Avocats Sans Frontières

ASF

REDRESS

Ending Torture, Seeking Justice for Survivors

International Conference on Reparations:

Redefining Complementarity with the International Criminal Court

26-27 September 2016
Entebbe, Uganda

www.asf.be / www.redress.org

ASF Headquarters
Rue de Namur 72
1000 Brussels
Belgium
Tel.: +32 (0)2 223 36 54
communication@asf.be

REDRESS Headquarters
87 Vauxhall Walk
London SE11 5HJ
United Kingdom
Tel.: +44 (0)20 7793 1777
info@redress.org

Avocats Sans Frontières

Founded in Belgium in 1992, Avocats Sans Frontières (ASF) is an international NGO specialising in the defence of human rights and support for justice in countries in fragile and post-conflict situations.

www.asf.be

REDRESS

REDRESS is a human rights organisation that helps torture survivors obtain justice and reparation. REDRESS works with survivors to help restore their dignity and to make torturers accountable.

www.redress.org

Acknowledgement

Avocats Sans Frontières (ASF) would like to express gratitude to the European Union for their financial support that made the development of this conference and report possible. ASF would also like to extend thanks to REDRESS and particularly Beini Ye, Post-Conflict Legal Adviser at REDRESS. Credit also goes to ASF's field mission staff in Uganda, the International Justice Program Officer, Jane Patricia Bako, and Program Assistant, Diana Natukunda, who worked tirelessly to organize the Conference and ensure the publication of this Report. Special gratitude also goes to Catherine Denis, Legal Counsel, and Jean-Philippe Kot, International and Transitional Justice Expert at ASF's Head Office in Brussels, for their technical support in the development of this Conference and subsequent Report.

Table of Contents

Foreword

On 26 and 27 September 2016, Avocats Sans Frontières (ASF) and REDRESS organized a two days' International Conference on Reparations in Entebbe (Uganda). The participants of the conference included transitional and international justice experts within and outside the continent, victims' representatives in Uganda, justices of the International Crimes Division of the High Court, Civil Society Organisations, Justice Law & Order Sector, Members of the Legal fraternity in Uganda.

The conference was premised on three objectives:

- Identifying the challenges of setting up and implementing (court-ordered and administrative) reparation programs in Uganda designed to address the harm caused to victims of mass atrocities;
- Identifying ways to address these challenges in the specific context of Uganda and learning form experience of similar contexts;
- Issuing and sharing recommendations addressed to the Ugandan stakeholders on the framework and implementation of reparation for mass atrocities.

This conference was further an opportunity to redefine complementarity with the International Criminal Court, not only at the level of national criminal proceedings with the International Crimes Division but also within the broader perspective of a transitional justice process.

The program was divided between three sessions. The first session focused on administrative reparation programs, the second was on court-ordered reparation and the last one was on reparations and development programs.

The various presenters shared their thoughts in the different sessions through conference papers and there were panels comprising of experts who shared their experiences from their countries.

This publication provides a compilation of the presentations as made by the various speakers in each of the sessions. These presentations have not been edited. We believe this publication will benefit civil society organizations and key stake holders working on the issue of reparations in Uganda.

Opening statements

Opening remarks by Ms. Patricia Bako, ASF Mission Uganda

Ms. Patricia Bako, Program Officer of the International Justice Project at Avocats Sans Frontieres (ASF) in Uganda welcomed the participants. She acknowledged REDRESS as partners in this conference and recalled ASF's mandate in Uganda. She explained the context of this conference recalling that Uganda is still recovering from a long conflict that covered the Northern part of the Country and some parts of the East, particularly Teso and Karamoja. She commented that usually when there is war, there are a number of human rights violations that arise and so there is need to address these human rights violations that are often committed by those involved in the conflict. A number of issues emerge that need to be addressed among which include: whether prosecutions should be conducted, whether or not amnesty should be granted to the people who were involved in the conflict, whether or not to establish a truth commission, and whether to establish any other mechanism that can be used to address the violations of human rights that could have been committed. Another major issue to be addressed is the right of victims of gross violations of international humanitarian law and international human rights law to reparation as enshrined in a number of international instruments (including the Universal Declaration of Human Rights under Article 8, International Covenant on Civil and Political Rights under Article 2(3)(a) and 9(5)). She mentioned categories of reparations such as administrative reparation programs, court ordered reparation programs; reparation and development programs, and an assessment of what has worked and what has not in other countries. She then concluded presenting the two main objectives of the Conference:

(1) Identifying and addressing the challenges to be faced by the Ugandan authorities in dealing with reparations in connection with international crimes (either judicial or administrative reparations).

(2) Making recommendations to Ugandan stakeholders on how to implement either judicial or administrative reparations.

Opening remarks by Mr. Komakech Lyandro, MP Gulu District

In his remarks, Hon. Lyandro Komakech, MP Gulu District discussed the challenges of the transitional justice process in Uganda. He discussed contextual issues including the unique historical experiences and perspectives. He highlighted the dangers of politicizing the reparation process, especially because Uganda lacks a national framework within which reparation debates and discussions can take place. According to Hon. Lyandro Komakech, there are two key things that we should take into account: 1) conflict sensitivity and 2) consolidation of peace. There is need to acknowledge victims. The State should be responsible for reparation. He argued that the question of reparation is not whether or not we need reparation; itt is about when, how and who are the victims. This should be at the centre of the reparation policy processes. He noted that we should consider the following:

- The need for mapping up regional, sub-regional and local process.
- The new conflict triggers, for example, in West Nile must be looked at critically.
- The linkages and differences between reparation and development programs should be examined.
- The need to engage victims in the reparation process.

In the reparation process, he noted, we need to look at the harm to be repaired and acknowledge harm. It is important to know who pays reparation and the limitations of individual and community reparations. The reparation program for Uganda should be framed in a policy document. In conclusion, Hon. Lyandro Komakech noted that the national transitional justice policy should be passed. There is need to have a law on reparation in place that survives beyond any government as a way of dealing with gross human rights violations and impunity.

Opening remarks by Ms. Ajok Magaret, National Technical Advisor on Transitional Justice (JLOS)

In her opening remarks, Ms. Ajok noted that the conference provided another opportunity to advocate for the passing of the transitional justice policy. She commended civil society organizations' work in the transitional process in Uganda and observed the need to continue pushing policy makers to have the transitional justice policy in place. One of the key challenges was that more than half of the new cabinet and members of parliament are not aware of the transitional justice process. There should be orientation of the new policy makers on the draft transitional justice policy. She highlighted key issues in the transitional justice process and shared views from the JLOS 2014 report. She noted that effects of war are still very vivid with a whole generation of youth who have been denied their childhood. There are still challenges with access to property rights. Women and girls have been traumatized. Many of the women and girls have children whose identity is questionable. These are the categories of victims that are asking for urgent reparations. Other issues mentioned related to mental health and poverty, failure to acknowledge harm in reparation programs and failure to consult the victims in the affected areas.

She argued that the existing legal and policy framework should clearly provide for reparation. The current legal framework only contains traces on reparation, but there are no provisions to guide lawyers. It is thus optional for lawyers to request for reparation as a remedy in court. She noted that if reparation is contained in our legal texts then state attorneys will be aware that at the end of presenting their cases they can ask the judge to specifically award reparation.

In response to the above challenges, she noted that, JLOS has taken a number of steps to facilitate the establishment of a reparation program. A national study has been conducted to inform reparation program. The key objectives to the reparation program are:

- Redress for gross violations suffered by victims of war.
- National healing and reconciliation.
- Youth empowerment and education support.
- Social and economic empowerment of victims.
- Reparation information dissemination.

According to Ms. Ajok, the victim communities have communicated their reparative needs that they desire that range from medical, physical, financial, and psychosocial support. In conclusion, Ms. Ajok noted that it is everyone's responsibility to advocate and lobby without seizing for effective reparation programs for the affected communities.

Brief overview of the Ugandan context

By Ms. Judi Erongot, Independent Transitional Justice, Gender and Humanitarian Consultant

Introduction

The paper is limited to the over view of Uganda' practice on awards specifically; fines, compensation, restitution inter alia on criminal and human rights breach. This does not mean that Uganda does not have compensation practice of a civil nature. Uganda' Civil Procedure Act Cap 71 (as amended) provides clearly on how persons can seek award in terms of compensation, fines among others in a civil court.

Uganda criminal compensation practice is provided for in law like the Magistrate Court' Act Cap 7 (as amended), Penal code Act Cap 120 (as amended), the Trial on Indictment Cap 23 (as amended), the 1995 Constitutions of Uganda (as amended), the Constitution seems to be silent on awards of criminal nature but allows for one to take a claim through a civil court; the International Criminal Court Act 2010 is limited to enforcing awards by the International Criminal Court (ICC). The law in Uganda gives the judiciary a lot of discretionary powers on awarding compensations. From the cases that have been captured in the paper, there seem to be no guidelines for the judiciary to determine how a person who has suffered a criminal wrong can be awarded or fine instituted. The cases came across seem to suggest that the lower courts seem to be attempting to give awards of different nature but the high courts seem reluctant and that is why from the few cases the writer came across at the appeal these awards are set aside. It leaves one with a desire to see courts of records become more victims responsive by awarding fines, compensation or ordering restitutions

Overview of the legal regime

- **Article 50 (1) of the 1995 Constitution of Uganda** appears to lay the foundation of compensation for violation of human rights nature:

    1. It states that a person whose fundamental rights have been violated may seek redress in a court with competent jurisdiction.

    2. **Clause 2** empowers a third party to seek redress if the rights of another are infringed. Notwithstanding the article' provisions it seem to be limited to human rights abuse and or violation not criminal matters (open to discussion).

    3. Worthy to note; is that clause **2** gives a good gesture that gives opportunity for individuals, Civil Society Organizations, organized groups to take an action on behalf of others(Victims).

- Chapter Eight of the same 1995 Constitution **Art. 126** seems to call on Uganda' Judiciary to be live to the people' needs and aspirations it further reminds the Judiciary in the administration of justice to take note that judicial power is derived from the people and shall be exercised by the courts in the name of the people and in conformity with law and with the values, norms and aspirations of the people. If I can be permitted to give an interpretation is that the aspirations of Kwoyelo' victims would be to receive some form of award for the wrong they suffered under Kwoyelo. The question is to what extent can judiciary appreciate the values attached to award and what would the judiciary think in terms of the victim' aspirations (for further reflections).

- **Article 126 (2)** calls upon court in adjudicating cases of both a civil and criminal nature, to apply a number of principles among others:

1. Adequate compensation shall be awarded to victims of wrongs.
2. Reconciliation between parties shall be promoted.
3. Substantive justice shall be administered without undue regard.

- **Article 51** establishes the Uganda Human Rights Commission whose functions are stipulated under **Article 52** which are not limited to but include investigating on its initiative on any complaints on violation of fundamental human rights and to recommend to Parliament effective measures to promote human rights, including provision of compensation to victims of violations of human rights or their families
- Sections **110 to 115** Trial on Indictment Act Cap 23 (amendments 2008) here after referred to TIA provides for fines, how they are administered and enforcement of punishment.
- Part IX of the TIA provides for Costs, compensation and restitution. **S.125. Award of costs** states that: (1) The High Court may order the payment of costs in any of the following circumstances:

1. To the prosecutor, by a person convicted of any offence;
2. To any person acquitted of any offence by the High Court, by the prosecutor if the court considers that the prosecutor had no reasonable grounds for prosecuting that person;
3. To any person in any matter of an interlocutory nature, including a request for an adjournment, if that person has been put to any expense when in the opinion of the court the applicant had no reasonable or proper grounds for making the application.

Noted; looking at the three the TIA did not envisage a situation where mass crimes would be committed and the need to compensate mass wrongs.

- S. 125 (3) An appeal lies to the Court of Appeal against any order awarding costs.
- **S. 126 provides powers for Compensation thus state:** (1) When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, **in its discretion and in addition to any other lawful punishment,** order the convicted person to pay to that other person such compensation as the court deems fair and reasonable. The question is what is fair and what is reasonable.
- The courts have powers to order restoration or restitution when found or recovered to the owner under **Section (S.) 202 MCA (Magistrate Courts)** and **S. 131 of the TIA (applied in High Court (HC), Court of Appeal and the Supreme Court).The Challenge** however restitution integral is limited to property for example for a person convicted of an offence relating to stealing, taking, obtaining property, converting or disposing property. Courts can order that such property be restored to the owner and the spirit behind is to restore the owner to the original position before commission of the crime. The question is how much has the judiciary exercised it power to restore those who have suffered such harm.

- In Uganda magistrate courts have powers to award **S. 197 of the MCA** and the HC has unlimited jurisdiction and it can award compensations of any amount under **S. 126 (1)** of the TIA on proof. The compensations can be awarded to the accused, defendant or even witnesses.

- Under **S. 199 of the MCA**, a magistrate has powers to award compensation if he/she is satisfied that the person (accused, prosecution or witness) suffered injury/harm or damages due to the acts of the accused or due to the loss incurred due to the prosecution and it can be recovered by way of a civil suit. The same principle was stated in the case of **UGANDA V SILVANO OKANYOTH.**[1]

- The Penal Code Act, offences under chapter XXV to XXX, **Sections 276 to 321** are offences that relate to property and compensation is awarded in case of loss suffered either for restitution or damages suffered. In the case of **UGANDA V. WAISWA**, it was a case involving robbery and court convicted the 3 accused and sentenced them to caution and ordered them to pay compensation to the victims for the goods robbed.[2]

- In a related case of **JUUKO IBRAHIM V UGANDA.**[3]The appellant was convicted of theft and ordered to pay compensation of 12,000,000 Uganda Shillings (UGX). On appeal the compensation was confirmed but reduced to 6,000,000 UGX (at HC).

- Of late Ugandan courts have also gone ahead to award compensation in cases that involve causing bodily harm to the victims. In the case of **OTEMA VS UGANDA.**[4] This was a case involving rape, the learned trial judge stated, '**The victim, Adoch Mary, suffered harm physically and psychologically. A lot of force was exerted on her. She had to incur medical and other expenses for her treatment, medical examination and travel**." Court therefore ordered that under **S. 129B** of the PCA and S. 126 (1) TIA accused was ordered to pay Adoch Mary, Shs.300,000UGX (three hundred thousand only) compensation. The practice was good it gave a signal that compensation is possible but the award does not seem deterrent enough.

Court further stated that in Payment of compensation to victims of defilement **S.129B (1) PCA** Where a person is convicted of defilement or aggravated defilement under **S. 129**, the court may, in addition to any sentence imposed on the offender, order that the victim of the offence be paid compensation by the offender for any physical, sexual and psychological harm caused to the victim by the offence.

The amount of compensation shall be determined by the court and the court shall take into account the extent of harm suffered by the victim of the offence, the degree of force used by the offender and medical and other expenses incurred by the victim as a result of the offence.

- When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable.

- When any person is convicted of any offence under the PCA committed for the loss of the property the property is restored to the possession of the person entitled to it.

- An appeal shall lie to the Court of Appeal against any order awarding compensation under this section.

Challenges

- It's also seen that though counsel ought to be vigilant for compensation to be awarded in cases involving harm, the compensation awarded is just a mockery considering the case of **OTEMAVS UGANDA;** where a girl was raped and court awarded 300,000 UGX as compensation less than 90 USD.[5]

1 CRIM REV 239 OF 1975.
2 Anor Criminal Session case No. 420 OF 2010.
3 Criminal Appeal No 058 of 2013 Arising out of Criminal Case No.233 of 2012 at Wobulenzi C/M.
4 Criminal Appeal No. 155 of 2008 [2015] UGCA 42 (15 June 2015).
5 Criminal Appeal No. 155 of 2008) [2015] UGCA 42 (15 June 2015).

- Any costs awarded by any court under subsection **S.125. Award of costs** (1) shall not exceed the sum of three thousand shillings this amount is still a mockery calling for a review.

- The principle of retrospective may not give the judiciary opportunity to award criminal compensation for the LRA victims even when the law may be passed (I live it for further interrogation).

- Even when Uganda has ratified a treaty like it ratified the Rome Statute treaty it will not be operational till it is domesticated. Uganda' ICC Act even when domesticated it provides for reparations awarded by the ICC. It does not provide for Uganda' judiciary to award compensation. PART VI of the ICC Act, 2010 provides for enforcement of the Penalties but this is only limited to assistance with Enforcement of Victim Reparation Fines and Forfeiture Orders by the ICC.

Recommendations

- If I can be permitted to give a wider Interpretation on the powers of Judiciary, as provided for by **Section 39 (2) of the Judicature Act, which states that "**Where in any case no procedure is laid down for the High Court by any written law or by practice, the court may, in its discretion, adopt a procedure justifiable by the circumstances of the case.[6] My understanding is that the Judicature Act has provided Judiciary power to decide on a procedure on where the law or practice has not provided thus in the case of reparation and compensation need the courts should revoke these power vested upon them.

- It would be prudent if parliament enacted a law in relation to compensation in criminal matters involving harm having it in mind that persons cannot be brought to restitution integram where a case involves harm. Therefore it is my humble submission that such a law if enacted should provide for high levels of compensation in terms of compensation for physical and psychological harm to victims.

- Alternatively the Chief Justice should come up with a policy as a matter of judicial practice borrowing a leaf from civil to guide judges in cases involving harm to award compensation proportionate to the harm caused to the victim.

- In the spirit of fighting impunity and accountability the Uganda Human Rights Commission invoke its Constitutional powers to recommend to Parliament to enact laws that promote the right to compensation and or reparations for victims who have suffered harm of a criminal nature.

- To be alive to progressively growing jurisprudence from the international tribunals in relation to the awards on reparation and or compensation for victims of criminal harm the judiciary should not shy away from awarding costs and invoking the provision of **Section 39 (2).**[7]

In conclusion there is a lot Uganda Judiciary can borrow from awarding compensation, restitutions, reconciling communities in Uganda as provided by the laws among others. The Prosecution should be vigilant to draw the attention of the bench for the need to award damages. In the spirit of recognizing victims of the Lord Resistance Army (LRA), Mukura Massacre, Obalang etc. Uganda Human Rights Commission should recommend to parliament to come up with some form of interim measures for the victims of war. Politicization of victims suffering should desist, the drafted Transitional Justice policy should be operationalized sooner. And Civil Society should not burn out to continue advocating for reparations for the LRA victims.

6 Judicature Act Cap 13 laws of Uganda.
7 Ibid note 6.

Key note: International framework for reparation

By Ms. Carla Ferstman, Director, REDRESS

REDRESS has been active in Uganda for some time, and has collaborated with a range of organisations in the country, including the Ugandan Victims Foundation and FIDA Uganda. We have also given some support to those engaged with the International Crimes Division as they move forward with accountability processes and seek to involve victims in those processes.

I am here to talk about reparations. It is something that is often spoken about, it is increasingly recognised as important as part of the package of measures that should follow as a response to serious crimes and human rights violations.

As a concept, reparations is about making amends, making good, rehabilitation, compensation, restoring the situation which existed before the crimes took place. To an extent it is aspirational: with the kinds of crimes we are talking about, you cannot go back to the way things were before; you cannot undo the pain caused by the loss of a child, you can't undo the harm caused to the children who lost their childhoods and educations because they were forcibly conscripted; you cannot undo the harm caused by rape.

