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The right to compensation for
victims of racial discrimination

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Summary

This thesis analyses the question of the right to compensation for victims of racial discrimination.

The purpose is first of all to determine whether or not victims of racial discrimination have a right to compensation under international human rights law and to establish the content and limits of such a right. In order to achieve this purpose four specific questions are examined, namely:

1. Is there a right to compensation for victims of racial discrimination under international human rights law?
2. Who is the holder of such a right?
3. Who is the party liable for compensation? and
4. What kind of damage is compensated?

After a brief presentation of the practice of racial discrimination today and its legal definition follows a comprehensive analysis based mainly of jurisprudence examined according to the judicial method and on studies undertaken by Theo van Boven, expert and member of the Committee on the Elimination of Racial Discrimination.

I conclude that at least art 6 International Convention on the Elimination of All Forms of Racial Discrimination entitle victims of racial discrimination a right to reparation, including compensation in appropriate cases.

It is further the individual victim who is the holder of this right.

The party liable for providing reparation is primarily the direct perpetrator, which in turn could be either the state or a private actor. In cases where the direct perpetrator is a person acting in his or her own capacity but where the victim is denied reparation because of failure on behalf of the state to provide an effective remedy can the state be held responsible for reparation.

A reasonable interpretation of the International Convention on the Elimination of All Forms of Racial Discrimination means that pecuniary and physical harm and suffering shall be fully compensated. Regarding mental suffering is an affirmative judgement on the merits considered a form of reparation and jurisprudence is restrictive regarding additional relief. States further seem to have a margin of appreciation to require certain level of gravity of harm. This might be a consequence of the fact that art 6 is primarily a right to seek and obtain reparation in accordance with national law as long as national legislation or enforcement is not in conflict with international standards, and such international standards are still very vague.

Abbreviations

ACHR	The American Convention on Human Rights
ACHPR	The African Charter on Human And Peoples' Rights
AComHPR	African Commission on Human and Peoples' Rights
BP	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.
CERD	International Convention on the Elimination of All Forms of Racial Discrimination.
CtERD	The Committee on the Elimination of Racial Discrimination
CtESCR	The Committee on Economic, Social and Cultural Rights
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	The European Union
HRC	The Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGO	Inter-Governmental Organisation
NGO	Non-Governmental Organisation
OAU	Organization of African Unity
Van Boven Basic Principles	Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law.
Victimsdeclaration	The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

1 Introduction

It all started when I read an individual communication from the Committee on the Elimination of Racial Discrimination (henceforth called CtERD).¹ Mr B.J, a thirty-two years old Danish engineer of Iranian origin, went to a discotheque in Odense with his brother. The doorman refused them entrance. When B.J asked the doorman why he replied: "Because you are foreigners". According to the discotheque's rules was the doorman only allowed to let ten so called foreigners in, and the quota was already filled for the evening. The case was taken to court and the discotheque owner convicted.

What caught my attention in this case was how the issue of compensation was handled. Mr B.J claimed compensation in accordance with Danish law because of the humiliation and harm inflicted on his dignity and person. The Danish court held however that the violation the claimant had been subjected to was not of such "*grave or humiliating character as to justify pecuniary compensation*" since the discriminatory information was given to the claimant in a "*polite*" manner.²

B.J turned to the CtERD claiming a violation of art 6 of the International Convention on the Elimination of All Forms of Racial Discrimination³ (henceforth called CERD), which gives victims of racial discrimination the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination. CtERD held that even though being refused access solely because of racial grounds was a humiliating experience, it found no violation of CERD.

This made me wonder, is not discrimination undertaken in a so-called polite manner just as humiliating? And, what does the right to reparation really mean for victims of racial discrimination?

1.1 Purpose

The purpose of this thesis is first of all to determine whether or not victims of racial discrimination have a right to compensation under international human rights law and to establish the content and limits of such a right. In order to achieve this purpose four specific questions are examined, namely:

1. Is there a right to compensation for victims of racial discrimination under international human rights law?
2. Who is the holder of such a right?
3. Who is the part liable for compensation? and

¹ The supervisory organ of the Convention on the Elimination of All Forms of Racial Discrimination. Opinion of the Committee on the Elimination of Racial Discrimination, Communication No 17/1999: Denmark. 19/05/2000, CERD/C/56/D/17/1999. See chapter 3.1.3.

² Ibid. para 2.5 and 4.15.

³ International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195.[henceforth called CERD]

4. What kind of damage is compensated?

1.2 Scope and limitations

This thesis cover only racial discrimination and not all racist practice as such, even though the conclusions might be equally valid for such practice.

The analysis is rather general and inclusive and principally embodies racial discrimination regarding civil and political rights as well as economic, social and cultural rights. It is not an in-depth of individual right though and does therefore not elaborate on specific problems and consequences connected to certain rights, such as for example the right to work.

I will further only analyse the right to compensation for persons who are direct victims of racial discrimination. The question of whether the ancestors to victims of slavery, slave trade and other forms of racist practises during colonialism will accordingly not be covered.

1.3 Definitions and terminology

There are no uniform definitions in international law of the terms surrounding the issue of compensation. Therefore have I tried to give a definition of the terms I will employ in this thesis. For pedagogical reasons are they not presented in alphabetic order.

When reading quotations please note that due to inconsistent usage of these terms, phrases can not always be reliable interpreted according to the definitions given below.

Remedy - remedy is a general term interpreted by several human rights organs to include access to justice and reparation for harm suffered as a result of a human rights violation.

Reparation - reparation is a general term including restitution, compensation, satisfaction and guarantees of non-repetition.⁴

Restitution - restitution is a form of reparation, meaning any measure that restores the victim's original situation prior to human rights violation.⁵

⁴ This interpretation has support in the International Law Commissions Draft Articles on International Responsibility of States, Part Two, ILC Yearbook 1980 Vol.II, 30-34 [henceforth called ILC Draft], art 42; Also in the latest Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, contained in The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Final report of the Special Rapporteur, Mr M. Cherif Bassiouni, E/CN.4/2000/62 Annex [henceforth called Basic Principles], para 21 (See chapter 3.2.3.3). The term is also used in CERD art 6, but has not been interpreted as such by the CTERD.

⁵ See ILC Draft art and Basic Principles para 22. The does not distinguish between restitution and compensation. If you look at principle 8 this provision seem to cover both restitution and compensation. Still I think it is valuable to distinguish between these two terms. The ILC Draft has listed the reparation measures giving priority to restitution over

Compensation - compensation is a form of reparation, which means financially compensating the victim for the pecuniary and non-pecuniary harm he or she has suffered as a result of the violation.⁶ This term is used interchangeably with payment of damages.

Damages - damages means pecuniary compensation. Damages can be *actual and compensatory*, i.e. directly related to the economical value of the pecuniary loss or non-pecuniary suffering. Damages can further be *exemplary or punitive*, which means that extra pecuniary compensation is given to the victim for the reason of punishing the perpetrator and to keep a particularly bad act from happening again. *Aggravated damages* mean that the amount of damages awarded is effected by the behaviour of the perpetrator as an aggravating factor increasing the amount.⁷

Satisfaction - satisfaction is a form of non-pecuniary measure of reparation which together with guarantees of non-repetition include measures such as cessation of continuing violations, apologies, public acknowledgement of the facts and acceptance of responsibility, judicial or administrative sanctions against persons responsible for the violations, prevention of the recurrence of the violations etc. Note however that this is the way I use the term and the way they are defined in recent Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.⁸ The European Court of Human Rights does not interpret the phrase "just satisfaction" in this way but rather as a synonym to compensation.⁹

Pecuniary harm- pecuniary harm means in this thesis any expenses and losses, including loss of future earnings. The term means the same as material damage, a term that is sometimes used by human rights courts and treaty bodies and therefore occur in this thesis in quotations.

Non-pecuniary harm - non-pecuniary harm mean any physical or mental harm or suffering including emotional distress, anxiety, humiliation, depression and harm to a person's honour and dignity. Synonym to moral damage.

compensation. Compensation is to be provided only if and to the extent that the damage is not made good by restitution, art 44. Also the Basic Principles can be interpreted in that manner.

⁶ Basic Principles para 23. See also case law from ECtHR and IACtHR chapter 3.1.4.2 and 3.1.4.3.

⁷ Kristian Myntti, Reparation and satisfaction for racial discrimination according to art 6 of the Convention on the Elimination of All Forms of Racial Discrimination, 2000. See also case law in chapter 3.1.4.2 and 3.1.4.4.

⁸ Basic Principles para 25.

⁹ See chapter 3.1.4.2

Harm and damage are used interchangeably.

1.4 Method

My thesis is mainly analytical. The right to compensation for victims of racial discrimination is analysed according to the judicial method.

The primary source of the examination is international human rights conventions, with the CERD in general and its art 6 in particular as the focus of the analysis.

Provisions in respective conventions are interpreted according the ordinary meaning of the words stated therein read in the context of the purpose of the convention in question. Relevant case law from international human rights courts are examined in order to determine the scope and content of the prohibition against discrimination and the right to compensation for such practice.

As supplementary means of interpretation are non-binding documents from monitoring bodies and other international supervisory organs as well as instruments developed within the United Nations' framework for human rights protection taken into account.¹⁰

1.5 Material

The descriptive part in chapter 2 is essentially based on annual reports from the CtERD, which has the competence to monitor State Parties implementation of the CERD, and from the Special Rapporteur on Contemporary forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. The Rapporteurs mandate is thematic and covers all countries, but with the focus on developed countries and the situation of vulnerable groups.¹¹

The rest of the thesis is analytical. The material consists to a large extent of jurisprudence from the CtERD, the European Court of Human Rights (henceforth called ECtHR) and the Inter-American Court of Human Rights (henceforth called IACtHR).

The work undertaken by Mr Theo van Boven, expert and member of the CtERD, on the right to restitution, compensation and rehabilitation resulting in a comprehensive study together with proposed principles and guidelines on the subject has been a helpful base for this thesis.

The issue of compensation had a for the purpose of this thesis a somewhat unfortunate focus during the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in September 2001.

The documents from the preparatory expert seminars contribute to an understanding of the importance of remedies for victims of racial discrimination.

¹⁰ Art 38, Statute of the International Court of Justice, 26 June 1945, 1 U.N.T.S XVI and art 31-33 the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S 331, in force 27 January 1980.

¹¹ The mandate cover incidents of contemporary forms of racism, racial discrimination, any form of discrimination against Blacks, Arabs and Muslims, xenophobia, negrophobia, anti-Semitism and related intolerance. Commission on Human Rights resolution 1994/64, para 4.

1.6 Outline

Chapter 2 describes the practise of racial discrimination together with the harm it causes to its victims. This in order to understand claims for compensation. The chapter further contains a presentation and analysis of the legal definition of discrimination. The purpose is first of all to establish what discriminatory acts that are prohibited according to international law and secondly to reveal relevant differences between the human rights instruments.

Chapter 3 is the main chapter of this thesis with a comprehensive analysis of the right compensation according to different human rights systems. Both binding and non-binding instruments, together with relevant jurisprudence and other interpretative statements are presented.

Chapter 4 is the concluding chapter that based on the information in chapter 3 answers the initial questions asked in chapter 1.1.

2 Racial discrimination

2.1 The practice of racial discrimination

Racism and racial discrimination is not only phenomenon of the past associated with Nazism or colonialism. Neither is it just acts of violence directed against Jews, Blacks, Muslims or non-Muslims perpetrated by extremists.¹² It is a much more complex problem existing today in every part of the world. A read through the latest reports of the CtERD and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance gives a picture of the practise. Racial discrimination arises in all areas of society, in education, employment, housing, healthcare, social security and other areas involving supply of goods or services to the public.¹³ People are being refused entrance at bars, discotheques and supermarkets because of the colour of their skin or their ethnic origin. Migrants and people belonging to minorities are denied loan in banks and apartment contracts because of their national and ethnic origin. They receive lower standard of healthcare and their children are put in special schools.¹⁴

The practise of racial discrimination involves different actions on behalf of the perpetrator. Some acts, but not all, result in direct pecuniary loss or physical harm for the victim. Common and characteristic for racial discrimination though is that the victim experiences the incident as very insulting and humiliating. It causes harm to the victim's perception of his or her worth and dignity.¹⁵

¹² Unlike violent manifestations of anti-Semitism and other forms of racial propaganda are racial discrimination often more sophisticated, more common and given less attention.

¹³ Report of the Committee on the Elimination of Racial Discrimination, 6-23 March and 30 July -17 August 2001, General Assembly Official Records, Supplement No. 18, A/56/18, see especially chapter 3 and 4. Report by Mr.Maurice Glélé-Ahanhazo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, submitted pursuant to Commission on Human Rights resolution 1998/78, 10 February 2000, E/CN.4/2000/16; and Report by Mr.Maurice Glélé-Ahanhazo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, submitted pursuant to Commission on Human Rights resolution 2000/14, 6 February 2001, E/CN.4/2001/21, see especially chapter 3 in both reports.

¹⁴ Regarding the situation of migrants see also Human Rights of migrants Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 1999/44, 6 January 2000, E/CN.4/2000/82, page 11; Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2000/48, 9 January 2001, E/CN.4/2001/83, page 22 and Review of reports, studies and other documentation for the Preparatory Committee and the World Conference, 18 April 2001, A/CONF.189/PC.2/23.

