

CHAPTER 13

REPARATIONS, INTERNATIONAL LAW, AND GLOBAL JUSTICE: A NEW FRONTIER

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1. POINTS OF DEPARTURE

It is only in the last decade or so that international law has moved significantly in the direction of providing the means to pursue global justice, that is, in global arenas or by reference to global standards and procedures, on behalf of the individual and collective victims of severe injustices of the sort associated with oppressive governing regimes.¹ Prior to that time this class of issues pertaining to global justice was treated as marginal, at best, to the endeavors of international law, although overseas economic interests of individuals from the North received periodic protection if encroached upon by governments in the South. But in the 1990s the combination of the end of the cold war, the rise to prominence of international human rights, trends away from authoritarianism and toward constitutional democracy, and the partial eclipse of sovereignty in a globalizing world gave unexpected attention to the many facets of global justice, hitherto mainly

neglected, including steps designed to rectify the harm endured by individuals at the hands of dictatorial and abusive governments.

At the forefront of these moves was the reinvigoration of efforts to impose accountability on individuals associated with the perpetration of crimes of state, highlighted by such high-profile cases as those associated with the transnational pursuit of Augusto Pinochet and of Slobodan Milosevic.² This emphasis on accountability by leaders was reinforced by institutional and procedural innovations enabling indictment and prosecution.

Of almost equal prominence was the temporarily increased acceptance of an international responsibility on the part of the organized international community to protect vulnerable populations facing catastrophic challenges, whether from an abusive government or from an inability to provide governing authority, giving rise to a series of humanitarian interventions as responses to chaos and oppression. This historical climate of concern reached its climax with the Kosovo War under NATO auspices in 1999, and has subsequently declined markedly. Here, the duty to protect an oppressed and endangered Kosovar Albanian majority in the province of Kosovo was assumed by a regional security alliance to validate military action against a sovereign state, in this instance Serbia, even without the benefit of a prior mandate from the United Nations Security Council. Such a use of force even if credibly undertaken for protective purposes was always controversial from the perspective of international law, and depends upon the presence of political factors that were selectively present in the 1990s to a greater degree than at any other historical moment, and have subsequently almost disappeared.³ The inability to mobilize support for humanitarian intervention in the setting of ongoing, massive ethnic cleansing and genocidal tactics in western Sudan during mid-2004 is indicative of how restricted to context was the surge of humanitarian diplomacy in the 1990s. And even then, without the presence of more strategic objectives of the sort present in Kosovo, but absent in Rwanda during the genocide of 1994, the prospects for humanitarian intervention by either the UN or a coalition of the willing are minimal.

As part of this climate of global opinion that seemed in the 1990s more sensitive to injustice than ever before, a new disposition to consider historic injustices endured by individuals and groups was evident in international relations. As Elazar Barkan, one of the more perceptive analysts of this welcome mutation in international attitudes, notes, there was 'the sudden appearance of restitution cases all over the world', leading him to postulate the possible beginnings of 'a potentially new international morality'.⁴ It is in this setting of a redress of historic grievances that the issue of reparations makes its appearance, especially in the setting of transitional justice arrangements, but not only. Part of this incipient normative revolution of the 1990s was a concern with rectifying harm previously done to individuals and groups, as well as punishing perpetrators and repudiating their documented wrongdoing in an authoritative forum. What accounted for this focus

on this redress agenda at such a historical moment is uncertain, but it undoubtedly reflected a loss of a guiding geopolitical purpose after the end of the cold war combined with the growing prominence of human rights and an impulse in leadership circles to overcome the chorus of criticisms directed at the amorality of neoliberal globalization.

Barkan and others, for entirely persuasive reasons, approach these issues of restitution and reparations as primarily matters of morality and politics rather than law, that is, treating these humanitarian initiatives as reflecting the impact of moral and political pressures, rather than exhibiting adherence to previously established or newly emerging legal standards and procedures.⁵ The sea changes in the 1990s reflected almost exclusively a combination of special circumstances generating political pressures and a mysteriously supportive moral 'window of opportunity' in a global setting. But to the extent that morality and politics created new widely shared expectations about appropriate behavior by governments, international law was being generated, even if it did not assume in most instances the positivist formality of treaty arrangements or the specificity of a meaningful legal obligation that included measures designed to ensure consistent implementation. Throughout the history of international society, the evolution of international law has been closely related to prevailing political currents, evolving moral standards, and dominant trends in religious thought. Such a linkage has been particularly evident in the war/peace context, international law essentially embodying the just war tradition as evolved by theologians, but it is also true with respect to the recent prominence of a global justice agenda in which redress and restitution play such a large part. In one sense the role of international law has been generally one of codifying behavioral trends in state practice and shifting political attitudes on the part of governments with the intention of stabilizing and clarifying expectations about the future.

It seems essential to distinguish three sets of circumstances: the first, the main preoccupation of international law and lawyers, involves disputes between states, and increasingly other actors, in which the complaining party seeks relief from alleged wrongs attributed to the defending party; the second involves war/peace settings in which the victorious side imposes obligations on the losing side, 'victors' justice, which may or may not correspond with justice as perceived from a more detached outlook; the third, achieving attention recently, involves transitions to democracy settings in which the prior governing authority is held accountable for alleged wrongs, and again reflect political outcomes of sustained struggle, but not international war. These three contexts should be kept distinct for both analytical and prescriptive purposes. In the first and second, there exists a more obvious role for international norms, procedures, and institutions than in the third, which is treated for most purposes as a matter of domestic discretion, although influenced by wider trends of *national* practice in comparable instances, and by wider global trends toward individual accountability for crimes against humanity.

To what extent these mainly encouraging developments involving the rendering of global justice have been stymied, the window closed, by the September 11 attacks and the American-led response are matters of uncertainty and conjecture at the present.⁶ The refocusing of attention on global security issues seems to have remarginalized in general the pursuit of the global justice agenda, including the drive for reparations associated with various forms of historic redress other than those associated with transitional issues in a given country relating to the recent past.⁷ As developments in 2003 within Argentina suggest, a change of governmental leadership at the national level can affect the approach taken to justice claims in a transition process, including those involving a renewed resolve related to individual criminal accountability and compensation for past abuse. Against this double background of an inchoate normative revolution in the 1990s and the altered historical setting of the early twenty-first century, this chapter analyzes the relevance of international law to reparations, and especially whether and to what extent reparations have acquired an international obligatory character of any practical significance.⁸ Such significance is difficult to assess, especially as its most tangible impact may be to encourage the provision by national legal systems of remedies for various categories of losses sustained due to prior abuses of human rights. To the extent that international law is relevant at all, it is to provide *legal* arguments or *jurisprudential* background useful for representatives and advocates of victims' rights in *domestic* political arenas to the effect that victims are legally entitled to reparations, and that the domestic system is obliged to make this right tangible by providing meaningful procedures.

