Essay on Development Policy

A case for distributive justice:
reparations for victims of an armed conflict
in developing countries

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## Abbreviations

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<td>Art.</td>
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<td>CPA</td>
<td>Comprehensive Peace Agreement 2006</td>
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<td>CPN(M)</td>
<td>Communist Party of Nepal (Maoist)</td>
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<td>CPR</td>
<td>Civil and political rights</td>
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<td>CPRV</td>
<td>Civil and political rights violation(s)</td>
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<td>ESCR</td>
<td>Economic, social and cultural rights</td>
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<td>ESCRV</td>
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<td>GONR</td>
<td>Guarantees of non-repetition</td>
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<td>Impunity Principles</td>
<td>Updated Set of principles for the protection and promotion of human rights through action to combat impunity</td>
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<td>Para.</td>
<td>Paragraph</td>
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<td>Reparations Principles</td>
<td>UN 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</td>
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<td>TC</td>
<td>Truth Commission (umbrella term for the Truth and Reconciliation Commission and the Commission of Inquiry on Disappearances)</td>
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<td>TJ</td>
<td>Transitional Justice</td>
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<td>TRC</td>
<td>Truth and Reconciliation Commission</td>
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I. Introduction

Since November 2011, Nepali newspapers have been reporting the resistance by the radical faction of the Communist Party of Nepal (Maoist) (CPN(M)) against the return of seized land to large estate owners.¹ Said land - among other property -² had been captured by the Maoists during their 10-year “People’s War” against the Royal Nepal Army.³ The Maoist insurgency mainly aimed at addressing economic and social injustices;⁴ accordingly, the seized land was largely distributed to landless people.⁵ Both the return of property and a land reform “to end feudal land ownership” have been explicitly stated in the Comprehensive Peace Agreement (CPA) of 2006 and considered part of the peace process.⁶ Generally, the CPA makes extraordinary commitments to economic and social justice and fundamental reforms.⁷ Distributive justice as an underlying principle of an equitable land reform thus has a firm base of legitimation.

Drawing from aspects mentioned in different definitions in the literature,⁸ this essay understands fostering distributive justice as reducing inequality among the members of a society with regard to their access to economic and social benefits such as income, education, social security or health services. In terms of human rights, it encompasses the non-discriminatory granting of economic, social and cultural rights (ESCR). Conceived this way, distributive justice directly corresponds to a certain minimum of equality that - according to modern development economics - must accompany economic growth in order to achieve poverty reduction,⁹ and thus constitutes a fundamental component of development.

While the redistribution of land from large estate owners to landless people corresponds to the principle of distributive justice, at the same time, the restitution of seized land represents one

¹ See Budhair/Chaudhary/Shakya/KC/Panthi (2011); Panthi (2011); Basnet (2012).
² Houses are also mentioned in Internal Displacement Monitoring Centre/Norwegian Refugee Council (2010), p. 1.
³ See with regard to the Bardiya District Robins (2010), elite discourse, p. 8.
⁵ See for example with regard to the Bardiya District Robins (2010), elite discourse, p. 8.
⁶ See the Comprehensive Peace Agreement (2006), para. 5.1.8 and paras. 3.7 and 3.10 respectively; see furthermore Jha (2012).
important form of fulfilling the internationally recognized right to reparations for gross human rights and international humanitarian law violations.\textsuperscript{10}

In societies emerging from an armed conflict connected with large-scale violations,\textsuperscript{11} such as Nepal, reparations are of a particular significance. They are typically considered one of the core elements of a comprehensive transitional justice (TJ) policy in theory and practice, besides criminal prosecutions, truth telling and institutional reform.\textsuperscript{12} If concerned countries at the same time exhibit great structural inequalities, as it is the case with Nepal,\textsuperscript{13} dilemmas such as the one described above thus often arise in the context of reparations programmes.

Despite commitments for reparations in important policy and legal sources,\textsuperscript{14} to date no actual reparations programme has been established in Nepal, but only an “Interim Relief and Rehabilitation Programme” aiming at providing conflict victims with interim financial support and other forms of relief.\textsuperscript{15} There is an ongoing discourse about reparations in Nepal however,\textsuperscript{16} which seems crucial, as reparations cannot be dependent on the (even still uncertain) establishment of Truth Commissions (TC).\textsuperscript{17}

Against this backdrop, this essay explores to what extent reparations can and should consider distributive justice concerns and thus contribute to long-term development and peace by

\textsuperscript{10} Grounded on a firm legal basis in international human rights as well as humanitarian and criminal law (see OHCHR (2008), p. 5 sq.), the state’s duty to offer reparation to victims of acts or omissions attributable to it and constituting gross violations of human rights and serious violations of international humanitarian law has in the last decade been further elaborated in international law in particular in the framework of two soft law instruments, namely the UN 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 (2006) (“Reparations Principles”), and the Updated Set of principles for the protection and promotion of human rights through action to combat impunity (2005) (“Impunity Principles”).

\textsuperscript{11} Due to its focus on the situation of Nepal as a post-conflict country, this essay only refers to violations suffered by victims of an armed conflict, not of authoritarian or other violent regimes.

\textsuperscript{12} See e.g. the categorisation by ICTJ, “What is Transitional Justice?”. In this context, it is often Truth Commissions, but also governments and other entities that design elaborate reparations programmes in the sense of administrative schemes (see OHCHR (2008), pp. 6 sq., 11 sqq., also on respective advantages and disadvantages of different entities designing a reparations programme; Roht-Arriaza/Orlovsky (2009), p. 171).

