LUMEN ET VIRTUS
ISSN: 2177-2789

THE COLLECTIVE HUMAN RIGHT TO HISTORICAL REPARATION VERSUS THE PRECLUSION OF THE RETROACTIVE APPLICATION OF INTERNATIONAL LAW IN MATTERS OF STATE RESPONSIBILITY

https://doi.org/10.56238/levv15n41-093

Submitted on: 24/09/2024 **Publication date:** 24/10/2024

Desirée Garção Puosso[1], Carlos Roberto Husek[2] and Fabricio Felamingo[3]

ABSTRACT

It is unanimous in International Law that the one who committed an unlawful act must make reparation, however, currently there has been an increasingly pressing debate in the sense of whether it is possible to hold colonial powers legally responsible for the acts and crimes committed in the past in their former colonies. The rules of international responsibility point out, among other issues, that time would have already exerted its preclusive influence on possible claims for reparation, according to the rules of intertemporal law, which leads us to believe that International Law still seems to be incapable of helping those who were colonized and enslaved, since in practice the issue of the collective human right to historical reparation versus the preclusion of the retroactive application of the Law is discussed International in terms of State responsibility, however, some issues have arisen currently, such as the recent statement by the then Portuguese president, in the sense of recognizing Portugal's responsibility for enslavement and for the crimes that occurred during the colonial period. Thus, and in the face of a whole context of the current scenario, it seems to be witnessing an important historical step in a larger political-legal process. It seems premature to talk about a collective human right to historical reparation, however, it seems that a period of a long and primary debate is beginning that is on the agenda of the day of major newspapers, social networks and academic research. Thus, this movement can lead in some way to an effective reparation for the serious violations committed in the past.

Keywords: International Responsibility. Historical Reparation. Estoppel.

[1] Doctorate student in International Economic Relations Law (PUC/SP), São Paulo/SP, Brazil
E-mail: desigp2@gmail.com
ORCID: https://orcid.org/0000-0001-9292-7353
[2] Professor at the Pontifical Catholic University of São Paulo-PUC/SP
Dr. in Law from the Pontifical Catholic University of São Paulo (2004)
Chief D. Dir. Difusos and Rel. Intern. Fac. Director of the Pontifical Catholic University of São Paulo
E-mail: carlosrhusek@gmail.com
LATTES: http://lattes.cnpq.br/3621741019243917
ORCID: https://orcid.org/0000-0003-2369-6349
[3] Professor at the Pontifical Catholic University of São Paulo-PUC/SP since 2007 (postgraduate and specialization), in the areas of Public International Law, Private International Law and Human Rights
Academic Coordinator of the International Law Course (postgraduate specialization level) since 2010
ORCID: https://orcid.org/0000-0001-5675-8839

INTRODUCTION

This article aims to deal with the evolution of International Law and society, within the context of historical reparations, since both are increasingly dedicated to solving the demands of modern life, where ethics are increasingly demanded in the actions of States and even companies and individuals.

Thus, the issue of the impasse in the applicability of historical reparations will be addressed, more specifically when it comes to colonialism, a pressing issue of resolution and very present in current debates, since it has left many impacts to the present day, one of the main ones being racism, which cannot fail to be mentioned.

THE EFFECTS OF THE DURBAN CONFERENCE (WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED FORMS OF INTOLERANCE) ON THE ISSUE OF HISTORICAL REPARATIONS

With broad Brazilian participation, the Durban Conference (World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance) promoted by the United Nations, was held for the first time on August 31 and September 8, 2001 in Durban, South Africa, and boosted the creation of public policies to confront racism.

In Brazil, the mobilization of governmental and non-governmental actors, especially the organizations of the black movement, opened up a range of possibilities for confronting the issue, especially with regard to affirmative action policies in universities, and the creation in 2003 of the Secretariat for the Promotion of Racial Equality, incorporated into the Ministry of Women, Racial Equality and Human Rights.

The Durban Conference has left important legacies, especially in the field of achievements of state instruments to reduce racial inequality and combat systemic and institutional racism, especially in Brazil. However, the path to racial equality has not yet been completely achieved and everything is part of a process in the legal field, in which national law gradually suffers positive international influence, that is, from both the law and the international community.

The final Durban document was signed by Brazil and became a guide for public policies against racism, demanding that States adopt concrete tools against inequalities.