¹⁵ This must be particularly true when this kind of treatment is repeatedly experienced in their daily life.

2.2 The definition of racial discrimination

Several international human rights instruments prohibit discrimination based on race. The main global instrument dealing specifically with this issue is the International Convention on the Elimination of All Forms of Racial Discrimination¹⁶ that has a broad and general definition of racial discrimination. Art 1(1) states:

Article I

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁷

[...]

The definition prohibits both direct and indirect discrimination and requires no discriminatory or racist motive on behalf of the perpetrator, only knowledge of the effects of his or her act. Not every differentiation of treatment will constitute discrimination however. If the different treatment is legitimate, compared with the objective and purpose of the Convention, the act will not be considered discriminatory.¹⁸ Distinctions between citizens and non-citizens and affirmative measures with the purpose of securing adequate advancement of certain racial or ethnic groups or individuals are likewise permitted.¹⁹

The definition protects enjoyment of human rights in the "*field of public life*". This could be interpreted as excluding all private acts. However such an interpretation would contradict other provisions of the Convention, such as art 2(1d) and 5 (e) and (f). Art 5 clarifies different areas where discrimination must be prohibited and states that, among others, the right to housing, health service, social security and the "*right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks*" shall be enjoyed without discrimination. Jurisprudence from the CtERD has made it clear that these guarantees extend to housing provided by

¹⁶ International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195.

¹⁷ "Colour" deals with discrimination based on physical criteria; "descent" is probably unique for CERD and has been interpreted to include the system of caste and denotes social origin; "national or ethnic origin" refers to prejudice against linguistic, cultural or historical differences. Snadra Fredman, *Discrimination and Human Rights - The Case of Racism*, Oxford 2001, page 152. The definition is very close to the definition of discrimination in the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation, 362 U.N.T.S. 31, 25 June 1958 and the Convention against Discrimination in Education, 429 U.N.T.S. 93, 14 December 1960, elaborated by UNESCO a few years earlier.

¹⁸ Committee on the Elimination of Racial Discrimination, Definition of discrimination (Art. 1, par.1), 19 March 1993, General Recommendation 14, A/48/18.

¹⁹ Art 1 CERD.

private owners, the admission to discotheques and restaurants owned privately etc.²⁰ It should be noted though that art 5 does not in itself create any of the rights enumerated but assumes their existence. As long as services and goods are provided for the general public, the principle of equality must be respected.²¹

Since my analysis covers the right to compensation according to other human rights instruments too do I find it necessary to say something about the definitions of discrimination in respective instrument.

The International Covenant on Civil and Political Rights²² (henceforth called ICCPR) prohibits discrimination based on among others race. Art 2 obliges states to ensure that the rights set forth in the Convention can be enjoyed in a non-discriminatory manner. Art 26 prohibit discrimination based on among others race, *as such*, regardless of whether or not the situation, in which the discriminatory act arises, in itself falls within the scope of the Convention.²³ None of the articles define discrimination however.²⁴ The Human Rights Committee (henceforth called HRC), which is the monitoring body for the Covenant, has defined discrimination in terms almost identical to the broad definition in art 1 CERD. Not every differentiation of treatment constitutes discrimination though. If the grounds are reasonable and objective and if the aim to be achieved is legitimate under the Covenant the act will not be considered discriminatory.²⁵

²⁰ See chapter 3.1.3.1. See also Committee on the Elimination of Racial Discrimination, Non-discriminatory implementation of rights and freedoms (Art. 5), 15 March 1996, General Recommendation 20, A/51/18

²¹ For a more elaborate analysis of this issue see Globalization, in the Context of Increased Incidents of Racism, Racial Discrimination and Xenophobia, Working paper submitted to the Sub-Commission by J. Oloka-Onyango in 1999 in the preparatory process of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, E/CN.4/Sub.2/1999/8

²² The International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S 171.

²³ Human Rights Committee, General Comment No. 18, 10 November 1989, para 1. See also Waldman v. Canada concerning whether public funding for Roman Catholic schools, but not for schools of the author's religion, which results in him having to meet the full cost of education in a religious school, constitutes a violation of the author's rights under the Covenant. The HRC concludes that despite the fact that the Covenant does not oblige States parties to fund schools which are established on a religious basis, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. Human Rights Committee Communication N° 694/1996, 5 November 1999, CCPR/C/67/D/694/1996, para 10.6. See also chapter 3.1.4.1

²⁴ It should be noted that nationality and national origin is not the same. According to CERD art 1(2) distinctions between nationals and non-nationals shall not be considered discriminatory. There was a discussion during the drafting of the ICCPR regarding this and it was clearly pointed out that this general prohibition of discrimination in art 26 did not prohibit each and every type of unequal treatment of nationals and aliens. Nowak, Manfred U.N. Covenant on Civil and Political Rights- CCPR Commentary, Germany 1993, page 51.

²⁵ In its General Comment has it stated that discrimination is to be understood as " *any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or*

The International Convention on Economic, Social and Cultural Rights²⁶ (henceforth called ICESCR) art 2 prohibit any discrimination, including racial, in the enjoyment of the rights set forth in the Covenant. This prohibition is accessory to the rights guaranteed in the Covenant and not independent as art 26 ICCPR. The monitoring body, the Committee on Economic, Social and Cultural Rights (henceforth called CtESCR) has stated that this provision is applies fully and immediately and is neither subject to progressive realisation nor the availability of resources. The article is to be interpreted according to the definitions of discrimination embodied among others CERD.²⁷

The European Convention on Human Rights and Fundamental Freedoms (henceforth called ECHR)²⁸ similarly states that the rights and freedoms set forth in the Convention must be guaranteed without discrimination of any kind, including racial discrimination.²⁹ The accessory nature of the prohibition theoretically limits its application to civil and political rights, except for the right to education protected by the Protocol to the Convention.³⁰ The ECtHR has however stated that art 14 can be relied on in connection with substantive provisions even though there is no violation of the substantive right as such.³¹ This issue of the accessory nature of the prohibition against discrimination will be less important if Protocol 12, containing a general prohibition enters into force.³²

impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms". Human Rights Committee, Non-discrimination , General Comment No. 18, 10 November 1989, para 6-8 and 13.

²⁶ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3

²⁷ The Committee also referred to the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation and the Convention against Discrimination in Education. Committee on Economic, Social and Cultural Rights, The right to education (Art.13), General comment 13, 8 December 1999, E/C.12/1999/10, para 31-34 and Committee on Economic, Social and Cultural Rights, The right to the highest attainable standard of health, General comment 14, 11 August 2000, E/C.12/2000/4, para 10.

²⁸ The European Convention for the protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, 4 November 1950, ETS No 5 [henceforth called ECHR]

²⁹ Ibid art 14. An act or omission does not in itself has to constitute an independent violation of one of the provisions of the ECHR or its protocols. It is enough that the act or omission falls within the scope of the rights set forth in the ECHR and that it can be concluded that art 14 taken together with the provision in question has been violated. See *Inze v. Austria*, European Court of Human Rights, 28 October 1987, Series A no. 126, p. 17, para 36

³⁰ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, 1 November 1998, ETS No. 155, art 2

³¹ In case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, concerning mother-tongue education the ECtHR. The ECHR does not protect the right to mother-tongue education but as far as it is provided it must be done so in a non-discriminatory way. Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, European Court of Human Rights, 23 June 1968, Series A6.

³² Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 177,

Art 14 ECHR protects individuals from discrimination based race, colour and national origin. It does not protect against difference in treatment as such. The European Court has considered only treatment that has "*no objective and reasonable justification*" as discriminatory. If different treatment in similar situations is established the State Party must show that the act has a "*legitimate aim*" and that there is a "*reasonable relationship of proportionality*" between the means employed and the aim sought to be realised.³³

The American Convention on Human Rights (henceforth called ACHR) also contains accessory prohibition against discrimination.³⁴ As a complement the ACHR grant everyone equality before the law and equal protection of the law.³⁵ The IACtHR has interpreted this as an independent and general prohibition of discrimination in the application of law. The Court has taken the same approach other human rights organs and stated that distinctions based on "*substantial, factual differences*" that are proportional and has a just and reasonable aim is not contrary to the Convention.³⁶

Also the African Charter on Human and Peoples' Rights³⁷ (henceforth called ACHPR) prohibit distinctions in the enjoyment of the rights protected by the Charter.³⁸ This accessory non-discrimination provision is complemented with art 3 that protects equality before the law and equal protection of the law. The Charter also contains duties for individuals and art 28 states that every individual shall have the duty to respect his fellow beings without discrimination.³⁹ Judging from the limited jurisprudence of the African Commission on Human and Peoples' Rights, established according to the Charter to promote, protect and

Article 1 – General prohibition of discrimination

"1 The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

³³Ibid. See also Darby v. Sweden, European Court of Human Rights, 23 October 1990, Series A No 187, para 31.

³⁴ Art1 American Convention on Human Rights, 18 July 1978, 1144 U.N.T.S. 123

³⁵ Ibid. Art 24

³⁶ Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Inter-American Court of Human Rights, Advisory Opinion, 14 August 1984, Series A No 4, para 56.

³⁷ African Charter on Human and Peoples Rights, 27 June 1981, OAUDoc. CAB/LAG/67/3 rev.5.

³⁸ Art 2 African Charter on Human and Peoples Rights, 27 June 1981, OAUDoc. CAB/LAG/67/3 rev.5.

³⁹ What this means in practise is difficult to say, treaties can only bind its parties, the states. On the other hand is this provision not so different from the indirect obligations of states in other human rights treaties to prohibit violations of human rights and to punish perpetrators. The Commission has not yet been faced with a communication alleging that an individual has violated his duties according to the Charter. See also U. Oji Umozurike, The African Charter on Human and Peoples' Rights, Hague 1997, page 30.

interpret the rights in the Charter⁴⁰, I would say that the prohibition against discrimination is interpreted in similar ways as in other international human rights systems. Not every distinction is considered discriminatory only those that cannot be justified and are therefore arbitrary.⁴¹

To conclude I can say that the definitions of racial discrimination is very similar if not almost identical in substance. The definitions are broad and inclusive and the criteria that exclude certain different treatment from the definition, such as "*just and legitimate aim*" and "*objective and reasonable justification*", are vague. Ultimately this means that decisions determining whether or not a particular act will be considered as discriminatory will be decided on a case-by case basis and dependent on value judgements.⁴²

⁴⁰ Ibid. Art 45

⁴¹ Amnesty International / Zambia, African Commission on Human and Peoples' Rights, 5 May 1999 Communication No. 212/98, para 43, concerning expulsion and arbitrary removal of a persons citizenship.

⁴² Nowak page 45.

3 Analysis - Compensation for victims of racial discrimination?

3.1 International law

The purpose of this chapter is to analyse how the issue of reparation and compensation is dealt with in cases concerning racial discrimination in international human rights law. The focus is on the issue of compensation why I in the absence of jurisprudence specifically regarding discrimination still find it of value to analyse how claims for damages are dealt with in reference to other human rights violations.

The presentation start with global international human rights treaties, with the focus on CERD, proceeds with regional human rights law and end with non-binding human rights documents.

Neither the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation nor the Convention against Discrimination in Education are analysed because of the fact that they contain no provision for remedies and because a more in depth study of racial discrimination on the labour market is out of the scope of this thesis. The Council Directive 2000/43/EC on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin from the European Union is not analysed since it contain no mandatory obligations regarding reparation.⁴³

The International Law Commission's Draft Articles on International Responsibility of States⁴⁴ was aimed at regulating the relations between states and not relations between states and individuals and is therefore not included in the analysis, even though Part two contain rules concerning the obligation to make reparation.⁴⁵

3.1.1 The International Covenant on Civil and Political

⁴³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180 , 19/07/2000 p. 0022 - 0026.

Article 15 - Sanctions

*"Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which **may** comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them."*[my emphasis]

⁴⁴ See The Draft Articles on International Responsibility of States, ILC Yearbook 1980 Vol.II, 30-34.

⁴⁵ See footnote 4.

Rights

Article 2 (3) ICCPR states that:⁴⁶

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an **effective remedy**, notwithstanding that the violation has been committed by persons acting in an official capacity; [my emphasis]

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.[my emphasis]

The HRC has not issued any General Comments regarding the interpretation of this provision. The jurisprudence of the HRC⁴⁷, though, show that the Committee usually, after finding a violation of the Covenant, proceeds to ask the State Party in question to take appropriate steps to remedy the violation. What measures that are considered appropriate and effective will depend on the right violated. The Committee has used a variety of formulations for compensation to victims. It has required "compensation for any injury suffered", "appropriate compensation", "compensation for the wrongs suffered", "compensation for physical and mental injury and suffering caused to the victim" etc. It should be born in mind that these clear statements on the issue of providing reparation and compensation as part of the state obligation to provide an effective remedy has came up mostly with respect to violations of the right to life and in cases involving forced disappearances and torture.⁴⁸

The HRC has not dealt with racial discrimination exclusively and only found a violation of art 26 in few cases. In *Gueye v. France* the HRC after finding a violation of art 26 went on to state that "*the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by the victims*".⁴⁹ And

⁴⁶ The ICCPR does contain specific provisions for compensation. Art 9 para 5 and art 14 para 6 gives victims of unlawful detention and faulty criminal conviction a right to compensation. Apart from this provisions there is no explicit right to compensation for a violation of the other rights of the Covenant.