But just because it has some aspirational qualities, it does not mean that reparations is discretionary. Courts and international standard setting texts have made clear that reparation is required, and that it should 'as far as possible' reflect the harm that was caused.

Consequently, it is not discretionary whether to afford reparation: reparations is an obligation; and victims have the right to receive it.

It is not discretionary what kind of reparations to provide: It is not possible to decide on some measure because these are easy or expedient to implement, there is no quick fix. Reparations must be full and effective, they must correspond to the harm, and must reflect the injuries caused. Usually, reparations will have several components, because as we know, the harm that victims suffer is multi-dimensional and complex. You cannot simply throw money at it or give an apology and expect that victims' dignity will be restored: reparations is necessarily hard work. Victims should have a say in what kind of reparations they get – the process should be empowering to them.

Usually this will require a range of measures, both individual and collective measures.

Individual measures such as restitution, compensation and rehabilitation are designed to recognise the harm caused to a person (physical and psychological harm, loss to their employment, to their dignity, to their life plan). These might take the form of financial compensation, medical and psychological treatment, access to services, rebuilding a destroyed house, releasing someone from jail who was wrongly convicted, helping refugees and displaced persons to return to their homes.

Collective forms of reparations such as measures of satisfaction and guarantees of non-repetition tend to be used when a whole community has been targeted in the same way (for example, when an entire village was burnt down or a religious or ethnic group was targeted and their institutions were destroyed) or when the number of individuals who suffered is so large that it is next to impossible to identify the individuals within the large group. Collective elements of reparation might include: rebuilding a church or a mosque that was destroyed and served a whole community; building a memorial to remember people who were killed in a massacre; setting a special day of remembrance to honour victims).

Who should be entitled to receive reparations? The persons who were impact by the crimes or the violations are the ones who are entitled to receive reparations. Usually this will be the persons who were directly impacted, such as the child who was forcibly recruited, the woman who was raped

and disfigured and/or the prisoner who was tortured. But it is also for the family members who suffer harm as a result of the impact on the direct victims. It is usually the direct family members that will be entitled to reparations, such as the parents who suffered harm because their child was abducted and killed; the wife and child who lost the husband and father and were disadvantaged economically and morally.

Is it ok to treat different classes of victims in different ways? Yes, because the way in which these classes of victims suffered may differ one from the other. Recognising the different ways in which groups suffered harm and distinguishing the forms of reparation they receive can be an important part of acknowledgment of the harm suffered. But at the same time, reparations cannot be discriminatory – so it would be wrong to leave out an ethnic group or a social class from reparations, if they suffered in the same or similar way as other groups.

Also, sometimes it will be necessary and important to take special measures to ensure that reparations can reach particularly marginalised or vulnerable groups. So, for example, if you force vulnerable and impoverished victims who live in remote locations to present a claim for reparations in the capital city, this may deny them access to reparations, because they will not have the means to travel to the capital city to claim it. If female widows are not able to inherit land when their husbands are killed, or are not given the authority to manage their own finances, then a compensation award which is given to them may have no meaning because they may be unable to benefit. It is therefore important to take into account the particular situations of victims when developing forms of reparations, in order to ensure that victims' particular situations of vulnerability or marginalisation do not impede them from accessing reparations.

But the whole country suffered? This is a typical response at the end of a conflict: often governments who are faced with the difficult task of rebuilding a country at the end of a conflict make this claim because there are so many competing demands on the country's resources. However, the principle of reparations underscores the need to acknowledge that suffering can happen in different ways, and that it is important to understand and take into account in devising the reparations award the different harms that particular groups will have suffered. To say that 'everyone suffered' can be like saying that no-one suffered. Recognising the particular ways in which suffering happens, and why certain groups were targeted, can be quite important for the restoration of their dignity and to promote mutual understanding and respect within societies. But at the same time, it may not be appropriate to go to the other extreme – if a reparations scheme selects out vulnerable people who suffered and are stigmatised because of that suffering, the scheme can inadvertently expose them to further harm. So what is the answer to this challenge? It is always important to engage with victims groups, including those that are the most marginalised, in the process of determining what would be an appropriate form of reparations and in developing the modalities for distributing the award, so that these victims groups can think through what would work best for them in their particular context.

Wouldn't it be better to focus on national development? Then everyone can benefit?

Development programmes are extremely important but they are distinct from reparations. There is a difference between the type of programmes all governments should engage in for the benefit of their citizens (such as health programmes, education or welfare) and providing reparations to victims of extreme violence or human rights abuses. Reparations is about rights, and development tends to be mostly about needs. This does not mean that the two concepts of reparations and development never intersect, they do intersect. It is often the most marginalised people who are impacted most by human rights violations. Perhaps not by chance, it is often these same groups

who are excluded from development projects, which keeps them in a state of marginalisation and makes it more difficult for them to move beyond their disadvantage. This cyclical problem can and often does contribute to new human rights abuses. Sometimes taking special steps to ensure that vulnerable people can partake in development, can be an important facet of reparations; because it is about giving back control; it is about empowerment.

Who should pay reparations? For human rights violations that are attributed to the State – either because State officials were responsible for carrying out the acts, or where the State can be said to be responsible because it did not do enough to prevent the abuses from happening, the State is responsible to pay reparations. A State is responsible even when it was a previous government which carried out the abuses; under the principle of state succession, the new government as the embodiment of the State, takes on the debts of the former government.

What about armed groups, companies, private persons? Do they also have an obligation to afford reparation? Yes they do. But we can understand their obligations in the context of different types of responsibility.

The State might be responsible for violating the rights of those it has an obligation to protect. In contrast, an armed group or any private person does not have collective obligations in the same way. But if these latter groups perpetrate a criminal act they should be punished and if they harm a person, the person will have a right to a remedy against them, the same way that if a person causes a car accident, or assaults someone, there is a possibility that they will have to pay damages for the harm caused.

Under international principles such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, the State is expected to take steps, particularly in mass crimes cases, to put in place structures to facilitate victims' access to reparations. Later today, you will hear about Colombia, where the transitional justice process in that country has sought to engage with armed groups, and strategies are being developed to involve companies in the reparations process.

How do reparations come about? Reparations are about remedying a wrong, so usually they are a secondary process. The first step is to agree that a wrong happened. This first step is determined usually through a court process, a truth commission or some other form of settlement agreement. It can also be through an admission of the wrong by the State or other party which caused the wrong. Sometimes the wrong is so obvious that there is a tendency to go straight to the act of repairing; or no one wants to talk about what happened, so the first part of acknowledgement of the wrong is skipped over, and the focus is only on the act of repairing. This can have its problems, because the act of acknowledging the wrong can be extremely important for victims, who want the truth to come out. Therefore, it doesn't necessarily work to skip the first step. Also, reparations can feel like a pay off when it is not accompanied by some kind of process to determine what happened and to find some kind of fault.

Reparations can sometimes arise out of criminal cases: In countries with a civil law tradition such as France or Belgium, this is very common. The procedure to determine the damages which arose from the criminal act is part of the case at the end of the criminal trial. In Africa, a good example is countries like Rwanda or Chad, or the Extraordinary African Chambers based in Senegal which recently found Hissene Habre guilty of a range of international crimes which took place in Chad. At the international level, the International Criminal Court has a reparations process whereby at the conclusion of a criminal trial, the judges determine a reparations award for the victims who suffered harm as a result of the criminal conduct.

Reparations may also arise of of a civil claim for damages. For example, British civil courts recently heard a claim brought by Mau Mau veterans in Kenya for the torture they suffered at the hands of the British colonial rulers. This led to a reparations settlement for the victims.

Reparations may also arise from a decision of a national human rights commission or a regional or international human rights court or quasi-judicial human rights body. Sometimes, such bodies may only have the power to recommend (as opposed to order) States to afford reparations to victims. Nonetheless, these bodies can nevertheless serve as important incentives for States to proceed with reparations, and can give impetus to civil society's call on States to implement reparations. These bodies serve another important role; at times they will comment on the adequacy of measures put in place to repair harm suffered by victims, leading States to amend or extend reparations programmes so that they better capture the complexity of the harm suffered.

How can victims be engaged in the process of reparations?

It can be difficult for victims to engage in the process of reparations. Victims will have different opinions and perspectives on the nature of the harm suffered and on the causes of their victimisation. Also, it can be challenging for governments to engage. Victims may be consumed with the day to day issues of their lives – food shelter, education; they may not have time or see the point in engaging on reparations or may have little faith that somethings will emerge from their engagement. Victims may also not have an easy route to engage with policy makers. Usually, they are not politicians or advocates – they are regular people. The government must therefore ensure that processes to engage are tailored to the realities faced by victims.

Justice processes are complex, and it is important for governments to make these as clear as possible for victims. Victims will need to have clear information if they are to engage effectively.

Sometimes, when governments consult victims, there can also be a tendency to filter out the responses that are received from victims; to simplify, even when there is nothing simple about victimisation or victims' wants or needs. There is also a tendency for people to talk on behalf of victims; it is important to find ways to engage directly with victims, to bring the process to them.

Engagement should focus not only on what type of reparations victims may want or need, but also on the reparations process itself, throughout the process. There will be hard choices about what can be achieved with reparations; engaging with the victims on those hard choices can empower them, get their buy-in, will help to validate the results.

Panel 1: Administrative reparation programs

Chair: Ms. Beini Ye, Post-Conflict Legal Adviser, REDRESS

Considerations for a program of reparation in Uganda

By Ms. Florence Nakazibwe, OHCHR-Uganda Office

Introduction

Reparations form part of the four main pillars of transitional justice[8] aimed to assist countries recovering from mass conflict or repressive regimes to redress the legacy of gross violations of human rights and serious violations of international humanitarian law.[9] In Uganda, the debate on reparations has gained prominence as the plight of several victims of historical injustices, authoritarian rule and armed conflict remains largely unaddressed. In the post-colonial era, Uganda has witnessed episodes of political instability characterized by armed rebellion, dictatorial rule and military coups resulting into gross human rights violations and abuses against innocent civilians in different parts of the country.

The two decades guerilla war waged by the Lord's Resistance Army against the Government of Uganda in northern Uganda is arguably the most brutal conflict ever recorded in Ugandan history. The legacy of this conflict has been well documented in several studies[10] as one that was characterized by the most widespread and egregious violations of human rights and humanitarian law. Hundreds of thousands of persons were displaced, others killed, raped, maimed, abducted and conscripted by rebel forces. In the aftermath of the conflict, the majority of victims continue to live with the effects of the war with no clear reparations policy or victim assistance program in effect to date. Consultations with victims in northern Uganda have shown that their priorities for remedy focus primarily on truth-recovery and reparations for the harms suffered.[11]

Duty to provide reparations

Under international law, the right to reparations for victims of human rights violations gives rise to a corresponding duty on States to make reparation and the possibility of the victim to seek redress from the perpetrator.[12] States are obliged to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.[13] This is particularly important for victims of the LRA conflict in Uganda in light of the unlikelihood of recovery from individual perpetrators despite having access to

---

8 The term 'Transitional Justice' used here refers to the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional Justice consists of both judicial and non-judicial processes and mechanisms including; individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof - (*UN SG's Report on The rule of law and transitional justice in conflict and post-conflict societies (2004*).

9 Such as crimes against humanity, grave breaches of humanitarian law, war crimes, genocide, torture and enforced disappearances, genocide, extrajudicial, summary or arbitrary executions; prolonged arbitrary detention, deportation or forcible transfer of populations, slavery and systematic racial discrimination fall into the category of gross violations of human rights. Deliberate and systematic deprivation of essential foodstuffs, essential primary health care or basic shelter and housing may also amount to gross violations of human rights.

10 Between 1987 and 2008, in Northern Uganda alone, nearly two million people were displaced and impoverished, at least 60,000 youth kidnapped and forced to serve in the LRA, and untold thousands killed. Thousands more experienced torture, rape, slavery, sexual slavery, inhuman and degrading treatment and abuse, or saw their family members, friends and neighbors killed, raped, beaten or displaced. See, UHRC/OHCHR joint thematic report titled: *The Dust Has Not Yet Settled: Victims' views on Remedy and Reparations: A Report from the Greater North of Uganda*.

11 In 2007, OHCHR-Uganda office published its first thematic report on transitional justice '*Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda*' which found that IDPs in Acholiland identified truth recovery and reparations as transitional justice priorities. Similar views were expressed in '*The Dust has not yet settled: Victims' views on their right to remedy and reparations*', published in 2011.

12 See, Updated Set of Principles, Article 31.

13 Article IX, Para 16, UN Basic Principles on the Right to Remedy and Reparation, 2006 (A/RES/60/147).

existing domestic justice mechanisms to hold them accountable.

Uganda is a party to several key international and regional human rights and humanitarian law treaties that recognize the right to an effective remedy for victims of human rights violations and linked to this, the right to reparation.[14] **Human Rights Committee General Comment N° 31 (2004)** has categorically stated that, the duty of States to make reparations to individuals whose rights under the Covenant have been violated is a component of effective domestic remedies; 'without reparation to individuals whose Covenant rights have been violated, the obligation to provide effective remedy…is not discharged.'

The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights and Serious Violations of Humanitarian Law* (herein UN Basic Principles) set out the international legal framework, basic standards and guidelines on the right to reparations as a justice measure for victims. It provides the scope of the right of victims to an effective remedy to include: (1) equal and effective access to justice; (2) prompt reparation for the harm suffered; and (3) access to relevant information concerning the violations and reparations mechanisms.[15] It further lays out five main forms of reparations which include; restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

At the national level, Uganda's Constitution protects the right to remedy and provides for compensation in case of human rights violations.[16] This provision however has a narrow focus on judicial remedy. Uganda has also not adopted a policy framework on Transitional Justice although a draft has been developed by the Justice Law and Order Sector. The draft policy envisages the establishment and implementation of a reparations programme for victims affected by conflict. It also draws largely upon the provisions of the Juba Peace Agreement signed between the Lord's Resistance Army and the Government of Uganda which lays out key principles to determine the parameters and modalities for a reparation programme to address the various forms of harm to victims of the LRA conflict.

Considerations for a reparation programme

While international law establishes the State duty to provide reparation, the exercise of this duty is essentially a matter of domestic law and policy.[17] States enjoy a degree of discretion and flexibility in determining the modalities of fulfilling this obligation tailored to their national context and in line with domestic priorities.

A reparations programme is an administrative, out-of-court process used by States to provide reparation to massive numbers of victims of gross violations of International Human Rights and or serious violations of International Humanitarian Law.[18] In such programmes, States identify the

[14] Universal Declaration of Human Rights (art. 8); International Covenant on Civil and Political Rights (art. 2); International Convention on the Elimination of Racial Discrimination (art. 6 & 14); Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment (art. 6, 14); International Convention for the Protection of All Persons from Enforced Disappearance (art. 24); the Convention on the Rights of the Child (art. 39); Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Art. 4 & 10); Hague Convention respecting the Laws and Customs of War on Land (art. 3), the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (art. 91) and the Rome Statute of the International Criminal Court (arts. 68 and 75). The Rome Statute not only reaffirms the right of victims to reparations in cases tried by the Court but also establishes a trust fund for victims (art. 79).

[15] Art. VII (Victims' Right to Remedies), UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Gross Violations of Human Rights and Serious Violations of International Humanitarian Law (2006).

[16] Constitution of Uganda, art. 50.

[17] OHCHR, Rule of Law Tools for Post-Conflict States: Reparations Programmes, p2.

[18] United Nations Guidance Note of the Secretary General on Reparations for conflict-related sexual violence, June (2014), p6.

violations and victims to be redressed and provide them with reparation through an established procedure. [19]

Fundamental questions must be asked regarding the type of benefits to distribute, to whom and to what magnitude? Ideally, a reparations programme should aim to fulfill 3 key features i.e. '**completeness**' by targeting every victim in an inclusive and non-discriminatory manner; '**comprehensive**' by considering a wide list of violations to trigger benefits and; '**complexity**' by distributing a combination of different kinds of benefits.

The UN Basic Principles have laid out certain key principles and parameters that should be taken into account in the design and implementation of reparations programmes.[20] In addition, OHCHR and UHRC joint study on reparations for victims of the LRA conflict in northern Uganda also provides crucial considerations on what should be reflected in a reparations policy and programme in Uganda that could be drawn upon.

Choice of victims

The right to reparation is for **victims** who have suffered serious and systematic violations of their human rights. The UN Basic Principles and Guidelines provide a broad definition of victims who should qualify for reparations as including persons who have individually or collectively suffered harm as a result of grave or serious violations of international human rights and humanitarian law. [21] For a reparation programme to be complete, it should strive to distribute benefits to every victim of gross and serious violations including those who suffer direct and indirect harms and their immediate family members. It should be irrelevant as to whether the perpetrator is identified, prosecuted or convicted and regardless of the family relationship between the perpetrator and the victim.[22]

The choice of victims to benefit from a reparation programme may be subject to political consideration but must abide by certain fundamental principles and procedures for purposes of ensuring legitimacy. In particular, ***participation, outreach and process*** are crucial for a rights-based approach to reparations programming.

As noted by the UN Secretary-General, '…the most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out.' [23] A victim-centred approach therefore lays emphasis on the centrality of victim participation in the design and implementation of a reparations programme. The process of participation in itself provides reparative benefits for victims and is equally vital for their recognition as rights-holders. Local consultation further enables a better understanding of the dynamics of past conflict, patterns of discrimination and types of victims.' As such, proper identification of victims to be consulted and engaged is crucial and can be done through documentation and mapping initiatives to establish who the targeted victims are and their specific categories and needs.

Similarly, qualifying a victim as a beneficiary must be sensitive not just to the needs of victims but also to their possibilities. In pursuing a non-discriminatory approach, there is need to pay close attention to accessibility of the programme by providing friendly application/registration procedures as well as avoiding unreasonable evidentiary standards that can potentially exclude legitimate claims. There should be well-coordinated outreach processes that specifically target vulnerable groups such as women and children, who are often traditionally excluded from participation. These groups should be provided protective measures sensitive to their needs so as to encourage their participation etc. In this regard, the *Juba Peace Agreement on Accountability and Reconciliation* also places priority for reparations for members of vulnerable groups, with special provisions for the treatment of women and children.[24] The parties acknowledged the suffering of victims, their right to information and truth about their experiences during the conflict and call for their effective and meaningful participation in accountability and reconciliation proceedings.

