

Collective Reparations: Concepts & Principles

The notion of *collective* reparations has resonance in the context of mass violations of human rights and humanitarian law. As gross violations of individual and group rights entitle victims to an effective legal remedy and to reparation, it would appear that in situations of widespread suffering, collective solutions might prove practical or appropriate. While there may be great benefits in collective reparations, there are also dangers that collective forms of reparation, such as the building of hospitals or schools for the benefit of victims, might easily lose their reparative objective, becoming humanitarian or developmental in nature given the parallel needs of rebuilding societies torn apart by war or widespread criminality.

Thankfully we now have the 2005 UN Basic Principles and Guidelines on the Right to Remedy and Reparation, which provide an international bill of rights for victims. Here I hope to draw together here some of the concepts and principles regarding the *implementation* of collective reparations specifically. As we have seen through the excellent presentations over the past day and a half, there are certain building blocks that we can perhaps pull together into an operative framework.

Our starting point must be that, in attempting to determine appropriate reparations, the process must, as far as possible, be nourished by the requirements of victims themselves. It must be victim-led. In this manner, there can be no one-size fits all solutions. Every situation and set of victims will organically reveal different considerations, needs and requirements.

It helps to look at this victim-centred approach in two phases: from a perspective of *procedural justice* on the one hand and *substantive justice* on the other. For victims, Justice is an experience. It is as much about the way that they are treated, consulted and respected *procedurally* throughout the reparation process, as it is about the substantive remedy, material or otherwise, they may be granted as part of the end result.

The procedural handling of the reparations process therefore plays an important role in ensuring that the process is well received, accepted, indeed that the process is *owned* by victims and that it *empowers* them as survivors, eventually reinstating dignity, respect and their rightful place in society. Ensuring that the process is a ‘just’ process will largely influence victims’ experience of reparations. Indeed the treatment, involvement and empowerment of victims in the process can, in and of itself, constitute a valuable part of

the reparative package. The process can restore a sense of significance, dignity and strength.

In this respect the relationship between the legal remedy and the reparation can be of key significance. For instance, if an administrative settlement is offered in the absence of an effective legal process (or acknowledgement of wrong-doing), monetary awards may become “dirty money” in the eyes of victims, was in the case in Argentina. From the dirty war, we had “dirty money”. In such cases the award might be perceived as merely means to silence and appease victims without genuinely redressing the harm suffered.

Thus, as a matter of principle, the *process* should set out to do justice to the victims.

So, as the judicial or reparation process can constitute a reparative end in itself, the process is of-course also a means to an end - a means to obtaining a substantive result. And, the quality of the substantive result, in terms of its ability to redress all victims, and to balance different levels of harm, will depend to a large extent on the thought and energy put into ensuring an inclusive and effective process.

I propose to briefly consider some procedural principles before addressing some key principles regarding substantive awards themselves.

Consultation & Outreach

The first key principle concerns consultation and outreach. According to a UN Report on Justice in Conflict and Post-Conflict societies, “the most successful transitional justice experiences owe a large part of their success to the quantity and the quality of public and victim *consultation* carried out”.¹

Taken in the context of reparations, what exactly is meant by *quantity and quality of public and victim consultation*? The issue of appropriate quantity of consultation should not be overlooked. The very nature of widespread and systematic violations implies that the harm to be addressed is not sporadic or isolated. There will be a vast beneficiary group to be redressed, with multiple layers of harm suffered by most victims. Furthermore, the very context of mass criminality and violence often implies a humanitarian crisis with vast populations either displaced or refugees in neighbouring states. Thus, there are great

¹ UN Secretary General’s Report to the Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 2004. S/2004/616.

challenges in terms of sheer numbers and accessibility, particularly in the humanitarian context.

In order to ensure *qualitatively* satisfying consultations, one must recognise that in most cases, victims in conflict situations in Africa are disenfranchised, dispossessed and difficult to reach. In addition they may have been subject to manipulation by a variety of actors and may have negative associations or mistrust for outsiders (or foreigners) or scepticism towards Courts and “justice” processes in general. There will be multiple cultural, ethnic socio-economic, gender and language barriers in ensuring the quality of consultations.

Thus, special attention needs to be given to the methods and means of communicating with affected populations, particularly in order to reach the most vulnerable of victims, who may be women, children, elderly and/or illiterate.

There are other important considerations with regard to adequate consultation and outreach to victims. Consultation and outreach are two-way processes - they involve *engaging with people*. In addition to simply providing information, there will be a need to build trust and confidence, ensuring inclusive and participatory fora for veritable exchange, and the need to support their empowerment.

