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Reparation for Decolonisation Violence

A Short Overview of Recent Dutch Litigation

*Larissa van den Herik**

Reparation claims for slavery and colonialism have been presented with a certain regularity. Yet, as also became apparent at the Durban Conference,¹ it is difficult to cast these claims in legal terms given their generic nature and particularly also in light of challenges to overcome the inter-temporal principle.² In this context, recent Dutch practice of reparation for decolonisation violence is noteworthy. The practice is analysed in this short contribution to the Max Planck Impulses on Reparation.³

On 14.9.2011, the Hague Court of First Instance delivered judgement in a civil case against the Dutch State determining that reparation had to be paid for acts of violence committed during the decolonisation period in Indonesia (1945-1950).⁴ 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 9.12.1947. Exceptionally, the Court found that, while strictly speaking the claims were time-barred, it was unreasonable for the State to invoke statutory limitations. This finding only concerned the claims brought forward by direct relatives, i.e., the widows and only the claims regarding the unlawfulness of the executions. In relation to claims of next generations, as well as claims asserting wrongfulness of the omission to prosecute, the State's invocation of statutory limitations was respected. The Court justified partly setting aside statutory limitations by observing that this case concerned a particularly exceptional situation and it emphasised the gravity of the offences, also in light of the State's constitu-

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¹ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/CONF.189/12, 3.8.-8.9.2001.

² *M. du Plessis*, Historical Injustice and International Law : An Exploratory Discussion of Reparation for Slavery, HRQ 25 (2003), 624 et seq.

³ Also see *L. van den Herik*, Historical Inquiry as a Form of Colonial Reparation?, Harv. Int'l L.J. Online Symposium on: Do Colonists Owe Their Former Colonies Reparations?, 15.7.2018, available at <www.harvardilj.org>.

⁴ Rechtbank s'-Gravenhage (Hague Court of First Instance), trial judgement, ECLI: NL: RBSGR: 2011: BS8793, 14.9.2011. See for an analysis, *L. van den Herik*, Addressing "Colonial Crimes" Through Reparations? Adjudicating Dutch Atrocities Committed in Indonesia, JICJ 10 (2012), 963 et seq.

tional duty to protect its own citizens. The Court further underscored that the facts concerned were regarded wrongful at the moment of their commission. The spirit of the judgement corresponded with findings of the historian *Rémy Limpach*, who analysed the structural nature of the use of mass violence during the Indonesian war of independence in his PhD research.⁵ *Limpach's* study, together with societal developments including the litigation, galvanised efforts to formally revisit the Dutch decolonisation period,⁶ leading to a government funded large-scale historic inquiry into *decolonisation, violence and war in Indonesia 1945-1950*.⁷

The 2011 judgement was not appealed and the Dutch government agreed in negotiation with the widows to pay a sum of 20.000 Euro to each widow and to also cover additional litigation fees and costs.⁸ Following suit, ten widows and children of men executed on South Celebes also claimed reparations from the Dutch State.⁹ The widows were offered the same arrangement as the Rawagedeh widows. Subsequently, on 10.9.2013, the Dutch government announced a Civil Settlement Scheme.¹⁰ 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.¹¹ Submissions for this out-of-court settlement had to be lodged before 11.9.2015, a deadline that was later extended to 11.9.2017. In addition, and building on the words of regret expressed in 2005 by the Minister of Foreign Affairs

⁵ Later published as *R. Limpach*, *De Brandende Kampongs van Generaal Spoor*, 2016. Of course, earlier studies finding patterns of violence rather than incidents did exist, such as *J. A. van Doorn/W. J. Hendrix*, *Ontsporing van Geweld: Over het Nederlands Indisch/Indonesisch Conflict*, 1970.

⁶ Letter of the Ministers of Foreign Affairs, Defence, and Public Health to Parliament, Tweede Kamer, vergaderjaar 2016-2017, Kamerstukken 26049, nr. 82, 2.12.2016.

⁷ <www.ind45-50.org>. The author is member of the Scientific Board of the Research Project.

⁸ As detailed in later judgements, e.g., *Rechtbank s'-Gravenhage* (Hague Court of First Instance), trial judgement, ECLI: NL:RBDHA:2015:2449, 11.3.2015, para. 2.12.

⁹ *Rechtbank s'-Gravenhage* (note 8), para. 2.13.

¹⁰ *Bekendmaking van de Minister van Buitenlandse Zaken en de Minister van Defensie van 10.9.2013*, 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, 10.9.2013.

¹¹ Widows had to prove, i.a., 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.

