May 26, 2022

International and Domestic Standards for Reparations for Violations of Rights of a Group Based on the Group’s Identity

Including a critique of Chair Moore’s March 29, 2022 slide presentation on eligibility

by

Adjoa A. Aiyetoro, J.D.

Submitted to
California Reparations Task Force created pursuant to AB-3121

Introduction

I submit this nine-page memorandum to assist the Task Force in its work. This memorandum provides information and documentations of domestic and international reparations standards found in caselaw, legislative histories and in international resolutions and case studies. I also provide an analysis of Chair Moore’s March 29 slide show presented the day the Task Force voted on eligibility for reparations pursuant to AB-3121. It is my view that as the Task Force concludes its work, its recommendations to the California legislature should be based on thorough assessment of standards and reparations history, even if it decides to depart from the current standards. Its recommendations to the California legislature should not be based on ideology that ignores these standards and may increase, rather than repair, the harm caused by slavery and its continuing legacy.

The basic international and domestic standards for reparations to members of a group whose rights have been violated based on group identity are that members of the group who are injured are provided material reparations. Material reparations are also frequently provided to the group as a whole even though all members are not directly injured. Lineage is seldom the criteria for obtaining material reparations.

United States Standard for Reparations

There are two examples in the United States when reparations have been awarded to members of a group for violations of their rights based on their group identity: African Americans for the 1923 massacre and destruction of Rosewood, Florida and Japanese Americans who lost homes and businesses in WWII, suffered the humiliation of being labeled non-patriotic, and were forced into internment camps.

- Rosewood, Florida
  On April 8, 1994, the Florida Legislature became the first legislative body in the United States to acknowledge its responsibility for an act of racial violence committed against African Americans. Rosewood was a prosperous, although small community of approximately 350 Black people in a predominantly white county. On January 1, 1923, believing that a white woman had been assaulted by a Black escapee from a county
chain gang, whites, including law enforcement, in surrounding communities killed and injured Rosewood residents, looted and burned their homes, and destroyed the community. The Rosewood Compensation Act\(^1\), in addition to an acknowledgment that Rosewood was destroyed by white violence and that the state was responsible for not preventing the violence, provided compensation to families who had lost real or personal property as well as compensation to African American Rosewood residents who were “present and affected by the violence”. Finally, the Act established a 25-year scholarship fund for “minority persons with preference being given to direct descendants of the Rosewood families”. The Florida University System was also required to continue research and instruction on the Rosewood Massacre.

- **Japanese Americans Interned during WWII**
  The Civil Liberties Act of 1988\(^2\) provided redress to Japanese Americans who were interned in World War II. It authorized the payment of $20,000 to each survivor who was alive at the time the bill was passed. It also authorized the appropriation of funds for the establishment of a foundation to “sponsor research and public educational activities . . . so that the causes and circumstances of this and similar events may be illuminated.” There was no lineage provision in the Act. Descendants of Japanese Americans who interned and who were deceased prior to the passage of the Act did not receive the one-time, tax-free compensation. The descendants of Japanese Americans who were interned and who were alive on the day the bill was passed received the one-time, tax-free compensations not by virtue of the bill but by virtue of the vesting of the award in the estate of the interned Japanese American.

**International Standard for Reparations**
The international standards for providing reparations gleaned from United Nations resolutions and reparations protocols established by a number of countries that have developed a reparatory program for violations of human and civil rights similarly show that there is no standard for providing reparations based on lineage. The U.N. documents do not establish a lineage standard. There is also no such “standard” in the reparations protocols of individual countries, although a minority provide reparations to descendants. The standard is that reparations are provided to those who have suffered violations of human rights because of their group identity, primarily although not exclusively at the hands of governments. Indeed, the U.N. documents that focus on historic violations of human rights, such as slavery, focus more on States (countries) developing reparations programs for the continuing legacy of racism that flows from slavery.

