Miskolc Journal of International Law
MISKOLCI NEMZETKÖZI JOGI KÖZLEMÉNYEK

VOLUME 1. (2004) NO. 2. PP. 259-289.

Dinah SHELTON[1]**:**

The World of Atonement Reparations for Historical Injustices

The April 2003 occupation of Iraq by armed forces predominately of the United States and the United Kingdom was accompanied by the looting of archaeological sites and the Iraqi National Museum.[2] Priceless artifacts dating back 7000 years disappeared. No effort was made by the occupying forces to protect the sites, although a few journalists and military personnel were later arrested when they attempted to smuggle looted objects into the United States.[3] Given that international law has obliged an occupying power to protect cultural property at least since the adoption of the Geneva Conventions of 1949[4] and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,[5] a new Iraqi government could seek reparations if the occupying powers fail to take widespread and effective action to recover or replace lost objects and restore the museum and sites.[6]

The looting and destruction of cultural property during wartime is probably as old as war itself.[7] Julius Caesar's 48 B.C. intervention in Egypt to support Cleopatra IV's royal claims against her brother Ptolemy XIII was accompanied by a fire that burned thousands of books in the ancient library of Alexandria, Egypt, at the time the most extensive collection of scholarship in the world.[8] The fire consumed manuscripts of science, philosophy, law and

---

1 Professor of Law, University of Notre Dame Law School. Reprinted with permission of the Netherlands International Law Review.

2 Andrews, Edmund L: Iraqi Looters Tearing Up Archaeological Sites, The New York Times, May 23, 2003 p. 1.

3 Zavis, Alexandra : Looted Iraqi Treasures Recovered Slowly, AP, May 7, 2003

4 Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. Earlier and less developed provisions are found in arts. 27, 47 and 56 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2 AJIL (1908), Supp. 90 (prohibiting pillage and protecting institutions dedicated, *inter alia*, to arts and sciences and prohibiting seizure, destruction or willful damage to historic monuments and works of art or science).

5 Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240-288, arts. 4(3) and 5. For a discussion of the 1954 Convention, see S. E. Nahlik, 'International Law and the Protection of Cultural Property in Armed Conflict,' 27 Hastings L. J. 1069 (1976).

6 As of August 4, 2003, Pietro Cordone, an Italian official in charge of Iraq's cultural activities, estimated that 1200 looted artifacts had been returned, but 2200 are still missing and the museum will not reopen for at least eighteen months. Sisario, Ben: Arts Briefing, New York Times, E2, Aug. 4, 2003.

7 See Capt. Kastenberg, Joshua E: The Legal Regime for Protecting Cultural Property During Armed Conflict, 42 A.F.I. Rev. 277, 1997

8 The library was founded by Ptolemy I Soter in 290 BC. At it peak it is estimated that the library held the equivalent of 100,000 to 125,000 books. The fire of 48BC is estimated to have burned 40,000 books. See Bibliotheca Alexandrina – On the Ancient Library, available at http://www.bibalex.org.

literature, including works of Aristotle, Euclid and Archimedes. Marc Antony partly compensated the kingdom by supplying some 200,000 scrolls from the Pergamum,[9] but many irreplaceable works were lost forever, causing unknown and unknowable global consequences.[10]

These examples of cultural property loss span a time frame of more than 2000 years and suggest the potential scope of claims for past injustices. It is probably not surprising that the destruction of the Alexandrian library has gone without a modern claim for reparations,[11] given the legal problems such a claim would face in trying to identify claimants, responsible parties, applicable law and proximate harm. Yet, history is replete with episodes of genocide, slavery, torture, forced conversions, and mass expulsions of peoples that remain alive in memory and sometimes resurge as a background to modern conflicts. To a large extent, the existence and boundaries of modern states are the result of past acts and omissions that would be unlawful today according to international law and most national constitutions and laws.

Historical injustices are generally seen as targeting entire groups, either disfavored minorities or foreign populations. They are different from and more than individual cases; they concern populations that have been killed, excluded and subject to discrimination by others who through privilege and suppression have enriched themselves. Historical claims thus generally cannot be based upon the remedial paradigm of individual perpetrator, individual victim and proven quantifiable losses. These differences pose formidable obstacles to reparations, especially when coupled with procedural barriers like statutes of limitations and the principle against non-retroactivity of law. Moreover, true reparations are costly because they entail some loss of social advantage by the powerful.

While the barriers to reparations are significant, historical events are the subject of a growing number of legal and/or political claims by groups seeking redress. The proliferation of such demands may represent a global tribute to the strength of human rights doctrine and its moral claim on the international community or the fact that success induces emulation.[12] Perhaps both elements are at work. German efforts to confront the Holocaust have set a standard for remedying the past that various groups have invoked and, throughout the world, states and societies are being asked to account for historic abuses and provide redress to victims or their descendants. Unresolved World War II injuries and losses, for example, have been brought

---

[9] Id.

[10] Id. The destruction begun by Caesar was completed after a decree of the Emperor Theodosius in 391 forbid pagan religions and the Bishop of Alexandria eliminated the library, viewing it as a house of pagan doctrine

[11] While modern Egypt made no reparations claim, various heads of state and other officials, including a representative of the Italian Ministry of Foreign Affairs, signed the *Aswan Declaration for the Revival of the Ancient Library of Alexandria* just over a decade ago, aiming to reconstitute the library as a repository for all human knowledge. Contributions, including financial assistance by UNDP, exceeded US $65,000,000 and the library reopened in 2003 with the cooperation of UNESCO. The *Aswan Declaration for the Revival of the Ancient Library of Alexandria* is available at http://www.sis.gov/eg/alex-lib/html/alex03.htm.

[12] According to the editor of a recent book on slave reparations, the success of some groups in obtaining reparations may be viewed as discriminatory by others who do not receive reparations for their injustices. See: Raymond A. Winbush, ed., *Should America Pay? Slavery and the Raging Debate on Reparations* (New York: Harper Collins 2003), p. 1. In Winbush's view, discrimination is 'not only a common occurrence, but is firmly rooted in international law.' *Id.* Chris K. Iijima posits that Japanese-Americans received reparations as a "model minority" and lesson to other groups. See Chris K. Iijima, 'Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation,' 40 B.C. L. Rev. 385, 1998

forward in recent years through litigation and negotiations.[13] The United Nations Conference on Racism, held in Durban in 2001, debated the issue of reparations for slavery and colonialism.[14] Other recent or current claims include those of Native Americans in the United States and Canada, aboriginal peoples in Australia and New Zealand, diamond miners and other victims of apartheid in South Africa,[15] and the families of disappeared persons in Latin America and North Africa. Less clear is whether the claims are predominately legal or moral ones. In either case, public interest in human rights, the rule of law, and legal certainty suggests the need to develop a framework to determine the legitimacy and modality of responding to reparations claims for historical injustices.

The issues, actors, legal regimes, and models for redressing historical injustices involve complex factors that must be evaluated in each case. Legal actions may seek to invoke state responsibility in international law (inter-state claims); national or international human rights law (individuals or groups filing complaints against a state or state agent); criminal law (a state or the international community prosecuting an individual perpetrator), or national tort law (individuals or groups seeking remedies against individual perpetrators). Substantive legal claims may be based on violations of human rights, state responsibility for injury to aliens, breaches of humanitarian law, violations of constitutional law, or acts contrary to national legislation such as theft, murder, or other personal injury. Equitable claims may assert unjust enrichment or a similar doctrine. Forms of reparations can include apologies, prosecutions, commemorations, memorials, rehabilitation, compensation, affirmative action, restitution, land reform, law reform and various types of truth commissions.

This article first describes some of the claims that are currently asserted and the responses of states and communities to them, from apologies and compensation to rejection. The next section indicates the primary arguments in favor of and against reparation for historical injustices, following which international law concerning state responsibility and human rights is briefly set forth. The article then examines the legal bases for claims in national law and equity and assesses some of the major claims according to international and national legal standards. The final section attempts an overall evaluation of the legal and political framework for repairing historical injustices.

---

13 More than 60,000 cases were filed in Greek courts as of Oct. 2001 arising out of World War II events. Rudolf Dolzer, 'The Settlement of War Related Claims: Does International Law Recognize a Victim's Private Rights of Action? Lessons after 1945' in "Fifty Years in the Making: World War II Reparation and Restitution Claims," 20 *Berkeley J. Int'l L.* 1, 296, at p 297 n. 2 (2002). On Oct. 30, 1997 a Greek court entered a default judgment against Germany and awarded damages. After the Greek government blocked enforcement of the judgment, Greek nationals sued in Germany seeking a declaratory judgment of liability. On June 26, 2003, the German Supreme Court held that Germany was not liable because the law in 1944 did not grant standing to individuals to pursue claims for violations of the laws of war. *Distomo Massacre Case*, BGH-III ZR 245/98 (June 26, 2003). See the discussion *infra*.

