outreach}

Any mass claim process must determine who will be an eligible claimant and inform him or her of its existence through some form of outreach.\footnote{528} Usually the eligibility standards for IMCPs are explicitly defined in the constituting instruments for the claims process or the procedural rules. Likewise, statutory provisions or executive decrees provide for the criteria for eligibility in

\footnotesize{525. Van Houtte et al., supra note 323, at 111-12.}\\
\footnotesize{526. See Rombouts et al., supra note 12, at 459.}\\
\footnotesize{527. The exception on the TJCP side appears to be the South African reparations program. The government’s reticence to compensate in accordance with the TRC recommendations, among other shortcomings, has been widely criticized for not responding to the needs of the victim community. See supra notes 303-304 and accompanying text.}\\
\footnotesize{528. Van Houtte et al., supra note 323, at 139.}
TJCPs. These sources tend to establish access by demarcating the types of claims that can be made as well as identifying who can make them. Interesting parallels will arise in situations where a shared substantive focus exists between mass claims processes, e.g., where the type of harm addressed stems primarily from human rights-type violations. This occurs when eligibility in the IMCP context, like with all TJCPs, turns on who is defined as a “victim” of state abuse.529 These types of parallels, like several of those to follow, will become increasingly important as new IMCPs are set up to provide compensation and other redress to victims of international crimes.530

Once the claimant categories are identified, an outreach strategy must be implemented to inform potential beneficiaries of the remedies available. “A Mass Claims Process has little practical value unless the potential claimants are aware of the opportunity to make claims and are given information on how to do so.”531 To the extent that an IMCP focuses on claims arising within a country or defined geographic region, the strategies it employs will correlate well with those available to TJCPs undertaking the same task. Typically, in both contexts, the strategies involved will draw upon all types of media to implement an informational campaign targeting the communities of potential claimants, as well as the public at large.

b. Initial screening procedures

Regardless of the type of mass claims mechanism or context involved, once the claims start arriving they must be screened, sorted, and processed. The objective of these efforts will generally be the same across the board: “to weed out claims that fall outside the scope of the ... programme or that are incomplete.”532 Over time, IMCPs in particular have developed and honed a range of effective procedures for this function. For instance, initial screenings for procedural requirements, like timeliness and sufficiency of the filing, are often performed by a registrar or secretariat, as occurs at the Iran-U.S. Claims Tribunal and the UNCC.533 The CRT-I provided for an arbitrator to make an

529. For instance, the CRT-II Governing Rules established claimant eligibility by defining victims entitled to file a claim as “any person or entity persecuted or target for persecution by the Nazi regime because they were or were believed to be Jewish, Romani, Jehovah’s Witness, homosexual, or physically or mentally disabled or handicapped.” CRT-II Rules, supra note 364, art. 46, ¶ 26.

530. See Pablo de Greiff & Marike Wierda, The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints, in OUT OF THE ASHES, supra note 11, at 235 (discussing how the “experiences of societies in transition may be instructive” in setting up and operating the Victims Trust Fund of the International Criminal Court). See infra Part IV.D.

531. HOLTMANN & KRISTJANSDOTTIR, supra note 8, at 141.

532. Van Houte et al., supra note 323, at 151.

533. HOLTMANN & KRISTJANSDOTTIR, supra note 8, at 164. The Registrar’s decisions were subject to review by the Tribunal if the claimant filed a timely objection. Procedural Rules, supra note 56, art. 2, ¶ 5. The UNCC Secretariat would send a notification of deficiency and allow the
initial determination as to the viability of the claim on the merits, though at a “very low threshold”. Of course, the TJCPs studied in Part II all had to implement similar administrative procedures to ensure the accurate sorting of victims’ claims. In Argentina, for example, a government ministry was charged with fulfilling the role of secretariat in this respect, and in South Africa, a committee of the Truth and Reconciliation Commission performed these functions. The point of this parallel is merely to highlight the overlap in approaches, and to suggest that some cross-referencing may be possible. TJCPs can reasonably look to the initial screening procedures replicated over time by IMCPs that have dealt with tens of thousands, even millions, of claimants; IMCPs that share a similar substantive focus to TJCPs, dealing with claims arising from human rights violations, could benefit from the administrative procedures employed by the TJCPs in screening those types of claims.