Category of harms/violations that should trigger benefits

Reparations programmes are meant to redress gross and systematic human rights violations, not sporadic or exceptional ones.[25] A comprehensive reparation progamme should ideally extend benefits to victims of all the violations that are reported to have occurred, although in reality, resource constraints tend to compel States to make a choice targeting the most serious crimes

---

19 Ibid.
20 Reparations programmes are administrative, non-judicial measures that seek to redress violations of HR by providing a range of material and symbolic benefits to victims.
21 Ibid. art. 4, para. 8.
22 Ibid., Art. 5, para. 9
23 UNSG, Rule of Law Report, 2004 Id.,n1, p7.
24 Juba Peace Agreement on Accountability and Reconciliation clause 11 and 12.
25 OHCHR Rule of Law tools on reparations programme, Id., p10

under international law.[26] In this regard, State practice has tended to focus on civil and political

rights violations while excluding other violations, including of economic, social and cultural rights that often disproportionately affect women and marginalized groups. In other instances, reparation programs tend to focus their attention on remedying particular forms of physical violence hence promoting a *de facto* hierarchy of suffering.[27]

A comprehensive approach to massive violations will require special attention to abuses committed against groups most affected by conflict, such as minorities, the elderly, children, women, displaced persons and families of the disappeared and establish particular measures that are sensitive to their needs.[28] In Sierra Leone, the Truth and Reconciliation Commission (TRC) recommended prioritizing reparations for amputees, women that suffered sexual abuse, children and war widows, as these groups were determined to have suffered multiple violations.[29] However, participation in the TRC process was not a requirement as many victims especially women did not participate for a variety of reasons including a fear of stigmatization.[30] It is therefore important to articulate clearly the principles or grounds for selecting certain violations and excluding others from benefiting. In this regard, the availability of objective and reliable data on the human rights abuses and serious crimes that occurred during the period in question is vital in establishing key facts.

In the OHCHR/UHRC joint Study, victims and victim-focused CSOs identified 11 specific categories of serious violations that they believed should trigger the right to both remedy and reparation. These include: killing, torture or cruel, inhuman or degrading treatment, abduction, slavery, forced marriage, forced recruitment, mutilation, sexual violence, serious psychological harm, forced displacement, and pillaging, looting and destruction of property.[31]

Kinds of benefits to distribute

Gross and systematic human rights violations imply a broad category of victims with multiple forms of abuse and distinct needs. Therefore, different forms of reparations are needed for different categories of victims. A programme that distributes a variety of benefits ranging from the material to the symbolic, and distributed both individually and collectively, provides the complexity necessary to satisfy a larger portion of victims. Findings from OHCHR/UHRC Joint Report showed victims' emphasis on symbolic forms and rehabilitation as well as assistance with livelihoods and economic empowerment of victims.

Therefore, there ought to be different types of reparations contemplated, a combination of material and symbolic measures, within the programme as spelt out in the Basic Principles in line with the specific local context. Uganda has several victims in urgent need of medical, psychological and livelihood assistance in the aftermath of the LRA conflict. The Juba Agreement on Comprehensive Solutions provides that the Government shall develop and implement a policy for the support and rehabilitation of the victims of the conflict.[32] A complex reparation programme needs to be established to address the diverse needs of multiple victims. For instance, in OHCHR/UHRC study, victims identified physical and mental health services, education, housing, land and inheritance, rebuilding livelihoods, empowering youth, public acknowledgement of harm and apologies, information on the disappeared and proper treatment of the dead, among the necessary forms of reparations.

Since massive reparation programmes require mobilization of significant resources vis-à-vis the need for a complex scheme that integrates a combination of different reparations, measures can be implemented in a phased approach that targets urgent needs immediately followed by medium and long-term interventions as a realistic plan.

A contextual challenge in the reparations debate in Uganda has also been the mistaken perception by Government officials that implementing development programs such as the Peace, Recovery and Development Plan (PRDP) launched in 2007 to coordinate development-focused initiatives, qualifies as reparations. While there may be an element of collective reparative benefits, it is important to differentiate the two so as to uphold the element of acknowledgment that is central to victims' right to reparations.

---

26 These refer to gross violations of international human rights law and serious violations of international humanitarian law. They include; torture and other cruel, inhuman or degrading treatment or punishment; extrajudicial, summary or arbitrary executions; slavery; and enforced disappearance, including gender-specific instances of these violations, such as rape. Grave breaches under IHL including; genocide, crimes against humanity, enforced disappearance, extrajudicial execution and slavery.

27 Dyan Mazurana, PhD and Bretton J. McEvoy - Enhancing Women's Access to Justice: From Transition to Transformation and Resilience (unpublished).

28 See, UN SG's Report on Rule of Law, (id.) p9.

29 Unifem Gender and Transitional Justice Programming: A Review of Peru, Sierra Leone and Rwanda 2010; Also Jeremy Sarkin, Jeremy Sarkin; Expert Policy Paper on a Reparations Process for Uganda: Procedural and Substantive Recommendations for Implementing Reparations, 2013, (unpublished) p.19 (unpublished).

30 Ibid.

31 See, UHRC/OHCHR joint thematic report titled: *The Dust Has Not Yet Settled: Victims' views on Remedy and Reparations: A Report from the Greater North of Uganda*, p38.

32 *Implementation Protocol to the Agreement on Comprehensive Solutions*, Clause 26, 22 February 2008.

Magnitude of economic benefits

This relates to the level of monetary compensation to be awarded to potential beneficiaries. While there is no universal standard on proper quantum of monetary compensation, ***Principle 20 of the Basic Principles and Guidelines*** provides that 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.

In reality, it is difficult for the State to provide direct financial compensation to every victim commensurate or proportional to what they suffered given competing demands on State resources. The fundamental obligation of a massive reparations scheme is however not so much to return the individual to his or her status quo ante, but to recognize the seriousness of the violation of the equal rights of fellow citizens and to signal that the successor regime is committed to respecting those rights.[33]

A reparations programme in Uganda should therefore include the setting of a minimum threshold of compensation for victims.[34] The amount to be paid should be calculated according to at least three basic criteria: (a) an amount that acknowledges the suffering caused by the violation; (b) an amount that enables access to requisite services and facilities, and (c) an amount that assists their living costs according to socio-economic circumstances.[35]

Different modalities need to be contemplated on how to deliver compensatory benefits to victims. Some involve apportioning benefits amongst family members, which has proved to be useful for women and children.[36] Benefits can be distributed either as a lump sum or periodic payouts. In OHCHR/UHRC Joint Report, Victims expressed different levels of understanding of collective reparations as dealing with reparations to a group of victims, delivery of public goods and distributing reparation in particular *geographic locations or ethnic communities* where violence and violations were concentrated.

Financing reparations

Adequate funding is crucial for the success of a reparation programme. Internationally, there are two main models for financing reparations which include; creation of a special trust fund or introducing a dedicated line in the annual national budget. [37] In line with this, the Implementing Protocol to the Juba Agreement on Comprehensive Solutions provides that the Government shall establish a special fund for victims, out of which reparations shall be paid, including reparations ordered to be paid by an institution established pursuant to the Agreement on Accountability and Reconciliation.[38] In this regard, the draft TJ policy proposes the creation of a fund to be drawn from the consolidated fund to implement the reparation programme. Important to note that funding reparations is heavily dependent on the level of political commitment and requires innovation including through asset recovery, special taxes upon alleged perpetrators or seeking international assistance.

Administering reparations

The Juba Agreement states that, "the Government shall establish the necessary arrangements for making reparations to victims of the conflict in accordance with the terms of the principal agreement."[39] In this regard, the Government is given the responsibility to establish a body to make recommendations for the most appropriate modalities for delivering reparations, including responsibility over administrative, financial and logistical aspects of such a program as well as determining procedures for reparations.[40]

Key considerations will have to be made on who should administer the reparation programme, whether it is part of the State or independent, and laying down how administrators can engage with victims including outlining how victims and other stakeholders (civil society, development partners, etc) can participate in the entire process, coordination with other government agencies etc.[41] Allied to this is the issue of the capacity of the institution established to deliver effectively. Consideration

---

33 Rule of law tools, p30.
34 Jeremy Sarkin, Policy paper, (id) p28.
35 Sarkin, Id.., p27.
36 See, Ruth Rubio-Marin, ed. Gender of Reparations.
37 See, OHCHR Rule of Law tools on reparations programme (id), p33.
38 Ibid. Clause 28.
39 Annexure to the Juba Agreement on Accountability and Reconciliation, para 16 (signed on 29th June 2007).
40 Ibid, paras 17 and 18.
41 ICTJ: Unredressed legacy: Possible Policy Options and Approaches to fulfilling reparations in Uganda, 2012 (p13).

has to be made on taking the option of national vs. community-driven reparation programmes or a combination of both. Consulting with victims on such aspects can be beneficial and satisfying to victims.

Gender considerations

Despite the recognition of the right to reparation as applying without discrimination, State practice has shown that interventions still fail to systematically incorporate women's, girls' and boys' specific experiences, needs and rights. Reparations as a justice remedy provide a platform for women and girls who are more often the massive victims of the massive atrocities and violations yet cultural bias and prejudice inhibit their participation.

A central focus on making a reparations programme gender-sensitive involves targeting of violations that disproportionately affect women including sexual violence in its various forms and deliberately targeting victims as underscored in the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa;[42] Nairobi Declaration on Women's and Girls' Right to Reparations and African Commission Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence (2007).[43] The UN Special Rapporteur on Violence against Women has also provided technical advice on reparations for women subjected to violence in conflict settings.[44]

Linkage with other TJ mechanisms

Reparation programmes are unlikely to succeed unless they are part of other transitional justice measures particularly prosecution, truth-telling and institutional reform. In reality, an isolated focus on a reparation programme only provides limited benefits to victims and cannot provide the expected 'satisfaction' of multiple victims. The draft TJ policy provides a combination of justice mechanisms, both formal and informal, to address the legacy of crimes perpetrated during the war. Similarly, the Juba Peace Agreement does not limit the delivery of reparations to one particular mechanism stating that both formal and alternative justice mechanisms require reparation for victims.[45] Significant opportunities prevail within the existing International Crimes Division of the High Court just as well as linkages with traditional justice mechanisms can be creatively explored. In traditional justice, justice is not done unless some form of compensation or reparation from perpetrators is received by the victim, their families or community members for the wrong.[46] It is however essential that traditional justice practices maintain basic international human rights standards pertaining to non-discrimination and uphold the dignity and integrity of victims.

---

42 Women should have access to reparations, Art. 4 & obligates the State to create mechanisms to increase the involvement of women in planning, formulation and implementation of post-conflict reconstruction and rehabilitation (Art. 10).

43 Calls for among others, State parties to put in place efficient and accessible reparation programmes that ensure information, rehabilitation and compensation for victims of sexual violence; to ensure that victims of sexual violence have access to medical assistance and psychological support; and to ensure participation of women in the elaboration, adoption and implementation of reparation programmes.

44 See, Annual Report of the UN Special Rapporteur on Violence against Women, its causes and Consequences, A/HRC/14/22, 19 April 2010.

45 Clause 5.3, 6.4, and 9.3.

46 Draft National Transitional Justice Policy (September 2014 version), p24.

Comparative experiences: The experience in Colombia

By Mr. Norbert Wühler, Chair of World Intellectual Property Organization's (WIPO) Appeal Board

History of the Colombian Conflict

- Over 50 years of fighting involving guerillas, paramilitaries and security forces.
- In the last 20 years, 70,000 people killed.
- Up to 50,000 people disappeared.
- 25,000 people kidnapped.
- An estimated 5.2 million people displaced, mostly from rural areas.

Justice and Peace Law 2005

- Demobilization of armed groups and responsibility to provide reparations.
- Victims had to report the crime and establish the culpability of that crime's perpetrator. Once completed, victims could seek reparations damages and land restitution) from the perpetrator.
- Practical impossibility to prove culpability.
- Fear of retaliation.
- After three years, only 24 victims had received damage payments.
- As a result, this approach was abandoned.

Victims Law 2011

- Administrative reparations first by presidential decree.
- Then as part of the Victims Law of 2011.
- Victims Law provides a number of benefits to victims, including restitution, social services, return of land or alternative land, monetary compensation and symbolic measures.
- Victim is any person who suffered grave violations of human rights or international humanitarian law since 1985.

Victim Status

- Victims need to present a written declaration and supporting evidence of the events that occurred and the damages suffered.
- A special institution has been set up that reviews the declaration and verifies the facts.
- The verification includes presumptions based on patterns and historic information.
- Once a person is recognized as a victim, he or she is entitled to all the benefits under the Victims Law.

Institutional Structure

- Three bodies for the different remedies.
- Special Administrative Unit for Land Restitution, managing a Registry of Dispossessed and Forcibly Abandoned Lands.
- Executive Committee for the Support and Reparation of Victims.
- Special Administrative Unit for Victim Support and Reparations (Special Unit).

Financial Compensation

- The Special Unit manages the Fund for Victim Reparations.
- Compensation is paid in different amounts depending on the type of damage or injury (death, torture, injury, disappearance, displacement etc.).
- The different amounts are set as multiples of the legal base salary.

Status of Compensation

- Over 600,000 persons have been paid compensation in a total amount of 3.7 billion pesos.
- However, this represents only 7 percent of the total claims for reparations.
- More than 500 collective reparation plans are being established.
- Over 600,000 persons have received a letter of recognition of the injury they suffered.

Challenges

- The Victims Law expires in 2022. Budget constraints make it unlikely that all financial obligations can be met.
- Security for the displaced returning to restituted lands is not always guaranteed.
- The organizational structure is complex and requires much coordination.
- The mechanisms under the Victims Law must be synchronized with those foreseen in the Peace Agreement between the Government and the FARC (which has a whole chapter on reparations).

Recommendations

- Foresee administrative reparations, especially financial compensation, since it is a relatively quick and simple measure.
- Keep the organizational structure simple and independent from existing government agencies. But enforce necessary cooperation and coordination.
- Manage expectations.

Uganda is facing the following challenges for defining reparations:

- Insufficient political leadership in making reparations for human rights a priority. Two indicators of this can be observed on:
  - A policy, resulting from consultation, is stalled at cabinet.
  - Current efforts are not supported by national budget commitments. Donors fund many of the transitional justice, accountability, and reparations efforts, while the national budget shows other priorities. This also affects the sustainability of any of those efforts.
- A lack of clarity on the narrative supporting a reparations policy.
  - Recognition of State responsibility on violations committed by state agents, as well as for failing to adequately protect those victimized by non-state actors?
  - Social cohesion for reducing the likelihood of future eruption of conflict; humanitarian assistance; stability; and power control? Labeling them as justice seems inaccurate, to say the least.
- The complexity of providing reparations for victims of serious violations in communities that have also suffered multiple violations, where the goal of assisting victims to overcome the consequences of those violations requires to also address the expectations and needs of the communities where they have returned:
  - Defining reparations to individual victims that could have an impact on their lives and in their ability to be part of their communities, but also that are possible to implement.
  - Defining other forms of addressing the demands for recognition of the violations committed against entire communities, as well as their social, economic, cultural, civil and political rights.

The challenges are not only technical, but also political.

Comparative experiences: The experience in Chile and Peru

By Mr. Cristián Correa, Senior Associate Reparative Justice Program, ICTJ

Uganda, though, have a series of advantages and opportunities for effectively implement reparations:

- Experience: Uganda had dealt with acknowledging the truth and reforming institutions for strengthening human rights before, as with the Oder Commission and the drafting of the 1995 Constitution. It has also being discussing accountability and reparations since their inclusion in the Juba Peace Agreements.

- Long processes of discussions and consultations that preceded and had followed the Peace Agreements, with several policy instruments, repots and active involvement of civil society. This process provides with:

    - Information needed for what should be the violations that could be included in a reparations policy and which should be the components of a reparations program, helping to prioritize among them.

    - A broad array of organizations that know what they want and are actively demanding them.

    However, for the same reason, there is also some degree of exhaustion from that process, and risk of victims and community losing faith and trust in the government. This should be understood as a mandate to act urgently.

    - Additionally, the experience on implementing the Peace, Recovery and Development Plans ("PRDP") is another advantage for the definition of reparations. It offers lessons, and a current willingness to learn from those lessons, reflected in PRDP III.

What the experiences from other countries can offer for addressing these challenges and that could help take advantage of these opportunities? As I was asked to refer to the Chilean experience I will offer an analysis of it, but also I'll draw form other experiences that can offer lessons and ideas that could be more relevant to these challenges. I'll distinguish them between the political and the technical challenges.

Relevance of the Chilean experience in coalescing the political leadership needed for transitional justice

Even if transitional justice is often seen as a comprehensive process where each component: truth, justice, reparations and reform, supports each other, these four components rarely come together or simultaneous: often one opens the door for a complex process of convincing about the need of others. The image of an icebreaker can serve to explain this.

In Chile a democratic government was elected after 17 years of dictatorship. The new government was very different than the dictatorship, so there was a marking point on style of leadership and commitment to human rights. However, it was a weak government; the dictatorship and its supporters controlled the military, the Supreme Court, and the Senate.

A truth commission was established:

- But limited to what was seen as the worse crimes: enforced disappearances and killings, including also killings by armed opposition groups.
- It was established quickly and started working only two months after the new government took office.
- The commission was able to shed light about the number of killings and disappearances, and clarified how many of the killings and disappeared were responsibility of state agents and how many of non-state agents, namely, armed opposition group.
- That clarity made impossible to deny the existence of victims of enforced disappearances and killings; the magnitude and systematicity of the state policy; and that the state responsibility was undeniable.
- It led to a commitment to continue the investigations of more cases, and to provide a reparations policy that addressed the different needs of the relatives of the victims: a pension for life; scholarships for their children; special provision of health care and

psychosocial support provided by professionals with experience and sensitivity.

The report was not able convince the supporters of the dictatorship about initiating criminal investigations; neither to get rid of the amnesty law. There was still fear that the military could destabilize the country, and political supporters of the dictatorship kept protecting them.

It took seven years for the first decisions that declared that the amnesty law was not applicable to a case of forced disappearance. After that case, prosecutions and a jurisprudence that interpreted national laws in the light of the obligations that derive from international human rights law had mostly prevailed.

It also took 12 years for addressing other violations not covered by the truth commission, and particularly the massive use of torture. There was fear, a sense of isolation of victims that were reluctant to talk about humiliating experiences, and reluctance of society to keep opening uncomfortable truths. But because the detention of Pinochet's in London was primary under charges of torture, victims begun to organize and lose fear, and progress in criminal justice and other areas made impossible for the country keep the truth unveiled.

A second truth commission was focused on investigating torture and identifying all the victims who were subjected to it.

- Its report revealed a level of systematic on the use of torture that nobody imagined.
- It also helped victims connect to each other and organize.
- It was impossible to blame torture on a few bad apples, or keep saying that there has been always torture, and that torture was part of the unwelcomed but frequent behaviours of any police force.
- The report led to the armed forces to recognize their responsibility.
- Nine years after, but 23 after the restoration of democracy, the Supreme Court finally acknowledged its responsibility for not having protected the rights of the thousands of people who presented habeas corpus or initiated judicial actions for investigating violations.
- Also a prominent museum and hundreds of memorial sites have been built in places were violations were committed.

But 26 years after democracy was restored there are still challenges. Perhaps the main one is how to apply the hard learn lessons of respecting the rights and dignity of all Chileans in regards to the indigenous peoples and immigrants.

In conclusion, the lesson is that making truth undeniable, in the case of Chile, created conditions for advancing on reparations and justice at a level never imagined in the early years of the transition, where the military and their political supporters, most entrepreneurs, and the media, didn't want to revisit the past.

But the process did not stop there: Each further step increased these favorable conditions for moving into new ones. It was impossible not to acknowledge responsibility, provide resources and political will, and interpret the law based on the obligations derived from human rights.

It was also impossible to use a language that didn't acknowledge the nature of the crimes committed. Victims and survivors of human rights violations were addressed as such, not as conflict affected persons or any other euphemism.