14 The World Conference against Racism, Durban South Africa, August 30, 2001 to Sept. 7, 2001, pursuant to UNGA 52/111, http://www.un.org/WCAR/e-kit/backgrounder1.htm.

15 On Nov. 6, 2003, a United States federal court began hearing a case against 34 international companies accused of profiting from apartheid in South Africa. BBC, 'Date Set in NY apartheid case' May 22, 2003. For background on the case see 'NGO Launches US Apartheid Reparations Law Suit,' South African Press Association, Nov. 12, 2002, available at http://allafrica.com/stories/pritable/200211140010.html.

A Sampling of Current Claims

With the German government having paid some 103 billion DM to victims of Nazi persecution,[16] individuals and groups in other states have come forward to press claims for mistreatment during World War II. Japanese Canadians asked the Canadian government for redress, apology, and the revision of history books with regard to their World War II relocation and detention.[17] Italian Canadians have done the same. Asian women who were forcibly detained as sex slaves by the Japanese military demand redress.[18] Former prisoners of war and civilians also seek compensation for the forced labor they performed in Germany and Japan.

Other claims involve events occurring a century or more ago. Chinese Canadians are seeking redress for the imposition of the Head Tax on Chinese immigrants, while Ukrainians want remedies for the World War I detention of about 5000 Ukrainian Canadians. Descendants of Acadians expelled from Nova Scotia have prepared a petition for presentation to the British government for reparations.[19] Families of would-be immigrants from India claim reparations because Canada refused permission for the Komagata Maru to land in Vancouver in 1914. In September 1995, when German Chancellor Helmut Kohl visited Namibia, some three hundred Herero tribal members led by Paramount Chief Kuaima Riruako presented a petition demanding US $600 million in reparations for alleged genocide during the Namibian war of 1904-7, when German forces and settlers killed some 75 – 80% of the Herero population.[20] The Herero also have pursued their claim for redress by filing a lawsuit against German companies Deutsche Bank, Terex Corporation and Woermann Line in United States federal court for the District of Columbia. The complaint asks US $2 billion from the companies, asserting that they were allied with imperial Germany in the Herero War.[21]

Abuses perpetrated against indigenous peoples represent perhaps the largest number of claims

---

16 Dolzer: *op. cit.* note 13 at 335 n. 157.

17 Omatsu, Maryka: Bittersweet Passage: Redress and the Japanese Canadian Experience, Toronto: Between the Lines, 1992

18 Lawsuits have been filed in Japan, the Philippines and the United States. For a discussion of the various claims, see <http://www.comfort-women.org/news.html>.

19 . Perrin, Warren A: The Petition to Obtain an Apology for the Acadian Deportation, 27 Southern University L. Rev. 1, 1999

20 Harring, Sidney L: German Reparations to the Herero Nation: An Assertion of Herero Nationhood in the Path of Namibian Development?, 104 W. Va. L. Rev. 393, 2002 Arbitrary seizures of their lands initially led to an uprising by the Herero, in response to which the German General Lothar Von Trotha issued a proclamation on October 2, 1904, ordering all Herero men killed and all their lands and cattle seized. Some Herero were sent to prison camps where they were subjected to eugenic experiments and torture. Women and children were driven into the Kalahari Desert where they died of mass starvation. Only a few thousand persons escaped to become refugees in what is now Botswana. Most of the traditional Herero lands today remain in the hands of German colonial descendants and are the mainstay of Namibian agriculture. Id. at pp. 397-98. See also Bley, Helmut: Namibia Under German Rule, Transaction Publishers, 1999; Bridgeman, John: The Revolt of the Hereros, Berkeley Univ. Press, 1981; Drechsler, Horst: Let Us Die Fighting: The Struggle of the Herero and Nama against German Imperialism, Lawrence Hill & Co, 1966; Pakenham, Thomas: The Scramble for Africa, New York, Avon Books, 1991, ch. 33.

21 Munnion, Christopher: Namibian Tribe Sues Germany for Genocide, filed January 31, 2003, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=news/2003/01/31/wherer31.xml>.

for historical injustices.[22] Many of the demands are based upon breaches of treaties entered into between a state and an indigenous group.[23] In Canada, claims involve the relocation of the Inuit in the 1950s and sexual and physical abuse of aboriginal students in residential schools where the children were sent after removal from their families.[24] Native Hawaiians demand redress for the loss of their independence, lands, and culture. They have filed state law claims based on the overthrow of the government in 1893, seeking back payment of trust revenues and to enjoin negotiation, settlement and execution of a release by trustees.[25]

Reparations for slavery in the United States (US) have been claimed and offered since well before emancipation in 1865.[26] At the end of the US civil war there were about 4.5 million slaves of African origin in the US who were promised 40 acres of land and a mule,[27] but instead were subjected to disenfranchisement and de jure discrimination during the following century. Issues of race continue to divide people in the US, where the descendents of slaves today number about 35 million persons. Many among these descendants are seeking redress, including by filing claims against individuals and companies for an accounting of their profits and assets acquired exploiting slave labor.[28]

While the issue of reparations for slavery is long-standing within the United States, it surfaced as an international issue mainly in the past decade. In 1992 the Organization of African Unity appointed a 'Group of Eminent Persons' with a mandate "to explore the modalities and strategies of an African campaign for restitution similar to the compensation paid by Germany to Israel and to survivors of the Nazi Holocaust."[29] Subsequently, at the African Regional Preparatory Conference for the 2001 UN Conference on Racism, African states asked for

---

[22] For an analysis of indigenous claims in the United States, see Bradford, William: With a Very Great Blame on Our Hearts: Reparations, Reconciliation, and an American Indian Plea for Peace with Justice, 27 Am. Indian L. Rev. 1, 2002-2003; Newton, Nell Jessup: Indian Claims in the Courts of the Conqueror, 41 Am. U.L. Rev. 753, 1992; Coulter, Robert T.: in Rethinking Indian Law 103, New Haven: Advocate Press, Inc., 1982

[23] Despite a plethora of treaties, Native American land holding went from 138 million acres in 1887 to 52 million acres by 1934. Some 26 million acres were lost through fraudulent transfers. See Brest, Paul and Oshige, Miranda: Affirmative Action for Whom?, 47 Stan.L.Rev. 855, 1995

[24] The Canadian practice of forcibly introducing indigenous children into residential schools is outlined in a 1998 report that attempts to make amends. *Gathering Strength: Canada's Aboriginal Action Plan,* available at www.ainc-inac.gc.ca/gs/chg_e.html. The Action Plan is based upon recommendations of an earlier report of the Royal Commission on Aboriginal People of Canada. Its "statement of reconciliation" calls for special attention to the cultural distinctiveness of indigenous populations.

[25] Office of Hawaiian Affairs v. State of Hawaii, Civ. No. 94-0205-01; Ka-ai-ai v. Drake, Civ. No. 92-3742-10 (1st Cir. 1992); Kealoha v. Hee, Civ. No. 94-0118-1 (1st Cir.).

[26] In 1774, Thomas Paine proposed reparations for the injuries caused by 'the wickedness of the slave trade,' Archive of Thomas Paine, Thomas Paine: African Slavery in America, available at http://www.mediapro.net/cdadesign/paine/afri.html. For more recent proposals, see Bittker, Bruno: The Case for Black Reparations, Boston: Beacon Press, 1973; Robinson, Randall: The Debt: What America Owes to Blacks, New York, Dutton, 2000. Between 1890 and 1917, over 600,000 of the 4 million emancipated slaves in the United States applied for pensions from the government on the basis that their labor subsidized the wealth of the nation. They formed the Ex-slave Mutual Relief, Bounty and Pension Association and lobbied without success for 26 years. See, Hitchens, Christopher: Debt of Honor, Winbush, *op. cit.* note 12, at 171.

[27] The phrase and the promise come from General William Tecumseh Sherman's Special Field Order No. 15 of January 16, 1865. Hitchens, *id.* at 174.

[28] Smith, Vern E.: Debating the Wages of Slavery, Newsweek, August 27, 2001, p. 20. In Congress, Representative John Conyers, first introduced the Reparations Study Bill (HR 40) in 1989. He has renewed the proposal in each subsequent session of Congress.

