

## **International Reparations Framework and Examples of Other Reparations Schemes [Gov. Code, § 8301.1, subd. (b)(3)(A)]**

### **A. Chapter 14: International Reparations Framework**

#### **I. INTRODUCTION**

AB 3121 required the recommendations from the Reparations Task Force to “comport with international standards of remedy for wrongs and injuries caused by the state, that include full reparations and special measures, as understood by various relevant international protocols, laws, and findings.”<sup>1</sup> Therefore, this chapter lays out the international legal framework for reparations as provided by the United Nations General Assembly (UNGA). Specifically, this chapter will cover the international legal framework for reparations the UNGA created by way of Adopted Resolution 60/147 in December 2005.<sup>2</sup> Going forward, the UNGA framework shall be referred to as the “UN Principles on Reparation.”

In the UN Principles on Reparation, the UNGA held that any full and effective reparations scheme must include the following five forms of reparations:<sup>3</sup>

- (1) Restitution,
- (2) Compensation,
- (3) Rehabilitation,
- (4) Satisfaction, and
- (5) Guarantees of non-repetition.

While the UN Principles on Reparation are primarily based on the notion of State responsibility, the negotiators also reached a consensus that “non-State actors are to be held responsible for their policies and practices, allowing victims to seek redress and reparation on the basis of legal liability and human solidarity, and not [just] on the basis of State responsibility.”<sup>4</sup> This can be found in Principle 3(c) which provides for equal and effective access to justice, “irrespective of who may ultimately be the bearer of responsibility for the violation.”<sup>5</sup> Additionally, Principle 15 states, “in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has

<sup>1</sup> Gov. Code, § 8301.1, subd. (b)(3)(A).

<sup>2</sup> United Nations General Assembly, *Adopted Resolution 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, (March 21, 2006) (UN Principles on Reparation).

<sup>3</sup> *Id.* at p. 7.

<sup>4</sup> Van Boven, *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, United Nations Audiovisual Library of International Law at p. 3.

<sup>5</sup> UN Principles on Reparation at p. 5.

already provided reparation for the victim.”<sup>6</sup> This means that the funding, among other remedies, for reparations may come not only from the State of California, but also from non-state actors who helped perpetuate the hardships against slaves and their descendants.

## II. INTERNATIONAL LEGAL FRAMEWORK FOR REPARATIONS

### A. Overview

This section sets forth the legal framework for reparations under international law, specifically the UN Principles on Reparation. The UN Principles on Reparation set forth the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”<sup>7</sup>

### B. Who qualifies for reparations under the UN Principles on Reparation?

According to the international legal framework laid out by the UN Principles on Reparation, victims of gross violations of international human rights law and serious violations of international humanitarian law should be provided with full and effective reparations.<sup>8</sup>

The UN Principles on Reparation defines victims as “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.”<sup>9</sup> Furthermore, “the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”<sup>10</sup> Additionally, “A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”<sup>11</sup>

In its 2018 practitioners’ guide on “The Right to a Remedy and Reparation for Gross Human Rights Violations,” the International Commission of Jurists (ICJ) highlighted how the word “victim” has many different meanings across international human rights systems.<sup>12</sup> However, the ICJ specified that for purposes of the UN Principles on Reparation, the definition for the word “victim” was meant to be broad.<sup>13</sup> According to the ICJ, a “victim is not only the person who was the direct target of the violation, but any person affected by it directly or indirectly.”<sup>14</sup> The ICJ cited how certain authorities “disfavor the distinction between direct and indirect victims,” so

<sup>6</sup> *Id.* at p. 7.

<sup>7</sup> *Id.* at p. 1.

<sup>8</sup> *Id.* at p. 7.

<sup>9</sup> *Id.* at p. 5.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Id.* at p. 6

<sup>12</sup> International Commission of Jurists, [The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners’ Guide](#) (Revised Edition, 2018). At p. 35 (ICJ).

<sup>13</sup> *Id.* at p. 36.

<sup>14</sup> *Id.* at p. 34.

“Reparations programmes should use a wide and comprehensive definition of ‘victim’ and should not distinguish between direct and indirect victims.”<sup>15</sup> A comprehensive definition of the word ‘victim’ should include family members who have endured “unique forms of suffering as a direct result” of what happened to their families.<sup>16</sup>

**C. What constitutes gross violations of international human rights law and serious violations of international humanitarian law under the UN Principles on Reparation?**

While the UN Principles on Reparation did not formally define either ‘gross violations of international human rights law’ or ‘serious violations of international humanitarian law,’ the ICJ elucidated on what these terms could mean. Specifically, the ICJ defined ‘gross violations’ and ‘serious violations’ as the “types of violations that affect in qualitative and quantitative terms the most basic rights of human beings, notably the right to life and the right to physical and moral integrity of the human person.”<sup>17</sup> The ICJ gave examples of these types of violations, which included “genocide, slavery and slave trade, murder, enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, deportation or forcible transfer of population, and systematic racial discrimination.”<sup>18</sup> The ICJ also held that “harm should be presumed in cases of gross human rights violations”<sup>19</sup>

**D. What are victims’ rights to remedies under the UN Principles on Reparation?**

Victims of gross violations of international human rights law and serious violations of international humanitarian law are entitled to certain remedies under international law:

- “(a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.”<sup>20</sup>

According to the Human Rights Committee, “the right to an effective remedy necessarily entails the right to reparation.”<sup>21</sup> An effective remedy refers to procedural remedies whereas the right to reparation refers to restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. In short, victims are entitled to have effective procedural remedies available to them, which will in turn help them receive the reparations they are entitled to.

As far as effective remedies go, victims “shall have equal access to an effective judicial remedy as provided for under international law.”<sup>22</sup> This would require a State to “establish functioning

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Id.* at p. xii.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Id.* at p. 42.

<sup>20</sup> UN Principles on Reparation at p. 6.

<sup>21</sup> Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 16.

<sup>22</sup> UN Principles on Reparation at p. 6.

courts of law or other tribunals presided over by independent, impartial and competent individuals exercising judicial functions as a prerequisite to ensuring that victims have access to an effective judicial remedy.”<sup>23</sup> This would also require the State to have “competent authorities to enforce the law and any such remedies that are granted by the courts and tribunals.”<sup>24</sup>

### **E. What must full and effective reparations include under the UN Principles on Reparation?**

According to the international legal framework laid out by the UN Principles on Reparation, full and effective reparations must include: 1. Restitution, 2. Compensation, 3. Rehabilitation, 4. Satisfaction, and 5. Guarantees of non-repetition.<sup>25</sup>

#### **1. Restitution**

“Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”<sup>26</sup>

According to the ICJ’s interpretation of the UN Principles on Reparation, where the State can return a victim to the status quo, the state has “an obligation to ensure measures for its restoration.”<sup>27</sup> However, even though restitution is considered the primary form of reparation, the ICJ acknowledges that “in practice [restitution] is the least frequent, because it is mostly impossible to completely return [a victim] to the situation [they were in] before the violation, especially because of the moral damage caused to victims and their relatives.”<sup>28</sup> So, the ICJ holds that where complete restitution is not possible, as will often be the case, the State must “take measures to achieve a status as approximate as possible.”<sup>29</sup> In situations where even this is not feasible, “the State has to provide compensation covering the damage arisen from the loss of the *status quo ante*.”<sup>30</sup>

#### **2. Compensation**

“Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;

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<sup>23</sup> ICJ at p. 55.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> ICJ at p. 173

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”<sup>31</sup>

According to the ICJ’s interpretation of the UN Principles on Reparation, compensation is to be understood “as the specific form of reparation seeking to provide economic or monetary awards for certain losses, be they of material or immaterial, of pecuniary or non-pecuniary nature.”<sup>32</sup> The ICJ highlighted how compensation has previously been awarded by claims commissions for cases that had claims of “material and immaterial damage” and especially for cases that had claims of “wrongful death or deprivation of liberty.”<sup>33</sup> The United Nations has recognized a right to compensation “even where it is not explicitly mentioned” in a particular treaty and the Human Rights Committee “recommends, as a matter of practice, that States should award compensation.”<sup>34</sup> The basis for this recommendation comes from Article 2(3)(a) from the International Covenant on Civil and Political Rights.<sup>35</sup> It is important to note that international jurisprudence divides compensation into “material damages” and “moral damages.”<sup>36</sup> Material damages include, among other things, loss of actual or future earnings, loss of movable and immovable property, and legal costs.<sup>37</sup> Moral damages include physical and mental harm.<sup>38</sup>

Per the UN Principles on Reparation, any reparation proposals involving compensation for “material damages” must cover “lost opportunities, including employment, education and social benefits”.<sup>39</sup> Additionally, according to the European Court of Human Rights, in order for a victim to receive compensation, “there [generally] must be a clear and causal connection between the damage claimed by the applicant and the violation.”<sup>40</sup> However, “as far as existence of material damage can be demonstrated, the award does not depend on whether the victim can give detailed evidence of the precise amounts, as it is frequently impossible to prove such exact figures.”<sup>41</sup> Therefore, in the likely event that a victim lacks detailed information, “compensation [ought to be] granted on the basis of equity” as long as there is a “causal link between the violation and the damage.”<sup>42</sup>

<sup>31</sup> UN Principles on Reparation at p. 7.

<sup>32</sup> ICJ at p. 174.

<sup>33</sup> *Id.* at p. 176

<sup>34</sup> *Id.* p. 177.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Id.* at p. 180.

<sup>37</sup> *Id.* at p. 181.

<sup>38</sup> *Id.* at p. 189.

<sup>39</sup> *Id.* at p. 187.

<sup>40</sup> *Id.* at p. 182.

<sup>41</sup> *Id.* at p. 189.

<sup>42</sup> *Ibid.*



Per the UN Principles on Reparation, any reparation proposals involving compensation for “moral damages” must “encompass financial reparation for physical or mental suffering.”<sup>43</sup> Since “this [type of] damage is not economically quantifiable, the assessment must be made in equity.”<sup>44</sup> Furthermore, “since it is difficult to provide evidence for certain moral or psychological effects of violations, mental harm should always be presumed as a consequence of gross violations of human rights.”<sup>45</sup> Finally, “for persons other than close relatives, harm may have to be shown so as to limit the number of persons who may claim compensation” but “the conditions for claiming compensation should not be impossible to meet.”<sup>46</sup>

### 3. Rehabilitation

“Rehabilitation should include medical and psychological care as well as legal and social services.”<sup>47</sup>

According to the ICJ’s interpretation of the UN Principles on Reparation, “victims are entitled to rehabilitation of their dignity, their social situation and their legal situation, and their vocational situation.”<sup>48</sup> The ICJ also highlighted the Convention Against Torture’s assessment on what constitutes rehabilitation. Accordingly, “rehabilitation must be specific to the victim, based on an independent, holistic and professional evaluation of the individual’s needs, and ensure that the victim participates in the choice of service providers.”<sup>49</sup> Furthermore, “the obligation to provide the means for as full rehabilitation as possible may not be postponed and does not depend on the available resources of the State.”<sup>50</sup> Finally, rehabilitation “should include a wide range of interdisciplinary services, such as medical and psychological care, as well as legal [rectification of criminal records or invalidation of unlawful convictions] and social services, community and family-oriented assistance and services; vocational training and education.”<sup>51</sup>

### 4. Satisfaction

“Satisfaction should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

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<sup>43</sup> *Id.* at p. 204.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> UN Principles on Reparation at p. 8.

<sup>48</sup> ICJ at p. 206.

<sup>49</sup> *Id.* at p. 207.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.”<sup>52</sup>

According to the ICJ’s interpretation of the UN Principles on Reparation, satisfaction is a “non-financial form of reparation for moral damage or damage to the dignity or reputation” that has “been recognized by the International Court of Justice.”<sup>53</sup> Satisfaction can come in the form of a condemnatory judgment, the acknowledgement of truth, as well as the acknowledgement of responsibility and fault.<sup>54</sup> The ICJ also held that satisfaction includes “the punishment of the authors of the violation.”<sup>55</sup> Furthermore, “the UN Updated Principles on Impunity recommend that the final report of truth commissions be made public in full.”<sup>56</sup> This is supported by the UN Human Rights Commission’s resolution on impunity which recognizes that “for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators, including the accomplices, of these violations are essential steps towards rehabilitation and reconciliation.”<sup>57</sup> Another important factor when it comes to satisfaction is a “public apology” as well as a “public commemoration.”<sup>58</sup> The public apology is to help “in restoring the honour, reputation or dignity of a [victim].” The public commemoration “is particularly important in cases of violations of the rights of groups or a high number of persons, sometimes not individually identified, or in cases of violations that occurred a long time in the past.”<sup>59</sup> A public commemoration “in these cases has a symbolic value and constitutes a measure of reparation for current but also future generations.”

## 5. Guarantees of non-repetition

<sup>52</sup> UN Principles on Reparation at p. 8.

<sup>53</sup> ICJ at p. 207.

<sup>54</sup> *Id.* at pp. 207-209.

<sup>55</sup> *Id.* at p. 209.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Id.* at p. 210; see also Human Rights Commission resolutions: 2001/70, para 8; 2002/79, para 9; 2003/72, para 8.

<sup>58</sup> ICJ at p. 211.

<sup>59</sup> *Ibid.*

“Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.”<sup>60</sup>

According to the ICJ’s interpretation of the UN Principles on Reparation, the guarantee of non-repetition derives from general international law.<sup>61</sup> A guarantee of non-repetition is an aspect of “restoration and repair of the legal relationship affected by the breach.”<sup>62</sup> According to the International Law Commission, “Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship.”<sup>63</sup> Guarantees of non-repetition overlap with international human rights law because “States have a duty to prevent human rights violations.”<sup>64</sup> A guarantee of non-repetition is “required expressly” as part of the “legal consequences of [a State’s] decisions or judgments.”<sup>65</sup> This express requirement is supported by the UN Commission on Human Rights, the Human Rights Committee, the Inter-American Court and Commission on Human Rights, the Committee of Ministers and Parliamentary Assembly of the Council of Europe, and the African Commission on Human and Peoples’ Rights.<sup>66</sup> Another measure that falls under the guarantee of non-repetition is “the necessity to remove officials implicated in gross human rights violations from office.”<sup>67</sup> Finally, a guarantee of non-repetition

<sup>60</sup> UN Principles on Reparation at pp. 8-9.

<sup>61</sup> ICJ at p. 135.

<sup>62</sup> *Id.* at p. 136.

<sup>63</sup> *Id.* at p. 137.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Id.* at pp. 138-139.

<sup>67</sup> *Id.* at p. 140.



can and often must involve “structural changes” that must be “achieved through legislative measures” to ensure that the violations cannot ever happen again.<sup>68</sup>

### International and National Genocide Framework

The term “genocide” was first introduced by Raphael Lemkin, a Polish-Jewish jurist who advocated for legal protections for ethnic, religious, and social groups. In his 1944 book, *Axis Rule in Occupied Europe*, Lemkin wrote:

By ‘genocide’ we mean the destruction of a nation or of an ethnic group. . . . Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.<sup>69</sup>

Lemkin argued for international law to recognize genocide as a crime, and in 1948, the United Nations General Assembly passed the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention or Convention).<sup>70</sup> The Convention has since been ratified by 149 states.<sup>71</sup>

As the United Nations has noted, “popular understanding of what constitutes genocide tends to be broader than the content of the norm under international law.”<sup>72</sup> The Genocide Convention defines genocide with two elements. One is the mental element (*mens rea*), wherein a perpetrator has the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.<sup>73</sup> The other is the physical element (*actus reus*), described as the act of killing or causing serious bodily or mental harm, the imposition of measures intended to prevent births within such group, the deliberate inflicting of conditions of life calculated to bring about the group’s physical destruction, or the forcible transferring of children of the group to another group.<sup>74</sup> The Convention does not specify a punishment for genocide, only that persons charged with genocide

<sup>68</sup> *Ibid.*

<sup>69</sup> Holocaust Encyclopedia, *Coining a Word and Championing a Cause: The Story of Raphael Lemkin* <<https://tinyurl.com/LemkinUSHMM>> (as of Mar. 16, 2023).

<sup>70</sup> Office on Genocide Prevention and the Responsibility to Protect, United Nations, *Genocide* <<https://tinyurl.com/GenocideUN>> (as of Mar. 14, 2023).

<sup>71</sup> Office on Genocide Prevention and the Responsibility to Protect, United Nations, *Genocide* <<https://tinyurl.com/GenocideUN>> (as of Mar. 14, 2023).

<sup>72</sup> Office on Genocide Prevention and the Responsibility to Protect, United Nations, *Genocide* <<https://tinyurl.com/GenocideUN>> (as of Mar. 14, 2023).

<sup>73</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 <<https://tinyurl.com/UNGenocideConvention>> (as of Mar. 14, 2023).

<sup>74</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 <<https://tinyurl.com/UNGenocideConvention>> (as of Mar. 14, 2023).

“shall be tried by a competent tribunal of the State in the territory of which the act was committed” or by an international tribunal with jurisdiction over the territory.<sup>75</sup>

The United Nations has taken the position that “cultural destruction does not suffice, nor does an intention to simply disperse a group.”<sup>76</sup> Prior to the passage of the Genocide Convention, the United Nations had passed a resolution defining the crime of genocide as “a denial of the right of existence of entire human groups” with no mention of intent.<sup>77</sup> That resolution included “cultural” losses as a form of genocide.<sup>78</sup> The 1948 Genocide Convention was adopted with no mention of “cultural” losses and with an intent element added, the result of “intense political brokering” by United States officials who feared “not just about being accused of genocide against indigenous peoples but also against its Black population” because of the involvement of government officials in lynchings and the Ku Klux Klan.<sup>79</sup>

Although then-President Truman’s administration supported the Genocide Convention in the United Nations, it encountered strong resistance in Congress and among academics over concerns of domestic sovereignty. A representative of the American Bar Association even criticized the Convention on the grounds that it could be used to classify attacks on individual Black Americans as “genocide.”<sup>80</sup> The next administration, under President Eisenhower, withdrew executive branch support for the Convention, for domestic political reasons.<sup>81</sup> Presidents Kennedy and Johnson took no action to reverse course, and when President Nixon endorsed ratification, Senate hearing witnesses again raised warnings that the Convention could expose the United States to foreign judgment on racial issues and on America’s military behavior in Vietnam.<sup>82</sup>

Nearly 40 years after the United Nations approved the Genocide Convention, the United States implemented legislation to ratify the Convention, becoming the 98th nation to do so.<sup>83</sup> The Genocide Convention Implementation Act of 1987 (Genocide Act) added the crime of genocide to the federal criminal code, but with a more heightened intent requirement than is found in the Convention. Under the Genocide Act, the offense of genocide is committed when an individual, with “the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group,” kills members of that group, causes serious bodily injury or permanent mental

<sup>75</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 <<https://tinyurl.com/UNGenocideConvention>> (as of Mar. 14, 2023)

<sup>76</sup> Office on Genocide Prevention and the Responsibility to Protect, United Nations, *Genocide* <<https://tinyurl.com/GenocideUN>> (as of Mar. 14, 2023).

<sup>77</sup> The Crime of Genocide, Dec. 11, 1946, U.N. General Assembly Resolution 96(1).

<sup>78</sup> The Crime of Genocide, Dec. 11, 1946, U.N. General Assembly Resolution 96(1).

<sup>79</sup> Hinton, *Black Genocide and the Limits of Law*, *Opinio Juris* (Jan. 13, 2022) <<https://tinyurl.com/HintonOJ>> (as of Mar. 17, 2023).

<sup>80</sup> Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 *J. of American Ethnic History* 35, 43.

<sup>81</sup> Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 *J. of American Ethnic History* 35, 54.

<sup>82</sup> Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 *J. of American Ethnic History* 35, 55.

<sup>83</sup> Roberts, *Reagan Signs Bill Ratifying U.N. Genocide Pact*, *N.Y. Times* (Nov. 5, 1988) <<https://tinyurl.com/NYTreagan>> (as of Mar. 14, 2023).

impairment through drugs, torture, or similar techniques to members of that group, imposes measures intended to prevent births within the group, subjects members of the group to conditions of life that are intended to cause the physical destruction of the group, or forcibly transfers children of the group to another group.<sup>84</sup> To be covered by the statute, the offense must be committed within the United States or be committed by a person who is a citizen or permanent resident of the United States, a stateless person whose habitual residence is in the United States, or present in the United States.<sup>85</sup> A person who attempts or conspires to commit the offense of genocide faces the same punishment as one who completes the offense.<sup>86</sup>

Genocide scholars have developed other frameworks outside of the narrow legal frameworks of the Genocide Convention and the Genocide Act. For example, in his early writings on genocide, Lemkin viewed genocide as a process, rather than an event, that involved “one destruction of the national pattern of the oppressed groups; the other, the imposition of the national pattern of the oppressor,” a view that encompasses “structural” genocide.<sup>87</sup> Cultural genocide, also derived from Lemkin’s early writings, encompasses “the destruction of a group’s cultural, linguistic, and existential underpinnings, without necessarily killing members of the group.”<sup>88</sup>

### **Applicability to Black Americans**

When the acts perpetrated upon Black Americans have been committed with the intent to destroy them, in whole or in part, as a group, Black Americans have been victims of genocide, as the Geneva Convention defines the term. While the intent requirement is understood to be the more difficult element of genocide to prove,<sup>89</sup> a number of scholars regard the acts committed against Black Americans, from enslavement forward, as constituting genocide under the Convention.<sup>90</sup> When a less legalistic understanding of genocide is employed, there is little debate.

Black Americans for centuries have suffered harms and atrocities, inflicted on the basis of race and without regard for their humanity. Slavery inflicted death and serious bodily and mental harms,<sup>91</sup> and the trafficking of enslaved people caused the “forcible transfers of children”

<sup>84</sup> See Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091, subd. (a)-(b), Pub.L. No. 100-606 (Nov. 4, 1988). The code was later amended to include a punishment by death. See Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 1091, Pub.L. No. 103-322 (Sept. 13, 1994).

<sup>85</sup> 18 U.S.C. § 1091, subd. (e).

<sup>86</sup> 18 U.S.C. § 1091, subd. (d).

<sup>87</sup> Hinton, *Black Genocide and the Limits of Law*, *Opinio Juris* (Jan. 13, 2022) <<https://tinyurl.com/HintonOJ>> (as of Mar. 17, 2023); see also Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 89.

<sup>88</sup> Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 95.

<sup>89</sup> Office on Genocide Prevention and the Responsibility to Protect, United Nations, *Genocide* <<https://tinyurl.com/GenocideUN>> (as of Mar. 14, 2023).

<sup>90</sup> See Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 115; James, *The Dead Zone: Stumbling at the Crossroads of Party Politics, Genocide, and Postracial Racism* (Summer 2009) 108:3 *South Atlantic Quarterly* 459, 460-467; Bowser, et al., *Ongoing Genocides and the Need for Healing: The Cases of Native and African Americans* (Dec. 2021) 15:3 *Genocide Studies and Prevention* 83, 85.

<sup>91</sup> See California Task Force to Study and Develop Reparations Proposals for African Americans, *Interim Report* (June 2022) pp. 59-64 <<https://tinyurl.com/TFInterimReport>> (as of Mar. 14, 2023) (hereafter Task Force Report).

from their families to plantations unknown.<sup>92</sup> The Ku Klux Klan and others committed innumerable lynchings and systematically visited racial terror against Black Americans, killing and causing serious bodily harm while government officials participated or turned a blind eye.<sup>93</sup> By 1931, at least 30 states had passed eugenics laws that deliberately targeted Black people for involuntary sterilization, an imposition of “measures intended to prevent births.”<sup>94</sup>

Acts against Black Americans that constitute genocide when committed with the requisite intent continued after the United States ratified the Genocide Convention. The American legal system continues to over-police Black communities and disproportionately kill and commit acts of violence against Black people and disproportionately imprison and execute Black Americans, causing serious physical and mental impairment and having the effect of separating families and preventing births.<sup>95</sup> Although the last recorded lynching in the United States was in 1981, the civil rights organization Julian has identified at least eight suspected lynchings in Mississippi alone since 2000.<sup>96</sup> Seven of these deaths were by hanging and each ruled as a suicide by law enforcement, despite suspicious circumstances; the other was a racially-motivated beating by a group of ten white teenagers.<sup>97</sup> Academics have also identified the involuntary sterilization of Black women through welfare incentive programs in the 1990s as an example of a violation of the Genocide Convention—specifically, its prohibition against the systemic elimination of specific populations.<sup>98</sup>

The framing of the United States’ treatment of Black Americans as a genocide is not new. Even before the Genocide Convention, in 1946, the National Negro Congress delivered an eight-page petition (1946 Petition) to the U.N. Secretary-General asking him to take action to address the subjugation of Black Americans, particularly in the South, where 10 million Black people lived in deplorable conditions.<sup>99</sup> Although the U.N. declined to act, the 1946 Petition had success in drawing attention to the plight of Black Americans.<sup>100</sup>

On Oct. 23, 1947, the NAACP, led by W.E.B. Du Bois, in order to spur the United States government’s slow pace of racial reform, presented U.N. officials with a 95-page “Appeal to the

<sup>92</sup> See Task Force Report, *supra*, at 59-60.

<sup>93</sup> See Task Force Report, *supra*, at 96-117.

<sup>94</sup> See Task Force Report, *supra*, at 407.

<sup>95</sup> See Task Force Report, *supra*, at 377-389.

<sup>96</sup> Brown, ‘Lynchings in Mississippi never stopped’, Wash. Post (Aug. 8, 2021) <<https://tinyurl.com/BrownWaPo>> (as of Mar. 17, 2023); See, e.g., Julian, *Willie* <<https://tinyurl.com/JulianWillie>> (as of Mar. 17, 2023).

<sup>97</sup> Brown, ‘Lynchings in Mississippi never stopped’, Wash. Post (Aug. 8, 2021) <<https://tinyurl.com/BrownWaPo>> (as of Mar. 17, 2023)

<sup>98</sup> Muhammad, *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations* (2013) 3 Colum. J. Race & L. 147, 200; see also Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse* (1994) 3 Am. U. J. Gender & L. 15, 21 & n. 55 (identifying state legislation that conditioned receipt of welfare benefits on Norplant use by mothers of beneficiaries, who at the time were disproportionately Black children in those states, and explaining that states did not fund Norplant removal despite a medical provider being needed to remove the implant).

<sup>99</sup> Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPPolitico> (as of Mar. 17, 2023).

<sup>100</sup> Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPPolitico> (as of Mar. 17, 2023).



World!” (1947 Petition), intended as an improvement of the 1946 Petition.<sup>101</sup> Du Bois framed the petition as “a frank and earnest appeal to all the world for elemental justice against the treatment which the United States has visited upon us for three centuries.”<sup>102</sup> The detailed 1947 Petition lambasted the United States for denying a host of human rights to its Black minority population and garnered much more attention than the previous 1946 Petition.<sup>103</sup> Du Bois sought support from Eleanor Roosevelt, a member of the American delegation to the United Nations, but Roosevelt informed him that the matter was “embarrassing” to the State Department and that “no good could come from such a discussion.”<sup>104</sup> Although Du Bois extensively publicized the petition, providing a copy to each U.N. ambassador with a request that the topic be placed before the general assembly, no U.N. committees or commissions took action.<sup>105</sup>

Next, in December 1951, less than a year after the Genocide Convention went into effect, the Civil Rights Congress, headed by Paul Robeson and William L. Patterson, presented a petition entitled *We Charge Genocide* (1951 Petition) to the United Nations.<sup>106</sup> *We Charge Genocide*, one of the very first petitions presented to the United Nations on the subject of genocide, detailed 152 lynchings and 344 other crimes of violence of Black Americans by lynch mobs and police between 1945, the year the U.N. was established, and 1951, in addition to the thousands of crimes committed prior to 1945.<sup>107</sup> The 1951 Petition also emphasized the countless African Americans who died each year as a result of health care, employment, education and housing discrimination.<sup>108</sup>

American representatives at the United Nations, including Eleanor Roosevelt, fiercely argued against the introduction of the 1951 Petition, claiming that the United States government was anti-discrimination and anti-segregation.<sup>109</sup> Partly to sway the United States to ratify the Convention, the 1951 Petition was even dismissed by Lemkin himself. Lemkin portrayed the petition as a maneuver by “communist sympathizers” to divert attention from the genocide of

<sup>101</sup> [cite source from fn that follows]

<sup>102</sup> Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPolitics> (as of Mar. 17, 2023); Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 38-39.

<sup>103</sup> Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPolitics> (as of Mar. 17, 2023).

<sup>104</sup> Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 39.

<sup>105</sup> Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 41.

<sup>106</sup> Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPolitics> (as of Mar. 17, 2023).

<sup>107</sup> Glenn, “*We Charge Genocide*” *The 1951 Black Lives Matter Campaign*, U. of Wash. Mapping American Social Movements Project, <[https://depts.washington.edu/moves/CRC\\_genocide.shtml](https://depts.washington.edu/moves/CRC_genocide.shtml)> (as of Mar. 14, 2023).

<sup>108</sup> Glenn, “*We Charge Genocide*” *The 1951 Black Lives Matter Campaign*, U. of Wash. Mapping American Social Movements Project, <[https://depts.washington.edu/moves/CRC\\_genocide.shtml](https://depts.washington.edu/moves/CRC_genocide.shtml)> (as of Mar. 14, 2023).

<sup>109</sup> Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 50-51.



“Soviet-subjugated people,”<sup>110</sup> though one scholar has noted that *We Charge Genocide* presented America’s violence against Black people in a manner that was consonant with Lemkin’s early writings, in which he presented a more holistic conception of genocide.<sup>111</sup> Other opponents similarly stigmatized the Civil Rights Congress as “disloyal” and the petition as “Communist propaganda.”<sup>112</sup> In the face of opposition from the United States and the hostile environment created by the Cold War and the Red Scare, the United Nations refused to accept the 1951 Petition.<sup>113</sup>

In 1964, Malcolm X and the staff of the Organization of African-American Unity drafted a document entitled “Outline for Petition to the United Nations Charging Genocide Against 22 Million Black Americans” (1964 Petition) and enquired about procedural mechanisms to bring a genocide case in front of the U.N. Commission on Human Rights.<sup>114</sup> The 1964 Petition charged economic genocide against Black Americans as illustrative of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” and segregation, discrimination, and racial terror as causing “serious mental harm” to Black Americans, in violation of Article II(b) of the Genocide Convention.<sup>115</sup> The 1964 Petition further charged police, the Ku Klux Klan and White Citizens councils of targeted killings on the basis of race, in violation of Article II, Section I of the Genocide Convention.<sup>116</sup> The 1964 Petition asserted that law enforcement and government officials were complicit in these acts of violence and also liable under Article III’s ban on conspiracies and complicity to commit genocide.<sup>117</sup> However, Malcolm X was assassinated before he could present the 1964 Petition to the United Nations and it was not advanced after his killing.<sup>118</sup>

Nearly 60 years later, there remains debate regarding whether the atrocities committed against Black Americans fit within the *legal* framework set forth in the Genocide Convention and the Genocide Act.<sup>119</sup> The view to the contrary emphasizes the difficulty of establishing the

<sup>110</sup> Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPolitico> (as of Mar. 17, 2023).

<sup>111</sup> *Ibid.* (referencing Moses, Raphael Lemkin, Culture, and the Concept of Genocide, [https://www.dirkmoses.com/uploads/7/3/8/2/7382125/moses\\_lemkin\\_culture.pdf](https://www.dirkmoses.com/uploads/7/3/8/2/7382125/moses_lemkin_culture.pdf)).

<sup>112</sup> Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 56.

<sup>113</sup> Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 54; Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 115.

<sup>114</sup> Nier, *Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations Human Rights Provisions and Institutions* (1997) 16 Pa. State Intl. L.Rev. 149, 178-179.

<sup>115</sup> Nier, *Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations Human Rights Provisions and Institutions* (1997) 16 Pa. State Intl. L.Rev. 149, 180-181.

<sup>116</sup> Nier, *Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations Human Rights Provisions and Institutions* (1997) 16 Pa. State Intl. L.Rev. 149, 181.

<sup>117</sup> Nier, *Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations Human Rights Provisions and Institutions* (1997) 16 Pa. State Intl. L.Rev. 149, 181-182.

<sup>118</sup> Nier, *Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations Human Rights Provisions and Institutions* (1997) 16 Pa. State Intl. L.Rev. 149, 179.

<sup>119</sup> See Heller, *Is “Structural Genocide” Legally Genocide? A Response to Hinton*, *Opinio Juris* (Dec. 30, 2021) < <https://tinyurl.com/HellerOJ> > (as of Mar. 17, 2023); Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 114.

“intent” element of a crime of genocide—that is, the intention to destroy Black Americans, in whole or in part, as a group.<sup>120</sup> Some may find this unsurprising given the efforts the United States undertook to bring about a legal framework for genocide that would exclude its own conduct.<sup>121</sup> As one scholar notes, however, the dispute over the requirement of genocidal intent does not negate that the United States’ “treatment of Black Americans before and after WW II satisfied the *actus reus* of genocide. The 240-page 1951 Petition, *We Charge Genocide*, is richly supported by disturbing detail concerning the tens of thousands of Black men and women killed for no reason other than their race, the massive mental trauma caused by segregation and other legalized forms of discrimination, and the appalling conditions of life to which Black people were deliberately subjected.”<sup>122</sup>

While cognizant of the legal definition’s *mens rea* requirement, other scholars have identified the American system of slavery as genocide, pointing out that the institution of slavery and the trans-Atlantic slave trade, by “utilizing every genocidal strategy listed in the UN Genocide Convention’s definition” inflicted

incalculable demographic and social losses. . . . The killing and destruction were clearly intentional, whatever the counter-incentives to preserve survivors of the Atlantic passage for labor exploitation. . . . If an institution is deliberately maintained and expanded by discernible agents, though all are aware of the hecatombs of casualties it is inflicting on a definable human group, then why should this not qualify as genocide?<sup>123</sup>

Additionally, enslavers

were very much aware of the outcomes of their activities [demonstrating the intent required by the legal definition of genocide] . . . . The traumatization of slaves was practiced, refined, and intentional. How to beat, abuse, torture, publicly humiliate, and terrorize slaves to control and motivate them to obey and work were the basis of endless discussion, exchange, consultation, and advisement among slave masters.<sup>124</sup>

One scholar has noted that the damage done by slavery, including abuse and trauma, “went on long enough and occurred frequently enough for post-traumatic stress disorder (PTSD) to become intrinsic to African American culture. Slavery was a multi-generational holocaust.”<sup>125</sup>

<sup>120</sup> Heller, *Is “Structural Genocide” Legally Genocide? A Response to Hinton*, *Opinio Juris* (Dec. 30, 2021) <<https://tinyurl.com/HellerOJ>> (as of Mar. 17, 2023).

<sup>121</sup> Hinton, *Black Genocide and the Limits of Law*, *Opinio Juris* (Jan. 13, 2022) <<https://tinyurl.com/HintonOJ>> (as of Mar. 17, 2023).

<sup>122</sup> Hinton, *Black Genocide and the Limits of Law*, *Opinio Juris* (Jan. 13, 2022) <<https://tinyurl.com/HintonOJ>> (as of Mar. 17, 2023).

<sup>123</sup> Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 115.

<sup>124</sup> Bowser, et al., *Ongoing Genocides and the Need for Healing: The Cases of Native and African Americans* (Dec. 2021) 15:3 *Genocide Studies and Prevention* 83, 85.

<sup>125</sup> Bowser, et al., *Ongoing Genocides and the Need for Healing: The Cases of Native and African Americans* (Dec. 2021) 15:3 *Genocide Studies and Prevention* 83, 88.

Outside of the narrow legal frameworks of the United Nations and the United States, academics acknowledge that the cultural destruction, social death, and subjugation of Black Americans has resulted in the equivalent of a cultural and social genocide.<sup>126</sup> Additionally, even those who take the very narrow definition of genocide as framed in the Genocide Convention and Genocide Act acknowledge that the United States’ treatment of Black Americans can be described as a gross crimes against humanity including persecution, extermination, and apartheid.<sup>127</sup> And slavery and the slave trade, murder, kidnapping, rape, torture or other cruel, inhuman or degrading treatment or punishment as well as systematic racial discrimination”—atrocities and harms that have purposefully and collectively been visited upon Black Americans—are all recognized as “gross violations of international human rights law” or “serious violations of international humanitarian law” that warrant reparations.<sup>128</sup>

### III. STATUTES OF LIMITATIONS

“Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.”<sup>129</sup> In short, when it comes to reparations, there are no statutes of limitation.