2. INTERNATIONAL LAW: AUTHORITY AND INSTRUMENTS

The fundamental norms of international law are contained in customary international law, and reflect widely accepted basic ideas about the nature of law, its relation to legal wrongs, and the duty to provide recompense. The Permanent Court of Justice, set up after World War I, gave the most authoritative renderings of this foundation for the legal obligation to provide reparations. This most general international law imperative was set forth most authoritatively, although without any equally general prospect of implementation, in the *Chorzow Factory (Jurisdiction) Case*: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'⁹ The Advisory

Opinion by the International Court of Justice involving the Israeli Security Wall reaffirmed this cardinal principle in ruling that Israel was under an obligation to provide reparations to the Palestinians for damages sustained due to the illegal wall built on their territory.¹⁰

A second equally important idea embodied in customary international law had to do with the nationality of claims associated with wrongs done to individuals. In essence, this norm expressed the prevailing understanding that only states were *subjects* within the international legal order, and that wrongs done to foreign individuals were in actuality inflicted upon their state of nationality. Accordingly, if the individual was stateless, a national of the wrongdoing state, or a national of a state unwilling to support the claim for reparations, there was no basis on which to proceed. This limiting notion was expressed succinctly by the Permanent Court of International Justice in the *Mavrommatis Palestine Case*: '[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.'¹¹ It is important to appreciate that these formulations were made before there existed any pretense of *internationally* protected human rights.

A third important idea in customary international law, that has persisted, forbids a state to invoke national law as a legal defense in an international dispute involving allegations of wrongdoing by the injured state. Such a principle pertains to the setting of international disputes, which is where the main precedents and doctrines of international law relative to reparations are fashioned. Somewhat surprisingly, the International Law Commission (ILC) Articles on State Responsibility, despite years of work, clarified to some extent this earlier teaching, refining and codifying it conceptually more than changing it substantively.¹² The ILC approach to remedial or corrective justice was based on distinguishing between restitution, compensation, and satisfaction. *Restitution* is defined in Article 35 as the effort 'to re-establish the situation which existed before the wrongful act was committed'. Such a remedy is rather exceptional. It is usually illustrated by reference to the *Temple* case before the International Court of Justice (ICJ) in which Thailand was ordered to return religious relics taken from a Buddhist temple located in Cambodia.¹³ This primary reliance on restitution where practicable has been recently reaffirmed by the ICJ in its ruling on Israel's security wall, an important restatement of international law although contained in an advisory opinion, because it was endorsed by fourteen of the fifteen judges. The language of the Advisory Opinion expresses this viewpoint with clarity in paragraph 153: 'Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage

suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.¹⁴

Article 35(a) and (b) of the ILC Draft Articles indicates that restitution is not the appropriate form of reparations in circumstances where it is 'materially impossible' or would 'involve a burden out of all proportion to the benefit deriving from restitution instead of compensation'.

Compensation, resting on the fungibility of money, is more widely used to overcome the adverse consequences caused by illegal acts. In the *Chorzow* case it was declared that where restitution cannot be provided to the wronged state, then the wrongdoer should be required to compensate up to the level of the value attributed to whatever was lost, including loss of profits. Articles 36 and 37 go along with this approach of full reimbursement, without qualifications based on capacity to pay.

Satisfaction is the third, and lesser known, manner of providing reparations. The ILC Articles make it a residual category in relation to restitution and compensation. As explained by du Plessis, '[s]atisfaction provides reparation in particular for moral damage such as emotional injury, mental suffering, injury to reputation and similar damage suffered by nationals of the injured state'.¹⁵

Customary international law, as well as the ILC Draft Articles of State Responsibility, impose an undifferentiated burden, as stated in Article 37, on the wrongdoing state 'to make full reparation for the injury caused by the internationally wrongful act'. As such, it gives very little guidance in specific situations where a variety of considerations may make the grant of full reparation undesirable for various reasons, although commentary by the ILC on each article does go well beyond the statement of the abstract rule.

International treaty law does no more than to restate these very general legal ideas in a variety of instruments, and without the benefit of commentary attached to the ILC articles. Because property rights are of paramount concern, the language of reparation is not used, and the more common formulations emphasize compensation for the wrongs suffered. The basic direction of these treaty norms also derives from international customary law, especially legal doctrine associated with the confiscation of foreign-owned property. The legal formula for overcoming the legal wrong accepted in international law involved 'prompt, adequate, and effective compensation'. Discussion of 'restitution' and 'satisfaction' is abandoned as the wrongdoing states are acknowledged by the United Nations to possess 'permanent sovereignty' over natural resources.¹⁶

The Universal Declaration of Human Rights shifts the locus of relief to national arenas and away from international disputes between sovereign states. Individuals are endowed with competence, and the notion of wrongdoing is generalized to encompass the entirety of human rights. Article 8 reads: 'Everyone has the right

to an effective remedy by the competent national tribunals for acts violating the fundamental human rights granted him by the constitution or by the law.' Of course, such a right tends to be unavailable where it is needed most, although the existence of the right does provide a legal foundation for reparation in future circumstances when political conditions have changed.

Article 10 of the American Convention on Human Rights (1978) particularizes a 'Right of Compensation' in a limited and overly specific manner: 'Every person has the right to be compensated in accordance with the law in the event that he has been sentenced by a final judgment through a miscarriage of justice.' It seems to refer exclusively to improper behavior of the state associated with criminal prosecution and punishment within the judicial system. It is available only on the basis of an individual initiative.

Article 14 of the Convention Against Torture and Other Cruel Inhuman and Other Degrading Treatment or Punishment (1984) imposes on parties the obligation to 'ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'. Again, the emphasis is on the legal duty of the state to provide individuals who are victims with a remedy within the domestic system of laws. That is, victims are not dependent on governments of their nationality pursuing claims on their behalf, nor are nationals barred from relief by the obstacle of sovereign immunity. Article 9 of the Inter-American Convention to Prevent and Punish Torture (1985) similarly obligates parties to 'undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture'.¹⁷ In the absence of case law it is difficult to know what this standard might mean in practice, and whether it is purely aspirational or represents a genuine effort to acknowledge the full spectrum of injury that often results from torture and severe abuse. Beyond this duty of the state, Article 8 allows persons alleging torture to internationalize their claims for relief '[a]fter all the domestic legal procedures of the respective State... have been exhausted' by submitting their case 'to the international fora whose competence has been recognized by that State'.

Within the European regional system there is a right of an individual in Article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) to seek 'just satisfaction' in the event that national law provides 'partial reparation' due to injury sustained as a result of a violation of the Convention. A proceeding of this nature would fall within the authority of the European Court of Human Rights. Here, too, the idea is to provide individuals with a remedy at the regional level beyond what is available within the national legal system.

These international law developments over the last half century have several different important consequences for the wider interest in reparations as provided

to a victimized group, especially in the context of transition from authoritarian regimes:

- first, there is the shift in the emphasis of international law from the protection of aliens abroad, and especially their property, to the protection of individuals who experience abuses of human rights;
- second, there is a legal recognition that the state responsible for the abuse should legally empower those who claim to have been victimized to pursue relief by way of compensation through recourse to the national judicial system;
- third, the national identity of the victim and the sovereign immunity of the state should not affect the availability of legal relief in the event of abuse;
- fourth, in the event of frustration at the national level, then some further mechanism for providing relief is becoming available at either the regional or global level, or both.

