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Herik, L.J. van den

Citation

Herik, L. J. van den. (2018). Historical Inquiry as a Form of Colonial Reparation? *Harvard International Law Journal*, 2018(online), 1-5. Retrieved from <https://hdl.handle.net/1887/68840>

Version: Not Applicable (or Unknown)

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Note: To cite this publication please use the final published version (if applicable).

HISTORICAL INQUIRY AS A FORM OF COLONIAL REPARATION?

LARISSA VAN DEN HERIK*

This symposium asks the question: “Do colonists owe their former colonies reparations under international law?” thus revisiting outcomes of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.¹ At the Durban Conference, it became apparent that claims for historic injustice including colonialism and slavery are not easily cast in legal terms given their generic nature and particularly also in light of challenges to overcome the inter-temporal principle.² Nonetheless, legal claims and other requests for redress have continued to be presented against former colonial powers, with increasing frequency in recent years it seems.³ The demands have met with a variety of responses by States and governments, as also described in Dinah Shelton’s “world of atonement”.⁴ The redress that is asked, and very occasionally obtained, is in any event more diversified than only reparations in the sense of payments and financial compensation.

There is thus merit in broadening the symposium question to also envisage other types of reparation that may come into play.⁵ The Articles on State Responsibility list satisfaction as

* Prof. dr. Larissa van den Herik is Vice Dean of Leiden Law School and professor of public international law at the Grotius Centre for International Legal Studies at Leiden University.

¹ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *UN Doc. A/CONF.189/12*, Durban, 31 August – 8 September 2001.

² M. du Plessis, *Historical injustice and international law : an exploratory discussion of reparation for slavery*, 25 *HUMAN RIGHTS QUARTERLY* 3: 624-659 (2003).

³ See e.g., cases against the UK regarding Kenya and Malaya (Malaysia) in UK courts for acts of torture/trespass and regarding the requirement to hold a public inquiry, respectively: *Ndiku Mutua and Others v. The Foreign and Commonwealth Office* [2011] EWHC 1913 (QB) and [2012] EWHC 2678 (QB) and *Keyu and Others v. Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69; cases against Germany (and earlier in 2001 against German companies) in US courts based on the Alien Tort Statute, VEKUII RUKORO, Paramount Chief of the Ovaherero People and Representative of the Ovaherero Traditional Authority and Others against Germany, 5 January 2017. The formal labeling of the “Namibian Question” as genocide by the German government only occurred upon explicit invitation to do so of the German parliament, Deutscher Bundestag, Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Niema Movassat, Wolfgang Gehrcke, Christine Buchholz, weiterer Abgeordneter und der Fraktion Die Linke, Drucksache 18/8859 (Sachstand der Verhandlungen zum Versöhnungsprozess mit Namibia und zur Aufarbeitung des Völkermordes an den Herero und Nama), Drucksache 18/9152, 11 July 2016. For scholarly reflections on these cases, see D. Hovell, *The Gulf between Tortious and Torturous; UK Responsibility for Mistreatment of the Mau Mau in Colonial Kenya*, 11 *J OF INT’L CRIMINAL JUSTICE* 223-245 (2013), and A. Buser, *German Genocide in Namibia in US Courts*, *VÖLKERRECHTSBLOG*, (2017). For an analysis of the claim of Caribbean States against several European States, see A. Buser, *Colonial Injustices and the Law of State Responsibility: The CARICOM Claim for Reparations*, KFG Working Paper Series, No. 4, August 2016.

⁴ D. Shelton, *The World of Atonement: Reparations for Historical Injustices*, in *NET. INT’L. L. REV.* 289-325 (2003).