Bot, the Dutch Ambassador in Indonesia formally apologised on behalf of the Dutch government, in particular to the widows.¹²

Despite the Settlement Scheme, the 2011 judgement still triggered further litigation capitalising on the opening offered by the Hague Court. These proceedings were also meant to safeguard procedural positions while awaiting the outcome of the settlement in concrete cases. In these proceedings, the boundaries of decolonisation-reparation were tested and refined. In a subsequent case that was brought forward by 22 widows and children regarding executions in South Sulawesi, the Court of First Instance in The Hague held that the invocation of statutory limitations could also be unreasonable in relation to claims brought forward by children.¹³ Aware that it overruled its own earlier case law on this point, the Court emphasised that children were also direct relatives. The decisive criterion was not whether they belonged to the same or a next generation, but rather whether they were dependent on the executed person at the moment he was executed.¹⁴ In subsequent cases, the Court also widened the scope of its case law in different respects. It held that it was also unreasonable for the State to invoke statutory limitations in relation to claims by victims of other acts, namely torture and rape. In an interim decision in the torture case, the Court recognised that it would be difficult, if not impossible, for the claimant to prove that he had been tortured, but it held that the question of reasonableness to invoke statutory limitations had to be separated from the question of proof.¹⁵ Contrary to what the State had argued, the Court thus decided that the exception to the application of statutory limitations was not limited to summary executions. The Court indicated that it had to be decided on a case-by-case basis whether the State could reasonably invoke statutory limitations in relation to acts committed in the decolonisation period.¹⁶ In respect to the case at hand, the Court underscored that torture was unacceptable, and that this had also been the case at the moment it was committed in 1947.¹⁷ Moreover, while the State may not have known of this specific case of torture, the general practice of torturing detainees was known and reported and also for that reason the State could not reasonably invoke stat-

¹² As also detailed in *Rechtbank s'-Gravenhage* (note 8), para. 2.18.

¹³ *Rechtbank s'-Gravenhage* (Hague Court of First Instance), trial judgement, ECLI:NL:RBDHA:2015:2442, 11.3.2015.

¹⁴ *Rechtbank s'-Gravenhage* (note 13), paras. 4.19-4.30.

¹⁵ *Rechtbank s'-Gravenhage* (Hague Court of First Instance), trial judgement, ECLI:NL:RBDHA:2016:702, 27.1.2016, specifically para. 4.20.

¹⁶ *Rechtbank s'-Gravenhage* (note 15), para. 4.22.

¹⁷ *Rechtbank s'-Gravenhage* (note 15), para. 4.9.

utory limitations.¹⁸ The State was then instructed to share with the Court all the information available to it regarding the alleged detainment and torture for further consideration.¹⁹ In the rape case, the State argued that rape was contrary to its own instructions and that it should thus be able to invoke statutory limitations and that in any event it could not be held liable for the rape. The Court dismissed both arguments and held that the rape, which had been documented by a reverend at the time, was sufficiently linked to the military operation for the State to be held liable.²⁰ Given that it found the rape to be sufficiently proved, the Court immediately awarded reparations of 7.500 Euro for immaterial damage, namely psychological harm. The Court had not awarded immaterial damage to the widows and children in the execution cases. In these cases, the Court indicated that, in conformity with standing Dutch case law, only material damage could be repaired in case of loss of a relative. The Court specified in these cases that the amount of compensation for execution had to be calculated on a case-by-case basis and that compensation in other cases might thus deviate from the 20.000 offered to the Rawagedeh widows. Pursuant to standing case law, a variety of factors would be taken into account for each calculation of damage, such as salary of husband/father, age and life expectancy of the husband/father, whether the widow remarried or otherwise made her own living and her own current life expectancy.²¹

The litigation is ongoing with some further relevant case law looming on the horizon. Nonetheless, through its casuistic approach the Court has limited the reach of its remarkable move to set statutory limitations aside. Beyond the great importance of these judgements for the individual victims, the value of this case law is multifaceted. From a general legal perspective, the line of cases revives questions regarding the propriety of statutory limitations in civil litigation when it concerns damage related to serious or international crimes. The suggestion has been made that the prohibition of statutory limitations as applicable in international criminal law should equally apply in civil proceedings. This argument builds on the Court's approach to separate the practical question regarding evidentiary difficulties from the discussion of principle whether statutory limitations can be in-

¹⁸ Rechtbank s'-Gravenhage (note 15), para. 4.11.

¹⁹ Based on evidence subsequently put forward by the claimant, the Hague Court of First Instance awarded damages of 5000 EURO for immaterial damage on 18.7.2018, ECLI:NL:RBDHA:2018:8525.

²⁰ Rechtbank s'-Gravenhage (Hague Court of First Instance), trial judgement, ECLI: NL:RBDHA:2016:701, 27.1.2016.

²¹ Rechtbank s'-Gravenhage (Hague Court of First Instance), trial judgement, ECLI: NL:RBDHA:2016:8635, 27.7.2016, para. 4.128.

voked.²² While there may be some merit in this argument from a justice-perspective, it is quite unlikely to be implemented anytime soon, if at all. From a broader political and societal perspective, the merit of the Indonesian cases lies in their concrete contribution to public debate and to sparking renewed inquiries into Dutch colonial past.²³ Hence, even though the cases may not provide direct precedent for colonial reparation as such, they do demonstrate that, in some concrete instances, historic justice can be rendered within the confines of domestic legal structures.

²² Inaugural address by *Liesbeth Zegveld* at the University of Amsterdam, *Civielrechtelijke verjaring van internationale misdrijven*, 13.11.2015. See also principle 7 of the 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, stating that statutory limitations should not be unduly restrictive, but not stating that they are unlawful *per se*, *van Boven/Bassiouni* Principles, adopted by the General Assembly in Res. 60/147, 16.12.2005.

²³ See also *B. Luttikhuis/A. D. Moses*, *Mass Violence and the End of Dutch Colonial Empire in Indonesia*, *Journal of Genocide Research* 14 (2012), 257 et seq.