Participation and Access

Which leads us to consider the concept of participation and questions of access. In order for victims to be in a position to negotiate or identify the types of remedy to be granted, particularly in the case of non financial reparations, it is vital for victims first to have a clear understanding of the process itself and to remain informed of all the key decisions that affect their interests. In the humanitarian context this will be easier said than done as local languages, dialects, access routes and security issues are critical obstacles that may only be overcome with creativity, reliance on local knowledge and the building of partnerships on the ground.

Other access issues that may need to be considered is the nature and format of application forms, which need to be sensitive and applicable to the context, available in local languages understood by victims.

Often victims will be put off wanting to apply to participate in a programme because of the requirement of completing a form, which they may be psychologically unprepared to do.

Thus, the availability of trained social workers or other individuals able to assist victims in completing such forms may play a significant role in promoting wide access to existing programmes.

The manner of filing and transmitting forms are also worth noting. If time frames are set that are too narrow or if forms have to be submitted in person these may also be prohibitive.

Evidentiary barriers

Finally experience has shown that in spite of the benefit of receiving reparations, numerous potential beneficiaries will be put off applying to participate due to the need to provide documentary evidence. In the humanitarian context obtaining medical records can be prohibitive. Where medical facilities are unavailable or very scarce, fees for medical consultations are prevalent and often prohibitive for the majority of victims.

To begin with, evidential thresholds should not be set too high and creative sources of evidence might be used to corroborate the victims' testimony, such as media archives, NGO records, etc.

Where medical or psychosocial reports may prove useful both for the victim and for the reparations process, the establishment of a special medical or psychosocial unit might be considered to carry out this task. For instance the Moroccan IER established an in-house medical unit, designed not to replace the need for other medical services but, *inter alia*, to provide a comprehensive study of the medical victims participating in the programme, and to identify particularly urgent cases requiring immediate attention prior to the completion of the reparations process. A similar approach could be taken with respect to psychosocial assessments, which would also be able to contribute to the identification of appropriate remedies.

Examples of creative approaches to evidential challenges include an interesting decision by the Commission on Illegal Detention and Torture in Chile,² that all persons who showed that they had spent time in certain detention centres were presumed to have been tortured.

² Informe de la Comisión Nacional sobre Prisión Política y Tortura (Santiago, 2005), highlighted in Pablo de Grief's paper on the implementation of Reparations, 2006.

Thus, creative approaches to evidentiary questions must be put in place, to avoid victims undue inconvenience, humiliation, double victimisation, lengthy, complicated procedures or expensive procedures. This would apply for instance to the requirements of proving indigence in order to qualify for legal aid. The mere fact of showing displacement, refugee status, or simply residence in an area where average income is less than 1 dollar a day (as is the case for Eastern Congo, Northern Uganda and Darfur) should suffice to provide a presumption of indigence.

Substantive Awards

Let me now turn to key principles regarding the substantive awards themselves. Collective reparations may arise in two ways.

First of all, victims' rights to a remedy and to reparation include both individual rights, for individual crimes suffered; or group rights, for crimes inflicted upon a specific group. In situations of mass crimes, collective reparations may be awarded for individual victimisation and, or group victimisation, if harm was inflicted on a specific group. Thus Collective reparations may arise to repair numerous individual violations or a group violation.

Specificity of Harm

Perhaps the most important principle is the need to take into account the specificity of harm. Collective reparations require very careful consideration of beneficiary groups and sub-groups. As individual victimisation gives rise to reparation for the specific harm suffered, it is important to ensure that if reparations address large classes of individual victims, the specific harm suffered by particular individuals should not get ignored in the group settlement.

For instance, survivors of sexual violence who have contracted HIV or amputees who are crippled, or children who were forcibly recruited as child soldiers may require specific recognition over and above the fact that they were forcibly displaced and dispossessed. Thus, in identifying collective reparation programmes it will be important to categorise victims in order to ensure that categories of specific harm are recognised and redressed.

Examples of Collective Reparations

Collective reparations fall into two broad categories, those requiring financial implications, and those of more symbolic or rights based nature. I would like to draw out certain principles from the interesting collective reparations awards granted by the Inter-American Court for Human Rights, particularly as regards non-financial reparations:

- Non-financial Reperations

The first principle concerns importance of non-financial remedies that can be granted or ordered in judicial decisions. While judicial remedies and reparative processes are often conceived of as two separate and unrelated processes, this need not be so. In fact, the exciting, new jurisprudence of the Inter-American Court for Human Rights, has in recent years increasingly identified wide ranges of reparative measures pronounced in its judgements that are of a collective nature.

