



Carnegie Council  
ON ETHICS AND  
INTERNATIONAL AFFAIRS

170 East 64th Street  
New York, NY 10021-7496  
tel: (212) 838-4120  
fax: (212) 752-2432

Justice and the World Economy  
Achieving Global Justice Seminar Series

## The Role of Reparations in Transitions to Democracy<sup>∞</sup> Pablo de Greiff

Research Director, International Center for Transitional Justice

May 6, 2004

CHRISTIAN BARRY: I'm extremely pleased that we have Pablo de Greiff from the International Center for Transitional Justice. Pablo is one of a rare breed of philosopher practitioners. He is an extremely capable political philosopher and moral philosopher with a wide range of philosophical interests. He is one of the few people who is truly well versed in both the continental and analytic traditions of modern moral philosophy, and also, over the past years, has focused on questions of institutional design and reform and in thinking through questions of transitional justice on the ground.

PABLO DE GREIFF: Thanks, Christian. I want to make two notes about the background for my presentation. One, the ICTJ is completing perhaps the largest and most comprehensive study of reparations programs going on in the world right now. It will be a three-volume set: one volume of case studies; one volume dealing with questions that come about frequently in the design and implementation of reparations programs; and one volume with basic documents, national legislation, reports, etc. We at the ICTJ have had the good fortune of being involved in the design of different reparations programs in different parts of the world as we were doing the research. The interaction between the research and the ongoing practice was very useful for both. For example, I was involved in Peru as an advisor to the Peruvian Truth and Reconciliation Commission (TRC) on its reparations recommendations—in that way we were able to use the resources from our research and at the same time modify the research program so as to address some of the problems and questions that were coming up as the Peruvian Commission worked. I will present here the most normative and conceptual issues that are central to this project.

### **The meaning of the term “reparations”**

The very meaning of the term “reparations” is contested. Hence, in the conceptual part of the project we tried to give some semantic clarity to the concept—of course not simply by fiat, but by

---

<sup>∞</sup> Transcript of edited remarks by Lydia Tomitova, Christian Barry, and Madeleine Lynn.

distinguishing the different ways in which the term is used. It is useful to distinguish between two different spheres of use.

The first sphere is the domain of international law. The basic categories in terms of which international law understands the concept are restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition. The scope of the term “reparations” in international law is very wide—for example, the very establishment of a truth commission would count as a measure of satisfaction, or criminal justice would count as a guarantee of non-repetition.

The second sphere is the design of massive reparations programs. The meaning of the term shifted, for example, in the understanding of the commissioners in the Peruvian TRC who were entrusted with the responsibility of designing the reparations programs. They were, of course, not entrusted with responsibilities that spanned from the design of the criminal justice policy, to the operation of the truth commission, the creation of programs of compensation and rehabilitation, and so on. They had a much narrower task at hand, and, I think, correctly so. For them there seemed to be two basic distinctions: between the material and symbolic benefits and between the collective or individual distribution of either material or symbolic measures.

By distinguishing between the two spheres of international law and massive reparations programs, I do not want to suggest that there is absolutely no overlap. For example, the commissioners who are responsible for designing reparations programs typically end up crafting a program that distributes different kinds of benefits, and most of those benefits can in some way be categorized under the headings that international law provides. But the basic categories in each sphere and the way in which people understand their responsibilities within each of sphere are relevantly different.

As a result, two different definitions of the term “reparations” have emerged. With regard to international law, the prevailing working definition (once again a very broad one) is that all those measures that may be used to respond to human rights violations would count as reparatory measures under international law. I have used a passive voice in this definition rather than, for example, saying, “All those measures that the state may use to respond to human rights violations,” because the state is no longer the only relevant agent. Article 17 of the Rome Statute of the International Criminal Court includes reference to the creation of a trust fund for victims—hence, it may be that the ICC through its trust fund would give out reparation measures. Another thing to note about this definition is its breadth, not just in the sense that it covers a huge variety of measures, but also that it doesn’t target the victims specifically. For instance, institutional reform under international law may also count as a reparatory measure because it may count as a measure to guarantee non-repetition. And, institutional reform need not target victims alone—it may encompass efforts that go well beyond the universe of victims. In this respect the definition is meant to capture the fact that under international law one can understand “reparations” more broadly than as measures that target the victims.

With regard to people who are responsible for drafting reparations programs, “reparations” can be more narrowly defined as all those benefits that may be given to victims directly to redress the violations they suffered. Notice that this definition makes reference to a specific target group, “victims.” This is because reparations in this definition are conceived of as a way of redressing *specific* human rights violations.

### **The advantages and disadvantages of the two definitions**

With respect to competing definitions of a widely used concept, it is seldom interesting to ask which of them is accurate and which of them is not. We should ask, rather, what the advantages and disadvantages are of using one definition rather than another in different contexts. The above

definitions of reparations, for example, lead naturally to a distinction that has become important in my work.

On the one hand, one can talk about reparations proper, or reparations as benefits that are meant to redress victims directly for a violation that they have suffered—which is to be distinguished from the reparatory effects that other justice measures may have. Truth-telling — for instance, the results of the work of a truth commission — may have reparatory effects, but from the standpoint of the design of a reparations program it does not count as a reparation benefit. Similarly, criminal justice measures may have reparatory effects for victims but, from the standpoint of those who are entrusted with designing a reparations program, they don't count as benefits that are included in the program itself.

Let's turn to the advantages and disadvantages of the two definitions. The broad definition that one can derive from international law invites the coordination of all the measures that it covers under its four or five different categories. But working with such a broad definition increases complexity. If you put yourself in the shoes of someone who is told, "Design a reparation program for country X," and by reparation you understand everything from criminal justice, through truth telling and institutional reform, plus the benefits that are traditionally associated with the term "reparations," you would have a very, very tall order at hand. By contrast, the narrower definition that people who design reparations programs have in mind has the advantage of facilitating design. You do not have to worry, for example, about how to design a criminal justice policy, put together a truth commission, or propose long-term institutional reform; rather, you worry about putting together a package of benefits that may have sufficient redressing power to satisfy victims and others, and that seems to be a much more manageable order. The problem with the narrower definition is that you run the risk of creating a reparation program that operates as a free wheel, without any connection with other justice measures. In a period of transition there is a particular danger to a free-wheeling reparation program, the main risk of which is that the benefits that the program provides may be easily perceived as if they are completely unconnected with other justice measures-- as "blood money" that the government is giving in exchange for your silence with respect to the fact that nothing else is going on.