c. Collection and evaluation of evidence

The violent circumstances that drive governments to create either IMCPs or TJCPs are themselves often responsible for producing a lack of evidence to buttress claims. From an evidentiary perspective, the challenges faced in these situations can be very similar, even identical. Thus, experiences in the collection and assessment of evidence can provide ample opportunity for constructive exchange between the two types of processes. One innovative technique employed by IMCPs and TJCPs alike is to provide for a “relaxed” standard of proof with regard to evidentiary submissions. In this respect, the UNCC was a pioneer among IMCPs, requiring claims to provide only “appropriate evidence of the circumstances and amount of the loss,” at a “reasonable minimum.” Subsequently, the CRT-I took the notion of a relaxed standard of proof even further by introducing the evidentiary test of mere “plausibility.” In South Africa, evidence gathering among victim communities was often conducted through informal means. Moreover, IMCPs themselves will sometimes collect evidence for purposes of efficiency in verification, basing decision making at

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534. Buergenthal, supra note 316, at 83. See also CRT-I Rules of Procedure, supra note 322, art. 10.
535. See supra notes 82-137 and accompanying text (Argentina); supra notes 249-304 and accompanying text (South Africa).
536. Buergenthal, supra note 316, at 83; see also Argentina case study, supra notes 82-137 and accompanying text.
537. UNCC Provisional Rules, supra note 159, art. 35(2)(c). The appropriate evidence of the circumstance included the difficult conditions claimants faced in making quick departures from Kuwait and Iraq, which often resulted in loss of their personal property, passports, and other documents. Wühler, supra note 139, at 20.
538. CRT-I Rules of Procedure, supra note 322, art. 22. “The claimant must show that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the dormant account.” Id.
least in part upon an institution’s internal databases. These institutions have been particularly good at developing uniform methods for the assessment and evaluation of evidence where overwhelming number of claims are filed requiring resolution in a timely and fair manner, especially where claimants face difficulties in producing documentary evidence. At the domestic level, the specialized administrative bodies in both Argentina and South Africa charged with studying the merits of victims’ claims also adopted flexible standards in the face of challenging circumstances for the evaluation of available evidence.

\[d. \text{Techniques for processing mass claims}\]

Information technology provides various means to enhance the effectiveness of claims procedures when faced with an overwhelming number of potential beneficiaries, often tens of thousands or more. IMCPs in particular have been making productive use of information technology. In this context, information technology serves three key functions: 1) it facilitates the planning and management of the process; 2) it permits computerized decision making and use of mass claims processing techniques such as statistical sampling and “matching;” and 3) it allows for decisions based on grouping as opposed to individual case-by-case determinations. By building on prior experiences, especially that of the UNCC, international mass claims processes have increasingly applied a series of techniques for evaluating very large numbers of claims that would undoubtedly be of great utility to TJCPs as well. The most promising of these techniques are these:

- **Statistical sampling and modeling.** This technique was pioneered by the UNCC, which faced millions of claims that had to be resolved within a limited period of time. Statistical sampling, for instance, permitted the UNCC to formulate evidentiary presumptions on the basis of decisions taken with respect to

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539. See Van Houtte et al., supra note 323, at 156 (discussing the collection efforts of the UNCC Secretariat in gathering evidence from governments and international organizations for its computerized verification database for Category “A” and “B” claims).

540. HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 211.

541. See supra Parts II.A.2, 5.

542. See Veijo Heiskanen, *Virtue Out of Necessity: International Mass Claims and the New Uses of Information Technology*, in REDRESSING INJUSTICES, supra note 1, at 27. For instance, the UNCC, using information technology that allowed for computerized matching and statistical sampling, reviewed 2.6 million claims in under ten years, as compared to the United States-German Mixed Claims Commission that spent seventeen years resolving approximately 20,000 claims. *Id.* TJCPs will naturally benefit from technology as well for many of the same reasons.