[29] Mazrui, Ali A.: Who Should Pay for Slavery? 40 World Press Review 22, August 1993

historical justice, laying stress on the right to financial compensation; the second recommendation of the Preparatory Conference called for "an International Compensation Scheme for victims of the slave trade, as well as victims of any other transnational racist policies and acts."[30]

Two of the main themes announced for the Durban Conference were (1) the treatment of victims of racism, racial discrimination and intolerance and (2) creation of effective remedies, recourse, redress and other measures at all levels of governance. The European preparatory conference for Durban said that "suffering caused by slavery or which arose from colonialism must be remembered."[31] The preparatory meeting of the Americas produced a commitment of action to alleviate inequalities that still persist because of the legacy of slavery. The measures pledged include making additional investments in basic social services such as health care, education, public health, electricity, drinking water, and environmental control; improving access to justice; and overcoming stereotypes. Another paragraph proved divisive in acknowledg[ing] that the enslavement and other forms of servitude of Africans and their descendants and of the indigenous peoples of the Americas, as well as the slave trade, were morally reprehensible, in some cases constituted crimes under domestic law and, if they occurred today, would constitute crimes under international law and accepting that these practices resulted in substantial and lasting economic, political and cultural damage to these peoples and that justice now requires substantial national and international efforts to repair such damage. Such reparation should be in the form of policies, programmes and measures adopted by the States which benefited materially from these practices, and designed to rectify the economic, cultural and political damage, which inflict the affected communities and peoples.[32]

The Asian Preparatory Conference, held in Teheran, forthrightly recognized that "States which pursued policies or practices based on racial or national superiority, such as colonial or other forms of alien domination or foreign occupation, slavery, the slave trade and ethnic cleansing, should assume responsibility therefore and compensate the victims of such policies and practices."[33] At the final preparatory conference of all regions, the US proposed an expression of regret combined with a pledge to aid African countries in lieu of an apology for slavery or reparations for descendants of slaves.

---

30 Declaration of the African Regional Preparatory Conference for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, WCR/CONF/DAKAR/2001/L.1 REV 3, Jan. 24, 2001. Paragraph 20 of the report reads: 'States which pursued racist policies or acts of racial discrimination such as slavery and colonialism should assume their moral, economic, political and legal responsibilities within their national jurisdiction and before other appropriate international mechanisms or jurisdiction and provide adequate reparation to those communities or individuals who, individually or collectively, are victims of such racist policies or acts, regardless of when or by whom they were committed.' At 6, para. 20.

31 Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Final documents of the European Conference against Racism, Strasbourg, France, Oct. 11-13, 2000, U.N. GAOR, Preparatory Comm., 2d Sess., Annex IV-V, U.N. Doc. A/CONF.189/PC.2/6 (2001).

32 Report of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Regional Conference of the Americas, Santiago, Chile, Dec. 5-7, 2000, U.N. GAOR, Preparatory Comm., 2nd Sess., Annex IV-V, U.N. Doc. A/CONF. 189/PC.2/7 (2001) at 14, para. 70. Over the objections of Canada and the United States, the paragraph remained in the report.

33 Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Asian Preparatory Meeting (Teheran, Feb. 19-21, 2001), U.N. GAOR, Preparatory Comm.., 2nd Sess., U.N. Doc. A/CONF.189/PC.2/9 (2001), at 11, para. 50.

Reparations remained a divisive issue at the Durban Conference itself. The Western Europe and Others group (including the EU, US, Canada, Australia, New Zealand and Japan) opposed international reparations, while states of Africa, Latin America and the Caribbean, and Asia sought agreement on compensation. Proponent states argued that current underdevelopment is a direct consequence of slavery, the transatlantic slave trade, and colonialism and the Conference therefore should promote a redistribution of wealth away from those responsible in favor of the descendants of past wrongs. In the end, the approved Durban Declaration and Programme of Action acknowledged that slavery and the slave trade constitute a crime against humanity today and urge concerned States to participate in compensation for its victims.[34]

Responses to Reparations Claims Involving Historical Injustices

States and governments have responded in varying ways to the proliferating claims for redress.

Apology

A prevalent action in recent years has been the issuance of a formal apology for past acts.[35] In 1992, President Chirac acknowledged French complicity in the deportation of 76,000 Jews of French nationality to death camps.[36] He also apologized to the descendants of Alfred Dreyfus and Emile Zola for the treatment afforded the two men.[37] British Prime Minister Tony Blair acknowledged an English role in the Irish potato famine. The Japanese government provided a limited recognition of wartime atrocities in Nanking. Benin and Ghana apologized for their roles in the slave trade.[38] Businesses and churches, too, have issued apologies, including the March 2000 apology of Aetna Insurance Company for issuing insurance policies to slave-holders on the lives of their slaves.[39] Pope John Paul II apologized for past injustices committed by the Catholic Church[40] while the Southern Baptists apologized for their former pro-slavery stance.[41]

---

34 Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban 31 Aug. – 8 Sept. 2001, U.N. GAOR, at 5-27, U.N. Doc. A/CONF.189/12 (2002). For a critical view of the Conference, see Christopher N. Camponovo, "Disaster in Durban: The United Nations World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, 34 *Geo. Wash. Int'l L. Rev.* 659 (2003).

35 Cunningham, Michael: Saying Sorry: The Politics of Apology, The Political Quarterly, 1999 p. 285; Gibney, Mark & Roxstrom, Erik: The Status of State Apologies, 23 Hum. Rts. Q 911, 2001

36 Taylor, Paul: France Finally Admits Role in Aiding Nazi Death Machine, Chicago Sun-Times, July 17 1995 at 20.

37 Mills, Nicolas: The New Culture of Apology, Dissent, Fall, 2001 p. 113-114.

38 Ghannam, Jeffrey: Repairing the Past, ABA Journal, November 2000 p. 39.

39 The companies may have been responding to recent legislative action. In 2000, the state of California enacted a law requiring insurance companies to reveal the existence of any policies issued on slaves' lives. Cal. Ins. Code §§ 13811 -13813 (West 2001). Eight companies, including Aetna, reported such policies and provided the names of 614 insured slaves. The City Council of Los Angeles voted unanimously on May 17, 2003 to draft a law requiring every company doing business with the city to report whether it ever earned profits from slavery. 'Los Angeles to Draft Law Revealing Business Links to Slavery,' *The New York Times*, May 18, 2003.

40 Memory and Reconciliation: The Church and the Faults of the Past. International Theological Commission, available at www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_concfaith_20000307_memory-reconcitc_en.html.

41 Mills: *op. cit.* note 37 at 113.

Indigenous groups also have received apologies. On Sept. 8, 2000, the director of the US Bureau of Indian Affairs formally apologized for the agency's participation in the clearing of western tribes.[42] The United Methodist Church in the United States apologized to Native Americans in the State of Wyoming for a massacre led by a Methodist minister.[43] Queen Elizabeth II apologized to the Maoris of New Zealand. In 1993, on the centenary of the conquest of the Kingdom of Hawaii, the United States Congress passed Public Law 103-150, known as the Apology Bill, which states: "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." The measure goes on to express the commitment of Congress to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii. In October 1997, the King of Norway apologized to indigenous Sami people for harm experienced under the earlier Norwegian policy of assimilation and a further apology was issued by the Prime Minister in December 1999. Similarly, in Denmark, in September 1999, the Prime Minister apologized to Inuit people displaced from northern Greenland in the 1950s.

Apology can serve different purposes. It can acknowledge the suffering of others, as when expressing sorrow over the death of a loved one ("I am sorry for your loss"). It can express regret and solidarity over events that are outside the control of the speaker ("I am really sorry about the miserable weather we are having"). It can also be an acceptance of fault leading to redress ("I am sorry I lost your book"). It is only in the last instance that apology may carry with it legal implications, establishing a causal link between the action of the speaker and the injury suffered. The possibility that an apology may serve to buttress legal claims can make government officials reluctant to express regret over historical injustices. US President George W. Bush, for example, has called the transatlantic slave trade "one of the greatest crimes of history," but has avoided issuing an apology for it.[44] In contrast, the US Congress's Apology Bill for Hawaii contains language that effectively acknowledges Hawaii's right of self-determination. In many circumstances, the exact meaning of apology and the sincerity with which an apology is given are difficult to discern. Unless the sincerity and meaning are clear, apology may exacerbate rather than mitigate the sense of injury resulting from historical injustices.