- **World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerances (WCAR): Declaration and Programme of Action**
  - There is no lineage-based requirement for reparations in the WCAR Declaration and Programme of Action. The documents speak to reparations for victims of historic injustices including slavery with a primary focus on taking “appropriate and effective measures to halt and reverse the lasting consequences of these practices”\(^3\).  

---

\(^1\) Laws of Florida, 1994, c. 94-359


\(^3\) WCAR, Declaration at par.32-35; 102-104; see also, Programme of Action, pp 48-51.
➢ The WCAR documents acknowledge that racism and other violations of human and civil rights flow from the historic injustice of slavery and, therefore, reparations should address that legacy. Reparations in these documents are for the racial group that was victimized by slavery in a State (country), whether or not recipients are direct descendants of those enslaved. The documents focus on the injuries to the group that flow from the legacy of slavery.

  ➢ The resolution identifies the longstanding commitment of the United Nations and international bodies to a right to a remedy and reparations. It indicates that these rights are grounded in the Universal Declaration of Human Rights as well as other international resolutions and statutes.\(^4\)
  ➢ The resolution indicates that victims should receive full reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
  ➢ It recommends that the remedy/reparations should be awarded to the victim of the crime noting that the “contemporary forms of victimization … while essentially against persons, may also be directed against groups.”\(^5\)
  ➢ It defines victims as direct victims, immediate family and dependents and persons who have suffered harm in intervening to assist victims.\(^6\)
  ➢ There is no lineage definition of victim except in a very narrow way – to family and dependents – not descendants.

- Elimination of racism, racial discrimination, xenophobia and related intolerance: comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action, Contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, United Nations General Assembly Resolution 73/262, Seventy-fourth Session, 21 August 2019.
  ➢ This document is the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Tendayi Achiume. It “addresses the human rights obligations of Member States in relation to reparations for racial discrimination rooted in slavery and colonialism.” It reaches the following conclusion based on the Special Rapporteur’s study and research:
    ❖ Reparations must address the contemporary, racially discriminatory effects of structures of inequality and subordination that flow from slavery.\(^7\)

---


\(^5\) Id. at 4.

\(^6\) Id. at 5, V

\(^7\) Contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, United Nations General Assembly Resolution 73/262, Seventy-fourth Session, 21 August 2019, at 4.
Reparations concerns both our past and our present. It is not just about individual wrongful acts. The human rights violations of slavery implicate the entire legal, economic, political and social structures that enabled slavery and which continue to sustain its legacy of racial subordination – anti-Blackness.\(^8\)

Recommends a structural approach to providing reparations due to slavery’s creation of structures that continue to harm those in the group that were victimized by slavery, not just descendants of enslaved Africans, but African Americans, as AB-3121 indicates.

Slavery was a dehumanization of persons on the basis of “race” - a social construct that shapes access to fundamental human rights.\(^9\)

 Victims of the human rights violations of slavery included victims of its legacy and all have the right to full reparations:

✓ Restitution – returning to pre-violation status
✓ Compensation – value of restitution if restitution not possible
✓ Satisfaction – includes acknowledgment, expression of regret, prevention measures to promote non-repetition.\(^10\)
✓ Complex reparations programs (providing both individual and collective forms of material reparations and symbolic measures) may better suit the needs of victims both direct victims and the targeted group of victims.\(^11\)
✓ Providing reparations for certain members of the group, for example, African American descendants of enslaved Africans, and not all members of the group, for example, African Americans, whose harm stems from the same violations of human rights and international law, ensures there will be ongoing calls for reparations.\(^12\) Restricting reparations to only one sector of the African American community that has been harmed by slavery and its ongoing legacy also fails to address the stigmatization of African Americans that is borne of enslavement and may in fact increase it.