#### B. Chapter 15: Examples of Other Reparations Programs

- i. International Programs (or International reparations and racial equity schemes)

##### 1. Germany-Israel

In September 1952, representatives of the newly established State of Israel and the newly formed Federal Republic of Germany (FRG) met at Luxembourg and signed an agreement that required the FRG to pay reparations to Israel for the material damage caused by the criminal acts perpetrated against the Jewish people during the Third Reich.<sup>130</sup> The 1952 Agreement (Agreement) consisted of three parts, two of which were protocols. The first part of the Agreement required the FRG to pay Israel DM3 billion<sup>131</sup> to help resettle Jewish refugees in the

<sup>126</sup> Hinton, *Black Genocide and the Limits of Law*, Opinio Juris (Jan. 13, 2022) <<https://tinyurl.com/HintonOJ>> (as of Mar. 17, 2023).

<sup>127</sup> Heller, *Is “Structural Genocide” Legally Genocide? A Response to Hinton*, Opinio Juris (Dec. 30, 2021) <<https://tinyurl.com/HellerOJ>> (as of Mar. 17, 2023).

<sup>128</sup> See Section \_\_, *supra*.

<sup>129</sup> UN Principles on Reparation at p. 5.

<sup>130</sup> De Greiff, *Luxembourg Agreement: Excerpts* in *The Handbook of Reparations (“Luxembourg Agreement”)* (2006) page 886; Colonomos and Armstrong, *German Reparations to the Jews After World War II* in *The Handbook of Reparations (“German Reparations”)* (2006) page 391.

<sup>131</sup> The Agreement sets out the FRG’s financial obligations in Deutschemark. When the Agreement was executed, one dollar equaled 4.2 Deutschemark. The DM3 billion was equal to \$820 million. Honig, *The Reparations Agreement Between Israel and The Federal Republic of Germany (“Reparations Agreement”)* 48 Am. J. Int’l L. 564, 566, fn. 11.

new State of Israel. The DM3 billion sum would be paid in annual installments.<sup>132</sup> The second part, Protocol 1, required the FRG to enact laws to pay individual compensation to “former German citizens, refugees, and stateless persons” for harms suffered during the Third Reich.<sup>133</sup> And the third part of the agreement, Protocol 2, required the FRG to pay the Conference on Jewish Material Claims against Germany (Claims Conference) DM450 million for the “relief, rehabilitation (social and cultural), and resettlement of Jewish victims of Nazi persecution living outside of Israel.”<sup>134</sup>

The Agreement between Israel and the FRG was intended to address the harms inflicted on Jewish people living in Germany or in territories controlled by Germany during the Third Reich, the regime that ruled Germany from 1933 to 1945.<sup>135</sup> Beginning in 1933, the Third Reich implemented several reforms that were intended to control and limit the citizenship and freedom of its Jewish citizens. The Nurnberg Laws were two race-based measures that were approved by the Nazi Party at its convention in Nurnberg in 1935.<sup>136</sup> One of the laws, the Reichsbürgergesetz or the “Law of the Reich Citizen”, deprived German Jews of citizenship, designating them as “subjects of the state.”<sup>137</sup> The other law prohibited miscegenation between Jews and “citizens of German or kindred blood.”<sup>138</sup>

Other laws were passed which excluded Jewish citizens from certain positions, schools, and professions.<sup>139</sup> For example, Jews were barred from earning university degrees, owning businesses, and providing legal and medical services to non-Jews.<sup>140</sup> Jews were also barred from participating in German social life. They were “denied entry to theatres, forced to travel in separate compartments on trains, and excluded from German schools.”<sup>141</sup>

During the Third Reich, the Nazis also confiscated Jewish property in a program called “Aryanization.”<sup>142</sup> It is estimated that around \$6 billion in property was stolen from the Jewish people living in Germany and the territories controlled by Germany.<sup>143</sup>

After the war began and Germany expanded its territories, more Jewish people came under German control.<sup>144</sup> The Nazi response was to create “ghettos” and force the Jewish population to live there until the German government decided what to do with them.<sup>145</sup> Eventually, these acts culminated in the final solution, which was the murder of Jewish citizens

<sup>132</sup> De Greiff, *Luxembourg Agreement*, *supra*, at p. 887.

<sup>133</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 399; De Greiff, *Luxembourg Agreement*, *supra* note 3 at pp. 895-897.

<sup>134</sup> The Claims Conference is an umbrella organization comprised of 23 Jewish organizations. It was founded in 1951 after a meeting in New York. (Colonomos and Armstrong, *German Reparations*, *supra*, at p. 394)

<sup>135</sup> Third Reich, official Nazi designation for the regime in Germany from January 1933 to May 1945.

<sup>136</sup> Britannica [Nurnberg Laws](#)

<sup>137</sup> Britannica [Nurnberg Laws](#)

<sup>138</sup> Britannica [Nurnberg Laws](#)

<sup>139</sup> <https://encyclopedia.ushmm.org/content/en/article/antisemitic-legislation-1933-1939>

<sup>140</sup> Britannica [Nurnberg Laws](#)

<sup>141</sup> Britannica [Nurnberg Laws](#)

<sup>142</sup> Britannica [Nurnberg Laws](#)

<sup>143</sup> Honig, *Reparations Agreement*, *supra*, at p. 565.

<sup>144</sup> Britannica [Nurnberg Laws](#)

<sup>145</sup> Britannica [Nurnberg Laws](#)



in concentration camps throughout Germany and territories controlled by Germany.<sup>146</sup> Although there is some debate about when the Nazis decided to kill Jewish people, it is undisputed that “in June of 1941, the Nazis began the systematic killing of Jews.”<sup>147</sup>

Just two months after his election, Konrad Adenauer, the Chancellor of the newly formed FRG expressed a willingness to address claims of reparations for the harms inflicted on the Jewish people by Nazi Germany.<sup>148</sup> The idea of providing reparations to Holocaust survivors or the heirs of those who died, did not begin with Adenauer, however. Beginning in 1949, the Council of States in the American-occupied zone established a law of compensation. They implemented a reparations or restitution scheme that was designed to restore to Jewish citizens the property taken from them.<sup>149</sup> By including concepts like the right of displaced people to compensation and the categories of harm that constitute persecution, the law of compensation “established the foundations of the first nationwide law on reparations....”<sup>150</sup>

Discussions about reparations were being held in the Jewish community even earlier—at the beginning of the war.<sup>151</sup> The idea gained support and was discussed at the War Emergency Conference organized by the World Jewish Congress in 1944.<sup>152</sup> In the Jewish community, both in the diaspora and Israel, there was strong opposition to the idea of reparations, however. The opposition was so intense that the head of the Jewish World Congress had to have “clandestine discussions” with Chancellor Adenauer until they could produce an agreement that would be acceptable to both parties.<sup>153</sup>

The Agreement was eventually signed in September 1952.<sup>154</sup> The first part of the Agreement required the FRG to pay DM3 billion in installments to Israel to help Israel meet the costs of resettling Jewish refugees who fled Nazi Germany and other territories that were formerly under Nazi Germany control. Specifically, those funds provided the means for Israel “to expand opportunities for the settlement and rehabilitation” of Jewish refugees in Israel.<sup>155</sup> Israel invested those funds into its industrial development by purchasing goods and services from the FRG to build and expand its infrastructure.<sup>156</sup> In addition to providing Israel with funds to purchase goods and services, the Agreement required the FRG to ensure the delivery of goods

<sup>146</sup> Authers, *German Compensation for Forced and Slave Laborers* in *The Handbook of Reparations* (“German Compensation”) (2006) 420, 421- 422.

<sup>147</sup> Britannica [Nurnberg Laws](#)

<sup>148</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 394.

<sup>149</sup> *Id.* at p. 392.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Id.* at p. 393.

<sup>152</sup> *Ibid.*

<sup>153</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 394.

<sup>154</sup> De Greiff, *Luxembourg Agreement: Excerpts* in *The Handbook of Reparations* (“*Luxembourg Agreement*”) (2006) page 886; Colonomos and Armstrong, *German Reparations to the Jews After World War II* in *The Handbook of Reparations* (“*German Reparations*”) (2006) page 391.

<sup>155</sup> De Greiff, *Luxembourg Agreement*, *supra* note 3, at p. 886; Honig, *Reparations Agreement*, *supra*, at p. 566.

<sup>156</sup> Colonomos and Armstrong, *German Reparations*, *supra* note 5 at p. 400; Heilig, *From the Luxembourg Agreement To Today: Representing A People* 20 *Berkeley J. Int’l L.* page 176, 179-180; Honig, *Reparations Agreement*, *supra*, at p. 569.



and services to Israel.<sup>157</sup> To ensure the participation of German suppliers, the Agreement provided incentives like tax refunds to suppliers “on deliveries of commodities in pursuance of the Agreement.”<sup>158</sup>

The payments would be paid according to the schedule in the Agreement.<sup>159</sup> The remaining DM140 million was due three months later.<sup>160</sup> After 1954, if the FRG determined that it could not comply with the obligation, it was required to give Israel notice in writing that there would be a reduction in the amount of the installments, but in no way could any of the installments be reduced below DM250 million.<sup>161</sup>

Four agencies were established to ensure that the Agreement would be carried out.<sup>162</sup> The Israeli Mission was the sole agency that could place orders with German suppliers on behalf of the Israeli Government.<sup>163</sup> But jurisdiction was conferred on German courts to decide disputes arising out of the performance of *individual* transactions involving individual German suppliers.<sup>164</sup> The second agency was the agency designated by the FRG to examine all orders placed by Israel to ensure that they conformed to the Agreement.<sup>165</sup>

The third agency was the Mixed Commission, which was responsible for supervising the operation of the Agreement.<sup>166</sup> Its members were appointed by their respective governments.<sup>167</sup> It had no adjudicative power.<sup>168</sup>

The fourth agency, the Arbitral Commission had adjudicative power over disputes between Israel and the FRG, except for those disputes that involved individual German suppliers.<sup>169</sup> Each country appointed one arbitrator, and the arbitrators, by mutual agreement, appointed an umpire who could not be a national of either contracting party.<sup>170</sup> If the parties could not agree on the appointment of an umpire, the President of the International Court of Justice would select one.<sup>171</sup> The arbitrators serve five years and were eligible to serve another term once their five-year term expired.<sup>172</sup>

### Individual Compensation

The second part of the Agreement, Protocol 1, required the FRG to enact laws for payment of individual compensation to former German citizens, refugees, and stateless

<sup>157</sup> Honig, *Reparations Agreement, supra*, at p. 569.

<sup>158</sup> *Ibid.*

<sup>159</sup> De Greiff, *Luxembourg Agreement, supra*, at p. 888.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Id.* at pp. 887-888.

<sup>162</sup> Honig, *Reparations Agreement, supra*, at p. 573.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Id.* at p. 574.

<sup>165</sup> *Id.* at p. 575.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Id.* at pp. 575-576.

<sup>170</sup> *Id.* at p. 575, fn. 40.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Id.* at p. 575.

persons.<sup>173</sup> The FRG enacted the first supplementary law for the compensation of victims in compliance with Protocol 1 in 1953.<sup>174</sup> The Compensation Law covered harms that occurred between January 30, 1933, the beginning of the Third Reich, and May 8, 1945.<sup>175</sup> The categories of harm that were eligible for compensation included,

- Compensation for Life: Under this category, widows, children, and dependent relatives could apply for an annuity for wrongful death, based on the amount paid to families of civil servants<sup>176</sup>
- Compensation for Health: Under this category claimants were entitled to medical care for “not insignificant damage to health or spirit.” For damages beyond claims for medical care, claimants could apply for an annuity but had to prove that the persecution caused health damages that led to at least a 30 percent reduction in their earning capacity<sup>177</sup>
- Compensation for Damages to Freedom: This category included claimants subjected to political or military jail, interrogation custody, correctional custody, concentration camp, ghetto, or punishment entity. It also included forced labor “insofar as the persecuted lived under jail-like conditions.”<sup>178</sup>
- Compensation for Property, Assets, and Discriminatory Taxes: Claimants could file claims for the loss of property that occurred because the claimant fled the country, emigrated, or was robbed of their freedom. They were also entitled to compensation for property damage and paying discriminatory taxes such as the Reich Flight tax.<sup>179</sup>
- Compensation for Damages to Career or Economic Advancement: This category entitled self-employed and privately employed claimants from the time persecution began until January 1, 1947. The exact amount would be calculated at 2/3 of the relevant civil servant’s pay. If a claimant was unable to resume their career, they could elect to receive their pension early. The amount of the pension was 2/3 that of a civil servant’s pension. Those who wanted to reestablish their business were entitled to a loan of up to DM30,000. Claimants could also claim assistance to make up their missed education.<sup>180</sup>
- Compensation for Loss of Life or Pension Insurance: The claimant could claim up to DM10,000.<sup>181</sup>

<sup>173</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 403; De Greiff, *Luxembourg Agreement*, *supra* at p. 889.

<sup>174</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 402.

<sup>175</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 403.

<sup>176</sup> *Id.* at p. 403.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> *Id.* at p. 404.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

Claimants could pursue compensation for harm endured under each of the various categories simultaneously.<sup>182</sup> They were not limited to one category when filing claims. If a claim was denied, the victim could file a case in court.<sup>183</sup> For damage to body or health claims, the claimant would have to be interviewed and examined by court-nominated experts.<sup>184</sup>

There were some deficiencies in the 1953 Compensation Law, which Parliament tried to fix in the 1956 Federal Compensation Law.<sup>185</sup> The 1956 Law increased the maximum compensation for loss of life to DM25,000 and improved the claims process to make it easier for claimants.<sup>186</sup> The 1956 Law still excluded those persecuted outside of Germany, forced laborers, victims of forced sterilization, the “antisocial,” Communists, Gypsies, and homosexuals.<sup>187</sup>

In 1965, the FRG enacted the Federal Compensation Final Law. The Final Law made the following changes:

- It created a hardship fund of DM1.2 billion to support refugees from Eastern Europe who were previously ineligible for compensation, primarily emigrants from 1953 to 1965<sup>188</sup>
- Compensation for Health: Eased burden on claimants to prove damages to their health were caused by their earlier persecution by including a presumption that if the claimant had been incarcerated for a year in a concentration camp, subsequent health problems could be causally linked to their persecution under the Nazi regime<sup>189</sup>
- The category for loss of life was expanded to include deaths that occurred either during persecution or within eight months after.<sup>190</sup>
- The ceiling for education claims increased to DM10,000<sup>191</sup>
- Claims already adjudicated were to be revised based on the new law.<sup>192</sup>

The Final Law still excluded some of the same groups as the prior versions of the compensation laws.<sup>193</sup> And it did not include a category for compensation for work performed by slave or forced labor.<sup>194</sup>

<sup>182</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 403

<sup>183</sup> Colonomos and Armstrong, *German Reparations supra*, at p. 410.

<sup>184</sup> Colonomos and Armstrong, *German Reparations supra*, at p. 410.

<sup>185</sup> *Id.* at pp. 404-405.

<sup>186</sup> Colonomos and Armstrong, *German Reparations, supra*, at p. 405.

<sup>187</sup> *Id.* at p. 406.

<sup>188</sup> *Id.* at p. 407.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> Colonomos and Armstrong, *German Reparations, supra*, at p.407

Over the course of the reparations process, the German government received over 4.3 million claims for individual compensation, of which 2 million were approved.<sup>195</sup> It is estimated that by 2000, Germany had paid more than DM82 billion in reparations or \$38.6 billion.<sup>196</sup>

### Protocol 2: Claims Conference

The third part of the Luxembourg Agreement, Protocol 2, required the FRG to pay the Claims Conference DM450 million for the “relief, rehabilitation (social and cultural), and resettlement of Jewish victims of Nazi persecution living outside of Israel.”<sup>197</sup> The money would be paid to Israel and Israel would disburse the funds to the Claims Conference for it to disburse the money.<sup>198</sup>

### Post 1952 Luxembourg Agreement Measures

The 1953, 1956, and 1965 Compensation Laws excluded compensation for forced labor and slave labor. The process for compensating these harms began in the German parliament in 1998.<sup>199</sup> The World Jewish Congress and the Claims Conference began placing pressure on German companies that benefited from slave labor and forced labor during World War II to pay reparations.<sup>200</sup> These companies also faced foreign political pressure from governments like the United States.<sup>201</sup> There was no political pressure from organizations like the United Nations, however.<sup>202</sup> Lawsuits in the United States against German companies that operated in the United States also applied pressure to the German government and the German companies to provide compensation for the labor they benefited from during the war.<sup>203</sup>

These efforts culminated in the enactment in July 2000 of the Forced and Slave Labor Compensation Law.<sup>204</sup> Eight countries were involved: Germany, the United States, Russia, Israel, Poland, the Czech Republic, Belarus, and Ukraine.<sup>205</sup>

The fund contained DM8.1 billion to pay the claims.<sup>206</sup> The compensation scheme implemented “rough justice.” Former slave laborers<sup>207</sup> received DM15,000 or \$7,500.<sup>208</sup> Former forced laborers received DM5,000 or \$2,500.<sup>209</sup> Payments were limited to claimants only and not

<sup>195</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 408.

<sup>196</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 408.

<sup>197</sup> *Id.* at p. 399.

<sup>198</sup> *Ibid.*

<sup>199</sup> Authers, *German Compensation*, *supra*, at p. 429.

<sup>200</sup> *Id.* at pp. 429-430.

<sup>201</sup> *Id.* at p. 431.

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> *Id.* at p. 433.

<sup>205</sup> *Id.* at p. 432.

<sup>206</sup> Authers, *German Compensation*, *supra*, p. 434

<sup>207</sup> Slave labor was work performed in a concentration camp or ghetto or other places of confinement under conditions of hardship. Forced labor was work performed by force other than slave labor in the Third Reich or its territories under conditions resembling imprisonment. (Authers, *German Compensation*, *supra*, p. 435.)

<sup>208</sup> *Id.* at p. 434.

<sup>209</sup> *Ibid.*

extended to descendants. However, heirs of anyone who died after February 1999, the date negotiations regarding compensation began, could file a claim.<sup>210</sup>

The Law also allowed for compensation for all non-Jewish survivors living outside the five Eastern European countries.<sup>211</sup> The International Organization for Migration processed those claims.<sup>212</sup> Claimants had to complete applications by December 31, 2001.<sup>213</sup> By the deadline, the International Organization of Migration had received 306,000 claims.<sup>214</sup>

In filing their claims, claimants had to provide details of previous claims made and provide a copy of their IDs.<sup>215</sup> They were also required to declare whether they received slave labor compensation directly from a German company.<sup>216</sup> They also had to identify a place where they were forced to perform slave or forced labor and waive their legal rights against the German government and in connection with Nazi-era activities against all German companies.<sup>217</sup>

Every check that was issued under the Forced and Slave Labor compensation law had the following apology from the President of Germany included:

This compensation comes too late for all those who lost their lives back then, just as it is for all those who died in the intervening years. It is now therefore even more important that all survivors receive, as soon as possible, the humanitarian agreement agreed today. I know that for many it is not really money that matters. What they want is for their suffering to be recognized as suffering and for the injustice done to them to be named injustice. I pay tribute to all those who were subjected to slave and forced labor under German rule, and in the name of the German people, beg forgiveness. We will not forget their suffering.<sup>218</sup>

### **Assessments of the FRG-Israel Reparations Scheme**

Initially, there was significant opposition to the idea of reparations in Germany.<sup>219</sup> Chancellor Adenauer's reparations initiative did not have the full support of German citizens.<sup>220</sup> Germans considered themselves victims of the war. And the majority believed that German widows and orphans should receive support first, with Jewish citizens at the bottom of the list.<sup>221</sup> Government officials were also against reparations. One concern was that a potentially large

<sup>210</sup> *Id.* at p. 435.

<sup>211</sup> *Id.* at p. 437

<sup>212</sup> *Ibid.*

<sup>213</sup> *Id.* at p. 435.

<sup>214</sup> Authers, *German Compensation*, *supra* p. 435

<sup>215</sup> *Id.* at p. 436

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*

<sup>218</sup> Authers, *German Compensation*, *supra* at p. 427

<sup>219</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 394

<sup>220</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 394

<sup>221</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at pp. 394-395



expenditure, as reparations would likely require, could be risky for Germany given its financial position after the war.<sup>222</sup>

There was also opposition in the Jewish community. Underlying the opposition was the idea that the Jewish people should not accept money to absolve the German people of the harm they caused. The debt the Germans had incurred was a moral one that could not be paid off.<sup>223</sup> Pragmatism eventually won. Reparations could help develop Israel so that the country would be stronger and could save Jews from all over the world quickly in another crisis.<sup>224</sup> But it was understood that the moral debt Germany had acquired because of its actions towards the Jewish people could not be “quantified and hence would remain eternal.”<sup>225</sup> This initial opposition was so intense that the initial negotiations were held in secret until they could reach an agreement that would be acceptable to both countries.<sup>226</sup>

Scholars have noted that the 1952 Agreement was unique in many ways. It was the first reparations agreement that required a country to compensate a country that was not the victor in a war.<sup>227</sup> Further, it was the first reparations program where the perpetrator paid reparations “on its own volition in order to facilitate self-rehabilitation.”<sup>228</sup> And the Agreement was formed by two states that were “descendant entities of the perpetrators and victims.”<sup>229</sup> The program was the largest reparations program ever implemented.<sup>230</sup> And it had significant economic and political consequences for both Israel and the FRG.<sup>231</sup> The treaty enabled a substantial trade relationship between the two countries.<sup>232</sup> When reparations payments ceased in 1965, Israel and the FRG gradually initiated political relations.<sup>233</sup>

## 2. Chile

Under the 1973 to 1990 dictatorship of General Augusto Pinochet, the people of Chile were subjected to a systematic campaign of torture and state violence: an estimated 2,600 to 3,400 Chilean citizens were executed or “disappeared” while another estimated 30,000 to 100,000 were tortured.<sup>234</sup>

The dictatorship began with a coup the morning of September 11, 1973 under the guidance of U.S. Secretary of State Henry Kissinger to seize the democratic socialist government of Dr.

<sup>222</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 395

<sup>223</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 397

<sup>224</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 397

<sup>225</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 397

<sup>226</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 394.

<sup>227</sup> Barkan, *Between Restitution and International Morality* (2001) 25 *Fordham Int'l L.J.* 46, 49

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*

<sup>230</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p. 408.

<sup>231</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p.408

<sup>232</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p.409.

<sup>233</sup> Colonomos and Armstrong, *German Reparations*, *supra*, at p.409

<sup>234</sup> *The Center for Justice & Accountability*, [Chile](#) (as of December 27, 2022).

Salvador Allende.<sup>235</sup> Pinochet’s military junta seized power, ending Chile’s long tradition of constitutional government.<sup>236</sup> Pinochet’s military dictatorship defined segments of the Chilean population as ideological enemies – the “subversive” – and detained, tortured, and murdered suspected opponents of the dictatorship.<sup>237</sup> According to the Valech Report on Political Imprisonment and Torture (2004), at least 27,255 people were tortured from 1973 to 1990. Approximately 2,296 people were killed or “disappeared,” although an additional 1,000 still remain unaccounted for.<sup>238</sup> The National Truth and Reconciliation Commission found 899 additional cases of individuals “disappeared” or killed by state agents in the same period.<sup>239</sup>

In 1988, a plebiscite was held to determine whether General Augusto Pinochet should remain president of the country, which voted against his continuation. In March 1990, Patricio Aylwin was sworn in as President of the Republic of Chile and one month later, he created the National Truth and Reconciliation Commission. This eight-member commission was tasked with disclosing the human rights violations that occurred under the previous dictatorship, gathering evidence to allow for victims to be identified, and recommending reparations in a legal, financial, medical and administrative capacity.<sup>240</sup> In February 1991, the Commission delivered its first report to the President, the Rettig Report. The report determined that 2,298 persons had died and were victims of human rights violations or victims of political violence between September 11, 1973 and March 11, 1990.<sup>241</sup> The Chilean armed forces and Supreme Court officially rejected the report, arguing that it did not take into account the historical and political context in which these acts occurred. Despite such criticism, however, the actual content of the Rettig Report was not denied.<sup>242</sup> President Aylwin sent a draft bill on reparations for the victims to Congress using the recommended measures of reparations from the Rettig Report. The bill was approved and signed into law (Law 19.123) on February 8, 1992.

Law 19.123 established the National Corporation for Reparation and Reconciliation with the purpose of coordinating, carrying out, and promoting actions needed to comply with the recommendations contained in the Report of the National Truth and Reconciliation Commission.<sup>243</sup> As written in Law 19.123, the national corporation shall, but it not limited to:

- Promote reparations for the moral injury caused to the victims referred to in Article 18 and provide the social and legal assistance needed by their families so that they can access the benefits provided for in this law.<sup>244</sup>

<sup>235</sup> The National Security Archive, [Kissinger and Chile: The Declassified Record](#) (as of December 27, 2022).

<sup>236</sup> *The Center for Justice & Accountability*, [Chile](#) (as of December 27, 2022).

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*

<sup>240</sup> Greiff, *The Handbook of Reparations* (2010) p. 57; United States Institute of Peace, [Truth Commission: Chile 90](#) (as of Dec. 23, 2022).

<sup>241</sup> Greiff, *The Handbook of Reparations* (2010) p. 57

<sup>242</sup> *Id.* at p. 58

<sup>243</sup> *Id.* at p. 748

<sup>244</sup> *Id.* at p. 749

- Promote and assist in actions aimed at determine the whereabouts and circumstances surrounding the disappearance or death of the detained-disappeared persons and of those persons whose mortal remains have not been located, even though their death has been legally recognized. In pursuing this objective, the corporation should collect, analyze, and systematize all information useful for this purpose.<sup>245</sup>
- Serve as depository for the information collected by the National Truth and Reconciliation Commission and the National Corporation for Reparation and Reconciliation, and all information on cases and matters similar to those treated by it that may be compiled in the future. It may also request, collect, and process existing information in the possession of public institutions, as well as request it from private institutions, in relation to human rights violations or political violence referred to in the Report of the National Truth and Reconciliation Commission.<sup>246</sup>
- Compile background information and perform the inquiries necessary to rule on the cases that were brought before the National Truth and Reconciliation Commission, in which it was not possible to reach a well-founded conclusion as to whether the person detrimentally impacted was a victim of human rights violations or political violence, or with respect to cases of the same nature that were not brought before the commission in timely fashion, or, if they were, in which it did not reach a decision due to lack of sufficient information. In this regard, it shall proceed pursuant to the same rules established for said Commission in Supreme Decree 355, of the Ministry of Interior, of April 25, 1990, which established it.<sup>247</sup>
- Enter into agreements with nonprofit institutions or corporations so that they may provide the professional assistance needed to carry out the aims of the Corporation, including medical benefits.<sup>248</sup>
- Make proposals for consolidating a culture of respect for human rights in the country.<sup>249</sup>

Law 19.123 also established a monthly reparations pension for the families of the victims of human rights violations or political violence as identified in the report by the National Truth and Reconciliation Commission.<sup>250</sup> The Institute of Pension Normalization was placed in charge of paying the pensions throughout the country. Article 24 of the law established that the reparations pension was compatible with any other benefits that the beneficiary was receiving at the moment, or would receive in the future, as well as any other social security benefits.<sup>251</sup> In 1996, the monthly pension amounted to \$226,667 Chilean pesos (US \$537).<sup>252</sup> This figure was used as a reference for estimating the different amounts provided to each type of beneficiary as defined in Law 19.123. Beneficiaries are as listed:

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<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> *Id. at p. 750*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Id. at p. 59*

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

- Surviving spouse received 40 percent of the total or \$90,667 pesos (US \$215);<sup>253</sup>
- Mother of the petitioner or, in her absence, the father received 30 percent of the total or \$68,000 pesos (US \$161);<sup>254</sup>
- Surviving mother or father of a victim's out-of-wedlock offspring received 15 percent of the total or \$34,000 pesos (US \$80);<sup>255</sup>
- Each of the children of a disappeared person received 15% or \$34,000 pesos (US \$80) until the age of twenty-five, or with no age limit in the case of handicapped children.<sup>256</sup>

A one-time compensatory bonus equivalent to twelve months of pension payments was also awarded.<sup>257</sup> A beneficiary would also receive the pension in the proportion determined by the law, even if there were no other beneficiaries in the family.<sup>258</sup> Also, if the amount required by the number of beneficiaries exceeded the reference amount, each of them still received the percentage established by law.<sup>259</sup>

At the time of Law 19.123, other smaller programs were created to remedy specific issues, including a program within the Chilean Ministry of Health, financed by the United States Agency for International Development, to provide comprehensive physical and psychological health care for those who were most affected by human rights violations.<sup>260</sup>

There have been public criticisms of the reparations measures proposed by the government. These criticisms object declaring the presumed death of the victims, harbor a mistrust in the creation of a public interest corporation with no juridical faculties to investigate the whereabouts of disappeared detainees, and condemn an unfair single pension model that does not take into account the number of members in each family.<sup>261</sup>

There were also notable issues with Law 19.123, which excluded certain beneficiaries (unmarried partners, victims without children, and mothers of illegitimate children) and lack recognition or remedy for specific victims (those illegally detained and tortured).<sup>262</sup>

In 1997, under new presidential leadership, the Corporation closed down on December 31, and issued a final report that the work of the institution had contributed effectively to political reconciliation, but that the pending cases of more than 1,000 disappeared detainees undermined these efforts and that some of the obligations assigned to the Corporation had not been fulfilled.<sup>263</sup> As such, and with obligation to continue searching for disappeared victims under Article 6 of Law 19.123, the state continued some of the work of the Corporation following its

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<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*

<sup>260</sup> *Id. at pp. 67-92*

<sup>261</sup> *Id. at p. 58*

<sup>262</sup> *Id. at p. 63*

<sup>263</sup> *Id. at p. 63*

closure. On April 25, 1997, the state issued Supreme Decree Num. 1.005, which established that a new “follow-up program” be created to follow up on specific duties and responsibilities of Law 19.123.<sup>264</sup> This included:

- Implementation of the recommendation by the Truth and Reconciliation Commission.<sup>265</sup>
- Provision of the legal and social assistance for the families of the victims upon request.<sup>266</sup>
- Preservation and safekeeping of documents and archival records collected by the National Truth and Reconciliation Commission and the former National Corporation of Reparations.<sup>267</sup>

The next president, Eduardo Frei Ruiz-Tagle, continued this work on reparations and initiated roundtables on human rights between 1999 and 2000.<sup>268</sup> These roundtables culminated into a supplementary report of 200 new cases of disappeared detainees.<sup>269</sup> In response, elements of the follow up program for Law 19.123 were integrated into the Human Rights Program of the Ministry of Interior. The new program continued to work with families and a newly reorganized judicial program provided logistical support to special judges conducting investigations in regiments, clandestine cemeteries, and other places indicated in the report by the armed forces.<sup>270</sup>

In August 2003, the next president, Ricardo Lagos, made a proposal to the country regarding pending issues related to the human rights violations that occurred between September 1973 and March 1990, and sent three bills to Congress to strengthen the work of the Follow-Up Program, increase pension amounts, and expand beneficiary access to pensions.<sup>271</sup> The president argued that the human rights violations of the dictatorship represented a social, political, and moral scar that required meaningful reparation measures and a responsible recognition of the magnitude of the problem.<sup>272</sup> In September 2003, President Lagos created the National Commission on Political Imprisonment and Torture Report (Valech Commission) to continue the work of reparations by identifying victims, proposing new measures of reparations, and producing a final report.<sup>273</sup> The Valech Commission delivered its first 1,200-page report to President Lagos on November 10, 2004, who then presented it to the nation in a televised speech later that month.<sup>274</sup> The President asked the Valech Commission to produce a complementary report taking into

<sup>264</sup> Greiff, *The Handbook of Reparations* (2010) p. 64

<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

<sup>268</sup> *Id.* at p. 65

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> *Id.* at p. 66-67

<sup>272</sup> *Ibid.*

<sup>273</sup> United States Institute of Peace, [Commission of Inquiry: Chile 03](#) (as of Dec. 27, 2022).

<sup>274</sup> *Ibid.*



account approximately 1,000 additional cases that were submitted by victims and their families.<sup>275</sup> That report was delivered in June 2005.<sup>276</sup>

In 2005, the Chilean government decided to provide 28,459 registered victims or their relatives with lifelong governmental compensation (approximately 200 USD per month) and free education, housing, and health care.<sup>277</sup> In 2009, the Chilean Congress passed Law No. 20.405 creating the Institute for Human Rights.<sup>278</sup> Under this law, Chilean President Michelle Bachelet was tasked with creating a consultative commission (Valech II Commission) for the qualification of disappeared detainees, persons killed by extrajudicial executions, as well as, prisoners of conscience and victims of torture.<sup>279</sup> At this time, the Chilean government began to enter into international networks to help address the human rights abuses that occurred in Chile. In 2009, Chile joined the Rome Statute of the International Criminal Court in 2009.<sup>280</sup> Later, in 2015, Chile became a signatory party to the Agreement on the Statute and Functions of the International Commissions on Missing Persons.<sup>281</sup> Today, the Chilean government continues to work to address past human right abuses through new commissions and instruments, including the Chilean System of National DNA Databases to test and match DNA samples between relatives and missing persons.<sup>282</sup>

### 3. South Africa

“Apartheid was an institutional regime of racial segregation and systematic oppression, implemented in South Africa for the purpose of depriving the majority black population of basic rights and securing the white minority’s power over the country’s government, economy, and resources.”<sup>283</sup> Following the election of Nelson Mandela as the country’s first non-white president, the South African government passed the Promotion of National Unity and Reconciliation Act to help transition South Africa out of the apartheid era and into an era of democracy in which Black South Africans would have full participation. To make that transition, the Act created the Truth and Reconciliation Commission (Commission), which operated through three committees. One committee was the Committee on Human Rights Violations (CHRV) which investigated the gross human rights violations committed during the apartheid regime. Another committee of the Commission was the Amnesty Committee, which was responsible for determining which perpetrators of gross human rights violations would receive amnesty, that is, immunity from civil and criminal liability for their crimes. And the final committee was the Committee on Reparations and Rehabilitation (CRR) which was responsible

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<sup>275</sup> *Ibid.*

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

<sup>280</sup> *International Commission on Mission Persons, [Where are the Missing: Chile](#) (as of Dec. 27, 2022).*

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

<sup>283</sup> Farbstein, *Perspectives from a Practitioner: Lessons Learned from the Apartheid Litigation* (2020) 61 Harv. Int’l L.J. 451, 454-455.

for developing an urgent interim reparations program and submitting final reparations policy recommendations to the government.

Included in the final reparations policy recommendations were financial and symbolic reparations as well as community rehabilitation programs and institutional reforms. The financial reparations recommendation was that the government pay individual reparations grants to 22,000 confirmed victims each year, for six years. To ensure successful implementation, the CRR also recommended that the government appoint a national body to implement the reparations program and a secretariat within the office of the President or the Vice President to oversee implementation.

The government adopted some of the CRR's symbolic reparations recommendations, its community rehabilitation program recommendations, and its institutional reforms. The government did not adopt the recommendation for a national implementing body. Nor did it adopt the CRR's recommendation that it pay individual reparation grants for six years. Instead, in 2003, five years after the CRR submitted its final reparations policy recommendations, the South African government paid a one-time payment of R30,000 to some of the 22,000 victims. The payment was about one-fifth of the amount the CRR recommended to compensate victims for their suffering. By 2004, only 10 percent of the confirmed victims had received their payment.

### **The History of the Apartheid and Gross Human Rights Violations**

De jure racial segregation was widely practiced in South Africa since the first white settlers arrived in South Africa.<sup>284</sup> When the National Party gained control of the government in 1948, it expanded the policy of racial segregation, naming the system apartheid.<sup>285</sup> This system of “separate development” was furthered by the Population Registration Act of 1950, which classified all South Africans as either Bantu (all Black Africans), Coloured (those of mixed race), or white.<sup>286</sup> Another piece of legislation, the Group Areas Act of 1950, established residential and business sections in urban areas for each race, and barred members of other races from living, operating businesses, or owning land in areas designated for a different race. The law was designed to remove thousands of “Coloureds,” Blacks, and Indians from areas classified for white occupation. As a result of the confluence of laws, specifically, the Population Registration Act, the Group Areas Act, and several “Land Acts” adopted between 1913 and 1955, more than 80 percent of South Africa’s land was set aside for the white minority.<sup>287</sup>

The government also passed laws limiting education for Black South Africans. Specifically, the Bantu Education Act enacted in 1953, provided for the creation of state-run schools, which Black children were required to attend. The goal of these state-run schools was to

<sup>284</sup> See Britannica <https://www.britannica.com/topic/apartheid> (as of Mar. 10, 2023).

<sup>285</sup> See Britannica <https://www.britannica.com/topic/apartheid> (as of Mar. 10, 2023).

<sup>286</sup> See Britannica <https://www.britannica.com/topic/apartheid> (as of Mar. 10, 2023). A fourth category for Asian, that is Indian and Pakistani, was added later.

