

2003

Introduction: Into the 21st Century: Reconstruction and Reparations in International Law

Penelope Andrews

New York Law School, penelope.andrews@nyls.edu

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

Andrews, Penelope, "Introduction: Into the 21st Century: Reconstruction and Reparations in International Law" (2003). *Articles & Chapters*. 1193.

https://digitalcommons.nyls.edu/fac_articles_chapters/1193

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

THIRD WORLD LEGAL STUDIES – 2000-2003

Into the 21st Century: Reconstruction and Reparations in International Law

Guest-Editor's Introduction

In January 2001, the International Third World Legal Studies Association and the Community Peace Program, School of Government, University of the Western Cape hosted a conference in Cape Town, South Africa entitled: *Into the 21st Century: Reconstruction and Reparations in International Law*. About 80 delegates from around the world gathered to discuss local, regional and global issues relating to the conference theme. The South African Truth and Reconciliation (T.R.C.) provided the theoretical and practical backdrop to the two days of discussion. South Africa's Minister of Transport (formerly the Minister of Justice) and one of the chief architects of the T.R.C., the Hon. Dullah Omar, gave the keynote address. This volume is a collection of the papers presented at the conference.

The volume commences with the keynote address of the Hon. Dullah Omar, who analyzes the South African T.R.C., outlining the developments, the political compromises and considerations that preceded its establishment, and the shape of the Commission. He reflects on the necessity of the T.R.C in the project of transformation and democracy in South Africa, its operation and its thus far limited success.

Maxwell Chibundu's innovative essay on economic reconstruction raises several interesting questions about Africa's growth and development. He states his goal:

To present perspectives that if employed by policymakers should lead to optimal prescriptions, and if properly implemented, might yield better economic performance.

He cogently lays out four indicators of national economic welfare and then attempts to gauge their applicability in the African context. He artfully describes the continent's major periods of reconstruction and the structural and other weaknesses inherent in all. He holds no sacred cows, explaining clearly the multifaceted nature of Africa's economic malaise. Tracking the stages of Africa's various economic projects, he turns his attention to the contemporary model, the Millennium Recovery Project, and concludes that this model lacks what its predecessors did as well: an outward focus that ignored the "enabling internal dynamics of these policies."

Chibundu's prescription lies in developing mechanisms to take account of internal economic processes. Such an internal approach, he argues, will spur Africa's national resources: its human capacity to develop and flourish and thereby sustain long-term economic growth.

John Torpey addresses the issues of reparations politics in the twenty-first century. He surveys what he sees as the proliferation of reparations demands for monetary and other kinds of reparations. He portrays the idea of race as central to this proliferation, largely "as a result of the delegitimation of race discrimination since the Holocaust." He comments on the paradox this generates: the need to classify individuals and groups along racial lines for the purpose of reparations may in fact hinder attempts to get beyond race.

In his paper he analyzes the sources of reparation demands: World War II claims; transitional societies (for example, those in Latin America, South Africa) and the claims resulting from "internal colonialism" (for example, slavery, indigenous groups). He also describes the types of reparations demands: commemorative claims (for past abuses) and continuing claims (past abuses continuing their legacy to the present). Although he recognizes that the issue will remain part of the political agenda for the foreseeable future, he does not see both the struggle and the gains as transformative.

John Van der Vyver analyzes the establishment of the International Criminal Court, focusing on the concept of "unwillingness" in the I.C.C. Statute. He raises the question whether truth commissions and amnesty arrangements in transitional societies can be interpreted as constituting "unwillingness" as outlined in the I.C.C. Statute.

He regards truth commissions and amnesty as important strategies for national reconstruction. Their significance is increasingly recognized within the United Nations, and tentatively in some regional systems.

He notes that the South African TRC has set a standard for evaluating the issue of "unwillingness." There the parameters of amnesty granting in exchange for truth were clearly articulated; the I.C.C. therefore has some useful guidelines which it could pursue, particularly to ensure that the rights of victims are not compromised.