This final document reaffirmed the commitment to prevent, combat and eradicate racism, racial discrimination, xenophobia and related intolerance. In addition, the conference highlighted the responsibility of governments to protect the individual rights of people within their jurisdictions against crimes perpetrated by racist or xenophobic people or groups or by agents of the State. The conference also condemned legislation, policies

and practices based on racism, racial discrimination, xenophobia and related intolerance that are incompatible with democracy and transparent and accountable governance.

In this way, the 2001 Durban Conference was an important milestone in the global fight against racism and discrimination, setting a strong legal and moral precedent for future action.

The resolutions present in the Durban platform materialized on different fronts in Brazil, having great influence, including in the legal sphere. Not least because much of the fight against racism is due to Durban.

It is commendable to observe how the Durban process was conducted, especially because it took place at a time when a collective human right to historical reparation was not yet envisioned in Public International Law, such as guidelines aimed at international reparation for colonialism, which to this day still does not exist. Although more recently and especially since Durban, being one of his legacies, we have begun to perceive what may be the beginning of a long debate that may lead to an effective reparation for the serious violations committed in the past.

With regard to the institute of historical reparation more specifically, it should be inferred that this reparation is not something simple to measure, since the humanitarian debt to the enslaved population and their descendants cannot be reduced to numbers or to a certain number of political measures.

In this way, the reparation of enslavement is inserted in a complex scenario that seeks to repair the effects of more than 350 years of exploitation of black people, added to the remaining obstacle of racism, which is sometimes veiled, even presenting itself in a structural and institutional way in Brazil.

In addition to being the country that most perpetuated slavery, Brazil was the last state to abolish it (only in 1888). These people were kidnapped from Africa and went through a process of forgetting and annihilating their cultures, families, possessions and the value of their own lives. They arrived here in sub-human conditions to be priced as "commodities".

Despite the abolition of slavery, many issues regarding racial equality have not yet been fully resolved in Brazilian and world society. Opinion No. 036/2019, which was requested by the Racial Equality Commission of the IAB (Institute of Brazilian Lawyers), points out that the ills of exploitation and discrimination against Afro-descendants remain in the structure of contemporary Brazilian society as well as in all countries that were structured by enslavement and in enslaving nations, considering that there has never actually been what is called reparation for slavery (2019, p. 3).

The reparatory policies and actions are not limited to seeking to compensate the almost 5 million enslaved black men and women and their descendants, but reach society as a whole, in order to create a collective awareness about the need to maintain constant and effective measures of inclusion and equality with a view to building a new national identity and a real Democratic State of Law.

Thus, the dissemination of human rights at the global level and fundamental rights at the national level does not allow the maintenance of any discriminatory mentality that still exists, much less the existence of new forms of enslavement, under penalty of committing a crime against humanity.

CURRENT TRENDS

In this sense, and to encourage reflection, still in the context of Durban, it is worth remembering that at the time of the Conference, the Belgian Prime Minister, Louis Michel, stated that the Durban Declaration and Programme of Action should be seen and this statement is documented in the research of Omar Ribeiro Thomaz and Sebastião do Nascimento (2003, pp. 74-75):

> as a political document and not a legal one. These documents cannot impose obligations, liability or right to compensation on anyone. And they are not even intended to do so. Nothing in the declaration and the programme of action affects the general principle that precludes the retroactive application of international law in matters of state responsibility.

Furthermore, in a movement contrary to this, there have been many statements, such as that of the then Portuguese president, Marcelo Rebelo de Sousa (CNN, 2024), which took place in early May 2024, recognizing Portugal's responsibility for enslavement and the crimes that occurred during the colonial period.

For Lucas Carlos Lima (2024), Professor of International Law at the Faculty of Law of the Federal University of Minas Gerais, this raises a series of international legal issues that are intricate to resolve – starting with the very capacity of International Law to offer satisfactory instruments of reparation to the former colonies.

In the classic doctrine of Francisco Rezek (2011), it is found that, in the world of international litigation, what we still have today is a compensation litigation, not a punitive litigation and adds that:

> The form of reparation must correspond to that of the damage. Whether this was strictly moral – as in the case of injury to the national flag of the victim State, or to the person of its ruler – there is no talk of compensation that is deducted in money,

> but of that which assumes a character consistent with the nature of the damage: public redress, the formal apology, the punishment of responsible persons. If the damage, however, had economic expression, the reparation must be made in money (p. 332).

For Carlos Roberto Husek (2015, p. 135):

> The rule around the State is that it must meet its internal and international obligations to its people and to other States and international organizations, being subject to the appropriate sanctions to correct material or ethical damage caused by the act performed.