Restitution

In some instances, particularly where indigenous groups are concerned, negotiated reparations include restitution of lands and resources.[45] Australia, for example, returned 96 thousand

---

42 Remarks of Kevin Gover, Assistant Secretary, Indian Affairs, Department of the Interior, at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the BIA (Sept. 8, 2000). In 1830, Congress passed the Indian Removal Act to force all Native Americans to relocate west of the Mississippi River. As a result of forced relocation, killings, assimilation, and sterilization the estimated population of 10 million Native American at European arrival has declined to approximately 2.4 million. Glauner, Lindsay: The Need for Accountability and Reparation: 1830-1976 The United States Government's Role in the Promotion, Implementation and Execution of the Crime of Genocide against Native Americans,, Symposium: The End of Adolescence, 51 DePaul L. Rev. 911, 2002

43 Mills: *op. cit.* note 37 at 113.

44 BBC News World Edition, July 8, 2003.

45 Frantz, Carter D.: Getting Back What was Theirs? The Reparations Mechanisms for the Land Rights Claims of the Maori and the Navajo, 16 Dick. J. Int'l L. 489, 1998

square miles of land in 1976 to Aborigines in partial compensation for land seized by white settlers.[46] Canada also restored land to indigenous groups, after some thirteen years of negotiations. A recent agreement between Quebec and the Cree Nation gives the latter management of their natural resources and recognizes their full autonomy as a native nation. In Africa, a broad-based movement for restitution of land in South Africa, Namibia, and Zimbabwe, the South African Reparations Movement (SARM), formed in October 2000. South Africa is permitting land claims for restitution back to the Native Land Act of 1913.[47] In the United States, as early as 1946 an Indian Claims Commission was given jurisdiction to hear and resolve claims arising from the seizure of Indian property and treaty breaches by the United States.[48] The 1971 Alaska Native Claims Settlement Act granted indigenous Alaskans monetary relief as well as land.[49] New Zealand created a process for redressing wrongs committed in the late 1880s that involves returning lands and factories, fishing vessels and fishing rights.[50] A 1990 federal law in the United States orders the restitution of human remains of Native Americans along with grave goods and funerary objects.[51] In the context of World War II, stolen art and other property have been returned.[52]

Compensation

Compensation has also been forthcoming. The United States and Canada, for example, compensated their nationals of Japanese ancestry for their internment during World War II. [53] In October 2000 Austria established a $380 million fund to compensate individuals forced into slave labor during World War II.[54] Five US Native American groups have successfully recovered monetary compensation[55] as did indigenous groups in Norway and Denmark.[56] In March 2003, the US Supreme Court upheld a 1999 federal court decision awarding damages to Native Americans for trust fund mismanagement by the US Department of the Interior and

---

46 Reynolds, Henry: Law of the Land, Penguin Books, 1987 p. 31-54.

47 Restitution of Land Rights Act 22 of 1993, Republic of South Africa, Department of Land Affairs, White Paper on Land Policy sec. 3.17 (1997).

48 Act of Aug. 13, 1946, ch. 959, sec. 1, 60 Stat. 1049 (West 1999).

49 43 U.S.C. § 1601 (1998). The Alaskan Native Claims Settlement Act awarded US$1 billion and 44 million acres of land that had been wrongfully seized.

50 The Waikato Raupatu Claims Settlement Bill of 1995 gave reparations of US $40 million for the seizure of Maori lands by British colonists in 1863. See Cunneen, Chris. One Way to Give Back to the Stolen Generations, The Sydney Herald, Aug. 14, 2000, at 14. Information also available at http://www.ngaitahu.iwi.nz

51 Native American Graves Protection and Repatriation Act, 25 U.S.C.A. § 3001-3013, 18 U.S.C.A. § 1170. Many state laws in the US similarly protecting Native American remains and cultural objects. See H. Marcus Price III: Disputing the Dead: U.S. Law on Aboriginal Remains and Grave Goods, University of Missouri Press, 1991

52 Kowalski, Wojciech: Art Treasures and War: A Study on the Restitution of Looted Cultural Property Pursuant to Public International Law, Leicester, 1998. Cases seeking restitution include Rosenberg v. Seattle Art Museum, 70 F. Supp. 1163 (W.D. Wash. 1999); Goodman v. Searle, No. 96C 6459 (N.D. Ill. Feb. 9, 1998); and People v. Museum of Modern Art, 252 A.D. 2d 211 (N.Y. App. Div. 1999).

53 On the US actions, see Civil Liberties Act of 1988, 50 U.S.C. § 1989. See also 'Symposium: Racial Reparations: Japanese American Redress and African American Claims,' 40 *Boston Coll. L. Rev.* 477 (1998).

54 AP Newswire, Oct. 6, 2000.

55 The five tribes are: the Klamaths of Oregon, the Sioux of South Dakota, the Seminoles of Florida and the Chippewas of Wisconsin, and the Ottowas of Michigan.

56 Norway announced a collective compensation fund in January 2000, aimed at promoting indigenous language and culture. Denmark established a collective compensation fund following a Danish High Court order in August 2000.

Treasury.[57] The fund had been established in the 1830s to compensate Native Americans for earlier injustices, including deprivation of land.

In 1995, the State of Florida paid $2.1 million for a race riot and massacre that occurred in 1923 in the town of Rosewood, Florida.[58] Each of nine survivors received $150,000 while the 145 descendants of residents killed or whose property was destroyed were each paid between $375 and $22,535. In Chile, a 1992 law created a National Corporation for Reparation and Reconciliation to afford redress to some of the victims of human rights abuses perpetrated during the prior two decades.[59] In January 1998, Canada established a $245 million "healing fund" to provide compensation for the First Nation children who were taken from their families and transferred to residential schools.[60] The government of Puerto Rico issued a public apology and compensated with up to $6000 each of the activists for independence who were spied on from the late 1940s. A Swedish Inquiry into a eugenics program conducted prior to 1941 that sterilized those deemed "unfit" to reproduce, a high proportion of them being travelers or gypsies, recommended a compensation package amounting to 175,000 Swedish crowns to anyone forcibly sterilized.[61] Norway similarly authorized compensation of 10,000 Crowns to persons lobotomized between 1940 and 1948.[62]

The response to demands for slave reparations has varied over time. Initially, the U.S. Congress proposed legislative remedies to aid the transition of the slaves to freedom, even before the Civil War ended. The Confiscation Act of 1862 authorized the taking of all rebel property.[63] The Act was eventually repealed in favor of another measure of permanent confiscation.[64] The Freedmen's Bureau Act of 1865[65] created the Bureau of Freemen's Affairs and authorized the Bureau to lease and sell confiscated land, but the Bureau ceased activity after only five years. All land distributed to freed slaves was taken back after the assassination of President Lincoln. In mid-June 2000, a resolution introduced into the US Congress proposed a formal national apology for slavery[66]

Rejection

Governments have rejected some claims. Japan has refused to give an official apology or make reparations to World War II sex slaves, arguing non-retroactivity of the law and rejecting the

---

[57] United States v. White Mountain Apace Tribe, 123 S.Ct. 1126 (March 4, 2003). See also Cobell v. Norton, 240 F.3d 1081 (C.A.D.C., 2001)(Feb. 23, 2001).

[58] Bassett, Jeanne: House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury, 22 Fla. St. U.L. Rev. 503, 1994

[59] Law Nr. 19, 123 Creating the National Corporation for Reparation and Reconciliation (Chilean National Congress 1992).

[60] Canada Statement of Reconciliation issued Jan. 7, 1998.

[61] D. Porter: Eugenics and the Sterilization Debate in Sweden and Britain before World War II, 24 Scandinavian J. History 145, 1999

[62] Kocking, Barbara Ann Confronting the Possible Eugenics of the Past through Modern Pressures for Compensation, 69 Nordic J. Int'l L. 501, 2001

[63] Chisolm, Tuneen E.: Note, Sweep Around your Own Front Door: Examining the Argument for Legislative African American Reparations, 147 U. Pa. L. Rev. 677, 685, 1999

[64] Id.