- International reparations programs
  - The Special Rapporteur’s report to the United Nations highlighted some reparations programs developed by countries to remedy violations of human rights. Most have been to direct victims and organizations.\(^13\)
  - Germany- developed a restitution program for Nazi-era crimes and supplemented it with “compensation for individual suffering, loss of life,

\(^8\) Id. at 4 (8)
\(^9\) Id. at 6-7 (16).
\(^10\) Id. at 14 (36)
\(^11\) Id. at (39)
\(^12\) Id. at 16 (39d).
\(^13\) Id. at V. 16-17, (2 and 43)
health and liberty inflicted by the Nazi regime.” In the early 1950s, the “Luxembourg Agreement” supplemented this by giving billions to the State of Israel and millions to the Conference on Jewish Material Claims against Germany.15

❖ In 2013 the United Kingdom and veterans of the Mau Mau movement in Kenya settled a lawsuit brought by the Kenyans in 2011. The settlement provided 19.9 million pounds in damages to the 5,228 survivors, The government also issued an apology.16

➢ The Handbook of Reparations, cited by Chair Moore in her March 29, 2022 slide presentation to the Reparations Task Force outlines reparations programs in a number of countries, including Argentina, Chile, Brazil, El Salvador, Haiti, South Africa, and Malawi.17 The standard for reparations in all these countries was providing reparatory justice to direct victims. In some cases, reparations were given to immediate family. For example, in Argentina economic assistance was given to the children/families of the disappeared in the form of scholarships, social assistance and job positions as well as pensions to spouses and children who were viewed as victims. Those detained by the government in violation of human rights received economic reparations. If they died in detention their reparations were given to immediate family and expired after 16 years.18 In other cases, reparations included providing support to organizations, for example, in Brazil.19 It was the rare case that reparations was given to descendants of direct victims. In Chile, benefits expired with the death of the person dismissed for political reasons unless there was a surviving spouse and children younger than 24 years old.20

Chair Moore’s March 29, 2022 Slide Presentation

In reviewing Chair Moore’s slides, I was struck by the way she stretches meaning of language, cites incompletely and inaccurately sources that she indicates support the position of lineage-based reparations and inaccurately states some reparations packages were based on lineage. It appears to me that in an effort to support the position that reparations based on AB-3121 should be lineage-based, she oversteps and fails to apply sound legal analysis. Her arguments are also based on xenophobia – anti-Black immigrants, something that would minimally violate the spirit of the UN documents as they address ending xenophobia as well as racism. Indeed, xenophobia can be seen as one of the bases of racism that led to slavery. Finally, the decision that reparations in California should be based on lineage, made by a narrow majority of the Reparations Task Force based in some part on a flawed slide presentation, will be extremely difficult if not impossible to implement given the difficulty of establishing descent by some

14 Id. at (42).
15 Id.
16 Id. at (43).
17 The Handbook of Reparations, Pablo De Greiff (ed.), The International Center of Transnational Justice (2010).
18 Id. at 22, 32.
19 Id. at 105.
20 Id. at 81.
African Americans who are in fact descended from enslaved Africans and free Africans during slavery. And, if the effort is to address the legacies of slavery that require legislation to enforce discrimination laws and add an enhancement for African Americans, if only applied to those descended from slaves would require the institution of a pass-like system. African Americans who have proof of their descendancy from an enslaved African or an African who was free during slavery would have to present the pass.

- **Reparations based on lineage narrows the scope of AB 3121**
  
  1. **AB 3121 is titled Task Force to Study and Develop Reparations for African Americans. Although it provides in the text “with a Special Consideration for African Americans Who are Descendants of Persons Enslaved in the United States” the statute as passed and signed by the Governor of California is not limited to only African Americans who are descendants of enslaved Africans. Indeed, Article 1, 8301 (a) (3) specifically notes “preponderance of scholarly, legal, and community evidentiary documentation. . . [of] the ongoing effects of the institution of slavery and its legacy of persistent systemic structures of discrimination on living African Americans and society in the United States.” The statute does not state, nor is there any evidence in the “scholarly, legal and community evidentiary documentation” that these “ongoing effects” are restricted to African Americans who are descendants of enslaved Africans.**