\textsuperscript{13} See for example Pasipanodya (2008), p. 380 sqq.; Robins (2010), elite discourse, p. 3.

\textsuperscript{14} These are the Comprehensive Peace Agreement (CPA), the 23-Point Agreement 2007, the Interim Constitution of Nepal 2007 and the draft bills on the Truth and Reconciliation Commission (TRC) and the Commission of Inquiry on Disappearances (see IOM/OHCHR (2010), p. 3; Carranza (2011), p. 12 sq., N. 19 sqq.).

\textsuperscript{15} IOM/OHCHR (2010), p. iii. While the government consistently refers to these measures as „relief“, some officials also call them „interim reparations“, see Carranza (2011), p. 9, N. 9. Besides only representing relief and not reparations, which are characterized by an acknowledgement of state responsibility (Carranza (2011), p. 4.), this programme is inter alia criticized for excluding key victim categories such as victims of torture and sexual violence (IOM/OHCHR (2010), p. 3).

\textsuperscript{16} This discourse exists in spite of the perception that a reparations programme will only be designed on the basis of recommendations by the TRC (Carranza (2011), p. 4).

\textsuperscript{17} Carranza (2011), p. 37, N. 86.
achieving greater equity. Thereby, the next chapter outlines how reparations are traditionally understood as a means of corrective justice and explores effects of such reparations on distributive justice. Thereupon, three approaches to reparations that contribute to distributive justice will be shortly presented and illustrated using the example of Nepal, in order to finally sketch an “ideal” approach to reparations in terms of distributive justice, while taking into account possible difficulties in implementation.

II. Reparations in the traditional sense and distributive justice

1. Reparations as a means of corrective justice

Corrective justice, generally speaking, refers to the rectifying character of the liability for an unjust harm inflicted by one person on another, and has traditionally been the focus of TJ.

In this context, according to Mani, it aims at rectifying those violations that are direct consequences of conflict. The most obvious violations resulting from armed conflict and thus traditionally being the scope of TJ in general and reparations in particular are violations such as killings and injuries of civilians, torture, or enforced disappearances, i.e. injustices manifesting themselves as violations of civil and political rights (CPRV).

According to the principle of integral reparation as stated in the Reparations Principles, victims should receive full reparation, or at least one proportionate to the gravity of the violation suffered. Thereby, the primary form is full restitution (restitutio in integrum), which means that the state should put the victim in the situation she/he was before the violation hap-

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18 How reparations and transitional justice in general can contribute to development in a more comprehensive sense unfortunately goes beyond the scope of this essay; a number of articles and studies have explored this relation however: see e.g. De Greiff (2009), Lenzen (2009), Duthie (2008), Alexander (2003).
20 Regarding the use of the term „corrective justice“, see also footnote 59.
21 Mani (2007), p. 1, who mentions „gross human rights abuses, war crimes and crimes against humanity“ as such direct consequences. Corrective justice is sometimes termed as well rectificatory justice, whereby the two terms seem to be used interchangeably by different authors; see e.g. the use in Uprimny Yepes (2009), p. 4 sq., and Mani (2007), p. 1.
22 While it is clear that the mentioned violations can also represent violations of international humanitarian law and crimes against humanity, which cannot be legally equated with human rights violations, in order to simplify the language, this essay will only refer to CPRV. The mentioned scope is also reflected in the Reparations Principles. They do not contain an actual definition of concerned violations and thus seem to offer the possibility for a wider interpretation, however, with Carranza, they “seem focused on political repression and armed conflict while equating human rights violations with gross violations of civil and political rights” (Carranza (2009), p. 2). The same seems to apply to the Impunity Principles that do not contain a definition of violations concerned either, but examples of which mostly refer to CPRV (see e.g. Definitions, B; principles 18.b, 26.a, 36.a).
23 Reparations Principles, principle 18.
24 See also Uprimny Yepes (2009), p. 7.
pened. Where full restitution is not possible, or sometimes as a complement to restitution, compensation and rehabilitation are resorted to. The broad understanding of reparations in the Reparations Principles also includes satisfaction and guarantees of non-repetition as more indirect forms of reparations. Moreover, reparations can be conceptualized as individual or collective measures, the latter generally referring to a collectivity as the subject of reparations. Material reparations as a further category can inter alia assume the form of cash payments or of service packages, whereas symbolic reparations may include measures such as official apologies or the establishment of memorials.

2. Effects of reparations as a means of corrective justice on distributive justice

It seems obvious that the provision of direct and partly also indirect reparations will always have some effects on the distribution of economic and social benefits in a society. Specifically in the context of (Rawlsian) “well disorganized societies” however, i.e. a great number of developing countries emerging from armed conflict, the principle of integral reparation becomes controversial out of distributive considerations. While in these countries, a part of the many people living in poverty and marginalisation have also suffered from civil and political rights (CPR) abuses due to their vulnerability—which moreover often aggravated their poverty—the portion of non-victimized poor people usually is higher than the one of those victimized, and not all victims of CPRV are poor. This leads to the general problem for the