### **Justice in reparations**

One can also argue that there are two different ways of thinking about what constitutes justice in reparations, what is fair and what is not. In international law—but not only in international law, since the model comes from tort law—the criterion of justice is the very familiar one of full restitution, or *restitutio in integrum*. The very idea is to try to make victims "whole," by which it is understood that you compensate the victim in proportion to the harm that he or she has suffered. For isolated cases of reparations this is an unimpeachable idea. Part of the motivation is to neutralize the consequences of the violation for the victim, so that in addition to the fact that he or she had his or her rights violated, the victim doesn't have to suffer the consequences of the violation.

The idea of full restitution is grounded in application. But it is a very hard one conceptually, even when one leaves aside the questions of feasibility, since one has to rely on assumptions that are always a bit dubious. For example, the calculation of compensation in proportion to harm is typically done by taking the person's income prior to the violation as the benchmark.. The Inter-American Court takes a person's income for the last year, makes a projection of that income through the average expected age of death for the different countries, then subtracts 25 percent on the assumption that the person would have consumed 25 percent of his or her income. In the end, it is only that 75 percent that would have been left for family members. Such calculation assumes that the world is in a steady state: that the person will live until the average expected age of death; that he or she will not become an alcoholic, a drug addict, or a complete flop in his or her professional career; or, coming from the other direction, that the person will not get a sudden flash of insight, become a

fantastic inventor and a millionaire. These kinds of assumptions, although always made in the implementation of full restitution, are rarely examined.

### **Difficulties in applying full restitution to cases of massive violations**

In the domain of massive programs there is actually no consensus on how to think about what is fair and unfair—there are no criteria and, moreover, there seems to be no clarity with respect to how to begin thinking about fairness and unfairness. I will make a proposal in this regard.

I want first, however, to examine some of the difficulties that arise when you try to apply the full-restitution criterion of justice to a very large universe of victims, especially those of a systematic policy of human rights violation.

The first problem is that there is no massive program that has ever come close to satisfying this criterion of justice. The international experience is absolutely conclusive. By 2030 the German reparations program will have distributed \$80 billion in reparations directly to victims, which, of course, is a massive amount of money. Nevertheless, what individual victims receive is a minimum fraction of any half-plausible calculation of the harm that they suffered individually.

A program that is larger than the German reparations program is the program established by the United Nations Compensation Commission to deal with the claims that resulted from the Iraqi invasion of Kuwait. The fate of that program is uncertain now that it appears that the bill will have to be footed by the United States, but it was estimated that the completion of the program would have required \$320 billion. The commission has already distributed close to \$200 billion—it started paying compensation on individual claims first, postponing the most expensive corporate claims, which are the ones that still remain to be resolved. There are two important points with regard to this program. First, this was a program run by the United Nations, the international body that was entrusted at the end of World War II with developing principles of reparations. Second, despite the fact that the program had a virtually unlimited amount of resources at its disposal (the UNCC received 20–25 percent of Iraqi oil proceeds since the inception of the program until the invasion), this program also failed to meet, by a huge margin, the criterion of full compensation for individual claims.

There is only one program that tries to meet in a serious way compensation in proportion to harm as the basic criterion of distribution—the September 11 Victim Compensation Fund in the United States. Not only does it calculate compensation on an individual basis, but it actually uses a quite unsophisticated and generous way of making the calculation. The program uses a career-specific projection of income—it takes the statistical average for the profession of each respective victim, instead of, for example, a rougher measure like the national minimum wage, a criterion that the Inter-American Court has used on different occasions. This method results in substantial benefits.

There are, however, questions about whether the September 11 fund is a reparations program. Reparations are typically accompanied by an acknowledgement of responsibility. In retrospect, given the recent revelations about incompetence in the government response, it may be that the program will become more and more of a reparations program—but at its inception it was certainly not conceived as such. The program actually came about as an afterthought appended to a piece of legislation that was made to save the airline industry, and at 2:00 a.m. someone in the House of Representatives—after the House had already approved an open-ended deal that imposed absolutely no limitations on the amount of money that the government was willing to give to airlines—said, “And how about the victims?” It was politically necessary to work to do something for the victims because they had just committed themselves to spending billions upon billions of dollars to try to save the airline industry.

The second problem has to do with the expectations that the criterion of full restitution generates and satisfies, respectively. I was working with the Inter-American Commission on Human Rights when the Peruvian government of Alejandro Toledo agreed to follow the Commission's recommendations on one of the many cases that it was examining. At the time there were 180 proven cases before the Commission, and so it was beginning to articulate its recommendations on reparations. One of the most notorious cases involved Leonor La Rosa, a former agent of the security forces who was herself eventually apprehended by another paramilitary group. She was very badly tortured. Eventually her case reached the Inter-American Commission, and the Commission recommended a payment of \$100,000 on account of the torture that she suffered. Toledo's administration—which was suffering, as it still does, from a very serious popularity and legitimacy crisis—gleefully accepted the recommendations. President Toledo went before TV cameras with a huge check, like the ones that are common on American TV programs, with \$100,000 written on it. Poor Leonor, depending on how you think about her, accepted the check in her wheelchair, and of course this was all over the news. The very next day I had meetings with victims groups in Lima, and of course the attitude was, "Fantastic! We accept that. If she received \$100,000, we will as well. This is what we expect." Now, there was absolutely no way that the whole universe of victims in Peru could receive anything remotely like \$100,000 per victim. At that time, and this was very early in the process, we were estimating that there were going to be probably 40,000 beneficiaries in the Peruvian reparations program, so times \$100,000 that's \$4 billion. Peru's national budget for a whole year is slightly less than \$9 billion. So such reparations would have consumed virtually 50 percent of the national budget, which of course is absolutely unthinkable, even if you spread it out over a number of years. Please keep in mind that reparation programs, as much of a defender as I am of them, compete with other perfectly legitimate obligations of the state, such as investing in education, the judiciary, infrastructure, and health care. So to think that a reparations program on its own could consume 40 percent or 50 percent of a national budget is completely morally and politically unacceptable.

