

INTERNATIONAL CONFERENCE ON REPARATIONS

(26th and 27th September 2016 – Entebbe, Uganda)

PRELIMINARY RECOMMENDATIONS

Administrative Reparations

Getting Started/Political Leadership

1. There can be no doubt that the most effective route to fulfilment of a State's obligation to provide an effective transitional justice policy, is to ensure programmes that are holistic, integrated and involve a combination of initiatives. A coherent and effective transitional justice programme involves Truth, Justice, Reparation and Reform. The benefits must be complex and sophisticated; with real participation at the grass roots level; real consultation with affected groups and links with other transitional mechanisms.
2. Similar to an icebreaking ship that must aim for where the ice is the thinnest to begin its work, it is also important at some point to take the first steps and do what can feasibly be done to commence the justice process. That is not to argue that pursuing only one element of a transitional justice process is acceptable or an end in itself. On the contrary, as has been seen in States such as Peru, Argentina, Colombia and Guatemala, addressing one type of reparation has often played a role in catalysing the willingness of Governments to establish other reparations programmes. If trying to do everything at once has led to inaction and stagnation, then it is important to appreciate that making progress in one transitional field may catalyse other related efforts.
3. This is no less true of reparations programmes if they are to fully recognize victims as rights holders through policies, domestic law and practice. Such a strategy must be complex (involving different kinds of benefits distributed in a variety of distinct ways) and be designed on an on-going basis. It must be reactive and be implemented within an overall development strategy. No one size fits all.

Which violations should be subject to reparations?

4. There is an increasing consensus about the advisability of adopting a uniform definition of “victims”. The definition should be broad, inclusive and include the immediate family or dependents of the direct victim. A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted.
5. A reparations programme must aim to be comprehensive and extend benefits to the victims of all the violations that may have taken place during the conflict. In order to achieve comprehensiveness, a reparations programme must define from the outset the human rights violations that are to be included and transparent about those that will not. The requirement to articulate the principles, or at least the grounds, for selecting the violations of some rights and not others is likely to guard against unwarranted exclusions. Understanding the inherent limitations of any programme is likely to help manage expectations and ensure effectiveness.

Monetary Compensation

6. Monetary compensation should only be considered as one of a number of potential benefits under a complex reparation programme. There are some harms that cannot be addressed through money alone and there is sometimes little or no money available. In some cases, money cannot provide due recognition to victims as citizens or right holders more generally. As with all reparations efforts, the distribution of monetary compensation should be designed to be closely linked and compliment other transitional justice or redress initiatives, including, criminal justice, truth-telling and institutional reform. For example, offering reparations to victims of human rights violations does not obviate the need for robust approaches to criminal justice or exempt States from their responsibility to punish the perpetrators for identified violations. Ensuring this complementarity will help to avoid any perception that the benefits are an empty gesture being extended to ensure the silence of victims.
7. One of the greatest challenges faced by reparations programmes is how and where to set the level of monetary compensation. Practice varies significantly from country to country. Reparations programmes must explain their decisions concerning the distribution of money and clarify how the amounts were calculated as a measure of effective reparation for specific harms.
8. Whichever approach is adopted: (i) financial compensation *could* be prioritized since it may be simpler and quicker; (ii) the administrative organ should be streamlined and independent from government structures, but be capable of

ensuring coordination and enforcing cooperation; (iii) the expectations of victims should be carefully managed; (iv) it should be clear who gets what and for what and importantly who will not be covered or benefit from this aspect of the reparations programme; and (v) the expectations of the overall community (and not just the victim group) should also be managed through appropriate outreach.

9. If a reparations programme aspires to provide benefits to all potential beneficiaries, it must create an administrative structure that ensures that benefits are distributed fairly, transparently and with optimal accessibility. Therefore, due consideration could be given to payments that are not based on making an assessment of each individual and their specific injury or harm but instead attempt to categorize the type of damage or injury and fix an amount for that type of injury, e.g. an amount for the death of a spouse.

Modalities of distribution

Lump sum or pension?

10. The modalities of distribution may well shape expectations and perceptions of the correctness or fairness of the programme. It is recommended that due consideration should be given to distributing financial reparations in the form of a pension or other ongoing payment rather than a lump sum. This modality may well be more sustainable, avoid causing divisions within communities and may well be more appropriate for women and other marginalized groups who benefit from the regularity of payment and the ongoing recognition of their harm. As well as encouraging participation by these groups, on-going benefits of this type may also assist in bolstering trust in the governmental institutions responsible for administering and issuing the reparation.

Making a reparations programme gender-sensitive

11. Even before a reparations programme is designed, gender-sensitive consultations and strategies must be set in place to gather information to ensure a gender-specific design. This will optimize the likelihood that women will be able to access the programmes as beneficiaries.
12. Complex programmes that include a range of distinct material and symbolic reparations are more likely to be effective in meeting the needs of female beneficiaries. The programmes implemented and the benefits selected must be delivered through gender-sensitive design frameworks that amongst other objectives increase access and ensure focused delivery and optimal control by the beneficiaries.

Court Ordered Reparations

Complexity

13. The underlying approach discussed above with regard to administrative reparations is also largely applicable to court ordered reparations. On their own, court ordered reparations are inherently limited in what they may achieve and may be overly focused on the demands of restitution and compensation, with other aims such as rehabilitation and guaranteeing non-repetition playing a lesser role. They need to be considered within the framework of a holistic response to violations and be part of a complex mix of measures designed to ensure comprehensiveness and completeness.
14. In this regard it is essential to consider the relationship between court ordered reparations and administrative reparations with a view to ensuring compatibility and complementarity: a bridge between the two forms needs to optimize each and ensure effectiveness in light of the overall mix.

Legal Compliance

15. It is essential that court ordered reparation programmes are situated within a comprehensive and harmonized legal framework. Any governing law and regulations need to be consistent with international standards, such as the Rome Statute, as well as harmonized with related justice programmes such as truth commissions, to maximize their effectiveness and avoid conflict or contradiction.
16. In relation to court processes, reparations should be comprehensively considered and an approach outlined to ensure that those engaged in the legal process, particularly the judiciary and the victims, are well informed about the substantive and procedural path ahead. In light of the specificities of court ordered reparations, any approach needs to be realistic about the specific judicial mechanisms and their capacity to deliver and this needs to be communicated to the beneficiaries clearly and from the outset.
17. In particular, the victims' expectations need to be understood and properly managed from the outset.
18. In order to ensure an effective court ordered reparations programme, the core elements of the process need to be defined from the outset. This includes the range of operative definitions concerning causation, evidence, and quantification and how it may be set or vary according to the range of potential violations or other operative circumstances.
19. It is recommended that the International Crimes Division (ICD) give due

consideration to clarifying and if needed expanding its rules governing the participation of victims in its proceedings. Consistent with many common law based systems, although the ICD's current legal framework provides victims with no substantive right to participate, Rule 51 obliges the Registrar to assist 'victims to participate during all phases of the proceedings'. The ICD could read into its remaining rules conditions for participation akin to Article 68(3) of the Rome Statute, and develop clear and supporting rules to facilitate this participation.

20. Consideration should be given to amending Uganda's Section 128(2) of the Trial on Indictment Act, to provide for a Trust Fund for Victims of (Serious) Crime, with fines (or a portion thereof) paid by convicted persons in all criminal cases as the main stream of funds for compensation. This could be used to fund court ordered reparations in respect of a defined category of crimes.