

Human Rights Watch
AN APPROACH TO REPARATIONS

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Human Rights Watch traditionally advocates reparations as part of the remedy for any serious human rights abuse. For example, under traditional human rights law and policy, we expect governments that practice or tolerate racial discrimination to acknowledge and end this human rights violation and compensate the victims. However, the U.N. World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance to be held in Durban, South Africa from August 31 to September 7, 2001, is likely to address a more complex reparations issue. It will ask whether, and if so how, reparations should be provided to people who may not have been the direct victims of racial discrimination but whose ancestors suffered such discrimination, particularly in the severe forms of slavery, the slave trade, certain especially racist aspects of colonialism, and other extreme official racist practices. This paper is Human Rights Watch's contribution to this debate. It is not a maximalist position but, rather, one that we hope will point the way to possible consensus on this contentious issue.

We begin with the premise that slavery, the slave trade, the most severe forms of racism associated with colonialism, and subsequent official racist practices such as apartheid in South Africa or the Jim Crow laws in the United States are extraordinarily serious human rights violations. If committed today these would be crimes against humanity. Under traditional and straightforward human rights law and policy, each living victim of these practices is entitled individually to seek and receive reparations from those who committed or permitted these wrongs. By "reparations" we mean not only compensation but also acknowledgment of past abuses, an end to ongoing abuses, and, as much as possible, restoration of the state of affairs that would have prevailed had there been no abuses.

In principle, we believe that the descendants of a victim of human rights abuse should also be able to pursue claims of reparations. That is, the right to reparations should not be extinguished with the death of the victim but can be pursued by his or her heirs. However, there are practical limits to how long, or through how many generations, such claims should survive. Because human history is filled with wrongs, many of which amount to severe human rights abuse, significant practical problems arise once a certain time has elapsed in building a theory of reparations on claims of descendancy alone. If one goes back far enough, most everyone could make a case of some sort for reparations, trivializing the concept. Moreover, the older a wrong, the less the residents of countries called on to provide reparations will feel an obligation to make amends.

For these practical reasons, when addressing relatively old wrongs, we would not base claims of reparations on the past abuse itself but on its contemporary effects. That is, we would focus on people who can reasonably claim that today they personally suffer the effects of past human rights violations through continuing economic or social deprivation. A group's ability to identify a wrong to its ancestors would not in itself be

enough to claim reparations (although under traditional human rights law its members could pursue claims for abuses against themselves). The group would also have to show continuing harm to itself from those past abuses. This focus on contemporary effects, in our view, provides a firmer and more appealing moral footing for discussions about reparations for old abuses. It would not deliver what might look like windfalls to people who assert vicarious claims to reparations but have suffered no harm themselves. Instead, this approach concentrates on those people who continue to be victimized by past wrongs and seeks to end their victimization. Both types of reparations can be important. But given the difficulty of mobilizing resources to redress racial injustice against victims of the past, redressing the contemporary impact of past wrongs should, in our view, be the higher priority.

We recognize that it is no easy matter to trace the contemporary effects of abuses that may have been committed a century or more ago. We propose, as a first step, the establishment of national and international panels to examine racist practices. These would include national panels on specific multiracial countries such as the United States, Brazil, and South Africa.¹ It would also include one or more international panels to look at the effect of the slave trade, as well as panels for specific countries that would examine the degree to which the slave trade and colonialism, as opposed to the subsequent practices of the post-independence government, have contributed to the destitution of the country's population.

These panels would focus on tracing these effects not for particular individuals but for groups. For example, upon a factual showing which we assume could be made, we would accept that most African-Americans continue to suffer the effects of slavery in the United States, or that most Congolese continue to suffer the effects of Belgian colonization. Difficult as it inevitably would be, the panels examining colonized countries should also determine the extent to which the post-independence governments' human rights abuses have contributed to the continuing social and economic marginalization of their populations, because external governments should be held responsible only for deprivation due to their own conduct.

The panels should be chosen in a way that maximizes their credibility – again, not a simple task. They should be transparent – open as much as possible to public scrutiny and participation. Effectively truth commissions, they should draw on all available sources, from work done by historians to testimony from sociologists and economists to the views of the victim communities.

In our view, these panels would serve critical functions quite apart from their role in trying to quantify the cost of remedying the continuing impact of past racist practices.

¹ We cite here three countries with a history of discrimination against persons of African descent which have been the focus of the reparations debate so far. But this principle clearly could and should apply to other victims of severe forms of racism and intolerance as well – for example, the Roma of Europe. In appropriate cases, it could also apply to severe forms of gender discrimination, and, in any event, the gender component should always be kept in mind when analyzing racial and other types of discrimination in order to appreciate their full effect.

They should aim to reveal the extent to which a government's past racist practices contribute to contemporary economic and social deprivation, educate the public about this continuing effect, acknowledge responsibility for it, and propose methods for rectifying these effects and making amends. If desired, they could also address current or recent racist practices.