It is this sort of expectation that can condemn a reparations program to failure, because compared to the \$100,000 paid in one individual case, participants in the massive program who were likely to receive \$5,000–\$10,000 under the best of circumstances were going to feel extremely cheated. This expectation comes about to a large extent because of the particular way of understanding what justice in reparations means. There is a sense in which one could say, "Yes, of course this might be true, but nevertheless there is a claim of justice that needs to be redeemed, and what you are telling us is that justice is too expensive." I want to say, "Yes, this is what I am telling you, and I don't think it's so insignificant"—but fortunately I am not saying just that!

### **Problems of case-by-case application of full restitution to mass violations**

There are additional problems. The procedure that would have to be implemented to satisfy the criterion of full restitution itself generates serious problems. The criterion of full restitution would require a case-by-case examination, just as it happens before the Inter-American Commission or as it is happening administratively before the September 11 Victim Compensation Fund. But here are some of the problems with a case-by-case approach when you are dealing with a massive universe of cases:

The first is the procedure that decides who are the victims. It takes each case individually, and therefore it ends up splitting victims from one another, which turns out to be a major complication if you want to establish a reparations program, for reasons which I will address below.

The second is that this is a procedure that may send a nonegalitarian message, because the benefits that individual victims would receive, even if they are victims in a group of the same category of crime, will depend not on the crime that they have suffered, but rather on their income. The calculation is

specifically supposed to neutralize the effects of the crime, taking as the benchmark the victim's earnings. And of course different victims earn differently, so you will get very different payments victim by victim. Ultimately, this is interpreted to mean that the violation of the rights of the wealthy is worse, more serious, than the violation of the rights of the poor. This is a terrible message to send, and it entrenches some of the suspicions with respect to the legal system in which these measures are embedded.

Third, since it takes a case-by-case approach, the procedure tends to disaggregate the reparation effort, in the sense that it is only at the end of the process, once all the cases have been individually taken, that a final tally of the sums distributed would be possible to get with any degree of accuracy. In addition, the different chronology of the cases—how they are taken, how they are resolved—makes it very difficult for people to get a comprehensive idea of what the government is going to do to repair the harm. In other words, a case-by-case approach doesn't really constitute a reparations program—it is simply tantamount to letting the judicial system deal with cases one by one.

Finally, to the extent that the case-by-case approach focuses narrowly on the idea of compensating people in proportion to harm, it gives absolutely no incentive to coordinate the reparation effort with other reparatory measures that may be important to have. The temptation on the part of a government will always be to say, "What else do the victims want? We are compensating them in proportion to the harm they suffered. What else could they possibly want?" Well, it turns out that the victims want much more, and for very good reasons. For instance, they want symbolic measures of reparations—an apology or a recognition of responsibility, as well as recognition of their victimhood in public spaces, and so on.

### **Justice in mass reparations programs: a proposal**

So I have a proposal. The proposal is rather to think about justice in reparations not in terms of compensation in proportion to harm, but rather in terms of whether one can craft a package of benefits that promotes three values:

- 1) the benefits provide some degree of recognition to victims—and not just in virtue of the fact that they are victims, but also that they are citizens;
- 2) the benefits promote the development of civil trust, especially trust between victims and the institutions under which they live;
- 3) they promote social solidarity.

First, these are not only desirable goals in the sense that it would be good for our society to provide recognition, to foster civil trust, and so on. I think that these are both conditions and consequences of justice, so by serving these three values you are serving the values of justice. There is an intrinsic connection with justice, and this is why it makes sense to think about reparatory justice in terms of these three values. The advantage of taking this route is that it recognizes that via a reparation program you can try to attain goals that differ from the individual restitution of victims. You can serve other broader social goals—for example, you can try to give some degree of legitimacy to a new democratic order, get citizens to trust their institutions, and so on.

Second, there is a healthy sense of contextualism that goes along with the proposal, because what is required to get victims to feel recognized may not be the same as in all societies. For example, people in the United States would never feel recognized by anything that does not include a whole lot of money because that is the currency that we use in order to measure the seriousness of legal and administrative efforts. But that, of course, is not the case in all contexts. The proposal allows you to tailor the reparations benefit in a way that is sensitive to these differences.

And finally, an advantage of the proposal is that it situates perhaps one of the most complicated problems in the design and implementation of a reparations program in its proper place—that is, the problem of finances. The problem of finances from my standpoint is a political problem. There is no country in the world that has established a reparations program enthusiastically—it always takes a great deal of struggle. The first temptation of all governments is to say, “There is no money for this.” The second temptation is to say, “There is money for social development and social investment and we are going to call that reparations.” This latter temptation should be resisted at all cost. By thinking about justice and reparations in terms that are much more political, you get to the problem of finances in the political arena. For example, as the South African Truth and Reconciliation Commission was trying to insist that the government of Mandela—an incredibly sympathetic government to the victims—do something to implement the recommendations that it had issued with respect to reparations, the very same government was saying, “There is no money for reparations,” and at exactly the same time it was contemplating the purchase of two new submarines for the South African Navy. Obviously this is a question of priorities, of politics, in the end. Even in poor countries it is possible to mobilize some funds in favor of reparations, but this must come about through a political struggle and not through the automatic application of a legal criterion.

Finally, I will just mention some of the design variables that are important when thinking about a reparations program: scope, completeness, comprehensiveness, internal and external coherence, finality, and “munificence.” By coherence, which I mentioned before, I mean the sort of relations that you try to establish between the reparations program and other justice measures. Although it makes sense to use a narrow definition of the term “reparations” so that you make the task of designing a program feasible, at the same time I think it is important to establish links between that reparations program and other programs so as to avoid the problem of free-wheeling benefits.

Thank you.

## DISCUSSION

**PARTICIPANT:** Could you compare more specifically the issue of reparations in South Africa, where it is a question of economic inequality that needs to be redressed, but hasn't been, and Desmond Tutu has been very critical about the lack of reparations payments, and Chile and Argentina, with the cases of the disappeared, which continue to be an issue of justice and not one of widespread economic inequality.

**PABLO DE GREIFF:** I actually think that it is very problematic to think about a program of reparations as a good tool for solving structural problems of inequality. First of all, it overburdens a reparations program, which will always be unpopular, underfunded, and relatively minor in terms of the economic scale. It will thus be completely inadequate as a way of redressing structural inequalities. Also, and more fundamentally, you may say that I have a purist understanding of reparations. I want to think of reparations as a relationship between a set of benefits and a violation of fundamental rights with no intermediary third term, not even the concept of need.