⁵ Cf. Michael Wood, who states that, “the word ‘reparations’ is best reserved for its traditional meaning of payments and other transfers of resources imposed, at the end of an armed

a form of full reparation if the wrongful act cannot be made good by restitution or compensation (Article 37, para. 1). Article 37, para. 2 specifies that satisfaction, “may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.” The Articles on State Responsibility also suggest other legal consequences, such as the obligation to cease the internationally wrongful act, if it is continuing, and the offer of appropriate assurances and guarantees of non-repetition, if circumstances so require (Article 30).⁶ There may be merit in analyzing how these forms of reparation and legal consequences could be translated to contexts of colonialism and decolonization violence. Yet, from a legal-technical perspective, the legal consequences do presuppose an international wrongful act. This may not always be easily construed, despite general overall agreement on the wrongs of the colonial project.⁷ Therefore, it is suggested that the symposium’s question should be understood as not only seeking to examine legal forms of reparation, but also as a trigger to explore how the legal and the non-legal interact, and how the non-legal may still offer some sort of general satisfactory reparation in a non-legal sense, possibly sparked by or coupled with more legal forms of reparation in concrete instances.

On the basis of such a broadened understanding of the symposium’s lead question, this contribution considers recent Dutch practice. It presents a series of judgments in which individual Indonesian victims claimed reparation from the Dutch State for concrete acts committed during the decolonization period. Notwithstanding some remarkable successes from a justice perspective, the reparatory effect of these judgments is ultimately limited and they cannot be regarded as some kind of precedent for general colonial reparation. Nonetheless, the tenor of these serial judgments corresponds with concurrent historical findings on the structural nature of the use of mass violence during the Indonesian war of independence.⁸ These societal developments, including the litigation, galvanised formal efforts to revisit the Dutch decolonization period,⁹ leading to a government funded large-scale historical inquiry into *decolonisation, violence and war in Indonesia 1945-1950*.¹⁰ Hence,

conflict, usually by the victor upon the vanquished. ‘Reparation’, on the other hand, is best used with the meaning given to it in the ILC’s 2001 Articles on State responsibility (that is, as a legal consequences of an internationally wrongful act).” In: M. Wood, *The rights of victims to reparation: the Importance of clear thinking*, in HEIDELBERG J. OF INT’L. LAW. 2/2018 (forthcoming).

⁶ *Id.*

⁷ For a discussion between historians on how colonialism should be academically approached and appraised, specifically focusing on the British Empire, see, K. Malik, *The Great British Empire Debate*, N.Y. REV. OF BOOKS, 26 January 2018.

⁸ G.J. OOSTINDIË, *SOLDAAT IN INDONESIË, 1945-1950; GETUIGENISSEN VAN EEN OORLOG AAN DE VERKEERDE KANT VAN DE GESCHIEDENIS* (Soldier in Indonesia, 1945-1950; witnesses to a war on the wrong side of history), (2015). Similar findings were reached in R. LIMPACH, *DE BRANDENDE KAMPONGS VAN GENERAAL SPOOR* (The burning Kampongs of General Spoor), (2016). Of course, earlier studies finding patterns of violence rather than incidents did exist, such as J.A.A. VAN DOORN AND W.J. HENDRIX, *ONTSPORING VAN GEWELD: OVER HET NEDERLANDS INDISCH / INDONESISCH CONFLICT* (Derailment of violence, the Netherlands Indies/Indonesian conflict] (Rotterdam), (1970).

⁹ *Letter of the Ministers of Foreign Affairs, Defence, and Public Health to Parliament*, Tweede Kamer, vergaderjaar 2016-2017, Kamerstukken 26049, nr. 82, 2 December 2016.

¹⁰ The author is member of the Scientific Board of the Research Project. www.ind45-50.org/en.

from a broader political and societal perspective, the merit of the Indonesian reparation cases lies in their concrete contribution to public debate and to sparking renewed inquiries into Dutch colonial past.¹¹ The impact of the judgments can thus be said to extend beyond the legal. Given this blurring of the legal and the non-legal domains, the question whether historical inquiries can also have reparatory effect deserves reflection too.