Thus, it is unanimous in International Law that the one who committed an unlawful act must make reparation, however, today it is almost impossible to hold colonial powers legally responsible for the acts and crimes committed in the past in their former colonies. The rules of international responsibility point out that, at the time, such acts were not foreseen as violations of International Law (although they currently are) and, in addition, time would have already exerted its preclusive influence on possible claims for reparation according to the rules of intertemporal law (Lima, 2024).

According to Lima (2024):

> International Law seems to incline, on the one hand, to the maintenance of the status quo and, on the other, to the impossibility of reparation for the distant acts committed at a time when colonialism was the rule of the day. This is without disregarding all the literature that demonstrates how, in many cases, International Law at the time served as a legitimizer of colonial claims.

From this, it can be understood that International Law still seems to be incapable of helping those who were colonized and enslaved, since in practice the issue of the collective human right to historical reparation versus the preclusion of the retroactive application of International Law in matters of State responsibility is discussed. Just look at the statement of the then Portuguese president, which seems to have little effectiveness in practice.

However, in view of this scenario, it should be added that this is an important step in a larger political-legal process.

Lima (2024) believes that international practice demonstrates that the recognition of the consequences of colonization is in fact a first step towards satisfaction and future negotiations between states that once colonized other peoples and their former colonies – and that is why we should receive this type of statement with enthusiasm, even if at first it does not seem to be enough.

Like all moral damage, thinking about the national Criminal Law, or in a more complex scenario, such as cases of crime against humanity, colonialism and enslavement are irreparable in many ways.

This does not mean, however, that reparations are unimaginable. Currently, some trends are emerging on the horizon of International Law that should guide future dialogue in this field, starting with the precise identification of the acts for which reparation and reconciliation are desired (Lima, 2024).

It is worth remembering that in the very recent past, in historical terms, three bilateral treaties were signed to offer remedies for acts related to colonial domination.

In this sense, the same author (2024) cites that it occurred in 2008, between Italy and Libya; in 2015, between Japan and South Korea; and a joint declaration between Germany and Namibia. Although these documents were not completed in the best possible way, since there was little participation of native peoples in their preparation, for example, they are initiatives that already demonstrate the potential of current International Law to deal with problems related to the colonial past.

In the same vein, Lima (2024) reports on the current trend reflected in the advisory opinion of the International Court of Justice in 2019, which recognized that the United Kingdom would be under the obligation to return an entire archipelago (called the Chagos Islands) to the Republic of Mauritius to put an end to the violation of the principle of self-determination of peoples.

Also in this sense, much has been debated in the field of cultural assets, where it is also possible to identify the tendency towards repatriation or the construction of agreements between museums so that items produced by a certain culture and removed to the former metropolis during the colonial period are definitively returned or shared with the former colony.

In this sense, it is worth mentioning that very recently, in 2023, the National Museum of Denmark announced the return of a rare Tupinambá cloak to Brazil (Lima, 2024). Therefore, it is identified that the relevant act reflects the beginning of what seems to be a trend in Public International Law today, through the various possible forms of historical reparation.

The initiatives listed here demonstrate to Lima (2024) that there is a possibility in International Law to deal with the issue, as well as a tendency to recognize the many evils caused by colonialism.

So, perhaps the current rules are not enough, but new rules are in the process of being developed precisely through statements such as that of the Portuguese president, in

the sense that there was a violation, there is recognition and reparation is needed that needs to be widely discussed.

Thus, what can be concluded from all this is that, although the understanding on the part of some leaders at the Durban Conference was that the documents could not impose obligations, responsibility or the right to compensation on anyone and that the retroactive application of international law on the responsibility of states had already precluded, On the other hand, most movements in the international community understand the opposite.

For Lima (2024) this is certainly not a subject that will fall into oblivion, not least because there are many international legal mechanisms and instruments to offer a remedy to the peoples of the former colonies, whether they are enslaved peoples, original peoples or the population that settled in the territory.

It seems premature to talk about a collective human right to historical reparation, however, we are undoubtedly witnessing the beginning of a long debate that is on the agenda of the major newspapers, social networks and academic research. Thus, it is hoped that the movement will lead in some way to an effective reparation for the serious violations committed in the past.