In summary, the importance of these international law developments is probably indirect, but the shift from a concern with dispute settlement to human rights does involve a major reorientation. The obligations embodied in legal instruments are vague and abstract, and are difficult and cumbersome to implement, but they do contribute to what might be called the formation of ‘a reparations ethos’ to the effect that individuals who have been wronged by applicable international human rights standards, especially in the setting of torture and kindred maltreatment, should be compensated as fully as possible. This ethos is a challenge to notions of sovereignty associated with earlier ideas that a state can do no wrong that is legally actionable, and that the wrong done to an individual is *legally* relevant only if understood as a wrong done to the state of which he or she is a national.

At the same time, the most important circumstances of reparations, leaving aside postwar arrangements, are not really addressed directly by contemporary international law. In authoritarian political settings, by definition, there is an absence of judicial independence, and there is no prospect of relief even in extreme situations. In postauthoritarian political settings, where there is an impulse to achieve redress, the magnitude of the challenge requires some categorization of the victims as well as a recognition of severe limits on the capacity of the new government to provide anything approaching ‘adequate compensation’. In this sense, the contributions of international law at this stage must be mainly viewed as indirect, and the actual dynamics of reparations arrangements reflect a variety of specific circumstances that exist in particular states. These arrangements have an ad hoc character that makes it impossible to draw any firm conclusions about *legal* expectations, much less frame this practice in the form of *legal doctrine*. For this reason, among others, it is appropriate to view reparations as primarily an expression of *moral* and *political* forces at work in particular contexts.¹⁸

3. SHADOWS OF MISUNDERSTANDING

Any broad consideration of the relevance of international law to the subject matter of reparations needs to be sensitive to several background factors that could invite misunderstanding if not addressed. Such factors illuminate the tensions that have historically existed between considerations of global justice and political relationships shaped by hierarchical relations between the strong and the weak.

For most people (other than specialists in international law concerned with international disputes about wrongdoing), the idea of 'international reparations' recalls the burdens imposed on Germany at the end of World War I that were embodied in the Versailles Treaty.¹⁹ These burdens were widely interpreted as accentuating the hardships faced by German society in the 1920s, and were viewed in retrospect as a damaging example of a 'punitive peace' that contributed to a surge of German ultranationalism, producing a political climate conducive to extremism of the sort represented by the Nazi movement. From an international law perspective, the reparations imposed were perfectly legal, indeed specified in a peace treaty formally accepted by Germany, but from a political perspective such reparations were viewed as imprudent, if not disastrous, and from a moral perspective, they were widely viewed as ill-deserved, mainly exhibiting the vengeful appetite of the victors in the preceding war in which neither side could convincingly claim the moral high ground. This 'lesson of Versailles' was heeded after World War II, Germany being assisted in economic recovery and political normalization despite the existence of a far stronger case for collective punishment of German society than existed in 1918, given the multiple legacy of crime and tragedy generated by Hitler's regime.²⁰ And the results are generally viewed as vindicating the soft approach, reinforcing the repudiation of Versailles.

And yet, somewhat surprisingly, the 'peace' imposed on Iraq after the Gulf War seems to have adopted the previously discredited Versailles model of punitive peace, although the terminology of reparations was largely displaced in this instance by the language of sanctions and claims, perhaps to avoid evoking bad memories. At the same time, extensive assets and oil revenues were made available, along with a procedure within the UN, to provide compensation to victims of Iraqi harm arising out of its invasion of Kuwait in 1990, and so there was a justice dimension so far as individual victims of Iraqi wrongdoing were concerned.²¹ Thus, overall, an important ambiguity emerges: the Iraqi people were punished collectively and severely despite being entrapped in a brutal dictatorship, while the various categories of victims arising from the *international* crimes of Iraq as committed in Kuwait were the recipient of substantial reparative efforts to compensate for losses sustained. In this respect, the positive side of reparations was present. This whole framework of 'sanctions', combining the punitive with the compensatory, was given legal stature in the form of unanimous UN Security

Resolution 687, the harsh terms of which were accepted by a defeated and devastated Iraq in the 1991 ceasefire that ratified the results of the Gulf War.²²

There are two observations to be made. First, in the sphere of interstate reparations, there is a confusing association of 'reparations' in language and policy both with a largely discredited process of imposing collective punishment upon a defeated state and its civilian population, and as seeking to give the victims of illegal and criminal conduct on behalf of a state a meaningful remedy for harm sustained in the form of substantial monetary compensation. Second, there is a flexible capacity for international law to provide a legal imprimatur, either by treaty or Security Council decision that ratifies a mechanism for the award of 'reparations', and gives legal expression to the geopolitical relationship that exists at the end of a war, without regard to whether the motivations for reparations are punitive or compensatory, or a mixture of the two. If the outcome of the war is 'just', and the victors are 'prudent', then the reparations imposed may contribute to global justice, but if not, not. International law provides at this point no substantive guidelines as to these assessments, and its main role is to provide victorious powers with a flexible *instrument* by which to give a peace process in accord with their goals and values an authoritative status.

The analogous dynamics of establishing reparations in the context of transitional societies also reflects power variables, although there is often not a clear dividing line between victory and defeat, but rather a political process that produces a negotiated compromise that inhibits to varying degrees the redress of past injustices by the newly emerging constitutional leadership. The arrangement is formalized exclusively through a reliance on mechanisms provided by the governing authorities enlisting the national legal system and establishing special administrative procedures. There is no direct role for international law, except to the extent of taking account of past wrongdoing as instances of 'crimes against humanity', or indirectly, as responsive to international pressures associated with imposing national means to determine accountability and rectifying past wrongs to the extent possible, given the political and economic realities. In the context of the Holocaust, and to some extent in relation to authoritarian antecedents to constitutional government, the goal of reparations is also a deterrent message to future leaders and a pledge of sorts by present leaders to repudiate the past and build a just constitutional order.

Certainly, in the background of the sort of moral and political pressures effectively brought to bear on Swiss banks by Holocaust survivors and their representatives during the 1990s was the strong sense that these individuals, or in this case sometimes their descendants, had truly been victims of internationally criminal conduct and deserved some sort of redress even if belatedly.²³ Decades had passed since the occasions of wrongdoing, and it was only a change in global setting that abruptly lent *political* credibility to claims that always had been actionable from *legal* or *moral perspectives*. It was this credibility that overcame the impulse to

disregard old claims as stale, and allegedly avoid opening old wounds. Such belated redress went against the traditional disposition of law to reach finality with respect to claims, both for the sake of stability and because evidence becomes less reliable and often unavailable with the passage of time.