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25 Ibid.; Carranza (2009), p. 2; see accordingly also the Reparations Principles, principle 19.
26 Reparations Principles, principle 18.
27 For example, the punishment of perpetrators as a form of victim satisfaction or institutional reform as part of guarantees of non-repetition is said to have a “reparative effect” (OHCHR (2008), p. 9). However, reparations programmes as such in practice mostly concentrate on measures providing benefits to victims directly (ibid.). This separation is also reflected in the above-mentioned typical classification of institutional reform and criminal trials as own TJ elements. While mainly a narrower understanding of reparations underlies the next two chapters of this essay, chapter V examines the effects of a notion incorporating guarantees of non-repetition on distributive justice. Victim satisfaction (besides cessation of violations) does not seem to have implications regarding distributive justice and is thus not examined here.
28 OHCHR (2008), p. 18 sqq.
29 See chapter V on guarantees of non-repetition.
30 Uprimny Yepes (2009), p.8 sqq., uses this term for societies where “large-scale gross human rights violations” occurred and which at the same time face deep inequalities and widespread poverty.
31 Ibid.
32 Generally, poor and marginalized people are more susceptible also to CPR abuses (Alexander (2003), p. 51, N. 6.28), as it was the case also in Nepal (Carranza (2011), p. 41, N. 97; in this sense also Robins (2010), victim-centred TJ, p. 17).
34 Uprimny Yepes (2009), p. 10 sq.
concerned to divide scarce resources between their duties to grant reparations and to address poverty and marginalisation.\textsuperscript{35}

The general budgetary dilemma between reparations and the enhancement of distributive justice is aggravated by the fact that integral reparations can have negative consequences in terms of distributive justice. Thus, Uprimny Yepes identifies a more common tension between the use of scarce funds to compensate affluent victims and the concurrent urgent need to alleviate poverty for poor non-victim persons. Second, the logic of reparations programmes can be contrary to the distributive aim of other state policies.\textsuperscript{36} Third, if consequently implemented, restitution as the core of integral reparation would mean that a poor victim should be turned back to a previous situation of deprivation, which seems “almost cruel”.\textsuperscript{37} With regard to restituting affluent victims, the above-mentioned resource tensions arise.\textsuperscript{38}

If reparations entail negative consequences for distributive justice, difficult conflicts between corrective and distributive justice arise.\textsuperscript{39} Such a conflict also manifests itself in the resistance of CPN(M) members towards the restitution of land to large estate owners. The next chapters will present different approaches to how the respective state duties might be better reconciled respectively how reparations can contribute to distributive justice.

\section*{III. The concept of transformative reparations}

Instead of restoring poor victims to their previous circumstances, which violate principles of distributive justice respectively ESCR,\textsuperscript{40} transformative reparations movements\textsuperscript{41} aim at

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\textsuperscript{35} Ibid., p. 12.
\textsuperscript{36} This is the case in the above-mentioned example of Nepal, where the restitution of seized land to large estate owners is inconsistent with the planned land reform intended to increase equality.
\textsuperscript{37} Ibid., p. 13, with reference to Carranza (2009), p. 2; with regard to Nepal, see Robins (2010), victim-centred TJ, p. 17.
\textsuperscript{38} Considering the general budget trade-offs between reparations and the fostering of distributive justice that Uprimny Yepes mentions, one can argue that there is actually always a (virtual) benefit taken from poor people (both victims and non-victims) as soon as a benefit is given to an affluent victim. This could be the case e.g. regarding the compensation of an affluent torture victim. A more direct negative effect however occurs in cases where providing a benefit to an affluent victim means taking the same benefit from a poor non-victim, as it would be the case with the restitution of seized land to large estate owners.
\textsuperscript{39} Uprimny Yepes (2009), p. 5.
\textsuperscript{40} According to the transformative approach, these circumstances therefore are, independent of their being a root cause of conflict or not, unjust in themselves (Uprimny Yepes (2009), p. 19).
\textsuperscript{41} See Torpey (2003), p. 48, with regard to these movements. A number of authors and institutions have, mostly in the context of specific reparations beneficiaries like women or specific reparations issues like the restitution of land, proposed a transformative approach to reparations (see e.g. Roht-Arriaza/Orlovsky (2009), p. 188 ff.; Rubio-Marín/De Greiff (2007), p. 325; Report of the UN Special Rapporteur on violence against women, its causes and consequences (2010), N. 30 sqq.; Duthie (2008), p. 296; Saffon/Uprimny Yepes (2010), p. 390 sqq. This
“transforming” these circumstances by integrating distributive considerations. While the fulfilment of the right of victims to full reparation should still be considered a prima facie obligation, it can be limited or even put aside in cases where the consequences of reparations on distributive justice are negative.42 The transformative approach has been the subject of critics that unfortunately cannot be examined in more detail here.43

Concretely, the present needs of beneficiaries should be taken into account in their selection, whereby the most vulnerable victims should be prioritized to receive significant material benefits, affluent ones in contrast should get only minimal material, but meaningful symbolic reparations.44 Further, benefits empowering vulnerable people and reducing inequalities should be preferred.45 A third aspect is concerned with participatory procedures of adopting and implementing a reparations programme, which could help reducing discrimination, alleviating poverty and empowering the most vulnerable victims. Finally, with regard to social services, a transformative approach should ensure compatibility of a reparations programme with the overall development strategy of a country, and could, in specific circumstances, allow the use of “social or welfare” services46 as reparations.47

The use of social services in the sense of collective material reparations has been an attempt to address the fact that groups of victims48 are often poor and marginalized collectivities whose post-transition demands may be directed at securing basic elements of survival.49 Thus, collective material reparations can also serve the integration of distributive considerations. They are however criticized for typically providing non-exclusive goods such as hospitals, schools, roads etc., which makes it difficult for victims to perceive them as repairing and recognising specific past human rights violations.50 Furthermore, goods delivered are usually

