

Notes on Reparations

From Clinton Fernandes, 4 July 2010

Perpetrators are obliged to make reparation, not victims. The Indonesian government was the primary perpetrator in the overwhelming majority of serious violations of international criminal law during the occupation of East Timor. However, some of my East Timorese friends have asked for some briefing notes in preparation for the discussion in parliament tomorrow about their own government's draft law on reparations.

The right of victims to Reparations is contained in UN General Assembly Resolution 60/147 of 2005, which states that victims have the following rights to Remedies:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.^[i]

Reparations are therefore only one part of the Remedies to which victims are entitled.

In turn, there are five components of Reparations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Restitution: This means that the victim must, where possible, be restored to the original situation before the violations occurred. It includes return to one's place of residence, restoration of employment, return of property, etc.

Compensation: This means that the victim must be compensated in proportion to the gravity of the violation and the circumstances of each case. In International Humanitarian Law, the right of compensation of individuals originates in Article 3 of the Fourth Hague Convention (HC IV) of 1907, which is reproduced in Article 91 of the First Additional Protocol to the Geneva Conventions (AP I):

Responsibility: A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.^[ii]

Although Article 3 of HC IV was not originally intended to provide for individuals' right to compensation, it now does, according to the Report of the International Commission of Inquiry on Darfur. This Commission stated that when the international obligation to pay compensation was first laid down in HC IV, and perhaps even when the Geneva Conventions were approved, it was seen as an obligation between States. However:

“the emergence of human rights doctrines in the international community” and “the right to an effective remedy for any serious violation of human rights has been enshrined in many international treaties”. Therefore, the Commission concluded, the obligation to pay compensation is now “assumed by States not only towards other contracting States but also vis-à-vis the victims, i.e. the individuals who suffered from those crimes. In other words, there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses.”^[iii]

According to the President of the International Criminal Tribunal for the former Yugoslavia (ICTY), Judge Jorda:

“The emergence of human rights under international law has altered the traditional State responsibility concept, which focused on the State as the medium of compensation. The integration of human rights into State responsibility has removed the procedural limitation that victims of war could seek compensation only through their own Governments, and has extended the right to compensation to both nationals and aliens. There is a strong tendency towards providing compensation not only to States but also to individuals based on State responsibility. Moreover, there is a clear trend in international law to recognize a right to compensation in the victim to recover from the individual who caused his or her injury.”^[iv]

However, there is a misleading tendency to equate Compensation with Reparations, when the latter concept is actually much broader. As currently stated (4th July 2010), the draft law distinguishes between a National Commemorations Program for all victims and an Individual and Collective Reparations Program for “vulnerable victims” and “communities seriously affected by the conflict”. In this context, perhaps Reparations should be re-written as Compensation.

Rehabilitation means that victims must have access to medical and psychological care as well as legal and social services.

Satisfaction means that there must be a “search for the whereabouts of the disappeared”, the reburial of bodies “in accordance with the expressed or presumed wish of the victims”, a “public apology, including acknowledgement of the facts and acceptance of responsibility”, “Judicial and administrative sanctions against persons liable for the violations” and “Commemorations and tributes to the victims”.

Guarantees of non-repetition addresses the needs of the society rather than the needs of the victims. It includes such objectives as “effective civilian control of military and security forces”, “the independence of the judiciary” and “human rights and international humanitarian law education to all sectors of society”.

The definition of Victims: As currently stated (4th July 2010), the draft law defines victims as “A person who suffered harm” as well as “the spouse or any person who lived under analogous condition”, such as the widow, widower, descendants, ascendants and dependents, as the result of “a human rights violation that took place ... between 25 April 1974 and 25 October 1999. However, the internationally-accepted definition is Victims is “natural persons who have suffered harm” and “organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”^[v]

The draft law states that all these victims are to be the beneficiaries of the National Commemorations Program. This is a huge category, potentially almost everyone in East Timor, because “Most individual East Timorese alive today have experienced at least one period of displacement. Many have experienced several”.^[vi]

The draft law also defines a narrower category of victims, called “vulnerable victims”, who are “residing in Timor-Leste”. They are to be the beneficiaries of the Individual and Collective Reparations Program (in reality, the Compensation program).

These Vulnerable Victims are defined as:

- i) Victims of torture;
- ii) Victims of a human rights violation that resulted in the victim’s permanent physical or mental disability;
- iii) Victims of the disappearance or summary execution of the spouse or of a person who lived with him or her under analogous conditions, descendants up to the 1st degree, and ascendants up to the 1st degree;
- iv) Victims of the forcible removal of their parents while a child and for an extended period of time; and
- v) Victims residing in Timor-Leste who suffered violations or sexual slavery, or who were born as a result of an act of rape or sexual slavery.

This is also potentially a large number of Vulnerable Victims.

The definition of “human rights violation”: the draft law defines human rights violations as “violation of international humanitarian law, violation of human rights and criminal acts.” This would include a large category of offences – much larger than war crimes. For example, even a murder becomes a war crime only if it is committed in the context of and associated with an armed conflict. That is, a murder is a war crime only if the killing was intended by the perpetrator to advance the interests of their military or political group or unit, otherwise it is a domestic crime incidentally committed. As currently defined, the draft law includes all criminal acts, whether they have a nexus to the armed conflict or not.

It should also be noted that there were two kinds of conflict in East Timor – an international armed conflict as well as a parallel non-international armed conflict. The international armed conflict was between Indonesia and Portugal. The parallel non-international armed conflict was between Indonesia and a non-state actor, namely Fretilin/Falintil, on Portuguese territory. This is because East Timor was not an independent state despite its Declaration of Independence on 28th November 1975.

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^[i] UN General Assembly Resolution 60/147, 16 December 2005, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>

^[ii] Available at http://www2.ohchr.org/english/law/protocol1_2.htm

^[iii] Available at http://www2.ohchr.org/english/law/protocol1_2.htm

^[iv] UN doc. S/2000/1063, available at <http://www.undemocracy.com/S-2000-1063.pdf>

^[v] Rule 85, International Criminal Court Rules of Procedure and Evidence, UN doc PCNICC/2000/1/Add.1 (2000).

^[vi] CAVR Executive Summary, p 73.