⁴⁷ The HRC has the authority to consider complaints from individuals against State Parties that that has made a declaration under the optional protocol accepting the Committee's jurisdiction. The Committee's opinions are however non-binding.

⁴⁸ Study concerning the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, page 21-27

⁴⁹ *Gueye et al. v. France* concerning whether the authors are victims of discrimination within the meaning of article 26 of the Covenant or whether differences in pension treatment of former members of the French Army, based on whether they are French nationals or not, should be deemed compatible with the Covenant. The HRC found no evidence to support the allegation that the State party had been engaged in racially discriminatory practices vis-

in *Waldman v. Canada* the HRC stated that "*the State party is under the obligation to provide an effective remedy, that will eliminate this discrimination*".⁵⁰ This requirement of an effective remedy does not necessarily mean compensation. What is considered to be effective will depend on the kind of act that is considered to be discriminatory and can only be determined in the concrete case, this being especially true in discrimination cases that can involve such different practices.

The HRC lacks the power to award just satisfaction in binding judgements. This led Nowak in 1992 to the conclusion that the ICCPR, except cases covered by art 9 and 14, does not contain any legal basis for compensation.⁵¹ Others have later come to different conclusions. Martin Scheinin, member of the HRC,⁵² has in an article argued that there has been a development towards more and more specific pronouncements on appropriate remedies by the Committee and that today there is a legal right to compensation under the ICCPR.

The latest statement from the HRC on the issue is the Committee contribution to preparatory process for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The Committee stated that the ICCPR require State Parties to ensure equality and adopt legal measures and effective remedies to victims of racial discrimination. Compensation was not explicitly mentioned, probably because of the controversial character of the issue during the conference.⁵³

To conclude I would say the ICCPR only explicitly require states to provide victims with effective remedies. Regarding victims of *discrimination Gueye v. France* and *Waldman v. Canada* could be interpreted as requirements to provide reparation and guarantees of non-repetition, but this is not explicitly stated. Further reparation can mean different things not necessarily compensation, which means that State Parties will have a margin of appreciation on what measures to take, as long as the measure is effective.

3.1.2 International Covenant on Economic, Social and

à-vis the authors. The Committee considered whether the differentiation made with reference to nationality was compatible with the prohibition of discrimination based on "other status" in the second sentence of article 26. It concluded that the act was not "reasonable and based on an objective criteria" and therefore amounted to prohibited discrimination within the meaning of article 26. The Human Rights Committee Communication No. 196/1985, *France*, 6 April 1989, CCPR/C/35/D/196/1985, para 1.5, 8.3 and 9.

⁵⁰ Supra footnote 23.

⁵¹ Nowak page 65.

⁵² Martin Scheinin, member of the Human Rights Committee and professor at the Åbo Institute of Human Rights, Remedy and Compensation under the Covenant on Civil and Political Rights. This analysis was written in 2001 with reference to the issue of compensation and its consideration on the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

⁵³ Contribution of the Human Rights Committee to the preparatory process for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 13 March 2001, A/CONF.189/PC.2/14, para 15 and 16.

Cultural Rights

The ICESCR contain no direct counterpart to the provision in the ICCPR art 2 (3) concerning effective remedies. Nevertheless has the CtESCR adopted a General Comment on the domestic implementation of the Covenant. Para 2 states that "*appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place*". The Committee continued to say that even though the right to an effective remedy need not be interpreted as always requiring a judicial remedy, for some obligations such as the right to non-discrimination, judicial remedies seemed indispensable in order to satisfy the requirements of the Covenant.⁵⁴ Whether this remedy include measures of reparation is not clear but in its last General Comments has the Committee held that victims of violations are in fact entitled to adequate reparation.⁵⁵

3.1.3 The International Convention on the Elimination of All Forms of Racial Discrimination

The CERD is the main instrument concerning racial discrimination containing a broad and general definition of such discrimination and obliging State Parties to take several measures to eliminate this practise.

Art 6 provide for individual remedies. It states:

Article 6

*States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals **just and adequate reparation or satisfaction** for any damage suffered as a result of such discrimination. [my emphasis]*

The terms used are "*adequate reparation or satisfaction*". CERD is one of our first international human rights instruments and entered into force before any of these terms were defined in international law documents. Still the term reparation is a general term, embodying restitution, compensation, satisfaction and guarantees of non-repetition, which might be the most appropriate one considering the fact that racial discrimination involve such different acts requiring different remedies.

⁵⁴ The Committee on Economic, Social and Cultural Rights, The domestic application of the Covenant, General Comment No. 9, 3 December 1998, E/C.12/1998/24, CESCR General comment 9, para 3 and 9.

⁵⁵ Committee on Economic, Social and Cultural Rights, The right to adequate food (Art.11), General Comment 12, 12 May 1999, E/C.12/1999/5, para 32 and Committee on Economic, Social and Cultural Rights, The right to the highest attainable standard of health, General comment 14, 11 August 2000, E/C.12/2000/4 para 59.

A few State Parties made interpretative statements upon signing the Convention. The United Kingdom interpreted the requirements in art 6 concerning "*reparation or satisfaction*" as being fulfilled if one of these means of remedies were provided. It further interpreted "*satisfaction*" as including any remedy that brought the discriminatory conduct to an end. Fiji, Malta, Nepal, Tonga and later also China made identical statements. Italy stated that the remedies referred to in art 6 should be provided within the framework of ordinary courts and that claims for reparation for any damage suffered by victims of racial discrimination must be brought against the persons responsible for the criminal act.⁵⁶

State Parties to CERD undertake to submit reports for examination by CtERD on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention.⁵⁷ These reports and the Concluding observations made by the Committee contain only limited information about the interpretation of art 6, mostly just a request from the Committee to the State Party to provide information on the national implementation of art 6.⁵⁸

The CtERD has made a few statements regarding remedies and compensation in its General Recommendations, though it is not evident that these statements are made in reference to discriminatory acts. The General Recommendation regarding refugees and displaced persons states that these people should, upon return to their country of origin be compensated appropriately for any such property that cannot be restored to them.⁵⁹ The CtERD has also said that indigenous peoples should first and foremost have a right to restitution and only if that is impossible should it be substituted with just, fair and prompt compensation.⁶⁰ Regarding the situation for Romas has the Committee recommended State Parties to take appropriate measures to secure their access to effective remedies.⁶¹ Otherwise these General Recommendations are mainly concerned with recommending different special measures or affirmative action to be taken by the State Parties. The most interesting General Recommendation for this thesis is No. 26. It states:

1. The Committee on the Elimination of Racial Discrimination believes that the degree to which acts of racial discrimination and racial insults damage the injured party's perception of his/her own worth and reputation is often underestimated.

2. The Committee notifies States parties that, in its opinion, the right to seek just and adequate reparation or satisfaction for any damage suffered as a

⁵⁶ United Nations Treaty Collection, Declarations and Reservations.

⁵⁷ Art 9 CERD

⁵⁸ See for example Report of the Committee on the Elimination of Racial Discrimination, 6-23 March and 30 July -17 August 2001, General Assembly Official Records, Supplement No. 18, A/56/18.

⁵⁹ Committee on the Elimination of Racial Discrimination, Article 5 and refugees and displaced persons, 24 August 1996, General Recommendation 22, A/51/18, para 2c

⁶⁰ Committee on the Elimination of Racial Discrimination, Indigenous Peoples, 18 August 1997, General Recommendation 23, A/52/18, annex V, para 5.

⁶¹ Committee on the Elimination of Racial Discrimination, Discrimination against Roma, 16 August 2000, General Recommendation 27, A/55/18, annex V, para 7

*result of such discrimination, which is embodied in article 6 of the Convention, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.*⁶²

The Committee did not say that victims had an absolute right to compensation for all non-pecuniary damage that acts of racial discrimination causes. It is rather a remainder that injuries to the victims self-esteem and dignity is often underestimated and a recommendation to not automatically consider damage of this kind compensated by the judgement itself but to consider awarding economic compensation in the judicial process.

3.1.3.1 Individual Communications

In this chapter follows a presentation of the relevant cases regarding the interpretation of art 6.⁶³ The presentation is given in chronological order according to the date of the opinion given by the Committee. The facts are given very briefly and the focus of the presentation is on the legal problems in trying to determine the scope of art 6.

L.K v. the Netherlands is from 1993 and concerned a Moroccan citizen who was residing in the Netherlands.⁶⁴ He was exposed to remarks and threats that constituted racial discrimination and acts of violence contrary to art 4(a) CERD. The incidents were reported to the police. The following investigation and prosecution by the authorities were insufficient. This constituted a violation of art 6 because the state had failed to afford the applicant effective protection and remedies against violations of CERD. The Committee recommended the state to review its prosecution policy in cases of racial discrimination and to provide the applicant with "*relief commensurate with the moral damage he had suffered*".⁶⁵

The second case, *Ziad Ben Ahmed Habassi v. Denmark*, is from 1999 and concerned a discriminatory loaning policy practised by a Danish bank. The bank

⁶² Committee on the Elimination of Racial Discrimination, Article 6 of the Convention, 24 March 2000, General Recommendation 26, A/55/18, annex V

⁶³ The jurisprudence from CtERD is not very extensive, depending on the fact that only few states (34 as of 17 August 2001) has recognised its competence to consider individual communications according to art 14, so I have been able read through most of it. You will discover that a relatively large part of the cases has its origins in Denmark. This is not a result of me having anything in particular against Denmark, but probably a consequence of the fact that only a few states has recognised the CtERD's competence.

⁶⁴ Opinion of the Committee on the Elimination of Racial Discrimination, Communication No 4/1991: Netherlands 16/03/93. CERD/C/42/D/4/1991

⁶⁵ Ibid para 6.6-6.9. The applicant had not requested any moral damages, the recommendation to pay such compensation was the Committees own initiative.

only lent money to Danish citizens.⁶⁶ An application from a Tunisian citizen was refused because of this requirement. The applicant reported the case to the police. The bank defended itself by claiming that the nationality requirement was motivated to ensure repayment of the loan.⁶⁷ The police investigation was disclosed given lack of evidence of any unlawful act and the public prosecutor agreed.

The victim submitted a communication to the CtERD.⁶⁸

The Committee declared the requirement of Danish nationality a violation of art 2(d) CERD and the states' inaction a denial of effective remedies against the violation. The Committee recommended the Denmark to counteract racial discrimination on the loan market and to "*provide the applicant with reparation or satisfaction commensurate with any damage suffered*".⁶⁹

The Committee did not however elaborate on what damage that in its opinion had been caused and accordingly should be repaired. The loan had been granted to the applicant's wife, which makes it doubtful whether there was any pecuniary harm. To me the damage is of a non-pecuniary nature.

B.J v. Denmark is very interesting and also from 1999.⁷⁰ The facts have already been described in the introduction. Two persons were refused entrance to a discotheque because they were foreigners. The owners were prosecuted and sentenced to pay a fine of 1000 DKr for racial discrimination. The authors claim for compensation was rejected. According to the Court was the act of discrimination Mr B.J had been subjected to "*not of such a grave or humiliating character*" as to entitling the him to any pecuniary compensation. Mr B.J appealed but the judgement of the District Court was confirmed. According to the High Court of the Eastern Circuit the doorman's information to refuse to let the claimant and his brother enter because of their foreign origin was given to them in a polite manner. Therefore the violation of Mr B.J's honour was not of such severity and did not involve such humiliation as to justify the granting of compensation.

In this case was it undisputed that racial discrimination has occurred and the state had taken action to investigate the crime and punish the perpetrators. It was also

⁶⁶ Opinion of the Committee on the Elimination of Racial Discrimination, Communication No 10/1997: Denmark. 06/04/99, CERD/C/54/D/10/1997

⁶⁷ Ibid. para 9.3

⁶⁸ Denmark objected and wanted the Committee to declare the case inadmissible because of non-exhaustion of domestic remedies. The applicant should, according to the state, have brought the case before a civil court claiming compensation for any pecuniary or non-pecuniary damage.

CtERD stated that the objective of filing a complaint to the police and subsequently to the prosecutor claiming to be a victim of racial discrimination was to get the perpetrator convicted for the offence. This objective could not have been achieved in a civil process, which could only lead to compensation for damages. Ibid. para 6.1

⁶⁹ Ibid. para 11.2

⁷⁰ Opinion of the Committee on the Elimination of Racial Discrimination, Communication No 17/1999: Denmark. 19/05/2000, CERD/C/56/D/17/1999.

clear that no pecuniary or physical harm has been caused by the act. The question was therefore whether art 6 CERD required states to facilitate or provide compensation for this kind of non-pecuniary damage.

Denmark held that the right to adequate reparation or satisfaction in art 6 CERD was not an absolute right and could accordingly be subject to limitations. The state party had a margin of appreciation to require certain conditions to be satisfied in order to award non-pecuniary compensation.⁷¹ Denmark further held that prosecution and conviction could in certain cases, such as this one, be enough to fulfil art 6.⁷²

Danish law contains provisions for providing compensation, for both pecuniary and non-pecuniary damage, including damage to self-esteem or character, inflicted by an unlawful act such as racial discrimination.⁷³ Such compensation presupposes however that certain conditions are fulfilled. The victim's perceptions of his own worth and reputation should have been injured, the unlawful act must be culpable and of some gravity and there must be a casual link between the discriminatory act and the harm.⁷⁴ Conditions that according to the state was not fulfilled in the present case.