*A series of reparation judgments on decolonization violence*¹²

The Dutch engagement with its own colonial past in Indonesia, and in particular the decolonization war, can in a very general fashion be characterized as one of silence. The government, and initially also academia and the media chose not to fully examine this period, nor was it standardly integrated in school curricula. After revelations in the media by a veteran in 1969, the government produced a policy brief that characterized violence committed during the decolonization war (a war better known in the Netherlands under the name of “police actions”) as “excesses.”¹³ No prosecutions were initiated and when a law was adopted in 1971 removing statutory limitations from the criminal code for war crimes and crimes against humanity, no specific provisions were included to ensure possibilities for retroactive prosecution of crimes committed during the war of 1945—1949.¹⁴ This did ultimately not prevent civil litigation, and decades later, on 14 September 2011, the Hague Court of First Instance delivered judgment in a civil case against the Dutch State determining that reparations had to be paid for concrete acts of violence committed during the decolonization period in Indonesia (1945-1950).¹⁵ The case was brought by eight widows of men who had been summarily executed as part of a group of 150 by the Dutch army at the *Kampong* of Rawagedeh on 9 December 1947. Obviously, time bars exist in Dutch civil law as well and they are absolute. Nonetheless, and extremely exceptionally, the Court found that, while strictly speaking the claims were time-barred, it was unreasonable for the State to invoke statutory limitations. While initially the court limited its judgment to direct relatives being the widows and only set aside statutory limitations for the claims regarding the unlawfulness of the executions, later cases did include children in the concept of direct relatives and also expanded to other acts, such as torture and rape. In these cases, the courts separated the question regarding the reasonableness to invoke statutory limitations from the question of proof. Whether reparation will actually be granted in individual cases thus mostly remains still to be determined, depending on available proof.

The judgments, while highly remarkable, cannot be regarded as reparatory justice for colonialism *per se*. Firstly, the cases do not regard the colonial period, but rather the post-colonial period as Indonesia declared independence on 17 August 1945 and so even the qualification of “decolonization violence” may be disputed. Secondly, the cases concern very

¹¹ See also B. Lutikhuis and A.D Moses, *Mass Violence and the End of Dutch Colonial Empire in Indonesia*, 14 J. OF GENOCIDE RESEARCH 3-4: 257-276 (2012).

¹² For a more detailed analysis of this case law, see also L. van den Herik, *Reparation for Decolonization Violence*, HEIDELBERG J. OF INT’L LAW (2/2018, forthcoming).

¹³ Excessennota 1969, Bijlage Handelingen II, 1968-1969, 10008.

¹⁴ Law of 8 April 1971, *Staatsblad* 210. The Dutch Act on criminal law in time of war, generally introducing the concept of war crimes in Dutch law dates from 10 July 1952, *Staatsblad* 1952, 48. See also R.A. Kok, *Statutory Limitations in International Criminal Law*, T.M.C. Asser Press, 2001, pp. 153-159.

¹⁵ *Rechtbank ‘-Gravenhage* (Hague Court of First Instance), trial judgment, ECLI: NL: RBSGR: 2011: BS8793, 14 September 2011. For an analysis, see L. van den Herik, *Addressing “Colonial Crimes” Through Reparations? Adjudicating Dutch Atrocities Committed in Indonesia*, 10 J. OF INT’L CRIMINAL JUSTICE, 963-705 (2012).

concrete incidents, not the colonial project or the decolonization war as such. Thirdly, the inter-temporal element that complicates discussions of reparation for colonialism generally presents less of a bar in these cases, given the smaller time lapse (“only” seven decades) and mainly also given that the concrete acts that were litigated were wrongful under law at the moment that they were committed as the courts also repeatedly underscored.¹⁶

Notwithstanding the relatively limited inherent value of the judgments as precedents of reparatory justice for colonialism as such, the Dutch cases did also produce other next steps which might have their own reparatory effects. Firstly and in direct reaction to the litigation, the Dutch government designed a Civil Settlement Scheme.¹⁷ While insisting that claims relating to this period were time-barred, the government nonetheless expressed a preparedness to compensate widows of men who had been victim of summary executions similar to Rawagedeh and South Celebes, provided that the claimant proved her case with sufficient plausibility.¹⁸ Secondly, also prompted by the litigation and building on words of regret expressed in 2005 by Minister of Foreign Affairs Bot, the Dutch Ambassador in Indonesia formally apologised on behalf of the Dutch government. The apologies were rather limited in scope though, mainly addressed to widows and zooming in on the violence that was being litigated, while also emphasising that harm had been done on both sides.¹⁹ Thirdly, a few years after the first judgment and also in response to new historical publications on the structural nature of the violence, the Dutch government decided to fund a comprehensive inquiry into the decolonization period, including an analysis of Dutch (dis)engagement with this period up until today.