<sup>287</sup> See Britannica <https://www.britannica.com/topic/apartheid> (as of Mar. 10, 2023).

train Black children for “manual labour and menial jobs” the government deemed suitable for their race. Black South Africans were also barred from attending universities in South Africa.<sup>288</sup>

To help enforce the segregation of the races and prevent Black South Africans from encroaching on white areas, the government strengthened existing “pass” laws, requiring “nonwhites to carry documents authorizing their presence in restricted areas.”<sup>289</sup> Many private companies, including ones based in the United States and Europe, enabled apartheid by manufacturing the military and police vehicles<sup>290</sup> used to enforce segregation and by creating the document system that stripped Black South Africans of their citizenship and their rights.<sup>291</sup>

Responses to violations of apartheid laws were brutal. Under South African law, police officers could commit acts of violence, that is, torture or kill, in the pursuit of their official duties.<sup>292</sup> One confirmed victim of gross human rights abuses was tortured by police on four different occasions.<sup>293</sup> On one occasion he was electrocuted.<sup>294</sup> On another “they put a tire around [his] neck, placed [his] hands behind [his] back and threw matches at [his] hair.”<sup>295</sup> On one occasion, he was tortured for five days.<sup>296</sup> And on yet another occasion, he was detained for six months without charges and tortured.<sup>297</sup>

There were also numerous large-scale shooting incidents that involved police officers roaming through Black townships in vehicles called Hippos and shooting Black people, including children.<sup>298</sup> In one incident in 1985, a thirteen-year-old was shot and killed by security forces while traveling from his grandmother’s house to his home to pick up his schoolbooks.<sup>299</sup> Other children were shot and killed while playing outside with friends.<sup>300</sup>

The Truth and Reconciliation Commission’s (Commission) Final Report documented the “extreme violence necessary to maintain the apartheid regime.”<sup>301</sup> In essence, the system of apartheid was held in place by gross human rights violations, “including prolonged arbitrary

<sup>288</sup> The 1959 Extension of University Education Act prohibited established universities from admitting nonwhite students. (Britannica <https://www.britannica.com/topic/apartheid> (as of Mar. 10, 2023).)

<sup>289</sup> See Britannica <https://www.britannica.com/topic/apartheid> (as of Mar. 10, 2023).

<sup>290</sup> A Ford plant in Port Saint Elizabeth manufactured vehicles that were used by the military and police. (Farbstein, *Perspectives from a Practitioner: Lessons Learned from the Apartheid Litigation* (2020) 61 Harv. Int’l L.J. 451, 462-463.)

<sup>291</sup> Farbstein, *Perspectives from a Practitioner: Lessons Learned from the Apartheid Litigation* (2020) 61 Harv. Int’l L.J. 451, 455

<sup>292</sup> The 1961 Indemnity Act gave police officers authority to commit acts of violence to uphold apartheid. See Britannica <https://www.britannica.com/topic/apartheid> (as of Mar. 10, 2023).

<sup>293</sup> Daly, *Reparations in South Africa: A Cautionary Tale* (2003) 33 U. Mem. L. Rev. 367,368-369.

<sup>294</sup> Daly, *Reparations in South Africa: A Cautionary Tale* (2003) 33 U. Mem. L. Rev. 367,368.

<sup>295</sup> Daly, *Reparations in South Africa: A Cautionary Tale* (2003) 33 U. Mem. L. Rev. 367,368.

<sup>296</sup> Daly, *Reparations in South Africa: A Cautionary Tale* (2003) 33 U. Mem. L. Rev. 367,368-369.

<sup>297</sup> Daly, *Reparations in South Africa: A Cautionary Tale* (2003) 33 U. Mem. L. Rev. 367, 369.

<sup>298</sup> See Farbstein, *Perspectives from a Practitioner: Lessons Learned from the Apartheid Litigation* (2020) 61 Harv. Int’l L.J. 451, 473-475.

<sup>299</sup> See Farbstein, *Perspectives from a Practitioner: Lessons Learned from the Apartheid Litigation* (2020) 61 Harv. Int’l L.J. 451, 474.

<sup>300</sup> See Farbstein, *Perspectives from a Practitioner: Lessons Learned from the Apartheid Litigation* (2020) 61 Harv. Int’l L.J. 451, 473-475.

<sup>301</sup> Daly, *Reparations in South Africa: A Cautionary Tale* (2003) 33 U. Mem. L. Rev. 367,380.

detention, forced exile, forced relocation, revocation of citizenship, forced and exploited labor, extrajudicial killings, and torture” committed by state and private actors.<sup>302</sup>

There was resistance to apartheid from the beginning. One of the first demonstrations against apartheid took place in Sharpeville on March 21, 1960. As a result of the demonstration, police officers opened fire on the crowd, “killing about 69 Black Africans and wounding many more.”<sup>303</sup> The primary political group that spearheaded the fight to eliminate apartheid was the African National Congress (ANC). The government banned the ANC from 1960 to 1990. Eventually, there was outside economic pressure on South Africa to abandon apartheid, including from the United States and Europe, which imposed selective economic sanctions on South Africa.

Secret negotiations between the National Party, the ruling apartheid party, and the ANC, the resistance, to end apartheid began under President Botha and concluded under President F.W. de Klerk on February 2, 1990, when he announced that he would release all political prisoners and unban anti-apartheid organizations, like the ANC.<sup>304</sup> De Klerk’s announcement began formal negotiations to end apartheid.<sup>305</sup> The bargain struck required the NP to give up power and allow free elections in exchange for amnesty.<sup>306</sup> Those negotiations culminated in the Interim Constitution, which enfranchised Black South Africans and provided for elections in 1994.<sup>307</sup> The Interim Constitution required the new Parliament to draft a final constitution and draft the framework for the new government of South Africa.<sup>308</sup>

The Interim Constitution also included an unnumbered section called the coda, post-amble, or epilogue, which provided for amnesty for the outgoing government in exchange for it giving up power peacefully and having the votes of everyone respected.<sup>309</sup> The coda also included language calling for reparations: “[T]he violent effects of apartheid can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparations but not for retaliation, a need for Ubuntu but not for victimization.”<sup>310</sup> Essentially the bargain struck during the negotiations to end apartheid called for the perpetrators of gross human rights violations to receive amnesty and the victims to receive reparations.<sup>311</sup>

### **Reparations and the Creation of the Truth and Reconciliation Commission**

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<sup>302</sup> Farbstein, *Perspectives from a Practitioner: Lessons Learned from the Apartheid Litigation* (2020) 61 Harv. Int’l L.J. 451, 455

<sup>303</sup> Britannica <https://www.britannica.com/topic/apartheid> (as of Mar. 10, 2023).

<sup>304</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* (De Greiff edit. 2006) p. 176, 177.)

<sup>305</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* (De Greiff edit. 2006) p. 176, 177.

<sup>306</sup> Daly, *Reparations in South Africa: A Cautionary Tale* (2003) 33 U. Mem. L. Rev. 367,371.

<sup>307</sup> Daly, *Reparations in South Africa: A Cautionary Tale* (2003) 33 U. Mem. L. Rev. 367,371.

<sup>308</sup> Daly, *Reparations in South Africa: A Cautionary Tale* (2003) 33 U. Mem. L. Rev. 367,371.

<sup>309</sup> Daly, *Reparations in South Africa: A Cautionary Tale* (2003) 33 U. Mem. L. Rev. 367,371

<sup>310</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 179.

<sup>311</sup> Daly, *Reparations in South Africa: A Cautionary Tale* (2003) 33 U. Mem. L. Rev. 367,372



In addition to creating the Commission and outlining the duties of its three committees, the Promotion of National Unity and Reconciliation Act (the Act) identified the need for reparations as a primary concern, requiring the Commission “to provide for ... the taking of measures aimed at the granting of reparations to, and the rehabilitation and restoration of the human and civil dignity of, victims of violations of human rights.”<sup>312</sup> It also defined several key terms that would be used throughout the reparations process. First, it defined reparations using a very broad and open-ended definition: “any form of compensation, *ex gratia* payment,<sup>313</sup> restitution, rehabilitation or recognition.”<sup>314</sup> The Act also distinguished between a longer-term reparations policy and an interim urgent reparations policy that would provide urgent reparations to “victims.”<sup>315</sup> The urgent reparations would go to those “victims not expected to outlive the [Commission]” and “those who had urgent medical, emotional, educational, material, and/symbolic needs.”<sup>316</sup>

A “victim” was defined as a person who “suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or 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.”<sup>317</sup> “A gross violation of human rights is 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 [killing, abduction, torture or severe ill-treatment.]”<sup>318</sup>

The Act also provided for but did not require, the creation of a President’s Fund (Fund) that would hold and disburse funds as reparations.<sup>319</sup> The Fund would hold and invest money appropriated to it by Parliament and money donated by nongovernmental sources.<sup>320</sup>

Even though it addressed reparations, the Act did not codify or otherwise guarantee the right to reparations.<sup>321</sup> Nor did it grant the Commission power to implement any of the final reparations policy proposals.<sup>322</sup> The Commission’s power ended with the submission of the final report.

### **The Committee on Human Rights Violations (CHRV)**

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<sup>312</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 181 [internal quotes omitted].

<sup>313</sup> *Ex gratia* payment means any payment given out of a sense of moral obligation instead of as a legal obligation.

<sup>314</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 182

<sup>315</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 182

<sup>316</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 182

<sup>317</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 182

<sup>318</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 182

<sup>319</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 183

<sup>320</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 184

<sup>321</sup> See De Greiff, *The Handbook of Reparations* (2006) at p. 777 (Chapter 5, ¶ 27, granting the President authority to revise and, in appropriate cases, discontinue or reduce “any reparation.”) The final Constitution did not guarantee the right to reparations either. But it adopted all the amnesty provisions in the Interim Constitution. (Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 179.)

<sup>322</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 181



The Commission's CHR V was responsible for investigating human rights abuses. One significant limit set on the work of the CHR V was that it could only investigate *gross* violations of human rights defined as killing, abduction, torture, and severe ill-treatment that were politically motivated and which occurred between 1960 and 1994.<sup>323</sup> This definition of gross human rights violations meant that forced removals to unfertile land, wholesale appropriation of land that left the majority of the population living on 13 percent of the land, oppressive labor conditions in mines and on farms, educational deprivations, and legal restrictions from birth to death would not be investigated.<sup>324</sup> Nor would any of the racially-based abuses that occurred between 1652 and 1960 be included.<sup>325</sup> Also excluded from investigation were practices that excluded Black South Africans from educational institutions and professions or restricted access to resources based on race.<sup>326</sup>

The Act also required a victim's claim of gross human rights violations to be corroborated before the victim could qualify for reparations.<sup>327</sup> There was a documented massive document destruction campaign during the reparations process, however, which likely affected the ability of many victims to obtain corroborating evidence of human rights abuses they suffered.<sup>328</sup> Further, there were outside critiques that the requirement for corroboration "placed an insurmountable burden on many individuals who lacked supporting evidence of their experiences of being tortured, kidnapped, or losing loved ones."<sup>329</sup>

With these limitations, the CHR V dispatched "specially trained statement-takers" to all parts of the nation to take statements of victims.<sup>330</sup> From the thousands of statements they received, several "individuals whose stories would shed light on the broader patterns of abuses" were asked to tell their stories during televised hearings held throughout the country between 1996 and 1997.<sup>331</sup> Of the three committees, the CHR V's work is the most well-known because of the televised hearings showcasing the victims' stories.

Once a claim was filed, an investigation was conducted to determine whether there was enough to corroborate that the individual was a victim of gross human rights violations.<sup>332</sup> If the claim was corroborated, the victim received a letter confirming their status as a "victim" of human rights abuses.<sup>333</sup> If the claim could not be corroborated, the person was also informed by

<sup>323</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,373

<sup>324</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,373

<sup>325</sup> See Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,373

<sup>326</sup> See Farbstein, *Perspectives from a Practitioner: Lessons Learned from the Apartheid Litigation* (2020)

61 Harv. Int'l L.J. 451, 456

<sup>327</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,375

<sup>328</sup> See Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,375

<sup>329</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,375

<sup>330</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,373-374 (internal quotes omitted)

<sup>331</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,373

<sup>332</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,374

<sup>333</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,374, fn. 15

letter and notified of their right to appeal the decision.<sup>334</sup> Ultimately, 22,000 individuals were identified as victims of gross human rights violations.<sup>335</sup>

### **Amnesty Committee (AC)**

Several clauses in the Act guaranteed amnesty, that is, immunity from criminal and civil liability, for perpetrators of gross human rights violations, which included individuals and the State itself.<sup>336</sup> Perpetrators of human rights abuses and/or violations could apply for amnesty for acts associated with a political objective in the course of the conflicts of the past as long as they made full disclosure of all relevant facts.<sup>337</sup> They did not have to express regret or remorse. Nor offer an apology or request forgiveness to be granted amnesty.<sup>338</sup> Ultimately, the Commission granted amnesty to approximately 1,200 individuals, turning down 5,000.<sup>339</sup>

Six months after the Commission began its work, three widows of victims of the security forces and the Azanian People's Organization (AZAPO) challenged the constitutionality of the Act based on the amnesty provisions, which absolved individuals and the state from civil and criminal liability for the human rights violations committed during apartheid.<sup>340</sup> The Constitutional Court held that the Act was constitutional despite the amnesty provisions because the amnesty provisions made it possible for "the truth of human rights violations to be known and the cause of reconciliation and reconstruction to be furthered."<sup>341</sup> The State authorized "the Parliament to balance the rights of the victims against the broad reconstructive goals of the Constitution."<sup>342</sup>

### **The Committee on Reparations and Rehabilitation (CRR)**

The Commission's CCR was responsible for developing both the Urgent Interim Reparations policy program (UIR) and making final reparations policy recommendations to the President. The policy recommendations for the urgent interim reparations policy were to be implemented during the life of the CRR and the CRR would be responsible for implementing those recommendations.<sup>343</sup> The CRR was also responsible for determining which individuals qualified as victims under the Act's definition.<sup>344</sup> This obligation required it to review referrals from both the CHRV and the Amnesty Committee and "make recommendations ... in and endeavor to restore the human and civil dignity of such victim."<sup>345</sup> The work of the CRR ended once the final reparations policy recommendations were submitted to the president.

<sup>334</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,374, fn. 15

<sup>335</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,374

<sup>336</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 184

<sup>337</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 372

<sup>338</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 372

<sup>339</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 372

<sup>340</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at pp. 184-185

<sup>341</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 185

<sup>342</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 185

<sup>343</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 183

<sup>344</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 183

<sup>345</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 182

## Development and Implementation of the UIR Program

The UIR was an interim financial reparations program. CRR sent UIR policy recommendations to the government in September 1996. The government did not pass regulations to implement the UIR until April 1998.<sup>346</sup> The UIR regulations required information and referrals to services and financial assistance to access services that were necessary to meet urgent medical, emotional, educational, material, and symbolic needs to be provided to applicants whose needs the CRR deemed urgent.<sup>347</sup> Those applicants whose needs were deemed urgent included individuals who,

- Were terminally ill and would not survive beyond the term of the Commission
- Had no fixed home or shelter
- Were orphaned because of the violation
- Physical impairments markedly affected their social functioning
- Required special education because of mental or physical disability<sup>348</sup>

The UIR payments were calculated based on need and the number of dependents the person supported, ranging from a maximum of R2900 (US \$250) for a victim with no dependents to a maximum of R5705 (US \$713) for beneficiaries with five or more dependents.<sup>349</sup> The regulations prohibited UIR funds from being transferred or ceded by victims.<sup>350</sup> Further, the proceeds could not be attached as part of a court judgment or pass to the victim's estate.<sup>351</sup>

The first UIR payments were made in July 1998.<sup>352</sup> The UIR “process was mostly completed in April 2001.”<sup>353</sup> The President's Fund paid out about R44,000,000 (US \$5.5 million) in cash payments to 14,000 victims for three years.<sup>354</sup> Those payments ranged from R2000 (US \$250) to R5600 (US \$700).<sup>355</sup>

The reactions of the beneficiaries who received reparations under the UIR program were mixed.<sup>356</sup> None of them considered the reparations “blood money” that was used to buy their silence.<sup>357</sup> Some of the victims interpreted the funds, not as compensation for the harm suffered, but as a symbolic gesture acknowledging their suffering.<sup>358</sup> Others felt the compensation was inadequate to meet “the tangible needs of their daily suffering” they experienced because of

<sup>346</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at pp. 187-188

<sup>347</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at pp. 188-189

<sup>348</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 188

<sup>349</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 188

<sup>350</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 188

<sup>351</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 188

<sup>352</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 188

<sup>353</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 189

<sup>354</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 189

<sup>355</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 189

<sup>356</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 189

<sup>357</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 189. This was a big issue with other reparations programs, including the FRG-Israel Reparations scheme following World War II. (See Colonomos & Armstrong, *German Reparations to the Jews after World War II: A Turning Point in the History of Reparations* in *The Handbook of Reparations* at p. 396.)

<sup>358</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 189

apartheid.<sup>359</sup> This group believed the UIR, even as a symbolic gesture, was inadequate.<sup>360</sup> The recipients of UIR also were sometimes threatened by those who did not receive UIR payments.<sup>361</sup>

Some critics of the UIR program contend that one inadequacy of the program was the lack of information shared with victims about the Commission.<sup>362</sup> Specifically, victims were not given information about how the Commission was organized or how it functioned.<sup>363</sup> Thus, they were not empowered to engage with the Commission, nor were they knowledgeable about the next steps in the reparations process.<sup>364</sup> And they received little information regarding the perpetrators the Amnesty Committee was considering for amnesty.<sup>365</sup>

One evaluation of the UIR program concluded that it “has not made a meaningful and substantial impact on the lives of recipients and cannot, therefore, be considered a significant or even adequate attempt at reparations.”<sup>366</sup> Another critique was that the process for determining who would receive payments and providing payments to those individuals who qualified under the UIR took longer than expected.<sup>367</sup> Although the CRR sent recommendations to the government in September 1996, the government did not pass regulations until April 1998, more than a year later.<sup>368</sup> The government’s delay in passing regulations caused the CRR to abandon the step in the process that called for the formation of a body that would coordinate and disburse the UIR reparations benefits.<sup>369</sup> The CRR assumed those duties instead.<sup>370</sup>

### Final Reparations Policy Recommendations

The CRR was also responsible for developing final reparations policy recommendations that were submitted to the President for review. Once the final recommendations were submitted to the President, the President would review them and submit a set of policy proposals, including some of his own to the Parliament for debate.<sup>371</sup> After a debate, the Parliament would pass a resolution approving the reparations policy recommendations.<sup>372</sup> Once the parliamentary resolution was passed, the President was required to “publish the appropriate regulations to enact the resolution.”<sup>373</sup> The regulations determined the basis and conditions upon which reparations would be granted and the authority responsible for implementing them.<sup>374</sup> The regulations also

<sup>359</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 190

<sup>360</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 189

<sup>361</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 189

<sup>362</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 190

<sup>363</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 190

<sup>364</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 190

<sup>365</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 190

<sup>366</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 190

<sup>367</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at pp. 188-189

<sup>368</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at pp. 187-188

<sup>369</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 189

<sup>370</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 189

<sup>371</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 183

<sup>372</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 183

<sup>373</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 183

<sup>374</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 183



provided for revision, discontinuance, or reduction of reparations where the President deemed fit to ensure the efficient application of the regulations.<sup>375</sup>

In creating its reparation policy recommendations, the CRR could consider all forms of reparations, including financial, symbolic, and community-wide benefits.<sup>376</sup> The CRR could also make recommendations for the “creation of institutions conducive to a stable and fair society and the institutional, administrative and legislative measures which should be taken or introduced in order to prevent the commission of violations of human rights.”<sup>377</sup>

In developing its proposals, the CRR turned to international sources and structured its policies around the five international reparations principles: redress, restitutions, rehabilitation, restoration of dignity, and reassurance of non-recurrence.<sup>378</sup> Once it defined the principles that would serve as the foundation for its reparations recommendations, the CRR began a consultative process with individuals, victim advocacy groups, NGOs, churches, civil society, and human rights organizations to develop a final reparations policy.<sup>379</sup>

The final reparations policy the CRR submitted to the President observed that “without adequate reparation and rehabilitation measures, there can be no healing or reconciliation.”<sup>380</sup> More specifically, reparations were “necessary to counterbalance amnesty” given the perpetrators.<sup>381</sup> The CRR reminded the government that reparations were a moral requirement for the transition out of apartheid and that moral obligation required substantial reparation grants not token awards to victims.<sup>382</sup> Granting reparations to the victims, added value to the truth-seeking process by enabling survivors to experience the state’s acknowledgment of the harm victims, their families, and South Africa as a whole experienced from apartheid.<sup>383</sup> Reparations also restored the survivors’ dignity and affirmed the values, interests, aspirations, and rights of those who suffered.<sup>384</sup> Just as important, granting reparations also raised consciousness about the public’s moral responsibility to participate in healing survivors and facilitating nation-building.<sup>385</sup>

The Commission through the work of its committees identified 22,000 victims.<sup>386</sup> Although victim advocates urged the CRR to keep the list of victims open so that victims who came forward later could qualify for reparations, it declined to do so for two reasons.<sup>387</sup> It

<sup>375</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 183

<sup>376</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 183

<sup>377</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 183

<sup>378</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 191

<sup>379</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 191

<sup>380</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 193

<sup>381</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 193

<sup>382</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 194

<sup>383</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 193

<sup>384</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 193

<sup>385</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 193

<sup>386</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367,374; Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 192

<sup>387</sup> See Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 191.



concluded that the government was unlikely to accept an open-ended list.<sup>388</sup> And the CRR was without power to expand the definition of a victim under the language of the Act to expand the list of people who qualified as victims beyond the 22,000 identified victims.<sup>389</sup> The CRR made the following final reparations policy recommendations:

### **Individual Reparations Cash Grants**

The CRR recommended that the government pay annual payments ranging between R23,023 (\$2,878) and R17,029 (\$2,129), based on the size of the family for six years.<sup>390</sup> The amount of the grants was based on the median annual household income for a family of 5 in South Africa, which was R21,700 or \$2,713 in 1997.<sup>391</sup> People in rural communities or with large numbers of dependents would receive more.<sup>392</sup> Despite the CRR's justification for its reparations grant recommendations, the government rejected its recommendation and decided to give victims a one-time payment of R30,000 each.<sup>393</sup> The financial costs for the reparation grants of R30,000 amounted to .067% of the Gross Domestic Product (GDP) and .25% of the government's total annual expenditure.<sup>394</sup>

Although the President's Fund contained sufficient funds to pay grants of R30,000 to each victim, the policy recommendations included several alternative schemes for financing the reparations grants:

- Imposing a wealth tax
- Imposing a one-off levy on corporate and private income
- Requiring each company on the Johannesburg Stock Exchange to make a one-off donation of one percent of its market capitalization
- Levying a retrospective surcharge on corporate profits
- Imposing a surcharge given to senior public servants since 1990
- Suspending taxes on land and other material donations to formerly disadvantaged communities<sup>395</sup>

### **Recommendations for Broader Macroeconomic Reforms**

As a broader restructuring of macroeconomic policies for the country, the CRR made the following recommendations:

- Reallocation of resources from the defense force budget
- Donations from individuals, international aid organizations, and the business sector
- Request that the EU divert unspent funds earmarked for development projects into the President's Fund

<sup>388</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 191

<sup>389</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 191

<sup>390</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 194.

<sup>391</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 194.

<sup>392</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 194.

<sup>393</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 197

<sup>394</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 198

<sup>395</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 199

- Exert pressure on Swiss and other governments and banks for contributions;
- Restructure social spending limits, the tax system, and the Government Pension Fund to release more money for social spending;
- Cancellation of foreign debt.<sup>396</sup>

One organization recommended that multinational corporations, which extracted roughly R3billion a year between 1985 and 1993 from South Africa be required to return 1.5 percent of those profits for six years, which would pay for the individual reparation grants.<sup>397</sup>

In addition to the individual reparation grants, the CRR recommended symbolic, community, and national reparation and rehabilitation policy proposals. The symbolic measures fell into three categories:

#### Individual interventions

- Issuing death certificates
- Exhumations, reburial, ceremonies
- Headstones and tombstones
- Declarations of death
- Expungement of criminal records,
- Acceleration of outstanding legal matters related to human rights violations

#### Community Interventions

- Renaming streets and facilities
- Memorials and monuments
- Culturally appropriate ceremonies

#### National interventions

- Renaming of public facilities
- Monuments and memorials
- A National Day of Remembrance

The community rehabilitation recommendations focused on programs and remedies that would address the harm caused to communities by apartheid policies.<sup>398</sup>

- National demilitarization
- Resettlement of displaced persons and communities
- Construction of appropriate local treatment centers
- Rehabilitation of perpetrators and their families
- Support for mental health services and community-based victim support groups
- Skills training

<sup>396</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 199

<sup>397</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 199

<sup>398</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at pp. 195-196

- Specialized trauma counseling services
- Family-based therapy
- Educational reform at the national level
- Study bursaries (monetary education awards)
- Building and improvement of schools
- Provision of housing

Also recommended were several proposals aimed at transforming institutions and a wide range of sectors in South African society, including the judiciary, media, security forces, business, education, and correctional services, to prevent the recurrence of human rights violations that characterized apartheid.<sup>399</sup>

The CRR had no power to implement any of the recommendations in its final reparations policy proposal because its term ended with the submission of the Commission's final report.<sup>400</sup> Recognizing that implementation would need to be organized at the national and local levels, the CRR recommended that the President appoint a secretariat, with a fixed term to oversee the implementation of the reparations and rehabilitation proposals.<sup>401</sup> The CRR also recommended the appointment of a national body, headed by a national director, to implement the reparations scheme.<sup>402</sup> Among its duties, the national body would be responsible for implementing and administering any financial reparations policy, monitoring and evaluating the implementation of the reparations policies, and establishing provincial reparations desks to implement reparations policies at the local level.<sup>403</sup> The provincial reparations desks would report directly to the National Director.<sup>404</sup>

### Government Implementation

After the CRR submitted its final reparations policy recommendations, a core group of NGOs and victim advocacy groups emerged as leaders in the fight to ensure that the government implemented the final reparations policy recommendations implemented.<sup>405</sup> The government resisted their efforts, however, on the grounds that not all of the Commission's work was completed, and until the Commission's final report was submitted, the government was not in a position to do anything with reparations.<sup>406</sup> The final report was submitted in 2003.<sup>407</sup>

In late 2002, before the Commission's final report was submitted, several individual victims and victim advocacy groups filed lawsuits in a US federal district court under the Alien

<sup>399</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 196

<sup>400</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 200

<sup>401</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 196

<sup>402</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 196

<sup>403</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at pp. 196-197

<sup>404</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 197

<sup>405</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 200

<sup>406</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 201

<sup>407</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 201

Tort Statute<sup>408</sup> against several multinational corporations that conducted business with South Africa during apartheid and manufactured products that helped the South African government maintain apartheid.<sup>409</sup>

In the end, the government did not adopt the CRR's recommendations to appoint a secretariat to oversee reparations. Nor did it appoint a national implementing body. It also did not adopt the recommendation for the government to pay individual reparations grants to victims for six years. Instead, in November 2003, five years after the CRR submitted its reparations policy recommendations, the government began paying victims a one-time payment of R30,000.<sup>410</sup> A year later about 10 percent of victims had not received payment because there was difficulty in locating them or confirming bank account information.<sup>411</sup> The total individual reparation grants paid to victims amounted to one-fifth of the CRR's original financial reparations recommendation.<sup>412</sup>

The government did enact some of the symbolic reforms and institutional reform recommendations. The government provided around R800,000 in reburial expenses to 47 families of disappeared persons whose remains were found and reburied.<sup>413</sup> Public symbols of martyrs and those opposed to apartheid have replaced those public symbols of apartheid.<sup>414</sup> The country's largest airport is no longer named after the first apartheid prime minister.<sup>415</sup> And institutions have been integrated even if tensions remain.<sup>416</sup> Much has been done for community rehabilitation in terms of housing, education, and access to healthcare.<sup>417</sup> "[T]here is still much to do" to ensure equity for Black South Africans in these areas of basic human needs, however.<sup>418</sup>

As of 2013, the President's Fund stands at around 1 Billion rand.<sup>419</sup> The government has proposed to use part of this for medical and higher education assistance to the same registered victims who received compensation previously. It has also proposed to fund "community

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<sup>408</sup> The Alien Tort Statute allows non-U.S. citizens to sue in U.S. courts for violations of International law done in concert with state officials. (Farbstein, *Perspectives From a Practitioner: Lessons Learned From the Apartheid Litigation* (2020) 6 Harv. Int'l L.J. 451,458, fn. 25 (citing 25 U.S.C. § 1350).)

<sup>409</sup> Farbstein, *Perspectives From a Practitioner: Lessons Learned From the Apartheid Litigation* (2020) 6 Harv. Int'l L.J. 451,458. The district court dismissed the lawsuit in 2014. The Second Circuit affirmed the dismissal. And the U.S. Supreme Court denied certiorari in 2016. (Farbstein, *Perspectives From a Practitioner: Lessons Learned From the Apartheid Litigation* (2020) 6 Harv. Int'l L.J. 451, 461-462.)

<sup>410</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 209

<sup>411</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at pp. 209-210

<sup>412</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 210

<sup>413</sup> International Center for Transitional Justice: South Africa [South Africa | International Center for Transitional Justice \(ictj.org\)](https://www.ictj.org/south-africa)

<sup>414</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 383

<sup>415</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 383

<sup>416</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 383

<sup>417</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 383

<sup>418</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 383

<sup>419</sup> International Center for Transitional Justice: South Africa [South Africa | International Center for Transitional Justice \(ictj.org\)](https://www.ictj.org/south-africa)

rehabilitation projects” in economically distressed communities.<sup>420</sup> Victims and survivors have criticized both policies and have argued that medical and higher education assistance should be given as well to an additional 30,000 more survivors who, for various reasons, were not able to register with the Commission during its tenure.<sup>421</sup> These organizations have asked that individual compensation get equal priority over community reparations and that the selection of communities for the latter program should be done in consultation with survivors’ organizations.<sup>422</sup>

Throughout the life of the Commission and after, victims raised the objection that the Commission and the government have been much more interested in placating and protecting perpetrators than they have been in meeting the needs of victims.<sup>423</sup> Another key critique of the South African reparations process was that there was no institutional support for victims after the final reparations policy recommendations were submitted to the government because the Commission formally ended with the submission of its final report.<sup>424</sup> “The failure to plan beyond the recommendations, however, resulted in many disappointed South Africans who assumed that meaningful reparations would begin at or before the close of the TRC process. Now that the TRC has formally shut down, the victims are left with their own meager resources and without any significant institutional support.”<sup>425</sup> The structure of the Commission, including the limitations placed on its power to implement its reparations policy recommendations or even be involved in the process after submitting its recommendations to the President, almost guaranteed that the victims would not receive reparations based on the final reparations policy recommendations.<sup>426</sup>

Some scholars believe the problem with the implementation of the reparations scheme began with the secret negotiations to end apartheid and carried through the Constitutional Court’s decision in the AZAPO case that the amnesty provisions were legitimate even if they stripped victims of remedies for actual harm suffered.<sup>427</sup> From the inception of the negotiations to end apartheid, there was no guarantee that victims would receive an adequate remedy or compensation. Although reparations were discussed at points during the negotiation process, a reparations policy that entitled victims to reparations was not codified in any of the official documents of the new government.<sup>428</sup> Indeed, the Act allowed the President to discontinue

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<sup>420</sup> International Center for Transitional Justice: South Africa [South Africa | International Center for Transitional Justice \(ictj.org\)](https://www.ictj.org/south-africa)

<sup>421</sup> International Center for Transitional Justice: South Africa [South Africa | International Center for Transitional Justice \(ictj.org\)](https://www.ictj.org/south-africa)

<sup>422</sup> International Center for Transitional Justice: South Africa [South Africa | International Center for Transitional Justice \(ictj.org\)](https://www.ictj.org/south-africa)

<sup>423</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 208

<sup>424</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 385-386.

<sup>425</sup> Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 385-386.

<sup>426</sup> See Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. Mem. L. Rev. 367, 385-386.

<sup>427</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at pp. 184-187

<sup>428</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 178



reparations if the President deemed it necessary to do so.<sup>429</sup> A perpetrator's entitlement to amnesty, however, was guaranteed by the Interim Constitution, the final Constitution, the Act, and the Constitutional Court.<sup>430</sup>

The 1948 Universal Declaration of Human Rights asserted that an effective remedy should be provided for violations of fundamental human rights.<sup>431</sup> "In this context reparations have come to mean much more than a means of support or a kind of recognition of suffering. They have become the unfulfilled answer to the question of whether or not justice has been done in the transition process."<sup>432</sup>

#### 4. Canada

The Indian Residential Schools Settlement Agreement was entered into by the Canadian federal government in September 2007. It acknowledged the damage Canada inflicted on its Indigenous peoples through the residential school system and established a multibillion-dollar fund to assist former students of residential schools in their recovery.<sup>433</sup> It has five main components: the Common Experience Payment; Independent Assessment Process; the Truth and Reconciliation Commission; Commemoration; and Health and Healing Services.<sup>434</sup> The Settlement Agreement allocated \$1.9 billion to the Common Experience Payment for all former students of the residential schools.<sup>435</sup> Every former student was given \$10,000 for the first year at school and \$3,000 for each additional year.<sup>436</sup>

Indigenous children in Canada were sent to residential schools from the 17th century until the late 1990s.<sup>437</sup> First established by Roman Catholic and Protestant churches, and based on racial, cultural, and spiritual superiority, residential schools were an attempt to separate Indigenous children from their traditional cultures and convert them to Christianity.<sup>438</sup> The passage of the Indian Act in 1876 formally gave the federal government the power to educate and assimilate Indigenous people in Canada, and the Act's further amendment in 1894 made attendance at residential schools mandatory.<sup>439</sup> Starting in the 1880s, the Canadian government made a concerted effort to establish and expand the residential school system to assimilate

<sup>429</sup> See De Greiff, *The Handbook of Reparations* (2006) at p. 777 (Chapter 5, ¶ 27, granting the President authority to revise and, in appropriate cases, discontinue or reduce "any reparation.")

<sup>430</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at pp. 178-179

<sup>431</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 178

<sup>432</sup> Colvin, *Reparations Program in South Africa* in *The Handbook of Reparations* at p. 208

<sup>433</sup> de Bruin, *Indian Residential Schools Settlement Agreement* (Jul. 11, 2013) *The Canadian Encyclopedia* (as of Jan. 24, 2023) (hereinafter "de Bruin").

<sup>434</sup> *Ibid.*

<sup>435</sup> *Ibid.*

<sup>436</sup> *Ibid.*; All dollar amounts referred to in this section refer to Canadian dollars.

<sup>437</sup> *The Residential School System* (Sept. 9, 2020) Government of Canada (as of Jan. 24, 2023)

<sup>438</sup> *Ibid.*; de Bruin, *supra*.

<sup>439</sup> De Bruin, *supra*.

Indigenous peoples into settler society and to reduce Indigenous dependence on public assistance.<sup>440</sup>

There were 130 residential schools in Canada between 1831 and 1996.<sup>441</sup> During this time, more than 150,000 First Nations, Métis, and Inuit children were forced to attend these schools.<sup>442</sup> Thousands of Indigenous children died at school or as a result of their experiences in school, while many remain missing.<sup>443</sup> Children were forced to leave their homes, parents, and some of their siblings, as the schools were segregated based on gender.<sup>444</sup> Their culture was disparaged from the moment they arrived at school, where children gave up their traditional clothes and had to wear new uniforms, the boys had their hair cut, and many were given new names.<sup>445</sup> At some schools, children were banned from speaking their first language, even in letters home to their parents.<sup>446</sup> The Christian missionary staff at these schools emphasized Christian traditions while they also simultaneously denigrated Indigenous spiritual traditions.<sup>447</sup> Physical and sexual abuse were common.<sup>448</sup> Many children were underfed, and malnutrition and poor living conditions led to preventable diseases such as tuberculosis and influenza.<sup>449</sup>

Indigenous communities struggled to heal the harm done by these residential schools, and starting in 1980, former students campaigned for the government and churches to acknowledge the abuses of this system and provide some compensation.<sup>450</sup> A group of 27 former students filed a class action lawsuit, *Blackwater v. Plint*, against the Government of Canada and the United Church of Canada in 1996.<sup>451</sup> *Blackwater* specifically pertained to the abuses perpetrated at Alberni Residential School on Vancouver Island in British Columbia.<sup>452</sup> The lawsuit spanned nine years, with the Supreme Court of Canada finally concluding that churches were not immune from damage claims and shared blame with the federal government.<sup>453</sup> Thousands of other former students began to sue the federal government and churches for, *inter alia*, assault, negligence, breach of fiduciary duty, and vicarious liability.<sup>454</sup> The sheer number of cases pending in the Canadian court system threatened to create a logjam, and the federal government in June 2001 “convened a series of dialogues on the subject of developing alternative dispute

<sup>440</sup> *Ibid.*; Miller, [Residential Schools in Canada](#) (Oct. 10, 2012) The Canadian Encyclopedia (as of Jan. 24, 2023) (hereinafter “Miller”).