543. *Id.* at 29.

544. Most of these techniques did not actually originate with international arbitral or mass claims institutions, but rather are derived from the statistical and computer-processing techniques developed by mass tort class action litigation and large insurance cases in the United States. See HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 244.
random but representative samples drawn from a predefined population of claimants sharing similar legal and factual issues.\textsuperscript{545} It then applied the presumptions to the other similarly situated claimants from the target population.\textsuperscript{546}

- **Computerized Matching.** Matching is computerized decision making on “large numbers of individual claims that can be resolved by determining relatively limited specific facts.”\textsuperscript{547} It is made possible by entering basic claim information into one database which is then compared against a second “verification database” containing evidentiary data “collected from sources such as banks, historical archives or property registers.”\textsuperscript{548} For example, the CRT-II employed this useful methodology, contrasting claims information in one database with another containing bank account records. When the computer program generated a “match,” this result either provided sufficient grounds for an award of compensation or provided a basis for additional research to confirm the match.\textsuperscript{549}

- **Grouping and precedent setting.** Claims that are too complex or large to be susceptible to matching may be managed through a decision making process that involves individual categorization of claims based on the similarity of their legal and factual issues. Claims are “grouped” according to key characteristics entered into a database, allowing decision makers “to focus on resolving the principal legal and factual issues [shared] by a large number of claims, without having to consider each of them separately.”\textsuperscript{550} Some IMCPs take grouping a step further by allowing initial decisions taken with respect to certain claims presenting common issues to act as “precedent” in resolving “all subsequent similar cases.”\textsuperscript{551}

- **Standardized verification and valuation.** Specialized techniques have been developed by technical experts in other fields that allow for the standardized verification of claims “using certain

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\item \textsuperscript{545} \textit{Id.} at 244-45, 248-49.
\item \textsuperscript{546} “The basic method of statistical sampling and modeling is, first, to design a sample that is representative of the entire population constituting a similarly situated group of claimants; secondly, to analyze the claims of that sample groups to answer the factual and legal questions that determine its eligibility for compensation; and, finally, to extrapolate or apply the results of the analysis of the sample to all other similarly situated claims.” \textit{Id.} at 245.
\item \textsuperscript{547} \textit{Id.} at 245.
\item \textsuperscript{548} \textit{Id.}
\item \textsuperscript{549} \textit{Id.} at 250-51.
\item \textsuperscript{550} \textit{Id.} at 256.
\item \textsuperscript{551} \textit{Id.} at 246. \textit{See also supra note} 80 and accompanying text (Iran-U.S. Claims Tribunal).
\end{itemize}
\end{footnotesize}
evidentiary presumptions justified by knowledge obtained from historical research or fact-finding about the event in question to fill in gaps in individual records." 552 These are methods employed by IMCPs to address the dearth of reliable evidence characterizing post-conflict scenarios as well as to avoid the great expense in time and resources associated with the verification of individual claims. 553

In light of the foregoing, it is fair to say that information technology “has become the enabling factor of modern mass claims processing in cases where most, if not all, of the claims arose during the same time period and involved many of the same legal and factual issues.” 554 This is as true for TJCPs as it has been for IMCPs. It would seem, therefore, that the marvelous advances in IT methodologies promoted by IMCPs, such as statistical sampling, matching, grouping, and standardized verification, represent an important but underexploited source of expertise for those working on large-scale reparations programs in the transitional justice context.

2. Partial Parallels

We have provocatively dubbed “partial” parallels as those traits sharing a surface similarity that upon closer examination turn out not to be as equivalent in substance as generally presumed. Partial parallels tend to flow from key concepts common to claims processing generally that are assumed to be comparable or interchangeable. In practice, however, these concepts can be understood and implemented in substantially different ways depending on the context. Basic notions of “fairness,” “remedies,” and even “compensation,” which can seem standard in an IMCP setting, may in fact fulfill a substantially different role when operating within a transitional justice framework. In other words, their meaning may vary according to the function assigned to them by the respective IMCPs or TJCP. They are a kind of “conceptual homonym,” commonly used terms for basic concepts that may nonetheless take on varying connotations depending on the type of mass claims process at issue.