[65] July 16, 1866, 14 Stat. 173, 1866

[66] The Apology for Slavery Resolution of 2000, H.R. 356, 106th Cong. (2000), available at http://www.house.gov/tonyhall/pr145/html.

assertion that the women were de facto slaves.[67] Japan admitted only in January 1992 that women had been used in official brothels during World War II.[68] The Australian government has denied reparations to members of the "Stolen Generations" of aboriginal children taken from their families as part of a government assimilationist policy, despite recommendations for an apology and compensation contained in the government-commissioned official report on the matter.[69]

The Durban Conference did not produce a collective apology for past slavery and colonialism. Participants acknowledged and expressed regret over "the massive human suffering" and plight caused by slavery, the slave trade, and colonialism, but called only for 'states concerned to honor the memory of the victims of past tragedies' and to find 'appropriate means' to restore the dignity of the victims. [70]

Law and Politics

Significantly, nearly all instances of reparations for historical injustices, whether in the form of an apology, in land or money, have come about through negotiations or the political process. In the United States, federal courts rejected claims for reparations for interned Japanese-Americans because in 1944 the United States Supreme Court held lawful the internment.[71] After government documents were declassified and showed the government had lied about the need for internment, a new case was filed.[72] The court found that relief could be granted to individuals, but final resolution of the matter came through legislation.[73]

A recent US case claiming slave reparations resulted in a decision that damages due to enslavement and subsequent discrimination should be addressed to the legislature, rather than to the judiciary. The court was unable to find 'any legally cognizable basis' for recognizing the claim,[74] distinguishing Native American claims because the latter were based upon treaties between nations. Similarly, in Japan, a reparations claim by South Korean women who had

---

67 See report of Special Rapporteur G. McDougall, UN EXCOR Comm. on Human Rights, 50th Sess., Prov. Agenda Item 6, at para. 4, UN Doc E/CN.4/Sub.2/1998/13 (1998). For actions taken to press the reparations claim, see Christine M. Chinkin, 'Women's International Tribunal on Japanese Military Sexual Slavery,' 95 *AJIL* 335 (2001).

68 M. Igarashi: Post-War Compensation Cases, 43 Jap Ann. of Int'l L. 45, at 49

69 Kocking, op. cit. note 62. See also, Graycar, Regina: Compensation for Stolen Children: Political Judgments and Community Values, 21 Univ. N.S.W. L. J. 253, 1998 Litigation for compensation over the Stolen Generations has been unsuccessful. Id., at p. 504. For the national report, see *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC)*(Sydney, Australia: Human Rights and Equal Opportunity Commission, 1997), available at www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/

70 Puddington, Arch: The Wages of Durban: The United Nations World Conference against Racism, Commentary, Nov. 2001, at 29.

71 Korematsu v. United States, 323 U.S. 214, 1944

72 584 F. Supp. 1406 (N.D.Cal. 1984).

73 Civil Liberties Act of 1988. An earlier act, the Japanese American Evacuation Claims Act of 1948, compensated for losses of real and personal property but not for the deprivation of liberty, moral injury to reputation, and pain and suffering attendant on internment. See Daniels, Roger, Taylor, Sandra and Kitano, Harry: Japanese Americans*:* From Relocation to Redress, Salt Lake City: Univ. of Utah Press, 1986 and Maki, Mitchell T., Kitano, Harry H. & Berthold, Megan S.: Achieving the Impossible Dream: How Japanese Americans Obtained Redress, Champaign: Univ. of Illinois Press, 1999

74 Cato v. United States, 70 F.3d 1103 1105 (9th Cir. 1995).

been held as sex slaves during World War II failed in the Hiroshima High Court on the basis that it lacked legal foundation.[75] Another case brought by forty-six former sex slaves from the Philippines claimed that the acts of Japan violated the Hague Convention of 1907 and that Japan had committed crimes against humanity as defined in the IMT Charter[76] and the Convention on the Prevention and Punishment of the Crime of Genocide.[77] The Tokyo District Court held on December 6, 2000, that the concept of crimes against humanity was not established in international law at the time of the acts alleged.[78] A lawsuit brought in a United States District Court by fifteen Asian women against Japan was similarly dismissed. The court's holding that the claims were barred by sovereign immunity was upheld on appeal.[79]

The fact that lawsuits do not produce a judgment favorable to reparations does not mean that they lack value in bringing attention to the legitimacy or moral dimensions of the claims at issue. Many lawsuits have been the precursor to negotiated or legislative settlements. Cases brought against insurance companies who failed to pay on policies owned by Holocaust victims led to the establishment of an International Commission on Holocaust Era Insurance Claims, formed by five of the major insurers.[80] In February 2000, it announced that it would begin a two year claim process to locate and pay unpaid Holocaust-era insurance policies.[81]

The 1995 German - US Agreement Concerning Final Benefits to Certain United States Nationals Who were Victims of National Socialist Measures of Persecution also resulted from a lawsuit brought by an individual Holocaust victim.[82] After the lawsuit was dismissed on the ground of German sovereign immunity, the US House of Representatives, under intense public pressure, voted in 1994 to lift German sovereign immunity for Holocaust claims. The German government then agreed to pay a lump sum settlement to US nationals including concentration camp survivors, in return for a waiver of all claims against Germany in that category.[83]

Many recent World War II-era cases have concerned banks. A class action filed in the US against Union Bank of Switzerland, Credit Suisse and other Swiss banking entities in 1997 alleged failure by the banks to return dormant accounts, looting of assets and profiting from

---

75 A 1998 ruling of the Shimonoseki Branch of the Yamaguchi District Court ordering nominal compensation was overturned in March 2001 by the Hiroshima High Court. *BBC News*, March 29, 2001.

76 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, London, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

77 Convention on the Prevention and Punishment of the Crime of Genocide, New York, December 9, 1948, 78 U.N.T.S. 277.

78 See "Comfort Women," Japan Forum Archive, available at <http://forum.japanreference.com/archive/topic/65-1.html>. Interestingly, however, as early as 1904 the Imperial Chancellor, Count von Bulow, called the extermination order issued respecting the Herero a 'crime against humanity.' See the letter from Bulow to Kaiser Wilhem II, 24 Nov.1904, quoted in Drechsler, *op. cit.* note 20, at p. 164.

79 Hwang Geum Joo v. Japan, 332 F.3d 679 (June 27, 2003).

80 The insurance claims were consolidated into a single case, In re Assicurazioni Generali S.P.A. Holocaust Insurance Litigation, No. 1374, 2000 U.S. Dist. LEXIS 17853 (S.D.N.Y. 2000).

81 Bayzler, Michael: The Holocaust Restitution Movement in Comparative Perspective, 20 Berkeley J. Int'l L. 11, at pp. 20-21, 2002

82 Princz v. Federal Rep. of Germany, 26 F.3d 66 (D.C. Cir. 1994).

83 Battauer, Ronald J.: The Role of the United States Government in Recent Holocaust Claims Resolution, 29 Berkeley J. Int'l L. 1, 4, 2002

slave labor.[84] It was asserted, first, that the banks unnecessarily required heirs to produce death certificates for Holocaust victims, using this as a pretext for failing to return funds deposited with them for safekeeping and making it impossible for heirs to receive the funds. Second, plaintiffs claimed that the banks wrongly accepted deposits from the Nazis knowing that the funds were looted or derived from slave labor. The federal court judge negotiated an agreement between the parties at the beginning of 1999 for $1.25 billion, to be paid in four installments over three years.[85] The Swiss government, all other Swiss banks and companies are released from future liability, except for three insurers who are targets of another case. The threat of sanctions and US government action were crucial to obtaining the settlement.

A second class action was filed in June 1998 against two German banks, with other defendants, including Austrian banks, later joined.[86] The case was settled in January 2000 for US $40 million. Finally, half a dozen French banks, a British bank and two US financial institutions were sued in the US. The British bank settled the case for US $3.6 million in July 1999 and the other banks agreed to establish two funds. One fund has no limits and will pay claimants who have documentation or other proof of wartime assets held in French banks. The second fund, capped at $22.5 million, compensates "soft claims" for which documentation is missing. These cases will be presented to a commission and each approved claim will result in payment of at least $1500. Distribution of the funds began in 2002.

In addition to the bank cases, more than 40 lawsuits have been filed against Nazi-era companies who allegedly used forced and slave labor.[87] Early claims were dismissed as precluded by the German settlement agreements while others were found to be time-barred.[88] These cases, however, also resulted in reparations being paid. Although the companies refused to settle the cases because they believed a settlement would acknowledge the legitimacy of the lawsuits, they agreed to establish a foundation into which they would make ex gratia payments and which would be the exclusive remedy and forum for resolving future claims.[89] Agreement was reached in December 1999 on a 10 billion DM capped settlement amount and the method of allocation was agreed in July 2000.

---

84 The original class actions were re-filed as separate actions and consolidated as In re Holocaust Victim Assets Litigation, Master Docket No. 96-CIV-4849 (ERK)(MDG), 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. Nov. 22, 2000).