For example, these panels would be an ideal vehicle for governments to acknowledge the harm that their past severe racist practices caused and continue to cause. Even insofar as these effects are widely known, it is important to keep in mind the well known distinction between "knowledge" and "acknowledgment" – everyone may "know" about a government's abuses, but the government's formal "acknowledgment" of the abuses is a critical part of repair.

These panels would enable governments not only to acknowledge the persistent harm caused by their past abuses but also to vow to take steps to end that harm. Any estimate of the cost of overcoming the contemporary impact of past racist practices will necessarily be inexact. Certainly pledges of money to remedy that impact will be welcome. But more important than a particular financial pledge will be a political pledge to remedy the continuing effects. In our view, governments should not be permitted to use pledges of financial assistance (inevitably insufficient) to buy their way out of reparations claims without first allowing this truth telling to proceed and then making a political commitment to remedy the harms found, since over the long term this truth telling and political commitment are more likely to generate the sustained investment needed to remedy these ongoing effects than one-shot, out-of-context pledges of compensation. Moreover, government acknowledgment of the degree to which past racist practices continue to victimize certain populations would set a standard – a public benchmark – to assess progress toward remedying these effects.

We recognize that these panels would be double-edged in a way that might not be terribly appealing to some of the governments currently advocating reparations. Implicit in determining the extent to which past racist practices underlie current deprivation is a determination of the extent to which such deprivation is due to other factors – an apportionment of blame. In many countries, one major factor behind current deprivation is the despotic and unenlightened rule of national leaders. These leaders, insofar as they are still in power, may well find this spotlight uncomfortable. We would resist efforts to focus this causal inquiry too narrowly, since we have no interest in letting these leaders off the hook.

How would one determine which groups continue to suffer from past racist practices sufficiently to warrant reparations, and how much are they owed? We believe a human rights perspective can be useful in answering these questions. On the theory that the primary concern should be people whose social and economic deprivation is greatest (at least, for these purposes, insofar as that deprivation is attributable to severe racial injustice committed against their forebears), we would focus reparations on those whose economic and social rights continue to be violated. The remedy to which they should be entitled would be an end to this violation of their economic and social rights – again, for

these purposes, at least insofar as this violation can be shown to derive from past racist practices.

We see several advantages to discussing reparations claims in terms of the impact of past racist practices on contemporary respect for economic and social rights:

- First, given that the resources available for reparations are inevitably limited, we would focus as a matter of priority on those in greatest need today. Wealthier individuals and groups may well be able to show that their ancestors suffered because of slavery or the most racist aspects of colonialism. They may even be able to demonstrate that their own contemporary prospects are limited to some extent by the continuing effects of these abuses. But because their wealth suggests that they have substantially surmounted this legacy, we would not make them the focus of a reparations scheme. An approach based on economic and social rights shifts the focus to those most in need.
- Second, a focus on economic and social rights provides greater urgency than traditional reparations claims, because it asks us to rectify today's injustices rather than yesterday's. We would expect the public to be more receptive to ending a contemporary wrong connected to a historical injustice than to providing compensation for the past injustice standing alone.
- Third, a focus on economic and social rights provides a more concrete benchmark for measuring the appropriate magnitude of reparations. The purpose of the amount sought would not be to rectify an intangible past harm but to redress a quite tangible contemporary harm – again, at least insofar as it was caused by past racial injustice.
- Fourth, an approach based on economic and social rights would allow reparations schemes to reinforce solutions to the world's most acute development challenges rather than setting up competition for limited funds from claimants who may not correspond with those most in need. The purpose of reparations payments would not be simply to hand over sums of money to the descendants of past victims, but to rectify the social and economic processes that underlie today's victims' continuing marginalization. Thus, reparations payments would presumably be used for investment in education, housing, health care, or job training, rather than consumer goods or other ephemeral benefits.
- Fifth, the “progressive realization” standard inherent in an approach based on economic and social rights has the flexibility needed to address reparations demands in societies at various levels of development.² In a wealthy country like the United

² Article 2(1) of the International Covenant on Economic, Social, and Cultural Rights provides: “Each State Party of the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum extent of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

States, relative deprivation could be the focus – rectifying the continuing inferior investment in, for example, schools, housing, and medical care serving much of the black population. (The same could be said for Native Americans and other similarly situated victim groups.) In impoverished countries, the aim would probably have to be more modest – raising people to a subsistence level, as defined by the U.N. Committee on Economic, Social, and Cultural Rights.

- Sixth, a focus on economic and social rights highlights the need for reparations schemes to supplement affirmative action with broader social investments aimed at benefiting entire disadvantaged groups, not just their most successful members. Affirmative action is certainly one useful remedial tool. But in practice affirmative action tends to favor those members of a disadvantaged group who are relatively advantaged and in the best position to benefit from the extra opportunities provided. An approach based on economic and social rights would insist on broader social investment to lift from extreme poverty even the least advantaged members of a disadvantaged group.
- Seventh, this approach would help avoid a problem of intergenerational justice. If reparations are made in the form of payments to individuals rather than investment in the economic and social dynamics behind continuing marginalization, that would raise questions about why today's generation should be seen as more deserving of these payments than tomorrow's generation or the next. Such payments would unjustifiably privilege today's descendants while leaving later generations suffering from the same racism-induced deprivation. By contrast, reparations aimed at redressing the economic and social dynamics behind systemic impoverishment would improve the lot of both today's and subsequent generations and, if successful, end continuing victimization.