Historical inquiry as reparation?

The historical project is ongoing and it raises the question whether such government-funded, independent historical inquiry can also be regarded as a non-legal form of reparatory justice. It is argued here that this can be the case to the extent that such an inquiry satisfies a certain quest for satisfaction.

Both the Articles on State Responsibility as well as the Van Boven/Bassiouni Principles recognize that reparation can take different forms. Building on this differentiation, States have made the argument that development aid should also be regarded as a form of reparation, but the counterargument to this is that aid lacks demonstration of atonement and offers insufficient space for victims to inform the nature and contents of reparation. In contrast, government-requested or sponsored yet independent historical inquiry can offer those two features depending on precise format and set-up. The Dutch historical inquiry involves Indonesian scholars and it also includes a life story project aimed at collecting

¹⁶ See e.g., *Rechtbank ‘-Gravenhage* (Hague Court of First Instance), trial judgement, ECLI: NL:RBDHA:2016:8635, 27 July 2016, para. 4.128.

¹⁷ *Bekendmaking van de Minister van Buitenlandse Zaken en de Minister van Defensie van 10 September 2013, nr. MinBuZa.2013-256644, van de contouren van een civielrechtelijke afwikkeling ter vergoeding van schade aan weduwen van slachtoffers van standrechtelijke executies in het voormalig Nederlands-Indië van vergelijkbare ernst als Rawagedeh en Zuid Sulawesi*, Staatscourant nr. 25383, 10 September 2013.

¹⁸ Widows had to prove, i.e., that they had been married to a person who had been victim of summary executions by Dutch military, that the execution was of comparable gravity as the executions in Rawagedeh and South Sulawesi, and the execution must have been mentioned in already publicised sources.

¹⁹ As also detailed in *Rechtbank ‘-Gravenhage* (Hague Court of First Instance), trial judgment, ECLI: NL:RBDHA:2015:2449, 11 March 2015, para. 2.18.

personal stories and experiences. It can thus be said to reach out and to involve victim perspectives in the process. As for the question of atonement, it is clearly not the primary aim of the inquiry to act as a “tribunal of history”. Nonetheless, it will be, and already is, confronted with discussions on the propriety of the use of legal terms such as war crimes and crimes against humanity. This discussion cannot be avoided since, as Isaiah Berlin stated in a different setting, the use of neutral language (“Himmler caused many persons to be asphyxiated”) conveys its own ethical tone.”²⁰ Hence, even in a non-legal setting, discussions on whether or not to use legal language tie into deeper questions of acknowledgement. Yet, in a non-legal setting, the ultimate quest is *not* to determine the amount of reparations due. Precisely for this reason, a non-legal setting may function less as a straightjacket and thus constitute an enabling environment to look into the mirror of history with open eyes. It may create a dialogue between different perspectives which may in turn offer more space for acknowledgement.

While independent historical inquiry can never and should never replace judicial processes, and at best the two should complement each other, historical inquiry may also have its own independent value in a reparatory sense. While legal discussions and judicial processes tend to focus on reparation, historical inquiry may instead enlighten on the issue of “owing”. And it may well be that if we accept the idea of a principle of owing reparation in colonial contexts in the broad sense, the core of this principle lies in the word “owing” rather than in the word “reparation.”²¹

²⁰ I. Berlin, “*Historical Inevitability*” FOUR ESSAYS ON LIBERTY(1969), xxix, 95 and 115, as cited by A/ De Baets, *Historical Imperscriptibility*, STORIA DELLA STORIOGRAFIA 59-60 (2011): 128-149.

²¹ Cf. the speech of Shashi Tharoor at the Oxford Union on 24 June 2015, *Britain Does Owe Reparations*.