85 The five classes of claimants eligible to receive payments are (1) the Deposited Assets Class who were Victims or Targets of Nazi Persecution seeking to recover assets deposited in a Swiss bank prior to May 9, 1945; (2) the Looted Assets Class, those seeking to recover compensation for assets belonging to them and stolen by the Nazis; (3) "Slave Labor Class I" those who worked for companies that deposited assets derived from that labor in the banks; (4) Slave Labor Class II, those who performed their labor in Switzerland and (5) the Refugee Class, individuals who sought entry into Switzerland to escape the Nazis and who were sent back. Covered are Jews, homosexuals, physically or mentally disabled or handicapped; Gypsies and Jehovah's Witnesses. Excluded are the Poles and Russians who were slave laborers, because they have an alternative remedy.

86 These were consolidated in March 1999 as In re Austrian and German Bank Holocaust Litigation, No. 98 Civ. 3938, 2001 U.S. Dist. LEXIX 2311 (S.D.N.Y. Mar. 7, 2001). A claim against a French bank was also filed, Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

87 The cases against private companies for utilizing slave and forced labor were consolidated in In Re Holocaust Era German Industry, Bank and Insurance Litigation, No. 1337, 2000 U.S. LEXIS 11650 (Aug. 4, 2000).

88 Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999); Burger-Fischer v. Degussa A.G., 65 F. Supp. 2d 248 (D.N.J. 1999).

89 Cohen, Roger: German Companies Adopt Fund for Slave Laborers Under Nazis, NY Times, Feb. 17, 1999 at A1.

The success of these lawsuits in raising the profile of reparations claims for historical injustices and ultimately securing redress has not been lost on other groups. In June 2002, a $50 billion class action suit was filed against Citigroup, Union Bank of Switzerland and Credit Suisse on behalf of victims of South African apartheid.[90] Armenians are now seeking reimbursement of the insurance proceeds paid by their deceased relatives on policies not honored. Eight lawsuits have been brought against insurance companies, shipbuilders and railroads on behalf of a class of slave descendants who assert that the companies unjustly profited from slave labor. The suits have been consolidated in a single action seeking an accounting, constructive trust, restitution, disgorgement and compensatory and punitive damages.[91]

Arguments Favoring and Opposing Reparations for Historical Injustices

In favor of reparations

Those claiming reparations present several reasons why reparations should be afforded for historical injustices. First, some acts were illegal under national or international law at the time they were committed. The victims have been unable to secure redress for political reasons, because evidence was concealed, or because procedural barriers have prevented them from presenting claims. In such circumstances, they argue that lapse of time should not prevent reparation for harm caused by the illegal conduct. Indigenous groups in the United States, for example, note that the government's 'relations with Indian tribes have devolved from legal recognition of their sovereignty to forced relocation, genocide, internment, imposition of a guardian-ward relationship, forced assimilation and underdevelopment, and now limited self-government under the shadow of the power of Congress to legally terminate their existence.'[92]

Second, states, communities, businesses and individuals have unjustly profited by many of the abuses, garnering wealth at the expense of the victims. The economic disparities created have continued over generations, often becoming more pronounced over time. It is thus contended that those who were unjustly enriched from slavery and apartheid, for example, should disgorge the wealth they accumulated in favor of those deprived of fair wages and their inheritance. As one author has put it: '… not seeking financial restitution, in the face of documented proof that financial giants worldwide are sitting on billions of dollars in funds made on the backs of … victims, which they then invested and reinvested many times over …, amounts to an injustice that cannot be ignored."[93]

Third, most examples of historical injustices have a compelling moral dimension because the events took place during or after the emergence of the concept of basic guarantees of human rights to which all persons are equally entitled.[94] Payment of damages is symbol of moral

---

90 In all, some ten separate actions have been filed against numerous corporate defendants. See In re South African Apartheid Litigation, 238 F.Supp.2d1379 (2002)(consolidating actions and transferring them to the Southern District of New York).

91 In re African-American Slave Descendants Litigation, 231 F.Supp.2d 1357 (2002).

92 Bradford: *op. cit.*, note 22 at n. 57.

93 Bayzler, Michael: The Holocaust Restitution Movement in Comparative Perspective, 20 Berkeley J. Int'l L. 11, 41, 2002

94 Olick, Jeffrey K and Coughlin, Brenda: The Politics of Regret: Analytical Frames, Politics and the Past (J. Torpey, ed., Rowman & Littlefield Publishers, 2003) p. 37.

condemnation of the abuses that occurred. Although not generally recognized in international law until after World War II, human rights were positive law in states in Europe and North America by the end of the 18th century, and at least partially recognized in other countries from the same period. By the end of the nineteenth century, international humanitarian law prohibited most of the twentieth century abuses. Proponents argue that if human rights are truly inherent and universal, then they apply not only territorially, but temporally and provide a basis to judge past practices. They point to the often savage treatment meted out to victims of historical injustices, in direct contravention of the stated norms, and to the lingering consequences of these acts.

Proponents of reparations also reject the notion that present generations have no responsibility for the past. They note that every individual is born into a society or culture that has emerged over time and that shapes each person, making the past part of the present and giving the society and individuals an historic identity. International law, recognizing that institutions or collective entities such as states have continuity over time, provides that a change of government does not absolve a state of responsibility for wrongful conduct.[95]

Finally, apology is sought and supported because it acknowledges the suffering of victims and the legacies of that suffering in contemporary society. The acknowledgement in itself can be restorative and help promote better relations today. 'The discourse of universal human rights is tied directly to a politics of regret because its advocates believe that only gestures of reparation, apology, and acknowledgment can restore the dignity of history's victims and can deter new outbreaks of inhumanity.'[96] On a practical level, '[u]nrighted wrongs can leave victims uncompensated, under-deter harmful conduct, and foster social resentment.'[97]

Against reparations

The most common objection to reparations for historical injustices is the general principle of non-retroactivity of the law. This ground of opposition assumes, of course, that the acts were lawful at the time they were committed. The passage time also raises the problem of long-passed statutes of limitations or laches and the fact that intervening events and contingencies can obscure the causes of harm.[98] Statutes of limitations and laches doctrines are deemed to promote efficiency and certainty by ensuring that claims are fresh and reasonably connected in time and space to a particular act. The older the claim, the more problematic it is to resolve.

The identities of the parties also create difficulties according to opponents of reparations. Whether the defendant is a state or private party, the notion of personal responsibility, including a ban on bills of attainder in the common law, means it is unjust to require individuals or companies today to pay for the acts of their predecessors.[99] Opponents also

---

95 In the Distomo Massacre Case, supra note 13, the German Supreme Court found that in general Germany can be liable for compensation claims as the legal successor of the German Reich.

96 Olick and Coughlin, o*p. cit*. n. 94 at p. 42.

97 "Symposium: Debates over Group Litigation in Comparative Perspective: What Can We Learn from Each Other?" 11 *Duke J. Comp. & Int'l L.* 157, at 158 (2001).

98 Soifer, Aviam: Redress, Progress and the Benchmark Problem, 40 B.C. L. Rev. 525, 1998

99 See, e.g., the comments of Representative Henry Hyde, Republican member of the United States Congress: 'The notion of collective guilt for what people did (200 plus) years ago, that this generation should pay a debt for that generation, is an idea whose time has gone. I never owned a slave. I never oppressed anybody. I don't

note that in many instances not only are living perpetrators absent, but there are no present day victims of temporally distant violations. In terms of standing to present claims, some governments contend that international claims, e.g. for war reparations, can only be presented by other states. Moreover, in foreign domestic courts, states generally are afforded sovereign immunity from suit.[100]

Other legal hurdles include proving that present harm was caused by past abuses and determining compensation or other appropriate remedies. In some instances, opponents point to existing laws protecting human rights and affirmative action, calling these reparative in aim and effect.

Governments sometimes object to reparations claims on political or economic grounds. The Namibian government, predominately composed of the Ovambo tribe, opposes the claim of the Herero on the basis that all people in Namibia were exploited by the Germans and none should be singled out for reparations. The federal government in the United States filed a brief in support of the insurance industry's challenge to a California law requiring disclosure of Holocaust insurance policies,[101] calling the law an infringement of presidential control over foreign affairs. The South African government opposes apartheid reparations litigation in the United States on the basis that the lawsuits could destabilize the South African economy.[102]

Some view reparations for historical injustices as the triumph of a victim psychology that blames everyone else for today's problems, saying that "[w]hat is alarming is the extent to which so many minorities have come to define themselves above all as historical victims."[103] When a community bases its communal identity almost entirely on the sentimental solidarity of remembered victimhood, it may give rise to recurring cycles of violence and turn victims into perpetrators.