43 Uprimny Yepes (2009) outlines five major concerns before shortly responding to them (ibid., p. 30 sq.); 1) the concept is useless, as the transformative purpose is incorporated in the guarantee of non-repetition; 2) it is contrary to the right of reparations; 3) it would weaken the specific right of victims to reparations; 4) it is too ambitious; and 5) it is inconsistent because of its reference to two principles of justice.
45 An example given in this context is that a focus on land restitution, without the previous modification of laws forbidding women to own land, would be discriminatory.
46 Uprimny Yepes (2009), p.15. These include e.g. education, health, water, etc.
47 Ibid., p. 27 sqq.
48 These can be bound by a common identity, experience, or form of violation (ICTJ (2009), p. 10).
49 Ibid., p. 9 sq.
basic, and may be considered by victims as fulfilment of a right provided by citizenship rather
than victimhood.\textsuperscript{51}

With regard to Nepal, it has been stated that it will be impossible to deal with property viol-
tions such as the takeover of land by Maoists without also looking at the pervasive land ine-
quality and other structural inequalities, and that there is the question if a reparations pro-
gramme prioritizing restitution will only reinforce the latter.\textsuperscript{52} Existing relief funds should
thus go first to the most vulnerable victim families, while compensation for property loss or
damage, especially for non-farming landowners, should not be a priority at all.\textsuperscript{53} In particular
with regard to women in Nepal, whose restoration to the pre-conflict status would marginalize
them, it is argued that addressing the broader discrimination suffered by the latter should be
prioritized in the design and implementation of TJ programmes.\textsuperscript{54}

\section*{IV. The socioeconomic rights approach}

The concept of transformative reparations could be summarized as an effort to ensure a “dis-
tributive justice-sensitive”\textsuperscript{55} implementation of reparations for CPRV. In the last years how-
ever, another more far-reaching approach has been propagated by a number of scholars and
practitioners, which will be termed “socioeconomic rights approach” for the purpose of this
essay.

\subsection*{1. Socioeconomic rights as a subject of transitional justice}

It has been stated frequently that the field of TJ has historically excluded issues of structural
inequalities and redistribution, thereby reflecting the bias between CPR and ESCR of its par-

\textsuperscript{51} Collective reparations are then at risk of being confused with development projects, and governments are
criticized to “get off too easy” (Roht-Arriaza/Orlovsky (2009), p. 192; OHCHR (2009), p. 26; ICTJ (2009), p. 11). These shortcomings can however be mitigated by providing non-basic services targeting the special needs of
the victim population (OHCHR (2008), p. 25 sqq.) as well as by explicitly tying collective reparations to the harms suffered (Roht-Arriaza/Orlovsky (2009), p. 193). Advantages of collective reparations are that in situations of resource scarcity, there is at least a concrete benefit for the concerned population, instead of - in the worst case - no material reparations at all, and that they avoid creating new resentments or the singling out of victims (see Roht-Arriaza/Orlovsky (2009), p. 193; see regarding resource scarcity the example of Peru: Magarrell (2003), p. 97).

\textsuperscript{52} Carranza (2011), p. 15 sq., N. 28 sqq.

\textsuperscript{53} Ibid., p. 40 sq., N. 97.

\textsuperscript{54} Aguirre/Pietropaoli (2008), p. 365.

\textsuperscript{55} Duthie (2008) uses the term „development-sensitive“ for an approach to transitional justice that is, at a mini-
mum, aware of the different links that may exist between the transitional justice and development and pursues
synergies between them, such as its transformative potential.
ent field, human rights – a bias that in theory has been overcome. Miller speaks of a “constructed invisibility” of economic questions in this context. According to Arbour, only by integrating ESCR into the TJ framework, justice in its fullest sense could make the contribution it should to societies in transition. Distributive justice is hence beginning to be considered another key dimension of TJ.

Throughout the literature, two dimensions of integrating ESCRV into transitional justice processes can be identified, whereby many authors only refer to one dimension.

On the one hand, ESCRV that constitute an underlying cause of numerous armed conflicts should be redressed. If the central objective of TJ is to address injustices occurred in a society in the past, this goal seems to be missed if the past is narrowed to the occurrence of CPRV that often were “just” a consequence of structural ESCRV (see below).

A particularly strong argument for addressing this dimension is the instrumentality of TJ, i.e. the aim of helping build a stable and sustainable peace. Research specifically focusing on low-income countries has found that socioeconomic inequalities among different groups of a society as a form of horizontal inequality are a significant cause of conflict. In this sense,
many authors argue that addressing these underlying causes reduces the likelihood for violent conflicts to recur.\textsuperscript{64}

The 10-year armed conflict in Nepal is a prominent example for economic and social inequalities being an underlying cause of conflict,\textsuperscript{65} and is even considered an emblematic case for the discussion about the need for TJ to pursue equality as well.\textsuperscript{66}

The second dimension of a socioeconomic rights approach concerns ESCRV that occurred during, or in other words, as a direct consequence of an armed conflict. Systematic destruction of homes and property, forced displacement or starvation of the population are deliberately used as instruments of war,\textsuperscript{67} and structural socioeconomic inequalities are likely to be exacerbated: as with CPRV, already marginalized groups are particularly vulnerable to abuses of their ESCR during a conflict.\textsuperscript{68}

This was the case also in Nepal, where Dalit communities and certain groups of women were particularly targeted for ESCR abuses. Generally, typical acts committed during the armed conflict that led to ESCRV included the destruction of infrastructure, restriction of food supplies, enforcing the provision of accommodation, food and taxes, collapses of the education system and recruitment of children.\textsuperscript{69}

In Nepal, horizontal inequalities respectively ESCRV have not been addressed by TJ until now.\textsuperscript{70} Although surveys found that victims (chosen for their suffering of CPRV) identified structural inequality and caste discrimination as primary reasons for the conflict,\textsuperscript{71} and stated