The applicants counsel replied that the reasoning of state party implied that compensation should not be granted in cases where racial discrimination had been conducted "politely", something that would be inconsistent with CERD.⁷⁵

The Committee supported the view of the state. A victim of racial discrimination is not always entitled to compensation in addition to conviction of the perpetrator. Art 6 require, though, that claims of compensation are considered by the national court, including cases where no physical injury has been inflicted but where the victim has suffered humiliation, defamation or other attacks against his or hers reputation or self-esteem.

The Committee went on, unnecessarily, to state that being refused from a place intended for the public on racial grounds was humiliating. Such an offence may not in all cases be adequately repaired by the mere conviction of the perpetrator and may therefore in such cases entitle the victim to economic compensation.

The Committee concluded that there was no violation of art 6 but recommended Denmark to take necessary measures to ensure that victims of racial discrimination will have their claims for compensation considered, not only in cases of bodily harm but also in cases causing humiliation and similar suffering.⁷⁶

⁷¹ The state supported this argument by holding that art 6 CERD should be interpreted in the same way as the ECHR interprets art 5 (5), concerning the right to compensation for victims of unlawful arrest or detention, meaning that the right to compensation is dependent on the ability of the person concerned to show damage resulting from the violation. Ibid. para 4.11

⁷² Ibid. para 4.12

⁷³ The reason for awarding compensation for non-pecuniary damage in such cases is the humiliation the victim experience.

⁷⁴ Ibid. para 4.14

⁷⁵ Ibid. para 5.4

⁷⁶ Ibid. para 6.1-7

The fourth case, *M.L v. Slovakia*, is from 2001 and concerned a person, Mr M.L, of Roma ethnicity who was told to leave the Railway Station Restaurant in Kosice.⁷⁷ The reason was simply that the owner had decided not to serve Romas because a couple of Romas had previously destroyed equipment in the restaurant. Mr M.L reported the case to the police. The police found no evidence of discrimination and closed the investigation.⁷⁸ The public prosecutor agreed. Mr M.L submitted a communication to the CtERD stating that the state's failure to sanction and remedy the restaurant owners racially motivated discrimination constituted a violation of CERD. The petitioner wanted the state to ensure non-repetition of the discriminating act, to adopt appropriate legislation for dealing with racial discrimination and to provide him with compensation for the humiliation and degradation he had suffered on account of the restaurant owner's behaviour. The state party held that Slovak legislation was in accordance with CERD. Racial discrimination was a crime according to the Penal Code and the Civil Code gave persons who had been exposed to arbitrary or unlawful interference with their integrity a right to have such interference stopped, consequences removed and to be given appropriate satisfaction. Such "*satisfaction*" included not only non-pecuniary measures but also compensation of non-pecuniary damage in cases where the "*dignity and respect enjoyed in society by the natural person had been significantly* [my emphasis] *harmed*".⁷⁹

On 19 April 2000, i.e three years after Mr M.L filed a complaint to the police and two years after he brought the case to CtERD, the Regional Prosecution Office decided to disagree with the previous decision by the police to dismiss the case and determined to bring the case to court. The court declared the restaurant owner guilty of racial discrimination and sentenced him to pay a fine of 5000 SKK.

The counsel argued that despite the judgement there was a violation of art 6 since a remedy delayed that long could not be considered to be effective.⁸⁰

The Committee disagreed. The penalty and condemnation of the act constituted a sanction compatible with the obligations of the state party. Despite the delay the Committee found no violation of CERD. Consequently the applicant was not awarded any compensation.

Finally the case of *Mr Sarwar Seliman Mostafa* is from 2001 and concern racial discrimination on the renting market.⁸¹ The petitioner was an applicant for renting an apartment with Danish public housing company. He was informed that an apartment was available and confirmed his interest. However the municipality had to approve the contract, which it denied due to "housing social criteria". Two

⁷⁷ Opinion of the Committee on the Elimination of Racial Discrimination, Communication No11/1998: Slovakia. 09/08/2001, CERD/C/59/D/11/1998

⁷⁸ This was to a large extent based on the fact that the police had discovered that some Roma women had been served at the restaurant. See *Ibid.* para 2.1-2.2

⁷⁹ *Ibid.* para 7.4

⁸⁰ *Ibid.* para 8.3

⁸¹ Opinion of the Committee on the Elimination of Racial Discrimination, Communication No 19/2000: Denmark, 10/08/2001, CERD/C/59/D/19/2000.

years later the Social Appeals Board declared the municipality's decision invalid since it was based on the applicant's status as an immigrant.⁸² The apartment in question was however rented to someone else.

The petitioner then turned to CtERD claiming a violation of art 6. He argued that Danish legislation did not provide adequate satisfaction in cases like this where he, despite the decision of the Social Appeals Board, had still not been provided with an appropriate apartment.⁸³

The legal question in this case is how far the obligation to provide appropriate satisfaction reaches. Restitution was not possible in this case due to consideration of an innocent third party, the person renting the apartment in question. To give the petitioner another apartment was not either an option because he had decided to have his name removed from the waiting list. The question remained whether the petitioner was entitled to compensation.

The State Party interpreted art 6 as having two parts. The first concerned the requirement to provide effective protection against discrimination and to afford victims with remedies. This provision contained an obligation to make it possible for citizens to have established whether or not they had been subjected to racial discrimination and to make it possible for them to have such acts brought to an end. The second part concerned the requirement to afford adequate reparation and satisfaction. This provision applied in situation where it was established that a person has been exposed to a discriminatory act and meant that the discrimination should be stopped and the consequences remedied, i.e. the situation prior to the violation should be restored. This was however impossible in this case due to the applicants decision to not remain on the waiting list.⁸⁴ Regarding the issue of damages said the state party that this had not been brought before a Danish court and consequently domestic remedies had not been exhausted.⁸⁵

The counsel argued that the petitioner was never informed that he should have remained on the waiting list and that it would be useless to claim compensation for any pecuniary or non-pecuniary damage since Danish courts refused to award such compensation in cases of racial discrimination.⁸⁶

The Committee supported the view of the State Party. The fact that the petitioner had not yet been provided with an apartment, a measure that would have been considered to be appropriate satisfaction, was dependent on his decision not to remain on the waiting list and could not be attributed to the state. The applicant could further have sought compensation. The doubts he had concerning the effectiveness of a civil proceeding could not absolve him from the obligation to

⁸² Ibid. para 4.2

⁸³ Ibid. para 3

⁸⁴ Ibid. para 4.5-4.9

⁸⁵ Ibid. para 4.10

⁸⁶ This argument was supported by a copy of a decision of 4 August 2000 from the Copenhagen City Court where the court came to the conclusion that acts of discrimination did not entitle the victims to non-pecuniary damages. Ibid. para 5.3

exhaust domestic remedies. The Committee therefore declared the communication inadmissible.⁸⁷

This case confirms the opinion that art 6 primary entitles victims to *seek* reparation from the direct perpetrator and place a corresponding obligation upon states to provide for the possibility. The State Parties are only liable for providing reparation for acts attributable to them.

To conclude I would say that art 6 entitles every victim of racial discrimination to seek reparation for any damage suffered and to have such claims *considered* according to national law. It is up to the victim to show damage and the CERD leave it up to the State Party to decide what requirements has to be fulfilled to be awarded compensation and the amount to be paid. General Recommendation No. 26 was issued after the individual communication against Denmark where two men of Iranian origin were refused entrance to a discotheque. In later jurisprudence involving claims for compensation for non-pecuniary harm did the Committee either conclude that the Convention had not been violated or declared the communication inadmissible. Accordingly the question remains whether General Recommendation No 26 meant a change in attitude regarding compensation for harm to victim's perception of their worth and reputation.

3.1.4 International regional law

This chapter analysis how the issue of reparation and compensation is dealt with in the European, the American and the African human rights systems.

3.1.4.1 The European Convention for the Protection of Human Rights and Fundamental Freedoms

Violations of the ECHR shall first and foremost be dealt with on the national level. Everyone whose rights or freedoms have been violated has a right to an effective remedy before a national authority.⁸⁸ The ECHR do not require a judicial procedure but the remedy must be effective, meaning that the authority handling the complaint must have competence to decide whether or not the ECHR has been violated and to correct an eventual violation.⁸⁹ This provision does not say anything about reparation but the Convention goes one step further and authorises the ECtHR the to grant "*just satisfaction*" in binding judgements. Art 41 reads as follows:

Article 41 – Just satisfaction

⁸⁷ Ibid. para 7.3-8

⁸⁸ The European Convention for the protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, 4 November 1950, ETS No 5, art 13.

⁸⁹ Hans Danelius, Mänskliga rättigheter i europeisk praxis - En kommentar till Europakonventionen om de mänskliga rättigheterna, Stockholm 1997, page 300-302

*If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, **if necessary**, afford **just satisfaction** to the injured party.* [my emphasis]

The Court has discretion as to whether or not to award satisfaction and only does so if the applicant makes a specific claim and only in cases where national legislation fails to award appropriate satisfaction.⁹⁰

The term used is "*satisfaction*". This term is not interpreted by the ECtHR similar to the definition of the term used in other contexts concerning the right to reparation for victims of violation of human rights. The term is rather used as a synonym for compensation. The aim of the article is to give the applicant full reparation in the sense of trying to eliminate the consequences of the violation.⁹¹ The Court can not order any other reparation than compensation.⁹² This means that the ECtHR can not explicitly order a State Party that has violated the Convention to take certain measures, such as those enumerated in van Boven's Basic Principles. (See chapter 3.2.3 and 3.2.3.1). However if the State Party voluntarily has taken any of those measures this could, and probably would, be taken into consideration by the Court and could result in the Court finding further compensation unnecessary.⁹³

Compensation can be ordered for both pecuniary and non-pecuniary harm. Compensation for pecuniary loss includes expenses, loss of earnings, lost value of assets etc. In order to get such compensation must the applicant show that the violation made a significant and financially assessable difference to him or her. Non-pecuniary compensation has been awarded for any physical harm and emotional stress, anxiety, feelings of frustration and other forms of mental suffering. Mental suffering must amount to a certain level of gravity in order to entitle to pecuniary compensation otherwise the ECtHR will consider the finding of a violation in itself sufficient just satisfaction.⁹⁴ The victim must further show that the harm is *caused* by the violation. In determining the amount of non-pecuniary

⁹⁰ Gaygusuz v. Austria, European Court of Human Rights, 16 September 1996, Reports 1996-IV, para 52 and 59-65

⁹¹ See Cases of de Wilde, Ooms and Versyp v. Belgium (the so called Vagrancy-cases), European Court of Human Rights, 10 March 1972, Series A No 14.

*"No doubt, the treaties from which the text of Article 50 (art. 50) was borrowed had more particularly in view cases where the nature of the injury **would make it possible to wipe out entirely the consequences of a violation** but where the internal law of the State involved precludes this being done. Nevertheless, the provisions of Article 50 (art. 50) which recognise the Court's competence to grant to the injured party a just satisfaction also cover the case where the impossibility of restitutio in integrum follows from the very nature of the injury; indeed, common sense suggests that this must be so a fortiori."* [my emphasis]

⁹² Brozicek v. Italy, European Court of Human Rights, 19 December 1989, Series A, No 167.

⁹³ Regarding the reparation measure "guarantees of non-repetition" one could say that the ECtHR's judgements are binding. The State Party has undertaken to comply with them which means that if the Court concludes that the Convention has been violated the State Party must stop the violation otherwise it risks another proceeding.

⁹⁴ See next chapter.

compensation the ECtHR has taken regard to, but has of course not considered itself bound by, the level of compensation for such harm that would have been awarded according to national law.⁹⁵

Regarding aggravated damages has the Court not yet made an explicit aggravated damages award. But the wording in a couple of cases when reasoning about non-pecuniary compensation suggests that the behaviour of the violator, the State in these cases, was relevant and might have been an increasing factor when determining the sum of money to be paid.⁹⁶

The Court has rejected claims for exemplary or punitive damages several times.⁹⁷

3.1.4.2 Case-law from the European Court of Human Rights

The Court has only dealt with racial discrimination in very few cases. One important factor is probably the accessory nature of art 14, which exclude certain areas from the protection of the principle of non-discrimination. The Court also seem to rather find a violation of the right set forth in the Convention as such then to argue in terms of racial discrimination.⁹⁸ I have not been able to find one single case dealing exclusively with racial discrimination where a violation of art 14 is established.

Since this thesis mainly concerns the issue of compensation have I decided to present other cases concerning discrimination and see how the Court dealt with the issue in such cases.

⁹⁵ Luke Clements, Nuala Mole, Alan Simmonds "European Human Rights: Taking a Case Under the Convention", London 1999, [Henceforth called Clements], page 81-84.

⁹⁶ Akdivar and others v. Turkey, European Court of Human Rights, 16 September 1996, Reports 1996-IV, para 35-37 Papamichalopoulos and others v. Greece, European Court of Human Rights, 31 October, Series A, No. 330-B, para 41-43.