The concept of basic fairness is a good example. While IMCPs and TJCPs both strive to be fair, the differences between the two described in prior sections ensure that this term will not necessarily mean the same thing in both contexts. Where IMCPs are configured as arbitral tribunals or commissions charged with establishing liability prior to making awards, the proceedings are adversarial in nature. In this environment, fairness means due process. It requires an opportunity for parties to present evidence in support of their claim, to be heard, and to challenge opposing evidence, all before a competent and impartial

552. Id. at 246.
553. Heiskanen, supra note 542, at 34.
554. Holtzmann & Kristjansdottir, supra note 8, at 244.
Where proceedings are essentially administrative, as is the case with most TJCPs (and some IMCPs), fairness more accurately represents efficiency, particularly in avoiding undue delays, and consistency in decision making. This means, among other things, treating similarly situated claims substantively in the same manner: “At an individual level, fair reparation requires that the distribution of reparation is done in a fair manner, [which] means without discrimination among groups or categories of beneficiaries (i.e. victims).”

Perhaps the most misleading of the partial parallels are those relating to the core function of remedies, especially compensation. To illustrate why this is so, we should recall the examples from the Introduction where commentators writing on IMCPs and TJCPs drew such comparisons. On the one hand, the reference by an IMCP expert to “reparations [as] important components of settlement” for victims of human rights abuses, in a publication dedicated primarily to the study of IMCPs, is intended to suggest a parallel to the function of remedies in international mass claims processing. The fact that access to remedies, sometimes referred to as procedural reparations, is central to the redress for victims as required by international human rights law, surely contributes to the impression that the two concepts are functionally interchangeable or naturally comparable. But, as we saw in the preceding sections, the profound differences that distinguish the two fields have a direct effect on the nature and function of the redress implemented by TJCPs. When the aforementioned differences in the transitional justice context are taken together with the diversity of reparatory measures available to domestic policymakers, they tend to render comparisons with IMCP remedies — themselves essentially limited to monetary compensation or asset restitution — virtually meaningless. Thus, suggesting or assuming such parallels, without a concomitant effort to engage with the universe of differences that reigns between TJCPs and IMCPs, is at best an incomplete exercise.

The same is largely true of the potential parallels presumed by TJCPs experts with respect to the utility of constructing a comparative approach with TMCPs around “measures of material compensation,” the one remedial strategy adopted by all the paradigmatic claims processes studied in Part II. It is true that, on the surface, the similarities appear obvious: beneficiaries of either IMCPs or TJCPs who meet certain pre-established criteria for harm and eligibility will receive economic redress via the operation of a legally constituted procedure. However, as we have seen, these shared characteristics are insufficient by themselves to enable a meaningful comparative analysis of the role of

555. Id. at 263.
556. See Das, supra note 30, at 9-10.
557. Rombouts et al., supra note 12, at 459.
558. See supra note 6 and accompanying text.
559. See Basic Principles and Guidelines, supra note 432.
compensation within, between and among particular mass claim processes. Compliance with state responsibility principles makes “compensation” distributed by IMCPs for property loss or personal injury functionally a more limited concept than that which characterizes the indemnifications or “grants” paid by governments to victims of serious human rights abuses and their families in the domestic context. Among other defining distinctions, one typically carries out the latter to advance both a reparatory strategy as well as an overarching transitional justice policy. Simply put, TJCP compensation is best viewed as one of several interlocking means to a set of overarching ends; IMCP compensation, on the other hand, is more accurately viewed as an end in itself.