\textsuperscript{67} Arbour (2006), p. 4; in this sense also Duthie (2008), p. 304.
\textsuperscript{68} Related to this second dimension is another phenomenon mentioned in the literature: while social and economic consequences are inherent in ESCRV, authors also advocate for reparations to address the social and economic consequences of CPRV, such as the exclusion from economic activity for example through illegal detention (see Alexander (2003), pp. 3 and 51, N. 6.24, 52, N. 6.29; in this sense also Arbour (2006), p. 10). Such consequences could also be regarded as a kind of “secondary” ESCRV; respectively, Pasipanodya lists the loss of homes and sources of income of Nepali women whose husbands died or disappeared as an ESCRV investigated by the UN Committee on Economic, Social and Cultural Rights (Pasipanodya (2008), p. 384). They furthermore form a part of the above-mentioned “overlap” of CPRV with ESCRV (Laplante (2007), p. 171). With regard to economic needs of wives of disappeared men see in particular Robins (2010), victim-centred TJ, p. 10 sqq.
\textsuperscript{69} Pasipanodya (2008), p. 383 sqq.
\textsuperscript{70} Robins (2010), elite discourse, p. 14; Robins (2010), victim-centred TJ, p. 17; in this sense also Pasipanodya (2008), p. 386 sqq.
\textsuperscript{71} ICTJ/AF (2008), p. 19.
their most urgent needs as being economic and social, the TJ discourse focuses on CPRV, and, as Robins argues, on prosecution as main TJ mechanism. Against this backdrop, Aguirre and Pietropaoli argue that unless transitional justice in Nepal takes redistributive justice into account, it might perpetuate the position of economic and political elites instead of empowering marginalized groups.

2. Socioeconomic rights as a subject of reparations

Firstly, from a legal point of view, the question arises which ESCRV could be subject to the right to reparations, because the latter, as stated in the Reparations Principles, is tied to a gross character of human rights violations. A respective examination shows that generally, large-scale discriminatory and a number of other ESCRV are clearly subject of the right to reparations by constituting gross human rights violations, if not even international crimes. This seems to apply also for both the seizure of land by the Maoists and the pervasive land inequality in Nepal.

Little can be found in the literature on how reparations should generally redress ESCRV. While Muvingi states the inadequacy of individual reparations in the form of pay-offs in cases

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72 ICTJ/AF (2008), p. 44; with regard to families of disappeared persons in Bardiya district see also Robins (2010), elite discourse, p. 9, and on the needs of wives of disappeared men see Robins (2010), victim-centred TJ, p. 10 sqq.
74 Aguirre/Pietropaoli (2008), p. 366 sq.
75 The Impunity Principles are less clear in this regard: see the formulation „any human rights violation“ in Principle 31.
76 While some authors speak in a rather general way of the option to broaden the mandate of TJ mechanisms to include “violations of social and economic rights, or at least economic crimes” (De Greiff (2009), p. 40) or of providing reparations “for practices of social injustice” (Mani (2008), p. 256), other authors clearly distinguish between gross violations, for which reparations are given, and others (Pasipanodya (2008), p. 394 sq.).
77 Lacking a single accepted definition under international law (Pasipanodya (2008), p. 392), one can derive by reverse argument that according to the Reparations Principles, there exist also gross human rights violations that do not qualify as an international crime and still are the subject of reparations (see Reparations Principles, principles 4 and 11). Albeit, clear examples of ESCRV constituting international crimes are certain crimes against humanity (see Alexander (2003), p. 51, N. 6.26; Duthie (2008), p. 304) and war crimes (see Carranza (2008), p. 327). Arbour, referring to international and national jurisprudence, proposes that TJ should, as a matter of priority or at all, investigate and provide remedies for discriminatory ESCRV (Arbour (2006), p. 8). It seems that systematic and large-scale discriminatory ESCRV might even be classified as an international crime (see UN draft declaration defining gross and large-scale violations of human rights as international crimes (1999), para. IV.B.50, article 1 (e) in connection with para. I.B.16).
78 This might constitute a war crime of pillaging (see Rome Statute and Elements of Crimes, art. 8.2.e (v)).
79 Although Pasipanodya argues that said inequality “may not be defined easily as specific gross human rights violations” (Pasipanodya (2008), p. 395), its systematic and large-scale discriminatory character seems to represent a valuable argument for doing so.
of systemic and institutionalized economic exploitation.\textsuperscript{80} Mani’s proposal is to combine individual with community reparations for practices of social injustice.\textsuperscript{81}

In Nepal, reparations are basically understood as redress for CPR abuses.\textsuperscript{82} Carranza thus advocates for CPA clauses referring to ESCRV to be as much part of the reparations agenda in Nepal as CPRV committed during the conflict, or in other words, that reparations programmes address “the widest range of human rights violations”.\textsuperscript{83} More concretely, Pasipanodya suggests individual reparations closely tied to gross CPRV and ESCRV, as well as communal reparations.\textsuperscript{84} The latter are proposed by Robins for cases where ethnicity or caste has led to exclusion, and particularly for women of marginalized groups.\textsuperscript{85}

The overview of approaches to reparations that contribute to distributive justice will be completed by exploring guarantees of non-repetition as part of a broad reparations concept.