An additional source of misunderstanding pertaining to international law relates to its state-centric orientation and traditions, which have been increasingly challenged in a variety of ways in the last few decades. The modern structure of international law was based on the idea that states were the only formal members of international society, and that the legal interests of individuals if associated with the actions of foreign governments were protected, if at all, by one's country of nationality on a discretionary basis.²⁴ International wrongs of aliens were thus treated as generating potential legal claims by a government on behalf of their aggrieved nationals, but purely as a matter of political and moral discretion, and under international law the wrong was done to the state, not to the individual who was harmed. The practice by states of reacting to such wrongs was described as 'the diplomatic protection' of nationals or aliens abroad, and was usually associated with the protection of foreign property rights. The individual beneficiary of such claims had no *legal* entitlement, and a government could ignore or waive the claims of its nationals. This statist pattern was further reinforced by ideas of nonaccountability with respect to wrongs inflicted on nations, both internationally and domestically. The doctrine of sovereign immunity meant that an individual suffering injury could not initiate any legal action in the courts of either the country where the harm took place or the country of his or her nationality. Claims of allegedly injured aliens in Third World settings were sometimes addressed by claims commissions assessing the merits of particular claims or by a lump sum settlement the funds of which were then allocated on some basis to the claimants. This background of international law is highly relevant to the circumstance of societies in the midst of transitions to democracy. There are three further observations that are relevant to this inquiry. First, the political reality of such dynamics reflected the geopolitical and hierarchical structures of the colonial era. These claims made by governments in the North involved only losses sustained by Western individuals in Third World settings. There was no reciprocity or equality given the manner with which investment and property rights were dealt with in international law. A bit later these claims for compensation involved opposition to socialist approaches to both private investment and economic development, and resisted the legal effects, as far as possible, of the rise of economic nationalism in the decades following World War II. The protection of nationals abroad was not at all in the spirit of 'reparations' (conceived as corrective justice) and reflected an opposite policy generally associated with protecting foreign investors who had characteristically been beneficiaries of 'unjust enrichment' in a variety of exploitative center-periphery relations. Ideas of state responsibility were also formulated with an eye toward fashioning an international law instrument designed for the

protection of transnational private property interests, especially in the face of allegedly confiscatory forms of nationalization. Even the most recent formulation of the law of state responsibility by the International Law Commission treats the state as the sole subject of wrongs whose victims are its nationals, and fails to address the existence of rights under international law of the victims if they are conceived of as individuals or groups. With moves toward neoliberal globalization since 1990, there has emerged a widespread intergovernmental consensus supportive of private sector autonomy, which has ended the widespread emphasis on balancing territorial rights against those of foreign investors in Third World countries. In this regard, the capitalist ethos has prevailed, at least for the foreseeable future.

Second, the kind of concerns that have been associated with transitions to democracy were completely absent from these earlier concerns of international law with harm sustained by individuals. For one thing, victims *within* society were left completely vulnerable to abuse by their own governments due to ideas of territorial supremacy of sovereign states, and thus the abuses of oppressive government toward their own citizenries remained outside the legal loop of potential responsibility. International law was completely silent as to state–society abuses so long as the victims were nationals.²⁵ The emergence of international human rights, by way of the Universal Declaration of Human Rights in 1948 and the 1966 Covenants were at first only *politically* feasible because there were no expectations of *legal* implementation, much less remedies for victims seeking reparations. The majority of governments were authoritarian, fully dedicated to traditional notions of sovereign rights, and would have opposed a legal structure that had explicit ambitions associated with implementation of individual rights. It is here where the emergence of transnational civil society actors changed the political equation, creating pressures to promote degrees of implementation for human rights that went far beyond what had been anticipated at intergovernmental levels.²⁶

Third, since international law failed to protect the human rights of individuals as a matter of law until after World War II, there was little pressure on national legal procedures to do so. But in more than a half century since the adoption of the Universal Declaration of Human Rights there has been an extraordinary set of regional and global developments enhancing the position of the individual as the formal holder or subject of rights.²⁷ What is important here is less the exceptional *international* initiative on behalf of the victims of human rights abuse, than the influence on the erosion of sovereign exemptions from accountability in *domestic* legal arenas.²⁸ Here the indirect impact of the human rights movement has been strongly felt. It includes the empowerment of civil society actors, creating intense perceptions of injustices endured by individuals, expectations of some sort of remedial process, and the importance of taking official steps toward corrective justice by a government in the struggle to renew an atmosphere of political legitimacy. This is the case with respect to its own citizens by means of a signal

of the repudiation in the past and also to aid efforts to acquire or reacquire legitimacy within international society.²⁹ In effect, some of the traditional veils of sovereignty are lifted to facilitate transition, but this is overwhelmingly disguised directly by the adoption of a self-interested national political and moral discourse. But what seems national, even nationalistic, is undoubtedly influenced by varying degrees by what has been going on internationally, transnationally, and in other kindred states. What is most evident, particularly in Latin America, which provided the main experimental frontier, was the degree to which justice for victims was complementary to what often from the outside appeared to be a more strident insistence, effectively promoted by civil society actors, on combating what came to be described as 'the culture of impunity' toward past wrongdoing by leaders. More properly considered, this effort to impose accountability on leaders was integral to restoring the dignity of victims, constituting a direct repudiation of the past, and was thus an aspect of rendering justice to the victims, however retrospectively.³⁰ There is also evidence of a mimetic element in which national dialogues listen to one another, while adapting to their own particularities, building a trend that establishes a new pattern of expectations about justice in transitional circumstances. Such a drive for corrective justice was tempered by resource constraints and by the search for normalcy or social peace, tending to produce compromise approaches, especially encouraging an approach to feasible levels of 'satisfaction' for victims by reliance on truth and reconciliation processes adapted to the particularities of a given country. The end result is an acknowledgment of the past, but without great efforts either to punish perpetrators or to compensate victims. Symbolic forms of redress prevail, with both corrective and deterrent goals.

Such a historical process of innovative practice is somewhat puzzling from an interpretative perspective. Whether we call such patterns 'law' or 'international law' is a matter of the jurisprudential outlook, either positivist or constructivist. It is also a question of what might be called the politics and epistemology of law. A positivist approach would not regard the existing rules of international law as sufficiently clarifying as to permissible behavior to qualify fully as law. A constructivist jurisprudence attributes to the interpreters of law, both judges and scholars, a dynamic role in imparting authoritative meaning, and proceeds from the belief that legal standards cannot be objectified by language and strict canons of interpretation. I favor such an acknowledgment of the uncertainty of law on the books as a means to encourage those with discretion to interpret, apply, and enforce the law to act responsibly, which I regard as meaning that ambiguities be resolved by opting for morally guided outcomes to decision-making. Of course, discretion is not unlimited, but confined by rules of reason that identify the boundaries of interpretative reasonableness and thus accord with the idea that those interpreting the law are not free to give expression to private ideas of morality and political prudence. Legality as a clarifying condition is left in abeyance until patterns of

expectations are shaped by interpretative trends and practice.³¹ Such a prism of evaluation would seek to relate law to widely endorsed expectations about behavior that exist in society, but would not 'legalize' moral sentiments that lacked such backing, however appealing, by pretending that these sentiments qualified as 'law'. From such a perspective, then, there is a greater relevance for international legal obligations in relation to reparations practice, and wider issues of corrective or remedial justice, than would seem to derive from a strictly positivist jurisprudence. The normative revolution that seemed to get underway in the 1990s had a law-making potential if expectations of legality are created by influential institutional and societal actors. Such expectations would acknowledge as valid specific claims and demands for justice, and thereby set precedents that shape perceptions as to the evolving character of 'the law'. If victims' rights become established legally, expectations of participants alter in circumstances of future victimization.