C. Concluding Observations

The previous sections have exposed a substantial number of inherent limitations to the comparison of IMCPs and TJCPs; they have also delineated more clearly a narrow but promising path of intriguing synergies. It should now be apparent that the ground considered common to the two types of claims processes is neither as broad nor as even as commonly assumed. Regarding the purported relevance of IMCP experience to emerging TJCPs, the primary axis of comparison in the literature, we have shown that a number of basic IMCP characteristics and components apparently shared with TJCPs in fact provide a doubtful foundation for a constructive comparison. Sweeping or implied presumptions of compatibility in this respect, then, tend to be imprecise and potentially misleading. At the same time, it is evident from the previous section not only that a set of “true parallels” do exist as between IMCPs and TJCPs, but also that these parallels represent avenues for cross-fertilization in both directions. It is, in other words, a two-way street, even if the traffic to date has predominantly flowed only in one direction. That under certain circumstances the TJCP experience may be a productive source of inspiration and input to IMCP experts devising or implementing new procedures is itself a paradigm-shifting conclusion. In any event, the foregoing are all significant findings running counter to prevailing wisdom that could, in our view, contribute to reorienting in more fruitful directions the scope of future studies contrasting different types of mass claims processes.

Ultimately, this rethinking of transnational mass claims processes is meant to contribute to improving the personal experience of the countless numbers of victims of mass atrocity who are their beneficiaries. How this goal can be realized in practice is the subject of the next Part. A final question to address

560. TJCPs capture this distinction in the notion of symbolic compensation, as in South Africa, where cash payments expressly were intended to convey recognition of victims and their claims, but not formal redress of the harms at issue, in substantial part due to resource and political limitations. No IMCP has ever claimed its payments to be purely symbolic.
here, albeit briefly, is this: why are IMCPs and TJCPs not as comparable as has been generally assumed? It is one thing to demonstrate that they are not; it is quite another to explain why such a difference in perception persists.

Without purporting to provide a definitive response to this query, we offer a preliminary reflection. It seems to us that the element of “transferability” provides a particularly illustrative lens. We noted above that while IMCP experiences tend to translate well into lessons learned for their successors, one rarely reproduces such a dynamic within the transitional justice arena. Indeed, when one considers that TJCP experiences are barely “transferable” between and among themselves, it becomes instantly evident why they are not more functionally comparable even to similar IMCPs. As it turns out, the reasons for the former premise hold largely true for the latter one as well.

Almost by definition, TJCPs experiences are non-cumulative, context-specific, and resistant to precedent. Unlike IMCPs, international law or practice influences but does not govern TJCPs. Efforts to systematize the study of TJCPs highlight their uniqueness, which flows from several defining traits of any domestic reparations program. One is the intensely indigenous nature of radical political transition. Another is the predominance of national actors as the primary decision makers who work predominantly within a domestic political context. A third is the nationalistic resistance to copying outside experiences that characterizes many native decision makers, often coupled with the need to tailor reparations to compelling domestic circumstances. And then there is the inherent non-transferability of domestic legislation and other normative decisions shaping country specific TJCPs, which will add layers of resistance to efforts to import concrete approaches adopted by other countries and cultures. Together these and related factors typical of the transitional justice context impede attempts to draw (much less assume the existence of) straightforward parallels between not just TJCPs, but also between these claims processes and their international counterparts.

IV. THE TMCP FRAMEWORK

A. Rationale

The preceding Part provided a more comprehensive response than previously existed to the interrogatories posed in the Introduction regarding the extent to which IMCPs and TJCPs are truly comparable. On the one hand, it confirms the instinct of most observers that there are common denominators

561. Note also what could be considered properly contextualized comparisons, such as restitution and compensation mechanisms in Eastern Europe with similar property centered IMCPs such as the BHZG Restitution Commission. See TEITEL, supra note 211, at 129-31.
between the claims processing experiences in both realms, limited as they might be. On the other, the analysis in Part III challenges several assumptions underlying the conventional wisdom about which “principles and precedents” are most pertinent to the comparative exercise, as well as how to view them. Contrary to prevailing perspectives, it establishes that the starting point for any analysis of parallels should be an express recognition of the deep divergences that separate international and domestic claims processes. These in turn not only dictate what aspects of a given mass claims process lend themselves to a meaningful comparative analysis, but also inform the extent to which useful lessons, procedures or practices in one context are functionally transferable to another. It is this dynamic that we seek to capture with the transnational mass claim process or TMCP framework.