Something counts as reparations for me if it tries to redress a specific violation of a fundamental right. To that extent, a reparations program is completely different from a program of social assistance or a program of distributive justice or a program of development. Obviously, I don't propose these distinctions arbitrarily and simply for the sake of semantic purity (although I make no apologies for that either!).

By introducing third intermediary terms, which inevitably means introducing additional goals that our reparations programs would have to satisfy, you are actually changing the nature of the program so much that it becomes a program of reparations only metaphorically. The more the program includes people other than victims, the weaker its reparatory power for the victims themselves will be, because naturally victims will say, "This is something that I am not receiving in virtue of the fact that my rights were violated. After all, my neighbor, who never suffered torture is also getting the same thing." Development programs do not target victims directly. Furthermore, they usually distribute goods that are primary goods. Citizens have good reason to think that they are entitled to these goods not in virtue of the fact that they suffered their violation of human rights, but in virtue of the fact that they are citizens, and as citizens they deserve to receive certain primary goods. In short, one should not confuse a development program with a reparations program, or a redistributive program with a reparations program. Those are entirely different things.

By saying this I am not saying that social investment, economic redistribution, investment in infrastructure, and so on are not called for in any of the contexts in which I work. Peru, to go back to the example I used before, is an incredibly inegalitarian society with a very weak infrastructure in vast areas of the country—so of course I advocate massive social investment and very aggressive redistributive measures. But that is not the task of a reparations program. A reparations program is supposed to establish a link between benefits and violations.

Think for a second about the sort of political mobilization that the establishment of a reparations program calls for. Reparations programs, as I said before, are always unpopular. After all, the beneficiaries are victims, mainly people about whom there is inevitably a great deal of suspicion: "Why were they victims in the first place? They must have done something." Of course, I am not endorsing this sort of attitude—I am describing what usually happens. Another kind of pernicious attitude, perhaps not equally pernicious but pernicious nevertheless, is expressed through, "My God, when are they going to be happy? We don't want to hear about them any more. It's better to move forward. The whole country is overcoming this thing. Why can't they?" Furthermore, the group of victims is usually horrendously marginal by any demographic measure. Typically the victims are overwhelmingly rural, overwhelmingly poor, and overwhelmingly uneducated—and hence an incredibly weak constituency.

To think that you can achieve massive economic redistribution through a movement that has such origins—a movement that rests on the shoulders of the group that I just described—is, I am sorry to say, completely naive. It has never happened. I am not sure that it should happen, because it would turn the reparations program into something else that, although very important and of course I endorse, is no longer a reparations program.

All countries in the world act on the issue of reparations under two temptations, as I said before. The first one is to say, "There is no money for this"; the second is, "We are going to do social investment." It doesn't matter how much social investment a country does. If you want to redress human rights violations, you still have to have a reparations program. That is a mystique sort of problem. A reparations program is not a program by means of which to try to achieve redistributive goals. It has never happened so far, and, I think, for reasons that are perfectly justifiable.

PARTICIPANT: My question follows up directly on where you stopped. What you are basically proposing is a political process of some sort rather than a kind of a judicial standard. This process, as I understand it, would involve in the first place getting the victims to have some kind of agreement about what kind of behavior would (I don't quite know what the word is here) satisfy them and bring in the government of the day and the domestic political support to allow, or in fact force, the



government to spend substantial chunks of money and symbolics (which is sometimes even harder) over an extended period of time. And, specifically, you haven't talked about where the victims fit in the setting up of this process. The result of this, hopefully, is some kind of reconciliation of the divisions within the society, between the victims and the others, presumably decreased in some substantial way. Is that an imaginary process or are there real cases in which this process has actually been attempted with some degree of success?

PABLO DE GREIFF: Actually I was with you until the last moment when you started talking about reconciliation—not because I think that that's an undesirable goal. I think it's a wonderful goal, but I'm not sure that you can load a reparations program with that goal either.

A purist understanding of reparations is part of a conception of the possibilities of transitional justice measures, including reconciliation, which is actually quite modest. I have very dim views about what the different transitional justice measures can accomplish on their own. I have to say that, unfortunately, I am convinced that they serve a redress on the side. There are no hugely successful prosecutorial efforts, for instance. Even in the postwar cases in Germany, except for a handful of people, by 1953 everyone else had received clemency—just eight years after an absolutely atrocious war virtually all the perpetrators were out on the street. Despite the fact that this is the one that took place under the most favorable circumstances—the presence of the occupying powers coupled with completely decimated and destroyed local military meant that the authorities could do basically what they wanted — and for reasons which, of course, I acknowledge were complicated, eight years after the conflict virtually everyone was free on the streets. So I would not count that as an incredibly successful prosecutorial effort. Argentina, which is perhaps the second most successful prosecutorial effort of all the transitions that we know, led to six generals being imprisoned for less than six years. And this was the outcome in a country in which, some claim, 30,000 people disappeared.

So prosecutions, I think, lead to modest results. Notice that I started my presentation by saying that part of my motivation is to block inferences from difficulties to impossibilities—so despite the fact that I am insisting on the difficulties, it should not be interpreted as an argument in favor of not trying. From my standpoint, difficulties in prosecutions should not lead to the conclusion that nothing should be tried. Go through the typical transitional justice measures and, in turn, you can make exactly the same argument. There is no truth commission, for instance, that can claim that it was able to uncover the truth of the fate of individual victims to any substantial degree other than was already available. Again, that's not to say that truth commissions are useless—I think that they are tremendously important, but not because they lead to a revolution in knowledge. There is no truth commission that has satisfied the claim to truth of all the victims, just as there is no prosecutorial effort that has satisfied the claims to criminal justice of all the possible victims.

Similarly with respect to reparations: Reparations can make a modest contribution to people's sense of justice. From my standpoint, what reparations represent is a materialization of a commitment to do things differently in the future—but they do this modestly. They do not do it by compensating in proportion to the harm, by a long stretch, that people actually suffered. And, at least from a detached perspective, one can say that the means that they use are in some ways completely inadequate to the task. Nevertheless I think their contribution is important, in particular when properly coordinated along with the different transitional justice measures.

For this reason I insist on external coherence, between a particular transitional measure and all other measures that are being undertaken. The proper coordination of different transitional justice matters can make people feel that the government is serious now. Yet, the government being serious now is not the same as “all my claims to justice have been redeemed.” It has never happened.