4. SOME LIMITING CONDITIONS

Reparations, if conceived as central to corrective justice, pose difficulties from the perspective of international law, but these are encountered in analogous form in transitional justice settings. Even more than efforts to impose individual accountability, a reliance on reparations, especially as a means to address the various dimensions of harm endured by victims, is inevitably to be context-driven.³² And because context is so decisive, the guidance functions of international law tend to be minimal beyond affirming the existence of an underlying obligation as a generality. As the 2004 Advisory Opinion on the legal status of the Israeli security wall clearly reaffirmed, there does exist in international law a well-established entitlement for the victim of legal wrongs to appropriate reparations. But between the affirmation of the legal right/duty and its satisfaction there exists a huge contextual gap. In this instance, Israel, backed by the US government, immediately repudiated the World Court decision, and the prospects of compliance are nil. The international legal standard is authoritative and context-free, but its implementation is context-dependent.

Several dimensions of this unavoidable contextuality can be identified, but such a reality also pertains at least as much to reparations within national settings, where a wide measure of prosecutorial discretion has been an attribute of efforts to bring justice to perpetrators and victims in transitional situations. So what is set forth as applicable in international contexts is also relevant with some adjustments to national contexts.

Unevenness of Material circumstances

To the extent that reparations attempt to compensate victims for losses endured, some assessment of an ability to pay needs to be made. This assessment should take account, as well, of the extent of victimization, and whether certain forms of victimization need to be excluded from the reparations program. But in the end, the question of fiscal capabilities at the disposal of the perpetrators, or their successors, is crucial. Of course, this is true, as well, for prosecutorial efforts to impose accountability on perpetrators, which also reflects the unevenness of national capacities to sustain the 'shock' of prosecutions. Iraq after the Gulf War, with extensive oil revenues, and South Africa, with an impoverished population, are at opposite ends of the spectrum in two respects: Iraq was an instance of reparations doubling as sanctions, whereas in South Africa any attempt to provide monetary reparations would involve a massive diversion from the priorities of the new leadership to promote economic growth and address the challenge of massive poverty.

The case of South Africa is significant for this inquiry.³³ The new political order had repudiated its criminal past mainly by way of a truth and reconciliation process. It was deeply committed to the improvement of the material circumstances of an extremely poor majority black population. Of course, the new leadership could have taken greater account of the high degree of victimization, as well as the unjust enrichment of the white minority, by combining constitutionalism with a program for the redistribution of wealth based on past injustice. To have done so, however, would likely have doomed the political miracle of a bloodless transition from apartheid, and might have led to prolonged civil strife. The role of reparations in transitions to democracy is especially complicated, taking into consideration the entrenched interests of those associated to varying degrees with the old order, seeking to avoid overtaxing available capabilities to ensure the success of the newly emerging order, and yet providing some needs-based relief to those who suffered incapacitating harms due to prior wrongdoing. As well, in the setting of many African countries that are extremely poor, it seems unrealistic because of resource constraints to impose corrective burdens of a monetary character.³⁴ This is especially so for national settings where prolonged civil strife has victimized many, if not all, living in the society; many severely, if massive atrocities were committed on a large scale. Normally more appropriate would be symbolic measures of acknowledgment (via truth and reconciliation) along with a needs-based conception of reparations that tries, at least, to enable those who have been disabled, or find themselves in acutely vulnerable circumstances, to be given the means by which to restore a modicum of dignity to their lives.³⁵

Remoteness in Time

Because some claims for redress of grievances arise from events that seem in the remote past, and their redress is of a magnitude that would be disruptive to present social and economic arrangements, there is a vigorous resistance to material forms of compensation.³⁶ It is partly a matter of responsibility, the unwillingness of most members of a present generation to believe that they owe obligations to the ancestors of claimants. It is partly a matter of changed mores, a sense that 'injustice' needs to be measured within the historical setting of the contested behavior. It is partly a matter of scale and impact, the realization that restoring the rights of victims would be enormously expensive and subversive of currently vested property interests. And it is partly a refusal to treat those in the present as truly victimized by occurrences that took place long ago. The reality is complicated, as old wounds often have not healed despite the passage of many generations.

At the same time, remoteness has not altogether stymied efforts to obtain redress in the form of reparations under certain conditions. The exemplary case is the pursuit of Swiss bank deposits by Holocaust survivors and their heirs, as well as claims on behalf of those who had been compelled to do forced labor in Nazi times. Swiss banks agreed to pay survivors \$1.25 billion, and the German government agreed to pay compensation for slave labor.³⁷ Related efforts produced agreements with France to compensate for stolen assets during the Vichy period, 'truth' commissions have been set up in as many as twenty-three countries that are continuing to assess claims relating to looted works of art and unpaid insurance proceeds owed to relatives of Holocaust victims. At the same time, beneficiaries are disappointed by the level of compensation received, and more than this, distressed by the monetization of their suffering that can never be compensated. When one survivor of Auschwitz, Roman Kent, was asked whether he was happy about the results, his reply was typical: 'Why did it take the German nation 60 years to engage the morals of the most brutal form of death, death through work?'³⁸ The pursuit of these claims on behalf of Holocaust victims has produced mixed assessments from observers, but the main relevant point is that the process has been primarily driven by moral and political pressures, with law playing a facilitative role, although lawyers have played a rather controversial role by siphoning off a considerable proportion of negotiated settlements as legal fees.³⁹ In a technical sense, the recovery of wrongfully taken property is an instance of reparations, but in its more unusual mode of restitution rather than as a means of providing compensation for injuries sustained.

In some respects, the relative success of Holocaust claimants has stimulated other categories of remote victims to be more assertive about seeking redress, although not necessarily in the form of reparations. To begin with, Asian victims of imperial Japan mounted pressures on behalf of survivors who had been engaged in forced labor, as did representatives of 'comfort women'. Asian claimants were

able to take advantage of national laws in the USA that had been drafted in response to pressures associated with the Holocaust, although in the end were unable to proceed as potential claims had been waived in the peace treaty concluded with Japan, an exemption from responsibility that the US State Department continues to support in litigation brought before American courts. Note here that the obligations to compensate written into American law do not pretend to be 'international legal obligations', but are instances of discretionary national legislation that results from moral appeals and political leverage.

Yet remoteness has not inhibited certain categories of claims for reparative justice, especially those associated with indigenous peoples and the institutions of slavery and slave trading. These claims, building credibility in the wake of efforts on behalf of Holocaust survivors, gained unprecedented visibility in the atmosphere of the 1990s.⁴⁰ To the extent that symbolic reparations were pursued there were positive results in the form of acknowledgments, apologies, and media attentions to past injustices.

Remoteness definitely limited the capacity of such claimants to implement the very broad legal imperative to give victims remedies for harms endured, but it did not formally preclude relief. There was no statute of limitations applicable to bar claims. Those with limited claims and a small constituency, most notably Japanese-Americans who had suffered enforced detention in World War II, were recipients of nominal compensation payments.⁴¹ These payments were important to the victims as much, if not more so, as acknowledgments of past injustice, that is, as symbolic reparations in the sense of acknowledgment and apology even though a nominal payment was involved. In contrast, descendants of slaves, although receiving some satisfaction, including a legal affirmation in authoritative global settings that slavery constituted a crime against humanity, have not been able to gain satisfaction in the form of compensation.⁴² Unlike the case of Japanese-Americans where compensation was not a huge financial tax on the present and unlike Holocaust survivors who had formal American pressures behind them (which appeared to push the Swiss banks and others into accommodating gestures), indigenous peoples and descendants of slaves found themselves without political leverage, despite generating significant moral pressures arising from the documentation of horrendous past atrocities. Beyond this, redress in these latter instances would have been economically and politically disruptive, imposing a major and politically unacceptable burden on present public revenue flows.