<sup>441</sup> Glover, [Residential Schools in Canada \(Plain-Language Summary\)](#) (Jan. 15, 2020) The Canadian Encyclopedia (as of Jan. 24, 2023) (hereinafter “Glover”).

<sup>442</sup> *Ibid.*

<sup>443</sup> *Ibid.*

<sup>444</sup> Miller, *supra*.

<sup>445</sup> *Ibid.*

<sup>446</sup> *Ibid.*

<sup>447</sup> *Ibid.*

<sup>448</sup> Glover, *supra*.

<sup>449</sup> *Ibid.*

<sup>450</sup> de Bruin, *supra*.

<sup>451</sup> [Litigation and Courts](#) (as of Oct. 20, 2022) Canadian Geographic Indigenous Peoples Atlas of Canada (hereinafter “Indigenous Peoples Atlas”).

<sup>452</sup> *Ibid.*

<sup>453</sup> *Ibid.*

<sup>454</sup> Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice* (2002) 52 U. Toronto L.J. 253, 262.

mechanisms between representatives from the church organizations, the federal government, and Aboriginal peoples, leaders, and healers.”<sup>455</sup>

The federal government issued a Statement of Reconciliation in 1998 that recognized the abuses of the residential school system and established the Aboriginal Healing Foundation.<sup>456</sup> In 2001, the federal government created the Office of Indian Residential Schools Resolution Canada to manage the abuse claims filed by former students through the alternative dispute resolution (“ADR”) process.<sup>457</sup> In 2003, the ADR process began to provide psychological support and calculate compensation. The Indian Residential Schools Settlement Agreement was signed on May 8, 2006, and it went into effect in September 2007.<sup>458</sup> It is the largest class action settlement agreement to date in Canadian history.<sup>459</sup>

As stated previously, every former student was given \$10,000 for the first year at school and \$3,000 for each additional year.<sup>460</sup> By the end of 2012, 98 percent of the 80,000 eligible former students received payments.<sup>461</sup> The Independent Assessment Process provided a mechanism to resolve sexual abuse as well as serious physical and psychological abuse claims.<sup>462</sup> By the end of 2012, it provided more than \$1.7 billion to former students.<sup>463</sup> Survivors had to detail at a hearing the abuse they faced, such as the duration, the abusers’ identities, and medical and personal information.<sup>464</sup> This often led to reopening of old wounds. For both the Common Experience Payment and Independent Assessment Process, rejections, inability to establish attendance at schools, failures of the process, and dismissal of claims led to re-traumatization of survivors and further harm.<sup>465</sup> Additionally, the Settlement Agreement allowed attorneys to charge clients up to 15 percent for difficult cases seeking compensation before the Independent Assessment Process.<sup>466</sup> Unfortunately, some unethical private attorneys charged 15 percent, in addition to further improper interest, fees, and penalties.<sup>467</sup>

The Settlement Agreement allocated \$60 million to the Truth and Reconciliation Commission for five years so that individuals, families, and communities could tell their stories, and the Commission held national events to bring public attention to this issue.<sup>468</sup> The Commission issued a report in December 2015 entitled *Honouring the Truth, Reconciling for the Future* that documented the experiences of the 150,000 survivors.<sup>469</sup> The Settlement Agreement also allocated \$20 million for commemorative projects and \$125 million for the Aboriginal

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<sup>455</sup> *Id.* at pp. 262–265.

<sup>456</sup> de Bruin, *supra*.

<sup>457</sup> [The Indian Residential School Settlement Agreement](#) (as of Oct. 20, 2022) The University of British Columbia.

<sup>458</sup> [Indian Residential Schools Settlement Agreement](#) (May 8, 2006); de Bruin, *supra*.

<sup>459</sup> de Bruin, *supra*.

<sup>460</sup> *Ibid.*

<sup>461</sup> *Ibid.*

<sup>462</sup> *Ibid.*

<sup>463</sup> *Ibid.*

<sup>464</sup> Indigenous Peoples Atlas, *supra*.

<sup>465</sup> *Ibid.*

<sup>466</sup> de Bruin, *supra*.

<sup>467</sup> *Ibid.*

<sup>468</sup> *Ibid.*

<sup>469</sup> *Ibid.*

Healing Foundation.<sup>470</sup> It also established the Indian Residential Schools Resolution Health Support Program, which provides former students with mental health resources provided by elders, Indigenous community health workers, psychologists, and social workers.<sup>471</sup>

Residential schools continue to be in the news. In 2021, Indigenous communities reported they uncovered hundreds of unmarked graves of children who possibly died at residential schools due to disease or neglect, or who were possibly even killed.<sup>472</sup> These discoveries have led to a federal investigation of similar schools in the United States.<sup>473</sup>

Additionally, despite the Settlement Agreement, litigation has not stopped.<sup>474</sup> In October 2022, the Canadian Supreme Court dismissed an appeal from a group of survivors from St. Anne's residential school in northern Ontario, who have alleged the federal government breached the Settlement Agreement because "it withheld documentation of abuse when deciding upon their compensation."<sup>475</sup> In 2014, the Ontario Superior Court ordered 12,300 pages of records (including transcripts of criminal trials, investigative reports from the Ontario Provincial Police, and civil proceedings about child abuse) be produced as a part of the compensation process.<sup>476</sup> The documents were still heavily redacted and survivors claimed the redactions made it impossible to determine adequate compensation.<sup>477</sup> The minister for Crown-Indigenous Relations has stated the office will still discuss the case with St. Anne's survivors and has pointed to a 2021 report that noted 11 compensation cases that could be eligible for further payments.<sup>478</sup>

In January 2023, Canada stated it had agreed to pay \$2.8 billion to settle a series of lawsuits seeking reparations.<sup>479</sup> This settlement is a resolution of a class action lawsuit initially filed by 325 First Nations in 2012 seeking compensation for the destruction of their languages and culture.<sup>480</sup> Under the terms of the settlement, the federal government will establish a trust fund for Indigenous communities to use for educational, cultural, and language programs.<sup>481</sup> A federal court judge approved the \$2.8 billion settlement on March 9, 2023, noting that it is "fair,

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<sup>470</sup> *Ibid.*

<sup>471</sup> *Ibid.*

<sup>472</sup> Austen, [With Discovery of Unmarked Graves, Canada's Indigenous Seek Reckoning](#), N.Y. Times (June 26, 2021) (as of Jan. 24, 2023).

<sup>473</sup> Hauser and Paz, [U.S. to Search Former Native American Schools for Children's Remains](#), N.Y. Times (June 23, 2021) (as of Jan. 24, 2023).

<sup>474</sup> See, e.g., Deer, [Less than Half of the Over \\$200M Requested for Burial Searches at Residential Schools Funded](#), CBC News (Sep. 29, 2022) (as of Jan. 24, 2023); Alhmid, [Canadians reflect about residential schools on Truth and Reconciliation Day](#), The Canadian Press (Sep. 30, 2022) (as of Jan. 24, 2023); Forester, [Trial Put on Hold in Residential School Reparations Class Action After Parties Agree to Negotiate](#), CBC News (Sep. 28, 2022) (as of Jan. 24, 2023).

<sup>475</sup> The Canadian Press, [Supreme Court Will Not Hear from St. Anne's Residential School Survivors](#), MSN (Oct. 20, 2022) (as of Jan. 24, 2023).

<sup>476</sup> *Ibid.*

<sup>477</sup> *Ibid.*

<sup>478</sup> *Ibid.*

<sup>479</sup> Austen, [Canada Settles \\$2 Billion Suit Over 'Cultural Genocide' at Residential Schools](#), N.Y. Times (Jan. 21, 2023) (as of Jan. 24, 2023).

<sup>480</sup> *Ibid.*

<sup>481</sup> *Ibid.*

reasonable, and in the best interests” of the plaintiffs.<sup>482</sup> As a part of this agreement, the First Nations plaintiffs consented to “fully, finally and forever” release the federal government from claims related to the harms inflicted on the First Nations at the residential schools.<sup>483</sup> The First Nations communities will decide what to do with these funds “based on the ‘four pillars principles outlined in the agreement: the revival and protection of Indigenous language; the revival and protection of Indigenous culture; the protection and promotion of heritage; and the wellness of Indigenous communities and their members.’”<sup>484</sup> The settlement will go to an appeal period after which the money will be managed by a board of Indigenous leaders through a not-for-profit fund.<sup>485</sup> The settlement does not release the federal government from future lawsuits involving children who died or disappeared at the residential schools.<sup>486</sup>

## ii. Domestic Programs (or Domestic reparations and racial equity schemes)

### 1. Federal

#### a. U.S. Indian Claims Commission

The United States Indian Claims Commission (“Commission” or “ICC”) was established in 1946 through federal legislation.<sup>487</sup> The Commission provided a forum for Native Americans to pursue legal claims against the United States based on the government’s appropriation of tribal land during the 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>488</sup> Congress established the forum out of a recognition that the treaties underlying many land transfers were inequitable.<sup>489</sup> However, the Commission was not empowered to transfer land back to tribes, and instead made financial awards to successful claimants.<sup>490</sup> Over the course of approximately 30 years, the Commission resolved over 500 claims and awarded approximately \$800 million to tribal claimants.<sup>491</sup>

The ICC was ostensibly established to redress the harms inflicted on native populations during the United States campaign of colonization and relocation that began in the late 18<sup>th</sup> century. Government transgressions during this period were as diverse as they were

<sup>482</sup> The Canadian Press, [‘Historic’ \\$2.5 Billion Class-Action Indigenous Court Settlement Approved](#), CBC News (Mar. 9, 2023) (as of Mar. 10, 2023).

<sup>483</sup> *Ibid.*

<sup>484</sup> *Ibid.*

<sup>485</sup> *Ibid.*

<sup>486</sup> *Ibid.*

<sup>487</sup> Kuykendall et al., [United States Indian Claims Commission, Final Report](#) at p. 5 (Sept. 30, 1978) (“Final Report”).

<sup>488</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 23, 60 Stat. 1049, 1050.

<sup>489</sup> U.S. Congress House Committee on Indian Affairs, Hearings on H R 1198 and H. R. 1341 to Create an Indian Claims Commission. 79th Cong. 1st sess. March 2, 3, 28 and June 11, 14, 1945.

<sup>490</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 23, 60 Stat. 1049, 1050.

<sup>491</sup> Final Report, *supra*, at p. 21.



devastating.<sup>492</sup> They included not only a staggering dispossession of land, but also the widespread killing of Native Americans that many, including California Governor Gavin Newsom, have called a genocide.<sup>493</sup> During this period, spurred by the doctrine of Manifest Destiny, the government acquired nearly two billion acres of land from indigenous peoples, leaving just 140 million acres under native control.<sup>494</sup> This dispossession was accomplished by various means, including outright conquest, treaty, executive order, and federal statute.<sup>495</sup>

Although the government's misconduct during this period was far-reaching, the ICC's focus was solely on land transactions, mostly notably the treaty process. Many government leaders and historians have claimed these transactions were fair and equitable,<sup>496</sup> but others have recognized that they were a means "to dismantle Native land ownership and codify its expropriation."<sup>497</sup> The treaties were "[n]egotiated under duress or facilitated with bribes, [and] were often violated soon after ratification, despite the language of perpetuity."<sup>498</sup> Moreover, the Indian Removal Act of 1830<sup>499</sup> codified the federal policy of relocating Native Americans to make way for settlers, which left tribal land owners with a Hobson's choice: either sell their land via treaty, or be forcibly removed without compensation.<sup>500</sup> Those removals led to many atrocities, including the Trail of Tears.<sup>501</sup>

Against the backdrop of these takings, tribes began to file legal claims in the U.S. courts in the early 19<sup>th</sup> century. But a succession of legal rulings and legislation precluded Native Americans from even having their claims heard.<sup>502</sup> Small progress was made in 1881 when Congress passed a jurisdictional act granting the Choctaw tribe access to the United States Court of Claims.<sup>503</sup> This theoretically made the legal process available to Native Americans, but any tribe seeking redress first needed individual congressional approval.<sup>504</sup> By 1946, almost 200 tribal claims had been filed in the Court of Claims, but only 29 received awards and most of the remainder had been dismissed for jurisdictional technicalities.<sup>505</sup> "The Government, the Indians,

<sup>492</sup> See, e.g., Cohen, *Cohen's Handbook of Federal Indian Law* (2005) at § 1.03[4][a] (discussing the Trail of Tears and several other forcible relocations associated with Indian Removal).

<sup>493</sup> Dunbar-Ortiz, [Yes, Native Americans Were the Victims of Genocide](#) (May 12, 2016) History News Network (as of Feb. 15, 2023); Dobuzinskis, [California governor apologizes to Native Americans, cites 'genocide'](#) (June 18, 2019) Reuters (as of Feb. 15, 2023).

<sup>494</sup> Final Report, *supra*, at p. 1.

<sup>495</sup> Saunt, [The Invasion of America](#) (Jan. 7, 2015) Aeon (as of Feb. 13, 2023).

<sup>496</sup> Churchill, *Charades, Anyone? The Indian Claims Commission in Context* (2000) 24 *American Indian Culture and Research Journal* 43.

<sup>497</sup> Derocher, *supra*, at p. 523.

<sup>498</sup> *The Invasion of America, supra*.

<sup>499</sup> Indian Removal Act, Pub. L. No. 21-148, 4 Stat. 411 (1830).

<sup>500</sup> Leeds, [By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land](#) (Fall 2005) 41 *Tulsa L. Rev.* 51, 63 (as of Feb. 13, 2023).

<sup>501</sup> Cohen, *supra*, § 1.03[4][a].

<sup>502</sup> Final Report, *supra*, at p. 2.

<sup>503</sup> *Ibid.*

<sup>504</sup> *Ibid.*

<sup>505</sup> *Id.* at 3.

and impartial researchers all deemed this process to be inadequate[,]” and the prevailing dissatisfaction led to the creation of the Indian Claims Commission.<sup>506</sup>

The Commission was established with the goal of efficiently and conclusively resolving tribal claims against the United States government. It had jurisdiction to hear claims from “any identifiable group of Indian claimants residing in the United States or Alaska.”<sup>507</sup> Much of the debate leading up to the enacting legislation centered on whether the entity should be adversarial or investigatory, and also on what role, if any, Congress should play in resolving individual claims.<sup>508</sup> It was ultimately decided that, though labeled a “commission” with investigatory powers, the ICC would also be a quasi-judicial and adversarial forum.<sup>509</sup>

The ICC was limited to awarding monetary relief and thus did not have jurisdiction to restore title to land.<sup>510</sup> The authorizing legislation permitted various claims, including those premised on “fraud, duress, [and] unconscionable consideration” as well as those based on “fair and honorable dealings.”<sup>511</sup> The congressional Committee on Indian Affairs stated that the bill was “primarily designed to right a continuing wrong to our Indian citizens for which no possible justification can be asserted.”<sup>512</sup> Indeed, the majority of claims alleged that “the United States acquired valuable land for unconscionably low prices in bargains struck between unequals.”<sup>513</sup> Another large swath of claims alleged that the government had failed to abide by treaty provisions and called for an historical accounting, including in instances where the government was alleged to have mismanaged tribal funds.<sup>514</sup>

The Commission initially comprised three members, all appointed by President Harry Truman.<sup>515</sup> It acted as a “quasi-judicial branch of the legislature” that considered voluminous documentary and testimonial evidence, rendered rulings on motions, and presided over trials.<sup>516</sup> Claims could be filed only during the first five years of the Commission.<sup>517</sup> Neither the statute of limitations nor laches could be raised as a defense to tribal claims, but all other defenses were available to the government.<sup>518</sup>

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<sup>506</sup> *Ibid.*

<sup>507</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 23, 60 Stat.

1049, 1050. The question of what constituted an “identifiable group” was heavily litigated in the early years of the Commission. See Final Report, *supra*, at p. 9.

<sup>508</sup> *Id.* at 4-6.

<sup>509</sup> *Ibid.*

<sup>510</sup> Derocher, [Manifesting a Better Destiny: Interest Convergence and the Indian Claims Commission](#) (2021-2022) 24 New York University Journal of Legislation and Public Policy 511, 535 (as of Feb. 2, 2023).

<sup>511</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 2, 60 Stat. 1049, 1050.

<sup>512</sup> U.S. Congress House Committee on Indian Affairs, Hearings on H R 1198 and H. R. 1341 to Create an Indian Claims Commission. 79th Cong. 1st sess. March 2, 3, 28 and June 11, 14, 1945.

<sup>513</sup> Final Report, *supra*, at p. 8.

<sup>514</sup> *Id.* at p. 6.

<sup>515</sup> *Id.* at p. 5.

<sup>516</sup> *Id.* at 7.

<sup>517</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 2, 60 Stat. 1049, 1052.

<sup>518</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 2, 60 Stat. 1049, 1050.

In 1946, the Commission sent notice of the claims procedures to every recognized tribe within the United States.<sup>519</sup> Native American tribes secured counsel of their choice and the government was represented by the Attorney General.<sup>520</sup> All land claims were divided into three phases: title, value-liability, and offsets.<sup>521</sup> In the title phase, the Commission sought to identify the territorial boundaries that the tribe exclusively occupied. This phase frequently relied on the testimony of historians and anthropologists.<sup>522</sup> If the tribe successfully established title, the Commission proceeded to determine whether the government bore any liability and if so, for what amount. During this stage, expert appraisers valued the land as of the treaty date, and historical records were reviewed to determine the compensation originally paid.<sup>523</sup> The award was calculated based on the difference between the fair market value and the original compensation.<sup>524</sup> Lastly, the Commission deducted “offsets” from any award based on “all money or property given to or funds expended gratuitously for the benefit of the claimant.”<sup>525</sup> Adverse rulings could be appealed to the Court of Claims and, in certain instances, the United States Supreme Court.<sup>526</sup>

If a trial led to a financial award, the amount was certified and reported to Congress after all appeals were exhausted.<sup>527</sup> The award was then automatically included in the next year’s appropriation bill.<sup>528</sup> Final payment was deposited in the Treasury and Congress directed how it should be distributed.<sup>529</sup>

The ICC was initially set to terminate ten years after its first meeting,<sup>530</sup> but it was repeatedly extended until its termination in 1978.<sup>531</sup> Individual cases often took several years to complete,<sup>532</sup> and the appeal process alone typically took between eight months and three years.<sup>533</sup> During its tenure, the Commission adjudicated more than 500 claims and issued tribal awards in over 60 percent of matters.<sup>534</sup> It awarded approximately \$800 million in total compensation to

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<sup>519</sup> Final Report, *supra*, at pp. 6-9.

<sup>520</sup> *Ibid.*

<sup>521</sup> Final Report, *supra*, at p. 6.

<sup>522</sup> *Id.* at p. 9.

<sup>523</sup> *Ibid.*

<sup>524</sup> *Ibid.*

<sup>525</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049, 1050.

<sup>526</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 23, 60 Stat. 1049, 1054.

<sup>527</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049, 1055.

<sup>528</sup> Final Report, *supra*, p. 7.

<sup>529</sup> *Ibid.*

<sup>530</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 23, 60 Stat. 1049, 1055.

<sup>531</sup> Final Report, *supra*, at p. iii.

<sup>532</sup> Final Report, *supra*, at p. 6.

<sup>533</sup> Final Report, *supra*, at p. 6.

<sup>534</sup> Final Report, *supra*, at p. 21.

tribal claimants.<sup>535</sup> At its termination in 1978, the Commission had not fully cleared its docket and the remaining matters were transferred to the Court of Claims.<sup>536</sup>

Historians and legal scholars have argued that the Commission did not go nearly far enough to address the centuries-long displacement and oppression of Native Americans.<sup>537</sup> The Commission was not empowered to convey land back to tribes,<sup>538</sup> yet its rulings have barred all subsequent claims, including those to repossess land.<sup>539</sup> Nor did the Commission address issues such as the suppression of native languages, religions, and forms of government.<sup>540</sup> And even where a tribe was able to secure a financial award, the amounts were significantly reduced in various ways. For example, the awards were whittled down by offsets for monies purportedly spent by the government on behalf of the tribes.<sup>541</sup> Moreover, except in the rare claim premised on a Fifth Amendment “taking,” the Commission ruled that interest on amounts owed was not recoverable.<sup>542</sup> The unpaid interest on successful claims likely amounted to several billion dollars.<sup>543</sup>

Many historians have argued that a core defect in the ICC’s structure and practice was the adversarial rather than investigative nature of the proceedings.<sup>544</sup> One scholar has observed that “the Commission, submissive to the requests of the lawyers who practice before it, has provided for a bewildering series of hearings on title, value offset, attorneys [sic] fees and all the motions that any party chooses present.”<sup>545</sup> Moreover, the government’s role as adversary against the claimants meant that government attorneys often aggressively fought *against* proper compensation for tribal claimants, and as a matter of policy the Attorney General did not pursue settlement.<sup>546</sup> Finally, the tribe’s obligation to retain counsel at its own cost diminished any eventual financial award.<sup>547</sup> In light of these and other inefficiencies, many have argued that the Commission should have operated as an investigative rather than quasi-judicial body.<sup>548</sup> Indeed,

<sup>535</sup> *Ibid.*

<sup>536</sup> Final Report, *supra*, at p. iii.

<sup>537</sup> See, e.g., Danforth, Repaying Historical Debts: The Indian Claims Commission (1973) 49 N.D. L. Rev. 359, 374-80; Lurie, The Indian Claims Commission (1978) 436 Annals of the Am. Soc. Of Poli. & Soc. Sci. 97; Vance, [The Congressional Mandate and the Indian Claims Commission](#) (1969) 45 N.D. L. Rev. 325. 332-35 (as of Feb. 14, 2023); Churchill, *supra*.

<sup>538</sup> Churchill, *supra*, at p. 53.

<sup>539</sup> Cohen, Cohen’s Handbook of Federal Indian Law (2005) § 5.06[3].

<sup>540</sup> Churchill, *supra*, at p. 57.

<sup>541</sup> Churchill, *supra*, at pp. 48, 53.

<sup>542</sup> Final Report, *supra*, at p. 11.

<sup>543</sup> *Ibid.*

<sup>544</sup> Danforth, *supra*, at pp. 376-77.

<sup>545</sup> Vance, *supra*, at p. 334.

<sup>546</sup> Churchill, *supra*, at p. 48; Vance, *supra*, at p. 334 (noting that although settlement at the ICC was authorized by statute, the prevailing Department of Justice policy at the time was to not make settlement offers).

<sup>547</sup> Final Report, *supra*, at p. 9.

<sup>548</sup> Vance, *supra*, at p. 334; Danforth, *supra*, at p. 376-77.

the Commission was statutorily authorized to conduct its own investigations,<sup>549</sup> but it rarely employed those powers and instead consistently acted as a tribunal.<sup>550</sup>

Despite its shortcomings, many contemporaneous political leaders and early historians pointed to the ICC as proof that the United States had acted benevolently and had atoned for past transgressions.<sup>551</sup> Some have called these claims mere sanctimony, and have argued that the ICC was established out of the government's self-interest in cloaking itself with moral authority, especially in the context of the United States' efforts to establish the post-World War II Nuremberg Trials.<sup>552</sup> Others have similarly argued that the Commission was simply a means of efficiently disposing of the "Indian problem."<sup>553</sup> For example, Professor Harvey Rosenthal, author of a comprehensive history of the ICC,<sup>554</sup> has observed that "the [C]ommission broke no new ground and was really a government measure to enhance its own efficiency by disposing of the old claims and terminating the Indian Tribes."<sup>555</sup>

#### b. Tuskegee Study of Untreated Syphilis in the Negro Male

The federal government in 1974 enacted legislation to study and write regulations governing studies involving human participants to acknowledge and provide redress for a study conducted in Macon County, Alabama intended to observe the natural history of untreated syphilis in African-American men. Following revelation of the study, a class-action lawsuit was filed against the government that resulted in a settlement of nearly \$10 million, which was divided amongst the study participants and their families. The government subsequently enacted policy changes to better protect human subjects in biomedical and behavioral research and issued a formal apology to the surviving study victims.

From 1891 to 1910, around 2000 white patients with syphilis were admitted to a Norwegian hospital under the care of Professor Caesar Boeck, the head of the hospital's skin department.<sup>556</sup> Professor Boeck held the belief that one should wait for the natural course of the disease and refrain from drug treatment.<sup>557</sup> Professor Boeck documented the diagnosis and the clinical course in detail in all his patients, and the materials gathered from this clinical trial formed the basis for current knowledge about the course and prognosis of syphilis infections.<sup>558</sup> The work of

<sup>549</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049, 1052.

<sup>550</sup> Danforth, *supra*, at p. 376-77.

<sup>551</sup> *Id.* at p. 52.

<sup>552</sup> *Ibid.*

<sup>553</sup> Nesterak, [Uprooted: The 1950s Plan to Erase Indian Country](#) (Nov. 1, 2019) American Public Media (as of Feb. 14, 2023).

<sup>554</sup> Rosenthal, *Their Day in Court: A History of the Indian Claims Commission* (1990).

<sup>555</sup> Rosenthal, *Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission, in Irredeemable America: The Indians' Estate and Land Claims* (1985) p. 35.

<sup>556</sup> Sandvik and Lie, [Untreated syphilis – from Oslo to Tuskegee](#) [English translation] (Dec. 20, 2016) *Journal of the Norwegian Medical Association* (as of Feb. 13, 2023); Reverby, [Examining Tuskegee: The Infamous Syphilis Study and its Legacy | Timeline](#) (Nov. 1, 2009) Chapel Hill: University of North Carolina Press (as of Feb. 13, 2023).

<sup>557</sup> Sandvik and Lie, [Untreated syphilis – from Oslo to Tuskegee](#) [English translation] (Dec. 20, 2016) *Journal of the Norwegian Medical Association* (as of Feb. 13, 2023).

<sup>558</sup> Sandvik and Lie, [Untreated syphilis – from Oslo to Tuskegee](#) [English translation] (Dec. 20, 2016) *Journal of the Norwegian Medical Association* (as of Feb. 13, 2023).



Professor Boeck and his successors eventually culminated in a 1955 dissertation referred to as the “Oslo study of untreated syphilis.”<sup>559</sup> The significance of these findings served as the precursor to the Tuskegee Study of Untreated Syphilis in the Negro Male conducted in Macon County, Alabama between 1932 and 1972 on the campus of the Tuskegee Institute.<sup>560</sup> “In particular, it was the relative frequency of cardiovascular affections compared to neurological affections in patients with advanced syphilis that interested [the Americans.] In the eyes of the Americans, the weaknesses of the material justified a prospective study, while they were also interested in discovering whether the findings would be the same with ‘the negro.’”<sup>561</sup>

The United States Public Health Service Syphilis Study also called the Tuskegee Study of Untreated Syphilis in the Negro Male was intended to observe the natural history of untreated syphilis in African-American men.<sup>562</sup> A total of 600 African-American men<sup>563</sup> were enrolled in the study and told by researchers that they were being treated for “bad blood,” which colloquially in the region referred to a number of diagnosable ailments including but not limited to anemia, fatigue, and syphilis.<sup>564</sup> The African-American men in the study were only told they were receiving free health care from the federal government of the United States.<sup>565</sup> Of the 600 enrolled men, most of whom were poor and illiterate sharecroppers, 399 of them who had syphilis became part of the experimental group and 201 became part of the control group.<sup>566</sup>

The men were enticed and enrolled in the study with incentives including medical exams, rides to and from the clinics, meals on examination days, free treatment for minor ailments and guarantees that provisions would be made after their deaths in terms of burial stipends paid to their survivors.<sup>567</sup> Although there were no proven treatments for syphilis when the study began, penicillin became the standard treatment for the disease in 1947, however the medicine was withheld from both groups enrolled in the study, resulting in blindness, deteriorating mental health, and in some cases, severe health issues and death.<sup>568</sup>

<sup>559</sup> Sandvik and Lie, [Untreated syphilis – from Oslo to Tuskegee](#) [English translation] (Dec. 20, 2016) Journal of the Norwegian Medical Association (as of Feb. 13, 2023).

<sup>560</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023).

<sup>561</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023).

<sup>562</sup> [The U.S. Public Health Service Syphilis Study at Tuskegee](#) (Nov. 3, 2022) Centers for Disease Control and Prevention, Office of Science (as of Feb. 13, 2023); [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023).

<sup>563</sup> [Tuskegee Patient Medical Files](#) (Jan. 13, 2021) National Archives at Atlanta (as of Feb 13, 2023).

<sup>564</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023).

<sup>565</sup> Reverby, *Examining Tuskegee: The Infamous Syphilis Study and its Legacy* (Nov. 1, 2009) Chapel Hill: University of North Carolina Press (as of Feb. 13, 2023); Nix, [Tuskegee Experiment: The Infamous Syphilis Study](#) (Dec. 15, 2020) History (as of Feb 14, 2023).

<sup>566</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023).

<sup>567</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023).

<sup>568</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023); Nix, [Tuskegee Experiment: The Infamous Syphilis Study](#) (Dec. 15, 2020) History (as of Feb 14, 2023).

Following a leak of the study and subsequent reporting by the Associated Press in July 1972, international public outcry led to a series of actions taken by U.S. federal agencies.<sup>569</sup> The Assistant Secretary for Health and Scientific Affairs appointed an Ad Hoc Advisory Panel comprised of nine members from fields including health administration, medicine, law, religion, and education to review the study.<sup>570</sup> The panel ultimately concluded that there was evidence that scientific research protocol routinely applied to human subjects was either ignored or deeply flawed to ensure the safety and well-being of the men involved.<sup>571</sup> Specifically, the men were never told about or offered the research procedure called informed consent.<sup>572</sup> Researchers had not informed the men of the actual name of the study, its purpose, and potential consequences of the treatment or non-treatment that they would receive during the study.<sup>573</sup> The men never knew of the debilitating and life threatening consequences of the treatments they were to receive, the impact on their wives, girlfriends, and children they may have conceived once involved in the research; and there were no choices given to the participants to quit the study when penicillin became available as a treatment and cure for syphilis.<sup>574</sup> One month after the panel's October 1972 findings, the Assistant Secretary for Health and Scientific Affairs officially declared the end of the Tuskegee Study.<sup>575</sup>

Following the Ad Hoc Advisory Panel's findings in October 1972, Attorney Fred Gray filed a class-action suit on behalf of the men in the study, their wives, children and families resulting in a nearly \$10 million out-of-court settlement in 1974.<sup>576</sup> Under the 1974 settlement in the Tuskegee Syphilis Study case, 70 living syphilitic participants received \$37,500 each. The 46 living men in the control group received \$16,000 each. The 339 deceased syphilitic participants received \$15,000 each. The deceased members of the control group received \$5,000 each.<sup>577</sup> Attorney Gray also negotiated free healthcare for life for the participants who were still living, as

<sup>569</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023).

<sup>570</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023).

<sup>571</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023); Tuskegee Syphilis Study Ad Hoc Advisory Panel, [Final Report](#) (April 28, 1973) U.S. Department of Health, Education, and Welfare Public Health Service (as of Feb. 13, 2023).

<sup>572</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023); Tuskegee Syphilis Study Ad Hoc Advisory Panel, [Final Report](#) (April 28, 1973) U.S. Department of Health, Education, and Welfare Public Health Service (as of Feb. 13, 2023).

<sup>573</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023); Tuskegee Syphilis Study Ad Hoc Advisory Panel, [Final Report](#) (April 28, 1973) U.S. Department of Health, Education, and Welfare Public Health Service (as of Feb. 13, 2023).

<sup>574</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023); Tuskegee Syphilis Study Ad Hoc Advisory Panel, [Final Report](#) (April 28, 1973) U.S. Department of Health, Education, and Welfare Public Health Service (as of Feb. 13, 2023).

<sup>575</sup> [About the USPHS Syphilis Study](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Feb. 13, 2023); Tuskegee Syphilis Study Ad Hoc Advisory Panel, [Final Report](#) (April 28, 1973) U.S. Department of Health, Education, and Welfare Public Health Service (as of Feb. 13, 2023); [Memorandum Terminating the Tuskegee Syphilis Study](#) (Nov. 16, 1972) Department of Health, Education, and Welfare Office of the Secretary (as of Feb 13, 2023).

<sup>576</sup> See *Pollard v. U. S.* (M.D. Ala. 1974) 384 F.Supp. 304.

<sup>577</sup> Gray, [The Tuskegee Syphilis Study: An Insider's Account of the Shocking Medical Experiment Conducted by Government Doctors against African American Men](#) (1998) Montgomery: New South Books (as of Feb 13, 2023).

well as healthcare for their infected wives, widows, and children.<sup>578</sup> Attorney Gray was not able to locate 36 syphilitic participants and 8 members of the control group.<sup>579</sup>

In 1974, Congress passed the National Research Act and created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research to study and write regulations governing studies involving human participants.<sup>580</sup> The Commission was directed to consider: (1) the boundaries between biomedical and behavioral research and the accepted and routine practice of medicine; (2) the role of assessment of risk-benefit criteria in the determination of the appropriateness of research involving human subjects; (3) appropriate guidelines for the selection of human subjects for participation in such research; and (4) the nature and definition of informed consent in various research settings.<sup>581</sup> In 1976, the Commission published the Belmont Report, which identified basic ethical principles and guidelines that address ethical issues arising from the conduct of research with human subjects.<sup>582</sup> The Belmont Report attempted to summarize the basic ethical principles identified by the Commission in the course of its deliberations.<sup>583</sup> In applying the general principles, the Belmont Report established new requirements for the conduct of research, including informed consent, risk/benefit assessment, and the selection of subjects of research.<sup>584</sup>

Following the Belmont Report, the Office for Human Research Protections (OHRP) was established in June 2000 within the United States Department of Health and Human Services to oversee clinical trials.<sup>585</sup> OHRP replaced the Office for Protection from Research Risks (OPRR), which was created in 1972 and was part of the National Institutes of Health.<sup>586</sup> OPRR had primary responsibility within the U.S. Department of Health and Human Services for developing and implementing policies, procedures, and regulations for the protection of human subjects involved in research.<sup>587</sup> OPRR and its successor agency was created to lead the Department of Health and Human Services' efforts to protect human subjects in biomedical and behavioral research and to provide leadership for all federal agencies that conduct or support human subject

<sup>578</sup> Gray, [The Tuskegee Syphilis Study: An Insider's Account of the Shocking Medical Experiment Conducted by Government Doctors against African American Men](#) (1998) Montgomery: New South Books (as of Feb 13, 2023).

<sup>579</sup> Watkins, [Charlie W. Pollard: The Man Who Led The Fight For Justice For Tuskegee Syphilis Study Participants](#) (Dec. 20, 2022) (as of Feb 13, 2023).

<sup>580</sup> PL 93-348 (HR 7724), PL 93-348, JULY 12, 1974, 88 Stat 342.

<sup>581</sup> PL 93-348 (HR 7724), PL 93-348, JULY 12, 1974, 88 Stat 342.

<sup>582</sup> The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, [The Belmont Report Ethical Principles and Guidelines for the Protection of Human Subjects of Research](#) (April 18, 1979) U.S. Department of Health, Education, and Welfare (as of Feb 13, 2023).

<sup>583</sup> The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, [The Belmont Report Ethical Principles and Guidelines for the Protection of Human Subjects of Research](#) (April 18, 1979) U.S. Department of Health, Education, and Welfare (as of Feb 13, 2023).

<sup>584</sup> The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, [The Belmont Report Ethical Principles and Guidelines for the Protection of Human Subjects of Research](#) (April 18, 1979) U.S. Department of Health, Education, and Welfare (as of Feb 13, 2023).

<sup>585</sup> [Office of Human Research Protection History](#) (June 18, 2020) U.S. Department of Health, Education, and Welfare (as of Feb 13, 2023).

<sup>586</sup> [Office of Human Research Protection History](#) (June 18, 2020) U.S. Department of Health, Education, and Welfare (as of Feb 13, 2023).