To go back to the body of your question, I think that you are right. From my standpoint, massive reparations constitute a heavily political process that requires a great deal of consultation. If one of the criteria of success of this process is whether people feel sufficiently recognized or not, one of the first things that you have to do is to ask: "What would make you feel sufficiently recognized or not?" I think it is not impossible to do and it will be significantly better than the experiences with reparations thus far, which is government officials, by fiat and through political deals, which of course is inevitable, setting levels of compensation, usually without too much consultation with the victims. So think about something like that, which isn't too far afield.

The level of compensation set in 1988 for the Japanese American internees during the war was \$20,000 for each. By American standards this is a very small amount of money, not just compared to other settlements, even of mass claims—and we know of very significant mass claim resolutions—but also compared to what the victims themselves expected. The resolution of this case was preceded by a class action suit, which was dismissed on statute of limitations grounds, but the petitioners were expecting \$10,000 per each count, of which there were twenty-one. So each petitioner in the initial class action suit was expecting to receive \$210,000. Instead, they ended up receiving less than a tenth. How did the \$20,000 figure come about? Certainly not through a process of consultation, although I have to say that compared to others, this process involved much more consultation—the Senate held hearings in different parts of the country, which is extraordinary for an American piece of legislation.

Most programs have never consulted with victims. The Argentinean reparations program, which is incredibly generous—\$200,000 per victim of death in one of the programs, which in Latin America is an incredible amount of money—was set by a President's decision. Some of his advisors had suggested using a workmen's compensation scale, and the President said, "No way. Torture and disappearance is not an accident. Give me another alternative." The alternative that he was offered was the highest wages of the Argentinean civil servants.

But setting levels of compensation is not an approach that obeys any sort of principle—for example, the South African Commission had chosen the South African mean income as the basic unit of distribution. Typically, the levels are chosen by bureaucrats. The criterion that I am suggesting involves consultation with victims. On the one hand, that may increase the difficulty of getting the thing off the ground. On the other, it may lead to a greater degree of satisfaction, and perhaps in some cases a more affordable total overall rate.

The Peruvian case is actually an example of just such a non-bureaucratic political process. There was a great deal of consultation among the victims' groups among themselves—and one should never think of victims' groups as monolithic; they are incredibly riven by divisions. For example, the victims of displacement typically do not get along at all with the victims of torture, who typically do not get along with the victims of disappearance. This is a nightmare in terms of putting together a coalition. But there was a great deal of consultation among those groups, as well as between them and the truth commission. As the process moved forward, there was in the end some degree of consensus about the basic shape that the program ought to take.

Mindful of the particular difficulties that I have talked about, it is incredibly important to have this sort of consensus from the outset—you need to get the natural allies of a reparations program together along the way because there are plenty of natural enemies of such a program. So consultation I think is important, not just for final success, but for launching a reparations program in the first place.

PARTICIPANT: I myself choose a very general theoretical approach to the things—say to constitution-making—but I wonder if this very general approach to this topic works, because I take it, thinking through countries that I know in relationship to countries you spoke about, I see some really fundamental differences.

I am from Hungary. I live here in the U.S.A. I was an advocate of Tadeusz Mazowiecki's thick line, i.e., that the regime change is about the future and trying to redress every issue of the past is going to lead to impossible conflicts and burdens. But there were other considerations for this line too: the political conditions of compromise at the roundtable; the legal setting, which really was quite different in the Latin American cases; and finally, the fact that in cases like this you could really not see very clearly who is responsible and who should carry the burden makes any kind of comprehensive program of restitution—say, restitution of property—very difficult.

The question is, who is responsible? Since Lenin, we know that a revolutionary state repudiates the acts of its predecessor. The state in Hungary that came into being after the 1990s is a new state. The other state was an outpost of an imperium. Why should the Hungarian state accept responsibility for something that happened because of the imposition of a state formed by the Russians? Given all the problems that you mentioned and the fact that if there are financial burdens involved, it is going to be either present owners of property who lose—and some of these properties went from Jewish to German to bourgeois to nonbourgeois to state hands and then were again sold—who knows how many hands they have gone through, even. And as far as the money, if it is just a question of money and monetary restitution, then it's the taxpayers who must pay, in a country in economic difficulty. So neither does the state feel itself responsible because it is not the old state, nor do the citizens who themselves suffered through this system for forty years feel that they should be paying.

You only mentioned the German example from that part of the world. But it's quite different still—there, it's the West German state that to some extent accepts the obligation of the fact that it was privileged with respect to the Eastern Germany, and it also has the funds. So there is both a willing candidate for the responsibility and a source of the funds. So I can see how the German case can sort of fit in the overall framework that you are describing. But I think that to put the Hungarian, Polish, Czechoslovak, Bulgarian cases into that framework—which was done because all these countries had restitution programs—was a tremendous mistake.

This problem has also an international dimension. It would be possible in principle for there to be an international responsibility which would sublimate the question of which state, and in principle it would be possible to have international funds. You may think it's Utopian, but it is certainly Utopian for the Hungarian population to pay anything to deal with the massive deprivation that a significant part of the population suffered under that system.

Let's stop at a really polemical point: Does the United States owe reparations for the people that they have tortured in the Iraqi prisons? I would say so. The British Ministry of Defense has just said that there is no liability on the part of the Ministry of Defense with respect to the ten people who have died in their custody. It's hard for me to understand how the European Court is going to permit that.

In cases of this type, where one can say there is a state that is also rich and bears responsibility, you have one kind of problem. In the case of the former communist countries you have another kind of problem, and then in Peru you have a third kind of problem. So I think probably you need a more contextual theory to deal with how to deal with this matter. I don't see how you can deflect from the material to the symbolic. I think some skepticism is justified because you try to solve the problem by

moving from redistribution to recognition. To me—maybe because I’m Hungarian and American—it’s only the money that matters, as it is in my two countries at least.

PARTICIPANT: A similar problem arises with regard to the reparations that Iraq owes for its 1990 invasion of Kuwait: one may argue that since the invasion was undertaken by an illegitimate government, the burden of reparations ought not to be taken by the Iraqi citizens who had no say over the decision to invade and were themselves victims of the aggressor regime.