It was not easy, though, neither a spontaneous result of the truth commission report. It took a constant, unremitting, and relentless effort by organizations of victims, as well as by some people in Government and some judges who were committed to keep pushing.

In the case of Uganda these challenges are a bit different, as it might be very difficult for the current government to initiate prosecutions of those who supports it, or of its military. But it might be possible to advance making undeniable the violations committed by the different groups. The current mapping process perhaps offers such an opportunity, and you might not need a truth commission. It might help visibilize victims and the types of violations that have targeted them, as well as shed light to the groups, organizations, or state entities that committed them, revealing policies and patterns of violations. After it might be less easy to dismiss the need to acknowledge, provide redress, and eventually initiate some investigations.

There are other lessons from Chile too, in terms of acting expediently once a course is decided, as it was when the truth commission was established. Other lesson is implementing the policies that are promised, as it is the case of the reparations policies. Even if in many cases responses have been insufficient in the eyes of the victims, by implementing them expediently, the Government

had showed seriousness, commitment, and mostly: trustworthiness. In general, what was promised was delivered soon.

Another aspect of the political support for reparations can be draw from Peru.

- Peru suffered a 20 years armed conflict between a Maoist guerrilla and state forces, with the participation of another smaller subversive group.
- The question was should they provide reparations for all victims, or reparations as result of responsibility derives only from actions of state agents.

The Peruvian Truth Commission analyzed this question carefully, considering not only the legal implications, but also the need for including all victims and of not making distinctions among them.

It concluded that the obligation to provide reparations for a State can derive from

- Its direct responsibility on the obligation to respect human rights: a negative obligation of not to violate the rights contained in international human rights and not to incur on breaches of international humanitarian law.
- And additionally on the obligation to guarantee human rights and prevent violations committed by third actors, or provide protection, effective remedies, and access to justice for victims of those violations. In the case of Peru, the inadequate response to victims, based only on military repression and violence, without offering support, adequate shelter in conditions of dignity, continuous marginalization, and repressive policies that targeted all the inhabitants of the affected regions as suspects or possible sympathizers of the guerrilla, led to the conclusion that there was also responsibility of the State towards those victims, and that it was legal, moral and political convenient to provide the same measures of reparations to all victims.

This might be of relevance for Uganda, and might help define well what is the acknowledgement and apology needed for accompany the reparations policy. It should include the direct actions by the State institutions, as well as all the different forms of inaction, or of active marginalization. It might also help define the legal reasoning beyond including all the victims of the most serious violations in a reparations policy that is based on the responsibility of the state, as Peru did.

Relevance of the Chilean and other experiences on how to define reparations in Uganda

In terms of how to define reparations in Uganda the Chilean experience offers some ideas, but there are other issues where the other experiences could be of relevance too.

- Base reparations not on the compensation mechanism often used by courts for single cases, but as a policy that includes all victims of the most serious violations
- Base reparations on the current consequences that affects today victims who suffered those violations in the past, and have long term effects:
  - To guarantee a better life, even if modest, though a pension for life
  - To provide health care for life and not limited to direct consequences of the violations
  - To provide psychosocial support through a program staffed by people who have experience, are sensible, and are located closer to the place of residence, and that is permanently embedded in the health care system for guaranteeing continuity
  - To provide education for the children of victims
- Assign concrete responsibilities to specific government entities, and provide those entities with the additional resources to deliver them: Reparations pensions were paid through the social security administration; scholarships provided by the Ministry of Education; and rehabilitation policies to specific centers located in the hospitals provided with specific funding.

However, the main challenges for reparations in Uganda derive from the complex intersection of historical marginalization; massive violations involving the displacement of entire communities for years and the disruption on the social fabric that it created; and the need for individual victims to not only receive reparations, but be able to be part of their communities and not be rejected by them. This requires for reparations in Uganda not to have only an individual nature, but also acknowledge all those other violations; address marginalization, poverty and exclusion of communities or entire

regions; and find ways for reparations not be a reason to deepen mistrust, rejection, or stigma, but to facilitate restoring membership and inclusion.

Peru: combining individual and collective reparations with social policies and decentralization

The 20 years armed conflict in Peru has more resemblance to Uganda than the dictatorship in Chile. It affected mainly the marginalized areas of the Andes and Amazon, inhabited by indigenous people living under conditions of poverty and exclusion. It affected traditional forms of living, based on tight communities governed by traditional values and a close sense of belonging. It resulted in tens of thousands of people, mostly from those communities, killed, disappeared, raped, or tortured; of massacres, massive displacement, and increase racism and bias against those coming from those regions.

The Truth Commission that examined this legacy recommended a comprehensive reparations program that included, in addition to individual measures, collective reparations. It also recommended a series of measures that are not reparations, but reforms intended to address the causes of the conflict and the reasons why it was for so long ignored by those living in the capital.

The collective reparations program was intended to repair the social fabric of the most affected communities. It was based on a registration of the communities according to the degree of harm they suffered, based on a series of factors (existence of a massacre, concentration of individual violations, destruction of communal property, targeting of the community leaders, etc.). Based on that there were more than 5,000 communities registered and assessed. The program included a series of measures, but the government opted to simplify them to one single project to be chosen by the community, for up to USD 33,000. Through a participatory process, the community chose what to do. In 8 years since the program started, close to 2,000 communities have received a project. The program is not perfect, as the projects do not include resources for maintenance of the investment; and they often get confused with normal public investment that the government needed to make in a community (paving a road, or building a couple of classrooms in a school). They are often presented as reparations against terrorism, without recognizing that a high portion of the violations committed were the result of actions by the army, the police, or other State supported groups. Still, the policy shows a capacity to have reached a significant number of communities based on an assessment of the degree of harm, and not preferring communities based on their political affiliation or the affiliation of the local mayor. They also show low degree of corruption in using the funds or in deciding the projects.

In terms of decentralization and social programs, Peru has been able to significantly decentralize power and resources to its provinces, strengthening local governments and increasing their budgets. Several of these local governments had included participatory budgeting process within their provinces, and even provincial reparations policies that add to the national one. Additionally, a national policy to increase enrolment and completion of education has been particularly directed to the Andean and Amazon regions, including bilingual education for indigenous groups. Between 2004 and 2013 completion of primary school for children whose mother tongue is not Spanish improved from 40.2% to 62.7%, and for students in secondary education from 14.5% to 42.5%. Additionally, a significant effort to register the inhabitants of marginalized areas in the civil registry, giving them identity documents, was implemented to address the consequences of the massive destruction of these registries, as well as of marginalization of those communities. These policies and reforms are not considered reparations, though, as a more long-term agenda towards equitable development. However, they contribute significantly to the way how reparations are received and to strengthen the perception of sincerity of the government's commitment to human rights.

Making easier for victims to be accepted by their communities

A reparations policy cannot include all harms suffered as result of years of armed conflict and massive violations. It needs to prioritize victims of the most serious crimes those who after decades still have devastating effects on their victims, like murder, disappearances, sexual violence, or harms causing disability. However, if other violations are not addressed or even recognized, there is a risk of exacerbating differences among people who all perceive that they had suffered, and to diminish the potential of reparations to restore the social fabric. This is particularly serious when the violations committed had the purposes of precisely destroy such social fabric. In Peru, collective reparations are aimed to address this dilemma. In other places, especially when indigenous communities have been affected by violence, similar approaches have been tried, but rarely in massive scale. Some court decisions, particularly by the Inter-American Court of Human Rights, and by some domestic courts in Colombia have address this, but in single cases. The Colombian Victims' and Land Restitution Law tries to do it, by combining a mandate of considering

the particularities of indigenous groups when defining individual as well as collective reparations. However, the approach, useful when applied to few cases, has been insufficient to respond to the number of victims that demand reparations.

Working at three levels that support each other, as proposed by the experience of Peru and is present also in the peace accords being signed today in Colombia, might offer possibilities of success:

- Individual reparations focused on the most serious violations that are designed based on the most relevant consequences that affect victims in the present; and which are addressed through measures that can have a long term or sustainable effect in alleviating or overcoming those consequences. These two conditions might help reparations be effective: that reparations should refer to events that happened in the past, but by addressing the consequences that those events have in the present day on those victims; and that reparations should be designed to effectively provide conditions for victims in the long term overcome those consequences, even if limited, but not just mere tokens. For defining this, it is needed to examine which are those consequences and what could effectively help victims address them.

- Community reparations that acknowledge the harm caused to them as result of displacement and dislocation, through a series of public investments on areas prioritized by its members, paying special attention to the proposals of women inside the community; and that affirm that those harms are also recognized. Implementing community and local dialogues about the violence and its consequences, that include all violations and perpetrators, could help to the demand for acknowledgment. These dialogues should consider all the violations suffered by the communities, and include among them the forced recruitment, sexual violence and their consequences. Perhaps a simple methodology of discussing together how life was before, during, and how it is now, could help. Participation of local authorities could also help to have a broader acknowledgement

- Development, reconstruction and social policies that can help integrate regions affected by conflict and historical marginalization to the rest of the country and to improve their well-being and economies. This could be done though public investment and additional staffing for improving services that guarantee basic rights to the population, as on education – as in the case of Peru, health care, roads, sanitation, drinkable water, electricity, telephone connection, or others. It might require a devolvement of functions and resources to local governments, which might be better in defining priorities and implementing these measures. What could help effectiveness could be to identify certain minimum goals, which could be based on the Sustainable Development Goals and the action plan defined in Uganda for their implementation, to be focused on those communities and regions, making sure that those communities and regions at least achieve those goals as minimum indicators.

PRDP, in its third definition, seems to precisely do this. By identifying local priorities of communities affected by violence; and by improving access and quality of education, health care, and socioeconomic conditions of people living in those communities, identified by them.

Making sure that certain victims don't suffer stigma

Victims of certain violations that carry stigma should be protected for not being singled out. Some of that stigma could also be associated to attribution of membership to rebel groups, or to situations that alter the traditional ways that define membership to a community or recognize somebody's lineage. This is particularly relevant in regards to victims of sexual violence, either abducted by rebel groups or not, and by their children. Any reparations policy requires addressing not only the consequences of the victims in regards to their well-being, but also in regards to their ability to belong to their communities and be accepted. The proposals on collective reparations might help achieving this, but additional measures are needed to protect the identity of these victims.

Measures that while directed to victims of sexual violence and their children, are not only limited to them, but also benefit other women and children from the communities. If a wider number of women and their children are benefited, victims of these crimes would be less singled out. The problem is that this requires more investment, as the number of participants of the measures needs to be broader than just the victims of sexual violence and their children. The measures need to be decided with the communities, perhaps targeting all single led households and all children of those households. This might help avoiding stigma, as it would allow to not singling out who suffered sexual violence among single led households. It might also help avoid victims' competition and jealously, and the sense that some victims or violations are privileged over others. Perhaps we could also evaluate including here families that have a member who is disabled, as their children might also find additional obstacles to finishing education.

Some experiences in Sierra Leone combined supporting the education of ex-combatants with improving funds for all schools. The schools that received demobilized children or youth receive additional funds, so all students benefited.

However, discussing about lineage inside the communities, and on how to establish acceptance and trust, without blaming the young mothers and their children, should be something that requires to be addressed with community leaders and with women of those communities.

Conclusion

The experiences explained are not for being copied, but to adapt them to the Uganda challenges. They offer important insights on how to overcome the challenges initially described, both, political and technical. Perhaps the most important one, though, could be the lessons about the need to act. There have been many debates, studies, and consultations about how to define reparations in Uganda. PRDP III and the documentation of violations by UHRC show that action is starting to take shape. A strong and clear policy definition on reparations should follow. Ugandans have the experience and information needed to make that definition.

It must be important, though, to define policies that are simple enough to guarantee that they would be implemented, and to register victims in a way that is inclusive enough to make sure that all victims of the worse violations are part of it.

However, it is important to keep in mind that reparations is not just the disbursing of some material goods to certain victims. Acknowledging wrongdoing, investigating what happened, and identifying what political and institutional changes are needed to avoid that human rights violations are committed again are at the essence of reparations. Documenting violations and starting implementation of reparations today can help to push into this direction.

Open discussion (Panel 1)

The questions and answers of the first panel session were dominated by the country's experiences, handling cases involving undocumented evidence, computation of benefits and use of categories to provide benefits.

The response to the question of use of categories revealed that the benefits should be determined based on each country context. Dr. Norbert Wühler shared experiences in certain Arab countries where the status of women and widows was considered. In response to the question related to compensations of victims who have suffered more than one loss, he observed that in certain countries the compensation is standardized. However, he emphasized that compensations should be contextualized and realistic.

The panel was asked to share country experiences on cases violations of economic, social and cultural rights which involved loss of undocumented properties. The response was that it is very difficult to establish loss of property in cases with no documentary evidence. Based country experiences, elaborate historical reports and data can be used. If loss fits within the patterns in the reports then the victims are compensated.

Panel 2: Court-ordered reparation

Chair: Ms. Jane Anywar Adong, Counsel for the victims (ICC), Dominic Ongwen Case

Court-ordered reparation in Uganda

By Dr. Godfrey Musila, Researcher, Commissioner, UN Human Rights Commission for South Sudan Geneva

Introduction

By way of introduction, highlight the following aspects:

- Restorative justice and as the best theoretical framework for understanding victims' rights, especially the right to reparations; then define reparations as both principles/values and methods.
- An overview of the Ugandan legal systems Common Law heritage and the role it traditionally reserves victims (witnesses) and the resultant philosophical orientation of lawyers and judges.

Overview of the legal and institutional framework relating to reparations

- The criminal justice system in Uganda is based on inherited Common Law, which is codified in the Constitution and key statutes, in particular the Penal Code, Criminal Procedure Code, Trial on Indictment Act, the Sentencing Guidelines and the Judicature (High Court) (International Crimes Division) Rules, 2016 (ICD Rules of Procedure). Other relevant criminal statutes are the International Criminal Court Act 2010 and the Geneva Conventions Act of 1964 which respectively incorporate the Rome Statute of the International Criminal Court and Geneva Conventions into Ugandan law. In terms of institutions, the criminal justice system entails the ministry of justice,[47] the hierarchical court system from the Supreme Court to the Magistrates' Courts, prosecution services under the Director of Public Prosecutions as well as the police
- The Human Rights Commission, which is mandated to receive and adjudicate complaints relating to human rights violations from the public and to make orders relating to reparations is part of the criminal justice system in so far as some of the complaints it adjudicates relate to proscribed acts.[48]

The legal framework

- The Constitution enacts general rules relating to reparations. Art 51 provides for the right to an effective remedy, including reparations. Individuals may petition the high court when protected rights are violated. While it does not form part of the specific legal regime for the operation of the ICD, to could anchor independent constitutional claims for reparations for human rights violations against state. Such litigation, especially when designed as public interest litigation has advocacy value, and can refocus the state and government on the plight of victims of the LRA conflict broadly.

---

47 On the role of the AG and justice Minister in comparative perspective, see generally Godfrey Musila, 'The role of the Attorney General in East Africa: Protecting public interest through independent prosecution and quality legal advice' in ICJ *Reinforcing judicial and legal institutions: Kenya and East African perspectives* (2007) 21-41

48 For a brief overview of the Ugandan legal system, see generally Brenda Mahoro & Lydia Matte, *Uganda's Legal System and Legal Sector* available at http://www.nyulawglobal.org/globalex/Uganda1.html (Accessed on July 5, 2016).

- Article 126(1)(c) of the Constitution enacts, as one of the principles by which judicial power should be exercised, the award of adequate compensation to victims of wrongs.

- Article 50(4) obliges Parliament to make laws for the enforcement of rights protected in the bill of rights. The traditional mode of bringing claims is by petition, although civil law also provides an avenue for victims to vindicate their rights where the complaint pertains to complaints that can be addressed under that body of law.

Lex specialis on reparations (specific legal framework)

- Specific rules on reparations are contained in several laws. The Penal Code and Criminal Procedure Code which detail the substantive and procedural criminal law applicable in Uganda do not provide for a general right to compensation when perpetrator is convicted.

- In the Penal Code, compensation is provided for as a penalty attached to a small list of crimes in addition to imprisonment. Compensation applies particularly to crimes involving loss of property or theft but is not generally sanctioned in case of 'personal crimes' or crimes that touch on the personal integrity of a person and in which the individual suffers personal harm, injury or is killed.

- One instance in which compensation may be ordered for personal harm is the crime of defilement and aggravated defilement under section 129B of the Penal Code Amendment Act, Act 8 of 2007, which the Court of Appeal held in the case of *Otema David v Uganda*, does not extend to rape[49]

- On the right to reparations in Uganda, one has to look to the Trial on Indictment Act, Rule 48 of the Rules of Procedure of the ICD of 2016 and the Magistrates Act.

- This legal regime on reparations for both ordinary crimes and international crimes is new in Uganda, and case law that is specific to international crimes is non-existent although there are recent cases on reparations (compensation and restitution) for lesser crimes which signal a favorable posture on judges in relation to reparations in the criminal process, and hopefully, for the ICD.

- The main provision, which establishes in law the victim's right to compensation by a convicted person is section 126 enacted in Part IX of the Trial on Indictment Act as amended in 2008. It is notable that section 126 of the TIA reproduces word for word section 197 of the Magistrates Act. Section 126 (1) of TIA states that:

> "When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, ***in its discretion and in addition to any other lawful punishment,*** order the convicted person **to pay to that other person such compensation as the court deems fair and reasonable**" (emphasis added).

- Rule 48(1) of the ICD Rules of Procedure reproduces verbatim Section 126(1) of the TIA. This provision empowers the court to order compensation in criminal cases in which an accused is convicted. For its part, Rule 48(2) expands the orders that may be made

[49] *Otema David v Uganda*, Criminal Appeal No. 155 of 2008 arising from HCT-02-CR-SC-0042 of 2002 at Gulu.

against an accused to fines and 'any reparation', which category would include restitution, rehabilitation, satisfaction and guarantees of non-repetition.

- Rule 48 ICD Rules of Procedure is supplemented by the non-binding Sentencing Guidelines published in 2013 by the Chief Justice,[50] which provides that 'the prosecution shall apply for ancillary, compensatory and confiscation orders in all appropriate cases[51] and includes compensation, restitution and forfeiture in the list of orders that a court (including ICD) can make when sentencing an offender.[52] Judges and magistrates have cited these guidelines with approval in several recent cases.

- Section 130(1) and (2) TIA provides for restitution of stolen property to the lawful owner or representative. Such property would have been stolen in an isolated act (see relevant parts of Penal Code ss 253-284), which under section 9 of the International Court Act of 2010 would amount to the war crime of pillage or as part of a course of conduct in which other crimes are committed. Sections 129 and 130 of the TIA reproduce section 200 and 201 of the Magistrate Courts Act.

- Section 128(2) of the TIA, which mirrors section 199 of the Magistrates Courts Act enacts that the court may order compensation to be made out of fines paid upon conviction. This provision has relevance for financing of reparations. It stipulates that:

  > Whenever the High Court imposes a fine, or a sentence of which a fine forms part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied— *in the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the court, recoverable by civil suit* (emphasis added).