  2. **The testimony of the author of the bill, Assemblymember Shirley Weber (D-San Diego), that her intent was to include only free Africans and the descendants of enslaved Africans does not change the language of the bill signed into law by Governor Gavin Newsom. This narrowing of the bill’s scope after it was signed, given its clear language, creates a legal concern that the implementation of the bill is under-inclusive and may be held to be unconstitutional.**

  3. **The slides Chair Moore presented to support her view that lineage has been the basis of reparations are misleading at best and incorrect at worse. Lineage is defined in Webster’s New Explorer Dictionary and Thesaurus as “lineal descent from a common progenitor”. Many, if not most, of the materials in the slide presentation do not satisfy this definition.**

     o **Slide AB 3121/H.R. 40: Legislative History**

      - Chair Moore incorrectly states that the reparations authorized in Civil Liberties Act of 1988 to be given to certain Japanese Americans was based on lineage. As discussed earlier, the compensatory reparations authorized in the Act were for Japanese Americans interned during WWII who were alive on the day the bill was passed. If they died prior to receiving the authorized compensation it went to their descendants. This is not lineage-based reparations, but rather reparations to members of a specific race or ethnic group who suffered injury by the actions of the United States because of their race or ethnicity. Their descendants only received the
compensation if the direct victims were alive at the time of the bill’s passage, yet not alive at the time of the distribution of reparations. The bill was not based on lineage. Because the compensatory reparations vested in at the time the bill passed the reparations became part of their estate.

❖ Chair Moore is correct that the Honorable John Conyers modeled H.R. 40 after the Japanese American bill. However, she is incorrect that that bill was a bill that provided reparations based on lineage. I worked with Congressman John Conyers regularly on H.R. 40 and reparations generally from 1988 until 2004 when I left Washington DC to teach at the University of Arkansas Little Rock Wm. H. Bowen School of Law. From 2004 to 2017, when he left Congress, I interacted with him at least annually on H.R. 40 and reparations. At no time to the best of my recall did he voice restricting reparations pursuant to H.R. 40 to lineage-based reparations.

❖ Chair Moore includes in this slide xenophobic data and comments that are irrelevant to the legislative history of AB 3121, H.R. 40 and the Civil Liberties Act of 1988. Having firsthand knowledge of the drafting of and advocacy for H.R. 40 and having worked with supporters of the Civil Liberties Act of 1988, I never heard Congressman Conyers voice views against African American who immigrated to the United States post slavery receiving reparations.

o Chair Moore’s reason for including the slide on the Freedmen’s Bureau Act is unclear to me. The Act does not speak to the issues of eligibility for reparations in a bill. This Act was narrowly constructed to provide support for those left without resources after slavery was ended.

o The slide on “birthright citizens” is misleading at best. Birthright citizens is about the advocacy for the clause in the 14th Amendment to the United States Constitution that provides in part: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” It has nothing to do with lineage eligibility for reparations. It corrects the United States Supreme Court decision in Dred Scott that ruled that Dred Scott had no rights that a white man (person) had to respect.

o Chair Moore, on the slide on Chapter 4.5 Reparations for the Institution of Slavery, Article 2. 8301.1 indicates, without support, that the mandate to document and examine contemporary or “present-day” harms is “clearly limited to freed African slaves and their descendants.” Article 2, taken within the whole of AB 3121, that Reparations Proposals for African Americans, with Special Consideration for African Americans Who are Descendants of Persons Enslaved in the United States, if implemented as Chair Moore suggests - to be “clearly limited to ‘freed Africans and their descendants’” - would be underinclusive and subject to constitutional scrutiny by the judiciary. Indeed, it also contradicts the oral testimony of Assemblywoman Weber that it was her intent (although not
stated in the Act) that eligibility would be limited to descendants of enslaved Africans and free Africans during slavery.