PABLO DE GREIFF: First, it seems to me that the argument that you are offering is not an argument against a particular way of thinking about the criterion of justice in reparations, but about the adequacy of implementing a reparations program in a particular context, regardless of what criterion of justice that program of reparations uses. So of course that is a question that I have not addressed at all. The argument that I offered here tried to concentrate on spinning out a criterion of justice of reparations, which of course assumes that we are operating in a context in which something like reparations is called for.

Second, there may be contexts, such as in Hungary, in which no one feels that they ought to be repaired for reasons that may vary from case to case—for instance, a very diffused sense of responsibility. The impossibility of making clear attributions of responsibility applies not just to cases in which there was huge and very intense participation in some sort of violations on the part of a very large part of the population, but also, and importantly, in cases in which there is a great temporal gap between the violations and the effort to redress them. I think that beyond a certain point the problem of the temporal lag is one that leads to dealing with the consequences of the violations much better and justifiably through programs of redistributive rather than reparative justice.

So I am going to offer an equally controversial view, just to finish the point as you did. I think that, for example, the question about reparations for African-Americans in the United States is a problem that is largely a question of distributive justice, not of reparations per se. And again, by saying that this is a problem of distributive justice and not of reparations, I am not saying that it is less urgent or less important. I think that it is an incredibly important issue and a very urgent one—except that is not reparations, it is distributive justice.

I am not offering a model or making a recommendation to apply the reparations model, if there were one, in all cases wherever violations of human rights have occurred. I am doing something slightly different: I am saying that there is a way of thinking about reparative justice which may be implemented in a context-sensitive fashion if one assumes that there are sufficiently justified claims for reparatory justice. If there are none, if the population feels legitimately (and this is not simply a matter of taking polls) that no reparations are called for, obviously I don’t want to impose my reparations program on people.

In cases of transition, a reparations program may play a useful, modest role— not by itself, but in conjunction with other justice measures, and if you use a criterion of justice that is significantly more flexible than the criterion that international law offers, and with a higher degree of participation in the actual implementation of such a program.

PARTICIPANT: It seems to me that your threefold proposal matched fairly well in the case of Japanese Americans in the United States. It’s the closest thing we have to offer, at any rate. And, significant to me, that process started in 1976 with the revocation of the presidential executive order of 1942—which was a very symbolic act since it meant a lot to Japanese Americans simply to have that order

revoked. And then they had the hearings and the report. Finally, twelve years later, Congress did what you described.

It's in the light of that that I wonder if it's possible to dismiss reparations for African Americans and just push the matter into distributive justice. If that debate is going to come to something concrete and some political consensus, I see no way around some kind of programmatic gesture which will have heavy symbolism in it, but part of that symbolism has to be something by way of what a president and a Congress say about slavery in the history of this country—something that a lot of African American leaders say has not been said yet.

From the conversations with some of the leaders that I have had, I believe that there are some educational measures that ought to be made available to young African Americans who have been pushed out of the society. You can call it "justice at last" if you want to, or call it "reparations." But in any case, this public that might eventually settle on reparations for African Americans will have to understand that, as with that \$20,000 for the Japanese Americans, the symbolism is very important, especially to the people who are being addressed by it.

One of the weaknesses of our culture it seems to me—maybe you appreciate this more than most of us—is that we think money does the trick, so to speak. Well, money doesn't do the trick. Twenty thousand dollars to the Japanese-Americans was largely symbolic, as you have said. Unfortunately, we don't appreciate that too well in this country. I do believe our politicians have got to teach us about it.

PABLO DE GREIFF: I think you are absolutely right. Let me just say two things. First, just to add to the list of things that I think made a difference in the case of the Japanese Americans, despite the surprising nature of the high levels of satisfaction with the program in this context, the other thing that proved to be absolutely critical is that along with the \$20,000 check each victim or family received a letter of apology signed by the president. This turned out to be hugely important in that program. What I have in mind by complexity as a design variable is precisely the way in which a program establishes most reparations programs, with only a few exceptions, as programs that distribute a variety of types of benefits. There are very, very few that have distributed just one type of benefit, even if it is just money. Most of them provide some services, some symbolic measures, some material compensation, and so on. So this is what complexity is meant to capture. The internal coherence characteristic refers precisely to the interrelationships that a program establishes between the types of benefits that it distributes.

So I agree with you that this is hugely important, not just instrumentally for the sake of lowering the price of the material compensation. I am not talking about anything as cynical as that. It is actually a recognition of precisely the point that you were taking toward the end, which I appreciate, about the importance of this evolving dimension of reparations. After all, there is no one still naïve enough to think that reparations can bring the victim to the *status quo ante*, as if the crime had never occurred. Although that is always mentioned as an ideal, everyone recognizes the impossibility of that task. So in a sense everyone takes the benefit, perhaps particularly the material benefits, as being nominal—I don't want to say symbolic—but everyone agrees that this is just a nominal effort to redress.

With respect to the African American case, I concur with you absolutely with respect to the need for greater acknowledgement, even official acknowledgement, which makes it a form of an education policy. I think, however, it is a mistake, both conceptually and, more importantly, strategically, to frame the discussion about material compensation in terms of reparations.

I am happy to concede that under present political circumstances calls for reparations may be the only way in which African American claims for justice may get a hearing. I'm not talking about success yet, but a hearing. Once politics is dead, which means largely that distributive questions are not addressed in the political arena but are rather surrendered to the operations of the market, it comes at no surprise to me that claims to justice are rephrased in terms of claims to victimhood—because this is the only currency that is left in our political arena, which is no longer willing to discuss questions about distributive justice. There is no alternative under present political circumstances—but it is not that this is the best way of dealing with this issue. This is a broader social and political problem that goes well beyond the issue of reparations, among other reasons, because framing the issue in this way of course leads you to questions of responsibility, which you would not have to face if you addressed the problem where I think it properly belongs, namely in the domain of distributive justice, which doesn't require certain questions of responsibility.

PARTICIPANT: I also think that the symbolic dimension is very important. I take it as the point of your talk, from what I heard, that you are interpreting reparations as a materialization—as a necessary one, but as still nevertheless a symbolic gesture. I think it's interesting, in terms of the issues of recognition of civic trust, social solidarity, and also the whole point of a rights violation, to pose the question in another way. Framing it that way implies to me that the point is not about individual rights violations. These are rights violations of groups, of constructed groups—it doesn't matter—but of groups to whom a particular identity is assigned; and clearly it has to be a negative one, for example, "the political enemy," otherwise you can't get away with a rights violation. The idea behind an apology or the recognition discourse is to say, "We don't look at you that way anymore. We look at you as rights-bearing individuals, as equal citizens, and with solidarity to get it."