⁹⁷ Aydin v. Turkey, European Court of Human Rights, 25 September 1997, 1997-VI, para 127 and 131 and Akvidar and others v. Turkey referred to above, para 38. Given the seriousness of the violation in the case of Aydin v. Turkey, violations of the prohibition of torture and rape, it is perhaps unlikely that the ECtHR will ever order punitive or exemplary damages, a practise unfamiliar in European Law.

⁹⁸ In Özgür Gündem v. Turkey was a daily newspaper, with owners of Kurdish origin situated in Istanbul, forced to close as a result of numerous of prosecutions and convictions. The actions were considered contrary to art 10 ECHR. The applicants further claimed that art 14 was violated because the authorities actions were based on the applicants Kurdish origin. The Court found no reason to believe that art 14 had been violated however. Özgür Gündem v. Turkey, European Court of Human Rights, 16 March 2000, para 20-23. In Velikova v. Bulgaria had the applicants husband died as a result of injuries inflicted on him by the police while he were in custody. He had not received adequate medical treatment and there had not been an appropriate investigation of his death. The Court found that the State Party had violated art 2 ECHR. The applicant further claimed that art 14 had been violated because the actions and omissions that constituted a violation of art 2 were taken on a discriminatory basis, namely on the basis of Mr Tsonchev's Romany ethnic origin. She made serious arguments of biases and prejudices existing within the police. The European Court recalled that the standard of proof required under the Convention is "proof beyond reasonable doubt". The Court was not able to conclude that Mr Tsonchev's death and the lack of investigation was motivated by racial prejudice. No violation of art 14. Velikova v. Bulgaria, European Court of Human Rights, 18 May 2000, para 59 and 91.

The first case, *Darby v. Sweden*, of interest concerned a Finish citizen who was refused to claim reduction of the church taxes unless he was formally registered as resident in Sweden. The Court found a violation of art 14 taken together art 1 of Protocol No. 1.⁹⁹

After finding a violation the ECtHR went on to consider the claim for damages. The applicant had requested repayment of the excess tax that he had paid during the years in question. He also sought 50 000 SEK as compensation for non-pecuniary damage. He argued that he had suffered from having to contribute directly to the religious activities of a foreign church and that having to challenge the obligation to pay church tax had caused him stress and considerable loss of time.

The Court awarded him pecuniary compensation comprising of the amount of tax unduly paid. As regards the compensation for non-pecuniary the non-pecuniary suffering the Court stated that the present judgement provided "*sufficient just satisfaction for any mental suffering*".¹⁰⁰

Van Raalte v. the Netherlands from 1997 concerned discrimination based on gender. According to national legislation in the Netherlands only childless women over 45 years were exempted from paying contribution to the General Child Care Benefits Act. The applicant, an 63 years old unmarried and childless man complained to the ECtHR arguing that the legislation was discriminatory and a violation of art 14 and art 1 of Protocol No. 1 taken together. The Court agreed. The claimant further claimed pecuniary damages in the amount of the contributions he had paid during 1988. The Court dismissed the claim by saying that the finding of a violation of the Convention in this case did not entitle the applicant to retrospective exemption from contributions paid under the legislation in question.¹⁰¹

The applicant also claimed compensation for non-pecuniary harm arguing that it had been very painful for him as an unmarried childless man to make the contributions. The Court considered the judgement in itself was "*sufficient satisfaction for such damage*".¹⁰²

The third case, *Larkos v. Cyprus*, is from 1999 and concerned a Cypriot citizen who rented a house in which he has been living since 1967 with his wife and four children from the state. He held that been unlawfully discriminated against in the enjoyment of his right to respect for his home on account of the fact that he, unlike a private tenant renting from a private landlord, was not protected from eviction on expiry of his lease. The ECtHR agreed.¹⁰³

⁹⁹ Para 28-34 *Darby v. Sweden*, see footnote 33

¹⁰⁰ *Ibid.* para 37-40

¹⁰¹ *Van Raalte v. The Netherlands*, European Court of Human Rights, 21 February 1997, Reports 1997-1, para 39-45.

¹⁰² *Ibid.* para 45-52.

¹⁰³ *Larkos v. Cyprus*, European Court of Human Rights, 18 February 1999, Reports 1999-1, para 31-32

The applicant claimed 10 000 CYP in compensation for non-pecuniary harm. He held that he and his family have lived under the threat of eviction from their home since 1986. This has been a source of stress and anxiety and the constant uncertainty about whether they would be forced to leave was disruptive of his family life. The Court stated that the threat of eviction could reasonably be considered to have caused the applicant stress and anxiety. He was therefore awarded 3000 CYP for non-pecuniary harm.¹⁰⁴

Finally *Mazurek v. France* from 2000 concern the French civil law, which had different rights concerning inheritance for children depending on their parents' civil status. The rules were considered to be discriminating and a violation of art 14 in connection with art 8.

The applicant claimed compensation amounting to the difference between the amount distributed to him and the amount he would have received if the discriminating rules had not been applied. The Court agreed and awarded him 376,034.61 French francs (FRF) for pecuniary harm.

The applicant also claimed FRF 100,000 as compensation for non-pecuniary harm. The Court decided, without further consideration, on an equitable basis, to award the applicant FRF 20,000 for non-pecuniary damage.¹⁰⁵

Case law from the ECtHR show that in cases of racial discrimination there must first of all be a violation of art 14 taken together with another provision of the Convention. Second this violation must have negative effects to a certain degree on someone, i e there must be an injured party. And finally the Court must consider it necessary to afford compensation in the individual case. This means that the victim must be able to show damage, which may be either pecuniary or non-pecuniary, and a casual link between the violation of the Convention and the existence of damage. Regarding compensation for emotional harm is it maybe more appropriate to say that the victim must show that the violation can reasonably be considered to have caused such emotional harm that is not sufficiently repaired by a favourable judgement on the merits. What this means in practise in cases of racial discrimination can only be determined on a case by case basis.

It should be noted that the above presented cases is different from the jurisprudence of CtERD in that the case law brought before the ECtHR involve discrimination attributable to the State Party and not discrimination perpetrated by private individuals.

3.1.4.3 The American Convention on Human Rights

Art 25 entitles persons who had their Convention rights violated a right to "*prompt and effective recourse*". Failure to provide national remedies constitutes a violation separate from the original violation. As the ECHR, the

¹⁰⁴ Ibid. para 38-43

¹⁰⁵ *Mazurek v. France*, European Court of Human Rights, 1 February 2000, para 55 and 58-59

ACHR goes further and authorises the IACtHR to award compensation in binding judgements.¹⁰⁶ Art 63 (1) ACHR states that:

"If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.[...] [my emphasis]"

The IACtHR has declared that this article codifies a fundamental principle in international law. According to the Court *every* wrongful act that is imputable to a state incurs international responsibility and a duty to make reparation.¹⁰⁷

The article can be translated into terms of guarantees of non-repetition, restitution and compensation.¹⁰⁸ Depending on the damage caused, different measures can be used to fulfil the obligation to make reparation. The purpose for choosing specific measures being to try to come as close as possible to full restitution.

The obligation to guarantee non-repetition is absolute while restitution and compensation are to be awarded only *"if appropriate"*. What this means in practise regarding the right to compensation has to be analysed through case law. There are unfortunately no cases concerning discrimination¹⁰⁹. The cases concerning compensation all involve severe human rights violations resulting in physical harm and death something that should be kept in mind before drawing any conclusion. Still the IACtHR is very elaborate in its reasoning concerning the question of compensation, why I find the case law interesting and relevant for this thesis.

3.1.4.4 Case-law from the Inter-American Court of Human Rights

Since the facts of the cases presented in this chapter is of inferior interest, except from the fact they all involve severe human rights violations, have I decided not to present them case by case as in previous chapters. Instead I confine myself to present my conclusions.

The IACtHR consider it a general rule of international law that compensation has to be sought and damage, both pecuniary and non-pecuniary, proved by the applicant.¹¹⁰ As a result the applicant often present an extensive compilation of

¹⁰⁶ David Harris and Stephen Livingstone, *The Inter-American System of Human Rights*, Oxford 1998, page 288.

¹⁰⁷ Velásquez Rodríguez Case, *Compensatory Damages* (Art. 63(1), American Convention on Human Rights), Inter-American Court of Human Rights, 21 July 1989. Series C No.7, para. 25. Repeated in every case concerning compensation.

¹⁰⁸ Ibid para 26 and Garrido and Baigorria Case, *Reparations* (art. 63(1) American Convention on Human Rights), Inter-American Court of Human Rights, 27 August 1998, Series C No. 39, para 41.

¹⁰⁹ Apart from the Advisory Opinion referred to in chapter 2.2. The case concerned a draft legislation, so even though it was considered potentially discriminatory there was no victim. See footnote 36.

¹¹⁰ Aloeboetoe et al. Case, *Reparations* (Art. 63(1), American Convention on Human Rights), Inter-American Court of Human Rights, 10 September 10, 1993. Series C No. 15, para 75.

evidence, both documentary and oral evidence, to support the claim for compensation.

The IACtHR has further stated that even though the idea of reparation is full restitution, the party responsible for paying compensation is only liable to compensate the immediate effects of the unlawful act and not unpredictable and remote consequences. The casual link between the violation and the damage caused must be adequate.¹¹¹

The phrase "*fair compensation*" includes compensation for pecuniary and non-pecuniary harm. Compensation for pecuniary damage covers all expenses and losses caused by the violation including loss of profit and future earnings.¹¹² Compensation for non-pecuniary harm is based on equity.¹¹³ Psychological symptoms and injuries such as fright, depression, withdrawal and feelings of humiliation have been compensated in cases also involving severe physical injury. Therefore this case law is not automatically applicable to any mental suffering experienced by victims of discrimination though, unless certain physical violence is involved.¹¹⁴

In order to be "*fair*" the IACtHR has said that reparations shall be proportionate to the violation.¹¹⁵ Whether the proportionality refers to the importance of right violated or to the seriousness of the act violating the right or to both is not clear, but maybe not of crucial importance either. The IACtHR has referred to the ECHR and stated that the judgement in itself is a type of "*moral satisfaction of significance and importance*".¹¹⁶ Depending on the seriousness of the cases has

Except in cases concerning him unlawful detention, cruel and inhuman treatment, disappearance and death where the moral damage inflicted upon the victim, according to the IACtHR, is obvious. Ibid. para 52. See also Castillo Páez Case, Reparations (art. 63(1) American Convention on Human Rights), Inter-American Court of Human Rights, 27 November 1998, Series C No. 43, para 86.

¹¹¹ Aloeboetoe et al. Case, para 48, see footnote 110 and Loayza Tamayo Case, Reparations (art. 63(1) American Convention on Human Rights), Inter-American Court of Human Rights, 27 November 1998, Series C No. 42, para 131.

¹¹² Aloeboetoe et al. Case, para 50 (see footnote 110) See though Loayza Tamayo Case, para 131 where the Court denied a claim for compensation of an amount for income that Ms. Carolina Loayza-Tamayo alleged to have lost by being forced to give up the contract she had with the Ministry of Foreign Affairs, and another that she claimed she was about to conclude with the same Ministry, in order to devote herself to the victim's defense. The Court finds that there is no proof to support either of these claims or their causal nexus to the wrongful acts perpetrated against the victim in the instant case. (see footnote 111). The concept of lost earnings refers to future economic earnings that can be quantified by certain measurable and objective indicators. Loayza Tamayo Case, para 147 (see footnote 111).

¹¹³ Equity is a form of justice administered according to fairness, which originated in England as an alternative to the strict rules of common law. The purpose is to render the administration of justice more complete and the rules and principles in the system of equity is based on what fair and just in a particular situation. Henry Campbell Black, *Black's Law Dictionary*, sixth edition, 1990

¹¹⁴ Thomas Buergenthal, Dianah Shelton, *Protecting Human Rights in the Americas - Cases and Materials*, Strassbourg 1995 [henceforth called Buergenthal]

¹¹⁵ Castillo Páez Case, para 51 (see footnote 110).

¹¹⁶ Velásquez Rodríguez Case, para 36, see footnote 107.

the IACtHR not yet confined itself to consider an affirmative judgement on the merits in itself enough satisfaction.¹¹⁷

The phrase "*fair compensation*" does not include punitive or exemplary damages. As art 63 refers to the injured party the Court concluded that the type of reparation intended was compensatory and not punitive. Punitive compensation was according to the Court not a principle of international law at the present time.¹¹⁸

To conclude I would say that apart from being confronted with different types of human rights violations the case law from the IACtHR and the ECtHR is similar in several aspects. Both concern violations attributable to the state and both hold that compensation can be obtained for both pecuniary and non-pecuniary harm but that damage has to be sought and proven by the victim. Compensation for any form of mental suffering is based on equity and both hold that an affirmative judgement on the merit is a form of non-pecuniary satisfaction.

3.1.4.5 The African Charter on Human and Peoples' Rights

The ACHPR contain no explicit right to an effective remedy similar to the ECHR, ICCPR and CERD, but art 7 states a right to have ones' case heard. The jurisprudence from the Commission is not quite consistent when it comes to issues of remedies and reparation. The confidentiality that has surrounded the work of the Commission in the past has complicated a thorough analysis but the last annual reports have been more elaborate on the facts and the reasoning leading the Commission to its conclusions. After finding a violation the Commission has recommended different measures such as to repeal or annul offending legislation and to release detained individuals.¹¹⁹ The Commission has also confined itself to,

¹¹⁷ See i.e Neira Alegría et al. Case, Reparations (art. 63(1) American Convention on Human Rights), Inter-American Court of Human Rights, 19 September 1996, Series C No. 28, para 55 and Castillo Páez Case, para 84 (supra footnote 110).