Opponents of reparations for slavery and colonialism introduce other objections. Some human rights advocates contend that combating slavery and slave-like practices of human trafficking today is more important than reparations for historical slavery.[104] Respecting claims of African states, historians note that Africans were actively engaged and compliant in slavery, as were other areas of the world for millennia.[105] Arabs, Chinese and Malays engaged in the slave trade on the eastern shore of Africa. No causal relationship therefore can be shown

---

know that I should have to pay for someone who did generations before I was born.' Kevin Merida, 'Did Freedom Alone Pay a Nation's Debt? Rep. John Conyers Jr. Has a Question. He's Willing to Wait a Long Time for the Right Answer,' *Wash. Post*, Nov. 23, 1999, at C1.

100 See e.g. Distomo Massacre Case, German Supreme Court, *supra* note 13; Hwang Geum Joo, *supra* note 79.

101 The government filed an amicus curiae petition in support of the petitioners in American Insurance Association v. Garamendi, 123 S.Ct. 2374 (2003).

102 See 'SA Monitor: Institute for Justice and Reconciliation,' available at http://www.ijr.org/za_mon/rep_n.html, citing South African government officials including President Mbeki in opposition to US apartheid lawsuits.

103 Elazar Barkan, "Restitution and Amending Historical Injustices in International Morality" in Torpey, *supra* note 94, p. 91 at 92.

104 Slavery continues today in many parts of Africa (Cameroon, Cote d'Ivoire, Mauritania, Nigeria, Somalia, South Africa, Sudan, Ethiopia, Ghana, Niger, Mali, Morocco, Sierra Leone, Togo and Uganda. See U.S. Department of State, Country Reports on Human Rights Practices. Bonded labor is common in areas of Asia and Latin America, while sex slave trafficking is widespread in Europe.

105 Metzler, Milton: Slavery: A World History, De Capo Press, 1993 Vol II 27-32.

between conditions in Africa today and European actions.[106] Even assuming a causal relationship, debt relief, development funds, and improved access to international markets – which are being promoted -- arguably provide more appropriate redress than would lump sum payments to sometimes unrepresentative governments. Any redress for historical injustices should also be discounted by historical benefits conferred upon African states. Another objection made is that the descendants of African slaves mostly live outside Africa today and if reparations are due to anyone, they are due to the families of former slaves and not to African states.

The legal framework of reparations: international and national law

International reparations for historical injustices may be afforded through (1) interstate claims based upon state responsibility and diplomatic protection; [107] (2) an interstate peace treaty at the end of a war; (3) a human rights claim brought by victims directly against the responsible state. Reparation is defined as "payment for an injury or damage; redress for a wrong done."[108] In international law, as a precondition, there must be a wrong that qualifies as legal damage. Marjorie Whiteman observed that the term "damages" presupposes the existence of an international claim based upon a wrongful act or omission.[109]

State responsibility

In the Articles on State Responsibility recently approved by the International Law Commission and submitted to the General Assembly,[110] reparations are owed for every breach of an international obligation[111] due to an act or omission attributable to the state.[112] Absent a breach of law, the duty to afford reparations does not arise, but upon such breach, the duty to afford reparations automatically becomes an independent legal duty.[113] The rules apply to inter-state claims and may have limited utility when the claimant is an individual, group, or organization,[114] but Article 33 contains a savings clause providing that the Articles do not prejudice rights accruing directly to a person or entity other than a state, leaving it to primary

---

106 Howard, Rhoda E. –Hassmann: Moral Integrity and Reparations for Africa, Human Rights Working Papers No. 16, posted 27 Sept. 2001, available at:
http://www.du.edu/humanrights/workingpapers/index.html

107 On diplomatic protection, Vattel (1758) said: 'Whoever uses citizens ill, indirectly offends the state which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible oblige him to make full reparations; since otherwise the citizen would not obtain the great end of the civil association, which, safety.' (J. Chitty, ed., 1985), § 71.

108 *Black's Law Dictionary* (5th ed. 1979), p. 1167.

109 Whiteman, Marjorie I: Damages in International Law, 1937, reprinted William S. Hein & Co., 1978 p. 6.

110 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UNGAOR, 56th Sess., Supp. No. 10, at 3, UN Doc. A/56/10 (2001)[hereinafter SR Articles]. The United Nations General Assembly adopted Resolution 56/83 on December 12, 2001, commending the articles to the attention of governments 'without prejudice to the question of their future adoption or other appropriate action.' GA Res. 56/83, para. 3 (Dec. 12, 2001), available at http://www.un.org/docs.

111 Arts. 1, 30-31, SR Articles ('every internationally wrongful act of a State entails the international responsibility of that State' and state responsibility creates duties of cessation, non-repetition and full reparation).

112 Attribution of an act or omission to a state is discussed in SR Articles 4-11.

113 Shelton, Dinah: Righting Wrongs: Remedies in the Articles on State Responsibility, 96 AJIL 833, 2002

114 SR Articles 42-48.

rules to define such rights.

The resolution of an international claim for historical injustice may require a determination of the law applicable to events that commenced or were concluded long ago. International dispute resolution bodies have expressed the notion of inter-temporality, that the rights and duties of parties are determined by the law in force at the time a claim arises. In the Island of Palmas Case,[115] arbiter Huber declared that inchoate claims of sovereignty arose upon discovery of new lands, based on the law at the time of discovery, but that the maintenance of sovereignty depended upon how the law and facts evolved. Thus, original title could be divested according to legal developments, based on the distinction between the creation of rights and the continued existence of rights. In the Advisory Opinion on Namibia,[116] the ICJ also took an evolutionary approach to legal obligations, finding that the terms of the Mandate over South-West Africa 'were not static, but were by definition evolutionary, as also, therefore, was the concept of the sacred trust. The parties to the Covenant must consequently be deemed to have accepted them as such.' Thus, interpretation of the agreement at issue was not governed by the law of 1919, but by developments in the subsequent half-century. The Court was clear that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.' Thus, original intent is not conclusive on the rights and duties of the parties. The ICJ applied the same evolutionary approach to interpreting the bilateral agreement between Hungary and Slovakia in the Gabçikovo-Nagymaros Project.[117]

In 1975, the Institut de Droit International adopted a resolution on intertemporality in public international law.[118] The resolution confirms that states and other subjects of international law have the power to determine the temporal sphere of application of norms and thus may give them retroactive effect. In the absence of a clear indication of the temporal scope of norms, the Institute proposed that any rule which relates to the licit or illicit nature of a legal act shall apply while the rule is in force, but any rule which relates to the continuous effects of a legal act shall apply to effects produced while the rule is in force, even if the act has been performed prior to the entry into force of the rule. Thus, the legality or illegality of historical events must be judged according to the law in force at the time in question, but the continuing effects of these events can be judged by more recent standards.

International law, like the law within states, is generally presumed to have prospective force only. Many treaties are explicitly non-retroactive: the Vienna Convention on the Law of Treaties, May 23, 1969,[119] Article 4, provides that the Convention applies only to treaties which are concluded by States after the entry into force of the Convention for such states, without prejudice to the application of pre-existing rules of customary international law.[120]

---

115 Island of Palmas Case (United States v. the Netherlands) 2 UNRIAA 829 (1928).

116 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16.

117 Case Concerning the Gabçikovo-Nagymaros Project (Hungary v. Slovakia), 1997 ICJ Rep. 92.

118 'The Inter-temporal Problem in Public International Law,' Resolution adopted by the Institut de Droit International at its Wiesbaden Session, 56 Ann. De l'Institut de Droit Int'l 537 (1975).

119 Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), 63 AJIL 875 (1969), 8 ILM 679 (1969).

120 A very few authors have tried to invoke the concept of jus cogens to give retroactive effect to certain norms. However, this involves giving the concept of jus cogens itself retroactive effect, because its inclusion in the

Alternatively, retroactivity may be foreseen or even required. A treaty may apply to a fact or situation prior to its entry into force. International environmental law, like national regulation, may require a polluter to bear the cost of cleaning up pollution that was lawful at the time of the discharge.[121] The International Convention for the Protection of the Ozone Layer,[122] with its Montreal Protocol on Substances that Deplete the Ozone Layer,[123] and the Framework Convention on Climate Change,[124] with the Kyoto Protocol, foresee roll-backs in the development, use or emissions of regulated substances, to levels existing a decade or more preceding the regulation.