\section*{V. Guarantees of non-repetition}

This chapter follows the perspective of guarantees of non-repetition (GONR) as an element of a broad notion of reparations in line with the Reparations Principles.\textsuperscript{86} In comparison to direct reparations, GONR are less concerned with past violations perpetrated against the individual victim, but oriented towards the future, targeting institutional practices of a State which allowed violations to occur.\textsuperscript{87} Traditionally, an emphasis is put on security sector reform, in accordance with the stated focus of TJ on CPRV.\textsuperscript{88} However, if interpreted in a comprehensive manner, GONR should be concerned with all the factors that could contribute to renewed gross and large-scale violations. GONR should thus, particularly in the context of low-income countries, address the above-mentioned socioeconomic inequalities among different groups of society through structural reforms.\textsuperscript{89}

\begin{itemize}
  \item \textsuperscript{80} Muvingi (2008), p. 180.
  \item \textsuperscript{81} Mani (2008), p. 256. Specifically, enhanced access to opportunities like education and employment, investment in services, and possibly also quotas and reservations could be envisaged. Mani (2007), p. 4.
  \item \textsuperscript{82} Pasipanodya (2008), p. 387; Robins (2010), elite discourse, p. 14.
  \item \textsuperscript{83} Carranza (2011), p. 14, N. 24, and p. 41 sq., N. 97.
  \item \textsuperscript{84} Pasipanodya (2008), p. 394.
  \item \textsuperscript{85} Robins (2010), victim-centred TJ, p. 19.
  \item \textsuperscript{86} Even when guarantees of non-repetition are not subsumed under reparations within TJ theory, but treated as a separate obligation (see Impunity Principles, Principles 31-34 and 35–38) respectively equated with institutional reform (see e.g. Magarrell (2003), p. 89, they constitute an accepted field of action of TJ.
  \item \textsuperscript{87} See Ferstman, p. 8.
  \item \textsuperscript{88} This is also reflected in the Reparations and the Impunity Principles; see De Greiff (2009), p. 33, with regard to the Reparations Principles (Principle 23); for the Impunity Principles, see Principle 35.
  \item \textsuperscript{89} Such an approach could possibly be linked with Principle 23.g) of the Reparations Principles („promoting mechanisms for preventing and monitoring social conflicts and their resolution“) and Principle 35 of the Impuni-
While many authors do not explicitly use the term “guarantees of non-repetition”, they often refer, as mentioned above, to the goal of prevention, and identify the related need for structural reforms also in the socioeconomic sphere.

With regard to GONR in Nepal, Robins points out that while human rights workers emphasize the reform of institutions such as the army and police, victims articulate political demands for autonomy that would ensure their access to land and livelihood. It is certain that the problem of land inequality as a major cause of conflict in some districts can only be solved through a programme of systematic land reform. Aguirre and Pietropaoli in a more general way propose a rights-based state policy as a necessary form of collective reparations in Nepal; this includes as well the right of women to create a new society based on gender equality.

VI. Outline of an “ideal” approach

On the basis of the foregoing overview of approaches, an attempt to sketch an “ideal” approach to reparations in terms of distributive justice will be made, followed by an outline of possible difficulties in implementation.

1. Main characteristics

As a starting point, it seems quite clear that the enlargement of the notion of victims by the socioeconomic rights approach to include victims of ESCRV generally will lead to more poor and discriminated people receiving reparations benefits compared to the transformative approach. However, reparations for ESCRV that were a consequence of a conflict can introduce a kind of a new corrective justice, whereby material reparations will have a negative effect

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90 Except for Laplante (2009), pp. 332, 342.
92 The concerned victims have suffered from CPRV, but at the same time from structural inequalities.
93 Robins (2010), elite discourse, p. 12 sq.
94 See Robins (2010), victim-centred TJ, p. 19, who explains that there has been a systematic theft of land from indigenous peoples by high castes in some districts.
95 Aguirre/Pietropaoli (2008), p. 375. Thereby, they emphasize the (collectively) reparative effect of such a guarantee of non-repetition.
96 Ibid., p. 366.
97 Regarding the use of the term „corrective justice“, see also footnote 59.
on distributive justice if an affluent person such as a large estate owner in Nepal becomes a victim. The mentioned “ideal approach” should thus, in line with a transformative approach, reduce reparations to a minimum of material benefits in cases where a victim of both a ESCRV or a CPRV is affluent, if any, and to a maximum where it is poor, thereby excluding *restitutio in integrum*. 

For redressing systematically *discriminatory* ESCRV, *collective* material reparations seem to have a more structural and thus more sustainable effect than individual payments or rehabilitation measures. One can also argue that in such a context, collective reparations more clearly seem to be an adequate acknowledgement of past harm, as it is characteristic for discriminatory violations to concern a specific group of people (often gathered geographically) suffering from ESCRV as a collectivity. However, in cases where members of a discriminated group are scattered among a population, individualized reparations seem more desirable from a distributive justice point of view. Generally, and where practicable, the combination of both individual and community reparations, as proposed above, seems to enable a maximised positive effect of direct reparations on distributive justice.

Yet, there is a reparative dimension that doesn’t seem to be reachable by direct reparations solely. In this context, Uprimny Yepes argues that the transformative approach is reconstructive of the concept of GONR, but goes further than GONR with regard to the inequalities targeted. In any case, it seems that neither aspect of the transformative approach can be

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98 As stated above and as it was the case in Nepal as well, poor and discriminated people in fact are often affected disproportionately by ESCRV during a conflict, such that the positive distributive effect of reparations for them can be weighted much higher than the negative one regarding an affluent victim. Nevertheless, it seems clear that transformative approach considerations need to be integrated for ESCRV occurred during a conflict.