¹¹⁸ Velásquez Rodríguez Case, para 36, supra footnote 107. This standpoint been confirmed in later case law where the Court has held that since the IACtHR is not a penal court it does not have the competence to determine any reparations that are not compensatory. Garrido and Baigorria Case, Reparations (art. 63(1) American Convention on Human Rights), Inter-American Court of Human Rights, 27 August 1998, Series C No. 39, para 43-44.

¹¹⁹ Media Rights Agenda and Constitutional Rights Project/ Nigeria, African Commission on Human and Peoples' Rights, Communication No. 105/93, 128/94, 130/94, 152/96, 31 October 1998, where the Commission requested the Government of Nigeria to take the necessary steps to bring its law into conformity with the Charter. And Constitutional Rights Project v. Nigeria (in respect of Wahab Akamu, G. Adeaga and others), African Commission on Human and Peoples' Rights, Communication No. 60/91, where it recommended that the Decree violating the Charter should be annulled. The Constitutional Rights Project (in respect of Zamani Lakwot and 6 others) v. Nigeria, African Commission on Human and Peoples' Rights, Communication No. 87/93 where the Commission recommended the Government of Nigeria to free the complaints.

See also Annette Pagnoule/Cameroon, African Commission on Human and Peoples' Rights, Communication No. 39/90. The Commission decided "to close the file because the victim has been released and the issue satisfactorily resolved." See also Rachel Murrey, *The African Commission on Human and Peoples' Rights and International Law*, Oxford 2000, page 55 ff.

in cases violating the prohibition against discrimination, just finding a violation of the Charter.¹²⁰ In a case concerning false imprisonment and miscarriage of justice did the Commission find that the author had been denied due process, contrary to Article 7 and that he had been entitled to compensation. The Committee did not however determine the amount but recommended that it should be resolved according to national law.¹²¹

At the regional conference for Africa in the preparatory process for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance there was a lot of focus on remedial issues. The African Ministers declared that the right to an effective remedy was stipulated in art 7 in the African Charter and that this principle undoubtedly applied to victims of racial discrimination. The importance of access to justice and appropriate remedies, especially for victims of racial discrimination considering their vulnerable situation socially, economically and culturally was affirmed and reaffirmed several times.¹²² A bit of the uncertainty regarding the right to compensation will maybe diminish if or when the African Court of Human and Peoples' Rights come into functioning. According to the Protocol to the African Charter on the Establishment of the African Court the Court will have the competence to order "*fair compensation and reparation*" to the injured party in binding judgements.¹²³ It is not totally clear though that individuals have a right to bring a case before the Court. The wording of art 6 in the Protocol suggest that it is up to the Court's discretion to consider such claims. How the Court will deal with this and what violations and what kind of damage that will be compensated remains to be seen.

3.2 Non-binding international instruments

The purpose of this chapter is to present a number of non-binding instruments and documents that can be of interpretative help when defining the rights and obligations set forth in international human rights law. None of the instruments create any binding obligations of their own but they are more elaborate on the issue of reparation and compensation than previous presented treaties. The preparatory process for the World Conference against Racism, Racial

¹²⁰ Supra footnote 41.

¹²¹ *Embga Mekongo Louis v. Cameroon*, African Commission on Human and Peoples' Rights, Communication No. 59/91 where Embga Mekongo, a Cameroonian citizen, alleged damages for which he claims the sum of \$105 million.

¹²² Report of preparatory meetings and activities at international, regional and national levels, Report of Regional Conference for Africa, 22-24 January 2001, A/CONF.189/PC.2/8, para 21-22 and 25-29.

¹²³ Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2(1997). Article 24 reads as follows: *Article 24 Findings*

1. *If the Court finds that there has been a violation of a human or peoples' right, it shall, order an appropriate measure to remedy the violation.*
2. *The Court may also order, that the consequences of the measure or situation that constituted the breach of such right be remedied and that fair compensation or reparation be paid or made to the injured party. [my emphasis]*

Discrimination, Xenophobia and Related Intolerance and the documents adopted at the conference are commented in the last chapter.

3.2.1 The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (henceforth called Victimsdeclaration) is primarily concerned with the victims of domestic criminal law and domestic abuse of power.¹²⁴ The declaration refers to international norms, but it does not provide for reparation for victims unless the international norms are incorporated in domestic legislation. Where international norms are not a part of domestic law, the Victimsdeclaration simply urges states to incorporate international standards and provide remedies for violations.¹²⁵

Paragraph 8 of the declaration states:

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights." [my emphasis]

As I see it the aim is to restore the victim's original situation. Less clear is however whether the phrase "*payment of the harm or loss suffered*" include non-pecuniary harm, considering the placement of the word "or" and the fact that the rest of the article is concerned with pecuniary harm. A contextual interpretation of the declaration, especially taking the provision concerning compensation into account, support though the conclusion that non-pecuniary harm is covered. The provision concerning compensation states that if the compensation can not be fully obtained from the offender should states endeavour to provide compensation in cases involving serious physical or mental injury.¹²⁶

For victims of racial discrimination this means that the declaration is only applicable if the discriminatory act is made a crime under national law and the primary responsibility to make restitution to victims is located on the offender.¹²⁷ Otherwise the Victimsdeclaration does not contribute to a better understanding regarding what kind of harm that should be compensated and requirements for obtaining such compensation.

¹²⁴The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34, 29 November 1985. See principle 1

¹²⁵ Ibid, principle 18 and 19

¹²⁶ Ibid principle 12.

¹²⁷ Ibid, principle 8 and 11

3.2.2 Model Legislation Against Racial Discrimination

In 1985 the General Assembly requested the Secretary-General to prepare model legislation against racial discrimination for the guidance of governments in their enactment of national legislation.¹²⁸ In preparing these model legislation the Secretary-General analysed both international and national law.¹²⁹ The final draft Model National Legislation for Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination contains provisions regarding compensation.¹³⁰ It states that everyone has a right to equal protection of the law including a right to an effective remedy as well as a right to "*seek just and adequate reparation or other satisfaction for any damage suffered as a result of such [racial] discrimination*"¹³¹. It further states that reparation shall be made to victims and that such reparation should take the form of restitution and/or compensation including "*payment for the harm or loss suffered, reimbursement of expenses incurred, provision of services or restoration of rights, as well as other measures taken within a specified period for the purpose of correcting or mitigating the adverse effects on the victims [...]. Victims shall also be entitled to recourse to all other means of satisfaction, such as publication of the judicial decision in an organ having wide circulation at the offender's expense or guarantee of the victim's right of reply by a similar means.*"¹³²

As seen the model legislation affords compensation for both pecuniary and non-pecuniary harm. It does not explicitly mention harm to a person's dignity and perception of him/herself, but the enumeration seems non-exhaustive. The superior principle concerning reparation is adequate reparation for *any* damage.¹³³

The model legislation is just a draft of a non-binding instrument and does not give raise to any legal obligations, but it gives a more detailed picture of what can be considered good regulations in the combat against racial discrimination. The model legislation does not explicitly point out who is to be responsible to provide for compensation, but I assume that since it is a model for national legislation responsibility is located on the direct perpetrator.

¹²⁸ A/40/22 para 10.

¹²⁹ A/43/637 para 1-45.

¹³⁰ It is just a draft not published in an official document but posted on the UNHCHR's homepage under the issue of racism and racial discrimination. Available at: <http://www.unhchr.ch>

¹³¹ Ibid. para 5 and 9

¹³² Ibid para 11.

¹³³ Ibid. para 9.

3.2.3 Guidelines on the right to restitution, compensation and rehabilitation

The Guidelines on the right to restitution, compensation and rehabilitation is by far the most elaborate principles regarding the right to reparation for human rights violations under international law. They are developed by experts within the framework of the United Nations. The latest version is still only a non-binding draft but the Commission on Human Rights gives the issue further attention.¹³⁴ In order to get a better understanding of the principles and guidelines have I chosen to present the preparatory process.

3.2.3.1 The work of Mr. Theo van Boven

In 1989 the Sub-Commission on Prevention of Discrimination and Protection of Minorities (henceforth called the Sub-Commission)¹³⁵ entrusted Theo van Boven with the task of undertaking a study on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.¹³⁶ He should take the existing human rights standards and relevant views and decisions from international human rights organs into account. The task was also to try to develop basic principles and guidelines in this respect.¹³⁷ In 1993 came the final report.¹³⁸ The study was limited to gross violations of human rights. The term "*gross violations*" was not defined in the document but the term "*gross*" was related to the type of right violated and indicated the serious character of the violation. Van Boven used international law for guidance and concluded that the term included at least acts such as genocide, slavery, summary and arbitrary executions torture etc. and "*systematic discrimination based on race or gender*".¹³⁹ For the purpose of this thesis is it important to bear in mind that the study did not cover racial discrimination as such, only when conducted in a systematic manner.¹⁴⁰

¹³⁴ In its decision 2001/105 the Commission decided to request the United Nations High Commissioner for Human Rights to hold a consultative meeting in Geneva, with a view to finalizing the "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law" (E/CN.4/2000/62). The Economic and Social Council, in its decision 2001/279, endorsed the above decision of the Commission.

¹³⁵ In 1999 the Economic and Social Council changed the title of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to Sub-Commission on the Promotion and Protection of Human Rights.

¹³⁶ Resolution by the Sub-Commission on Prevention of Discrimination and Protection of Minorities 1989/13.

¹³⁷ Ibid.

¹³⁸ See Study concerning the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8

¹³⁹ See para 1 Proposed Basic Principles and Guidelines, included in E/CN.4/Sub.2/1993/8 para 137.

¹⁴⁰ This does not mean that the study exclude the possibility of getting compensation in the case of racial discrimination it is only a consequence of Mr van Bovens' mandate.

The study was comprehensive and thoroughly investigated international human rights norms at both global and regional level. As these norms are already examined in previous chapters, where the conclusions of van Boven are taken into account, I will not elaborate on this further here.

Van Boven proposed Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law (henceforth called van Boven Basic Principles), in the end of his study.¹⁴¹ These principles stated that under international law *any*¹⁴² violation of human rights gave rise to a right to reparation for the victim. The obligation corresponding to this right rested upon states. The legal basis was the obligation for State Party to human rights conventions to respect and ensure the rights stated therein. This obligation includes not only a duty to prevent, investigate violations and punish perpetrators but also a duty to afford remedies to individuals exposed to such violations.¹⁴³

According to the van Boven Basic Principles was reparation a general term that included restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁴⁴ All reparation should be proportionate to the gravity of the violation and the harm suffered and should respond to the needs of the victim. The purpose of reparation was preventive but above all to reveal the suffering and remedy the consequences of the violation for the victim to the extent possible.¹⁴⁵ Compensation should be provided for "*any economically assessable damage*". This included pecuniary harm such as harm to property or business (including lost profits), lost opportunities, loss of earnings and earning capacity as well as non-pecuniary harm. Any physical or mental harm such as pain, suffering and emotional distress and harm to reputation or dignity should be compensated.¹⁴⁶ The van Boven Basic Principles further stated that satisfaction and guarantees of non-repetition should be provided. This included measures such as cessation of continuing violations, verification of the facts, apology, the bringing to justice of persons responsible, paying tribute to victims, acts of prevention etc.¹⁴⁷ The van Boven Basic Principles were communicated with states, IGO:s and NGO:s.¹⁴⁸ A new set of principles was elaborated in 1996, where the comments

¹⁴¹ See E/CN.4/Sub.2/1993/8 para 137.

¹⁴² Note that this para, although included in a document concerned with gross violations of human rights says any and not only gross violations.

¹⁴³ See para 1-2 van Boven Basic Principles, included in E/CN.4/Sub.2/1993/8 para 137. The van Boven Basic Principles para 3 used the term "direct victim" and judging from the rest of the study this must have meant the individual and not the state of which the individual was a citizen.

¹⁴⁴ See chapter 1.3.

¹⁴⁵ Ibid para 3.

¹⁴⁶ Ibid para 9.

¹⁴⁷ Ibid para 11. These Basic Principles and the ECtHR use the term satisfaction very differently. The ECtHR utilise the term in the same way as the Basic Principles use compensation, while the Basic Principles mean any of the above stated non-pecuniary measures.