CONCLUSION

There is no discussion in the sense that there should be reparation when an international unlawful act is committed today, what is still debated is the effectiveness and applicability of the international responsibility of States, but beyond that, there is a pressing and current debate, in the sense of the possibility of holding colonial powers legally responsible for acts and crimes committed remotely in their former colonies, this is an even more complex issue because it involves the issue of preclusion that is exercised over possible claims for reparation, according to the rules of law.

Furthermore, it is known that Law evolves and is subject to improvement, as civilizational and historical advances occur in society. In this sense, one of the themes that emerge as a reflection of this is the possibility of the collective human right to historical reparation.

Thus, the issue has recently gained greater space in international forums, and much of this is due to the processes of the Durban Conference, which left important legacies, including Brazil being one of its great beneficiaries.

Among some recent actions in this regard, it is worth mentioning the statement of the then Portuguese president this year, in the sense of recognizing Portugal's responsibility for

the enslavement and acts that occurred during the colonial period, as well as the return made by the National Museum of Denmark of a rare Tupinambá cloak to Brazil last year.

Thus, these actions may even seem like isolated or merely symbolic initiatives, but in fact it is an important step in the theme of historical reparation, which can begin in the field of cultural assets, through, for example, repatriation or the construction of agreements between museums so that items produced by a certain culture and removed to the former metropolis during the colonial period – something very common to find even today – are definitively returned or shared with the former colony.

Thus, this movement can lead in some way to an effective reparation for the serious violations committed in the past, but which somehow still generate reflections in the present, seeming to perpetuate itself in a certain way, a cycle that needs to come to an end.

REFERENCES

1. Accioly, H. (2012). *Manual de Direito Internacional Público* (20ª ed.). São Paulo: Saraiva.

2. Bauman, Z. (1999). *Globalização: As consequências humanas* (M. Penchel, Trad.). Rio de Janeiro: Zahar.

3. CNN - Brasil Meio-Dia. (2024, 24 de abril). Portugal reconhece culpa por escravidão e massacres durante era colonial. Disponível em: <https://www.youtube.com/watch?v=NaZTxa5OK4M> Acesso em: 9 jul. 2024.

4. Comparato, F. K. (2017). *A afirmação histórica dos direitos humanos* (11ª ed., M. Bandeira de Mello Leite Nunes, Trad.). São Paulo: Saraiva.

5. Cortez, R. de C. S. (2019). *Reparação da Escravidão. Fundamentos da Reparação. Fontes da Reparação. Diferenças entre Ação Afirmativa e Reparação da Escravidão. Modelos de propostas já existentes. Reparação da Escravidão no mundo. Iniciativas e medidas reparatórias no Brasil* (Parecer nº 036/2019, Comissão de Igualdade Racial do IAB).

6. Cultne Cinema. (2013, 27 de setembro). *Conferência Internacional Durban 2001 – Documentário*. Disponível em: <https://www.youtube.com/watch?v=G0bzC-Uvv9k> Acesso em: 9 jan. 2024.

7. Geledés – Centro de Documentação e Memória Institucional. (2021). *Brasil e Durban: 20 anos depois* (I. Eghrari, Pesquisador). São Paulo: Geledés – Centro de Documentação e Memória Institucional. Livro eletrônico.

8. Husek, C. R. (2015). *Curso de Direito Internacional Público* (13ª ed.). São Paulo: LTr.

9. Jenkins, A. (2001, 9 de agosto). *Race matters*. *The Nation*. Disponível em: <https://www.thenation.com/article/archive/race-matters/> Acesso em: 27 fev. 2024.

10. Lima, A. A. (1999). *Os direitos do homem e o homem sem direitos* (2ª ed.). Rio de Janeiro: Educam.

11. Lima, L. C. (2024, 14 de maio). *Reparação internacional pelo colonialismo?* Disponível em: <https://www.estadao.com.br/opiniao/espaco-aberto/reparacao-internacional-pelo-colonialismo/> Acesso em: 27 fev. 2024.

12. Rezek, F. (2011). *Direito Internacional Público: Curso elementar* (13ª ed.). São Paulo: Saraiva.

13. Souza, M. C. de, & Vinci, W. J. Júnior. (2019). *Globalização e direito humano cultural*. *Revista de Direito Internacional e Globalização Econômica*, 1(1).

14. Thomaz, O. R., & Nascimento, S. do. (2003). *Entre a intenção e o gesto: a Conferência de Durban e a elaboração de uma pauta de demandas de políticas compensatórias no Brasil*. São Paulo: Núcleo de Pesquisa sobre o Ensino Superior (NUPES) / USP. (Dossiê).