Heidy Rombouts and Stef Vandeginste pursue the theme of reparations for gross violations of human rights by focusing on the notion of victim. They explore this concept by utilizing socio-legal approaches, as well as those utilized in international law. Excavating the fields of victimology, sociology, and psychology, they explore different definitions of victim. They also refer to the definition of victim articulated in the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and

Abuse of Power. Specifically they highlight with approval the definition provided by Cherif Bassiouni (known as the Bassiouni Principles), which provides for an inclusive definition of both direct and indirect victims. They also explore an appropriate definition and offer one which they believe works best.

They survey regional systems of human rights, including the European System, the Inter-American System and the African Charter on Human and People's Rights, to analyze comparative approaches to dealing with direct and indirect victims. They conclude by proffering a definition which interweaves both legal approaches as well as those developed by social scientists, and which provides for an inclusive definition of victim. In their analysis they also provide a useful methodological approach to balance the subjective rights of victims to reparations against the obligations that a state may undertake to provide such reparations.

Ronald Rychlak and John Czarnetzky focus on the International Criminal Court and the doctrine of subsidiarity. They argue that this doctrine is preferable to the doctrine of complementarity in addressing concerns of sovereignty.

They outline the history of war crime tribunals from Nuremburg to the adoption of the Rome Statute setting up the I.C.C. They point out that even though the doctrine of complementarity assures state parties that national courts are the preferred venues for trying war criminals, "the decision as to whether a state is unwilling or unable to conduct a meaningful trial will ultimately not be made by that state." This does not solve the problems of state sovereignty, it may in fact, exacerbate it. They see subsidiarity as offering a broader, moral approach, one that incorporates a more cohesive vision and one that ultimately will survive constant challenges to the jurisdiction of the I.C.C.

Philip Iya analyzes the issue of reconstruction in South Africa by focusing on the transformation of legal education and legal practice. He describes the various attempts by professional legal bodies there, including the Society of Law Teachers, the Law Society and the General Counsel of the Bar, to ensure that the new Constitutional principles and particularly its values of equality and social justice are reflected in contemporary legal education and legal practice.

Against the backdrop of enormous inequalities and disparities in legal education, legal practice and access to the legal services by the majority of South Africa's (black) population, he highlights the tremendous challenges facing those who wish to transform legal education and legal practice. He concludes that even though apartheid's racial legacy of discrimination, deprivation and disadvantage will haunt legal education, access to the legal profession and the provision of legal services to the country's black

majority for a considerable time, he is optimistic that significant change is possible. His optimism is bolstered in the paper by a host of practical measures which he lists and discusses to ensure that the goal of transformation and reconstruction is met.

Natsu Taylor Saito addresses her remarks to the “importance of speaking truth.” She believes that redress and reparations cannot be adequately addressed without an articulation of the wrong in very specific terms.

She refers to the T.R.C. process in South Africa, commenting on its limitations in focusing on a particular set of wrongs, excluding economic exploitation after centuries of colonialism and slavery. This too she sees as a problem in the United States, where the lens of equal protection and equal opportunity provides only a limited vision. She articulates a need to move beyond this approach—one that will incorporate the social, political and economic legacy of slavery.

She believes the experience of reparations for Japanese Americans for their internment during the Second World War can provide propinquitous lessons, both to redress the immediate wrong and to assist in the reconstruction of the society as a whole.

Diane Amman discusses the creation of the International Criminal Court (the I.C.C.), particularly its pertinence at this point in time. She sees the establishment of the court as a product of global human rights agitation by a growing number of individuals and groups.

She locates the kernel of the idea of international criminal adjudication in the remarks of the Chief U.S. Prosecutor at Nuremberg, and its confirmation in subsequent attempts to try war criminals. She interprets the goals of these international tribunals as retribution, deterrence, redress, and pacification—although attaining these goals is obviously not possible in all circumstances. She comments on the novel role of these prosecutions. In other words, that they establish the record clearly. This too, she sees as lacking in many respects, and she pursues them in her analysis.