- Traditionally, the law set very low fines. The passing of the Law Revision (Fines and other Financial Act 14 Amounts in Criminal Matters) Act 2008 has made it possible for imposition of substantial fines on convicts, from which courts have ordered that compensation payable to victims should be defrayed in some cases.[53]

- The ICD should apply Rule 48 of its Rules of Procedure, the Trial on Indictment Act as the base law on reparations not only for war related crimes, but also for other crimes triable by the ICD. The ICD should construct a coherent legal framework on provisions spread out in the Penal Code, TIA, the Law Revision (Fines and other Financial) Act and Sentencing Guidelines, 2013 which provide a good framework, particularly on operational aspects of reparations.

---

50 See generally, Sentencing Guidelines. For a wide-ranging analysis of the guidelines, see generally Hanibal Goiton, 'Uganda' in Library of Congress, Sentencing Guidelines: *Australia, England and Wales, India South Africa* and Uganda (2014) 45-56 available at https://www.loc.gov/law/help/sentencing-guidelines/sentencing-guidelines.pdf (available at July 15, 2016).

51 Sentencing Guideline 58(1).

52 Sentencing Guideline 11.

53 *Isale Paul and Oluka Milton v Republic Criminal Appeal* 22 OF 2013 [Arising from Ngora Criminal Case135 of 2013, decided on August 27, 2014].

Comparative experience: The experience before the International Criminal Court

By Ms. Catherine Denis, Legal Counsel, ASF

My presentation will focus on the experience of reparations before the International Criminal Court (ICC) so far. First, I will briefly recall the relevant legal framework at the ICC; then address in turn the way ICC judges have interpreted the law thus far and the lessons learned from this practice that could prove useful to the Judges of the International Crimes Division ("ICD") in Uganda. It will then offer very humble recommendations to assist the Judges and the parties when dealing with reparations resulting from ICD proceedings.

ICC Reparations legal framework

Article 75 of the ICC Statute provides that:

"1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".[54]

According to the ICC provisions, the judges will hear the convicted person, the victims and other interested persons or States before issuing any reparation order. "Victims" are defined as persons who have suffered harm *as a result of the commission of any crime* within the jurisdiction of the Court.[55]

The Court may order individual or/and collective reparations, depending on the circumstances of the case.[56] Reparations can take many different forms, including (but not limited to) restitution, compensation and rehabilitation. Reparations ordered by the ICC do not prejudice the rights of victims under national or international law.[57]

The ICC Statute further establishes a Trust Fund for Victims ("Trust Fund") "for the benefit of victims of crimes within jurisdictions of the Court, and of the families of such victims".[58] The Trust Fund has a two-fold mandate: (i) to provide physical, psychological, and material support to victims and their families within the Court's jurisdiction over a situation (so called "assistance mandate") and (ii) to implement Court-Ordered reparations when a person is convicted in a specific case (so called "reparation mandate").[59] The first mandate is not linked to a conviction.[60] Quite contrary, the Trust Fund will provide assistance to victims and their families in a country's situation pending before the Court if and only if it is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[61]

---

54 All the legal texts of the ICC are available at https://www.icc-cpi.int/resource-library#legalTexts.

55 ICC Rules of Procedure and Evidence ("ICC Rules"), Rule 85 (a). Rule 85(b) includes "organizations.

56 ICC Statute, Art. 75-3: "Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States".

57 ICC Statute, Art. 75-6: "Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law".

58 ICC Statute, Art. 79; ICC Rules, Rules 98.

59 Regulations of the Trust Fund, Regulation 50; see also: http://www.trustfundforvictims.org/two-roles-tfv; ICC, Appeals Chamber, The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with Amended order for reparations (Annex A) and public annexes 1 and 2 ("Appeals Chamber Lubanga Judgment"), 3 March 2015, ICC-01.04/01/06-3129, para. 107.

60 http://www.trustfundforvictims.org/two-roles-tfv: "The TFV's assistance mandate enables victims of crimes (as defined in Rule 85 of the Rules of Procedure and Evidence) and their families who have suffered physical, psychological and/or material harm as result of war crimes, to receive assistance separately from, and prior to, a conviction by the Court. This assistance relies upon resources the Trust Fund has raised through voluntary contributions, and is distinct to reparations awards, in that it is not linked to a conviction. The key difference between the assistance and reparations mandates is that reparations are linked to accountability, arising from individual criminal responsibility of a convicted person, whereas the assistance mandate is not".

61 Regulations of the Trust Fund, Regulation 50 (a): ""For the purposes of these regulations, the Trust Fund shall be considered to be seized when:
(i) the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families; and
(ii) the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".

Under the second mandate, the Trust Fund may assist the Court in implementing reparations in two different ways. First, the Court may order (1) the Trust Fund to collect fines or forfeitures from a convicted person to provide reparations awards to victims[62] or that (2) an award for reparations against a convicted person is deposited with the Trust Fund where it is impossible or impracticable to make individual awards directly to each victim.[63] Second, where appropriate (most likely when the convicted is indigent) and upon a decision from the Trust Fund's Board of Directors, the Trust Fund may decide to make available some of its resources for the purpose of complementing the resources collected for an award for reparations ordered by the Court.[64] Such intervention however does not exonerate the convicted person from liability and he/she is supposed to reimburse the Trust Fund.[65]

It is worth noting that the Trust Fund has this mere particularity not to be an organ of the Court, although clearly its existence and mandate is intrinsically linked to the ICC. This explains that the Court has limited authority of the Trust Fund and that the Trust Fund considers itself as independent from the Court.[66]

Practice so far

As of September 2016, three cases are at the stage of reparations before the Court. The first one concerns Mr. Thomas Lubanga Dyilo, former leader of a Congolese rebel group (UPC/FPLC). In July 2012, he was sentenced to 14 years of imprisonment for war crimes of conscripting and enlisting children under the age of 15 years and using them to participate actively in hostilities.[67] Due to various procedural issues, including the Appeals Chamber's Judgment overturning the Trial Chamber's decision on reparations in that case, the issue of reparations is still under consideration. Thus far, 129 victims have filed application for reparations, but the main issue remains as whether other victims (and how many) should be considered for reparations. The second case concerns Mr. Germain Katanga, former commander of another Congolese rebel group (FRPI). In May 2014, he was sentenced to 12 years' imprisonment after being found guilty, as an accessory, of crime against humanity (murder) and war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on one village.[68] As of today, 304 victims, including one institution, have filed applications for reparations. The reparations are still under consideration but the parties have already filed related-submissions, at the Trial Chamber's request, including application forms for reparations and supporting material. The parties were further requested to file submissions on the monetary assessment of the harm caused to the parties (deadline is 30 Sept. 2016). While it is difficult to set a clear end date, one can say that this process is moving forward and that a Trial Chamber's order on reparations could be delivered in the first half of 2017 (which does not mean that reparations will actually be delivered in 2017 – this would depend on the Trial Chamber's Decision and whether appealed). The third case is against Mr. Jean-Pierre Bemba, President and Commander of the MLC (*Mouvement de Libération du Congo*), who was found guilty of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging).[69] On June 2016, he was sentenced to 18 years' imprisonment.[70] More than 5200 victims were authorized to participate to the trial proceedings and might be claiming for reparations. In July 2016, the Trial Chamber ordered the parties and the Trust Fund to file submissions on reparations in the case by Mid-September. The Chamber also granted interested organizations to file submissions on this same matter.[71]

Despite the time elapsed since the conclusion of the very first case before the ICC in 2012, the ICC remains at a very preliminary stage in defining the principles applicable to reparations. Although Article 75 of the Statute provides that the "Court shall establish principles relating to reparations", the Chambers' practice seems not standardized (yet?). Core issues remain to be clarified such as: how to determine the types of harm suffered and how to assess them, what evidence the victims are required to submit to prove the nature and the scope of their harm, who may benefit from reparations and how to proceed with applications (including whether indeed application forms should be filed in by each and every victim and what it should contain), what is to be considered as an "individual" or "collective" reparation.

---

62 ICC Statute, Art. 79-2.
63 ICC Rules, Rule 98-2.
64 ICC Rules, Rule 98-5 and Regulations of the Trust Fund, Regulation 56.
65 Appeals Chamber Lubanga Judgment, para. 115-116.
66 Appeals Chamber Lubanga Judgment, partic. para. 111-114 and 116.
67 Judgment 10 July 2012; upheld on Appeal: 1 December 2014.
68 Judgment, 23 May 2014.
69 ICC, Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343.
70 ICC, Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo, Decision on sentence p to Article 76 of the Statute, 21 June 2016, ICC-01/05-01/08-3399.
71 ICC, Trial Chamber III, The Prosecutor v. Jean-Pierre Bemba Gombo, Order requesting submissions relevant to reparations, 22 July 2016, ICC-01/05-01/08-3410; Decision on request to make submissions pursuant to Article 75(3) of the Statute and rule 103 of the Rules of Procedure and Evidence, 26 August 2016, ICC-01/05-01/08-3430.

In the first case before the ICC – the *Lubanga* case - , the ICC Appeals Chamber however sets out five core elements to be contained in an order for reparations under Article 75:

1) The order for reparations has to be issued in *all* circumstances against the convicted person, whether he/she is indigent or not.[72] Reparations are to be awarded based on the harm suffered *as a result of the commission of the crime* for which the person was convicted.

Consequences:

- Where the convicted person is acquitted on some charges, he/she cannot be held liable for redressing the harms resulting from these charges (the causal link between the crime and the harm is to be proven)
- Standard and burden of proof: The applicant shall provide sufficient proof of the causal link between the crime and harm suffered based on the specific circumstances of the case –
- Standard of causation: "but/for" relationship (but for the crimes committed, would the harm has occurred"
- The crimes must be the "proximate cause" of the harm for which reparation is sought

2) The order for reparations must establish and inform the convicted person of his/her liability with respect to the reparations awarded in the order;

A convicted person's liability for reparations must be proportionate to the harm caused and, inter alia, his/her participation in the commission of the crimes for which he/she was found guilty, in the specific circumstances of the case.

3) The order for reparations must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both.

The question arises as whether the Chamber shall examine individually each and every application and enter findings about the individual harm of each victim.

The Appeals Chamber ruled that where only collective reparations are awarded the Trial Chamber is not required to rule on the merits of the individual requests for reparations.

4) The order for reparations must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriated based on the circumstances of the specific case before it;

According the Appeals Chamber's ruling, the Trial Chamber must at least identify the harms caused to the victims by the crimes for which the person was convicted. This might include the types of harms suffered (material, psychological, physical prejudice) and the forms (such as loss of family members; loss of property, loss of chance (schooling), separation from family, and material loss due to the loss of family member's contribution).

Then, the extent of the harm is to be assessed either by the Trial Chamber itself or by the Trust Fund upon clear directions and criteria given by the Trial Chamber. This is to be done with a view to determine the appropriate size and nature of the reparation awards.

In that respect, question arise (and are yet to be solved by that ICC) as to how to prove the harm and how to assess it (use of experts, use of documents and which ones).

5) The order for reparations must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted. Thus according to the Appeals Chamber, a "community" may be considered for reparation only if it is proven that it is a group of victims.

The Appeals Chamber further specified that these principles are to be applied, adapted, expanded upon or added to by future Trial Chambers.[73]

---

[72] ICC, Appeals Chamber, The Prosecutor v. *Thomas Lubanga Dyilo,* Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with Amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01.04/01/06-3129 ("Appeals Chamber Lubanga Judgment"), para. 64-76.

[73] §55 AC Lubanga.

Relevant lessons learned and recommendations for the ICD

Under Rule 48 of the ICD Rules of Procedure and Evidence, the Judges may grant reparations to the victims of the crimes for which the person is convicted. In other words, Rule 48 (1) requires a conviction of the accused person and (2) a link between the crimes for which he/she is convicted and the harm allegedly suffered by the victims. Rule 48 also requires the proportionality and adequacy between the harm and the reparation.

In view of all this, the ICC case-law is certainly relevant and useful to the work of the ICD.

From the thus-far experience of and practice from the ICC, I would suggest very humbly the following recommendations to the ICD:

1) Include the issue of reparations from the outset into the judicial process and management (without prejudicing on the results of the trial/conviction or not). This will strongly assist the judges in the trial management and in anticipating on how address these new issues. This will further assist the victims in having a better view and understanding of what they can expect and what will be requested from them.

Particularly:

- From the outset of the proceedings, set out a procedural framework for participation and reparation, particularly as to victims' admission and applications and supporting material that the ICD could request (whether death certificates; proof of residence; proof of medical treatment).

- Ensure a continuous genuine, proactive and accessible information of the victims as to the case before the ICD (charges for which the person is prosecuted) and as to their rights (participation and reparation)

2) From the outset of the proceedings, consider defining core principles in adjudicating the matter, including standard of causation and standard of proof. In that respect, consider the context of the case (the material difficulties to bring evidence about certain facts) and consider adequately informing the victims as what they will need to adduce before the Court to prove their harm.

3) While different in nature, consider how to **adopt an integrated approach to reparation between court-ordered reparations and administrative reparations**.

Comparative experience: The experience in South Africa

By Mr. Allan Ngari, Researcher, Institute for Security Studies

Missed Opportunities and Unfinished Business: the South Africa Truth and Reconciliation Commission and Reparations

Introduction

In order to gain a full understanding of the reparations process in South Africa, I must point out that the South African legal system follows the common law legal tradition with certain aspects of the Roman-Dutch tradition. As a general rule, an individual who has suffered harm following from an offence recognised in the penal or other laws of the country, can move a court with jurisdiction in South Africa and claim for damages against the convicted person. This presentation does not address this practice of court-ordered reparations, but makes particular reference to the tragic history of apartheid South Africa and the reparations process for victims of apartheid and other violations of human rights from that period. While the courts are the logical starting point for pursuing such claims, South Africa went about it differently.

The transition from governance by apartheid to democracy entailed a negotiated settlement in South Africa. A part of that negotiated settlement included the establishment of a Truth and Reconciliation Commission (TRC) under the Promotion of National Unity and Reconciliation Act.

The journey towards reparations

The TRC was not a court as such but a different kind of forum set up to deal with political crimes committed during apartheid. It is through the TRC that a reparations process was envisioned for the young democratic South Africa – a process whose objective was to promote national unity and reconciliation. It is important to note that reparations schemes are favored when there is difficulty in pursuing civil suits to recover damages. They are also favored when the victims seeking reparations are so numerous that individual claims are impracticable, when certain deprivations have been sanctioned by the courts, or when other sources of compensation are inadequate. With the millions of victims of the apartheid government, it naturally follows that a reparations scheme would best serve the interests of the victims and the ends of justice in South Africa.

The TRC had three Committees of note. First is the Amnesty Committee, which had the power to grant amnesty (which means the perpetrator could not and cannot be prosecuted) for politically motivated crimes if fully and truthfully confessed, under certain conditions. Curiously, unlike in Argentina and Uruguay, there have not been many cases before South African courts challenging the amnesty provisions of the TRC, for purposes of obtaining reparations. In some cases in Argentina and Uruguay, the petitioners claimed that the legal consequences of the amnesty laws denied them the right to obtain a judicial investigation in a court of criminal law. The effect of the amnesty laws was that cases against those charged were thrown out, trials already in progress were closed, and no judicial avenue was left to present or continue cases. The petitioners before the Inter-American Commission of Human Rights alleged that the effects of the amnesty laws violated their right to judicial protection and their right to a fair trial, as recognized by the American Convention. The Inter-American Commission distinguished the petitioners' right to compensation for "the original or substantive violations" and the denial of justice that was "the legal consequence of the amnesty laws." Specifically, it found that the amnesty legislation was incompatible with the provisions of the Inter-American Convention on Human Rights guaranteeing the right to judicial protection and a fair trial. In consequence, it recommended that the governments pay the petitioners just compensation for those violations.

Somewhat in line with this thinking, the South African TRC recognised that in the South African context reparations were even more important to counterbalance the amnesty provisions for apartheid perpetrators. The problem with this is that the reparations process in South Africa did not unfold as intended. The granting of amnesty denied victims the right to institute civil claims against perpetrators and, therefore, the government had to accept responsibility for reparations. The one case that remains *locus classicus* on this question of reparations is the case of *Azapo and Others v The President of the Republic of South Africa and Others*. In this case, the Constitutional Court – the highest court in South Africa - stated that South Africa's transition should be understood on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation. This case was also instrumental in clarifying the obligations on South Africa to provide reparations to its citizens. Due to delays in implementing reparations in that country, there was an increase in friction between NGOs and

government, which appeared reluctant to follow through with the reparations process. In fact, the South African government began to conflate reparations with a developmental discourse – arguing that the provision of socio-economic services and infrastructure delivery to the poor constituted reparations. I am sure that many in the room will identify this argument as akin to Uganda's Peace, Recovery and Development Plan. There is an example of the role that courts can play to recalibrate the reparations process. Also, while the Supreme Court of Uganda has made pronouncements regarding amnesty, it could likely be that in the future, judges are faced with petitions that in preventing prosecutions, amnesty by its very nature prevent victims from pursuing their individual claims for damages from convicted individuals.

Back to the South African TRC, the second committee was the Human Rights Violation Committee (HRV Committee),which decided on acts, which constituted violations of human rights, based on statements made to the TRC. Once the HRV Committee identified victims of gross human rights violations, they were referred to the third committee –the Reparation and Rehabilitation Committee (R&R Committee), which decides on how to compensate victims. The R&R Committee is the most relevant one to our discussions. I assure you that unlike their acronym R&R Committee, their work was far from 'rest and relaxation'. Before I discuss this R&R Committee, there are a few things to say about the work of the HRV Committee in identifying victims.

There are approximately 22,000 victim-survivors identified by the HRV Committee. This does not reflect the reality. Large numbers of survivors did not come forward to the TRC for a variety of reasons – including a lack of access, ongoing security concerns, a lack of trust in the process, ignorance of the TRC or its deadlines for application and political interference. When the work of the HRV Committee closed, it became apparent that the lists of identified victims did not reflect reality; civil society began to lobby for the list to be re-evaluated. As a member of the civil society and having participated in some of the meetings of a coalition of South African NGOs working on reparations matters, I have to sadly admit that we are sometimes our own worst enemy. The divide was that some members strongly felt that the list of victims should be opened to reflect the reality; others felt that list should remain closed and that government should deliver on those already identified. Others still, wanted the lists to be done away with and a fresh list generated. After months of debates, consensus was to present to government a request to open the list of victims. Ultimately this request was denied by the Department of Justice and as a result individual reparations have been paid to only a section of an already limited grouping defined as 'victims'. My personal view is that there was room for judicial review of this matter, but this was not taken up.

The R&R Committee of the TRC presented a reparation and rehabilitation policy. Quite comprehensive in nature, it provided that there was a moral and legal basis for the provision of reparations. The moral basis for reparations is that: (i) victims of gross human rights abuses have the right to reparation and rehabilitation because of the many different types of losses they have suffered; (ii) victims need to be compensated in some way, because the amnesty process means they lose the right to claim damages from perpetrators who are given amnesty; and (iii) the present government has accepted that it must deal with the things the previous government did and that it must therefore take responsibility for reparation.

The legal basis for reparations is the Promotion of National Unity and Reconciliation Act. This Act says that the TRC must aim to: (i) make proposals for measures that will give reparation to victims of human rights violations; and (ii) rehabilitate and give back the human and civil dignity of people who suffered human rights violations.Providing legal redress to victims contributes to a process of reconciliation by recognizing state responsibility, by acknowledging the rights and interests of victims, and by raising public consciousness.