Absence of Individuation

The magnitude of the harm done, especially when directed at a large class of victims, makes it impractical to evaluate individual claims on a case-by-case

basis in most instances, and therefore is not consistent with the international law approach based on the individual that is embedded in human rights.⁴³ It has been historically possible under certain circumstances to create claims commissions to deal with efforts to achieve restitution of property and compensation arrangements, as was done in relation to the Iranian Revolution and the first Gulf War. In both instances, there were large pools of resources available that belonged to the accused governments, as well as antagonistic international attitudes toward the government that was being charged with improper taking of private property rights. And redress for claimants did not impose any burdens on the states that established the reparations mechanism, which distinguishes the situation from those where payment of reparations would be imposed from within. That is, the geopolitical climate was supportive of efforts to implement reparations on an individuated basis in Iran and Iraq. But these instances are the exception rather than the rule. No such redress occurs when the accused government is victorious or beyond the reach of the international community, as has been the case in relation to the USA, considering the wrongs associated with its conduct of wars in Vietnam, Panama, Afghanistan, and Iraq in the course of the last forty years, as well as in relation to both world wars of the twentieth century.

More common are those many circumstances in a wide range of countries where an oppressive past has been finally repudiated by a new political leadership, but not necessarily in a conclusive fashion. Beyond this, there are neither the administrative nor financial capabilities to process claims on an individual basis, particularly if the abuses do not involve property rights that can be established by the claimants. In such circumstances, the dynamic of redress has tended to emphasize accountability for the main perpetrators of atrocities and a collective truth-telling procedure for the community of victims, especially reliance on truth and reconciliation commissions.⁴⁴ Reparations are certainly not excluded, but they have not been consistently part of the process, and rarely reach the majority of victims except in pitifully small amounts. In Latin America several countries have implemented significant reparations programs, including Argentina, Chile, and Brazil, others have made efforts that are more than token. Reparations have received less attention than efforts at criminalizing the perpetrators of gross wrongs, but have been at least as significant an aspect of attempts at overall rectification.

Generality of Obligation

Any attempt to evolve a law-centered approach to reparations must accept the frequent inability to specify the level of responsibility with the kind of precision that makes it more likely that equal circumstances will be treated equally. Of

course, this difficulty with reparations should not be exaggerated, and it should be appreciated that the more demanding rules of evidence and standards of persuasion that apply to criminal prosecution make problems of ascertaining responsibility and entitlement with respect to reparations somewhat manageable. The provision of reparations, however constructed, usually must depend in the end on a rule of reason, which accords those who administer the program, whether judicially or administratively, wide discretionary authority. Only where the idea of full compensation for losses is sustained, as in Kuwait after the Gulf War, is there operational guidance for those making decisions. Or where uniform payments are decreed, which overlook the unevenness of harm sustained, as with compensation accorded to Japanese-Americans detained during World War II, is specificity attained. In other settings, the legal mandate to award reparations operates in a manner similar to other areas of the law where the specific and the general are only loosely connected, as when such standards as 'due process' or 'the reasonable person' are used to judge legal responsibility in particular circumstances. Where the number of claimants is very large, there is a greater disposition to rely on administrative procedures that compensate victims by category of harm, and usually with no pretension that the level of reparations corresponds to the level of harm. Again, the human rights approach based on individual rights challenges this flexibility.

Extreme Selectivity

To the extent that reparation claims are given support in national legal systems, there are present critical geopolitical factors that inhibit any kind of standardization of treatment. It is one thing to initiate litigation to give some remedial relief to Holocaust victims, but it would be inconceivable that comparable relief, even of a symbolic character, were to be accorded to Indochinese victims of the Vietnam War or to Palestinian victims of Israeli abuses of international human rights and international humanitarian law during the period of extended occupation of the West Bank and Gaza. The victims require political leverage, and the target of remedial abuse must be discredited or defeated for such remedies to exist. Whenever geopolitical factors become relevant to the application of legal standards, the issue of legitimacy casts a shadow over discussions of legality, especially because selective implementation means that equals cannot be and are not treated as equals. Should such a realization be allowed to taint those applications of law that can be explained by reference to geopolitical patterns of influence?⁴⁵

5. WHAT INTERNATIONAL LAW CAN DO

So far the emphasis has been placed on the limitations of international law in relation to the imposition of obligations to provide reparations to victims of past injustices and deprivations of rights, especially in the setting of transitions to democracy. But international law also has contributed to a generalized atmosphere of support, a reparations ethos, for compensating victims as part of its overall dedication to global justice and the enforcement of claims, and thus lends support to the domestic willingness to provide reparations when contextual factors are favorable. Beyond this, international law is part of the normative context, giving a higher level of credence to victims and their supporters who insist on reparations as part of a new political regime of 'fairness'. Such a change in the climate of credibility with respect to claims of reparations for past wrongs is perhaps most evident in the greater seriousness accorded to the grievances associated with the descendants of slaves and the representatives of indigenous peoples. These claims had previously been hardly ever mentioned in influential settings, being treated as too frivolous to warrant attention, much less action.

International law also helps by clarifying those forms of governmental abuse that constitute international crimes, and therefore cannot be shielded from legal accountability.⁴⁶ Certainly, the establishment of the International Criminal Court (ICC) is a step in the direction of accountability for perpetrators, and by its provisions of funds for reparations of victims, there is an agreed-upon framework that should exert an indirect influence upon those transitions to democracy that occur against an established background of gross abuse and international criminality. That is, by linking accountability for perpetrators to compensation for victims there is encoded in international law a conception of fairness and rectification of past harm that includes victims.⁴⁷ This is a major conceptual step forward, with policy consequences, although disappointments also arise to the extent that compensatory steps are either trivial in relation to the quantum of harm endured or are never implemented beyond nominal awards.⁴⁸ Perhaps the most important impact of this level of generalized obligation is to influence the approach of national legal systems, which in any event have the most opportunity to actualize international standards, including those associated with human rights, in relation to the persons who endured the wrongs or their representatives. To the extent that national programs of reparations are enacted, there are expectations generated that a transition to democracy is incomplete if it does not include efforts to address as well as possible, given contextual constraints, the harms endured by victims of a prior oppressive regime. At the same time, there exists a margin of appreciation that allows a given national government a wide range of discretion in determining what it is reasonable to appropriate for the satisfaction of past claimants.

To the extent corrective justice is taken into account, then the pressure to overcome the culture of impunity relating to transitions to democracy is of at least symbolic benefit to the victims, as well as to their families and friends. The difficulties of providing material compensation are offset to some extent by publicly and officially acknowledging past abuses, documenting the record of wrongdoing associated with a prior regime, discrediting perpetrators while expressing solidarity with a community of victims, issuing apologies, and challenging self-serving grants of amnesty. In this process, not only is the harm to those most victimized repudiated as wrong, but the general public is educated about the limits on permissible behavior by governments.