<sup>587</sup> See Ellis, [Office for Protection from Research Risks \(OPRR\)](#) (Aug. 1994) *Politics and the Life Sciences*, 13(2), 271-73 JSTOR (as of Feb 13, 2023).

research under the Federal Policy for the Protection of Human Subjects.<sup>588</sup> To further protect patient interests and to ensure that participants are fully informed, Section 474 of the National Research Act also established Institutional Review Boards.<sup>589</sup> Institutional Review Boards were established at the local level consisting of at least five people, including at least one scientist, one non-scientist, and one person not otherwise affiliated with the institution.<sup>590</sup> No human subjects research may be initiated, and no ongoing research may continue, in the absence of an institutional Review Boards' approval.<sup>591</sup>

In February of 1994 at the Claude Moore Health Sciences Library in Charlottesville, Virginia, a symposium was held entitled "Doing Bad in the Name of Good?: The Tuskegee Syphilis Study and Its Legacy."<sup>592</sup> The one-day symposium featured seven humanities scholars discussing the Tuskegee Syphilis Experiments, their troubling historical reality, and their legacy.<sup>593</sup> Following this symposium, the Tuskegee Syphilis Study Legacy Committee was formed to develop ideas that had arisen at the symposium.<sup>594</sup> The Committee issued its final report in May 1996,<sup>595</sup> presenting two goals:

(1) To persuade President Bill Clinton to apologize to the surviving Study participants, their families, and to the Tuskegee community. This apology is necessary for four reasons: the moral and physical harm to the community of Macon County; the undeserved disgrace the Study has brought to the community and Tuskegee University, which is in fact a leading advocate for the health of African Americans; its contribution to fears of abuse and exploitation by government officials and the medical profession; and the fact that no public apology has ever been made for the Study by any government official.

(2) To develop a strategy to redress the damages caused by the Study and to transform its damaging legacy. This is necessary because an apology without action is only a beginning of the necessary healing. The Committee recommends the development of a professionally staffed center at Tuskegee for public education about the Study, training programs for health care providers, and a clearinghouse for scholarship on ethics in scientific research.<sup>596</sup>

The Committee's report set forth an outline for the context of the apology, and provided possible functions for the proposed Tuskegee research center.<sup>597</sup>

<sup>588</sup> [Office of Human Research Protection History](#) (June 18, 2020) U.S. Department of Health, Education, and Welfare (as of Feb 13, 2023).

<sup>589</sup> PL 93-348 (HR 7724), PL 93-348, JULY 12, 1974, 88 Stat 342.

<sup>590</sup> Ellis, [Office for Protection from Research Risks \(OPRR\)](#) (Aug. 1994) *Politics and the Life Sciences*, 13(2), 271-73 JSTOR (as of Feb 13, 2023).

<sup>591</sup> Ellis, [Office for Protection from Research Risks \(OPRR\)](#) (Aug. 1994) *Politics and the Life Sciences*, 13(2), 271-73 JSTOR (as of Feb 13, 2023).

<sup>592</sup> [Syphilis Study Legacy Committee](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Jan 14, 2023).

<sup>593</sup> Klein, [Doing Bad in the Name of Good: The Tuskegee Syphilis Study and Its Legacy](#) (1992) University of Virginia Health System Claude Moore Health Sciences Library (as of Feb 14, 2023).

<sup>594</sup> [Syphilis Study Legacy Committee](#) (undated) National Center for Bioethics in Research and Health Care, Tuskegee University (as of Jan 14, 2023).

<sup>595</sup> Tuskegee Syphilis Study Legacy Committee, [Final Report](#) (May 1996) (as of Feb. 14, 2023).

<sup>596</sup> Tuskegee Syphilis Study Legacy Committee, [Final Report](#) (May 1996) (as of Feb. 14, 2023).

<sup>597</sup> Tuskegee Syphilis Study Legacy Committee, [Final Report](#) (May 1996) (as of Feb. 14, 2023).



On May 16, 1997, Bill Clinton formally apologized and held a ceremony at the White House for surviving Tuskegee study participants. Along with the apology, President Clinton pledged a \$200,000 planning grant to allow Tuskegee University to pursue building a Center for Bioethics in Research and Health Care.<sup>598</sup> The President also announced the creation of bioethics fellowships for minority students and extended the life of the National Bioethics Advisory Commission until 1999. Additionally, the President directed the Health and Human Services Secretary to draft a report outlining ways to better involve all communities—especially minority communities—in research and health care.<sup>599</sup>

In June 2022, the Milbank Memorial Fund—the foundation that paid the funeral expenses of the deceased study participants as an incentive for their participation—publicly apologized to descendants of the study's victims for its role in the study.<sup>600</sup> The Milbank Memorial Fund conditioned the payment of these funeral expenses on consent by the deceased's descendants to conduct autopsies.<sup>601</sup> These autopsies facilitated the study's ultimate purpose of observing untreated syphilis in African-American men. The apology and an accompanying monetary donation to a descendants' group, the Voices for Our Fathers Legacy Foundation, were presented during a ceremony in Tuskegee at a gathering of children and other relatives of men who were part of the study.<sup>602</sup>

### c. Japanese American Internment

The federal government in 1988 enacted legislation to acknowledge and provide redress for the internment of Japanese Americans in the United States between 1942 and 1946. The federal government's plan included a cash payment of \$20,000.00 for each surviving internee, a program to fund public education of the events, and an apology.

In early 1941, the United States House Committee on Un-American Activities began investigating Japanese espionage in the United States.<sup>603</sup> The committee, which existed since 1938, was authorized to make from time to time investigations of (1) the extent, character, and objects of un-American activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by the United States Constitution, and (3) all other questions in relation thereto that would aid Congress in any

<sup>598</sup> Ross, [AP WAS THERE, Tuskegee Syphilis Study: Clinton apologized](#) (May 10, 2017) The Associated Press (as of Feb. 14, 2023); [Remarks by the President in Apology for Study Done in Tuskegee](#) (May 16, 1997) The White House Office of the Press Secretary (as of Feb. 14, 2023).

<sup>599</sup> Ross, [AP WAS THERE, Tuskegee Syphilis Study: Clinton apologized](#) (May 10, 2017) The Associated Press (as of Feb. 14, 2023); [Remarks by the President in Apology for Study Done in Tuskegee](#) (May 16, 1997) The White House Office of the Press Secretary (as of Feb. 14, 2023).

<sup>600</sup> By The Associated Press, [A fund apologizes for its role in the Tuskegee syphilis study that targeted Black men](#) (June 11, 2022) NPR (as of Feb 14, 2023).

<sup>601</sup> By The Associated Press, [A fund apologizes for its role in the Tuskegee syphilis study that targeted Black men](#) (June 11, 2022) NPR (as of Feb 14, 2023).

<sup>602</sup> By The Associated Press, [A fund apologizes for its role in the Tuskegee syphilis study that targeted Black men](#) (June 11, 2022) NPR (as of Feb 14, 2023).

<sup>603</sup> Everest-Phillips, [The Pre-War Fear of Japanese Espionage: Its Impact and Legacy](#) (April 2007) *Journal of Contemporary History*, vol. 42, no. 2, p. 243 *JSTOR*, (as of Oct. 21, 2022).



necessary remedial legislation.<sup>604</sup> The committee's turned focus on Japan reflected general European and American suspicion of Japanese espionage.<sup>605</sup> A year before the Japanese attack on Pearl Harbor in Hawai'i, the United States Army's Signal Intelligence Service broke Japan's highest-level diplomatic code.<sup>606</sup> The message appeared to reveal widespread Japanese espionage networks operating along the West Coast of the United States, which proved decisive for President Franklin D. Roosevelt's authorization of internment of Japanese-Americans.<sup>607</sup>

On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066 interning Japanese-Americans and creating a zone "from which any or all persons may be excluded," at the discretion of the Secretary of War or appropriate military commander, from the whole of California, the western halves of Washington State and Oregon, and the southern third of Arizona.<sup>608</sup> By the fall of 1942, all Japanese-Americans were evicted from California and sent to one of ten internment camps that were built to imprison them.<sup>609</sup> Many internees lost their property and assets as they were prohibited from taking more than what they could carry with them, and what remained was either sold, confiscated, or destroyed in government storage.<sup>610</sup> The Masuda family for example, were owners of the Wanto Grocery in Oakland, California, who proclaimed that they were American, even as they were forced to sell their business before they were interned in August 1942.<sup>611</sup> The Masudas and others were among the tens of thousands of Japanese-Americans who were incarcerated in desolate camps for up to four years.<sup>612</sup>

Nearly 70% of those interned were American citizens by birth, and the remaining 30% were Japanese nationals who were legally barred from naturalization because of the *de jure* racist policies of the time.<sup>613</sup> Many resisted the curfews and the constitutionality of the exclusion orders on U.S. citizens based on racial ancestry, however many found their convictions upheld by the United States Supreme Court in decisions that argued that the court was not in a position

<sup>604</sup> Schamel, [Records of the House Un-American Activities Committee, 1945-1976](#) (July 1995) Center for Legislative Archives National Archives and Records Administration, (as of Oct. 21, 2022).

<sup>605</sup> Everest-Phillips, [The Pre-War Fear of Japanese Espionage: Its Impact and Legacy](#) (April 2007) *Journal of Contemporary History*, vol. 42, no. 2, p. 243 *JSTOR*, (as of Oct. 21, 2022).

<sup>606</sup> Everest-Phillips, [The Pre-War Fear of Japanese Espionage: Its Impact and Legacy](#) (April 2007) *Journal of Contemporary History*, vol. 42, no. 2, p. 261 *JSTOR*, (as of Oct. 21, 2022).

<sup>607</sup> Everest-Phillips, [The Pre-War Fear of Japanese Espionage: Its Impact and Legacy](#) (April 2007) *Journal of Contemporary History*, vol. 42, no. 2, p. 261 *JSTOR*, (as of Oct. 21, 2022).

<sup>608</sup> Everest-Phillips, [The Pre-War Fear of Japanese Espionage: Its Impact and Legacy](#) (April 2007) *Journal of Contemporary History*, vol. 42, no. 2, p. 261 fn. 60 *JSTOR*, (as of Oct. 21, 2022); Exec. Order No. 9066, 7 Fed.Reg. 1407 (Feb. 19, 1942); Golden Gate National Recreation Area, [Remembering Executive Order 9066](#) (Feb. 23, 2021) U.S. National Park Service, (as of Oct. 21, 2022).

<sup>609</sup> Golden Gate National Recreation Area, [Remembering Executive Order 9066](#) (Feb. 23, 2021) U.S. National Park Service, (as of Oct. 21, 2022).

<sup>610</sup> Golden Gate National Recreation Area, [Remembering Executive Order 9066](#) (Feb. 23, 2021) U.S. National Park Service, (as of Oct. 21, 2022).

<sup>611</sup> National Museum of American History Behring Center, [The Roundup](#) (undated) Smithsonian, (as of Oct. 21, 2022).

<sup>612</sup> National Museum of American History Behring Center, [The Roundup](#) (undated) Smithsonian, (as of Oct. 21, 2022).

<sup>613</sup> Kunioka et al., [Relocation and Internment: Civil Rights Lessons from World War II](#) (July 2006) *PS: Political Science and Politics*, vol. 39, no. 3, p. 503. *JSTOR*, (as of Oct. 21, 2022).

to question claims of military necessity.<sup>614</sup> In the mid-1980s, these convictions were eventually vacated by federal court orders for *writ of error coram nobis*, which helped spur the passage of the Civil Liberties Act of 1988—the law that eventually provided a formal apology and redress from the United States in the form of reparations for Japanese-Americans.<sup>615</sup>

The Japanese American Evacuation Claims Act was signed by President Harry S. Truman in 1948 to provide a mechanism to compensate Japanese-Americans for losses incurred at the time of their official removal from the West Coast in 1942.<sup>616</sup> It was the first civil rights-associated law enacted in the 20th century, however the legislation proved largely ineffectual in practical terms due to onerous burdens for proving losses and red tape that slowed the process to a crawl.<sup>617</sup>

In 1980, congress and President Jimmy Carter approved the Commission on the Wartime Internment and Relocation of Civilians (CWRIC).<sup>618</sup> The CWRIC was established to: (1) review the facts and circumstances surrounding the relocation and internment of thousands of American civilians during World War II under Executive Order Numbered 9066 and the impact of that Order on American citizens and resident aliens; (2) review directives of United States military forces requiring the relocation and internment of American citizens, including Aleut civilians and permanent resident aliens of the Aleutian and Pribilof Islands; and (3) recommend appropriate remedies.<sup>619</sup> In December 1982, the commission released a unanimous 467-page report titled *Personal Justice Denied* detailing the history and circumstances of the wartime treatment of people of Japanese ancestry and the people of the Aleutian Islands.<sup>620</sup>

<sup>614</sup> Kunioka et al., [Relocation and Internment: Civil Rights Lessons from World War II](#) (July 2006) PS: Political Science and Politics, vol. 39, no. 3, pp. 503, 506. *JSTOR*, (as of Oct. 21, 2022); See *Hirabayashi v. U.S.* (1943) 320 U.S. 81 [63 S.Ct. 1375, 87 L.Ed. 1774]; See also *Korematsu v. U.S.* (1944) 323 U.S. 214 [65 S.Ct. 193, 89 L.Ed. 194] *abrogated by Trump v. Hawaii* (2018) 201 L.Ed.2d 775 [138 S.Ct. 2392].

<sup>615</sup> Kunioka et al., [Relocation and Internment: Civil Rights Lessons from World War II](#) (July 2006) PS: Political Science and Politics, vol. 39, no. 3, p. 503. *JSTOR*, (as of Oct. 21, 2022); See *Ex parte Endo* (1944) 323 U.S. 283 [65 S.Ct. 208, 89 L.Ed. 243]; See also *Korematsu v. U.S.* (N.D. Cal. 1984) 584 F.Supp. 1406.

<sup>616</sup> Robinson, [Japanese American Evacuation Claims Act](#) (October 5, 2020) Densho Encyclopedia, (as of Oct. 21, 2022).

<sup>617</sup> Robinson, [Japanese American Evacuation Claims Act](#) (October 5, 2020) Densho Encyclopedia, (as of Oct. 21, 2022). “[The Japanese American Evacuation Claims Act] provided up to \$25 million to compensate Japanese Americans for actual losses pursuant to their ‘evacuation.’ [...] Those Japanese Americans who wished to recoup losses were forced to swear that this was their sole and final claim against the government for their wartime ordeal. Congress refused to settle claims for lost wages or anticipated profits, personal injury, pain and suffering, or any of the other costs of removal and confinement. Even the procedure instituted for allowable claims under the Act was exceedingly harsh. The former inmates were in [sic] required to provide sworn testimony and to produce receipts and other proofs of their losses. If their claim amounted to over \$2,500, they were required in effect to sue the government for damages, and await fresh appropriation of funds to pay claims. The Justice Department strongly contested each claim, using a legalistic definition of what could be counted as a ‘loss.’ [...] In all, the government paid \$38 million to settle damage claims—a fraction of actual losses by Japanese Americans. Many families paid more in lawyer's fees than they received in compensation.”

<sup>618</sup> Yang, [Redress Movement](#) (August 24, 2020) Densho Encyclopedia, (as of Oct. 21, 2022).

<sup>619</sup> [Commission on Wartime Relocation and Internment of Civilians Act](#), H.R. No. 5499, 96th Cong., (1979).

<sup>620</sup> Yamato, [Commission on Wartime Relocation and Internment of Civilians](#) (July 8, 2020) Densho Encyclopedia, (as of Oct. 21, 2022).

The findings and recommendations of the CWRIC among other events helped bring about the passage of the Civil Liberties Act of 1988. Earlier in 1982, California enacted legislation permitting the filing of claims with the state for salary losses for up to five years at \$1,000.00 per year for employees who were dismissed from state service because of their Japanese ancestry (Los Angeles and San Francisco later enacted similar provisions).<sup>621</sup>

The Civil Liberties Act of 1988, signed by President Ronald Regan, provided redress from the nation in the form of \$20,000.00 for each surviving internee.<sup>622</sup> Under the Act, the U.S. Attorney General was charged with locating eligible individuals for the purpose of paying restitution in the amount of \$20,000.00.<sup>623</sup> No application was required and the onus was on the Attorney General to attempt to complete the identification and location of individuals within 12 months of the Act's enactment.<sup>624</sup> The Act provided for notice requirements to eligible individuals, a right to refuse payment, a waiver of all claims if payment was accepted, payments to survivors of eligible individuals who were deceased, priority payments to the oldest eligible individuals, and tax treatment that excluded payments as income under the internal revenue laws.<sup>625</sup> By 1999, redress payments had been distributed to approximately 82,220 claimants.<sup>626</sup> There were about thirty lawsuits filed by those who had been found ineligible for redress, and a later settlement on a lawsuit filed by Japanese Latin Americans eventually resulted in smaller \$5,000 reparations payments to those claimants.<sup>627</sup>

The Civil Liberties Act of 1988 further established the Civil Liberties Public Education Fund within the U.S. Treasury administered by the Secretary of the Treasury and available for disbursements by the Attorney General and by the newly established Civil Liberties Public Education Fund Board of Directors.<sup>628</sup> The trust was authorized to be funded by appropriations totaling \$1,250,000,000, and the fund would terminate once the funds were exhausted or 10 years after the enactment of the Civil Liberties Act of 1988.<sup>629</sup> Additionally, all documents, personal testimony, and other records created or received by the CWRIC during its inquiry were kept and maintained by the Archivist of the United States who was directed to preserve such documents, testimony, and records in the National Archives of the United States and make it

<sup>621</sup>Reparations for State Civil Service Employees, AB2710 (Feb. 19, 1982) [Press Conference Statement by Patrick Johnston on Introduction on Legislation](#) (as of Oct. 21, 2022); Koseff, [California Expected to Apologize to Japanese Americans for WWII Incarceration](#) (Feb 18, 2020) San Francisco Chronicle, (as of Oct. 20, 2022); Report of the Commission on Wartime Relocation and Internment of Civilians, [Personal Justice Denied Part 2: Recommendations](#), (June 1983).

<sup>622</sup> Kunioka et al., [Relocation and Internment: Civil Rights Lessons from World War II](#) (July 2006) PS: Political Science and Politics, vol. 39, no. 3, p. 503. *JSTOR*, (as of Oct. 21, 2022); H.R. No. 442, 100th Cong., (1988) [50 U.S.C.A. § 4211 et seq.]

<sup>623</sup> 50 U.S.C.A. § 4215

<sup>624</sup> 50 U.S.C.A. § 4215

<sup>625</sup> 50 U.S.C.A. § 4215

<sup>626</sup> Kunioka et al., [Relocation and Internment: Civil Rights Lessons from World War II](#) (July 2006) PS: Political Science and Politics, vol. 39, no. 3, p. 503. *JSTOR*, (as of Oct. 21, 2022).

<sup>627</sup> Niiya, [Office of Redress Administration](#) (January 28, 2022) Densho Encyclopedia, (as of Oct. 21, 2022); See *Mochizuki v. U.S.* (Fed. Cl. 1999) 43 Fed.Cl. 97.

<sup>628</sup> 50 U.S.C.A. § 4214, 4216

<sup>629</sup> 50 U.S.C.A. § 4214

available to the public for research purposes.<sup>630</sup> <sup>631</sup> The Act also called upon each department and agency of the U.S. Government to review with liberality, giving full consideration to the findings of the CWRIC, any application by an eligible individual for the restitution of any position, status, or entitlement lost because of any discriminatory act of the U.S. Government against those of Japanese ancestry during the period of internment.<sup>632</sup> Finally, the Act provided a formal apology for each surviving internee.<sup>633</sup> President George H. W. Bush signed the first letters of apology in 1990.<sup>634</sup>

To operationalize the Civil Liberties Act of 1988, the federal government established the Office of Redress Administration (ORA) located within the Civil Rights Division of the Department of Justice. Given that the office had 10 years to complete its work, the office was limited in its ability to attract federal employees, although the office eventually gained about 100 employees at its peak.<sup>635</sup> Since the Act only authorized redress payments and did not itself appropriate funds, separate appropriations had to be secured from Congress, which in 1990 only gained the fund \$20 million for redress payments, or about 1.6% of the amount authorized.<sup>636</sup> This issue was later resolved when redress was turned into an entitlement program that did not require annual appropriations.<sup>637</sup>

The ORA initially worked to build trust in the community, working with Japanese-American organizations, including the Japanese American Citizen League and the National Coalition for Redress/Reparations.<sup>638</sup> The ORA prioritized the oldest living recipients and organized redress check ceremonies throughout the country and held workshops at which they could disseminate information on the redress program and meet community members.<sup>639</sup>

As the life of the ORA drew to an end, the remaining focus turned to paying on claims that had initially been denied, or locating recipients who had not responded to outreach. Cases that were initially denied and subsequently reviewed for reconsideration included Japanese Latin Americans, children of “voluntary evacuees,” minor children who had gone to Japan with their families, and those Japanese-Americans who lived in Hawai‘i and were excluded from their

<sup>630</sup> 50 U.S.C.A. § 4217

<sup>631</sup> From the Civil Liberties Act of 1988 came the Aleutian and Pribilof Islands Restitution Act of 1988. This Act addressed the Aleut civilian residents of the Pribilof Islands lands west of Unimak Island who were relocated during World War II to temporary camps in isolated regions of southeast Alaska where they remained, under United States control and in the care of the United States, until long after any potential danger to their homes and villages had passed. This Act provided monetary compensation for the loss of land and property, but did not return the Attu Island lands to the Aleut people. The funds were made available by appropriation and were administered by the Secretary of the Interior with the assistance of the Attorney General. 50 U.S.C.A. § 4231 et seq.

<sup>632</sup> 50 U.S.C.A. § 4213

<sup>633</sup> Kunioka et al., *Relocation and Internment: Civil Rights Lessons from World War II* (July 2006) PS: Political Science and Politics, vol. 39, no. 3, p. 503. *JSTOR*, (as of Oct. 21, 2022); H.R. No. 442, 100th Cong., (1988) [50 U.S.C.A. § 4211 et seq.]

<sup>634</sup> Kunioka et al., *Relocation and Internment: Civil Rights Lessons from World War II* (July 2006) PS: Political Science and Politics, vol. 39, no. 3, p. 503. *JSTOR*, (as of Oct. 21, 2022).

<sup>635</sup> Niiya, *Office of Redress Administration* (January 28, 2022) Denso Encyclopedia, (as of Oct. 21, 2022).

<sup>636</sup> Niiya, *Office of Redress Administration* (January 28, 2022) Denso Encyclopedia, (as of Oct. 21, 2022).

<sup>637</sup> Niiya, *Office of Redress Administration* (January 28, 2022) Denso Encyclopedia, (as of Oct. 21, 2022).

<sup>638</sup> Niiya, *Office of Redress Administration* (January 28, 2022) Denso Encyclopedia, (as of Oct. 21, 2022).

<sup>639</sup> Niiya, *Office of Redress Administration* (January 28, 2022) Denso Encyclopedia, (as of Oct. 21, 2022).



homes, but not necessarily incarcerated.<sup>640</sup> In some cases, where written documentation did not exist, the ORA was able to approve redress claims based on affidavits by contemporaneous witnesses.<sup>641</sup>

#### d. 9/11

The federal government passed legislation in 2004, 2011, and 2019 to compensate victims of the September 11, 2001 terrorist attacks. Congress's plan includes a Victim Compensation Fund where victims who have a physical injury or condition caused by the 9/11 terrorist attacks can file claims for pain and suffering and past and future lost earnings.

The militant Islamist network al-Qaeda carried out four coordinated suicide terrorist attacks against the United States on September 11, 2001, commonly known as 9/11.<sup>642</sup> Terrorists hijacked four commercial airliners and crashed two planes into the Twin Towers of the World Trade Center in New York City, one plane into the Pentagon in Arlington County, Virginia, and one plane in a field in Pennsylvania that was intended to hit a federal government building in Washington, D.C.<sup>643</sup> Nearly 3,000 people died in the attacks.<sup>644</sup>

The incineration of the Twin Towers and the crashed aircrafts on September 11, 2001, released clouds of noxious toxins in lower Manhattan.<sup>645</sup> First responders, volunteers, and residents near Ground Zero inhaled harmful dust, smoke, toxic chemicals, and particle remnants.<sup>646</sup> This toxic exposure subsequently caused various illnesses including more than 60 types of cancer, respiratory conditions, and digestive disorders.<sup>647</sup> Thousands of survivors and first responders have been diagnosed with 9/11-related illnesses and thousands more have died.<sup>648</sup> The compensation provided to 9/11 victims and their families or representatives addresses the damages from both the terrorist attacks and the clean-up efforts.

Almost immediately after the terrorist attacks on September 11, 2001, Congress passed the Air Transportation Safety and Stabilization Act, which enacted the September 11th Victim Compensation Fund (VCF1).<sup>649</sup> This bill was enacted to bring financial relief to any individual, or relative of the deceased individual, who was physically injured or killed as a result of the terrorist attacks.<sup>650</sup> The claims window for VCF1 closed in 2004.

The VCF was reopened on January 2, 2011, when President Obama signed the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act).<sup>651</sup> While the original VCF1

<sup>640</sup> Niiya, [Office of Redress Administration](#) (January 28, 2022) Densho Encyclopedia, (as of Oct. 21, 2022).

<sup>641</sup> Niiya, [Office of Redress Administration](#) (January 28, 2022) Densho Encyclopedia, (as of Oct. 21, 2022).

<sup>642</sup> Jackson, [September 11 Attacks: What Happened on 9/11?](#) (Aug. 3, 2021) BBC News (as of Feb. 14, 2023).

<sup>643</sup> *Ibid.*

<sup>644</sup> *Ibid.*

<sup>645</sup> CDC World Trade Center Health Program, [Toxins and Health Impacts](#) (as of Feb. 14, 2023).

<sup>646</sup> *Ibid.*

<sup>647</sup> *Ibid.*

<sup>648</sup> *Ibid.*

<sup>649</sup> *Virgilio v. City of New York*, 407 F.3d 105, 109 (2d Cir. 2005).

<sup>650</sup> September 11<sup>th</sup> Victim Compensation Fund, [20<sup>th</sup> Anniversary Special Report](#) (September 2021) at p. 4 (as of Feb. 14, 2023).

<sup>651</sup> *Ibid.*



only covered the victims (or their representatives) who were either killed or injured as a direct result of the 9/11 terrorist attacks, the Zadroga Act expanded the VCF to compensate victims for injury or death related to the debris removal process conducted in the aftermath of the terrorist attacks and exposure to the toxic air in lower Manhattan and the other attack sites during that time.<sup>652</sup> Eligible individuals were present at the World Trade Center, the surrounding New York City exposure zone, the Pentagon crash site, or the Shanksville, Pennsylvania crash site, at some point between September 11, 2001, and May 30, 2002, and have since been diagnosed with a 9/11-related illness.<sup>653</sup> Compensation is available to first responders; those who worked or volunteered in construction, clean-up, and debris removal; and people who lived, worked, or went to school in the exposure zone.<sup>654</sup> The claim filing deadline was October 2016.<sup>655</sup>

The 2011 Zadroga Act also established the World Trade Center Health Program (WTCHP) to provide medical monitoring and treatment for responders and survivors with chronic health conditions arising from the 9/11 attacks.<sup>656</sup> The WTCHP is administered by the director of the National Institute for Occupational Safety and Health (NIOSH) and also conducts scientific research to better identify, diagnose, and treat physical and mental health conditions related to 9/11 exposures.<sup>657</sup> In contrast to the WTC Health Program, the VCF does not cover mental health conditions.<sup>658</sup>

In 2015, the Zadroga Act was reauthorized and extended until December 2020. Certain award calculations were changed.<sup>659</sup> The original VCF paid an average death claim award of over \$2 million<sup>660</sup> and awarded anywhere from \$500 to over \$8.6 million in personal injury claims.<sup>661</sup> Due to budgetary concerns, the reauthorization of the Zadroga Act in 2015 restricted victim compensation.<sup>662</sup> It capped awards for non-economic loss from cancer conditions at \$250,000, awards for non-economic loss from non-cancer conditions at \$90,000, and awards for economic loss of annual income at \$200,000.<sup>663</sup>

In early 2019, the VCF announced reductions to claim awards from 50 to 70 percent because of insufficient funds.<sup>664</sup> Outraged, the public demanded increased funding and Congress held hearings on fund and claim deadline extension.<sup>665</sup> In July 2019, Congress signed the “Never Forget the Heroes, James Zadroga, Ray Pfeifer, and Luis Alvarez Permanent Authorization of

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<sup>652</sup> *Ibid.*

<sup>653</sup> September 11<sup>th</sup> Victim Compensation Fund, [Frequently Asked Questions \(FAQs\)](#) (as of Feb. 14, 2023).

<sup>654</sup> *Ibid.*

<sup>655</sup> *Ibid.*

<sup>656</sup> [20<sup>th</sup> Anniversary Special Report](#), *supra* at p. 4.

<sup>657</sup> CDC World Trade Center Health Program, [About the Program](#) (as of Feb. 14, 2023).

<sup>658</sup> September 11<sup>th</sup> Victim Compensation Fund, [Annual Report 2022](#) at p. 14 (as of Feb. 14, 2023).

<sup>659</sup> [20<sup>th</sup> Anniversary Special Report](#), *supra* at p. 4.

<sup>660</sup> September 11<sup>th</sup> Victim Compensation Fund of 2001, [Compensation for Deceased Victims](#) (as of Feb. 14, 2023).

<sup>661</sup> CNN Editorial Research, [September 11 Victim Aid and Compensation Fast Facts](#) (Sept. 7, 2022) CNN (as of Feb. 14, 2023).

<sup>662</sup> September 11<sup>th</sup> Victim Compensation Fund, [About the Victim Compensation Fund](#) (as of Feb. 14, 2023).

<sup>663</sup> *Ibid.*

<sup>664</sup> [About the Victim Compensation Fund](#), *supra*.

<sup>665</sup> *Ibid.*

the September 11th Victim Compensation Fund Act” fully funding the VCF as necessary to pay all eligible claims through the extended filing deadline of October 1, 2090.<sup>666</sup>

To receive compensation, claimants must meet two deadlines: the registration deadline and the claim deadline.<sup>667</sup> For both personal injury and deceased claims, a new or subsequent government determination that a condition or injury is 9/11-related triggers a two-year registration window; however, a 9/11-related diagnosis is not necessary for registration.<sup>668</sup> Registering preserves the right to file a claim in the future.<sup>669</sup> If registration is timely for any condition or injury, then all eligible conditions are considered for a claim.<sup>670</sup>

The VCF was designed to be a compensation scheme in lieu of tort litigation for the economic and noneconomic losses incurred by victims who were physically injured and families of victims whose lives were taken as a result of the terrorist attacks.<sup>671</sup> Claimants who participate in this compensation scheme waive their right to sue for damages for injury or death as a result of the terrorist attacks.<sup>672</sup> A compensation fund was chosen as an alternative to potential class action toxic tort litigation because it is a more efficient and effective solution for compensating victims.<sup>673</sup> It was enacted to relieve victims and their families from navigating through the legal system and possibly having their claims rejected under government immunity or other potential bars.<sup>674</sup>

The VCF is administered by the U.S. Department of Justice.<sup>675</sup> To be eligible for compensation from the VCF, claimants must have a physical injury or condition caused by the 9/11 terrorist attacks or by the rescue, recovery, and debris removal efforts during the immediate aftermath of the terrorist attacks.<sup>676</sup> Claimants must have at least one of the pre-determined WTC-Related Physical Health Conditions in order to be eligible.<sup>677</sup> Claimants must demonstrate a diagnosis through a private physician process and/or a World Trade Center (WTC) Health Program.<sup>678</sup>

After a diagnosis, claimants then fill out a claim form that includes eligibility and compensation information and attach certain supporting documents to demonstrate presence at a 9/11 crash site, debris-removal route, or within a exposure zone.<sup>679</sup> Examples of acceptable documentation include sworn affidavits, medical records, lease or mortgage documents, and

<sup>666</sup> *Ibid.*

<sup>667</sup> September 11<sup>th</sup> Victim Compensation Fund, [Section 1: Eligibility Criteria and Deadlines](#) (Jan. 9, 2023) (as of Feb. 14, 2023).

<sup>668</sup> *Ibid.*

<sup>669</sup> *Ibid.*

<sup>670</sup> *Ibid.*

<sup>671</sup> Isaacson, *Terrorism and Mass Toxic Torts: An Examination of the James Zadroga 9/11 Health and Compensation Act*, 25 *Fordham Envtl. L. Rev.* 509 (2014).

<sup>672</sup> *Ibid.*

<sup>673</sup> *Ibid.*

<sup>674</sup> *Ibid.*

<sup>675</sup> [Frequently Asked Questions \(FAQs\)](#), *supra*.

<sup>676</sup> *Ibid.*

<sup>677</sup> *Ibid.*

<sup>678</sup> *Ibid.*

<sup>679</sup> September 11<sup>th</sup> Victim Compensation Fund, [Claim Review Process](#) (Feb. 4, 2021) (as of Feb. 14, 2023).

employer letters.<sup>680</sup> The VCF first reviews the claim for eligibility and if approved, the VCF then reviews the losses claimed for compensation.<sup>681</sup> At this stage, the VCF reviews non-economic loss (pain and suffering) based on the severity of the physical harm and reviews economic loss based on past and future lost earnings.<sup>682</sup> Once the total amount of compensation is calculated, then the claimant is informed of the outcome and has an option to appeal within 30 days.<sup>683</sup> If no appeal is exercised, then the U.S. Treasury authorizes the payment and disburses it to the bank account designated in the claim application submitted to the VCF.<sup>684</sup>

The most significant issue with implementation has been the consistent funding of the Fund. Over the past two decades, the Fund struggled to meet rising medical costs and cancer rates.<sup>685</sup> Many exposure symptoms and 9/11-related diseases took years to manifest.<sup>686</sup> The original fund operated from 2001 until 2004. In 2011, the Zadroga Act reactivated the VCF and extended the claim deadline until 2016. The bill was reauthorized in 2015 and extended the VCF for another five years until 2020. But in February 2019, a Special Master determined that the funding was insufficient to pay the remaining pending and projected VCF claims and reduced awards were announced. In response to public outrage and victims' activism, the VCF was permanently authorized in July 2019, allocating over \$10 billion to cover claims through the next 10 years. The VCF Permanent Authorization Act allows for the appropriation of funds as necessary to pay for all eligible claims filed before October 2090. It also compensates any victims who received reduced awards due to budgetary restrictions with the full value of their award.<sup>687</sup>

Another issue has been claimants providing inadequate documentation for their claim or filing premature claims. According to the VCF's 2022 Annual Report, 54% of claims are deactivated for failure to provide the minimum required information, 41.9% of all claims are submitted with insufficient proof of presence documents, and 32.2% do not have a certified physical condition at the time the claim is filed.<sup>688</sup>

#### e. **Sandy Hook Elementary School**

In the years following the 2012 Sandy Hook Elementary school shooting, one of the deadliest in U.S. history, the federal Departments of Justice and Education issued several grants to establish a new Sandy Hook school at a vacant campus, to hire and train staff, including

<sup>680</sup> [Section 1: Eligibility Criteria and Deadlines](#), *supra*.

<sup>681</sup> [Claim Review Process](#), *supra*.

<sup>682</sup> *Ibid*.

<sup>683</sup> *Ibid*.

<sup>684</sup> *Ibid*.

<sup>685</sup> Goldmacher, [With Ground Zero Payments Slashed, a Push to Replenish a 9/11 Fund](#) (Feb. 28, 2019) New York Times (as of Feb. 14, 2023).

<sup>686</sup> Gordy, The 9/11 Cancer Conundrum: The Law, Policy, & Politics of the Zadroga Act, 37 Seton Hall Legis. J. 33, 50 (2012).

<sup>687</sup> September 11<sup>th</sup> Victim Compensation Fund, [VCF Permanent Authorization Act: Questions and Answers](#) (Aug. 2019) (as of Feb. 14, 2023).

<sup>688</sup> [Annual Report 2022](#), *supra* at p. 8.

mental health professionals, and to help staff private charities who were handling donations intended for victims and victims' families.

On December 14, 2012, Adam Lanza shot and murdered twenty children and six adult staff members, including the school principal and school psychologist, at Sandy Hook Elementary School in Newton, Connecticut, after killing his mother.<sup>689</sup> Lanza had gathered an AR-15, two semi-automatic pistols, as well as several hundred rounds of ammunition stored in high-capacity magazines; his mother had purchased several of the guns.<sup>690</sup> When he arrived at the school, he shot and killed the school's principal and school psychologist.<sup>691</sup> Teachers, who heard the gunshots, entered lockdown procedures, but Lanza was able to enter a classroom where he killed the teacher and fourteen children.<sup>692</sup> He entered a second classroom and killed the teacher and six students; he also killed a special education aide and a behavioral therapist.<sup>693</sup> When police arrived at the school, they discovered that Lanza had killed himself.<sup>694</sup> It is the deadliest mass shooting at an elementary school in U.S. history and the second deadliest school shooting overall.<sup>695</sup> The school was demolished in 2014 and replaced by a new building in 2016.<sup>696</sup>

On January 3, 2013, Connecticut Governor Dannel P. Malloy established the Sandy Hook Advisory Commission, to investigate the facilities, recommend public policy implementation, and law enforcement recommendations.<sup>697</sup> The Commission concluded that Lanza acted alone, but did not identify a motive.<sup>698</sup> The Commission made several recommendations, including investment in mental health professionals and funding for short-term and long-term recovery plans and behavioral health and education responses to crisis events.<sup>699</sup>

<sup>689</sup> Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. Times (Dec. 14, 2012) <<https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html>> (as of Feb. 14, 2023).