The R&R Committee made provision for urgent interim reparations. This was for people who need immediate assistance because of the gross human rights violations they suffered. It had also had recommended the payment of between R17,000 and R21,000 ($1,200 and $1,500) per year for six years to each "identified TRC victim" depending on their need. The amount recommended by the TRC was thus a total of between R102,000 and R126,000 ($7,200 and $9,000) per victim.The government, however, did not implement these recommendations, but instead paid out a "once-off, full and final payment" of R30,000 ($2,140) for each individual. While the budget recommended by the TRC to provide for reparation and rehabilitation measures amounted to some R3 billion, according to the government it allocated just over R1 billion ($70 million) under the title 'President's Fund'. R550 million ($39 million) was spent on the "once-off" payments, R260 million ($19 million) allocated towards health assistance, R110 million ($8 million) to housing needs, R500 million ($36 million) to community rehabilitation needs and R35 million ($2.5 million) to reburial costs.

In 2003, the TRC final report was completed and President Thabo Mbeki presented it to Parliament. This report and particularly recommendations around reparations remains wholly unimplemented

and not representative of the R&R Committee representations of the reparations policy for South Africa, the views of victims, victims' groups or civil society consulted in the process. The flawed reparations process in South Africa thus represents the 'unfinished business' and a 'missed opportunity' for true reconciliation in South Arica. This unfinished business has invited litigation in South African courts and for the majority of South Africans who were previously disadvantaged during the apartheid era, a deep sense of betrayal by the government. The victims of apartheid have generally remained true to this bargain – they have, by and large, traded in vengeance and retaliation but where are the reparations for these concessions?

The dissatisfaction with this process of dealing with reparations by government has also invited litigation courts outside of South Africa, notably in the United States. Discussions on the findings of these courts are hopefully instructive for our purpose here, at the very least for their comparative value.

Under the Alien Tort Claims Act of the United States, victims and relatives of victims of the apartheid regime sued several corporations for their involvement in South Africa in the period between 1948 and 1994. The plaintiff reasoned that they were liable because the police shot demonstrators "from cars driven by Daimler-Benz engines", "the regime tracked the whereabouts of African individuals on IBM computers", "the military kept its machines in working order with oil supplied by Shell" etc. The South African Government's response to the lawsuit was emblematic of their handling of reparations issue more generally. Penuel Maduna, the former Minister of Justice filed an affidavit with the court requesting that the case be dismissed on grounds that it interfered with South Africa's own reconciliation process and state sovereignty. The action only served to confirm the perception that South Africa's reparations policy and the rhetoric accompanying it have been more concerned with reassuring the business community and past beneficiaries than it was with securing justice for victims of the past. Ultimately the case in the Supreme Court was not in favour of the victims, but the lower courts made some findings which are key: Daimler, Ford and General Motors aided and abetted apartheid, torture and extrajudicial killing; IBM aided and abetted apartheid and arbitrary denationalization etc. General Motors entered a settlement with the victims of $1.5million before the decision of the Supreme Court was issued.

Conclusion

Suffice it to say, as others before me and others after me will posit – there is no cookie-cutter or prescriptive model for reparations. States and international institutions continue to grapple with adequately and effectively repairing the lives of victims and survivors of human rights violations and international crime. It is my firm belief that each state dealing with the past must approach the question of reparations in a way that is most relevant for those that by right must obtain reparations. I refrain from the use of the word "beneficiaries" because this word connotes, at least in my mind, the idea that victims are benefiting from reparations awards. Nothing could be further from the truth. There remains a critical role for the courts in Uganda to stymie executive reneging on the promise of reparations for victims, perhaps to shape the parameters for reparations schemes in conjunction with other stakeholders.

Open discussion (Panel 2)

Key issues emerging from the open discussions included the notion of reparation being tied to a conviction, the issues around the PRDP development strategy and reparations, procedures at the ICD and substantive rights of victims, role of civil society organizations and lack of political will.

During the open discussion, the participants felt that the notion of reparations being tied to a conviction limits the objective of reparations. It was noted that reparations are meant to deal with cases of mass atrocities. The law that government will put in place to govern reparation should do away with the need for a conviction. The discussants responded to this issue agreeing that the need for conviction limits court ordered convictions. Ms. Catherine Denis observed that it is very important to inform victims on what they should expect from the process. She noted that administrative reparation may be preferred by many victims. Dr. Musila observed that court should rely on experts to assess harm.

In relation to substantive rights of victims, Dr. Musila recommended that some more thought needs to go into impact statements and facilitating participation of victims in the process as a matter of right. There is need for broader legislative reforms to address the issue of substantive rights.

Reiterating the discussion in the opening session, the discussants and participants felt that there is need to distinguish development programs like PRDP from reparation. It is important to make it distinctly clear and draw clear parameters.

Dr. Musila's response to the question on political will indicated that it is important to address the reparation issues at the national level before moving to the regional level. He highlighted the challenges faced by the African Commission in handling reparation cases. He recommended that focus should be at national level.

Another question rotated around the role of civil society. The CSOs present were asked why they were not taking on an active role in holding the state accountable. There is need for civil society to be pro-active. The Honorable Justice Ezekiel Muhanguzi noted that civil society, mainly from Northern Uganda, had commenced an action against the state of Uganda, however the process stalled. He was of the view that CSO should have instituted a civil suit against the state of Uganda for reparations. Though the State of Uganda may not comply with the court orders, he noted that it would serve as a caution, deterrence and challenge to the state of Uganda. There is a failure on the part of civil society organisations to move court for interpretation on reparations. Civil society should be in position to bring a group action seeking for reparations on the basis of the state having failed to fulfil its obligation to protect citizens.

Two participants raised an issue of victims being paid twice in respect of the same loss. This may happen where the reparation process has both administrative and court ordered reparation programs. Dr. Norbert Wühler shared the experiences from Colombia where victims who received large administrative damages waived judicial reparation. This can be adopted for the case of Uganda. Dr. Musila observed that although these harms are often irreparable, courts will usually consider the question of proportionality in awarding compensation to a victim.

Panel 3: Reparation and development programs

Chair: Mr. *Lino Owor Ogora, Co-Founder and Director, Foundation for Justice and Development Initiatives (FJDI)*

Development programs in Uganda

By Ms. Patricia Bako, Program Officer, International Justice Program, ASF

Introduction

The conflict between the Lord Resistance Army (LRA) and armed forces of the Government of Uganda, (UPDF) left Greater Northern Uganda region in a poor economic state as the people could not engage in economic activities. As a result, the Government of Uganda and other development partners such as World Bank, European Union, United Kingdom Department for International Development and the Swedish International Development Agency undertook development initiatives that could support the region to recover from the economic stagnation. These developments comprised of funds that could support the area to recover from the effects of the conflict. This contribution paper will firstly provide for the basis of reparation at the international level. Secondly, it further discusses who is responsible for paying reparations and who is entitled to reparation. Lastly it will provide the development programs that the Government of Uganda has undertaken in Northern Uganda and it will analyze whether these form part of reparations.

Definition and legal basis for reparations

According to the Black's law dictionary, reparations is defined as "the act of making amends for a wrong and or compensation for an injury or a wrong."[74]

The definition of reparations goes way back to the Factory at Chorzow (German . v. Poland) case[75] where the Permanent Court of International Justice said that "it is a principle of International law that the breach of an engagement involves an obligation to make reparations in an adequate form." From the statement by the Permanent Court of Justice, one can rightly assert that reparation is an obligation of wrongdoing party to redress the damage caused to the injured party.

Under international law, reparation must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability, have existed if that act had not been committed.[76] As a result of international normative process, the legal basis to a remedy and reparation became firmly enshrined in the elaborate corpus of international human rights instruments, now widely accepted by States.[77] Among these instruments are the Universal Declaration for Human Rights (Ar.8), the International Covenant on Civil and Political Rights (Ar.2) and the International Convention on Elimination of all forms of racial Discrimination (Ar. 6). This principle is also set out in instruments of international humanitarian law and international criminal law, including the Additional Protocol I to the Geneva Conventions relating to the protection of victims of international armed conflict (Ar. 91) and the Rome Statute of the International Criminal Court (Art. 68 and 75). **Who is responsible to provide reparations? And who benefits from reparations?**

States are primarily responsible to provide reparations for violations of international human rights law or serious violations of international humanitarian law by State agents. This responsibility that

74 Bryan A. Garner (ED), Black's law dictionary, Ninth Edition, Pg 1413.
75 Factory at Chorzow (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 17 at page 29. (Order of Nov. 21).
76 http//redress.org/what-is-reparation (Accessed on 13-09 2016).
77 Office of the United Nations high commissioner for human rights: Rule of law tools for post conflict states, reparations program. United nations, New York and Geneva 2008.

makes it an obligation for States to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from: (*a*)Treaties to which a State is a party; (*b*) Customary international law; (*c*) The domestic law of each State.[78] A State can be seen to have taken measures to be reparative, when it acknowledges wrongdoing and recognizes harm.[79]

In addition, it is not only the duty of the State to pay reparation but rather also a person. A legal person or any other entity found liable for committing gross violation of human rights may be ordered to pay for reparations or compensate the State if it has already paid for the reparations.[80] UN Basic Principles on Reparation number16 further provides for a duty by the State to establish national programmes for reparations to victims in situations where the parties liable for harm suffered are not in position to meet their obligations due to unwillingness or inability to do so.[81] Although these guidelines are not binding on a State, they do offer guidance to the State on how to address the issue of reparations.

The Agreement on Accountability and Reconciliation between the LRA and the Government of Uganda ("Agreement") under clause 9 provides for aspect of reparations. It mentions that reparation will be paid to a victim as part of penalties and sanctions in accountability proceedings. [82] However, the Agreement does not provide for who would pay for the reparations. In order to give effect to the Agreement, the Implementation Protocol to the Agreement on Comprehensive Solutions was signed in which it was agreed that the Government of Uganda would establish a special fund for victims through which reparations would be paid including reparations that would be ordered to be paid by an institution established by the Government.[83] This clause does not state per se that it is the duty of the Government to provide for reparations but rather it is implied in the interpretation of the clause.

In terms of who benefits from the reparations, it is clearly the victims of gross human rights violations.[84] International human rights law recognizes that victims of State violations of human rights have the right to reparations by the State.[85] A State may be liable for human rights abuses by non-State actors if it is established that it failed to take steps to protect the victims in question.

Victims are defined 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.[86] Therefore, they are entitled to a) equal and effective access to justice b) adequate, effective and prompt reparation for harm suffered and c) access to relevant information concerning violations and reparation mechanisms.

Forms of reparations

The major forms of reparations provided for by the Basic Principles and Guidelines on the right to remedy and reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law. These forms include restitution, compensation, satisfaction, rehabilitation, guarantee of non repetition.[87] The paper will not discuss these forms in depth as it is not the focus of the discussion.

Perceptions on reparations in Northern Uganda

The type of reparation appropriate to remedy the harm suffered differs depending on the individual circumstances. This was also stated in 2007 when civil society organizations in Kenya made an important statement on the particular factors to be considered in providing reparations to women and girls harmed in the conflict in the Nairobi Declaration on Women's and Girls' Rights to a remedy and reparations.[88] As such it is important when developing any reparations to ensure that they are

78 Obligation 1 of the Basic Principles and Guidelines on the right to remedy and reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law. Adopted and proclaimed by the General Assembly resolution 60/147 of December 2005.

79 ICTJ briefing paper September 2012, Reparations for Northern Uganda: Addressing the needs of victims and affected communities.

80 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, UN General Assembly Resolution A/RE/60/147 Principle 15, herein after referred to as 'UN Basic Principles on Reparations' http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx (accessed on 12-9-2016).

81 See n.9 above Principle 16.

82 Agreement on Accountability and Reconciliation between the Government of Uganda and Lord Resistance Army / Movement, Agenda Item Number 9 (3) , http://www.amicc.org/docs/Agreement_on_Accountability_and_Reconciliation.pdf (accessed on 12-9-2016).

83 Implementation Protocol to the Agreement on Comprehensive Solutions, Clause 28, http://www.peaceau.org/uploads/northern-uganda-comprehensive-solutions.pdf (accessed on 12-9-2016).

84 See n. 9 Obligation 8,9 10 and 11.

85 See n. 9.

86 See n. 9 Obligation 8.

87 http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx.

88 http://www.redress.org/what-is-reparation/what-is-reparation (Accessed 13-09-2016).

victim centered and they are involved in the development and implementation of any reparation program. This will greatly contribute to a sense of ownership and perhaps also to the idea of satisfaction from the victims' point of view.

Furthermore, cultural briefs have also impacted on the victim's perception on reparations. In some cultures active participation in the criminal proceedings may be essential whereas in others, the admission of guilt by the wrong doer will be most important. In some contexts, the fact that one can never undo what was done or make adequate reparations may mitigate against reparations, whereas in others the symbolic effect is seen as extremely beneficial.[89] In Greater Northern Uganda, the victims have often looked up to the Government for reparations in form of compensation for its failure to protect the victims from the violations their faced during the conflict. [90] During the consultation that was carried out by Justice and Reconciliation Project and Institute of Justice and Reconciliation in Acholi/ Lango sub-region, one of the respondent note; '*Government should compensate victims and community members because as citizens of Uganda, it was their duty to provide security to us. So because the Government didn't provide security, it's their role to compensate us*'[91] From this consultation what stands out clearly is the victim are aware that it is the duty of the Government to ensure that reparations are paid but what is interesting is that the victims seem not to understand the reparations per say to occur there must be some form of acknowledgment for the wrong committed and the need to address the harm caused.

The development programs in Uganda

There have been a number of development programs that have been undertaken by the Government of Uganda. Among such include the Northern Uganda Social Action Fund (NUSAF) I and II and the Peace Recovery and Development Plan (PRDP) I, II and the yet to be implemented PRDP III. There have been other programs such as Karamoja Integrated Development Programs, Karamoja Livelihoods Programs and Agricultural Livelihood programme. However, the focus of this paper will be NUSAF and PRDP programs. These programs were or are carried out in previously conflict affected areas and those that are politically sensitive areas. The paper will highlight these programs in depth and what they have been able to achieve and what have been the challenges with the exception of PRDP III which has just been adopted by the Government.

- **Northern Uganda Social Action Fund (NUSAF I)**

The Government of Uganda with support from the International Development Association (IDA) implemented the Northern Uganda Social Action Fund (NUSAF 1) project from 2003- 2009 with the purpose of improving the socio-economic conditions of the people in Northern Uganda and ensuring the improvement in service delivery in the region.[92] During its six years implementation period, it has been reported that NUSAF 1 project was instrumental in creating a platform in which communities became active players in ensuring decentralization of service delivery. Further, it strengthened transparency in local government service delivery processes in the region.[93] NUSAF I was criticized for not reaching the beneficiaries that it was intended for and as such resources ended up in the hands of those with power or to the most influential in the community who could develop good project proposals.[94] There was also an issue of lack of accountability of funds received on behalf of the sub projects and as such this greatly affected the implementation of the project.[95]

- **Northern Uganda Social Action Fund (NUSAF II**)

This Fund had a purpose of improving the access of beneficiary households in Northern Uganda to income earning opportunities and to better the access to basic socio- economic services. The NUSAFII had three components: the livelihood investment support, community infrastructure rehabilitation, institutional development. It ended on 29 February 2016.[96]

In terms of livelihood investment support, the emphasis was on supporting the communities to come up with income generating activities and also provide them with skills that would help them in creation of self employment. For the community infrastructure rehabilitation, this was intended to ensure the rehabilitation of community infrastructure so as to improve access to basic socio-economic services such as rehabilitation of schools, hospitals, community water points, health

89 See above n.17.
90 Lindsay M and Allan N , Pay Us so we can Forget, reparations for victims and affected communities in Northern Uganda, JRP-IJR Policy Brief No 2, August 2011; (accessed on 12-09-2016) http://www.ijr.org.za/publications/pdfs/JRP%20IJR%20Policy%20Brief%20Reparations.pdf (accessed 12-09-2016).
91 See foot note 19 above, respondent JRP-IJR victim consultation in Acholi/ Lango , 1-2 December 2010.
92 http://opm.go.ug/assets/media/resources/18/NUSAF%20II-Operations%20Manual.pdf (accessed on 5/4/2014).
93 See n.21.
94 Tonny Okwir'The reason behind the NUSAF Project phase one in Uganda' January 15 2012, https://okwirtonny2011.wordpress.com/2012/01/15/reasons-behind-the-failure-of-nusaf-project-phase-one-in-uganda/ (accessed on 5-9-2016).
95 See n.23 above.
96 http://www.worldbank.org/projects/P111633/second-northern-uganda-social-action-fund-project-nusaf2?lang=en (accessed on 5-4-2016).

centers and basic solar lighting system. To implement this component, grants were provided by the World Bank through the Government of Uganda. The last component focusing on institutional development focused on financing activities at national, district, sub-county and community level so as to improve accountability and transparency in the use of the project money.[97] This project had been designed to feed into the PRDP with the aim of rebuilding and empowering communities.

- **Peace Recovery and Development Plan (PRDP I and II)**

In order to improve the security situation in Northern Uganda, the Government of Uganda and its partners established the PRDP I to provide for a framework of reconstructing Northern Uganda after the conflict. The plan covers some districts in Northern and Eastern part of the country. The purpose of the plan was to strengthen coordination, supervision and monitoring of development programs in Northern Uganda. It further focused on stabilization of peace so as to regain and consolidate peace in the area. This program lasted for three years. PRDP I and II majorly focused on infrastructural development and little effort was put into the inter-communal systems. It has been argued that this mandate of these PRDPS was centered on hardware (development programs) and neglecting the software component of the needs of victims that directly benefits them per se.[98]

After the expiration of PRDP I, the government undertook the next phase of developing PRDP II. This was after a meeting was convened by the Office of the Prime Minister with the Policy Monitoring Committee in which it was highlighted that more efforts needed to be taken, in order to ensure that Northern Uganda is at par in terms of development with other regions of the country.[99] It was reported that PRDP II was able to contribute towards rebuilding physical security, health, education and construction of water sources.[100]

- However key challenges of PRDP II as was pointed out by the Office of the Prime Minister (OPM) which plays an over sight role of monitoring the implementation of all the PRDP programs have been inadequate staffing, low absorption of funds by the local government at the different districts, issue of reporting which is not in line with the funds received and non functioning of the investment received by the people.[101] It is important to note that the problem of accounting for the funds received was a major issue in the OPM as they were many corruption instances reported between 2012 and 2013 which led to number of donors withdrawing from giving financial support towards the programs. [102] This program ended in June 2015 and as such the Government undertook to develop PRDP III as it shall be discussed below.