It's interesting, for example, how resistant political leaders are to making an apology. Now, of course they're afraid if they apologize somebody might ask for money. But even if they didn't, the resistance I think comes from the problem that you can't just change one identity; you've got to change the dominant identity as well. And so if there is an apology in terms of, let's say, blacks in America, it's not just black identity that's at stake, it's the identity of this country, and that initiates another dynamic, a very serious resistance—of the type that points to the founding fathers to describe the identity of the nation. I have a student who is doing a dissertation on apology in Australia, and who comes across this issue, and there's a very interesting discussion that she has about that resistance and the dynamic that is going on about the transformation of identities on both levels, so that you can actually have inclusion and social solidarity.

PABLO DE GREIFF: I am in absolute agreement with everything that you have said. Let me add only two points. One, think about the differences between an insurance for the victims of crime, on the one hand, and the reparations programs, on the other.

PARTICIPANT: Or a natural disaster.

PABLO DE GREIFF: Right, exactly. So on the insurance scheme, which most European countries have, and which South Africa is considering establishing for the victims of common crimes, what that does of course is to try to neutralize the consequences.

PARTICIPANT: That's why September 11 fund can't be about reparations.

PABLO DE GREIFF: Right, entirely, and this is my point. I think that a reparations program fulfills an entirely different function. One of the reasons why it can fulfill that function, if it can, is because it is accompanied by an acknowledgement of responsibility. This is precisely why I think the connection

between the benefit and the crime should be uninhibited, that you should not put in a lot of third intermediary terms, because you stop having a reparations program and you start having things like social welfare or insurance for victims of crime, all of which might be very important, but that's not reparations.

PARTICIPANT: Of course you could have both.

PABLO DE GREIFF: Yes, of course. This is ideally what we would want and should have.

The other thing I want to add is that we take the question of group identity very seriously. In my own work advising different truth commissions on this issue I have insisted on the importance of an individual component to the reparations programs. You may be surprised to find that I have encountered some opposition on this from members of groups that are very interested in defending broad group identities. The reason why I insist on the importance of an individual component, particularly in contexts in which there are people who have traditionally been seen simply as "one more member" or a nondifferentiated mass of people is precisely because this was the first time that the government recognizes these individuals as individual right bearers. So, for example, my conversation with members of the indigenous groups who were not seen as individuals was always: "Look, you have always been considered "the Indians," not as discrete individual rights-bearers but just members of an undifferentiated class." It is precisely there that I would insist it is most important to give an individual component for reparations programs. So while group identities are important, if part of the idea is to raise and reinvigorate the notion of citizenship, the program has to have an individual component.

PARTICIPANT: First, there seemed to be two main distributive questions with regard to reparations: one is how much to allocate to reparations among all the possible things that you can budget in a government; and, second, how to allocate those funds across different victims. The first distributive question is as important as the second. Are the three goals of reparations cases supposed to apply only to the second or to the first? And if you need a broader list of criteria for the first question, what might that involve?

Second, I wonder how much the implausibility of the criterion of proportion to harm depends on the choice of the metric, namely the income space. If we focus on something like deprivation of basic capabilities or something of that kind, it may not seem so implausible as a standard that we are trying to achieve.

Third, with respect to assessment of claims in practice: You compared reparations to tort law. How do you deal with questions such as burden of proof in establishing victimhood, what the relevant standard of proof is, and admissibility of evidence, and how the three goals of reparations programs then deal with these questions—because it doesn't seem that you can simply import the tort criminal law into this case.

PABLO DE GREIFF: Let me take the questions in reverse order.

Different countries have implemented different measures and different standards of evidence. The obvious rule of thumb is the two-fold, perfectly commonsensical observation: setting the standard of evidence too high would leave out lots of legitimate beneficiaries; setting the standard too low invites lots of people who not deserve benefits to apply for them.

Actually, two of your questions relate to issues that I think are more difficult in theory than they are in practice. The violations obviously do not take place in a vacuum. People normally complain as some of these things start happening, and their complaints may take different forms. For example, in the Argentinean case, people stopped complaining to the institutions of the state—since after a while they realized it was futile and in some cases dangerous—and they started filing complaints to NGOs. So those were the records that were accepted subsequently, ten, fifteen years down the line, as evidence to support a reparations claim.

In Argentina the population was fairly well educated, with a very high percentage of literacy and a tradition of record keeping. In cases in which some of those characteristics are lacking, some programs have contemplated accepting the testimony under oath of two persons that they received a complaint from the family of the victim at the time, and then they are asked further questions—and that counts as sufficient evidence for certain things.

Perhaps the most interesting cases are those of torture, which is a crime that largely goes unrepaired by massive programs. There are very few programs that have given actual benefits for torture, except in cases of permanent handicaps, since those are very obvious. Chile is currently engaged in trying to decide what to do with the victims of torture because both the truth and reconciliation commission and the reparations program that was established as result of the work of the TRC targeted victims of death and disappearances for the most part and not torture. As it happens, the number of victims of torture is significantly higher than the number of beneficiaries of the regular programs. Right now the commission that is in charge of dealing with this issue is estimating that there might be 35,000 victims of torture who might participate in a reparations program specifically for them. There might be fewer, depending whose numbers you trust, for example, if you are going to have victims of disappearance and torture who have already been repaired through different programs for other kinds of violations. This case is further complicated because of the very significant time lag now. In this situation they had to face the question of what counts as evidence of torture for the sake of receiving benefits. The problem came also from the fact that not all 35,000 people were permanently disabled through torture. What to do with the rest?

Attorneys and are trying to resolve in theory those kinds of problems that occur in practice. It turns out that in some of these cases—and Chile is one of them—here is meticulous record keeping on the part of the very torturers. So now the commission is close to reaching a determination that anyone who was imprisoned in the overwhelming majority of those 3,000 detention centers in the country was a victim of torture, because there is so much documentary evidence of the mode of operation of the detention centers that it makes sense to presume that whoever was there was a victim of torture because torture was the regular mode of operation.