<sup>690</sup> Encyclopedia Britannica, *Sandy Hook Elementary School shooting* (last updated Feb. 16, 2023) <<https://www.britannica.com/event/Sandy-Hook-Elementary-School-shooting>> (as of Mar. 13, 2023).

<sup>691</sup> *Ibid.*

<sup>692</sup> *Ibid.*

<sup>693</sup> *Ibid.*

<sup>694</sup> Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. Times (Dec. 14, 2012) <<https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html>> (as of Feb. 14, 2023).

<sup>695</sup> Gamio & Hubler, *Texas Massacre Is the Second-Deadliest School Shooting on Record*, N.Y. Times (May 24, 2022) <<https://www.nytimes.com/interactive/2022/05/24/us/texas-school-shooting-deaths.html>> (as of Feb. 14, 2023).

<sup>696</sup> Encyclopedia Britannica, *Sandy Hook Elementary School shooting* (last updated Feb. 16, 2023) <<https://www.britannica.com/event/Sandy-Hook-Elementary-School-shooting>> (as of Mar. 13, 2023).

<sup>697</sup> Sandy Hook Advisory Commission, Final Report (March 6, 2015) at p. 1 <[https://portal.ct.gov/-/media/Malloy-Archive/Sandy-Hook-Advisory-Commission/SHAC\\_Final\\_Report\\_3-6-2015.pdf?sc\\_lang=en&hash=BDF55EC4ACE382E87941870AD9BF2A34](https://portal.ct.gov/-/media/Malloy-Archive/Sandy-Hook-Advisory-Commission/SHAC_Final_Report_3-6-2015.pdf?sc_lang=en&hash=BDF55EC4ACE382E87941870AD9BF2A34)> (as of Feb. 15, 2023).

<sup>698</sup> *Id.* at pp. 10-12.

<sup>699</sup> *Id.* at pp. 211-213.



At least \$28 million was fundraised by more than 77 charities in the years after the shooting; with about half of that amount distributed to families by the end of 2014.<sup>700</sup> Families settled a lawsuit with Remington, the manufacturer of the gun used by Lanza, for \$73 million<sup>701</sup> and won judgements of \$965 million and \$473 million against Alex Jones, the founder of Infowars, for defamation, infliction of emotional distress, and violations of Connecticut's Unfair Trade Practices Act.<sup>702</sup> The federal Departments of Justice and Education have awarded several grants to supplement these funds.

A *Hartford Courant* review found that the federal government had given the town of Newton and several agencies related to Sandy Hook over \$17 million in aid, used primarily to enhance mental health services and school security, in the two years following the shooting.<sup>703</sup> Much of the money from the grants went directly to opening the new Sandy Hook Elementary.<sup>704</sup>

On December 17, 2013, the federal DOJ granted \$1.5 million to reimburse organizations and agencies that provided direct support to victims, first responders and the Newton community, granted by the Department of Justice's Office for Victims of Crime to the Connecticut Judicial Branch.<sup>705</sup> The grant was reimbursements for costs incurred by organizations that provided crisis intervention services, trauma-informed care, victim-related law enforcement support and costs incurred in moving students from Sandy Hook to a new school location.<sup>706</sup> The grant was distributed through the Antiterrorism and Emergency Assistance Program, which grants awards for crisis response, and is funded by the Crime Victims Fund for the Antiterrorism Emergency Reserve Fund.<sup>707</sup> The DOJ also provided \$2.5 million in funding for Connecticut and Newtown law enforcement agencies through the Bureau of Justice Assistance.<sup>708</sup>

<sup>700</sup> Altimari, *Sandy Hook Two Years Later: Where is the Aid Going?*, *Hartford Courant* (Dec. 14, 2014) <<https://www.courant.com/news/connecticut/hc-sandy-hook-shooting-two-years-later-20141214-story.html>> (as of Mar. 13, 2023).

<sup>701</sup> Rojas, Zraick, & Closson, *Sandy Hook Families Settle With Gunmaker for \$73 Million Over Massacre*, *N.Y. Times* (Feb. 15, 2022) <<https://www.nytimes.com/2022/02/15/nyregion/sandy-hook-families-settlement.html>> (as of Feb. 15, 2023).

<sup>702</sup> Slater, *Alex Jones ordered to pay nearly \$1 billion to Sandy Hook families*, *Wash. Post* (Oct. 12, 2022) <<https://www.washingtonpost.com/nation/2022/10/12/alex-jones-sandy-hook-verdict/>> (as of Feb. 15, 2023); Collins, *Alex Jones ordered to pay \$473M more to Sandy Hook families*, *Associated Press* (Nov. 11, 2022) <<https://www.boston.com/news/local-news/2022/11/11/alex-jones-ordered-to-pay-473m-more-to-sandy-hook-families>> (as of Feb. 15, 2023).

<sup>703</sup> Altimari, *Sandy Hook Two Years Later: Where is the Aid Going?*, *Hartford Courant* (Dec. 14, 2014) <<https://www.courant.com/news/connecticut/hc-sandy-hook-shooting-two-years-later-20141214-story.html>> (as of Feb. 15, 2023).

<sup>704</sup> *Ibid.*

<sup>705</sup> U.S. Dept. of J., Attorney General Holder Announces \$1.5 Million to Reimburse Support Efforts to Victims of the Sandy Hook Elementary School Shooting (December 17, 2013) <<https://www.justice.gov/opa/pr/attorney-general-holder-announces-15-million-reimburse-support-efforts-victims-sandy-hook>> (as of Feb. 15, 2023).

<sup>706</sup> *Ibid.*

<sup>707</sup> *Ibid.*

<sup>708</sup> U.S. Dept. of J., Attorney General Holder Announces \$2.5 Million to Connecticut Law Enforcement for Costs Related to Sandy Hook School Shootings (August 28, 2013) <<https://www.justice.gov/opa/pr/attorney-general-eric-holder-announces-25-million-connecticut-law-enforcement-costs-related>> (as of Feb. 15, 2023).



In June 2014, the federal DOJ issued another grant for \$7.1 million through its Office for Victims of Crime.<sup>709</sup> This grant was for victim services, school safety efforts, and new mental health services.<sup>710</sup> Additionally, the town of Newton and the state received \$2.5 million from the DOJ for police overtime costs.<sup>711</sup>

The federal funding was split between several groups. Newton Recovery & Resiliency Plan received \$826,443: \$618,000 went to hiring four fulltime staffers.<sup>712</sup> The second group, Resiliency Center of Newton, received \$501,000, with \$408,000 used for hiring therapists.<sup>713</sup> The United Way of Western Connecticut received around \$131,355 from the DOJ, of which half was spent to hire a lobbying firm for public relations.<sup>714</sup> The Sandy Hook Foundation used \$122,000 of the DOJ money to hire an Executive Director.<sup>715</sup>

School Emergency Response to Violence (SERV) Grants from the Department of Education totaled \$6.4 million; \$1.3 million was earmarked for mental-health providers working with student survivors.<sup>716</sup> The rest was used to hire teachers, security guards and other personnel. In total, the federal government has given \$17 million in additional aid for mental health services and school security.<sup>717</sup>

The reasons given for the grants was to strengthen the aid infrastructure and create programs that will aid in the recovery process for many years.<sup>718</sup> Immediately after the shooting, there was an increase in crisis referrals for mental health assistance, an increase in chronic absenteeism and an increase in school nurse visits.<sup>719</sup>

Parents and community members criticized the fund disbursement process, since most of the grants were for support services, and none of the federal money was designated for survivors or their families.<sup>720</sup> Parents have said in public meetings that “trying to get help has been at best confusing, and at worst impossible, for many families” and that the advertised supports were inaccessible and difficult to identify.<sup>721</sup> Parents and community members have also criticized that the funds have gone towards hiring public relations and lobbying firms for groups, rather than going to direct aid.<sup>722</sup> The Sandy Hook Foundation, for example, raised \$12 million for victims’

<sup>709</sup> New Haven Register, *Newtown receives \$7.1M federal grant to support Sandy Hook Victims* (June 17, 2014) <<https://www.nhregister.com/connecticut/article/Newtown-receives-7-1M-federal-grant-to-support-11380111.php>> (as of Feb. 15, 2023).

<sup>710</sup> *Ibid.*

<sup>711</sup> Altimari, *supra.* 1

<sup>712</sup> *Ibid.*

<sup>713</sup> *Ibid.*

<sup>714</sup> *Ibid.*

<sup>715</sup> *Ibid.*

<sup>716</sup> *Ibid.*

<sup>717</sup> *Ibid.*

<sup>718</sup> *Ibid.*

<sup>719</sup> *Ibid.*

<sup>720</sup> Altimari, *supra.*

<sup>721</sup> *Ibid.*

<sup>722</sup> *Ibid.*

families through private donations and distributed only \$7.7 million, without accounting for the rest.<sup>723</sup> The DOJ still granted the Foundation \$173,830, most of which was used to pay the salary of the director.<sup>724</sup>

#### f. Iranian Hostages

In 2015, Congress created the United States Victims of State Sponsored Terrorism Fund to compensate American diplomats and staff who had been abducted and held hostage by Iranians at the U.S. Embassy in Tehran for 444 days between 1979 and 1981. Each former hostage is entitled to receive \$10,000 for each day they were held in captivity; spouses and children of the former hostages are entitled to a lump sum of \$600,000 each. However, due to issues with funding, the former hostages and their families have yet to receive the entire amount each are due.

On November 4, 1979, a group of 3,000 Iranians stormed the U.S. embassy in Tehran and took 63 American men and women hostage, including diplomats.<sup>725</sup> The seizure took place shortly after the Iranian Revolution. Mohammed Reza Shah Pahlavi, the previous ruler of Iran who was deposed in January of 1979, had been a close ally to the U.S.; after he was deposed, the revolutionary government treated the U.S. cautiously and suspiciously.<sup>726</sup> The U.S. embassy had been the scene of frequent demonstrations by Iranians who opposed the American presence in Iran and, on February 14, 1979, the embassy was attacked and briefly occupied by guerillas, trapping the U.S. Ambassador William H. Sullivan and 100 members of his staff inside.<sup>727</sup> The Ambassador called on Ayatollah Khomeini, the revolutionary leader of Iran for help; Khomeini's forces freed the hostages, but several personnel were wounded or killed.<sup>728</sup> No reparations have been proposed for the February 14 hostages.

In October 1979, the Shah Pahlavi travelled to New York City to obtain medical treatment; U.S. authorities informed the Iranian prime minister, Mehdi Bazargan of this and Bazargan guaranteed the safety of the U.S. embassy and its staff from potential retaliation for Americans welcoming the deposed ruler.<sup>729</sup> The leaders of the storming of the embassy, a group of about sixty Iranian university students who called themselves the Students Following the Imam's Line, demanded that the Shah be returned immediately to face the revolution.<sup>730</sup> In the following days, the Carter Administration and diplomats from other countries attempted but failed to negotiate the release of the hostages.<sup>731</sup> On November 12, acting foreign minister

<sup>723</sup> *Ibid.*

<sup>724</sup> *Ibid.*

<sup>725</sup> Encyclopedia Britannica, *Iran Hostage Crisis* <<https://www.britannica.com/event/Iran-hostage-crisis>> (as of Feb. 14, 2023).

<sup>726</sup> *Ibid.*

<sup>727</sup> Gage, *Armed Iranians Rush U.S. Embassy*, N.Y. Times (Feb. 15, 1979) p. A1 <<https://www.nytimes.com/1979/02/15/archives/armed-iranians-rush-us-embassy-khomeinis-forces-free-staff-of-100-a.html>> (as of Feb. 14, 2023).

<sup>728</sup> Encyclopedia Britannica, *supra*.

<sup>729</sup> *Ibid.*

<sup>730</sup> Bowden, *Among the Hostage Takers* (Dec. 1, 2004) The Atlantic <<https://www.theatlantic.com/magazine/archive/2004/12/among-the-hostage-takers/303596>> (as of Feb. 14, 2023).

<sup>731</sup> Encyclopedia Britannica, *supra*.

Abolhasan Bani-Sadr proposed a release of the hostages if the United States ceased interfering in Iranian affairs, if the Shah was returned to Iran for trial, and if assets in the possession of the Shah were declared stolen property.<sup>732</sup> The U.S. responded by stating that it would support establishing an international commission to investigate human rights abuses under the Shah's regime, and by refusing to purchase Iranian oil, instituting an international economic embargo against Iran, and freezing billions of dollars in Iranian assets in the United States.<sup>733</sup> On November 17, 13 hostages, all women or African Americans, were released on orders of Khomeini on the grounds that they were unlikely to be spies.<sup>734</sup>

On April 24, 1980, a small group of special operations soldiers attempted to free the hostages by force.<sup>735</sup> Their mission failed, however, when three of eight helicopters malfunctioned; U.S. forces withdrew, and one helicopter crashed, killing eight U.S. servicemembers.<sup>736</sup> No diplomatic progress was made until later in the year. In Mid-August, Iran implemented a permanent government; in September, Iraq invaded Iran. The economic embargo and Iraq-Iran War led to Iran re-engaging in hostage negotiations. Algerian diplomats brokered an agreement, the Algiers Accords, and the hostages were released on January 20, minutes after the inauguration of Ronald Reagan; the hostage crisis is widely believed to have contributed to Reagan's victory over Carter.<sup>737</sup> The Algiers Accords included, among other items, a provision preventing the freed hostages from seeking compensation from Iran in U.S. courts.<sup>738</sup> As a result, former hostages and their families have never successfully won judgments or collected damages from the harms of the hostage crisis.

The Hostage Relief Act of 1980, passed during the crisis, did not provide a cash payment to former hostages or their families, but did provide other benefits, including the creation of an interest-bearing salary savings fund including retroactive interest, reimbursement of medical expenses, extension of various forms of service members relief to hostages, tax relief, including deferred assessment of taxes for the period of captivity and refunding of tax collected prior to enactment of the Act, and educational expenses for family members and hostages.<sup>739</sup> A proposal to provide each hostage with \$1,000 per day of captivity, to be funded by frozen Iranian assets, was shot down by the State Department on the grounds that it would complicate negotiations.<sup>740</sup>

On the same day that the Algiers Accords were signed, President Carter created the President's Commission on Hostage Compensation, with the goal of providing recommendations on financial compensation to former hostages. The commission issued a report that the United States, as the employer of the former hostages, should not be held liable in a "tort sense" but that

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<sup>732</sup> *Ibid.*

<sup>733</sup> *Ibid.*

<sup>734</sup> *Ibid.*

<sup>735</sup> *Ibid.*

<sup>736</sup> *Ibid.*

<sup>737</sup> *Ibid.*

<sup>738</sup> P.L. 96-449, 94 Stat. 1967 (1980); see also Elsea, Congressional Research Service, The Iran Hostages: Efforts to Obtain Compensation (November 2, 2015) at p.1 <<https://sgp.fas.org/crs/misc/R43210.pdf>> (as of Feb. 15, 2023).

<sup>739</sup> Elsea, *supra*.

<sup>740</sup> *Ibid.*

the former hostages should receive a payment of tax-exempt detention benefits in the amount of \$12.50 per day of captivity, similar to benefits paid to Vietnam War prisoners of war.<sup>741</sup> These recommendations were debated in Congress, but ultimately not adopted.<sup>742</sup>

In 2015, Congress passed the United States Victims of State Sponsored Terrorism Act, establishing a fund through the Consolidated Appropriations Act of 2015.<sup>743</sup> The Fund initially included an appropriation for \$1.025 billion for Fiscal Year 2017.<sup>744</sup> Further funding has been provided by proceeds of federal enforcement actions.<sup>745</sup> At the time of passage, 39 former hostages were still alive.<sup>746</sup> Each hostage is entitled to receive \$10,000 per day of captivity, and spouses and children are each entitled to a lump sum of \$600,000.<sup>747</sup> Some of the appropriated money came from a \$9 billion penalty assessed on Paris-based bank BNP Paribas, for violating sanctions against Iran, Sudan, and Cuba.<sup>748</sup>

In November 2019, Congress enacted the United States Victims of State Sponsored Terrorism Fund Clarification Act, amending the original legislation by extending the life of the Fund and expanding eligibility to receive payments from the Fund.<sup>749</sup> The Consolidated Appropriations Act of 2021 again amended the legislation.<sup>750</sup>

An eligible claimant was originally statutorily limited to:

- (1) a U.S. person<sup>751</sup> with a final judgment issued by a U.S. district court under state or federal law against a state sponsor of terrorism and arising from an act of international terrorism;
- (2) a U.S. person who was taken and held hostage from the United States embassy in Tehran, Iran, from the period beginning November 4, 1979, and ending January 20, 1981, or the spouse and child of that person, and who is also identified as a member of the proposed class in case number 1:00-CV-03110 (EGS) of the U.S. District Court for the District of Columbia (*Roeder I*);<sup>752</sup> or

<sup>741</sup> *Ibid.*

<sup>742</sup> H.R. No. 2851, 99th Cong. (1985).

<sup>743</sup> Originally 42 U.S.C. § 10609; now, as amended, 34 U.S.C. § 20144.

<sup>744</sup> Feinberg, United States Victims of State Sponsored Terrorism Fund, Report from the Special Master (Jan. 2017) <<http://www.usvsst.com/docs/USVSST%20Fund%20Congressional%20Report%201-9-17.pdf>> (as of Feb. 14, 2023) (2017 Report).

<sup>745</sup> United States Victims of State Sponsored Terrorism Fund, Special Master's Supplemental Report Regarding the Third Distribution (Dec. 2022) <<http://www.usvsst.com/docs/USVSST%20Fund%20Supplemental%20Congressional%20Report%20Dec%202022.pdf>> (as of Feb. 15, 2023) (2022 Report).

<sup>746</sup> Herszenhorn, *Americans Held Hostage in Iran Win Compensation 36 Years Later*, N.Y. Times (Dec. 25, 2015) p. A1 <<https://www.nytimes.com/2015/12/25/us/politics/americans-held-hostage-in-iran-win-compensation-36-years-later.html>> (as of Feb. 15, 2023).

<sup>747</sup> 34 U.S.C. § 20144, subds. (c)(2)(B) – (c)(2)(C).

<sup>748</sup> Herszenhorn, *supra*.

<sup>749</sup> 2022 Report, *supra*.

<sup>750</sup> *Id.*

<sup>751</sup> U.S. person is not limited to U.S. citizens, but is defined as a natural person who has suffered an injury arising from the actions of a foreign state. (2017 Report, *supra*).

<sup>752</sup> *Roeder v. Islamic Republic of Iran* (2002) 195 F.Supp.2d 140, was a class action brought by former hostages and their families against Iran to recover tort damages. The D.C. district court dismissed the claims as barred by the Algiers Accords. *Id.* at p. 162.



(3) the personal representative of a deceased individual in either of the two categories.<sup>753</sup>

On May 17, 2016, the Attorney General appointed Kenneth R. Feinberg as the Special Master to administer the Fund.<sup>754</sup> The Clarification Act removed the requirement that the former hostage be identified as a class member of *Roeder I*, but the requirement remains for the hostages' spouses and children.<sup>755</sup>

Former hostage applicants for the fund were required to apply by October 12, 2016.<sup>756</sup> Each applicant needed to establish eligibility. Former hostages were required to verify their identities and the date that they were released; spouses were required to verify that they were married to the former hostage during the hostage period, and children were required to produce birth records showing that they were born before January 20, 1981.<sup>757</sup>

The Special Master has ultimate authority over compensation of the fund, and their decisions are not subject to administrative or judicial review.<sup>758</sup> A claimant whose claim is denied may request a hearing before the Special Master within 30 days of receipt of the denial.<sup>759</sup> The Special Master hosted two telephonic town hall meetings to provide potential claimants, their lawyers, and the public with the opportunity to ask questions concerning the Act, and the Special Master also met personally with victims and their advocates.<sup>760</sup>

The Special Master extended the application deadline to December 2, 2016, and received a total of 2,883 applications for both the former Iran hostages and their families, and those who had received eligible judgements.<sup>761</sup> By August 2017, \$1 billion had been disbursed, and \$9.7 billion in compensatory damages and statutory awards remained unpaid.<sup>762</sup>

The Fund distributed another \$1 billion between 2017 and 2019, and another \$1.2 billion between 2019 and 2022. As of the latest report, \$93.4 billion in compensatory and statutory damages remained unpaid for the former hostages, judgement holders and 9/11 victims eligible for compensation from the fund.<sup>763</sup> The Fund is scheduled to terminate in 2039, and the Special Master predicts authorizing annual payments if sufficient funds are available.<sup>764</sup>

<sup>753</sup> 2017 Report, *supra*.

<sup>754</sup> *Ibid*.

<sup>755</sup> 2022 Report, *supra*.

<sup>756</sup> Justice for United States Victims of State Sponsored Terrorism Act, Notice, 81 Fed.Reg. 135 (July 14, 2016) <[www.usvsst.com/docs/Notice.pdf](http://www.usvsst.com/docs/Notice.pdf)> (as of Feb. 15, 2023).

<sup>757</sup> *Ibid*.

<sup>758</sup> 34 U.S.C. § 20144, subd. (b)(3).

<sup>759</sup> 34 U.S.C. § 20144, subd. (b)(4).

<sup>760</sup> 2017 Report, *supra*.

<sup>761</sup> 2022 Report, *supra*. For privacy reasons, the Special Master Reports do not designate which applicants received funds or how much each applicant received in funds. *Id.* at p. 9.

<sup>762</sup> 2022 Report, *supra*.

<sup>763</sup> *Id.* at p. 12.

<sup>764</sup> *Id.* at p. 13.

The Act was amended to include 9/11 victims who had won judgements against Iran and the Fund was converted to be disbursed on a pro rata basis.<sup>765</sup> Following the amendment, the Fund was to be divided in half: half to be provided for 9/11 related victims of state sponsored terrorism and half to non-9/11 victims.<sup>766</sup> The half allocated to non-9/11 related victims is further divided on a pro rata basis, based on the amounts outstanding and unpaid on eligible claims, until such amounts are paid in full.<sup>767</sup>

As a result of the inclusion of 9/11-related claimants to the fund, only a fraction of the amount entitled to former hostages and their families has been distributed.<sup>768</sup> The former hostages have gotten occasional payments; Fund administrators estimate that the non-9/11 beneficiaries, including the former hostages, have received about 24% of what they are eligible for.<sup>769</sup> As of September 26, 2021, only 35 hostages remained alive.<sup>770</sup> As long as the Fund is maintained and there are outstanding payments, the Special Master will authorize payments on an annual basis; the Fund sunsets on January 2, 2039.<sup>771</sup>

## 2. State and Local

### a. North Carolina Sterilization

In 2002, Governor Mike Easley apologized for forced sterilizations performed under the purview of the State of North Carolina's Eugenics Board. In 2013, North Carolina was the first state to pass legislation to compensate victims of state-sponsored eugenic sterilizations. The law set aside a \$10 million pool for compensation payments, and at least 215 victims received \$20,000 in 2014, \$15,000 in 2015, and a final payment of around \$5,000 in 2018.

In 1919, North Carolina passed its first forced-sterilization law, which was amended in 1929 to allow the head of any penal or charitable institution that received even some state support to "have the necessary operation for asexualization or sterilization performed upon any mentally defective or feeble-minded inmate or patient thereof."<sup>772</sup> The North Carolina Supreme Court invalidated the law in 1933 because it failed to provide any notice or opportunity for appeal.<sup>773</sup> In response, the North Carolina Legislature created the North Carolina Eugenics Board, to implement the new forced-sterilization law with very limited appeal rights.<sup>774</sup>

<sup>765</sup> 34 U.S.C. § 20144, subd. (d)(3).

<sup>766</sup> 34 U.S.C. § 20144, subd. (d)(3)(A)(i).

<sup>767</sup> 34 U.S.C. § 20144, subd. (d)(3)(A)(i)(II).

<sup>768</sup> Parvini, *They were hostages in Iran for 444 days. Decades later, they're waiting for compensation*, L.A. Times (Nov. 3, 2019) <<https://www.latimes.com/world-nation/story/2019-11-03/iran-hostages-444-days-decades-later-waiting-compensation>> (as of Feb. 15, 2023).

<sup>769</sup> Gearan, *40 years later, a dwindling band of Iran hostages awaits a promised payment*, Wash. Post (Sept. 26, 2021) <<https://www.washingtonpost.com/politics/2021/09/26/40-years-later-dwindling-band-iran-hostages-awaits-promised-payment>> (as of Feb. 15, 2023).

<sup>770</sup> *Ibid.*

<sup>771</sup> United States Victims of State Sponsored Terrorism Fund, Important Dates, <<http://www.usvsst.com/important.php>> (as of Mar. 13, 2023).

<sup>772</sup> North Carolina P.L. 1929, c. 34.

<sup>773</sup> *Brewer v. Valk*, 204 N.C. 186 (1933).

<sup>774</sup> North Carolina P.L. 1933, c. 224.

The five members of the Board heard petitions brought by heads of state institutions, county superintendents of welfare, next of kin, or legal guardians arguing that individuals should be sterilized due to being either epileptic, “feebleminded,” or mentally diseased.<sup>775</sup> There was a very limited appeal process, but the board approved about 90 percent of the petitions.<sup>776</sup> The state ultimately sterilized around 7,600 persons, the third-largest number in the country.<sup>777</sup> The program was somewhat unique in that it also sterilized non-institutionalized individuals, not just those residing in penal or mental facilities. Moreover, the vast majority of sterilizations took place after World War II.<sup>778</sup>

Governor Bev Perdue established the N.C. Justice for Sterilization Victims Foundation as part of the N.C. Department of Administration in 2010 to function as a clearinghouse to help victims of the former N.C. Eugenics Board.<sup>779</sup> During 2011 and 2012, the Foundation also supported the separate Gubernatorial Task Force on Eugenics Compensation established under Executive Order 83.<sup>780</sup> This effort culminated in the State Legislature creating the Eugenics Asexualization and Sterilization Compensation Program in 2013.<sup>781</sup>

The statute set out a program to compensate individuals who were asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina under either the 1933 or 1937 version of the laws.<sup>782</sup> This requirement that the State Eugenics Board have been involved and/or have a record of the sterilization caused implementation issues, as it turned out that many individuals were sterilized at the county level without the involvement of the State Board.<sup>783</sup> A sterilization was “involuntary” under the statute if done in the case of: (1) a minor child, an incompetent adult, a competent adult without the adult’s informed consent.<sup>784</sup> A claimant must also have been alive on June 30, 2013 in order to receive compensation.<sup>785</sup>

The State Legislature allocated \$10,000,000 to pay compensation claims, with payments to be made in waves.<sup>786</sup> The first payment was to be made to those claimants deemed qualified

<sup>775</sup> North Carolina P.L. 1933, c. 224.

<sup>776</sup> Railey & Begos, “*Still hiding,*” *Against their Will: North Carolina’s Sterilization Program, Part One*, Winston-Salem Journal (Mar. 13, 2003) at [https://www.journalnow.com/news/local/still-hiding/article\\_e26e967c-8fe4-11e2-b104-0019bb30f31a.html](https://www.journalnow.com/news/local/still-hiding/article_e26e967c-8fe4-11e2-b104-0019bb30f31a.html) [as of Jan. 23, 2023].

<sup>777</sup> Bakst, *North Carolina’s Forced-Sterilization Program: A Case for Compensating the Living Victims*, John Locke Found. Policy Rep. (2011), p. 7, at <https://www.johnlocke.org/wp-content/uploads/2016/06/NCEugenics.pdf> [as of Jan. 20, 2023].

<sup>778</sup> *Ibid.*

<sup>779</sup> Brochure, N.C. Justice for Sterilization Victims Foundation (Sept. 2014), at <https://ncadmin.nc.gov/media/3165/download> [as of Jan. 23, 2023].

<sup>780</sup> *Ibid.*

<sup>781</sup> N.C.S.L. 2013-360, sec. 6.18, subd. (a), creating N.C.G.S. §§ 143B-426.50 – 143B-426.57.

<sup>782</sup> N.C.G.S. § 143B-426.50, subd. (5).

<sup>783</sup> Menzel, *Why Some NC Sterilization Victims Won’t Get Share of \$10 Million Fund*, WUNC.org (Oct. 6, 2014) at <https://www.wunc.org/2014-10-06/why-some-nc-sterilization-victims-wont-get-share-of-10-million-fund.html> [as of Jan. 24, 2023].

<sup>784</sup> N.C.G.S. § 143B-426.50, subd. (3).

<sup>785</sup> N.C.G.S. § 143B-426.50, subd. (1).

<sup>786</sup> N.C.G.S. § 143B-426.51, subd. (a).

by the Commission by October 31, 2014.<sup>787</sup> Any claimants determined to be qualified recipients after that date were to receive their initial payment within 60 days, and final payment checks splitting the remaining funds among qualified recipients were to be remitted within 90 days of the exhaustion of the last appeal.<sup>788</sup> Applications needed to be received by September 23, 2014 in order to be considered for the program.<sup>789</sup>

Now Senator Thom Tillis was a co-sponsor of the legislation while he was North Carolina Speaker of the House. Discussing the need for financial payments, Tillis stated: “We decided that we were going to take the hits and do the right thing for the victims. It was not easy. We had opposition from both sides, some saying we shouldn’t do it at all, others saying we weren’t doing enough. But those had been the arguments that had prevented it from happening in the past, and we decided that we were going to push through and do the right thing for the victims.”<sup>790</sup> The financial reparations were specifically limited to those who were themselves directly harmed by the State Eugenics Board and still alive at the time the legislation was passed.<sup>791</sup>

The bill specifically stated that financial compensation would not be subject to several tax and other limitations: (1) Any payment should not be considered income or assets for purposes of determining the eligibility for, or the amount of, any benefits or assistance under any State or local program financed in whole or in part with State funds; and (2) the N.C. Department of Health and Human Services should disregard compensation money in the determination of public assistance or recovery of Medicaid-paid services.<sup>792</sup> Once he became a United States Senator, Tillis authored a bill to protect compensation payments from any determination for federal benefits.<sup>793</sup>

<sup>787</sup> N.C.G.S. § 143B-426.51, subd. (a). This initial payment was \$20,000, see Craver, *N.C. Eugenics Victims Projected to Get Final State Compensation Payment Soon*, Winston-Salem Journal (Jan. 17, 2018) at [https://www.journalnow.com/n-c-eugenics-victims-projected-to-get-final-state-compensation-payment-soon/article\\_87e3c891-7828-5f2d-856f-498b6405781a.html](https://www.journalnow.com/n-c-eugenics-victims-projected-to-get-final-state-compensation-payment-soon/article_87e3c891-7828-5f2d-856f-498b6405781a.html) [as of Jan. 23, 2023].

<sup>788</sup> N.C.G.S. § 143B-426.51, subd. (a). A second payment of \$15,000 went out in 2015, but the final payment did not go out until 2018. See Craver, *N.C. Eugenics Victims Projected to Get Final State Compensation Payment Soon*, Winston-Salem Journal (Jan. 17, 2018) at [https://www.journalnow.com/n-c-eugenics-victims-projected-to-get-final-state-compensation-payment-soon/article\\_87e3c891-7828-5f2d-856f-498b6405781a.html](https://www.journalnow.com/n-c-eugenics-victims-projected-to-get-final-state-compensation-payment-soon/article_87e3c891-7828-5f2d-856f-498b6405781a.html) [as of Jan. 23, 2023].

<sup>789</sup> N.C.G.S. § 143B-426.51, subd. (e).

<sup>790</sup> Press Release, *Tillis Discusses Eugenics Compensation Legislation and the Moral Obligation to Assist Victims* (Oct. 5, 2016) at <https://www.tillis.senate.gov/2016/10/tillis-discusses-eugenics-compensation-legislation-and-the-moral-obligation-to-assist-victims> [as of Jan. 24, 2023].

<sup>791</sup> Bakst, *North Carolina’s Forced-Sterilization Program: A Case for Compensating the Living Victims*, John Locke Found. Policy Rep. (2011), p. 12, at <https://www.johnlocke.org/wp-content/uploads/2016/06/NCeugenics.pdf> [as of Jan. 20, 2023].

<sup>792</sup> N.C.G.S. § 143B-426.56.

<sup>793</sup> Press Release, *Tillis Discusses Eugenics Compensation Legislation and the Moral Obligation to Assist Victims* (Oct. 5, 2016) at <https://www.tillis.senate.gov/2016/10/tillis-discusses-eugenics-compensation-legislation-and-the-moral-obligation-to-assist-victims> [as of Jan. 24, 2023].



North Carolina only repealed its sterilization law in 2003, and as part of the repeal, Governor Easley issued a public apology.<sup>794</sup> He stated, “To the victims and families of this regrettable episode in North Carolina’s past, I extend my sincere apologies and want to assure them that we will not forget what they have endured.”<sup>795</sup>

The statute creating the compensation program formed the Office of Justice for Sterilization Victims in the North Carolina Department of Administration to administer claims. Applicants were able to submit claims to the Office between January 2013 and June 30, 2014.<sup>796</sup> Claims needed to be dropped off in person, or mailed, and received by the above date to be considered.

Claims were first assessed by a deputy commissioner to determine eligibility, and if the claim was not approved, the deputy commission had to set forth in writing the reasons for the disapproval and notify the claimant.<sup>797</sup> If not approved, a claimant could submit additional documentation and request a redetermination by the deputy commissioner.<sup>798</sup> A claimant whose claim was not approved at either previous stage had the right to request a hearing before the deputy commissioner, where the claimant could be represented by counsel, present evidence, and call witnesses.<sup>799</sup> The deputy commissioner who heard the claim had to issue a written decision of eligibility.<sup>800</sup>

A claimant could then file a notice of appeal with the Commission within 30 days, such appeal to be heard by the full Commission, and the Commission had to notify all parties concerned in writing of its decision.<sup>801</sup> A claimant could appeal the decision of the full Commission to the Court of Appeals within 30 days of the date notice of the decision is given.<sup>802</sup> Decisions favorable to the claimant were final and not subject to appeal by the State.<sup>803</sup>

If a claimant was determined to be a qualified recipient, the Commission gave notice to the Office of Justice for Sterilization Victims and the Office of State Controller. The Office of State Controller then made a payment of compensation to the qualified recipient.<sup>804</sup> Compensation was intended to be in the form of two payments, with the first by October 31, 2014, (or 60 days after claimant determined qualified if determined after that date), and the second payment after the exhaustion of all appeals arising from denial of eligibility.<sup>805</sup> Due to

<sup>794</sup> Reynolds, *Easley Signs Law Ending State’s Eugenics Era*” Inclusion Daily Express: International Disability Rights News Services (Apr. 17, 2003) at <https://www.inclusiondaily.com/news/institutions/nc/eugenics.htm> [as of Jan. 23, 2023].

<sup>795</sup> Ibid.

<sup>796</sup> N.C.G.S. § 143B-426.52, subs. (a), (b).

<sup>797</sup> N.C.G.S. § 143B-426.53, subd. (b).

<sup>798</sup> N.C.G.S. § 143B-426.53, subd. (c).

<sup>799</sup> N.C.G.S. § 143B-426.53, subd. (d).

<sup>800</sup> Ibid.

<sup>801</sup> N.C.G.S. § 143B-426.53, subd. (e).

<sup>802</sup> N.C.G.S. § 143B-426.53, subd. (f).

<sup>803</sup> N.C.G.S. § 143B-426.53, subd. (h).

<sup>804</sup> N.C.G.S. § 143B-426.53, subd. (g).

<sup>805</sup> N.C.G.S. § 143B-426.51, subd (a).

the time several court cases appealing denials took to work through the courts, the State ultimately sent three payments to victims between 2014 and 2018.

There were two groups of court cases regarding who qualified as a claimant under the program. First, a group of plaintiffs argued they should be eligible for compensation payments as heirs to victims of sterilization. The Court ruled it was not an Equal Protection Violation for the statute to provide compensation only to those victims alive on the date the statute was passed.<sup>806</sup> Second, a group of plaintiffs challenged the limitation of compensation to only those whose sterilization was directly under the auspices of the State Eugenics Board, rather than a county official or state judge. The Court eventually ruled it was constitutional for the statute to limit compensation to those sterilized directly under the auspices of the State Eugenics Board.<sup>807</sup>

### **b. Virginia (Eugenics)**

On May 2, 2002, 75 years after the *Buck v. Bell* Supreme Court decision that upheld Virginia's eugenics statute, Virginia Governor Mark R. Warner issued an apology for the state's embrace of eugenics and denounced the state's practice that involuntarily sterilized persons confined to state institutions from 1927 to 1979.<sup>808</sup>

In 2014, Virginia House Member Robert G. Marshall introduced House Bill 1529, the Justice for Victims of Sterilization Act. The bill as introduced would have provided compensation in the amount of \$50,000 to persons involuntarily sterilized between 1924 and 1979. Funds would be administered by the Department of Social Services. The provisions of the bill would expire July 1, 2018. The bill however never left the House and died in Appropriations by February 2013.