- **PRDP III**

PDRP III is the Government's additional efforts to the PRDPI and II as a way of consolidating all the achievements in the earlier two programs. Unlike the previous PRDPs that was geared towards resettling of Internal Displaced Persons and infrastructural development, the PRDP III will be mainly focused on livelihood improvement by supporting household initiatives to improve their income. The PRDP III has three strategic objectives; firstly consolidating peace which will address issues such as transitional justice, reconciliation, reintegration, elimination of gender based violence and dispute resolution; secondly there will be focus on development of the economy with thematic areas such as access to finance, access to land, house hold income enhancement, and skills development among others. Thirdly, it will contribute to the reduction of vulnerability and it will address issues under critical health care services, completion of quality education and resilience to issues of climate charge. It is hoped that this phase will be more beneficiary to the people and it will be able to achieve all its objectives as provided for in the plan.

Are these programs part of reparation in Uganda?

The developments programs that are being implemented in Greater Northern Uganda are not part of reparation program but rather recovery programs. The programs have been premised on the need to rebuild the region and as such the Government made it a priority to put in place measures with a purpose to improve the economic and social set up of the region. It is important to note that if these programs were considered as reparations, then it would called for some form of accounting for the harm suffered during a conflict and providing remedies in that regard. In addition, it would require some form of acknowledgment and acceptance of responsibility on the side of the Government or perpetrator which has to be connected to the aspect of truth, justice and guarantee

97 See n. 25 above.
98 http://refugeelawproject.org/files/ACCS_activity_briefs/Are_We_There_Yet_%20ACCS_PRDP_III_Briefing.pdf (accessed 5-9-2016).
99 See n.23.
100 2 See "We Saw What was Done but Our Will was not Done: Assessing the impact of the impact of the Peace, recovery and Development Plan1 in Northern Uganda. ACCS PRDP II Baseline Survey June 2013. Available at http://www.refugeelawproject.org/files/ACCS_activity_briefs/RLP_PRDP_II_baseline.pdf (accessed on 13-9-2016).
101 See n .29.
102 See n. 29.

of non-reoccurrence.[103] In all these government programs, there is no acceptance of responsibility on the side of the Government and the programs are not implemented so as to ensure justice or truth but rather they are implemented so as to support the region of Northern Uganda in terms of development to be able on the same equal footing as other regions.

In addition, NUSAF and PRDP programs as discussed above have experienced high levels of corruption in terms of who benefits from these programs. It has been reported that the determination of who benefits from the programs has often been based on personal interest from the people in the control of the program.[104] In addition, it has been noted that these program lacked community involvement which affected their implementation and not in line with the dire needs of the different communities.[105] It is important to ensure that in any reparation program victims are not only perceived as victims but also as rights holders so as to achieve social integration and reconciliation.[106] The government programs are generated or developed without the consent of or involvement of the victims. These programs are only brought to the northern region with no other thing remaining for the victims to get involved in but only to implement them. These programs do not take account of the situation of victims in line with the UN basic Principles.[107] Clearly one can urge that from the way these programs are developed and implemented, they cannot qualify to be considered as reparation program in the sense.

Furthermore, these government programs are not in line with the principle of proportionality applicable in international law in compensation for gross violations for human rights.[108] This is provided for under UN Basic Principle on reparations number 15,[109] that reparations should be proportional to the gravity of the violation or harm suffered.[110] from the above provision of the law that the author is of the view that the government programs are not directly proportional to the harm suffered by the people in the greater northern Uganda more especially in the fact that it does not address individual harm caused during the conflict and in any case they are not reparation mechanisms More so, Programs like NUSAF and PRDP do not clearly mention the harm they are aimed at repairing and as such this cannot be considered as reparations.[111]

It was also important to ensure that there is a casual link between the violation, harm suffered and reparation sought. In terms of the UN Basic Principle on reparation number 15, it is highlighted that a state shall provide reparations if the acts or omission can be attributed to the State. However for all this to happen, there must be some form of acknowledgement of the harm suffered from the side of the State which has not happened yet in Uganda. Therefore, these developments programs cannot be considered as reparations for this specific reason.

Conclusion

It is important to recognize the programs undertaken by the government of Uganda in the different regions of the country especially post conflict and politically sensitive areas. However in doing so, there is a need to draw a line between reparation and the services that the Government is providing for the people in the regions which it is meant to do. It is hoped that once the reparation policy for the serious violations committed in Uganda is put in place, it will probably provide for the guidelines on how reparations will be provided rather than simply guessing that the service delivery to the people in Northern Uganda is reparation. In addition, these services are not only provided in Northern Uganda but in other regions as well. Therefore one cannot argue that these development programs are only being given to the people in Greater Northern Uganda who were affected by the conflict between the Lord Resistance Army and the Uganda Peoples' Defence Force.

103 United Nations General Assembly report by the Special Rapporteur on promotion of truth, justice, reparations and guarantee of non-reoccurrence during the sixty- nine session, Agenda Item 68 (b) paragraph 11.
104 Jessica Chirichetti , Transitional Justice and its Role in Development in Post-Conflict Northern Uganda; spring 2013 http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2547&context=isp_collection (accessed on 12-9-2014).
105 See above.
106 See foot note 32 paragraph 9.
107 Principle 10 UN Basic Principles Available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx (Accessed 14-09-2016).
108 Octavio Amezcua-Noriega, Reparation principles under International Law and their possible application by the International Criminal Court: some reflections. Briefing paper No.1 (2011), Pg 5
109 UN Basic Principles, Principle 15.
110 See The report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, in accordance with Human Rights Council resolution 18/7, (accessed on 10-25-2016).
111 See n. 35.

Comparative experience: The experience in Kenya

By Dr. Godfrey Musila, Researcher, Commissioner, UN Human Rights Commission for South Sudan Geneva

Introduction

- Increasingly, the relationship between reparations and development elicits interest particularly from practitioners and policy makers operating in the field of reparations for mass atrocities. The need to interrogate the link between reparations and development arises out of necessity: practitioners, policy makers, development partners, victims' organizations are often confronted with arguments raised by States that they lack financial resources to implement meaningful reparations programs to benefit victims of core international crimes and serious human rights violations. While some countries confronted with demands for action by victims acknowledge victimization but then cite resource constraints while pointing to broader developmental needs, other states make no such connection even when implementing development programs that benefit victims.

- In this brief presentation, I conduct a general discussion and sketch the key arguments while proposing what I think are the key conceptual linkages between development and reparations that policy makers should explore when thinking about both concepts in practical ways with a view to maximizing benefits that can be derived by such an approach.

Definition and distinguishing reparations and development

- For our purposes, "reparations" is a composite term that encapsulates all the measures taken to remedy a human rights violation, and typically include five categories of measures: compensation, restitution, rehabilitation, satisfaction and guarantees of non repetition.[112]
- To further clarify the meaning of reparations, the term must be distinguished from two related terms – assistance and development – which in varying degrees can be said to yield the same social goods for victims.
- Assistance, which refers to programs that may be packaged as development projects, humanitarian relief, aid initiatives or subsidies that may be undertaken to address the needs (not injuries suffered) of victims of crime and human rights violations without establishing responsibility for the wrongs that necessitate assistance.
- Assistance programs may be instituted by a government that is unwilling or unable to investigate and assign responsibility for crimes but finds it expedient to address (at least some) concerns of victims. Assistance programs thus focus on the *needs,* rather than *rights* of victims. The fact that such programs are instituted 'in solidarity' with victims, who may not be recognized as such, means that no claim can lie as of right against any individual or government agency.[113] Reparations, which is anchored on the *rights* of victims require the establishment of the liability of the perpetrator as well as the identification and consequently recognition of victims, who is entitled to make claims, is recognized by the court.
- For its part, development, refers to the totality of processes and measures undertaken by government to grow the economy, generate wealth and thus expand access to social services and goods in general to the greatest number of its citizens as possible. One commentator has defined development as

> "… the process by which a society increases the general and individual prosperity and welfare of its citizens, building the infrastructure and institutions necessary to ensure its members the most fulfilling life possible, or at least a minimum level of income or livelihood for a life with dignity." [114]

---

112 See Basic Principles and Guidelines on the Right to a Remedy, 2005; for a discussion in comparative perspective, see Godfrey Musila, Rethinking International Criminal Law, Chapter 6.

113 On the difference between assistance and reparations, see Peter Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' International Journal on Transitional Justice 2016 10 (1): 88-107 doi:10.1093/ijtj/ijv031.

114 Naomi Roht-Arriaza and Katharine Orlovsky. 'A Complementary Relationship: Reparations and Development. Research brief of the International Centre for Transitional Justice (July 2009) available at https://www.ictj.org/sites/default/files/ICTJ-Development-Reparations-ResearchBrief-2009-English.pdf (accessed on Aug 1, 2016).

Conceptual linkages between reparations and development

- Reparations and development are interrelated but different concepts. While reparations programs are targeted at particular victims of crime of human rights violations, development programs are for the common economic and social welfare of all people in a polity, although economic growth does not necessarily yield equal distribution of wealth as sometimes, only a few benefits from it.

- Given that deprivation and poverty are often the result of victimization of particular individuals and groups and that material lack in general is one of the root causes of conflict that results in human rights violations and crime, the complementary relationship between reparations and development appears self-evident. Commentators argue that development efforts impact reparations outcomes and that conversely, individual and collective reparation efforts may have spill over effects on aspects of development. [115] It has been suggested that benefits may be derived in encouraging cooperation between actors around reparations and development, and that where there is greater participation of donors in post conflict development programs than in funding reparations, cooperation between development actors and those involved in reparations could portend benefits for the latter, including sourcing of funds and maximizing impact or reparations program.[116] In post conflict situations, or in situations of mass atrocity, development partners should therefore factor reparations into development programs.

- Development can be seen as a context in which reparations claims are adjudicated by courts or determined by other bodies. While entities including courts that adjudicate claims relating to reparations are not economic policy makers, the economic status of victims or more aptly the state of want of victims is a concern with which they are invariably confronted and must address, particularly in mass atrocity situations. This often reflects, or should reflect, in the types of reparations ordered, with communal reparations being fashioned to address or call attention to the marginalization of victims from economic development. The modalities chosen by the court, commission or reparations fund therefore can serve as a link between reparations and the wider idea of economic development. In South Africa, development projects are being implemented among designated victim communities to improve access to infrastructure, health facilities and housing. Rwanda's *Fonds d'Assistance pour Rescapés du Génocide* (FARG) has a similar objective.

- *Development as social economic rights*: Although development in context of the African Human Rights system, is protected and seen a right (see article 22 African Charter on Human and Peoples Rights)[117], the recognition of such a norm is unmatched in practice and development is seen primarily as 'what governments do' rather than an enforceable right of citizens. This notwithstanding, marginalization or even more narrowly economic marginalization essentially means deprivation of or lack of access to social-economic goods understood as rights (which entail obligations for the state). Possibilities are opened up when one bundles the benefits of development as rights – in these case, social economic rights to water, health, education, housing (land), food and social security– which victims can claim as such within a developmental context. Victims of violations can thus sue the state for access to water or health, where the law provides for such a possibility whether reparations programs that seek to address specific violations are adequate or not.

- Both reparations and development programs can *deliver social goods for victims*, and because lack of development (underdevelopment) is a root cause of conflicts that generates victims of human rights violations, the linkages between these two concepts appear self-evident. Indeed, it often the case that past victims of human rights violations operate on the fringes of social and economic life of their countries in part because they lack means to participate or that one of the violations they suffer is exclusion from socio-economic life. The Inter-American Court, which has developed an extensive jurisprudence on reparations, has often made orders pertaining to socio-economic development, obliging states to undertake specific developmental measures disguised as communal reparations in favor of victims. In *Plan De Sanchez v Guatemala*, the Court ordered the state to implement within five years, various development projects (in addition to the public works financed by the national budget allocated to that region or municipality): maintenance and improvement of the road systems; sewage system and potable water supply; supply of teaching personnel and; the

115 Roht-Arriaza and Orlovsky, p 2.

116 UNWomen and UNDP, 'Reparations, development and gender' report of a consultation held in Kampala, Uganda on December 1-2, 2010 available at http://www.unwomen.org/~/media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06A-Development-Gender.pdf (Accessed on July 20, 2016).

117 Article 22 provides that: 1) All peoples shall have the right to their economic, social and cultural develop- ment with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

establishment of a health center in the village of Plan de Sánchez with adequate personnel and conditions.[118] In Uganda, the Peace, Recovery and Development Plan launched for Northern Uganda by the government in 2009 was not sold as a reparations program, but rather, a development program for the war ravaged region of Uganda. It was borne out of the need, as conceived by the Juba Peace Agreement, to provide access to services to people in war ravaged and impoverished Northern Uganda and as a basis for economically reintegrating in Uganda, a region long isolated and 'left behind'.

Conclusion

In view of the suggested links between reparations and development, policy makers, CSOs and particularly victims groups should seek to leverage the development policies, especially those aimed at spreading economic and social goods to marginalized groups to benefit victims who often occupy the fringes of society. In a context where reparations programs – communal reparations are to be implemented – policy makers should link such with development programs, an approach that proffers various benefits. First, the language of rights and the human rights based approach applicable to reparations can be extended to development programs thus enhancing participation and accountability of the state to victims and beneficiaries. Second, one can maximize the benefits of reparations programs to include more beneficiaries or add value to reparations. For instance, where a skills development program is implemented for women and girls that suffered SGBV (as reparations), they would gain more if the government and development partners implemented development programs that enhance access to credit, markets (eg infrastructure), create a conducive environment for SMEs to thrive in the communities where these women live. Third, selling reparations programs alongside development – or in fact justifying implementation of development programs in an area or region because residents were victims of massive violations of human rights – has the same effect as communal reparations, even when the language of rights is not used by government.

[118] Case of the Plan de Sánchez Massacre v. Guatemala, Judgment of November 19, 2004 (Reparations) available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_116_ing.pdf (Accessed on 20, August 2016) para 110. See also orders of the court in Case of Aloeboetoe et al. v. Suriname, Judgment of September 10, 1993 (Reparations and Costs) available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_15_ing.pdf (Accessed on July 22, 2016).

Comparative Experience: The experience in Tunisia

By Ms. Magda el Heitem, Project Officer, Transitional Justice Program, ASF
Reparations and development programs – The experience in Tunisia – Magda El Haitem

Introduction

Tunisia's transitional justice process is based on the feature that serious violations of human rights have been committed not only because of ideological reasons, but also because of a desire to protect and ensure personal interests of a small group of people. This policy has implied major development's inequalities between regions and conducted to the marginalisation of interior regions. Evidence of this policy can be found in the extreme centralization of the Tunisian economic system and the exportations-based economy, focused on the development of the coast. The economic system was also based on corruption and cronyism which allowed a small group of people to access to ownership and exploitation of natural resources, and excluding some communities from the exploitation of those resources. This policy has led to major disparities in the development of certain regions (their marginalization), and between different parts of the population.

As numerous studies (notably those published after the revolution) show, Tunisia was marked for many years by major and persistent disparities between some governorates at the level of human, social and economic development. The high rates of unemployment, especially in the regions (where, for example, the rate is up to 29% in Kasserine)[119], access to basic rights in marginalized/ excluded regions (as access to water, healthcare, education) and economic disparities between regions have been at the core of the revolution.

Claims for transitional justice in Tunisia are therefore not only related to violations of civil and political rights. They are also raised in terms of economic and social rights, fight against corruption, and equal economic and development opportunities. The 2011 revolution in Tunisia started with claims on economic rights, especially in the regions that have been marginalized. One of the biggest challenges of the Tunisian transitional justice process is thus to deal with reparations to face claims relating to economic rights. As pointed out by Pablo de Greiff, Special Rrapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, there is need for a specific approach to transitional justice in Tunisia, more oriented towards issues of development and involvement of economic and social rights.[120]

Considering systematic marginalization and exclusion at the core of the Tunisian transitional justice process

The debates on transitional justice in Tunisia has started just after the Revolution and one of the most challenging issues was to establish a process to redress disparities between regions through a reparation program but also through establishing guarantees of non-recurrence. The legislators of the transitional justice law decided to place the region at the core of the process. Article 10-3 of the transitional justice law specifies that the definition of victim "includes any region having suffered from systematic marginalization or exclusion."

a) Mandate of the Truth and Dignity Commission

With a view to determine these regions as victims, the Tunisian legislator established in 2003 the Truth and Dignity Commission (TDC) within the framework of the transitional justice process in Tunisia. Its mandate covers the period between July 1st, 1955 and December 24th, 2013. According to the transitional justice law, the TDC's mission is essentially to reveal the human rights violations

committed during the aforementioned period, to identify the responsible parties and, to a further extent, establish the truth based on the objectives of the transitional justice law, to contribute to national reconciliation, to guarantee non-recurrence and finally to contribute to the establishment of the rule of law.

Considering the specificity of the Tunisian context, article 10-3 of the transitional justice law recognizes the marginalization or exclusion suffered by regions by declaring them as "victims". This

[119] Regional Development Indicator, July 2012. p. 17 (emphasis added) https://www.fichier-pdf.fr/2013/03/23/tunisie-indicateur-developpement-regional/tunisie-indicateur-developpement-regional.
[120] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, P. de Greiff, 9 August 2012, A/HRC/21/46, §17.

qualification aims at taking the adequate measures to ensure that such a situation is never to arise again and to address the marginalization and exclusion suffered by a region.

According to the law, the TDC is in charge of elaborating programmes for reparations, but also drafting recommendations and proposals to the authorities to ensure non-recurrence of past violations and to take into consideration individuals rights, "*in particular women and children's rights as well as the rights of those with special needs and vulnerable groups*"[121]. These programs of reparations also apply to the situation of Regions as victims.

To fulfil its mission, the TDC can receive files, complaints and motions. Broadly speaking, it may rely upon any measure or mechanism likely to help reveal the truth within the framework of the transitional justice objective of the transitional justice law and, thus, including as to the regions that suffered from systematic marginalization or exclusion. As of September 2016, 30 files concerning regions were filed with the TDC, including the very first one filed by ASF and Tunisian Forum for Economic and Social Rights regarding the region of Kasserine[122].

b) Definition of marginalization and exclusion

The Tunisian transitional justice law does not define marginalization and exclusion. These concepts are however defined at the international level (including by the UN).

Marginalization can be defined as a form of acute or persistent distinction, discrimination or disadvantage, which compromises the group opportunities in life; and derives from social, economic or political processes. The social, economic and political process or processes do not need to necessarily aim at creating this distinction, discrimination or disadvantage. They may merely produce it, albeit inadvertently. The distinction, discrimination or disadvantage shall show a certain persistence and ability to affect the group's opportunities.

Exclusion is a process which leads to the prevention of some people from having access to services or rights, namely access to employment or a decent income, education; participation in power and decision-making that has an impact on their daily life.

According to the law, **marginalization or exclusion** shall be **systematic**. The adjective "systematic" indicates the severity and structural quality of marginalization or exclusion. It is not about addressing marginalization or exclusion which is momentary or relating to factors such as the overall economic context or the geographic or climatic situation of a region.

The **violation of social and economic rights (ESR)** in itself is not required to establish the systematic marginalization or exclusion of a region. It may, however, constitute an item of **proof** that marginalization or exclusion is occurring.

c) Use of indicators to show that a Region suffered from systematic marginalization or exclusion

To address the marginalization and exclusion of regions, the first step is to look at the situations between regions to determine whether there is a marginalization or exclusion. The issue is how to measure objectively the existence of a marginalization or exclusion. For this purpose, based on comparative experiences (including before the Kenyan Truth and Reconciliation Commission), the use of socio-economic indicators helps to objectively compare the status of a region to the national situation and to other regions' statuses and to determine the existence of disparities, their extent and their persistence. From the analysis of these indicators, it will then be possible to determine the existence of disadvantages or discriminations or lack of access to rights or services in order to establish a systematic marginalization or exclusion.