Given the degree to which transitions to democracy are carried on within national legal frameworks, where the contours of arrangements are determined exclusively by reference to domestic law, the role of international law is inherently limited. Of course, to the extent that international human rights and criminal law are internalized, they push the national approach, in circumstances of transitional justice, in the direction of providing 'just compensation' for victims as determined contextually. Beyond this, international law could impose obligations on states and other actors to provide financial capabilities via the ICC, and elsewhere, to enable those countries with limited resources and very widespread claims of victimization to receive special credits and loans for the purpose of satisfying certain categories of victimization. Whether such an undertaking could fit within the mandate of existing international financial institutions such as the World Bank or IMF is doubtful, but a special commission could be created within the UN system to receive voluntary contributions earmarked for such purposes. The record to date is not encouraging if the UN Voluntary Fund for Victims of Torture established by GA Res. 36/151 on December 16, 1981, is taken as indicative. The Fund receives contributions from governments, nongovernmental organizations, and individuals, but has managed to raise only \$54 million during its entire course since coming into existence in 1983. Another possibility, undoubtedly remote, would be to affix a 'Tobin Tax' on international currency transactions or on activities that pollute the commons, such as commercial jet international travel, thereby providing a pool of funds to be used to bolster the capabilities to realize the goals of corrective justice in transitional societies and other circumstances where international victimization has occurred. This kind of mechanism could also be used to address categories of claimants on a group basis, thereby circumventing the extraordinary bureaucratic burdens associated with judicial and administrative approaches that are based on assessing the merits of individualized claims.

NOTES

1. For review of this dynamic see Falk, 'Reviving the 1990s Trend toward Transnational Justice: Innovations and Institutions', *Journal of Human Development* 3 (2) (2002): 169–97.
2. See Falk, 'Assessing the Pinochet Legislation: Whither Universal Jurisdiction?' and the reply by Pablo de Greiff, 'Universal Jurisdiction and Transitions to Democracy', in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, Stephen Macedo, ed. (Philadelphia, PA: University of Pennsylvania Press, 2004).
3. The conclusion of the Independent International Commission on Kosovo was that the action was 'legitimate' (as it prevented an imminent instance of ethnic cleansing), but 'illegal' (as it lacked a required UNSC mandate). See the report of the commission, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000); along similar lines, but with a more comprehensive approach, see the report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, Canada: International Development Research Centre, 2001).
4. Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: Norton, 2000), ix.
5. In this collection, de Greiff defends a nuanced position with respect to the issue of the relationship between reparations and international law: the main point is that what international law has to say about this issue is still mostly geared to the case-by-case resolution of claims, and that both this and the (related) adoption of *restitutio in integrum* as the criterion of justice in reparations, make the guidance provided by international law less than clear when the task is to create a massive program. See de Greiff, 'Justice and Reparations' (Chapter 12, this volume).
6. For a consideration of this dynamic of distraction see Falk, *The Great Terror War* (Northampton, MA: Olive Branch Press, 2003); also, Falk, 'Reviving Global Civil Society after September 11', in *Traditions, Values, and Humanitarian Action*, Kevin M. Cahill, ed. (Fordham, NY: Fordham University Press, 2003), 344–67.
7. Even in the aftermath of the Afghanistan War and the Iraq War there does not seem to be a disposition to set up a procedure to provide reparations for the numerous victims of these brutal regimes. Unlike after World War II or the Gulf War, the main goals of the occupying powers, aside from selective criminal prosecution of the leaders of the former regime, seem to involve the establishment of stability and a sense of normalcy.
8. Of course, there are a series of affirmations of a legal obligation to compensate victims of abuses that can be found in such influential documents as Article 8 of the Universal Declaration of Human Rights, Articles 2(3), 9(5), 14 of the International Covenant on Civil and Political Rights, Article 14 of the UN Convention against Torture, and Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, as well as the elaborate consideration of victims' rights in the Statute of the International Criminal Court. See also Theo van Boven, 'Basic Principles and Guidelines', E/CN.4/2000/62, January 18, 2000. It is to be noted that most of the assertions of this right to compensation situate the remedy within national legal systems. With the

exception of the ICC approach there is no attempt at an *international* remedial option made available to a victim even in the event that there is no meaningful national remedy. The Basic Principles document, in Principle 12, affirms the victim's right to pursue a remedy in all legal arenas 'under existing domestic laws as well as under international law', but without any clarification as to how such rights can be upheld in concrete circumstances. States are obliged to '[m]ake available all appropriate diplomatic and legal means to ensure that victims exercise their rights to a remedy and reparation for violations of international human rights or humanitarian law'.

9. Case concerning the Factory at Chorzow, 1927 P.C.I.J. (Ser. A) No. 9, at 29; in explaining the bearing of international law I have adapted the framework clearly set forth by Max du Plessis, 'Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery', *Human Rights Quarterly* 25 (2003): 624–59.
10. 'On the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories', ICJ Reports, July 9, 2004, para. 152.
11. Mavrommatis Palestine Concessions Case (*Greece v. UK*), 1924 P.C.I.J. Reports (Ser. A) No. 2, at 12; for fuller account see Ian Brownlie, *Principles of Public International Law*, 3rd edn. (New York: Oxford University Press, 1982).
12. For the definitive account of the ILC treatment of reparations see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002); for useful assessment see Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibilities', *American Journal of International Law* 96 (4) (2002): 833–56. Professor Shelton asserts that these draft articles, that is, not yet in the form of an international convention, combine persuasively the descriptive function of 'codification' with the prescriptive function of 'progressive development' in accord with the mission of the International Law Commission. She also confirms the influence of this statement of the law despite its lack of a formally obligatory character, including extensive reliance by the International Court of Justice in its decisions, and by parties in their submissions.
13. The Temple Case, 1962, ICJ, 6.
14. See 'On the Legal Consequences', para. 152.
15. du Plessis, *op. cit.*, at 631.
16. See especially GA Res. 1803, December 14, 1962, Res. 3171, December 17, 1973; also Declaration on the Right to Development, December 4, 1986.
17. For a careful study of reparations in the Inter-American Human Rights System see Carrillo (Chapter 14, this volume).
18. Which is one of the conclusions at which de Greiff, Segovia, and others in this volume arrive.
19. For a sense of the professional viewpoint on reparations associated with international law practice see Shelton, *op. cit.* A typical view of the Versailles approach, primarily because the reparations features were regarded as symbolically humiliating and substantively burdensome for Germany and Germans, and thereby leading to a backlash, is the following: 'The Treaty of Versailles... represented a peace without justice. The desire of the First World War victors to seek revenge against the vanquished is widely believed to have contributed to conditions which led to the Second World War.' Stuart Rees, *Passion for Peace* (Sydney: New South Wales University Press, 2003), 21. Of course, it would be simplistic to explain the rise of Hitler by reference only to an extremist reaction to Versailles. See Hannah Arendt, *The Origins of Totalitarianism*