The collective measures awarded by the Inter-American Court are of significance given that the Victims Trust Fund of the International Criminal Court may or may not be able to afford individual compensation awards for all eligible victims. Indeed, it is uncertain whether even the modest financial calculation of loss used by the Inter-American Court would be viable for the Victims Trust Fund, or whether such economic damages would be found to be desirable or appropriate in all or any cases. [Just on a side note : the Inter-Amecian method of calculation is takes into account the widespread poverty in Latin America, and the calculation of loss is principally based on the present value of the victim's expected lifetime earnings, minus projected expenses, had he or she lived. Where victims were unemployed or employed in the informal sector, the Court presumes that their annual income would have been equal to the minimum wage. As a result, the Court generally awards no more than 30 to 35,000 USD for the total present value of the victim's lifetime lost earnings. However, given the inter-ethnic dimension of the conflicts under the jurisdiction of the Court, which often involved land or conflict over other resources, awarding economic damages to one group and not another may simply reignite violence and thwart possibilities of lasting peace.]

In any case, collective remedies, as a matter of principle, in addition to or instead of individual compensation collective reparations are of significance in their own right.

Publicity of Judicial Remedies

A first collective measure of satisfaction used by the Inter-American court concerns publication of its judgements.

Judicial remedies can (of-course) have a reparative impact. This may seem obvious, but one needs just to consider the Judgements of the Rwanda Tribunal or Yugoslav Tribunal to note the generalised omission of reparative elements. In fact, the reparative impact of a judgement can be magnified in a number of ways, which in themselves can constitute forms of collective reparation. The Inter-American Court has ordered states to publish portions of its judgments in official gazettes and popular newspapers in 19 cases since 2001. In the case of a massacre of indigenous villagers, the Court ordered Guatemala to translate the judgement into the local Mayan language and to deliver copies to each victimised survivor and family member³. Judge Garcia Ramirez explained that publication in this manner sought to provide :

- 1) moral satisfaction of the victims or their successors, the recovery of honour and reputation that may have been sullied by erroneous or incorrect versions and comments;
- 2) the establishment and strengthening of a culture of legality for coming generations, and
- 3) the truth to those who were wronged and to society as a whole.⁴

Other forms of collective reparation, which have been ordered by the Inter-American Court, (which might fall under “satisfaction” or “guarantees of non-repetition”), include ordering States to:

- “effectively” investigate cases in order to identify, put on trial and punish actors;
- Remove all obstacles and mechanisms, whether legal or de facto that perpetuate impunity for the perpetrators;
- Provide security for judicial authorities, prosecutors, witnesses, victims as well as the victims’ family;
- Undertake a public act to honour and dignify the memory of the victims (including the naming of plazas, streets or commemoration days);
- Establish funds for education or medical treatment
- Provide pensions to survivors of pensionable age;

³ Douglas Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, in M. Bossuyt, P. Lemmens, K. De Feyter, and S. Parmentier, eds., *Out of the Ashes: Reparations for Gross Violations of Human Rights* (2006).

⁴ Idem.

Thus, these are a number of non-economic reparations that can be called upon. Recommending some of these measures, particularly those relating to ending impunity, may constitute innovative interpretations of the ICC's complementary nature to national jurisdictions.

- Reparations with Financial Implications

As regards collective measures or programmes which would require financial implications, there are perhaps several pertinent principles to be noted.

Most importantly, in the humanitarian context, it will be important to ensure that medical, psychosocial rehabilitation, educational or other programmes are distinguishable from general humanitarian, development or relief efforts. The role of collective programmes of this nature is not to replace or indeed pioneer humanitarian remedies, it is to repair specifically the harm and suffering endured. Which may or may not include generalised health, educational or other facilities that can be used by all the population.

Finally, and this is something I have noted in my recent trips to affected areas in Northern Uganda and Eastern Congo, programmes specifically designed to redress victimisation need to take the views of victims themselves (not necessarily or specifically (!) those of their representatives) into account. Victims' perceptions of their needs often differ greatly from community leaders' perceptions, who are invariably more politically conscious of ensuring widely inclusive programmes or peace building programmes as oppose to addressing the suffering of particular minority groups. In this respect, reaching and involving women victims is crucial given the particular social stigma and prevalence of sexual violence in violent conflicts.