In 2014, Virginia House Member Robert G. Marshall reintroduced the Justice for Victims of Sterilization Act as House Bill 74. The bill included an updated sunset of July 1, 2019. House Bill 74 was referred to the Committee on Appropriations but was voted on to be continued in 2015.

In 2015, Virginia House Member Patrick Hope reintroduced the Justice for Victims of Sterilization Act as House Bill 1504. The bill remained the same and included a sunset provision. The House assigned House Bill 1504 to the General Government and Capital Outlay Subcommittee, but by February 2015, the bill was left in Appropriations. The same year, Virginia House Member Benjamin Cline introduced an identical bill, House Bill 2377. However, House Bill 2377 was left in Appropriations in February 2015.

Despite both bills not making it out of Appropriations, an amendment was added to the 2015 House Budget Bill, HB 1500, to allocate \$400,000 from the state general fund for compensation

<sup>806</sup> See, e.g., *Matter of Hughes, by and through Ingram*, 253 N.C. App. 699, 801 S.E.2d 680 (N.C. Ct. App. June 6, 2017).

<sup>807</sup> See, e.g., *Matter of Davis*, 256 N.C. App. 436, 808 S.E.2d 369 (N.C. Ct. App. Nov. 21, 2017).

<sup>808</sup> Leung, E. (2014, March 18). Virginia becomes the first US state to issue a formal apology for sterilization. Retrieved November 4, 2022, from <https://eugenicsarchive.ca/discover/tree/532874b8132156674b00029c>

to individuals who were involuntarily sterilized pursuant to the Virginia Eugenical Sterilization Act and who were living as of February 1, 2015.<sup>809</sup> As written in the budget, the funds were to be managed by the Department of Behavioral Health and Developmental Services and limited to \$25,000 instead of the proposed \$50,000.<sup>810</sup> Furthermore, should the funding provided for compensation be exhausted prior to the end of fiscal year 2016, the department shall continue to collect applications.<sup>811</sup> The department shall provide a report to the Governor and the Chairmen of the House Appropriations and Senate Finance Committees on a quarterly basis on the number of additional individuals who have been applied. The Virginia House and Senate approved House Bill 1500, and the bill was signed by the Governor on March 26, 2015, establishing the Virginia Victims of Eugenics Sterilization Compensation Program (VESC). As of the enactment, there were only 11 surviving victims.<sup>812</sup>

In 1924, Virginia passed its Eugenical Sterilization Act, which authorized the sexual sterilization of inmates at state institutions. The Act provided that the superintendent of the Western, Eastern, Southwestern, or Central State Hospital or the State Colony for Epileptics and Feeble-Minded could impose sterilization when he had the opinion that it was for the best interest of the patients and of society that any inmate of the institution under his care should be sexually sterilized and the requirements of the Act were met.<sup>813</sup> The Act responded to fifty years of scholarly debate over whether certain social problems, including shiftlessness, poverty, and prostitution, were inherited and ultimately could be eliminated through selective sterilization.<sup>814</sup> The Act was passed alongside the Racial Integrity Act, which banned interracial marriage by requiring marriage applicants to identify their race as “white,” “colored,” or “mixed” with “white” being defined as a person “who has no trace whatsoever of any blood other than Caucasian.” The Racial Integrity Act was bolstered by the eugenics efforts like the Eugenic Sterilization Act, which saw non-White people as having inferior genes. One inmate, Carrie Buck, appealed her order of sterilization, but U.S. Supreme Court upheld the Virginia state law in *Buck v. Bell*

<sup>809</sup> <https://budget.lis.virginia.gov/bill/2015/1/>

<sup>810</sup> <https://budget.lis.virginia.gov/bill/2015/1/>

<sup>811</sup> <https://budget.lis.virginia.gov/bill/2015/1/>

<sup>812</sup> **Need cite for this fact.**

<sup>813</sup> Encyclopedia Virginia, Chapter 46B of the Code of Virginia § 1095h–m (1924), <https://encyclopediavirginia.org/entries/chapter-46b-of-the-code-of-virginia-%c2%a7-1095h-m-1924/>

<sup>814</sup> Encyclopedia Virginia, *Buck v. Bell* (1927), <https://encyclopediavirginia.org/entries/buck-v-bell-1927/>

(1927) by a vote of 8 to 1.<sup>815</sup> <sup>816</sup> The controversial ruling was never overturned, but the law was repealed in 1974.<sup>817</sup> Between 1927 and 1972, about 8,300 Virginians were sterilized.<sup>818</sup>

In 1980, the American Civil Liberties Union sued the Lynchburg Training School and Hospital (previously the Virginia State Colony for Epileptics and Feeble-minded) on behalf of the men and women who had been sterilized there. In *Poe v. Lynchburg Training School and Hospital* (1981), the U.S. District Court for the Western District of Virginia ruled that while the sterilizations had been legal, there was cause to believe that correct procedure had not always been followed. The plaintiffs later settled with the state out of court, with the state agreeing to attempt to locate all living persons who had been sterilized, to inform them of the consequences of the operation, and to provide them with counseling and medical treatment.<sup>819</sup>

To apply for compensation through the Victims of Eugenics Sterilization Compensation Fund, authorized through the 2015 Appropriation Act, claimants must complete and mail an application form and provide supporting documentation to the Virginia Department of Behavioral Health and Developmental Services.

An individual or lawfully authorized representative is eligible to request compensation under this program if the individual was:

1. Involuntarily sterilized pursuant to the 1924 Virginia Eugenic Sterilization Act;
2. Living as of February 1, 2015; and
3. Sterilized while a patient at Eastern State Hospital; Western State Hospital; Central State Hospital; Southwestern State Hospital; or the Central Virginia Training Center (formerly known as the State Colony for Epileptics and Feeble-Minded; now closed).

On October 7, 2016, the Treatment of Certain Payments in Eugenics Compensation Act was signed by the President and became law as Public Law 114-241. This federal law provides that payments made under a state eugenics compensation program shall not be considered as income

<sup>815</sup> Encyclopedia Virginia, Buck v. Bell (1927), <https://encyclopediavirginia.org/entries/buck-v-bell-1927/>

<sup>816</sup> On October 19, 1927, John H. Bell, the colony's superintendent, performed a salpingectomy, sterilizing Carrie Buck. She was released from the institution a month later. Historians have since found evidence that neither Carrie Buck nor her daughter suffered from any mental illness and that Bell's sterilization relied on a false diagnosis. Vivian Dobbs, Carrie Buck's daughter, was placed on the honor roll at her elementary school in 1931, a year before she died at the age of eight. Carrie Buck Eagle Detamore, who married twice, died in a nursing home in Waynesboro on January 28, 1983, and is buried in Oakwood Cemetery in Charlottesville. Encyclopedia Virginia, Buck v. Bell (1927), <https://encyclopediavirginia.org/entries/buck-v-bell-1927/>

<sup>817</sup> Encyclopedia Virginia, Buck v. Bell (1927), <https://encyclopediavirginia.org/entries/buck-v-bell-1927/>

<sup>818</sup> Encyclopedia Virginia, Buck v. Bell (1927), <https://encyclopediavirginia.org/entries/buck-v-bell-1927/>

<sup>819</sup> Need citation.



or resources for purposes of determining the eligibility of a recipient of such compensation for, or the amount of, any federal public benefit.<sup>820</sup>

### c. California Sterilization Compensation Program

In 2003, the State of California formally apologized for California's eugenic sterilization program up to 1979, including apologies from Governor Gray Davis, Attorney General Bill Lockyer, and a resolution passed by the State Senate expressing profound regret over the program.<sup>821</sup> In 2021, the California State Legislature passed Assembly Bill 137 (AB 137) creating the California Forced or Involuntary Sterilization Compensation Program, apologizing for sterilizations at state prisons, ordering the creation of memorial plaques, and allocating \$4.5 million for financial reparations to those sterilized by the State.<sup>822</sup>

California's eugenic sterilization program began in 1909, with the passage of Chapter 720 of the Statutes of 1909 (revised in 1913 [Chapter 363 of the Statutes of 1913] and 1917 [Chapters 489 and 776 of the Statutes of 1917], which authorized medical superintendents in state homes and state hospitals to perform "asexualization" on patients.<sup>823</sup> This allowed medical personnel to perform vasectomies for men and salpingectomies for women who were identified as "afflicted with mental disease which may have been inherited and is likely to be transmitted to descendants, the various grades of feeble-mindedness, those suffering from perversion or marked departures from normal mentality or from disease of a syphilitic nature."<sup>824</sup>

The law passed unanimously in the state Assembly, and drew only one dissenting vote in the state Senate in 1909. The subsequent amendments shifted the focus of the program from the castration of those imprisoned in state prisons and towards the sterilization of those held in state mental hospitals.<sup>825</sup>

California maintained 12 state homes and state hospitals that housed thousands of patients who were committed by the courts, family members, and medical authorities. While many sterilizations included the use of consent forms, such consent was often a condition for release from commitment, and this along with other conditions prevented true consent.<sup>826</sup> Moreover, Assembly Bill 137 lays out how though the law did not target specific racial or ethnic

<sup>820</sup> Virginia Department of Behavioral Health & Developmental Services, Victims of Eugenics Sterilization Compensation Program, <https://dbhds.virginia.gov/developmental-services/victimsofeugenics/>

<sup>821</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 34, subds. (g)-(h).

<sup>822</sup> Galpern, *Social Justice Coalition Key to Success in California's New Sterilization Compensation Program*, Genetics and Society (Jan. 26, 2022), at <https://geneticsandsociety.org/biopoliticaltimes/social-justice-coalition-key-success-californias-new-sterilization-compensation> [as of Jan. 12, 2023].

<sup>823</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 34, subds. (a), (b).

<sup>824</sup> *Ibid.*

<sup>825</sup> Sen. Com. On Judiciary, Analysis of Assem. Bill. No. 1007 (2021-2022 Reg. Sess.) Jul. 1, 2021, p.5. The provisions creating a reparations scheme for the state sterilization programs were originally in a stand-alone bill, Assem. Bill No. 1007. Identical provisions were then placed in Assem. Bill 137 (Committee on Budget, 2021), which as a budget trailer bill, took effect immediately. The legislative history for Assem. Bill 137 does not include detailed discussion of the reparations scheme, which can be found in the legislative history for Assem. Bill 1007.

<sup>826</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 34, subd. (c).

groups, in practice, “labels of ‘mental deficiency’ and ‘feble-mindedness’ were applied disproportionately to racial and ethnic minorities, people with actual and perceived disabilities, poor people, and women.”<sup>827</sup> For example, between 1919 and 1952, “women and girls were 14 percent more likely to be sterilized than men and boys,” “male Latino patients were 23 percent more likely to be sterilized than non-Latino male patients, and female Latina patients were 59 percent more likely to be sterilized than non-Latina female patients.”<sup>828</sup>

California’s eugenic sterilization law was repealed in 1979, but sterilization without proper consent continued in state institutions. In 2014, the California State Auditor released an audit of female inmate sterilizations that occurred in the state prison system’s medical facilities between fiscal years 2005–06 and 2012–13.<sup>829</sup> The auditor discovered 144 women imprisoned by the State were sterilized through bilateral tubal ligation, which is not medically necessary and is solely used for female sterilization.<sup>830</sup> The auditor found that officials failed to receive informed consent in at least 39 of these cases, but more broadly, expressed serious reservations about all of the procedures as it was “unable to conclude whether inmates received educational materials, whether prison medical staff answered inmates’ questions, or whether these staff provided the inmates with all of the necessary information to make such a sensitive and life-changing decision as sterilization.”<sup>831</sup> Following this report, the Legislature prohibited the sterilization for the purpose of birth control any individual under the control of the California Department of Corrections and Rehabilitation (CDCR).<sup>832</sup> There are an estimated 244 survivors of illegal prison sterilization.<sup>833</sup>

The California Legislature passed, and the Governor signed, AB 137 in the 2021-2022 legislative session. AB 137 created the California Forced or Involuntary Sterilization Compensation Program (FISCP or Program), which financially compensates survivors of state-sponsored sterilization. The California Victim Compensation Board (CalVCB) administers the Program.

AB 137 sets out specific criteria for those who can apply for compensation from the Program: “(1) Any survivor of state-sponsored sterilization conducted pursuant to eugenics laws that existed in the State of California between 1909 and 1979. (2) Any survivor of coercive sterilization performed on an individual under the custody and control of the Department of Corrections and Rehabilitation after 1979.”<sup>834</sup>

<sup>827</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 34, subd. (e).

<sup>828</sup> *Ibid.*

<sup>829</sup> Cal. State Auditor, *Sterilization of Female Inmates, Some Inmates Were Sterilized Unlawfully, and Safeguards Designed to Limit Occurrences of the Procedure Failed* (June 2014), at <https://www.auditor.ca.gov/pdfs/reports/2013-120.pdf> [as of Jan. 12, 2023].

<sup>830</sup> *Id.* at 19.

<sup>831</sup> *Id.* at 19, 3.

<sup>832</sup> Assem. Bill No. 1135 (2013-2014 Reg. Sess.).

<sup>833</sup> Sen. Com. On Judiciary, Analysis of Assem. Bill. No. 1007 (2021-2022 Reg. Sess.) Jul. 1, 2021, p.6.

<sup>834</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 21, subd. (b), codified at Health & Saf. Code § 24210, subd. (b)(1), (2).

To be eligible under the first category, a person must have been: (1) sterilized pursuant to the eugenics laws in place between 1909-1979; (2) sterilized while the individual was at a facility under the control of the State Department of State Hospitals or the State Department of Developmental Services; (3) and alive at the start date of the program, July 1, 2021.<sup>835</sup>

To be eligible under the second category the following conditions must be met: (1) sterilization procedure occurred after 1979; (2) claimant was sterilized while in the custody of the California Department of Corrections and Rehabilitation; (3) sterilization was not required in an emergency life-saving medical situation or due to a chemical sterilization program for convicted sex offenders; (4) sterilization was for birth control purposes; and (5) the claimant was sterilized under one of the following conditions: without consent, with consent given less than 30 days before sterilization, with consent given without counseling or consultation, or with no record or documentation of providing consent.<sup>836</sup> The law also requires CalVCB to affirmatively identify and disclose coercive sterilizations that occurred in California prisons after 1979 so that individuals may then apply for compensation.<sup>837</sup>

AB 137 allocated \$4.5 million for direct financial compensation to applicants who met the above eligibility criteria. Each approved applicant receives an initial payment of \$15,000 within 60 days of notice of confirmed eligibility.<sup>838</sup> After all applications are processed and all initial payments are made, any remaining program funds will be disbursed evenly to the qualified recipients by March 31, 2024.<sup>839</sup> Applications to the program are accepted from January 1, 2022, through December 31, 2023.<sup>840</sup>

Sponsor of the bill, California Latinas for Reproductive Justice, summarized the rationale for the apology and financial compensation: “California will become the third state to compensate survivors of forced sterilizations under eugenics laws, following North Carolina (2013) and Virginia (2015). It will also become the first state to compensate survivors of involuntary sterilizations performed outside of formal eugenic laws. Enactment of this bill would send a powerful message around the country that forced sterilizations will not be tolerated in carceral settings, including prisons, detention centers, and institutions.”<sup>841</sup>

<sup>835</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 21, subd. (c)(3)(A), codified at Health & Saf. Code § 24210, subd. (c)(3)(A). Claimants can designate a beneficiary for their compensation in the case they pass away prior to resolution of their claim.

<sup>836</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 21, subd. (c)(3)(B), codified at Health & Saf. Code § 24210, subd. (c)(3)(B).

<sup>837</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 21, codified at Health & Saf. Code § 24211, subd. (a)(4).

<sup>838</sup> Beam, *California Trying to Find, Compensate Sterilization Victims*, A.P. News (Jan. 5, 2023), at <https://apnews.com/article/politics-health-california-state-government-prisons-b560ec0a0155d8cc13730310e1073d9d> [as of Jan. 12, 2023].

<sup>839</sup> CalVCB, *Forced or Involuntary Sterilization Compensation Program Frequently Asked Questions*, at <https://victims.ca.gov/fiscp/#:~:text=your%20eligibility%20reviewed,-.CalVCB%20will%20accept%20applications%20from%20January%201,%2C%20to%20December%2031%2C%202023.&text=Applicants%20may%20submit%20documentation%20demonstrating.state%20records%20for%20eligibility%20documentation> [as of Jan. 17, 2023].

<sup>840</sup> Ibid.

<sup>841</sup> Sen. Com. On Pub. Saf., Analysis of Assem. Bill. No. 1007 (2021-2022 Reg. Sess.) Jun. 29, 2021, p.10.

The bill specifically stated that financial compensation would not be subject to several tax and other limitations: “Notwithstanding any other law, the payment made to a qualified recipient pursuant to this program shall not be considered any of the following: (1) Taxable income for state tax purposes; (2) Income or resources for purposes of determining the eligibility for, or amount of, any benefits or assistance under any state or local means-tested program; (3) Income or resources in determining the eligibility for, or the amount of, any federal public benefits as provided by the Treatment of Certain Payments in Eugenics Compensation Act (42 U.S.C. Sec. 18501); (4) Community property for the purpose of determining property rights under the Family Code and Probate Code.”<sup>842</sup> Moreover, the financial compensation shall not be subject to an enforcement of a money judgment under state law, a money judgment in favor of the Department of Health Care Services, the collection of owed child support, or the collection of court-ordered restitution, fees, or fines.<sup>843</sup>

In 2003 the State Legislature, Governor, and Attorney General all issued formal apologies for the 1909-1979 eugenic sterilization program.<sup>844</sup> Specifically, the State Senate passed a resolution expressing “profound regret over the state’s past role in the eugenics movement and the injustice done to thousands of California men and women,” addressing “past bigotry and intolerance against the persons with disabilities and others who were viewed as ‘genetically unfit’ by the eugenics movement,” recognizing that “all individuals must honor human rights and treat others with respect regardless of race, ethnicity, religious belief, economic status, disability, or illness,” and urging “every citizen of the state to become familiar with the history of the eugenics movement, in the hope that a more educated and tolerant populace will reject any similar abhorrent pseudoscientific movement should it arise in the future.”<sup>845</sup>

In 2021, as part of the passage of AB 137, the State Legislature formally expressed regret for the sterilizations that took place after 1979. Specifically, the Legislature stated, “The Legislature also hereby expresses its profound regret over the state’s past role in coercive sterilizations of people in women’s prisons and the injustice done to the people in those prisons and their families and communities.”<sup>846</sup>

AB 137 also requires the State Department of State Hospitals, the State Department of Developmental Services, and the Department of Corrections and Rehabilitation, in consultation with stakeholders (including at least one member and one advocate of those who were sterilized under California’s eugenics laws between 1909 to 1979, and of those who were sterilized without proper authorization while imprisoned in California state prisons after 1979), to establish markers or plaques at designated sites.<sup>847</sup> These memorials should “acknowledge the wrongful sterilization of thousands of vulnerable people under eugenics policies and the subsequent

<sup>842</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 21, codified at Health & Saf. Code § 24217, subd. (a).

<sup>843</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 21, codified at Health & Saf. Code § 24217, subd. (b).

<sup>844</sup> Ingram, *State Issues Apology for Policy of Sterilization*, L.A. Times (Mar. 12, 2003), at <https://www.latimes.com/archives/la-xpm-2003-mar-12-me-sterile12-story.html> [as of Jan. 12, 2023].

<sup>845</sup> Assem. Bill No. 137, (2021-2022 Reg. Sess.) § 34, subd. (h), citing Sen.Res. No. 20 (2003-2004 Reg. Sess.).

<sup>846</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 34, subd. (l).

<sup>847</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 21, codified at Health & Saf. Code § 24215.



sterilization of people in California’s women’s prisons caused, in part, by the forgotten lessons of the harms of the eugenics movement.”<sup>848</sup>

The compensation program is administered by CalVCB. The bill gave CalVCB six months from passage to have applications ready for the public, and applications are accepted from January 1, 2022, through December 31, 2023.<sup>849</sup> Applications are available through CalVCB’s website, over the phone, through the mail, or by visiting in person, and can be returned by mail, email, or fax.

The individual submitting the application will receive a letter from CalVCB either confirming a complete application or requesting additional information. Once the application is screened and deemed complete, the application will be considered for eligibility. The statute sets out eligibility criteria (discussed above) and the specific documents and document types CalVCB may use to determine eligibility.<sup>850</sup> Upon completion of the eligibility review, a letter will be sent out with the determination.<sup>851</sup>

If eligibility is verified, the claimant will receive a confirmation letter, and they shall receive an initial payment of \$15,000 within 60 days of the board’s determination.<sup>852</sup>

If eligibility is not verified, the application will be denied. Notification will be sent with the necessary appeal information. An individual may file an appeal to the board within 30 days of the receipt of the notice of decision, and after receiving the appeal, the board shall again attempt to verify the claimant’s identity pursuant to statutory requirements.<sup>853</sup> If the claimant’s identity cannot be verified, the claimant can provide additional evidence including, but not limited to, documentation of the individual’s sterilization, sterilization recommendation, surgical consent forms, relevant court or institutional records, or a sworn statement by the survivor or another individual with personal knowledge of the sterilization.<sup>854</sup> The Board has 30 days to rule on an appeal, and any successful appeals will receive compensation as above.

After exhaustion of all appeals arising from the denial of an individual’s application, but by no later than two years and nine months after the start date of the program, the board shall send a final payment to all qualified recipients. This final payment shall be calculated by dividing the remaining unencumbered balance of funds for victim compensation payments by the total number of qualified recipients.<sup>855</sup>

According to CalVCB, as of December 20, 2022, the program has received 309 applications. Of those, 45 have been approved, 102 have been denied, three have been closed as

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<sup>848</sup> Ibid.

<sup>849</sup> CalVCB, *Forced or Involuntary Sterilization Compensation Program Frequently Asked Questions*, *supra* n.19.

<sup>850</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 21, codified at Health & Saf. Code § 24213, subd. (a).

<sup>851</sup> CalVCB, *Forced or Involuntary Sterilization Compensation Program Frequently Asked Questions*, *supra* n.19.

<sup>852</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 21, codified at Health & Saf. Code § 24213, subd. (b)(1).

<sup>853</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 21, codified at Health & Saf. Code § 24213, subd. (a)(5).

<sup>854</sup> Ibid.

<sup>855</sup> Assem. Bill No. 137 (2021-2022 Reg. Sess.) § 21, codified at Health & Saf. Code § 24213, subd. (b)(2).

incomplete, and 159 are being processed.<sup>856</sup> Experts estimate there may be about 600 people alive today that qualify for compensation, and the CalVCB is undertaking several actions to try to spread the word about the program.<sup>857</sup> This includes sending posters and fact sheets to 1,000 skilled nursing homes and 500 libraries, and distributing more than 900 posters to the state's 35 correctional institutions to post in common areas and housing units, in hopes of reaching more people.<sup>858</sup> The state also signed a \$280,000 contract in May with JP Marketing to launch a social media campaign that will run through the end of 2023. The biggest push began in December 2022, when the State will pay for TV and radio ads in Los Angeles, San Francisco and Sacramento that will run through October 2023.<sup>859</sup>

#### d. Chicago Police Department

Chicago's Jon Burge was a high ranking officer who, between 1972 to 1991 led a group of detectives and officers to torture and abuse over 120 African American criminal suspects that sometimes led to coerced confessions.<sup>860</sup> Investigations reveal Burge led operations of abuse that included physical and psychological abuse such as "trickery, deception, threats, intimidation, physical beatings, sexual humiliation, mock execution, and electroshock torture."<sup>861</sup> Moreover, evidence suggests judges and some city officials were complicit in these abuses for many years.<sup>862</sup> As a result, many African American victims ended up in prison due to coerced confessions and some were sentenced with the death penalty.<sup>863</sup> There was an effort to hold Jon Burge specifically accountable for his actions; however the statute of limitations had expired on many of the alleged cases of torture and community members started to seek alternative methods to tackle this issue, which eventually led to the reparations ordinance.<sup>864</sup>

Community activist organizations in Chicago, including the Chicago Torture Justice Memorial (CTJM), and attorney Joey Mogul of Peoples Law Office, fought for years. Frustrated activists

<sup>856</sup> CalVCB, *At Program's Halfway Point, California Continues to Search for Survivors of State-Sponsored Forced Sterilization to Compensate Them* (Dec. 21, 2022), at <https://victims.ca.gov/news-releases/at-programs-halfway-point-california-continues-to-search-for-survivors-of-state-sponsored-forced-sterilization-to-compensate-th%E2%80%A6> [as of Jan. 17, 2023].

<sup>857</sup> Beam, *California Trying to Find, Compensate Sterilization Victims*, A.P. News (Jan. 5, 2023), at <https://apnews.com/article/politics-health-california-state-government-prisons-b560ec0a0155d8cc13730310e1073d9d> [as of Jan. 12, 2023].

<sup>858</sup> CalVCB, *At Program's Halfway Point, California Continues to Search for Survivors of State-Sponsored Forced Sterilization to Compensate Them* (Dec. 21, 2022), at <https://victims.ca.gov/news-releases/at-programs-halfway-point-california-continues-to-search-for-survivors-of-state-sponsored-forced-sterilization-to-compensate-th%E2%80%A6> [as of Jan. 17, 2023].

<sup>859</sup> Beam, *California Trying to Find, Compensate Sterilization Victims*, A.P. News (Jan. 5, 2023), at <https://apnews.com/article/politics-health-california-state-government-prisons-b560ec0a0155d8cc13730310e1073d9d> [as of Jan. 12, 2023].

<sup>860</sup> Baer, *Dignity Restoration and the Chicago Police Torture Reparations Ordinance* (2019) 92 Chi.-Kent L.Rev. 769, 769-70.

<sup>861</sup> *Id.* at 769.

<sup>862</sup> *Id.* at 770.

<sup>863</sup> *Id.*

<sup>864</sup> Taylor, *Symposium: Police in America: Ensuring Accountability and Mitigating Racial Bias: The Long Path to Reparations for the Survivors of Chicago Police Torture* (2016) 11 Nw. J. L. & Soc. Pol'y 330, 340; Macaraeg & Kunichoff, *How Chicago Became the First City to Make Reparations to Victims of Police Violence* (Mar. 21, 2017) Yes Magazine.

petitioned the Inter-American Commission for Human Rights and the United Nations Committee Against Torture.<sup>865</sup> Although the IACHR did not take official action, the UNCAT issued a report affirming the advocates' position and urged the United States to provide redress to the survivors of torture "by supporting the passage of the Ordinance entitled Reparations for the Chicago Police Torture Survivors."<sup>866</sup> The UNCAT also noted its concern although Burge was convicted for perjury and obstruction of justice, because there was not sufficient evidence for a constitutional rights violation prosecution, no police officer has been convicted for their crimes and the majority of victims still did not receive "compensation for the extensive injuries suffered."<sup>867</sup>

During the twenty years before the reparations ordinance was passed, activists and attorneys, including those from the People's Law Office (PLO) in Chicago, were actively litigating torture cases in court.<sup>868</sup> For example, in the 1990s PLO attorneys represented a torture victim sentenced to death, Andrew Wilson, in his civil suit seeking damages for the torture he suffered from Burge under 42 U.S.C. § 1983.<sup>869</sup> An all-white jury found in favor of Burge, but the Seventh Circuit Court reversed the verdict ordering a new trial.<sup>870</sup> Another example is with Aaron Patterson, a torture victim who was sentenced to death.<sup>871</sup> In that case, the attorneys filed a post-conviction petition with an evaluation on whether or not Patterson was a victim of torture.<sup>872</sup> After denials in the lower court, the Illinois Supreme Court heard the case, specifically to question if showing physical injury is necessary to prove the confession was physically coerced.<sup>873</sup> Here, the Illinois Supreme Court held that proof of physical injury is no longer required to establish a confession was physically coerced.<sup>874</sup> These two examples show the wide range of cases that were being litigated, some were for post-conviction justice and seeking damages, some were for more limited issues/questions, and others asked for re-hearings on the coerced confessions cases. The general results varied and the frustration in these cases led to attorneys seeking affirmation from the UNCAT and other international bodies to hold Burge and the city more accountable.

In May 2015, the Chicago City Council "approved a municipal ordinance giving reparations to Burge torture survivors"<sup>875</sup> and the \$5.5 million package would award claimants \$100,000 in financial payments along with other non-financial reparations such as psychological counseling, healthcare, and a memorial site.<sup>876</sup> The ordinance was originally drafted by attorney Joey Mogul who worked with survivors, their families, and other activists.<sup>877</sup> This reparation was designed

<sup>865</sup> Taylor, *Symposium: Police in America: Ensuring Accountability and Mitigating Racial Bias: The Long Path to Reparations for the Survivors of Chicago Police Torture* (2016) 11 Nw. J. L. & Soc. Pol'y 330, 337-38.

<sup>866</sup> *Id.* at 337, 346.

<sup>867</sup> U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Concluding observations on the third to fifth periodic reports of United States of America, U.N. Doc. CAT/C/USA/CO/3-s (Nov. 2014).

<sup>868</sup> Taylor, *Symposium: Police in America: Ensuring Accountability and Mitigating Racial Bias: The Long Path to Reparations for the Survivors of Chicago Police Torture* (2016) 11 Nw. J. L. & Soc. Pol'y 330, 343.

<sup>869</sup> *Id.* at 331-32.

<sup>870</sup> *Id.* at 333.

<sup>871</sup> *Id.*

<sup>872</sup> *Id.*

<sup>873</sup> *Id.*

<sup>874</sup> *Id.* at 334.

<sup>875</sup> Taylor, *supra*, at p. 771.

<sup>876</sup> *Id.*

<sup>877</sup> [Joey L. Mogul](#), People's Law Office.

to respond to years of torture conducted by Chicago police under the leadership of Jon Burge. There is no explicitly stated temporal limit in the ordinance.

The intended recipients of the reparations included all torture survivors that have credible claim of torture or physical abuse at the hands of Jon Burge or his subordinates . . . [], their immediate family members, and “in some cases, to their grandchildren.” The ordinance requires the individual must have a credible claim of torture or physical abuse by Jon Burge or one of the officers under his command . . . [] between May 1, 1972, and November 30, 1991.<sup>878</sup>

The holistic reparation ordinance includes many components, including a formal apology, financial compensation, services and support for survivors, public education, and a memorial. First, there is a formal apology and acknowledgement that describes the police abuse and admits that the city and other players, were complicit in the abuse of over 100 African Americans.<sup>879</sup> Second, there is financial reparations totaling \$100,000 for each survivor with a credible claim of torture or abuse from Jon Burge or one of the officers under his command.<sup>880</sup> The ordinance also created the “Chicago Police Torture Reparations Commission” to administer these financial reparations to the survivors. Third, the ordinance provides free tuition at the City Colleges of Chicago and free access to job training, certification programs, and access to City programs that offer formerly incarcerated individuals job placements as well as other support services and programs.<sup>881</sup> Fourth, the ordinance provides psychological services to survivors and family members at a dedicated community center.<sup>882</sup> Finally, the City of Chicago promised to work with CTJM to “construct a permanent memorial to the Burge victims; and beginning in the 2015-2016 school year, the Chicago Public Schools will incorporate into its existing U.S. history curriculum for eighth-grade and tenth-grade students a lesson about the Burge case and its legacy”<sup>883</sup>

The ordinance stated that CTJM would provide the City with a list of individuals it determined are eligible for the reparations, then both the City and CTJM would investigate the claim, and if both parties agree the victim has a credible claim, they will be entitled to the financial reparations from

<sup>878</sup> [Chicago Ord.](#) No. SO2015-2687.

<sup>879</sup> *Id.* (The apology included the following language: “Whereas, The City Council wishes to acknowledge this exceedingly sad and painful chapter in Chicago’s history, and to formally express its profound regret for any and all shameful treatment of our fellow citizens that occurred; and whereas, The City Council recognizes that words alone cannot adequately convey the deep regret and remorse that we and our fellow citizens feel for any and all harm that was inflicted by Burge and the officers under his command. And yet, words do matter. For only words can end the silence about wrongs that were committed and injustices that were perpetrated, and enable us, as a City, to take the steps necessary to ensure that similar acts never again occur in Chicago; and whereas, The apology we make today is offered with the hope that it will open a new chapter in the history of our great City, a chapter marked by healing and an ongoing process of reconciliation . . . Be it resolved, that we, the Mayor and Members of the City Council of the City of Chicago, on behalf of all Chicagoans . . . apologize to the Burge victims for these horrific and inexcusable acts . . .”).

<sup>880</sup> *Id.*

<sup>881</sup> Taylor, *Symposium: Police in America: Ensuring Accountability and Mitigating Racial Bias: The Long Path to Reparations for the Survivors of Chicago Police Torture* (2016) 11 Nw. J. L. & Soc. Pol’y 330, 349; [https://www.chicago.gov/content/dam/city/depts/dol/supp\\_info/Burge-Reparations-Information-Center/BurgeRESOLUTION.pdf](https://www.chicago.gov/content/dam/city/depts/dol/supp_info/Burge-Reparations-Information-Center/BurgeRESOLUTION.pdf)

<sup>882</sup> Taylor, *Symposium: Police in America: Ensuring Accountability and Mitigating Racial Bias: The Long Path to Reparations for the Survivors of Chicago Police Torture* (2016) 11 Nw. J. L. & Soc. Pol’y 330, 349.

<sup>883</sup> [https://www.chicago.gov/content/dam/city/depts/dol/supp\\_info/Burge-Reparations-Information-Center/BurgeRESOLUTION.pdf](https://www.chicago.gov/content/dam/city/depts/dol/supp_info/Burge-Reparations-Information-Center/BurgeRESOLUTION.pdf)



the fund.<sup>884</sup> If there is disagreement between CTJM and the City on an individual's credibility, the person has an opportunity to present information and evidence to an independent arbitrator who will then make a final and binding decision.<sup>885</sup>

The only remaining unfulfilled reparation is the memorial. As of 2021, the memorial has still not been built but individuals at CTJM are meeting with the Mayor and remain hopeful the process will start soon.<sup>886</sup> This is, in part, because the resolution did not specify the timeline for the memorial and specific funding was not provided.<sup>887</sup>

#### e. Evanston, Illinois

The City of Evanston passed its first reparations program, the Restorative Housing Program (37-R-27), in March 2021 to redress the city's discriminatory practices in housing, zoning and lending that created a wealth and opportunity gap between white and Black Evanstonians.<sup>888</sup> Under this initiative, Black Evanstonians, their descendants, or other residents who experienced housing discrimination by the City of Evanston are provided \$25,000 to either purchase a home, conduct home improvements, or pay down their existing mortgage.<sup>889</sup> The Restorative Housing Program was the first reparations program enacted by the City, but Evanston has also studied its discriminatory past, created a City Reparations Fund, honored local historical African-American sites, and issued an apology.

The City Council enacted the Restorative Housing Program to redress the injustices found in the report commissioned for the City Council's Reparations Subcommittee, *Evanston Policies and Practices Directly Affecting the African American Community, 1900 - 1960 (and Present)*.<sup>890</sup> According to the report, "the City of Evanston officially supported and enabled the practice of segregation"<sup>891</sup> with specific actions such as passing a zoning ordinance in 1921 that condoned implicit race-based housing segregation; the demolition of homes owned by Black families for economic development on the grounds that they were "unsanitary" or "overcrowded"; providing permits to Northwestern University to develop temporary, segregated housing for veterans after World War II; segregating post-World War II temporary housing for veterans; and failing to enact a fair housing ordinance to outlaw housing discrimination until the late 1960s.<sup>892</sup>

A Restorative Housing Reparations Program was created as Evanston's first reparations program in March 2021<sup>893</sup> with the aim of increasing Black homeownership in order to revitalize and preserve Black owner-occupied homes in Evanston.<sup>894</sup> To be eligible, the home must be

<sup>884</sup> [Chicago Ord.](#) No. SO2015-2687.

<sup>885</sup> *Id.*

<sup>886</sup> Evans, [Chicago Promised Police Torture Survivors A Memorial. Nearly 6 years Later, They're Still Waiting For Funding](#) (Feb. 26, 2021)

<sup>887</sup> *Id.*

<sup>888</sup> Evanston Resolution No. 37-R-27.