- (London: Allen and Unwin, 1951). For a recent inquiry into the origins of 'radical evil' as a political reality see Ira Katznelson, *Desolation and Enlightenment: Political Knowledge After Total War, Totalitarianism, and The Holocaust* (New York: Columbia University Press, 2003).
20. The issue of punishment and responsibility was individualized after World War II, as exemplified by the Nuremberg trials. See the instructive account in Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), esp. 14–205. For the international law foundations of the Nuremberg approach see Richard Falk, Gabriel Kolko, and Robert Jay Lifton, eds., *Crimes of War* (New York: Random House, 1971), 73–176. The lesson of Versailles was reinforced by geopolitical considerations that regarded the reconstruction of Germany (and Japan) as an essential element in the containment of the Soviet Union as the cold war unfolded and came to dominate the political imagination of those shaping the policies of leading Western states in the 1940s and 1950s.
 21. See the study of the UNCC by van Houtte et al. (Chapter 9, this volume); and David Bederman, 'The UN Compensation Commission and the Tradition of International Claims Assessment', *NYU Journal of International Law and Politics* 27 (1) (1998).
 22. For a range of critical assessments of sanctions imposed on Iraq see Anthony Arrove, ed., *Iraq Under Siege: The Deadly Impact of Sanctions and War* (Cambridge, MA: South End Press, 2000); a broader perspective is to be found in David Cortright and George A. Lopez, eds., *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder, CO: Lynne Rienner, 2000), esp. 37–61. Also, Falk, 'Iraq, the United States, and International Law: Beyond the Sanctions', in *Iraq: The Human Cost of History*, Tareq Ismail and William W. Haddad, eds. (London: Pluto Press, 2004).
 23. See Michael J. Bazylar, 'Nuremberg in America: Litigating the Holocaust in United States Courts', *University of Richmond Law Review* 34 (1) (2000). For a general study see Gregg J. Richman, *Swiss Banks and Jewish Souls* (New Brunswick, NJ: Transaction, 1999).
 24. See Richard B. Lillich, *International Claims: Their Adjudication by National Commissions* (Syracuse, NY: Syracuse University Press, 1962) on the nationality of claims, and their discretionary prosecution, as well as international practice; discussed earlier in this chapter.
 25. The role of sovereignty in creating sanctuaries for state wrongs is impressively depicted in Ken Booth, 'Human Wrongs and International Relations', *International Affairs* 71 (1) (1993): 103–26.
 26. This argument is set forth in greater detail in Falk, 'The Challenges of Humane Governance', in *Concepts and Strategies in International Human Rights*, George J. Andreopoulos, ed. (New York: Peter Lang, 2002), 21–50; for scholarly treatment that fails to address this hypothesis of nonimplementation see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, Intent* (Philadelphia, PA: University of Pennsylvania Press, 1999).
 27. For various aspects of this evolution see Andreopoulos, op. cit.; also Falk, *Human Rights Horizons: The Prospect of Justice in a Globalizing World* (New York: Routledge, 2000); for theoretical inquiry into the expanding status of individual rights see Jack Donnelly, *Universal Human Rights: In Theory & Practice* (Ithaca, NY: Cornell University Press, 2003); the most comprehensive assessment of this trend can be found in Henry J. Steiner and Philip Alston, eds., *International Human Rights in Context*, 2nd edn. (New York: Oxford University Press, 2000).

28. Donnelly makes this point strongly.
29. For a pioneering study of legitimacy see Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990); further elaborated and explored in impressive detail in Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995). Despite the sweep of coverage in this latter study, Franck gives no attention whatsoever to issues of corrective justice, and limits his relevant coverage to issues of 'fairness' associated with alien property claims (453–73).
30. Of course, from another perspective, Germany after 1945 could be described in a similar manner, but Germany was taking steps in the aftermath of a devastating military and political defeat, and in the midst of a foreign occupation, to restore its standing as a legitimate state. It seems like an antecedent case to that of victim-oriented reparations as conferred by Latin American legal initiatives. See the studies on German reparations by Ariel Colonomos and Andrea Armstrong (Chapter 10, this volume) and John Authers (Chapter 11, this volume).
31. Although not so formulated, this jurisprudence derives from the work of the New Haven School, especially Myres McDougal, Harold Lasswell, and Michael Reisman. For the most comprehensive overview see McDougal and Lasswell, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven, CT: Yale University Press, 1992). A constructivist account of political and conceptual reality is most explicitly set forth by Alexander Wendt in *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).
32. Reparations can also be conceived, in part, as punitive, or at least directed toward burdening perpetrators with obligations. For insightful discussion of some of these issues see Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston, MA: Beacon, 1998).
33. See the study of South African reparations by Colvin (Chapter 5, this volume).
34. For one such example, see the study of reparations in Malawi by Cammack (Chapter 6, this volume).
35. A harm-based conception is more in accord with ideas of corrective justice, treating the victim as an autonomous subject entitled to compensation, at least to the extent otherwise feasible.
36. The issue of intertemporality is carefully considered by du Plessis, *op. cit.*, in relation to efforts to obtain reparations on behalf of descendants of slaves. Interesting issues are posed as to the nature of victimization, and whether the grant of reparations, even in symbolic amounts, would not heal the inherited wounds of slavery and past forms of racial persecution and discrimination.
37. See study by Authers (Chapter 11, this volume).
38. Quoted in 'Satisfaction not Guaranteed', a review of books on the Holocaust dynamic by John Authers, *Financial Times*, August 23, 2003.
39. Among the treatments of this process see Stuart Eizenstat, *Imperfect Justice* (New York: Public Affairs Press, 2003); Michael Bazylar, *Holocaust Justice* (New York: New York University Press, 2003); and for a skeptical account see Norman Finkelstein, *The Holocaust Industry* (London: Verso, 2000).
40. These claims categories are included in Barkan, *op. cit.*, and du Plessis, *op. cit.*; see also Falk, 'Reviving the 1990s Trend toward Transnational Justice', *op. cit.*

41. See study on reparations for Japanese-Americans by Yamamoto and Ebesugawa (Chapter 7, this volume).
42. For instance, in the declaration adopted at the 2001 Durban UN Conference on Racism and Development. It is notable that the US government withdrew its delegation from the conference, partly to protest criticism of Israel and partly because of reparation claims advanced in relation to the condemnation of slavery. On this issue generally see du Plessis, *op. cit.*, for extensive treatment.
43. de Greiff spells out the possible consequences of a case-by-case approach (Chapter 12, this volume).
44. For an admirable overview see Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001).
45. It should be noted that this same selectivity applies in many crucial areas of international law, including that of humanitarian intervention, regulation of nonproliferation of weaponry of mass destruction, and enforcement of UN Security Council resolutions. It is an aspect of the balancing act that conjoins law and power within *any* social order, but its influence is more salient and pronounced in relation to global policy concerns.
46. See a useful overview in Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: Norton, 1999).
47. For an analysis of reparations and the ICC see Pablo de Greiff and Marieke Wierda, 'The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints', in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Marc Bossuyt, Paul Lemmens, Koen de Feyter, and Stephan Parmentier, eds. (Antwerp: Intersentia, 2005).
48. Such nominal forms of satisfaction can be worse than nothing to the extent that the claimant continues to feel the anguish associated with harm while the impression is spread that reparative justice has been rendered, setting the stage for reconciliation.