

The Right to Compensation and Related Remedies for Racial Discrimination

Concluding observations by Theo van Boven

from
*Conference on the Right to Compensation and Related Remedies for Racial Discrimination
hosted by the Danish Centre for Human Rights, Copenhagen, on 27 - 28 April, 2001*

*held in conjunction with the first annual meeting of Association of Human Rights Institutes (AHRI)*¹

1. Introduction

The 2nd Copenhagen Conference on Discrimination and Toleration had its focus on questions of compensation and other forms of reparation for past wrongs as one of the major themes of the upcoming World Conference Against Racism to be held in Durban, South Africa, in September 2001. The perspective of the victim was an aspect of central concern. While questions of compensation were the principal topic of the 2nd Copenhagen Conference, participants were aware that this topic was by no means the only issue of the World Conference. Excessive focus on one issue should be avoided.

The 2nd Copenhagen Conference held sessions which addressed the following aspects:

- Historical Human Rights Violations in the Perspective of Morality and Law;
- Current Claims, Regional Experiences, Pressing Problem Areas;
- Models of Reparation.

2. Three basic sources for reparation

In recent times, cases for reparation and related claims have been pursued as a result of the following circumstances and in the light of the following contexts:

(a) Cases arising from serious patterns of injustice and wrongs perpetrated during World War II by the Axis Powers, notably state-sponsored mass killings, forced labour, sexual exploitation. Programmes and schemes of "wiedergutmachung" for victims of these crimes were set up and prominence was given to victims of the Holocaust and their descendants.

(b) Claims ensuing, in the aftermath of transition from totalitarian

¹AHRI consists of the following members: Netherlands Institute of Human Rights, Raoul Wallenberg Institute, Essex University Human Rights Centre, Åbo Akademi University Institute for Human Rights, Norwegian Institute of Human Rights, Danish Centre for Human Rights, Icelandic Human Rights Center, Ludwig Boltzmann Institute of Human Rights.

repression and state terrorism to democratic rule, as occurred in countries of Latin America, Central and Eastern Europe and in South Africa. One important phenomenon was the establishment of truth commissions which had the task of clarifying the circumstances under which victims of the regimes had suffered. In some instances, the truth commissions were also instrumental in establishing the responsibilities of the regimes and the perpetrators.

(c)

Demands for reparations arising from colonialism, slavery and the slave trade, postulated by the formerly colonised peoples of Africa and Africans living in the diaspora. Demands of a similar nature were also put forward by a variety of indigenous peoples against the descendants of their European conquerors.

3. The Role of Law

The role of law and legal issues relating to reparations were extensively discussed. From the presentations and discussions the following notions and views can be distilled:

(a) International human rights law and, to an increasing extent, international humanitarian law offer a firm legal basis for reparations to victims of gross violation of human rights and humanitarian law. Victims include relatives, and in a wider sense, victimized groups, communities and peoples.

(b) International human rights courts, notably the European and the Inter-American Courts for Human Rights, are giving growing attention to the right to reparation for victims of violations of human rights, in particular violations of ius cogens rights. Equally these courts increasingly stress the importance of provisional measures as a means to protect and to prevent irreparable harm.

(c) There is also a growing tendency in criminal law and procedures to take the rights and interests of victims duly into account. This is also illustrated by the Rome Statute of the International Criminal Court.

(d) It is widely agreed that genocide, systematic racial discrimination, apartheid, enslavement and exploitation of people, enforced disappearances are among the serious crimes that pursuant to contemporary international law fall within the category of crimes against humanity (see also the Rome Statute of the International Criminal Court). Legal constraints, often embedded in national legal systems, such as statutes of limitations and blank amnesty laws, are inadmissible impediments to block the investigation, prosecution and punishment of crimes of such grave nature.

(e) The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by some 160 States, is the most comprehensive international legal instrument to combat racial discrimination. Its

provision on redress and reparation may still have limited application, but the supervisory body (CERD) has in recent years adopted General Recommendations expressing support for compensatory measures on behalf of indigenous peoples, refugees and displaced persons as well as Roma. The Convention also provides for special measures (affirmative action) to make up for racially or ethnically disadvantaged groups.

- (f) Pursuing legal claims entails many complexities which are inherent in (formalistic) legal structures in particular the issue of the time factor (ratione temporis), ambiguities as regards collectivities and communities, entities to which historical wrongs can be attributed (states, corporations, social and religious institutions etc.), natural or legal persons as beneficiaries entitled to civil damages, the quantification of damages.
- (g) While the role of law and the legal method raise many complexities as regards the compensation of historical wrongs, the law nevertheless offers significant potentials and perspectives to repair and redress contemporary wrongs, including contemporary forms of slavery.