On the question of the metric and whether by changing the criterion to not just income but something else you might preserve a certain connection with proportionality: In a certain sense I don't think that is to an undesirable goal at all. You may say that in this respect I hold a very traditional view of how these things should work. I am not completely opposed to the idea, and I don't find anything horrendously objectionable about setting higher levels of compensation for crimes that are considered to be more serious, not just in the sense that they produce more pain, although I do not think that is an irrelevant consideration, but also because they produce greater difficulties in recovering from having suffered them. So, for instance, in cases of death and disappearance I don't find anything particularly objectionable about giving higher benefits to family members of victims of death and disappearance than to the victims of illegal and unjustified detention, in part because, on the one hand, you cannot overcome death. On the other hand, despite all the difficulties, which of course I do



not want to minimize, you can overcome a period of illegal detention. So I am myself not ready to surrender the notion of proportionality altogether under a changed metric.

On the question of the several distributive issues—how much to assign to reparations versus other things and how much to assign to each victim once you have made that determination: I am afraid to say that, at least as far as I have been able to see, there is no principle that can give you a neat answer to that question. When you think about the legitimate obligations of the state and you weigh them against one another, I don't think there is a principle that will lead you to an easy answer with respect to how much to put into the reparations program versus how much to put into the current health-care system or into social investment. The absence of a principle makes life messy; on the other hand, it's a bit enterprising. I don't think that there are too many principles that will make life simple in that respect. That once again reintroduces an element of politics, by which I do not mean merely partisan politics in the cheap sense, but rather politics ideally and under some circumstances of the best sort, as serious questions about the public good: in this case, the place that the public good assigns to those who got a notoriously raw deal in the past.

CHRISTIAN BARRY: Let's take the last two questions together.

PARTICIPANT: It seems to me that reparations imply that the people providing the reparations are responsible as individuals for the crimes that the reparations are meant to compensate. Further, to go to the distinction between reparations and insurance that you touched on, it seems to me that in the cases of Argentina and Chile—as well as reparations owed by Iraq for the invasion of Kuwait—it's impossible for the governments to provide reparations because the crimes are really the responsibility of another government which did not have the consent of the governed and hence there is no continuity between it and the current, legitimate government. It seems to me that you could argue this is sort of an *ex-post* insurance, but reparations seem to me to be the wrong word to describe the programs that Chile and Argentina and other countries are developing.

PARTICIPANT: I am still confused by this wall that you have created between reparations and distributive justice. In the case of apartheid, all nonwhite people were victims of apartheid as an economic system. Some of those were then victims of apartheid in terms of police repression, torture, disappearances, and murders. But you're only discussing reparations with respect to the smaller category. So that's why in the first place I ask for the distinction between South Africa, Chile, and Argentina, because the issue of apartheid is unique, and racism in the United States is similar to apartheid in South Africa. The issue is one of victimization based on economic exclusion as an integral aspect of apartheid, and then to enforce that system we have police repressive measures.

Second, how would you distinguish between compensation and reparation with respect to a decision made last week by an Iranian court that held the U.S. responsible for supplying chemical weapons to Iraq during the Iraq-Iran war and determined that it must pay \$750 million for continuing victims who are dying from those weapons in Iran? It's dual — there is symbolic acknowledgement of U.S. responsibility for providing the chemical weapons, and a demand to compensate the past, the present, and the future victims.

PABLO DE GREIFF: First, the issue has of course to do with that distinction of different types of rights. Comprehensiveness as a design criterion has to do with how many categories of the crime that a society suffered will be covered by a reparations program. So there is a certain sense in which, normatively speaking at least, a higher degree of comprehensiveness is a desirable feature of a reparations program, so that no category of crime is left unrepaired. In reality, of course, there is no reparations program that is totally comprehensive in the sense of giving benefits to the victims of all

the categories of crime that massive and systematic crime usually involves. So you have to make choices about which categories of crime to try to repair. In part, this is because of the scarcity of resources and the difficulties of mobilizing politically scarce resources. Typically, reparations programs have tracked the very familiar hierarchy of crimes, and have usually tried to redress what are normally considered to be the worst sort of crimes.

Of course there are discussions about the nature of the hierarchy, and about where to draw the boundary. For example, I take it as great progress that the Peruvian Truth and Reconciliation Commission decided to include sexual crimes as one of the explicit categories for which victims were going to receive benefits. That hasn't been the case in all reparation programs. So there are relevant distinctions and discussions about where you draw the line, but you have to choose because total comprehensiveness is very difficult to achieve. There is no question about that, at least thus far in international disputes.

There are two different issues with respect to the first question. One has to do with the corporate identity of the state which makes it very difficult for a transitional government to simply claim, "Because we are new, we the state bear absolutely no responsibility for what happened in the past." After all, there is a sense in which the identity of the state goes further than the identity of the immediate officeholders, regardless of all questions about legitimacy. The international community is an entirely different domain. For example, it does not think that debts incurred by an illegitimate government are simply wiped away once a legitimate government comes into place. The reason is that of course there is the assumption of a sense of corporate identity—although it's a lousy state of affairs. It would provide a great disincentive for people to take power illegitimately if there were the standing rule in the international community that no money would be lent to illegitimate governments or that the debts incurred by illegitimate governments would not be binding upon successive governments. But nevertheless the rule is the identity of the state is not equivalent to the identity of the officeholders, and that has to do with the sense of corporate identity of state institutions.

The second issue is that it is not the case that the institutions are radically transformed once someone assumes power illegitimately, or even less once someone recovers power legitimately. Some of the state institutions are the very same—the police station in the neighborhood, the trial chambers. The whole apparatus of the state does not get transformed from one day to the next. There is never a complete changeover—not even in the sense of personnel, let alone laws and regulations—either at the stage of the loss of legitimacy or at the stage of the recovery of legitimacy. So from the standpoint of victims and from the standpoint of the common citizen, there is, as a matter of fact, a great deal of continuity, and it would be very hard from that standpoint to say, "Simply because there has been a change at the very top level of the apparatus of the state, everything has changed, claims of responsibility dissolve, and now we are at an entirely new beginning." It never happens. So there is a sense in which it is understandable why the governments of Chile and Argentina were willing to give reparations, despite the fact that in terms of the personal responsibility of the new officeholders, of the post-transition new officeholders, they bore no responsibility. In some of those cases, it was former dictators who now occupy positions of power, but nevertheless they are representing a state that has not simply vanished into nothingness at the point of transition.

CHRISTIAN BARRY: Thank you very much.