We recognize that there is a certain legal redundancy in translating the duty to make reparations for past racist practices into a duty to uphold economic and social rights. After all, there is already a duty to uphold economic and social rights, as codified in the International Covenant on Economic, Social, and Cultural Rights. However, in our view, there is something to be gained from speaking of this same duty as arising not only from the ICESCR but also from the distinct obligation to remedy past racist practices. That is, we would provide another reason for doing the right thing. This is particularly important for claims of reparations across international frontiers, since a government's duty to respect ICESCR obligations has always been understood as stronger within its borders than in its relations with other states.

Despite the legal obligation articulated in the ICESCR, we must recognize that governments are extraordinarily reluctant to meet their financial responsibilities – especially, as noted, though by no means exclusively, when it comes to providing aid to other countries. Demonstrating that economic and social deprivation is due, at least in part, to state-sponsored or state-tolerated racism should help to reinforce a public sense of responsibility for realizing economic and social rights, since it would demonstrate an important way in which officially sanctioned policies have created and maintained

poverty. By transforming what is so often seen mainly as a matter of largesse into an obligation for past misconduct, this approach to reparations should enhance (not merely restate) today's meager commitment to helping those around the world who are most in need. By highlighting the structural dimension to racial marginalization, it also helps the public understand the limits to "equal treatment" or "non-discrimination" approaches to racial problems and the need in some cases to invest in more fundamental and structural solutions.

However, it is important to note that providing another reason to respect the rights contained in the ICESCR is not a matter of playing favorites among victims. We seek to uphold everyone's economic and social rights. This reparations policy would simply provide an additional reason to uphold the rights of certain victims. It should not be taken to prioritize those victims over others in comparable need.

Once the appropriate beneficiaries of reparations can be identified, it is still necessary to determine who should pay the financial component. People today will ask why they should be held responsible for the crimes of their ancestors. That is why we would focus on the responsibility of governments. A government that sponsored or permitted slavery, the slave trade, or other severe racist practices should not, in our view, be allowed to avoid responsibility simply because of the passage of time.³

However, even though governments have an intergenerational life, we recognize that to hold them responsible for past crimes is, as a practical matter, to hold today's citizens or taxpayers responsible. We believe this attribution of responsibility can be justified by reference to the economic benefits that these countries derived from, say, slavery or abusive colonialism – benefits that presumably helped to jumpstart their industrialization and thus continue to the present. We note that this rationale would apply even to immigrants who arrived in a beneficiary country after these abusive practices ended, since they, too, presumably have benefited from the advanced economy they joined.

There remain questions about the mechanics of such an approach. Reparations can obviously take several forms. One approach would be to establish trust funds on a country-by-country basis to receive payments. The trust funds should be charged with remedying the worst local violations of economic and social rights. Trustees should be chosen fairly to represent the population most in need. Governments, both domestic and foreign, found responsible for past racist practices with ongoing effects would be expected to make financial pledges, ideally commensurate with their degree of responsibility, to each relevant trust fund. Payments presumably would be pledged over several years. When international payments are involved, some degree of international supervision might be maintained, perhaps through the United Nations.

³ Human Rights Watch recognizes that a different resolution may be appropriate for private corporations that were complicit in past severe racial discrimination.

Reparations could also be made in other forms. For example, at the international level, a useful model is the one adopted by the international financial institutions for debt relief. This model imposes strict reporting and transparency requirements in an effort to channel the benefits of debt relief to those most in need. A comparable procedure could be used if a government found to have the requisite responsibility chooses to fulfill its obligation through debt relief rather than cash payments. Similarly, reparations could presumably be made, at least in part, by reducing tariffs or increasing import quotas, with appropriate guarantees that the benefits inure foremost to those most in need.

Finally, financial compensation in whatever form should be only one aspect of a broader approach to reparations. Because the authors of many of the most severe racist practices of recent history are dead, criminal prosecutions will usually not be a meaningful option. However, as noted, the panels to identify the contemporary effects of past racist practices should also serve as a vehicle for governmental acknowledgment that these wrongs were done and governmental vows to end any persistent racist practices and to avoid repetition of such abuses in the future. (Once more, payments should not be allowed to replace these non-financial aspects of reparations.) Similarly, we would encourage the establishment of monuments or museums as a way of paying respect to the victims of past abuses, educating the public about what was done, and building a public morality dedicated to avoiding repetition of these offenses. Finally, the reparations debate should be an occasion to examine and change institutions, such as the criminal justice system in the United States, that arguably extend the effects of past racist practices through their disproportionately negative impact on racial minorities.⁴

Human Rights Watch welcomes further discussion of these important issues.

⁴ See Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, (New York: Human Rights Watch, May 2000) and Human Rights Watch, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, (New York: Human Rights Watch, October 1998).