- The slide, Chapter 4.5. Reparations for the Institution of Slavery, Article1. Findings and Declarations, supports the conclusion that this Act was to look at the effect of slavery on African Americans, generally, not just those descended from an enslaved Africans or an African who was free during slavery. This is also supported by the next slide on this same chapter and article “(D) . . . and the crime against humanity committed against people of African descent in California and the United States.” Chair Moore’s attempt in her analysis of that slide to change the explicit language to fit her perspective on eligibility violates sound practices of legislative interpretation.

- This same flaw in interpretation of legislation that directly contradicts the clear language of the statute is repeated on the two slides on Chapter 4.5. Reparations for the Institution of Slavery, Article 2, 8301.1 (b).

- On the third slide on Chapter 4.5. Reparations for the Institution of Slavery, Article 2, 8301.1 (b), Chair Moore makes a statement in her analysis that is unsupported by a thorough review of the Act that “rehabilitation or restitution are to be limited to ‘African Descendants’ which were defined previously through the statute as descendants of ‘freed African slaves’ in the United States.” In all the subsequent slides on Chapter 4.5. Reparations for the Institution of Slavery, Chair Moore makes the same error, taking the clear language of the Act “African Americans” and indicating this actually means descendants of enslaved Africans in the United States.

- The slide that includes a photo of the book cover of We Charge Genocide and a picture of Paul Robeson and others with the book is quizzical at best. Neither William Patterson nor Paul Robeson limited their concerns with the genocide of African Americans to descendants of enslaved Africans.

- The slide that includes the Black Panther Party’s platform, What We Want, What We Believe, rather than supporting a lineage argument supports one that includes all Black people, not simply descendants of enslaved Africans. The Black Panther Party’s Program states in “What We Believe”:

  “We believe that this racist government has robbed us and now we are demanding the overdue debt of forty acres and two mules. . . . We will accept the payment in currency which will be distributed to our many communities. . . .”

The Black Panther Party did not limit their community to descendants of enslaved Africans. Indeed, James Forman, a Black Panther Party member and organizer of SNCC (Student Non-Violent Coordinating Committee) and former SNCC executive secretary, interrupted a Sunday service at Riverside Church in New York to present the Black Manifesto. The Black Manifesto was a demand

---

for $500 million reparations to Black Americans, not simply those descended from enslaved Africans, slavery and its legacy.  
- The slide on the Primer: International Human Rights Law does not accurately cite The Handbook of Reparations. Its editor is Pablo De Greiff, Director of Research at the International Center for Transitional Justice (ICTJ). Chair Moore presents it to support the conclusion it seems that the only recipients of reparations are direct victims or their descendants. Earlier in this memorandum the reparations programs discussed in this book were summarized. If in this slide Chair Moore is suggesting that the book supports lineage-based reparations it is at best an incomplete statement. In fact, as discussed earlier, most of the reparations programs described in this volume were not lineage based.

Conclusion

The domestic and international standards for providing reparations for descendants of members of a group who were the victims of violations of their civil and human rights based on their group identity do not support the argument made by some who testified before the Reparations Task Force, as well as some members of the Task Force, including Chair Moore, that the standards are for lineage-based reparations. As discussed above, most of the domestic and international reparations programs and policies do not provide lineage-based reparations – reparations to those who descend from a common progenitor. In fact, most provide material reparations to direct victims, some to immediate family and a large number to the broader group, even if not directly injured. It is unfortunate that in her advocacy for a lineage-based reparations program in California, Chair Moore made a number of misstatements and misleading representations on her slides that distorted the place of lineage-based reparations in the long history of the creation of reparations programs and policies.

Finally, based on a brief review of caselaw, the California Reparations Task Force’s recommendation that reparations be lineage based may be subject to a constitutional challenge. The language of AB 3121 addresses reparations for African Americans, with specific focus on descendants of enslaved Africans and Africans who lived free during slavery. It also specifically addresses the need for reparations for the legacy of slavery. Excluding African Americans, particularly post emancipation, who are not descendants of enslaved Africans may be constitutionally barred as well as subjecting the state to continuing demands for reparations by African Americans not included in this narrowing of AB 3121.

---