99 On the basis of a proposal by Laplante (2007), p. 171), for victims of both ESCRV as an underlying cause of conflict and CPRV/ESCRV as a consequence of conflict, reparations that somehow reveal this overlap of violations should be envisaged; or in other words, reparations should be given that victims understand as rectification for the impact of the conflict and a history of exclusion (see regarding such an understanding Robins, victim-centred TJ, p. 19).

100 Furthermore, by presenting a state’s failure to provide minimum socioeconomic conditions as rights violations, it seems that collective material reparations would be perceived as flowing from victimhood (in this sense also Laplante (2008), p. 352), not citizenship per se, and would actually, through the provision of non-exclusive goods, seem to have a good reparative effect with regard to a discriminatory violation.

101 This because the provision of non-exclusive goods could benefit many people who were not victims of discriminatory socioeconomic rights violations and thus have a negative or at least a neutral effect on distributive justice. Individual payments should be complemented through more long-term benefits, such as scholarships, employment opportunities etc.

102 Uprimny Yepes (2009), p. 22.

103 Ibid., p. 30. Thus, he explains that transformative reparations are meant to overcome some forms of inequality and poverty even if they do not constitute factors that would generate new violence. It seems though that the theoretical potential of massive structural inequalities to lead to physical violence is too high not to regard them always as possible generating factors. Rather, it seems that this statement is meant to confirm Uprimny Yepes’
equated to structural reforms aimed at by GONR. Even the concept of “empowering benefits” as it is described by Uprimny Yepes does not demand structural changes from the state. Rather, the transformative approach should guarantee the coherence of reparations with poverty reduction and development policies, thus in the best case contribute to the implementation of the latter. Moreover, where the transformative approach reduces inequalities, it seems that it remains within the limits of those inequalities concerning victims of CPRV and the people who would be directly affected by the issuance of a benefit to these victims, e.g. by restitution. Out of these reasons, the transformative approach seems to capture unequal distribution in a more incomplete way than GONR, which - if taken seriously – would demand broad structural socioeconomic reforms that generally improve distribution among all groups of society. Nevertheless, reducing inequalities in the mentioned way as well as using participatory procedures would further serve the aims of an “ideal” approach to reparations.

GONR in the sense of structural socioeconomic reforms seem to be also advocated for by authors who argue that reparations might serve as a surrogate for significant redistribution. It seems indeed realistic to assume that direct reparations, even when applying an extended socioeconomic rights approach, don’t redistribute benefits on a significant scale; GONR, which stand for this aim, are obviously not considered part of reparations by these authors.

Hence, an “ideal” approach to reparations in terms of distributive justice would seem to include GONR aiming inter alia at socioeconomic reform besides direct reparations for CPRV and ESCRV. Whereas in particular the distribution of collective material reparations might substantially alter the access of a great number of victims to economic and social benefits, GONR in the sense of socioeconomic reform - while possibly also containing a

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104 See ibid., p. 24 sqq.
105 While e.g. with regard to land redistribution, transformative reparations could often be seen “as a first step for deeper land reform” (see in this sense ibid., p. 24), other areas of importance for poor non-CPRV victims such as equal access to health care or education that are not connected to the restitution to a privileged victim would rather fall out of their purview.
107 Differently Magarrell, who distinguishes a broad notion of reparations including GONR from direct benefits distributed by a reparations programme, in line with the usual practice in TJ mentioned in the beginning of this essay (Magarrell (2003), p. 89 sq.). While she arrives, on the basis of Peru’s example and considerations in the sense of the ones outlined above, at the conclusion that the integration of ESCR in a reparations programme is not desirable from a practical and theoretical viewpoint (see ibid., pp. 85, 93 sq.), she doesn’t speak of a counterproductive effect of a reparations programme on distributive justice.
108 The question of the specific value of direct reparations for victims in comparison to GONR cannot be explored in more detail; apart from that they represent a substantive form of reparations according to the Reparations Principles, it seems obvious that GONR alone wouldn’t suffice victims’ demand for justice for the past violations.
(re)distribution of material benefits – have a complementary function by aiming at changing structural conditions for the actual enjoyment of benefits in the longer term.\textsuperscript{109}

In which form such GONR should be worked on by TJ however remains an open question. Considering in particular the already high complexity of issuing direct reparations for ESCRV (see below), the dimension of GONR might be better addressed by TC recommendations with regard to reform policies than by reparations programmes themselves.\textsuperscript{110}

With regard to Nepal, several authors make such a suggestion;\textsuperscript{111} however, due to the uncertainty of the TCs coming into existence in the foreseeable future or at all, it seems questionable if a reparations programme shouldn’t explore some ways of searching the government’s commitment to socioeconomic reform itself, such that TJ doesn’t give away the chance to maximise its positive effects on distributive justice.

2. Possible difficulties in implementation

The implementation of the “ideal” approach outlined above could firstly be hampered by financial constraints. Thus, it is argued that reparations for ESCRV could be beyond the capacity of (typically chronically underfunded) reparations programmes and entail an unacceptable dilution of benefits.\textsuperscript{112} Certainly, a limited budget being used for both CPRV and ESCRV leads to less benefits for the single victim. But from the point of view of distributive justice as a legitimate component of TJ, the higher and more systematic enhancement of the former makes such a reduction tolerable.\textsuperscript{113}

More generally, the question arises if the above-mentioned dilemma between resources for reparations and for development persists unaltered. One can argue that it is diminished even more, as at least reparations for victims of structural inequalities benefit in a larger manner those people who are targeted by development aid, too, such that the invested budget serves

\textsuperscript{109} In the context of Nepal, an example could be a previously landless person who is given land as compensation, but is compelled to sell it after a drought because of lacking economic reserves. If there would exist a system of low-cost insurance – as a possible element of socioeconomic reform -, the person could keep the land.