A threshold issue worth attending to before outlining our framework concerns why commentators in both fields have tended to assume or suggest untenable degrees of IMCP and TJCP comparability. There are several likely reasons that can be deduced from the analyses of the preceding Part; we highlight but a few of them here. The first is undoubtedly the increasing trend towards an overlapping of subject matter involving human rights abuses between international and transitional justice mass claims processes.\textsuperscript{562} The UNCC provides an early example. Because it is one of the few IMCP experiences to compensate personal injury, including harm that in a domestic context would clearly constitute human rights violations, commentators have readily considered it alongside the more traditional TJCP experiences.\textsuperscript{563} Likewise, the CRT can be recognized as straddling the divide between traditional IMCPs and domestic TJCPs as the institution achieved “reparations and the moral accounting... through Holocaust restitution and reparations claims.”\textsuperscript{564} Such a statement recognizes the value of “moral compensation” which provides restitution for a property loss, bank accounts, but also recognizes the reparation aspect of the payment for the human rights atrocity that was the Holocaust.

The notion of “conceptual homonyms” discussed in the preceding part explains a second contributing factor. The overlap of nominally identical terminology (such as “compensation”) can suggest a stronger interchangeability of key principles and procedures than is borne out in practice. A third consideration is the relative autonomy with which the two camps have developed until recently, which has led practitioners without detailed knowledge of the companion field to accept such apparent overlap at face value. Lastly, as noted, there are indeed significant parallels that lend themselves to productive analysis, some of which require careful contextualization, others less so. The challenge now is to move beyond mere comparison and towards a more

\textsuperscript{562} See supra note 18 and accompanying text.
\textsuperscript{563} See, e.g., SHELTON, supra note 15, at 404.
\textsuperscript{564} Holocaust Claims Against Swiss Banks, supra note 308, at 251.
purposeful, comprehensive and nuanced examination of the ways IMCPs and TJCPs interrelate.

In other words, to paraphrase an old adage, you cannot assume to compare apples and oranges, unless, of course, you are talking about fruit. As the adage suggests, it is a matter of proper perspective. The TMCP framework introduced in the following section is intended as a corrective lens. It can guide analysts in breaking down the constituent parts of any mass claim procedure regardless of context to better understand the extent to which its key components will relate or “translate” when contrasted with those of another process. By stepping back and viewing mass claim processes at a slightly higher level of generality than heretofore employed, commentators using the TMCP framework can identify those considerations, conditions and qualifiers needed to most appropriately frame a comparative analysis of parallels, principles and precedents. We expect this new approach to move the discussion of IMCPs and TJCPs away from mere pronouncements or suggestions of mutual relevance, and towards a plane of deeper integration through the strategic exploitation of true parallels.

B. A Framework for the Study of Transnational Mass Claims Processes (“TMCPs”)

Transnational mass claim processes are those that take place in the international or domestic context to resolve claims by persons acting individually or collectively, usually against a state, where such claims are brought for serious personal harm or property loss resulting from armed conflict, political repression and/or social upheaval. Depending on the type of procedure involved, the affected persons can bring such claims either directly or through their respective governments.