¹⁴⁸ Most of the comments received welcomed the Basic Principles. One problem pointed out by a number of states was that the concept of compensation had different meanings in different legal systems and would therefore be interpreted differently. Report of the

were taken into account. The structure of the new Basic Principles was different but in substance they varied only slightly.¹⁴⁹ They still covered only gross human rights violations. The revised version was more flexible since it clearly pointed out that a victim might receive a combination of the different forms of reparation listed and also that the list was non-exhaustive.¹⁵⁰

The revised Basic Principles were communicated with the working group on the administration of justice and the question of compensation.¹⁵¹ The comments of the working group were considered and van Boven made a few changes in the revised Basic Principles. The most significant change is probably the deletion of the word "gross" in the title, which meant that the principles were now to be applicable to all human rights violations. Regarding reparation it was added that reparations should be provided in accordance with the law of every state. What is meant by this change remains a bit unclear. Judging from my analysis of binding international law it may be a codification of the interpretation that the right to reparation is primarily a right to seek reparation in accordance with national law, giving states a margin of appreciation as to what conditions that has to be fulfilled in order to obtain such reparation. Regarding compensation it was added that such compensation should include medicine and medical services.¹⁵²

To sum up I want to say that according to the latest version of the van Boven Basic Principles victims of human rights violations had a right to a remedy and this right included a right to reparation. Such reparation could take any of the forms enumerated, i.e. restitution, compensation, satisfaction and guarantees of non-repetition and should be provided in accordance with the law in every state. If compensation was provided it should include any economically assessable damage.

3.2.3.2 The work of Mr. Louise Joinet

The Sub-Commission requested the Mr Louise Joinet, Special Rapporteur on impunity in the working group on the administration of justice and the question of compensation to continue the consideration of the van Boven Basic Principles.¹⁵³ This resulted in two sets of principles for the protection and promotion of human

Secretary General prepared pursuant to the Sub-Commissions resolution 1993/29, E/CN.4/Sub.2/1994/7, see especially Sweden para 7.

¹⁴⁹ Regarding the issue of compensation and the kind of damage that should be compensated these revised Basic Principles replaced the phrase "*harm to property or business, including lost profits*" with "*material damages and loss of earnings, including loss of earning potential*". Revised set of basic principles for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commissions resolution 1995/117, E/CN.4/Sub.2/1996/17 para 13 (c)

¹⁵⁰ E/CN.4/Sub.2/1993/8 para 4 compared with E/CN.4/Sub.2/1996/17 para 7

¹⁵¹ E/CN.4/Sub.2/1996/16

¹⁵² It is doubtful whether this added something new in substance. It was probably just an express reference to costs that would have been covered by the other provisions in the previous van Boven Basic Principles. Note by the Secretary General, E/CN.4/1997/104 Appendix, para 11 and 13 (e). See also E/CN.4/Sub.2/1996/16 para 18.

¹⁵³ See decision of the Sub-Commission on Prevention of Discrimination and Protection of Minorities 1996/119

rights through action to combat impunity issued in 1997 within a couple of months after each other.

Regarding the right to compensation they did not differ much in substance. They both stated that *any* human rights violation gave rise to a right to reparation on part of the victim, implying a corresponding duty on behalf of the state to make reparation and to provide for the possibility of seeking redress from the direct perpetrator, in cases where this is not the state.¹⁵⁴ The first set of principles explicitly enumerated the different measures of reparation, i.e restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, and described what these measures should cover. The provisions are almost identical to the corresponding provisions in van Bovens Basic Principles. The second revised set of principles simply incorporated van Bovens Basic Principles from 1997.¹⁵⁵

I think the differences between the principles of Mr Joinet and van Boven are more of approach than substance. The van Boven principles focus exclusively on the issue of reparation, including compensation, while the Joinet principles discuss the topic of reparation in a broader context as an important component of a larger set of principles designed primarily to combat impunity.¹⁵⁶

3.2.3.3 The work of Mr. M. Cherif Bassiouni

In 1998 the Commission on Human Rights appointed an independent expert, Mr M. Cherif Bassiouni, to prepare a final version of the Basic Principles elaborated by Mr van Boven taking views from states, IGO:s and NGO:s into account.¹⁵⁷

¹⁵⁴ Question of the impunity of perpetrators of human rights violations (civil and political), Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20 Annex II, principle 33 and Question of the impunity of perpetrators of human rights violations (civil and political), Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev1 Annex II, principle 33

¹⁵⁵ There is one slight difference though that might be of interest. The first principles from Mr Joinet states that compensation "*must equal the financially assessable value of the damages suffered*". See principle 41. In contrast the second principles incorporated van Bovens Basic Principles that states that compensation "*shall be provided for any economically assessable damage*". The first Joinet principles seem to required a certain level of compensation while van Boven merely required that compensation should be provided, which may or may not equal the damage. However other provisions in the van Boven Basic Principles seem to made sure that the compensation is not nominal. See for example para 4 that required states to ensure adequate legal or other appropriate remedies and para 7 that stated that reparations should be proportionate to the gravity of the violation.

¹⁵⁶ Report of the independent expert on the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Mr.M. Cherif Bassiouni, E/CN.4/ 1999/65 para 31

¹⁵⁷ Commission on Human Rights resolution 1998/43 para 2 , The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, E/CN.4/RES/1998/43, 17 April 1998. Mr Bassiouni was requested to take the views of the governments (the UN Secretary General has circulated the van van Boven Guidelines and urged the states to comment on them. Only a few states responded and the views were published in Views and comments recieved from states on the note and revised draft basic principles and guidelines on the right to reparation for victims of [gross]

In the experts initial work he discovered differences and discrepancies over the use of terms in the work of van Boven and Joinet and in UN reports dealing with reparation and compensation.¹⁵⁸ In order to highlight these problems and try to uncover remaining ambiguities Mr Bassiouni compared and analysed the different documents. The relevant differences in cases of racial discrimination have already been discussed in reference to the respective instrument. Bassiouni concluded that a number of issues needed to be solved. First the lack of uniformity and consistency in terminology regarding reparation needed to be addressed before the van Boven Basic Principles were to be transformed into a legal document. Secondly the question regarding whom should be responsible for providing reparation needed to be solved. Should it be the violator in his/her own personal capacity, as in the Victimdeclaration, or should the state bear the burden? And further, how and according to which criteria should compensation be provided in view of significant differences between states in legal systems and economic standards?¹⁵⁹

The expert went on to say that it was a principle of justice that the measure of damages should be proportionate to the gravity of the harm suffered. It was also important that the guidelines reflected various legal cultures and traditions of the world in order to be amenable to universal application.¹⁶⁰

In January 2000 Bassiouni submitted his final report to the Human Rights Commission. The report included the latest version of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (henceforth called Basic Principles).¹⁶¹ These Basic Principles was circulated among governments in order to assure that they were in keeping with different legal traditions.¹⁶² These latest principles are not limited to so-called gross human rights violations but applicable to all human rights violations and were prepared with the purpose to be in keeping with international law. The instrument use the word *shall* for *existing* international obligations and the word *should* for existing non-mandatory standards and for emerging norms.¹⁶³

The preamble refers to a number of international treaties entailing provisions providing victims of violations with a right to a remedy, including CERD, ECHR, ACHR and ACPHR. Similar to the previous versions the latest Basic Principles

violations of human rights and international humanitarian law, Report of Secretary General, E/CN.4/1998/34) and other UN documents concerned with redress into account.

¹⁵⁸ E/CN.4/ 1999/65 para 6.

¹⁵⁹ Ibid para 73, 77-79.

¹⁶⁰ Ibid. para 88-91.

¹⁶¹ The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Final report of the Special Rapporteur, Mr M. Cherif Bassiouni, E/CN.4/2000/62 Annex.

¹⁶² Ibid para 4-6.

¹⁶³ Ibid para 8.

state that this right to remedy includes a right to reparation for the individual victim.¹⁶⁴

The purpose of reparation is to promote justice and redress human rights violations.¹⁶⁵

Regarding liability providing reparation para 2 (c) states that states *shall* ensure that domestic law makes adequate, effective and prompt reparation, that is proportional to the gravity of the violation and the harm suffered. This obligation is further developed as an obligation to either provide or facilitate reparation. The liability for providing reparation is located on the state if the violation is attributable to the state. Paragraph 17 states that in cases where the violations are not attributable to the state then the responsible party *should*¹⁶⁶ provide reparation. This allocation of primary responsibility on the direct perpetrator is very similar to the Victimsdeclaration. If states fulfil their international obligations, depending on what treaties they have ratified, are they not responsible for private individuals actions and consequently not responsible for providing reparations. Mr Baussiouni suggest in his Basic Principles that if the direct perpetrator is unable or unwilling to provide reparation the state *should endeavour* to provide victims who have "*sustained bodily injury or impairment of physical or mental health*" with reparation.¹⁶⁷ This provision is very similar to para 12 of the Victimsdeclaration and place no legal obligation upon states to provide such reparation but encourage states to do so in certain situations.

Reparations should be provided in accordance with domestic *and* international law.¹⁶⁸ The reference to international law is added to the van Boven Basic Principles, which just referred to national law.

Regarding compensation do the Basic Principles state that compensation *should* be provided for any economically assessable damage resulting from a human rights violation. The new principles add costs for psychological and social services to be compensated. Otherwise the only change in the paragraph is the use of the word *should* instead of *shall* as in van Bovens corresponding paragraph.¹⁶⁹ The question remains what does this change mean. Van Boven did not reflect as much over the usage of words and terms as Mr Bassiouni. If it is an deliberate change of words this must mean that the obligation to provide compensation is a non-mandatory or emerging norm.¹⁷⁰

To sum up I would say that in these latest Basic Principles compensation should be awarded in accordance with both international and national law and should

¹⁶⁴ Ibid para 8 and 11.

¹⁶⁵ Ibid. Annex para 15

¹⁶⁶ The word *should* is probably used because is still disputed whether the human rights instruments oblige states make perpetrators compensate their victims.

¹⁶⁷ Ibid. Annex para 18

¹⁶⁸ Ibid Annex para 21

¹⁶⁹ Ibid Annex para 23 compared with E/CN.4/ 1997/104 Appendix para 13

¹⁷⁰ It could be mentioned that the last paragraph of these latest Basic Principles entails a provision of non-discrimination among victims prohibiting discrimination based on race among other grounds.

include compensation for both pecuniary and non-pecuniary harm. The expert has paid attention to the question of the allocation of obligation to provide reparation that is corresponding to the right on behalf of the victim to get reparation. The primary responsibility lies on the direct perpetrator.

3.2.4 The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance took place in Durban South Africa 31 August -8 September 2001. This chapter is not a report of the whole Conference but rather a short summary on how the issue of reparation was addressed.

During the preparatory process were several voices raised claiming compensation for past racial practices. Four regional Conferences were held before the World Conference in Europe, Asia, America and Africa. All recognised the importance of effective remedies but their approach to compensation differed. The European Conference focused more on prosecution of offenders than on civil remedies for victims.¹⁷¹ The Asian Conference urged states to provide adequate and fair reparation and compensation¹⁷² and the American Conference recalled the legal duty to investigate, penalise and secure fair reparation the victims.¹⁷³ The African Conference had a lot of focus on compensatory reparation, reaffirming the right of individuals and communities to adequate reparation referring to the damage caused by slave trade and other colonial practises.¹⁷⁴

Five expert seminars took place, one concerning remedies available to victims of racial discrimination, xenophobia and related intolerance. This meeting found that while remedies were a principal responsibility of states international co-operation and monitoring was important. A problem linked to victims of racial discrimination was that even though most states have appropriate laws they are not effectively enforced. Different types of measures of reparation were discussed and references made to the Basic Principles refined by Mr. Bassiouni. The meeting declared that victims of racial discrimination had a right to reparation contained in art 6 CERD and recommended together with awarenessraising and affirmative actions that high priority should be given to addressing the lack of implementation of this right.¹⁷⁵

On the World Conference were the issue of compensation very controversial and even put within square brackets on the agenda. The sensitivity of the issue of

¹⁷¹ Final document of the European Conference against Racism Strasbourg 11-13 October 2000, 30 March 2001, A/CONF.189/PC.2/6, para 9-11

¹⁷² Report of the Asian Preparatory Meeting Tehran 19-21 February 2001, 10 April 2001, A/CONF.189/PC.2/9, para 51.

¹⁷³ Report of the Regional Conference of the Americas Santiago 5-7 December 2000, 24 April 2001, A/CONF.189/PC.2/7, para 68 and 189.

¹⁷⁴ Report of the Regional Conference for Africa (Dakar, 22-24 January 2001), 27 March 2001.

¹⁷⁵ Report of the expert seminar on remedies available to victims of racial discrimination, xenophobia and related intolerance and on good practises, Geneva 16-18 February 2000, 26 April 2000, A/CONF.189/PC.1/8, Appendix, para 43-44.

compensation during the Conference for the Western group appears to have risen from the sense that the inclusion of the word "compensation" would have opened the possibility for descendants of slaves and others suffering damage from colonialism to claim such compensation. The final documents, that is the Declaration and Programme of Action contain only references to art 6 CERD and call upon states to provide adequate compensation.¹⁷⁶

Maybe was it a bit unfortunate that the discussions regarding reparation and compensation focused to such a large extent on the consequences of colonialism. The World Conference might otherwise had been an appropriate forum for a discussion on international standards of remedies and reparation for victims of racial discrimination in general.

¹⁷⁶ Contained in Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August - 8 September 2001, A/CONF.189/12, para 104 in the Declaration and para 163-166 in the Programme of Action.