\textsuperscript{110} Magarrell anyway considers TC recommendations with regard to reform policies as the appropriate TJ tool for the enhancement of distributive justice (Magarrell (2003), p. 97; see also Alexander (2003), p. 51, N. 6.25), while other authors argue for both TC recommendations as well as direct reparations for ESCRV (Mani (2008), p. 256; Mani (2007), p. 3; Laplante (2008), pp. 333, 347 sqq., 355).

\textsuperscript{111} Several authors propose a future TRC to make respective recommendations: see Aguirre/Pietropaoli (2008), p. 373; Pasipanodya (2008), p. 393; Robins (2010), victim-centred TJ, p. 19.


\textsuperscript{113} Only if one thinks that “meagre” reparations could be considered insulting by victims, such as Roht-Arriaza/Orlovsky (2009) assume in relation to individual reparations as opposed to collective ones (p. 193), or that there is a hierarchy of rights ignored by such an approach, a dilution of benefits would seem unacceptable.
the fulfilment of both these state duties. One certainly contested possibility Mani proposes would thus be to finance at least a part of reparations for ESCRV through development bud-
et.\textsuperscript{114} Another interesting financing opportunity with a direct positive effect on distributive justice is to collect revenues respectively recover assets from affluent stakeholders who benefited from exploitative systems.\textsuperscript{115}

A second difficulty concerns, as indicated above, the high complexity of implementing a respective reparations programme, in particular to measure reparations for the damage done to generations of victims of systematic structural violence.\textsuperscript{116} The experience with Peru’s reparations plan seems to confirm such an estimation.\textsuperscript{117} However, reflecting on this process,\textsuperscript{118} Laplante arrives at the conclusion that reality may make a more expansive view reflecting harm suffered from both CPRV and ESCRV inevitable.\textsuperscript{119} It is clear though that the concrete design of such a programme represents a major challenge.

\section*{VII. Conclusion}

Taking the resistance of CPN(M) members against the return of seized land as starting point, this essay gave an overview of approaches to reparations contributing to distributive justice and tried to merge them into an “ideal” approach. At this point, an attempt to apply the latter to the original dilemma seems owing. In this regard, it could be proposed to issue minimal material reparations in the form of compensation to the concerned large estate owners, accompanied by symbolic reparations. The land could be kept by the previously landless people as a redress for the structural inequalities endured, possibly together with some individual and/or collective material reparations. Finally, the implementation of the government’s commitment to a pervasive, redistributive land reform in the sense of a GONR would need to be worked on, either through a reparations programme itself or recommendations by a future TRC.

\textsuperscript{114} Mani suggests to include reparations for practices of social injustice in development packages for donors to fund (Mani (2008), p. 256; in this sense also Robins (2010), victim-centred TJ, p. 19). Such an approach would also mitigate the restrictive budgetary effect of integrating ESCRV on reparations for CPRV.
\textsuperscript{115} See Carranza (2009), p. 3; Carranza (2008), p. 324 sq.
\textsuperscript{116} Mani (2008), p. 255.
\textsuperscript{117} An early model of the Peruvian Comprehensive Reparations Plan that included generations of violations indeed was declared to be unmanageable because of its complexity (Magarrell (2003), p. 91 sqq.).
\textsuperscript{118} Thus, victims in interviews had explicitly requested redress for their current needs, reflecting a lack of protection of their ESCR. While the final Reparations Plan only remedied CPRV, it nevertheless tried to address socio-economic conditions through collective reparations, thereby generating frustration among society that perceived them as development (Laplante (2007), p. 165, 169 sqq.).
\textsuperscript{119} Laplante (2007), p. 177.
While it is clear that this essay leaves many questions open, e.g. with regard to the concrete design of an “ideal” reparations programme, the reasons presented for policy makers to try and maximise the positive distributive impact of reparations seem numerous as well. Those arguing that distributive justice can be better addressed by the development field could be reminded that it is justice “in its deepest sense” that is at stake here. TJ processes, including reparations, should and could not substitute longer-term development policies, but address socioeconomic inequalities and spearhead necessary reforms, which might benefit from a “legal obligation to fulfil rights and further justice” and thus ultimately a human rights-based approach to development.

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120 See Duthie (2008), p. 308. This assumption is also mentioned by Pasipanodya (2008), p. 389. Using the example of land inequality, she interestingly states that issues of inequality often remain unaddressed by neither field (p. 390). With regard to the term “development field”, it needs to be added that while development actors have increasingly directly supported TJ processes (Lenzen (2009), p. 79), “conventional” development cooperation is meant here.


123 Ibid.

124 Laplante (2008), p. 334. Such a strengthening would arguably be greater than it could be through the general recognition of victims of CPRV as rights bearers, which Lenzen (2009), p. 90 sq., mentions.
Bibliography

Literature


Jha, Prashant, „The final countdown in Nepal“, in: The Hindu, 6 March 2012: http://www.thehindu.com/opinion/lead/article2964646.ece (last accessed on 12/2/2012)


**Materials**

**United Nations Documents**


Documents from Nepal

Comprehensive Peace Agreement held between the Government of Nepal and the Communist Party of Nepal (Maoist), 22 November 2006: http://reliefweb.int/node/219161 (last accessed on 17/3/2012)


Nepal Secretariat of Legislative Parliament, A Bill formulated to Make Provisions in Relation to Disappearance, (unofficial translation), 2009