To facilitate the analysis of TMCPs, we have developed a “checklist” built around basic elements shared by all such mechanisms, regardless of context. It can be utilized to establish the TMCP “profile” of a given claims process, which in turn provides a more comprehensive reference for productive comparison with other processes similarly profiled. Among other things, the TMCP checklist outlined below is designed to make explicit the consideration of key issues relating to the context and manner in which TMCPs are created; the purpose and nature of the mechanism(s) established; the nature and function of the procedures employed; the remedies prescribed and their disbursal; their overall funding; and their transparency. The comparative analysis of TMCP “profiles,” as opposed to the decontextualized consideration of certain components thereof, should provide designers of mass claims processes in any

565. The TMCP Checklist presented draws extensively from that compiled by Howard Holtzmann and Edda Kristjánsdóttir in their study of IMCPs. See Annex E to HOLTZMANN & KRISTJANSDOTTIR, supra note 8, at 419. No similar checklist exists in the transitional justice field, though important efforts to systematize the rubric of reparations have been undertaken. See, e.g., De Greiff, supra note 14; OUT OF THE ASHES, supra note 11.
context with a heightened capacity to identify and integrate functionally compatible elements of other experiences in a manner that better advances their own particular objectives.

C. The TMCP Checklist

1. Constituting Method and Instrument(s): Refers to the process and to the constituent instrument(s) by which a TMCP is created. Includes reference to political context and related formative events.
   1.1 Who are the parties creating the TMCP? E.g., states, IGOs, domestic authorities (executive, legislative, judicial), etc.
   1.2 What are the relevant political circumstances, domestic and/or international?
   1.3 What are the enabling normative sources or instruments? E.g., treaties, agreements, judicial decisions, legislation, executive decrees, etc.
   1.4 What are the stated goals of the TMCP?
   1.5 To what extent do the constituting instruments detail the norms, rules and procedures to be applied by the TMCP?
   1.6 What is the role in the constituting process of the international community?
   1.7 What is the role of the potential beneficiaries/claimants in the constituting process?

2. Legal and Procedural Norms I: Refers to jurisdiction as well as legal nature of proceedings and decisions.
   2.1 What is the nature of the claims process created? E.g., arbitration, administrative proceedings, etc.
   2.2 What is the range of claims covered by the TMCP?
   2.3 Who is entitled to remedies pursuant to these claims?
   2.4 Who is entitled to bring a claim?
   2.5 What substantive law applies, if any?
   2.6 How are the procedural rules defined and administered?
   2.7 How is fairness guaranteed?
   2.8 Are decisions final and binding? What is their legal authority?
   2.9 Can decisions be enforced?
   2.10 What is the effect on claimants’ legal rights to recourse in other jurisdictions, domestic or international?

3. Legal and Procedural Norms II: Refers to the claims process, including the participants and procedures involved.
   3.1 How are potential claimants identified and informed of the process?
   3.2 What is the process for screening claims to ensure only those meeting prima facie criteria are processed?
   3.3 Is there a timetable for implementing the TMCP’s mandate, including deadlines and a wind-up date?
   3.4 Who makes decisions on claims?
   3.5 How were these decision makers selected?
   3.6 What rules apply to the submission of evidence by claimants?
   3.7 What rules apply to burdens and standards of proof?
   3.8 Are provisions made for oral hearings?
   3.9 What mass claim techniques, if any, are employed?
   3.10 What provisions exist to support claimants who may not have the
resources to access the TMCP?

4. Remedies and Reparations:
   4.1 What types of loss or harm can be addressed?
   4.2 What types of individual remedies or reparations are offered to claimants?
      4.2.1 Restitution?
      4.2.2 Compensation?
      4.2.3 Non-monetary benefits or services?
   4.3 What types of collective remedies or reparations are offered to claimants?
   4.4 How are the rules governing compensation defined?
   4.5 How are the amounts of individual compensation fixed?
   4.6 How is compensation distributed?
   4.7 Is compensation subject to a maximum aggregate amount or other limitations?
   4.8 What non-pecuniary remedies or reparations (NPRs) are available?
   4.9 How are NPRs realized or distributed?

5. Operational Funding
   5.1 What types of expenses are required to set up and operate the TMCP?
   E.g., staff salaries, other official fees and expenses, infrastructure costs, IT, etc.
   5.2 How are these operational costs funded?
   5.3 How are the available remedies and reparations, especially compensation, funded?
   5.4 Is the TMCP sustainable, that is, secured enough in terms of resources to carry out its mandate in substantial part?