Ultimately she articulates the need for international criminal adjudication, but warns that it is “a powerful but dangerous instrument.” She cautions against seeing international criminal adjudication(s) as the panacea of all evils and calls for constant attempts to improve the process.

Chris Cunneen explores the difficulty in achieving reconciliation between indigenous peoples and the non-indigenous majority in Australia today. He focuses on the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families to analyze the laws,

policies and practices which resulted in the enforced separation of indigenous children from their families. The purpose of the enquiry was to address the consequences of the separations, and to suggest ways that the Australian government could seek remedies for these issues. He highlights the recommendations generated by the Inquiry which included several approaches to reconciliation: an acknowledgement of the wrong done and the harm suffered, an apology, mechanisms to guarantee against the repetition of the practices, restitution and rehabilitation resources and monetary compensation. To effect these recommendations, the Inquiry suggested a Reparations Tribunal. Cunneen recognizes the centrality of such a structure to the project of reconciliation and reparations in Australia. He is not hopeful though—pointing to the Australian government's reluctance to even acknowledge the harm, and to issue an apology.

Peter Mutharika draws attention to the Malawian Project of Reconstruction and in particular, the necessity to unearth the truth about the widespread abuse that occurred during the tenure of the Banda regime. Mutharika argues that customary international law and the African Charter on Human and People's Rights provides for accountability to the Malawian citizens for the array of abuses that occurred during the Banda regime. In light of the frequency and brutality of these abuses, Mutharika suggests mechanisms that will contribute to filtering out the truth.

He describes various developments towards the project of reparations: a Commission of Enquiry, the Malawi History Project to record the history of the Banda regime, the National Compensation Tribunal, the Human Rights Commission, the Office of the Ombudsman and the Anti-corruption Bureau. Mutharika insists that all these efforts should be directed at establishing the truth as a fundamental step to addressing the issue of reparations.

Pamela O'Connor, like her compatriot, Chris Cunneen, focuses on the harm done to the "stolen generation." She points to the two issues that ought to be resolved with respect to the stolen generations. The first is the question of the precise nature of the harm done to the individuals who form part of the stolen generation, and the second is the definition of victim. In her paper she focuses only on the first, pointing out that the second issue has been well canvassed by Rombouts and Vandeginste in this volume.

She argues that the plethora of abuses to which the stolen generation were subjected had lasting effects on their lives which could not be obliterated. She argues that violations occurred both under international law and the Australian common law. These were accepted by the National Inquiry into the separation of Aboriginal and Torres Strait Islander children, who have proposed a Reparation Tribunal. However, the tribunal would confine eligibility for reparations only to claimants who can show that they

were forcibly removed. O'Connor sees this as too limited, and would include those Aboriginal claimants whose experience mirrored those of the stolen generation; those who were "separated" rather than "stolen."

Ralph Wilde discusses territorial administration by international organizations, and their effects on local communities. He specifically raises the question: To what extent does territorial administration play a part in the construction or reconstruction of a particular cultural, political, economic and social system? He explores different modalities of territorial administration: mandates with respect to refugees administered by the United Nations High Commissioner for Refugees, the office of the United Nations Representative in Bosnia-Herzegovina, the United Nations Mission in Kosovo and the United Nations Transitional Authority in East Timor.

In his analysis he distinguishes between the processes of administration and that of nation and community building. Very often however, the mandates incorporate both. Wilde sees this as appropriate because the two processes are ultimately linked. In fact, he posits that distinction ignores "the way in which the administration itself shapes the community it is concerned with."

We hope that you will enjoy reading this volume. It is dedicated to Mrs. Wendy Stoffels in recognition of her splendid work as Conference Co-ordinator, and all the participants at the conference whose names we listed at the end of this volume.

Penelope Andrews
New York
November 2001