4. Forms of Reparations

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (UN.doc E/CN.4/2000/62) distinguish between the following forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition. It should be kept in mind that there are financial and non-financial means of reparation. While compensation as a financial means of reparation is often regarded as the most important device for redress, it must be stressed that the concept of reparation is broader and deeper than the arrangement of a financial settlement.

For the reparation of historical wrongs such notions as recognition, acknowledgement, apologies, documentation of the truth, accurate history writing, commemorations and educational measures deserve due attention. Also the notion of atonement was stressed, involving recognition and acknowledgement.

Concrete experiences were presented and discussed, such as the Austrian practice with respect to World War II restitution claims for violations of human rights; restitution claims in connection with land issues in South Africa and more in general the experiences with the South African Truth and Reconciliation Commission. While these experiences were positively appreciated, it was felt that no uniform models for truth commissions commend themselves. Different contexts and different cultures should be taken into account.

5. Special measures (affirmative action)

Special measures are not listed as a form of reparations in terms of redress on behalf of victims. Nevertheless, as also indicated in the International Convention on the Elimination of All forms of Racial Discrimination (see above), special measures may constitute an important means and policy device to do justice and to provide better opportunities to the racially and ethnically disadvantaged and marginalised. In this regard additional resources should be made available so as to create conditions for these people to enjoy to a larger extent their economic and social rights (education, social welfare, health services, employment, housing etc.). These special measures should also be envisaged in national and international development programmes on behalf of people who as a result of historical wrongs continue to live in deprived and disadvantaged conditions.

6. Moral case for reparations

In addition to legal aspects (see above) much attention was given to the moral underpinnings of reparations. Reparations must be seen as a means to restore the legal and moral order and as a basis for reconciliation between individual persons and between groups of people.

There is a moral imperative to repair massive and systematic violations of basic human rights (ius cogens rights), taking into account the perspective of victims. This means restoration of their dignity and worth as human beings, particularly since many of these victims have been stigmatized and treated as inferiors.

Large groups of people (Africans, Asians, indigenous peoples, Roma and Sinti, victims of caste discrimination) have been the object of age old, persistent and entrenched discrimination. The moral imperative for reparation flows from the concept of universal human rights as embodied in the Universal Declaration of Human Rights, which enshrines the worth and dignity of all human beings, irrespective of race, colour, creed, gender, age, ethnic or national origin etc.

Participants stressed the concept of moral reciprocity as a communicative, two-way relationship between the victim and the guilty/responsible party, as a means to live together, recognizing the moral value and the dignity of the other party, white or non-white, rich or poor. The concept of moral reciprocity is linked to the notion of moral integrity as an essential pre-condition for reaching out to the other side and for coming to terms with each other.

7. Historical wrongs and their effects on present generations

Participants discussed the effects of colonialism, slavery and slave trade and their lasting impact on the living conditions and the psychology of the peoples of Africa. Reference was made to the proposals made by the regional African conference in Dakar to establish compensation and development funds as a means and mechanism to repair historical wrongs.

Attention was also given to claims for reparation by the African Americans redress

movement and to discrimination and deprivation suffered by Afro-Brazilians. It was stated that these concerns were often met by strong eurocentrist attitudes and racist bias and a tendency to ignore crimes and wrongs committed in the past.

In addition, attention was also drawn to historical wrongs in the context of deeply rooted and persistent discrimination in the political, social and religious structures of national and international society, and their effects upon indigenous peoples, roma, dalits and many others. In these instances oppression and victimization were not so much based on colour, but on ethnicity, national origin, culture, religion.

In dealing with historical wrongs the following considerations may be kept in mind:

- (i) History is not a closed book describing the past. It has effects on the lives and the psychology of present generations.
- (ii) A basic precondition and means of reparation is recognition and acknowledgement of wrongs committed.
- (iii) There is a moral imperative to repair massive and systematic violations of basic human rights and to restore the moral order between people for the sake of justice and integrity.
- (iv) To construe a legal case to repair historical wrongs is more complex than to pursue and defend the moral case.
- (v) Special measures should be taken in order to create better conditions and to do justice to the racially and ethnically disadvantaged and deprived. Such special measures should be part of national and international development policies and programmes and serve in particular the realization of economic and social rights of the disadvantaged and deprived.

8. **Recommendations**

1. When dealing with reparations, both financial and non-financial means of reparation should be considered as mutually complementary.
2. In approaching the issue of historical wrongs, the above mentioned (five) considerations may be taken into account.
3. The problems of the World Conference against Racism should be taken up with an open mind in a spirit of moral reciprocity.
4. It is important that the World Conference recommends the setting up of a mechanism or procedure for review and appraisal so as to promote the follow-up and the implementation of the programme of action of the

Conference at all levels (national, regional, international).

5. It is recommended that the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (doc.E/CN.4/2000/62) receive early endorsement and wide support.