4 Conclusion

The international provisions of equality and non-discrimination do not only oblige State Parties not to discriminate themselves. Apart from the need for affirmative action to counteract institutionalised or structural discrimination must one primary significance today lie in the obligation on states to protect those subject to their jurisdiction against discrimination by private actors. This is as true concerning racial discrimination as it is for discrimination based on other grounds. Everyday life is filled with situations which falls under the general prohibition against non-discrimination. Of course states are not obliged to protect individuals against all inequalities between private parties. Discrimination, even on racial grounds, in private relations is maybe not desirable but a matter of personal decision-making, which is protected against state interference by the right to privacy. This does not, however, mean that discrimination in the field of education, housing, and healthcare, in facilities of entertainment or refreshment or in any other field providing goods, facilities and services to the public, even when provided by private parties, are permitted.¹⁷⁷ When some people are persistently denied access to certain residential areas, private restaurants or schools because of their race, the colour of their skin or their national or ethnic origin, then at least State Parties to ICCPR and CERD are under an obligation to ensure that such discrimination is stopped victims provided with remedies.

4.1 Is there a right to compensation for victims of racial discrimination under international law?

The question has to be answered with reference to respective instrument analysed above. The ICCPR only require State Parties to provide an "*effective remedy*". This has been interpreted as including an obligation to provide reparation in certain situations but it is doubtful whether there is a corresponding right to compensation.¹⁷⁸

Article 6 CERD contains both a right to an "*effective remedy*" and a right to "*seek just and adequate reparation or satisfaction*". This provision first of all says reparation *or* satisfaction. This was interpreted by several State Parties as a requirement to provide either reparation or satisfaction and implies that states have a margin of appreciation to choose which measure of reparation to provide.¹⁷⁹ Secondly the provision entitle victims of racial discrimination to "*seek*" reparation, something that could support the argument put forth by the Danish government that the right to reparation is not an absolute right but could be

¹⁷⁷ Art 5 CERD.

¹⁷⁸ Art 2(3) ICCPR . See chapter 3.1.1

¹⁷⁹ Chapter 3.1.3.

subject to limitations in accordance with national law.¹⁸⁰ A counterargument would be that a right to just *seek* reparation seems superfluous if one is not entitled to obtain such reparation.

I would like to modify the above stated and hold that the emphasis should be on the right to "*just and adequate reparation*", (which does in fact include satisfaction per se), with restitution as the primary reparation measure. Restitution of the victim's situation prior to the discrimination is not always possible or appropriate. In such situation is there according to me a right to compensation for the harm suffered.

As regards regional human rights systems they grant victims effective remedies and, at the time of writing at least two of them, goes one step further and authorises the respective supervisory organ to award reparation in binding judgements.¹⁸¹ The ECtHR shall grant injured parties "*just satisfaction*", a phrase interpreted synonymous to compensation and the ACtHR shall award "*fair compensation*". Both courts have certain discretion and shall only award compensation in appropriate cases, that is if national law only allows partial reparation and the injured party is able to prove harm. According to the IACtHR is this a codification of a fundamental principle in international law. Every wrongful act attributable to a state incurs international responsibility to make reparation to the injured party.¹⁸²

The right to reparation, restitution and compensation has been affirmed in other, though not legally binding instruments. The Model Legislation against Racial Discrimination uses the same phrase as art 6 CERD, that is a right to "*seek just and adequate reparation or satisfaction*".¹⁸³ The recent Basic Principles finalised by Mr. Bassiouni prescribes an unconditional obligation on states to ensure that their domestic legislation provide adequate, effective and proportional reparation.¹⁸⁴ Further, compensation *should* be provided for damage resulting from human rights violations. The Basic Principles uses word "*shall*" for existing international obligations and the word "*should*" for existing non-mandatory standards and for emerging norms.¹⁸⁵ This supports my view that there is a right to adequate reparation, including compensation in appropriate cases.

¹⁸⁰ Opinion of the Committee on the Elimination of Racial Discrimination, Communication No 17/1999. See chapter 3.1.3.1.

¹⁸¹ Art 13 and 41 ECHR, art 25 and 63 ACHR and art 7 ACHPR and art 24 Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights.

¹⁸² Velásquez Rodríguez Case, Compensatory Damages (Art. 63(1), American Convention on Human Rights), para. 25.

¹⁸³ See Model National Legislation for Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination, para 5 and 9. See also Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para 8 and 12.

¹⁸⁴ The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, E/CN.4/2000/62 Annex.

¹⁸⁵ Ibid para 8.

To answer the question I would hold that there is a right to seek and obtain reparation, including compensation in appropriate cases, for victims of racial discrimination. This right is primary to be enforced at the national level. If enforcement fails, injured parties can be awarded such compensation within the European and American regional systems.

4.2 Who is the holder of such a right?

A comparison between the instruments covered by this thesis show that "everyone who had his or hers rights violated" is entitled to an effective remedy. The CERD further entitle "everyone subjected to discrimination" a right to seek compensation. According to the ECHR and the ACHR shall "injured parties" be awarded such compensation.

There seem to be consensus on the fact that it is no longer the other State Parties to a human rights treaty that has a right to reparation and compensation. The provisions in respective conventions address victims as individuals and provide for individual complaints procedures.¹⁸⁶

4.3 Who is the part liable for compensation?

In order to answer this question I would like to distinguish between three situations.

Situation A consists of cases where the state is the direct perpetrator. This is not just a phenomenon of the past experienced during Nazi Germany and apartheid in South Africa. It does not have to take such extreme measures as total exclusion or ethnic cleansing. All legislation or enforcement of such legislation that has the purpose or effect of nullifying or impairing the enjoyment of individuals' human rights because of that persons race falls into this category together with all discriminatory actions carried out by public officials acting in their official capacity.

¹⁸⁶ In an early case the European Commission of Human Rights stated: "The obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves." See *Austria v. Italy*, Yearbook of the European Convention of Human Rights 1961, page 116 ff. (at page 140). The ACtHR has stated that: "The Court must emphasize, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.". The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights, Advisory Opinion OC-2/82 of September 24, 1982, Inter-American Court of Human Rights, Series. A, No. 2, para 29

May it be separate educational systems for certain groups of the population based on racial criteria, discriminatory tax or immigration law or other such policies. In situations like these I consider the obligation to make reparation a rather natural consequence of state responsibility. It is true that according to traditional international law responsibility is between states and not between the state and the individual but as stated in previous chapter is this view is modified regarding in human rights treaties. The case law presented in chapter 3.1.4.2 from the ECtHR involving violations of the prohibition against discrimination, although not based on race, support this conclusion. The ECtHR made the state responsible for providing reparation to the individual victim. The same is true for cases brought before the IACtHR.¹⁸⁷

Situation B concern cases where the direct perpetrator is a private actor. Due to absence of appropriate remedies at the national level is the victim unable to obtain redress and reparation from the offender. This includes situations where allegations of racial discrimination are not investigated and perpetrators not brought before justice. It also includes cases where the national law does not provide the victim with the possibility to seek adequate reparation or where the law is applied in such a way. The failure to provide an effective remedy and adequate reparation, including the possibility to obtain compensation from the direct perpetrator, is an independent violation of international human rights law.¹⁸⁸ The CtERD is the only international human rights organ seized with allegations of discrimination perpetrated by private subjects. The two first cases presented in chapter 3.1.3.1 involving insufficient investigation and prosecution of racial discrimination fall under this category. In both cases did the CtERD recommend the State Party in question to provide the victim with satisfaction and reparation for the damage suffered. I would also like to include the case described in the introduction involving refusal to enter a discotheque based on national origin since I think that national law that does not consider so-called "*polite*" discrimination as humiliating and grave enough to entitle to compensation is inadequate, but CtERD disagreed. (See further next chapter.)

Situation C finally concern cases where the direct perpetrator is a private actor and where the state does provide the victim with an effective remedy, including the possibility to seek and obtain compensation. Due to failure to seek compensation inability on behalf of the offender to pay such compensation is the victim denied reparation. According to me this situation does not involve a human rights violation and therefore the victim can not rely on international law in order to obtain compensation from the state. The state has fulfilled its international

¹⁸⁷ See chapter 3.1.4.4 although not seized with allegations of discrimination. See also chapter 3.1.4.5 where the African Commission on Human and Peoples' Rights has required compensation to be paid for human rights violations although confined itself to just finding a violation of the ACHPR. Also supported by the latest version of the Basic Principles, para 17 e contrario.

¹⁸⁸ Art 6 CERD, art 2(3) ICCPR, art 13 ECHR, art 25 ACHR and art 7 ACHPR.

obligations to prevent, investigate and remedy violations and is not strictly liable for actions of private individuals occurring on their territory.

The rest of the jurisprudence from the CtERD, including the incident at the discotheque, belongs according to the Committee to this category and is involves no violations of CERD and consequently does not entitle to compensation from the state. Only in cases involving sustained physical or mental harm as a result of the racial discrimination are states recommended under international law to provide victims with reparation if the direct offender is unable to do so.¹⁸⁹

It should be added though that victims of racial discrimination are the most marginalised in many societies and often unaware of their rights additional measures such as awarenessraising and legal assistance is important.¹⁹⁰

4.4 What kind of damage or harm is compensated?

The purpose of reparation is to remedy the consequences of a violation and to restore the victim's original situation. In cases where restitution is impossible is compensation often the most appropriate reparation measure. Such compensation shall be actual, that is directly related to the harm suffered, and award full compensation but not more. At least the regional human rights courts have repeatedly rejected claims for exemplary or punitive damage.¹⁹¹

Racial discrimination arises in all areas of society take different forms and has different consequences for its victims. Common though is the humiliating character of the act and the damage it causes to its victims worth and dignity.

Neither of the binding instruments analysed above specifies the kind of damage that should be compensated. It is clear from the jurisprudence from the European and American regional systems that compensation in general should cover both pecuniary and non-pecuniary harm. A reasonable interpretation of art 6 CERD, which refers to reparation and satisfaction for "*any damage*", leads to the same conclusion.

More complex is the question to what extent the kind of non-pecuniary called mental suffering should be compensated. This includes suffering such as emotional distress, humiliation and harm to a person's honour and dignity. This kind of harm is not only more difficult to prove than pecuniary or physical damage. The ECtHR has held, in cases concerning discriminatory tax and social benefits legislation, that a favourable judgement on the merits constitutes "sufficient satisfaction" for this kind of non-pecuniary harm.¹⁹²

¹⁸⁹ Victimsdeclaration para 12 and the latest version of the Basic Principles para 18.

¹⁹⁰ Common problems linked to all remedies available to victims of racial discrimination, Background paper prepared by Mr Theo van Boven, 12 January 2000, HR/GVA/WCR/SEM.1/2000/BP.5, page 8.

¹⁹¹ See chapter 3.1.4.1 and 3.1.4.4.

¹⁹² See the first two cases presented in chapter 3.1.4.2, *Darby v. Sweden* and *van Raalte v. the Netherlands*.

The CtERD has recommended that reparation should be provided for the harm suffered in a case not involving any pecuniary or physical harm, implying that mental suffering should be compensated.¹⁹³ On the other hand did the Committee accept the arguments put forward by the Danish government that the right to reparation and satisfaction is not an absolute right and that mental harm must attain a certain gravity in order to be compensated.¹⁹⁴ This decision could be interpreted in, at least, two ways. Either does art 6 CERD only require that states *consider* claims for reparation resulting from racial discrimination and gives the states a margin of appreciation to decide the limits and prerequisite for compensation; or is there an international standard for reparation regarding moral suffering that the Danish standpoint at least does not contradict. Or both. It is difficult however to say anything regarding the scope and content of such an international standard. The Committee has issued General Recommendation No 26 stating that mental harm is often underestimated by national court recommending its State Parties to not automatically consider an affirmative judgement on the merits sufficient reparation. Due to failure on the behalf of the State Parties to CERD to provide information on the implementation of art 6 has the Committee not clarified its scope and limits during the examination of state reports. A more detailed General Recommendation on this issue would be of value though.

According to the Basic Principles should compensation be provided for "*any economically assessable damage*". The paragraph clarifies this by making a non-exhaustive enumeration of the kind of damage that at least should come in question. This enumeration includes the kind of mental harm referred to above such as distress and harm to reputation and dignity.¹⁹⁵ Mr. van Boven, who is a member of CtERD, has stated that the Basic Principles are of considerable interest for assuring remedies to victims of racial discrimination.¹⁹⁶

To answer the question of what kind of harm that should be compensated I would say that any pecuniary and physical harm proven to be caused by an act of racial discrimination shall be fully compensated. Regarding mental suffering is an affirmative judgement on the merits considered non-pecuniary reparation and jurisprudence is restrictive regarding additional relief. States further seem to have a margin of appreciation to require certain level of gravity of harm. This might be a consequence of the fact that art 6 is primarily a right to seek and obtain reparation in accordance with national law as long as national legislation or enforcement is

¹⁹³ See the second case presented in chapter 3.1.3.1, where a Tunisian citizen were refused a bank loan because of his non-Danish nationality. Opinion of the Committee on the Elimination of Racial Discrimination, Communication No 10/1997.

¹⁹⁴ See the case presented in the introduction and in chapter 3.1.3.1, Opinion of the Committee on the Elimination of Racial Discrimination, Communication No 17/1999.

¹⁹⁵ The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, E/CN.4/2000/62 Annex, para 23.

¹⁹⁶ Common problems linked to all remedies available to victims of racial discrimination, Background paper prepared by Mr Theo van Boven, 12 January 2000, HR/GVA/WCR/SEM.1/2000/BP.5, page 4.

not in conflict with international standards. It probably does not need to be said but such international standards are still very vague.

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