<sup>889</sup> *Ibid.*

<sup>890</sup> Gavin, [Report Examines the City of Evanston's Practices That Impacted the Black Community, 1900-1960](#), (Oct. 12, 2020) Evanston RoundTable, (as of Oct. 4, 2022).

<sup>891</sup> Robinson and Thompson, [Evanston Policies and Practices Directly Affecting the African American Community, 1900 - 1960 \(and Present\)](#), (Aug 2020) p. 39.

<sup>892</sup> *Id.* at pp. 35-57.

<sup>893</sup> Evanston Resolution No. 37-R-27.

<sup>894</sup> City of Evanston, [Local Reparations: Restorative Housing Program: Official Program Guidelines](#) (2021) p. 3.

located in Evanston and be the applicant's primary residence.<sup>895</sup> The program will eventually extend funds to all intended recipients: Evanston residents over the age of 18 years, of Black/African American ancestry, and, in order of priority, either (1) an Ancestor, a resident who lived in Evanston between 1919 and 1969, was at least 18 years old at the time, and experienced housing discrimination due to the City's policies/practices; (2) a Direct Descendant of an Ancestor (e.g., child, grandchild, great-grandchild, and so on); or (3) a resident that does not qualify as an Ancestor or Direct Descendant, but experienced housing discrimination due to City ordinance, policy or practice after 1969.<sup>896</sup> The City Manager's Office has primary responsibility for administering this program.<sup>897</sup> The Office takes in the applications and verifies eligibility based on the guidelines established by the Reparations Committee, discussed below.<sup>898</sup> At the close of the first round of applications, 122 Ancestor-applicants were verified by the city, and 16 were randomly selected on January 13, 2022 via the City's lottery to receive the first round of payments.<sup>899</sup> In March 9, 2023, Evanston planned its second round of disbursements for 35-80 Ancestors.<sup>900</sup>

Upon approval by the City Council, funds are sent electronically or via check to the closing agent for disbursement when the Applicant closes on a home purchase; to the contractor upon receipt of invoice; or to the lender for mortgage payment.<sup>901</sup> This method of fund disbursement was selected due to IRS reporting requirements: the City lacks the requisite authority to exempt direct payments from either state or federal income taxes. Consequently, a recipient would be liable for the tax burden associated with the award.<sup>902</sup> A recipient could end up being required to pay between 24 to 28 percent to the IRS and Illinois.<sup>903</sup> By distributing payments to the financial institution or vendor, instead of the Evanston resident, they become responsible for the tax liability.<sup>904</sup> Contracts are paid in installments, half of the money arriving upfront, a quarter halfway through the job, and the final quarter upon completion.<sup>905</sup> Approved funds must be utilized within the year of approval.<sup>906</sup> Funding can be layered with other housing assistance programs by the city, state or federal government.<sup>907</sup>

Evanston's recent movement for reparations began in 2019. Former Evanston Alderperson Robin Rue Simmons (5<sup>th</sup> Ward) led the charge for reparations with the support of the City's Equity and Empowerment Commission.<sup>908</sup> First, the Commission studied the discriminatory past of the City by enlisting the help of two Evanston-based historical

<sup>895</sup> *Id.* at p. 8.

<sup>896</sup> City of Evanston, [Local Reparations: Restorative Housing Program: Official Program Guidelines](#) (2021) pp. 6-7.

<sup>897</sup> City of Evanston, [Local Reparations: Restorative Housing Program: Official Program Guidelines](#) (2021) p. 6.

<sup>898</sup> *Ibid.*

<sup>899</sup> Brown and Cahan, [Evanston Reparations Begin: Random Drawing Selects 16 Black 'Ancestors' to Receive \\$25,000 Grants](#) (Jan. 13, 2022) Evanston RoundTable, (as of Oct. 4, 2022).

<sup>900</sup> Castro, [Reparations Committee Approves Cash Payments for 2 Ancestors](#) (Mar. 2, 2023) Evanston RoundTable, (as of Mar. 9, 2023).

<sup>901</sup> City of Evanston, [Local Reparations: Restorative Housing Program: Official Program Guidelines](#) (2021) p. 10.

<sup>902</sup> City of Evanston, [Evanston Local Reparations](#), (as of Oct. 3, 2022).

<sup>903</sup> *Ibid.*

<sup>904</sup> *Ibid.*

<sup>905</sup> Abraham, [Evanston's First "Reparations" Payments Have Gone Out. Here's How It Was Spent](#) (July 7, 2022) Next City, (as of Oct. 4, 2022).

<sup>906</sup> City of Evanston, [Local Reparations: Restorative Housing Program: Official Program Guidelines](#) (2021) p. 8.

<sup>907</sup> *Ibid.*

<sup>908</sup> Manjapra, [How the Long Fight for Slavery Reparations is Slowly Being Won](#) (Oct. 6, 2020) The Guardian, (as of Oct. 3, 2022).

organizations, the Shorefront Legacy Center and the Evanston History Center, to identify past harms inflicted against Black Evanstonians. They produced a draft report that provided justification for the enactment of reparations by listing historical and contemporary instances where the City of Evanston might have facilitated, participated in, enacted, or stood neutral in the wake of acts of segregated and discriminatory practices.<sup>909</sup> The report described Evanston's historic segregated practices in transportation, public spaces, and employment; delayed desegregation efforts; and housing and zoning policies that led to overcrowding, higher rents, and segregated, inferior housing for Black residents.<sup>910</sup> The Commission also held community meetings to gather public input and recommend actions to the City Council.<sup>911</sup> Both the National Coalition of Blacks for Reparations in America (NCOBRA) and the National African American Reparations Commission (NAARC) provided advice regarding Evanston's reparations process.<sup>912</sup> Additional town halls and meetings were hosted by the City to further engage residents in program specifics.<sup>913</sup>

In November 2019, Evanston adopted Resolution 126-R-19 to study community recommendations for "repair and reparations" and create the City Reparations Fund, where tax revenues would be collected.<sup>914</sup> Resolution 126-R-19 committed the first \$10 million of the City's Municipal Cannabis Retailers' Occupation Tax (3 percent on gross sales of cannabis) to fund local reparations for housing and economic development programs for Black Evanston residents over the course of 10 years.<sup>915</sup> Individual residents, churches, and local businesses can make donations to the City Reparations Fund.<sup>916</sup> Following the establishment of the funding source, Evanston formed a permanent Reparations Subcommittee and hosted several town hall and Subcommittee meetings were held to solicit feedback on the structure of local reparations.<sup>917</sup> In June 2020, the Evanston Preservation Commission of City Council passed Resolution 54-R-20 to preserve and honor historical African-American sites in Evanston's 5<sup>th</sup> Ward.<sup>918</sup> In November 2022, City Council passed a resolution to delegate \$1 million annually from the graduated real estate transfer tax collected from all property purchased above \$1.5 million to the City Reparations Fund for a period of 10 years.<sup>919</sup> More funding came in December 2022 when the City Council passed Resolution 125-R-22 to transfer \$2 million from the City's General Fund to the Reparations Fund.<sup>920</sup> Evanston Mayor Daniel Biss launched a survey to assess Evanston residents' views on the reparations program on February 16, 2023.<sup>921</sup> Respondents answered

<sup>909</sup> Robinson and Thompson, [Evanston Policies and Practices Directly Affecting the African American Community, 1900 - 1960 \(and Present\)](#) (Aug 2020).

<sup>910</sup> *Ibid.*

<sup>911</sup> City of Evanston, [Evanston Local Reparations](#), (as of Oct. 3, 2022).

<sup>912</sup> *Ibid.*

<sup>913</sup> *Ibid.*

<sup>914</sup> Evanston Resolution No. 126-R-19.

<sup>915</sup> *Ibid.*

<sup>916</sup> City of Evanston, [Evanston Local Reparations](#), (as of Oct. 3, 2022).

<sup>917</sup> City of Evanston, [Evanston Local Reparations](#), (as of Oct. 3, 2022); City of Evanston, [Reparations Committee](#), (as of Oct. 3, 2022).

<sup>918</sup> Evanston Resolution No. 54-R-20.

<sup>919</sup> Evanston Resolution No. 120-R-22.

<sup>920</sup> Evanston Resolution No. 125-R-22.

<sup>921</sup> Biss, [Mayor Daniel Biss Newsletter](#) (Feb. 16, 2023) (as of Mar. 10, 2023).

questions about their political views, thoughts on racism, support and understanding of Evanston's reparations program, and their personal demographics and housing information.<sup>922</sup>

Prior to a reparations scheme, the City Council of Evanston created the Equity and Empowerment Commission in 2018 to address systemic inequalities and adopted Resolution 58-R-19, "Commitment to End Structural Racism and Achieve Racial Equity." In Resolution 58-R-19, Evanston's City Council apologized for the damage caused by its history of racially-motivated policies and practices such as zoning laws that supported neighborhood redlining, municipal disinvestment in the black community, and a history of bias in government services; declared itself an anti-racist city; and denounced White Supremacy.<sup>923</sup> The Resolution begins with findings laying out the foundation for an apology and then proceeds with a series of pronouncements against anti-Black racism:

Now, therefore, be it resolved by the city council of the City of Evanston, Cook County, Illinois, that in accordance with the fundamental principles set forth in the declaration of independence, which asserts as a fundamental basis that all people are created equal and are endowed with the unalienable rights of life, liberty and the pursuit of happiness:

**Section 1:** The City Council of Evanston hereby acknowledges its own history of racially-motivated policies and practices, apologizes for the damage this history has caused the City, and declares that it stands against White Supremacy...<sup>924</sup>

To receive reparations under the Restorative Housing Reparations Program interested applicants must provide proof of eligibility based on the sample list of documents cited in the program guidelines.<sup>925</sup> To prove Ancestor eligibility, applicants must provide documentation of their age, race and residency.<sup>926</sup> To prove Direct Descendent eligibility, applicants must provide documentation of age, race and relationship to Ancestor via birth certificate, marriage record, hospital record of birth or death, yearbook, or other means.<sup>927</sup> To prove eligibility based on discrimination as a resident, applicants must show proof of age, residency and the City ordinance, policy, or procedure that served to discriminate against the Applicant in the area of housing.<sup>928</sup>

Issues of funding, restrictive eligibility and spending, distribution and other criticisms arose during the implementation of Evanston's Restorative Housing Program. First, the cannabis tax has not generated enough revenue to pay out reparations to the eligible applicants. When City Council drafted the resolution, they expected three cannabis stores to open in Evanston; however, so far only one, Zen Leaf, opened.<sup>929</sup> In late 2022, the City secured alternative sources

<sup>922</sup> *Ibid.*

<sup>923</sup> Evanston Resolution No. 58-R-19.

<sup>924</sup> Evanston Resolution No. 58-R-19.

<sup>925</sup> City of Evanston, [Local Reparations: Restorative Housing Program: Official Program Guidelines](#) (2021) p. 4.

<sup>926</sup> *Id.* at pp. 4-5.

<sup>927</sup> *Ibid.*

<sup>928</sup> *Id.* at 4.

<sup>929</sup> Brown, [City OKs Paying out \\$3.45 Million in Reparations](#) (Aug. 9, 2022) Evanston RoundTable, (as of Oct. 4, 2022).



of funding to supplement the cannabis tax—the graduated real estate transfer tax and the general fund. Additionally, community members and business contribute private donations to the Reparations Community Fund.<sup>930</sup>

Funding restrictions have also been a critique of the Evanston reparations program. Only Ancestors who currently reside in Evanston are eligible, leaving out many Black homeowners who were victims of Evanston’s discriminatory policies but moved away. Alderman Peter Braithwaite (2<sup>nd</sup> Ward), chair of the Reparations Committee, said that restricting reparations to current residents was necessary because of the city’s limited staff and resources.<sup>931</sup> Other residents complained that funding was too narrowly constrained to housing-based projects, ignoring other potential needs for reparations.<sup>932</sup> In response, leaders stated that the housing program was only the first of many reparations programs to come and housing was identified as the most urgent need among those who attended the public subcommittee and town council meetings.<sup>933</sup> As an example of the funding’s restraints, two of the 16 selected in the first round of applications for funding did not own property and almost lost the funds.<sup>934</sup> On March 2, 2023, the Reparations Committee approved a direct cash payment for those two Ancestors.<sup>935</sup> One Committee member argued that all Ancestors should be given cash payments and voted against the motion.<sup>936</sup> Liability for the tax burden remains the reason why Evanston chose not to give cash payments to all recipients.<sup>937</sup>

Another issue involved the disbursement process: many residents believed that the money should have gone directly into the hands of the eligible, and not to the banks who facilitated racial discrimination in the first place. To address this concern, the City hopes to provide a resource guide for grant recipients with a list of Black banks; banks with a history of fair lending; and a directory of Black contractors, realtors, real estate attorneys, appraisers, and surveyors that grant recipients can hire.<sup>938</sup> Many residents have complained that the pace of the reparations program is too slow.<sup>939</sup> Seven ancestors died before they were selected for a

<sup>930</sup> Lydersen, [Can Liberal Evanston, Illinois, Atone for Its Racist Past?](#) (Sept. 26, 2022) New Republic, (as of Oct. 4, 2022).

<sup>931</sup> Gomez-Aldana, [For Some People, Evanston’s Reparations Program Remains Incomplete](#) (Mar. 31, 2022) WBEZ Chicago, (as of Oct. 4, 2022).

<sup>932</sup> Abraham, [Evanston’s First “Reparations” Payments Have Gone Out. Here’s How It Was Spent](#) (July 7, 2022) Next City, (as of Oct. 4, 2022).

<sup>933</sup> Misra, [Illinois City’s Reparations Plan was Heralded – But Locals Say It’s a Cautionary Tale](#) (Aug. 18, 2021) The Guardian, (as of Oct. 4, 2022).

<sup>934</sup> Castro, [City Plans Second Round of Reparations, for up to 80 More Ancestors](#) (Mar. 9, 2023) Evanston RoundTable, (as of Mar. 9, 2023).

<sup>935</sup> Castro, [Reparations Committee Approves Cash Payments for 2 Ancestors](#) (Mar. 2, 2023) Evanston RoundTable, (as of Mar. 9, 2023).

<sup>936</sup> *Ibid.*

<sup>937</sup> Castro, [City Plans Second Round of Reparations, for up to 80 More Ancestors](#) (Mar. 9, 2023) Evanston RoundTable, (as of Mar. 9, 2023).

<sup>938</sup> Misra, [Illinois City’s Reparations Plan was Heralded – But Locals Say It’s a Cautionary Tale](#) (Aug. 18, 2021) The Guardian, (as of Oct. 4, 2022).

<sup>939</sup> Ma, [‘Too Little, Too Late’: Black Residents Disillusioned by Pace of Evanston Reparations Program](#) (Feb. 2, 2023) Evanston RoundTable (Mar. 13, 2023).

restorative housing reparations grant.<sup>940</sup> The Reparations Committee added a requirement for ancestors to name a beneficiary to pass down the rights of the grant once they have been awarded.<sup>941</sup>

Finally, some experts critiqued the Evanston reparations program as being piecemeal and potentially distracting from the priority of a comprehensive national reparations program.<sup>942</sup> Economists A. Kirsten Mullen and William A. Darity Jr. objected to the Evanston program's restrictions on funding, preferring unrestricted direct payments, and said that the program didn't go far enough to address the huge racial equity gap between Black and white Evanston residents.<sup>943</sup> They also said that Evanston's municipal government lacks the budget necessary to adopt an adequate reparations proposal, which would require \$3.85 billion to close the \$350,000 per capita racial wealth gap.<sup>944</sup>

#### f. Asheville, North Carolina

The City of Asheville, North Carolina, unanimously passed Resolution 20-128 on July 14, 2020, to consider reparations for the city's participation in and sanctioning of the enslavement of Black people, its enforcement of segregation and accompanying discriminatory practices, and carrying out an urban renewal program that destroyed multiple successful Black communities.<sup>945</sup> Asheville has formed a Reparations Commission, which anticipates presenting final policy recommendations to be voted upon by August 30, 2023, and submitting a written report by October 31, 2023.<sup>946</sup> Only two recommendations have been made so far — one, to provide funding in perpetuity and two, to request a third-party audit of the City of Asheville and Buncombe County to ensure harms done to Black residents are stopped.<sup>947</sup>

According to Resolution 20-128, the Reparations Commission intends to address the following harms to Black people: unjust enslavement, segregation, and incarceration; the denial of housing through racist practices in the private realty market, including redlining, steering, blockbusting, denial of mortgages, and gentrification; discriminatory wages paid in every sector of the local economy regardless of credentials and experience; the disproportionate unemployment rates and reduced opportunities to fully participate in the local job market;

<sup>940</sup> Castro, [A 7th Ancestor Dies While Waiting for City's Reparations Process](#) (March 10, 2023) Evanston RoundTable (as of Mar. 13, 2023).

<sup>941</sup> *Ibid.*

<sup>942</sup> Lydersen, [Can Liberal Evanston, Illinois, Atone for Its Racist Past?](#) (Sept. 26, 2022) New Republic, (as of Oct. 4, 2022).

<sup>943</sup> Darity and Mullen, [Opinion: Evanston, Ill., Approved 'Reparations.' Except It Isn't Reparations](#) (March 28, 2021) Washington Post, (as of Oct. 4, 2022).

<sup>944</sup> Darity and Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* (2nd ed. 2022) pp. xv-xvi.

<sup>945</sup> [Asheville Res. No. 20-128](#) (hereinafter "Asheville Resolution"); Davis, [Asheville reparations resolution is designed to provide Black community access to the opportunity to build wealth](#) (Jul. 20, 2020) The City of Asheville (as of Oct. 3, 2022) (hereafter "Davis"); see also Honosky, ['Slap in the face:' Asheville Reparations Commission balks at proposed timeline changes](#), Citizen Times (Jan. 10, 2023) (as of Mar. 9, 2023) (hereinafter "Honosky").

<sup>946</sup> [2023 Reparations Project Timeline and IFA Recommendation Development](#), January 9, 2023 Meeting, City of Asheville and Buncombe County Community Reparations Commission (as of Feb. 10, 2023).

<sup>947</sup> Honosky, *supra*,

systematic exclusion from historic and present private economic development and community investments; segregation from mainstream education and within present day school programs; denial of education through admission, retention, and graduation rates of every level of education in Western North Carolina and through discriminatory disciplinary practices; historic and present inadequate and detrimental health care; unjust targeting by law enforcement and criminal justice procedures, incarceration at disproportionate rates, and subsequent exclusion from full participation in the benefits of citizenship that include voting, employment, housing, and health care; disproportionately forced to reside in, adjacent to, or near Brown zones and other toxic sites; disproportionately limited to confined routes of travel provided by public transportation; and disproportionately suffering from isolation of food and childcare deserts.<sup>948</sup> Asheville did not provide any specific timeline of the harms the Reparations Commission is intended to address.

Resolution 20-128 states that the Reparations Commission will make short-, medium-, and long-term recommendations to “make significant progress toward repairing the damage caused by public and private systemic racism.”<sup>949</sup> The resolution tasks the commission to issue a report so the City of Asheville and local community groups may incorporate it into their short- and long-term priorities and plans.<sup>950</sup> The resolution states the “report and the resulting budgetary and programmatic priorities may include but not be limited to increasing minority homeownership and access to other affordable housing, increasing minority business ownership and career opportunities, strategies to grow equity and generational wealth, closing the gaps in health care, education, employment and pay, neighborhood safety and fairness within criminal justice.”<sup>951</sup>

The city manager and city staff have recommended a three-phase process that includes: information sharing and truth-telling; formation of the reparations commission; and finalization and presentation of the report.<sup>952</sup> Phase One occurred from May 2021 to June 2021, and was intended to:

- Provide a better understanding of policy impacts and where those impacts occurred
- Identify and understand current disparities and areas that need focus
- Identify barriers to addressing generational wealth
- Inspire our community to identify collaborative opportunities to create a more equitable Asheville<sup>953</sup>

During Phase One, three events were held in June 2021—namely, three information sharing and truth telling speaker series regarding past policies and practices, present trends and disparities,

<sup>948</sup> Asheville Resolution, *supra*.

<sup>949</sup> *Ibid.*

<sup>950</sup> *Ibid.*

<sup>951</sup> *Ibid.*

<sup>952</sup> [The City of Asheville Reparations](#), The City of Asheville (as of Oct. 3, 2022) (hereinafter “The City of Asheville Reparations”).

<sup>953</sup> *Ibid.*

and future initiatives.<sup>954</sup> Information from this speaker series was used to inform the development of the Reparations Commission and the Commission’s scope of work.<sup>955</sup>

Phase Two was the formation of the Reparations Commission, which will address disparities in housing, economic development, public health, education, and public safety and justice.<sup>956</sup> The City announced on March 8, 2022, the approval of five members for the Reparations Commission appointed by the Asheville City Council, as well as 15 members and two alternates appointed by the historically impacted Black neighborhoods.<sup>957</sup> The Commission members are serving on five Impact Focus Area (“IFA”) workgroups — criminal justice, economic development, education, health and wellness, and housing — which are responsible for analyzing information on these areas and reporting key findings to the full Commission.<sup>958</sup> **As of the publication of this report**, the Commission is in Phase Three, but according to documents from the January 9, 2023 Commission meeting, the priorities are no longer short-, medium-, and long-term recommendations but rather feasibility and community impact.<sup>959</sup> The documents also reflect an updated timeline with ten different activities, the last six of which are slated to occur in 2023 — reaffirm resolution and commission role, develop IFA recommendations (by May 31), community engagement and input (by May 31), recommendation vetting and refinement (by July 31), present recommendations for commission voting (by August 30), and submit written report and close project (by October 31).<sup>960</sup> The documents reflect a few draft recommendations, but no final recommendations have yet been presented.<sup>961</sup>

On June 8, 2021, the Asheville City Council voted to allocate \$2.1 million of the city’s proceeds from the sale of city-owned land (a portion of which includes land the city purchased in the 1970s through urban renewal, a policy that “resulted in the displacement of vibrant Black communities and the removal of Black residents and homeowners, many into substandard public housing”).<sup>962</sup> The city anticipates that of the \$2.1 million, \$200,000 will fund the Reparation Commission’s planning and engagement process, leaving approximately \$1.9 million in initial funding for reparations.<sup>963</sup>

Asheville’s reparations scheme has not gone without any criticism. William A. Darity, a professor of public policy at Duke University, stated that he was “deeply skeptical about local or piecemeal actions to address various forms of racial inequality being labeled ‘reparations.’”<sup>964</sup> Darity has written that reparations would “have to close the pretax racial wealth disparity in the

<sup>954</sup> *Ibid.*

<sup>955</sup> *Ibid.*

<sup>956</sup> The City of Asheville Reparations, *supra*.

<sup>957</sup> Miller, [Announcement of New City of Asheville Reparations Commission Members](#) (Mar. 8, 2022) The City of Asheville (as of Oct. 3, 2022).

<sup>958</sup> [Community Reparations Commission](#), The City of Asheville (as of Sept. 27, 2022).

<sup>959</sup> [2023 Reparations Project Timeline and IFA Recommendation Development](#), January 9, 2023 Meeting, City of Asheville and Buncombe County Community Reparations Commission (as of Feb. 10, 2023).

<sup>960</sup> *Ibid.*

<sup>961</sup> *Ibid.*

<sup>962</sup> Traynum-Carson, [Asheville City Council makes initial \\$2.1 million in reparations funding appropriation](#) (Jun. 8, 2021) The City of Asheville (as of Oct. 3, 2022) (hereinafter “Traynum-Carson”); *Davis, supra*.

<sup>963</sup> Traynum-Carson, *supra*.

<sup>964</sup> Vigdor, [North Carolina City Approves Reparations for Black Residents](#), N.Y. Times (Jul. 16, 2020) (as of Oct. 3, 2022 (hereinafter “Vigdor”).



United States, which would cost about \$10 to \$12 trillion,” in order to be effective.<sup>965</sup> Darity further notes that “piecemeal reparations taken singly or collectively at [the state and municipal level] cannot meet the debt for American racial injustice.”<sup>966</sup> With respect to the local community, reactions have been mixed. During the virtual meeting at which the reparations resolution was passed, a resident of Montford, North Carolina, “argued that the city’s Black police chief, city manager and council members are ‘an indication that Blacks can succeed in Asheville. So, to dump this all on us [w]hite folk — I think is offensive.’”<sup>967</sup> Conversely, a resident who identifies as white, stated “White people: We have to realize that we are complicit, and our souls are in jeopardy.”<sup>968</sup>

A number of news articles have been written about Asheville’s reparations scheme.<sup>969</sup> Bloomberg noted:

Asheville’s reparations are not focused on slavery or redlining — though it was not innocent of either — but rather on its participation in what was considered one of the largest urban renewal projects in the South, if not the country. Throughout the 1960s and 1970s, Asheville’s clearance of areas considered blighted ended up displacing thousands of Black Ashevilleans, stripping them of their land, businesses and properties without recompense. According to local historian Wesley Grant, one Black neighborhood alone, East Riverside, lost “more than 1,100 homes, six beauty parlors, five barber shops, five filling stations, 14 grocery stores, three laundromats, eight apartment houses, seven churches, three shoe shops, two cabinet shops, two auto body shops, one hotel, five funeral homes, one hospital, and three doctor’s offices.” Most of the Black families and workers displaced ended up living in housing projects, mostly cut off from the rest of Asheville society and its growing economy.<sup>970</sup>

Bloomberg further noted that Asheville’s reparations scheme will be a “community reparations model,” which means that instead of making direct payments to individuals, Asheville will look for areas within the city’s budget to add resources to address the racial disparities that persist today.<sup>971</sup> The city manager will also work with surrounding Buncombe County and other community stakeholders to define what reparations will be.<sup>972</sup> Accordingly, the exact form of

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<sup>965</sup> *Ibid.*

<sup>966</sup> *Ibid.*

<sup>967</sup> Mizelle, [North Carolina city votes to approve reparations for Black residents](#), CNN (Jul. 15, 2020) (as of Oct. 3, 2022) (hereinafter “Mizelle”).

<sup>968</sup> *Ibid.*

<sup>969</sup> See, e.g.,; [North Carolina’s Asheville unanimously approves reparations for slavery](#), BBC (Jul. 16, 2020) (as of Oct. 3, 2022); Burgess, [North Carolina city makes history on local reparations, but not all experts ‘applaud’](#), USA Today (Jul. 16, 2020) (as of Oct. 3, 2022); Associated Press, [North Carolina city commits \\$2.1M for reparations](#), ABC News (Jun. 9, 2021) (as of Oct. 3, 2022); Vigdor, *supra*; Mizelle, *supra*.

<sup>970</sup> Mock, [What It Actually Means to Pass Local ‘Reparations’](#), Bloomberg (Apr. 15, 2021) (as of Oct. 3, 2022).

<sup>971</sup> *Ibid.*

<sup>972</sup> *Ibid.*

reparations will remain unknown until the issuance of the final report in 2023 and eventual adoption of specific reparations measures.

### g. Providence, Rhode Island

After the murder of George Floyd in the summer of 2020, the mayor of Providence, Rhode Island signed an executive order to launch a truth-telling, reconciliation, and reparations process to “eradicate[e] bias and racism” against its Black and Indigenous residents and other people of color.<sup>973</sup> Following that three-part process, the city has issued a formal apology and enacted a 2023 city budget which includes \$10 million earmarked for reparations programs, but does not include direct cash payments to descendants.<sup>974</sup>

Beginning with a truth-telling phase, the Rhode Island Black Heritage Society collaborated with city and state historical institutions to publish a 200-page report, titled, *A Matter of Truth: The Struggle for African Heritage and Indigenous People Equal Rights in Providence, Rhode Island (1620-2020)*.<sup>975</sup> The report documents the history of harm that Providence sought to remedy, including the lasting wounds caused by slavery, the genocide of indigenous people, and the ongoing racial discrimination from 1620 to 2020 throughout the city of Providence and the state of Rhode Island.<sup>976</sup>

In the reconciliation phase, the Providence Cultural Equity Initiative and Roger Williams University published a report detailing their efforts to survey Providence community members, develop guiding principles for reparations, and develop a model and proof of concept to continue reconciliation in perpetuity, including through a multimedia initiative.<sup>977</sup> For its guiding principles on reconciliation, the Reconciliation Report noted the need for ongoing, communal learning, a focus on particular people, places, and the importance of efforts to cross barriers of identity and empathy.<sup>978</sup> The city’s reconciliation principles also rejected depictions of participants that reduce them to racialized categories or tropes, while celebrating resilience both past and present.<sup>979</sup> Finally, Providence’s reconciliation principles underscored action, emphasizing a community-owned but institutionally supported process, and the principle that reconciliation cannot be accomplished without reparations.<sup>980</sup>

In the third and final phase—reparations—the mayor of Providence signed an executive order creating the Municipal Reparations Commission (Commission), consisting of 13 members

<sup>973</sup> Providence, Rhode Island Mayor’s Exec. Order No. 2020-13 (Jul. 15, 2020).

<sup>974</sup> Kalunian, [Providence Finalizes Plan to Invest \\$124M in Federal COVID Money](#), WPRI.com (May 20, 2022) (as of Oct. 3, 2022).

<sup>975</sup> Rhode Island Black Heritage Society, [A Matter of Truth: The Struggle for African Heritage and Indigenous People Equal Rights in Providence, Rhode Island \(1620-2020\)](#) (2021), pp. 1-2 (as of Oct. 7, 2022).

<sup>976</sup> *Ibid.*

<sup>977</sup> Roger Williams University & Providence Cultural Equity Initiative, [Truth-Telling and Reconciliation: Proposing a Framework for the City of Providence](#) (Feb. 9, 2022), p. 10 (as of Oct. 7, 2022).

<sup>978</sup> *Id.* at pp. 4-8.

<sup>979</sup> *Id.* at p. 8.

<sup>980</sup> *Id.* at pp. 8-9.

from the local community.<sup>981</sup> The Commission held over a dozen public meetings, discussing the justifications for reparations and the form they might take.<sup>982</sup> Among other things, presenters at the public meetings discussed the international framework for reparations and its five elements, as well as international treaties and reports, including the Universal Declaration for Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination (which the United States ratified in 1994), the Civil Rights Congress’s petition to the United Nations for *Relief from Crimes Against Humanity by the United States Government*, and a UNESCO publication titled, *Healing the Wounds of Slave Trade and Slavery*.<sup>983</sup>

Following its public hearings, the Commission published a report listing its final recommendations for an 11-point reparations program.<sup>984</sup> In its recommendations, the Commission defined reparations as “closing the racial wealth and equity gap between Providence residents and neighborhoods[.]”<sup>985</sup> When defining the communities eligible for such reparations, the Commission identified Indigenous people, African Heritage people, Providence residents facing poverty, and Providence residents living in qualifying census tracts and neighborhoods.<sup>986</sup> While the latter two categories—residents facing poverty and those in qualified census tracts—include Providence residents of any race, the Commission included those categories of eligibility to comply with limitations imposed by federal funding, as the city was relying upon federal COVID-19 relief as a source of initial funding for its reparations program.<sup>987</sup>

In November 2022, the mayor of Providence signed a city budget allocating \$10 million—provided to the city from the American Rescue Plan Act—to fund programs across seven of the Commission’s recommendations:<sup>988</sup>

**Recognition of Harm**

Reimagining Building & Sites \$400,000

**Equity Building**

Homeownership & Financial Literacy \$1,000,000

Home Repair Fund \$1,000,000

Capacity Investments in Community Organizations \$500,000

<sup>981</sup> Providence, Rhode Island Mayor’s Exec. Order No. 2022-4 (Feb. 28, 2022). Seven of the Commission’s members were appointed by the mayor, while six were appointed by the city council. *Ibid.*

<sup>982</sup> [Providence Municipal Reparations Commission](#) (as of Oct. 7, 2022).

<sup>983</sup> See Providence Municipal Reparations Commission (May 31, 2022), [Testimony of Robin Rue Simmons](#) (as of Oct. 7, 2022); see also Providence Municipal Reparations Commission (May 16, 2022), [Testimony of Linda J. Mann](#) (as of Oct. 7, 2022) (also discussing the Durban Declaration, the UN General Assembly’s Resolution proclaiming an International Decade for People of African Descent, and the UN’s creation of the Permanent Forum of People of African Descent).

<sup>984</sup> Providence Municipal Reparations Commission, [Report of the Providence Municipal Reparations Commission](#) (August 2020) Summary (as of Oct. 7, 2020).

<sup>985</sup> *Id.* at § 5.

<sup>986</sup> *Ibid.*

<sup>987</sup> See Providence Municipal Reparations Commission (May 2, 2022), [Testimony of Diana Perdomo](#) (as of Oct. 7, 2022).

<sup>988</sup> City of Providence, [Ordinance 38099 COVID-19 Equities Program Budget](#) (as of Oct. 7, 2022); Russo, [Elorza Signs Providence’s \\$10M Reparations Budget. Here’s What’s in It](#), *The Providence J.* (Nov. 18, 2022) (as of Mar. 13, 2023); Abdul-Hakim et al., [Providence Establishes Reparations Program to Praise and Criticism](#), *ABC News* (Jan. 31, 2023) (as of Mar. 13, 2023).

Earn & Learn Workforce Training	\$1,000,000
Small Business Acceleration	\$1,500,000
Expansion of Guaranteed Income Program	\$500,000
Expansion of Youth Internship Program	\$250,000
Establish A Legal Defense Fund Facing Rental Evictions	\$250,000
<b>Creation &amp; Development of Media</b>	
Invest In Media Firms	\$250,000
Expand Operational Capacity	\$1,000,000
Preserve, Safeguard & Promote Cultural Programs	\$200,000
<b>Creation Of Survivors &amp; Descendants of Urban Renewal Fund</b>	
Establish A Fund Dedicated To Urban Renewal Impacts	\$200,000
Develop Grant Program To Assist Urban Renewal Impacted Neighborhoods	\$200,000
<b>Expansion Of Cultural Engagement &amp; Educational Opportunities</b>	
Creation of K-12 “A Matter of Truth” Curriculum	\$50,000
Advancing Public Education Campaigns	\$50,000
Funding To Establish History School	\$50,000
Creation Of Artist In Residence Fund	\$100,000
K-12 Curriculum Grounded In Rhode Island & New England History	\$100,000
Creation Of Resident Scholarship Fund	\$500,000
Creation of Fund For Home-Based Day Care Providers	\$250,000
Invest In District Wide Coordinator For Educational Enrichment	\$100,000
<b>Movement Towards A More Equitable Healthcare System</b>	
Expansion of Mental & Behavioral Support Programs	\$150,000
Collaborate With Neighborhood Providers Including Barbershops	\$250,000
<b>Accelerate The Evolution of AAAG Into Policy Institute Model</b>	
Creation of Policy & Research Center	\$150,000
<b>TOTAL</b>	<b>\$10,000,000</b>

While some Commission and community members expressed concern that \$10 million would be insufficient to redress the harms identified in the Truth Report,<sup>989</sup> others observed that the \$10 million represented a start to the reparations program, not the end, and that once the programs were enacted, future funding could be drawn from other public and private sources.<sup>990</sup>

The mayor of Providence also issued an executive order recognizing and apologizing for the city’s role in discriminating against African Heritage and Indigenous people.<sup>991</sup> The order apologizes for the city’s role in “discriminatory practices, including lack of equal access to public education, voting rights and general civil rights that led to the subjugation, enslavement, de-tribalization, death, and control of African Heritage and Indigenous people in past and present day.”<sup>992</sup> The order also apologizes for Providence’s actions after the King Philip’s War, where

<sup>989</sup> See, e.g., Marcelo, [Mayor Proposes \\$10M Reparations Spending Plan](#), Associated Press (Aug. 25, 2022) (as of Oct. 3, 2022) (chair of Commission noting that \$10 million “is nice, but . . . definitely not enough for true reparations”).

<sup>990</sup> See, e.g., Providence Municipal Reparations Commission (May 31, 2022), [Testimony of Keith Stokes](#) (as of Oct. 7, 2022).

<sup>991</sup> Providence, Rhode Island Mayor’s [Exec. Order No. 2022-6](#) (Aug. 25, 2022) (as of Mar. 13, 2023).

<sup>992</sup> *Ibid.*



city leaders transferred captured and surviving Indigenous people into slavery in the West Indies.<sup>993</sup> The Order further apologizes for the systemic harm enacted upon African Heritage and Indigenous families through school segregation; unjust incarceration; police use of force; family destabilization; employment discrimination; warning out laws; deliberate denials of public assistance, including red-lining policies; and the city's failure to intervene in the destruction of African Heritage and Indigenous neighborhoods and communities, including during racist riots in the 1800s.<sup>994</sup>

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<sup>993</sup> *Ibid.*

<sup>994</sup> *Ibid.*