6. Transparency and Accountability
   6.1 Does the TMCP have a communications strategy? If so, who is responsible for it?
   6.2 What type of outreach, if any, does the TMCP engage in? E.g., to potential claimants, government institutions and authorities, the general public.
   6.3 What mechanisms exist to provide information to the public on the TMCPs activities? E.g., webpage, mass media announcements, etc.
   6.4 Does the TMCP engage in regular or periodic reporting on its activities? If so, what form does it take?
   6.5 What types of information are made available to the public? E.g., information on legal norms and procedures, rules, decisions and awards, number of claims, etc.

D. Application of TMCP Framework

The need for a more methodical approach to the study of transnational mass claims processes is more evident than ever. The area of international law dedicated to international tribunals and commissions has expanded enormously since the establishment of the Iran-US Claims Tribunal in 1981. The field of transitional justice, which did not exist two decades ago, is now an established and active area of academic as well as institutional pursuit. Mass claims experiences in both contexts are increasingly viewed in light of each other, due to a deepening convergence, first in practice, and now theory. The TMCP
framework outlined in the preceding sections represents a conscious step in this direction. It provides the analytical tools that were missing from prior studies to promote a more functional systematization of experiences in mass claims processing. As such, it enables practitioners and policymakers to engage in comparative analyses that are better informed, appropriately focused and, ultimately, more fruitful. International claims processes such as the Ethiopia-Eritrea Claims Commission, or domestic reparations programs such as those active in Peru and Colombia, are examples of ongoing TMCPs that could benefit from the application of the framework outlined above, as well as the underlying analyses in Part III. And, of course, there are those mass claims experiences still to come. The framework could prove instructive for instituting a procedure and resolving property claims arising from present conflicts, like that between the Palestinians and Israelis.

At the outset we suggested that the TMCP framework could assist in the design of novel compensation or reparations scenarios, like the one that the International Criminal Court is developing. We noted that the context and large number of victims typical of several types of international crimes, for example genocide and crimes against humanity, point to the need for traditional mass claims processing techniques. Yet these crimes by their very definition arise from the widespread and systematic human rights abuses characteristic of transitional justice scenarios. The issue is whether the ICC would be best served by following IMCP approaches in designing its reparations procedures or whether it should also look to national programs despite their limiting specificity. Much has been written on the subject already. Some commentators rely primarily on conventional international mass claims experiences to draw lessons for the Court, making little reference to domestic practice. Other experts, however, observe that “[t]he experiences of societies in transition may be instructive,” especially as concerns the goals and remedial modalities of an ICC-administered reparations program. How, then, should the ICC proceed in evaluating its options?

Even the cursory application of the TMCP framework to the challenge that the ICC poses illuminates a methodological pathway to resolving this question. It is evident, for example, that the ICC’s reparations structure will more closely resembles traditional IMCPs in terms of the Court’s constituting method and instruments, its decision makers, and the mass nature of most of the claims procedures to be adopted. Therefore, many of the lessons, mechanisms and techniques of mass claims processes like the UNCC will likely be directly relevant to the development of ICC reparations procedures. But a similar

analysis of the other ICC features, such as the Rome Statute Art. 75’s stated goal to provide “reparations” to victims, suggests that it should in other respects act more in line with the experience of TJCPs insofar as substantive measures of redress are concerned. It is undoubtedly for this reason that Art. 75 also speaks of the “rehabilitation” of victims while leaving the door open to other reparations derived from international human rights law. Another feature closer to the TJCP experience than that of IMCPs revolves around claimant participation given the standing that victims will have to participate in ICC reparatory proceedings.569 The monetary compensation and restitution measures typical of IMCPs and the expeditious “justice” they provide to a mass of largely disenfranchised claimants may therefore be insufficient in the ICC context. Rather, a hybrid system that draws appropriately from both the TMCP and TJCP contexts, as oriented by the TMCP framework, will be most likely to produce an effective ICC reparations program in any particular case.