In the case of the regions of Tunisia, 3 indicators were found particularly relevant:

- Human Development Indicator ("HDI").
- the Human Poverty Indicator ("HPI").
- Regional Development Indicator ("RDI") designed by the former Tunisian Ministry for Regional Development and Planning which provided for an analysis of four thematic indexes at the governorate's level. (knowledge, wealth-employment, health-population and justice-equity.)[123]

---

121 Transitional justice law, article 43; see also article 67(2) of the Transitional justice law providing that these suggestions and formulations shall be included in the collective and final report of the TDC.

122 ASF/FTDES, Request to declare the region of Kasserine as "victim" filed on the 16 June 2015 with the TDC, http://www.asf.be/blog/publications/the-press-file-on-the-kasserine-victim-region/

123 MRDP Report, The Regional Development Indicators, November 2012, pp. 2-3. http://www.mdci.gov.tn/fileadmin/Conference_presse/Strat%C3%A9gie%20de%20d%C3%A9veloppement/Diagnostic%20strat%C3%A9gique/Indicateurs%20de%20d%C3%A9veloppement%20r%C3%A9gional.pdf.

These indicators consider the following rates:

- The unemployment/employment rate, rate of qualified workforce, the concentration of businesses (and their types), the private/public investment rate.
- The poverty rate.
- The rate of infant mortality, average life expectancy, the number of hospitals or healthcare centres per capita, the number of qualified doctors per capita.
- The illiteracy rate, the enrolment rate in elementary and secondary schools, the level of school facilities.
- The level of public infrastructure, including access to electricity, telecommunication, drinking water, sanitation networks, quantity and quality of roadways.
- The scale of equality (or inequality) between men and women.

The analysis of these indicators helps identify discriminations, disadvantages and/or deficiencies a Region was subject to. Then, to conclude that there is a marginalization or exclusion, there is need to establish that these discriminations, disadvantages or deficiencies are the result of institutionalized (social, economic or political) processes. They are neither the result of chance nor of an economic downturn.

Treating marginalization and exclusion via reparation programs

By extending the concept of "victim" to regions having suffered from systematic marginalization or exclusion in Tunisia, the transitional justice law aims at establishing the truth on those situations and at making sure that this marginalization or exclusion will be treated and will not be repeated. Therefore, development programs have to take reparations into consideration to target marginalized regions and to conduct special policies in line with the status of victim.

In that respect, it is noteworthy that breach to ESR can be a cause and a consequence of the marginalization, direct or not, and implies specific reparations on the short and long term. But ESR violations are only one of the causes of marginalization of the regions. So, to establish a global reparation program, all the causes of the uprising have to be taken into consideration, individual and collective, short and long term, adapting to the changing context, to make sure that ESR are not considered as only one root of reparations.

To determine and implement the adequate and proportionate measures that shall redress the marginalization or exclusion suffered by a region, it would be appropriate to adopt a methodology that consists in:

Addressing the causes of marginalization and exclusion to develop and implement a coherent economic policy

The analysis of the marginalization and exclusion processes helped shed light on the role of the successive economic policies in Tunisia, the discrepancy between the official discourse and the efficient measures taken to combat the regional disparities, the highly centralized power, the favouritism of investment in specific regions, the bad governance, the cronyism as well as corruption.

The effective involvement and participation of the regions in the decision-making process and in determining all economic policy will be essential to prevent the repetition of past mistakes due to inadequate economic policy. Such an approach will also offer stronger guarantees the non-recurrence of marginalization or exclusion. In that respect, reference to the 2014 Tunisian Constitution (particularly its Article 131 article) will be particularly relevant. This Constitution promotes decentralization, positive discrimination and participatory democracy to give more power to the regions. The decentralization process is still pending for now but it can be considered as a way of placing the victim-region at the heart of the process by giving them financial independence and allowing the regions themselves to redress marginalization.

In addition to the economic policy incorporating the situation of the regions, measures shall be taken to change the mode of governance and including in view of fighting against corruption. Bad governance, cronyism and corruption are other processes that led to marginalization or exclusion in Tunisia.

Addressing the consequences of marginalization or exclusion

The analysis of the socio-economic indicators of various regions in Tunisia has highlighted the acute and persistent disadvantages suffered by some areas as well as the denial of access to services and rights. To redress the marginalization and exclusion suffered by Kasserine, not only does it take to formulate a coherent economic policy, but also "*to improve the quality of life, access to basic services, and connectivity of interior regions*"[124]. The following measures could thus be considered as relevant:

- In infrastructures: develop an efficient (road and rail) transport network, particularly for economic opening-up; improve and push the services of drinking water supply and sanitation system; improve the Internet network (particularly to improve the access in key- locations such as schools, public areas…);
- In healthcare: equal redistribution of public expenditure on healthcare; increase the hospitals' capacities (number of beds and doctors) and grant the healthcare equipment upgrading; consider ambulatory healthcare delivery to remote areas; consider all the measures that shall improve the healthcare service quality, namely the incentives aiming at favouring the establishment of doctors in the most disfavoured areas; design indicators to measure the healthcare service quality;
- In education: consider measures that offer educational support to disadvantaged families; create methods to facilitate the access to schools (ex : school transport).

Specific measures of gender perspective integration, particularly to address the disadvantaged status of women, should be considered and adopted (including in terms of access to jobs). Marginalization has had an important impact especially on women. In fact, women are affected directly by marginalization in term of education, health, access to water, unemployment because economic marginalization impacts even more women in rural areas. Numbers of studies have been conducted in Tunisia on the impact of marginalization on women and the results are noticeable[125]. It has been revealed that only 19.7% of rural women have their own income (versus 65.3% of men in rural areas), women have to walk around 4.12km to go to a clinic for themselves or for their children and have a lot of difficulties to access to a job because of social and familial responsibilities, lack of training and transportation problems. Therefore, targeted reparation measures have to be taken to focus especially on women within marginalized regions as, for example, nursery systems to allow women to work and to have access to an income by using a gender-responsive budgeting, linked with reparations.

Adopting a calendar and determine the applicability of measures

It is primordial that the elaboration of measures to redress suffered marginalization or exclusion be accompanied by the elaboration of **a calendar.** The adoption of measures within reasonable deadlines translates the effective fulfilment of the law's objective of reconciliation. It is also relevant to determine the **authority (or authorities) and other stakeholders in charge of implementing** the proposed measures.

Conclusion and recommendations

In view of this comparative experience, the following recommendations would be relevant for reparation programs:

1) In the event of marginalized or excluded regions, **determine the exact causes and consequences** of such marginalization of exclusion to provide adequate and proportionate measures in line with the context of each form of suffered marginalization or exclusion. It will also help providing the necessary and appropriate measures to address the suffered marginalization or exclusion and to ensure non-repetition and the non-creation of new discriminations or resurgence of conflicts. The proposed measures shall be subject to an "impact assessment" to determine the impact at the local level and compared to other regions, and even to the national level, not to repeat the corrective measures which are already in place and did not have a real impact.

2) Adopt a strict calendar and determine the applicability of the measures to target the objective of reconciliation.

3) Define the **role and the responsibility of the State** to implement a reparation program due to the non-respect of State's obligations.

---

[124] World Bank, "The Unfinished Revolution: Bringing Opportunity, Good Jobs and Greater wealth to All Tunisians", Development Policy Review, May 2014, p. 317.

[125] Recherche sur la situation des femmes en milieu rural tunisien et leur accès aux services publics dans onze gouvernorats de la Tunisie -République tunisienne, Secrétariat d'Etat de la femme et de la famille - D.G.F.F / J.H – AECID – Tunis, décembre 2013 - http://www.femme.gov.tn/fileadmin/_temp_/recherche_FR.pdf.

Open discussion (Panel 3)

During the open discussions, strong observations were made on the relationship between reparations and development. One participant noted that the right to development stems out of the need to address the question of inequality and welfare in post-conflict regions. There is need to consider how development programs are aligned to national development plans. It is also important to engage development partners and parliament on their role in development programs. It is important to ask partners a number of questions: Do development partners consider their support as reparation? When parliament approves these development programs, what exactly are they approving? In answering such pertinent questions, CSOs can effectively engage in the transitional justice process.

Another participant observed the changing narratives in the conversations around development and reparations. In any reparation process, justice measures should be focus on addressing economic, social and cultural rights violations. The participant noted that the only issue is connecting with development actors who design these programs. It is also important to consider the fact that development partners are not necessary transitional justice specialists. There transitional actors need to ensure that development programs cater for issues related to specific needs of victims.

Other participants who commented on presentations on development programs observed that government had failed in its duty to provide reparations to victims of war. One of the participants expressed concern that government was not taking into account the views of victims and civil society organisations in designing development programs.

According to another participant, the notion of recurrent victims has to be dealt with. Many victims as understood during conflict contexts continue to be victims even after conflict. The time considered for awarding remedies to victims should be defined and revisited depending on various contexts. The concept of reparation should include harm suffered after conflict.

There is need to strengthen citizens' role and participation in the transitional justice process. One of the participants noted that citizens should contribute to the reparation process. He noted that citizens have a duty to make reparations for certain situations that they have benefited from. The conversation on reparation in Uganda should include the role of citizens in the reparation process.

There was a call from one of the participants to civil society organisations to utilize court remedies. Civil Society Organisations who are working on transitional justice and reparation issues should find a way presenting issues before courts of law. It was noted that the judiciary in Uganda has been very progressive in providing guidance on legislation and human rights issues.

During the open discussion, Hon. Lyandro Komakech provided further details on the development programs implemented in Northern Uganda. He shared recommendations of the Northern Uganda Report produced by three Civil Society Organisations. The study found that even with the implementation of the strategic objectives in PRDP 2, the outcomes of the program could not meet the victims' expectations. Based on the views of victims, PRDP3 was very necessary. The first strategic objective of PRDP3 is consolidation of peace. Key components of this strategic objective include, elimination of sexual gender based violence, reconciliation and transitional justice. He recommended that civil society should concentrate on advocating for the passing of the transitional justice policy and a law on reparation.

Conclusions and recommendations

By Mr. Wayne Jordash QC, Managing Partner Global Rights Compliance

Mr. Wayne Jordash QC provided a summary of the conference and recommendations that emerged from the presentations and discussions. He noted that reparation is part of the transitional justice process. No single approach will work. Any reparation program must be holistic. It must recognize the rights of victims. There are a number of challenges faced during a reparation process. These include: lack of clarity about reparation programs, lack of political will and lack of a clear definition of victims. Another challenge identified related to lack of clarity between the concepts of reparations and development. Mr. Wayne Jodash identified both cross cutting and specific recommendations for administrative and court-ordered reparations.

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.

Closing remarks

In her concluding remarks, Justice Elizabeth Nahamya, ICD expressed her gratitude to the organisers of the conference. She observed that reparation is a pivotal aspect of the transitional justice process. Justice Nahamya highlighted some of the issues discussed at the conference. These included draft transitional justice policy, the role of the ICD, source of funding for reparations, participation of victims in the reparation process, questions of identify and assessing harm, managing of expectations of victims, reparation and development, linkages between court-ordered reparations and other forms of reparations, political will, need to have dialogues between different actors and government and the need to employ the services of experts to conduct a study for the judiciary on how to identify victims, especially those who have suffered sexual and gender based violence. She noted that as a community, we have to ensure that the question of reparation is answered and most importantly, that it is implemented in the most effective way possible.

In her closing remarks, Ms.Beini Ye, Post-Conflict Legal Adviser at REDRESS thanked the organisers, presenters and participants for their contributions during the conference. She hoped that the next conference will be convened to discuss the Reparations Bill.

Annex 1: Programme of the conference

INTERNATIONAL CONFERENCE ON REPARATIONS

26th-27th September 2016, Entebbe, Uganda

DAY ONE	
Time	**Responsible Actor**
8.30 – 9.00Am	Registration
9.00 – 9.30Am	Opening Statements ▪ *Ms. Patricia Bako, ASF Mission Uganda* ▪ *Mr.Komakech Lyandro, MP Gulu District* ▪ *Ms.Ajok Magaret, National Technical Advisor on Transitional Justice (JLOS)*
9.30 – 10.00Am	Key Note: International Framework for Reparation ▪ *Ms. Carla Ferstman, Director, REDRESS*
10.00 – 10.15Am	Brief Overview of the Ugandan Context ▪ *Ms. Judi Erongot, Independent Transitional Justice, Gender and Humanitarian Consultant*
10.15 – 10.45Am	**Break Tea and Group Photo**
10.45 – 12.00Nn	Panel 1: Administrative Reparations Programs ▪ Chair: *Ms. Beini Ye, Post-Conflict Legal Adviser, REDRESS* ▪ Speaker: *Ms. Florence Nakazibwe, National Legal Officer, OHCHR:* Considerations for a program of reparation in Uganda ▪ Respondents: ▪ The experience in Colombia: *Norbert Wühler, Chair of World Intellectual Property Organization's (WIPO) Appeal Board* ▪ The experience in Chile: *Cristián Correa, Senior Associate Reparative Justice Program,ICTJ*
1.00 – 2.00Pm	**Lunch Break (Hotel)**
2.00 – 3.20Pm	Panel 2: Court Ordered Reparation ▪ Chair: *Ms. Jane Anywar Adong, Counsel for the victims (ICC), Dominic Ongwen Case* ▪ Speaker:*Dr. Godfrey Musila, Researcher, Commissioner, UN Human Rights Commission for South Sudan Geneva* ▪ Respondents ▪ The experience before the International Criminal Court*: Ms. Catherine Denis, Legal Counsel, ASF* ▪ The experience in South Africa*: Mr. Allan Ngari, Researcher, Institute for Security Studies*
3.20 – 4.00Pm	**Tea Break (Hotel)**
4.00 – 5.00Pm	Open Discussion
5.00Pm	**End of Day One**

DAY TWO	
Time	**Responsible Actor**
8.30 – 9.00Am	Registration
9.00 – 9.20Am	Recap of Day One ▪ Ms.Caroline Kanyago, *Conference Rapporteur*
9.20 – 10.40Am	Panel 3: Reparation and Development Programs ▪ Chair: *Mr. Lino Owor Ogora, Co-Founder and Director, Foundation for Justice and Development Initiatives (FJDI)* ▪ Speaker: *Ms. Patricia Bako, Program Officer, International Justice Program, ASF* ▪ Respondents ▪ The experience in Kenya: *Dr. Godfrey Musila, Researcher, Commissioner, UN Human Rights Commission for South Sudan Geneva* ▪ *The* experience in Tunisia:*Ms. Magda el Heitem, Project Officer, Transitional Justice Program, ASF*
10.40 – 11.20AM	**Tea Break (Hotel)**
11.20 – 12.20Pm	Open Discussion
12.20 – 1.20Pm	**Lunch Break (Hotel)**
1.20 -2.00Pm	Conclusion and Recommendations ▪ *Mr. Wayne Jordash QC, Managing Partner Global Rights Compliance*
2.00 – 2.30Pm	Closing Remarks ▪ *Justice Elizabeth Nahamya, International Crimes Division (ICD)* ▪ *Ms. Beini Ye, Post-Conflict Legal Adviser, REDRESS*
2.30Pm	**Departure - All**

Annex 2: List of participants

NAME	ORGANISATION/INSTITUTION
1. Justice Ezekiel Muhanguzi	International Crimes Division
2. Justice Elizabeth Nahamya	International Crimes Division
3. Hon.MP Lyandro Komakech	Member of Parliament
4. Ms.Lillian Kobusingye	FIDA -Uganda
5. Ms.Marianne Akumu	ACORD
6. Ms.Vivian Ninsiima	Office of the Prime Minister
7. Ms.Nancy Awori	Ministry Of Justice & Constitutional Affairs
8. Ms.Florence Nakazibwe	Office of the High Commissioner for Human Rights
9. Ms.Jane A.Adong	ICC
10. Ms.Rosalba Oywa	People's voice for Peace
11. Mr.Daniel Ruhweza	Makerere University
12. Mr.Ssensalire Ismail	Ministry of Internal Affairs
13. Mr.Owor.L.Ogora	Foundation for Justice & Development Initiative
14. Mr.Ebiru Nathan	Amuria District Development Agency
15. Ms.Kanyago Caroline	Uganda Christian University
16. Ms.Nyanjura Victoria	Womens Advocacy Network
17. Mr.Odwar Denis	AYINET
18. Ms.Amooti Jane Magdalene	Uganda Law Society
19. Ms.Chepkap Esther	Uganda Martyrs University Nkozi
20. Ms.Sharon Nakandha	Open Society Foundation
21. Ms.Munduru Mercy Grace	FIDA-Uganda
22. Ms. Grace Balungi	European Union
23. Ms.Christabella J.Aceng	Action Trans-Crime
24. Mr.Chris Ongom	Uganda Victims Foundation
25. Mr. Okwir Isaac	Justice & Reconciliation Project
26. Mr.Odong Jackson	Refugee Law Project
27. Ms.Florence Epodoi	FIDA-Uganda
28. Mr.Ian Morrison	USAID-SAFE
29. Mr.Zalagoye Blaise	ICC-CPI
30. Mr.Randon Olivier	ICC
31. Mr.Godfrey Musila	UNCHRSS
32. Mr.Henry Kilama Komakech	Advocate
33. Mr.Allan Ngari	ISS
34. Ms.Judi Erongot	Independent consultant
35. Ms.Margaret Ajok	Justice Law & Order Sector
36. Mr.Joseph A.Manoba	Advocate
37. Mr.Scott Bartell	Trust Fund for Victims-ICC
38. Ms.Dorah C.Mafabi	Democratic Governance Facility
39. Mr.Julius-Lutalo Kiyingi	Independent Consultant
40. Ms. Agwang Florence	NECPA
41. Mr.Okello Moses	LWF
42. Mr.Nobert Wuehler	WIPO
43. Mr.Wayne Jordash	Global Rights Compliance
44. Mr. Cristian Correa	International Center for Transitional Justice
45. Ms. Carla Ferstman	REDRESS
46. Ms.Beini Ye	REDRESS
47. Ms.El Haitem Magda	ASF, Tunisia
48. Ms.Catherine Denis	ASF, Belgium
49. Ms.Bako Jane Patricia	ASF, Uganda
50. Ms.Diana Natukunda	ASF, Uganda
51. Ms.Atuhe Christina	ASF, Uganda

ASF & REDRESS

Pictures © ASF, ASF/Local Voices, Charles Akena/IRIN

Publisher: Francesca Boniotti, rue de Namur 72, 1000 Brussels, Belgium
Layout: MPK Graphics, Uganda
Publication finalised: October 2016

ASF Headquarters

Rue de Namur 72
1000 Brussels
Belgium
Tel.: +32 (0)2 223 36 54
communication@asf.be

REDRESS Headquarters

87 Vauxhall Walk
London SE11 5HJ
United Kingdom
Tel.: +44 (0)20 7793 1777
info@redress.org

Funded by

www.asf.be www.redress.org