War reparations

In the settlement of armed conflicts, reparations are often a matter of compromise and look to the future as much as to the past, to reconciliation rather than redress or punishment. There is no consistent legal basis for war reparations,[125] but in most instances only the nationals of the victor state have received reparations: 'The alien enemy's individual grievances are settled by the treaty of peace, and if his country should happen to lose in the war, he is without redress. If his country should be the conqueror, indemnities may be demanded from the defeated nation, but his pecuniary remedy then depends on the bounty of his own state.'[126]

Humanitarian law seems to afford standing to make claims to states only. Article III of the 1907 Hague Regulations, Laws and Customs of War on Land[127] expresses the duty to compensate for injuries caused during war: "A belligerent party which violations the provisions of the said Regulations shall, if the case, demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." However, according to one court, 'nothing in the Hague Convention even impliedly grants individuals the right to seek damages for violation of [its] provisions.'[128] Nonetheless, the Treaty of Versailles implemented the Hague Convention requirement by establishing mixed

---

Vienna Convention on the Law of Treaties represented progressive development not codification of international law. For an anachronistic analysis, see Haunani-Kay Trask: Restitution as a Precondition to Reconciliation: Native Hawaiians and Indigenous Human Rights, in Winbush *op. cit.* n. 12 p. 32 at 41 in which the author alleges violations of the Universal Declaration of Human Rights in 1893 and suggests that as a peremptory norm, "the principle of self-determination is of sufficient importance to be applied retroactively to relationships among states and peoples before the adoption of the 1948 United Nations Charter." *Id.* at 41.

121 The polluter pays principle is widely accepted in international environmental law and incorporated in most international environmental agreements. In national law, see Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980, codified at 42 U.S.C. § 9601 et seq (1994).

122 Vienna Convention for the protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. 11097, 25 ILM 1529 (1985).

123 Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 ILM 1550 (1987).

124 Framework Convention on Climate Change, May 9, 1992, 31 ILM 849 (1992).

125 Bergmann, Carl: The History of Reparations, New York, Houghton Mifflin, 1927

126 Borchard, Edwin: The Diplomatic Protection of Citizens Abroad, New York The Banks Law Publ. Co., 1915 p 251.

127 (Hague IV) and Annexed Regulations, Oct 18, 1907, 36 Stat. 2277, 1 Bevans 631.

128 Fishel v. BASF Group, U.S. Dist. LEXIC 21230 at 14 (S.D. Iowa 1998). Yet, an early US case, Christian County Court v. Rankin & Tharp, 63 Ky. (2 Duv.) 502 (1866), a state court granted private compensation against Confederate soldiers for burning the courthouse "in violation of the law of nations" saying that "for every wrong the common law provides an adequate remedy . . . on international and common law principles."

arbitration tribunals for private claimants to present their damages against Germany, even against the wishes of their own governments.[129]

The decisions made by governments in concluding a peace treaty may later preclude injured individuals from obtaining redress. World War II peace treaties deliberately excluded or settled some claims. For German reparations, the Allies operated on the assumption that reparations would afford partial compensation calculated on the basis of German assets, rather than the full value of loss and injuries. Second, the signatories recognized that reparations would extinguish all claims of their nationals, including those for forced labor, against Germany and its agencies. Issues with respect to reparations were to be determined either through a comprehensive peace treaty or bilateral agreements.[130]

The recorded negotiations with Japan after World War II indicate a conscious decision to waive many claims for reparations:

> Reparation is usually the most controversial aspect of peacemaking. The present peace is no exception. On the one hand, there are claims both vast and just. Japan's aggression caused tremendous cost, losses and suffering. On the other hand, to meet these claims, there stands a Japan presently reduced to four home islands which are unable to produce the food its people need to live, or the raw materials they need to work. Under these circumstances, if the treaty validated, or kept contingently alive, monetary reparations claims against Japan, her ordinary commercial credit would vanish, the incentive of her people [would disappear] and the misery of body and spirit. . . would make them easy prey to exploitation.[131]

The Japanese peace treaty ultimately provided: 'that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering.' Several bilateral agreements that included reparations were later concluded, but the unresolved claims of those who suffered abuse in Asia continue to surface and garner support.

---

129 Treaty of Versailles, June 28, 1919, 2 Bevans 43.

130 Between 1959-1964, Germany agreed upon lump sum payments with 12 countries, amounting to 971 million DM, the amounts to be transferred to nationals of the receiving states. For an example of a bilateral agreement, see Luxembourg Agreement between the Federal Republic of Germany and Israel, Sept. 10, 1952, 1953 BGB1.II, 37. Pursuant to Article 1(a), Germany paid 3 billion DM to the State of Israel in the form of goods and services for resettlement of Jewish refugees. Post-reunification and changes in the governments of Eastern Europe a further set of agreements were concluded. In Oct. 1991, Germany agreed to pay to a Polish fund an amount of 500 million DM to benefit victims of Nazi persecution. Similarly in 1993, Germany agreed with Russia, Byelorussia and the Ukraine to create a foundation to benefit those persecuted. About 1.5 billion DM committed to the foundations. An agreement with the Czech Republic established a Future Fund with 140 million DM and other former Eastern bloc states received about 80 million between 1998 and 2000. In 1998 another 200 million was given to the Claims Conference to extend benefits to Jewish persons in Eastern Europe. Dolzer, op. cit. note 13 at p. 335. On July 7, 2000, the German Bundestag established another foundation with joint contributions by the government and industry of 5 billion DM each to compensate those who performed forced labor during the War.

131 See U.S. Dept. of State, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 82-83 (1951) quoted in In re World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939, 942 (N.D. Cal. 2000).

Human rights claims

International human rights instruments generally provide a right to a remedy when acts violate human right rights guaranteed by international or national law.[132] Most human rights treaty procedures permit complaints to be filed only for non-conforming state conduct occurring after the entry into force of the treaty for the state.[133] The notion of "continuing violations" has, however, mitigated the effect of this rule, as has the independent requirement that a remedy be provided even for violations that took place prior to entry into force of a Convention.[134]

Non-retroactivity is required for criminal offenses. Article 11(2) of the Universal Declaration of Human Rights provides that 'no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one applicable when the act was committed.'[135] A half century of controversy has surrounded the question of whether the Nuremburg prosecutions involved ex post facto offenses, despite the Nuremberg Charter's reference to existing treaties and customary international law binding on Germany.[136] Reparations other than prosecution are considered restorative rather than punitive and should not be affected by bans on ex post facto offenses.
International human rights law also recognizes that unilateral acts of states may retroactively alter vested rights. Thus, states may divest property owners of their previously acquired

---

132 See, e.g. Art. 8, UDHR ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law); Art. 2(3)(a) ICCPR (parties shall ensure that any person whose rights or freedoms as recognized in the Covenant are violated shall have an effective remedy); Art. 25, American Convention on Human Rights.

133 The Optional Protocol to the International Covenant on Civil and Political Rights, for example, permits communications against states parties to the Covenant and Protocol, thereby excluding events occurring before the state becomes party to the Covenant. See also Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, 5 ILM 352 (1966), Art. 14.

134 See, e.g. Inter-Am. Comm'n Hum.Rts, Res. 74/90, Case 9850 (Argentina), 4 Oct. 1990, Ann. Rep. Inter-Am. Comm'n Hum. Rts. 1990-1991, OEA/Ser.L/V/II.79 rev. 1, doc. 12, 22 Feb. 1991.

135 See also, Art. 7(1) of the European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221, ETS 5 (no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty b e imposed than the one that was applicable at the time the criminal offence was committed. Paragraph 2 adds that the prohibition 'shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.'); Art. 9, American Convention on Human Rights, San Jose, Costa Rica, Nov. 22, 1969, OAS Off. Rec. OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr.1, Jan. 7, 1970, 9 ILM 101 (1970). For a domestic application of the non-retroactivity rule as regards war crimes and crimes against humanity, see Constitutional Court of Hungary, Decision 53/1993 of 13 Oct. 1993, 'On War Crimes and Crimes against Humanity,' in Laszlo Solyom and Georg Brunner, *Constitutional Judiciary in a New Democracy* (Ann Arbor, University of Michigan Press, 2000), 273.

136 The London Agreement defined crimes against peace in article VI as "planning, preparation, initiation, or waging a war of aggression, or a war in violation of international treaties, agreements, assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." The charge involving crimes against humanity was limited to acts committed between September 1939 and April 1945, i.e. during wartime. For the court's rejection of a defense based on *nullum crimen sine lege* see 'The Justice Case,' (Case 3), Opinion and Judgment, III Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 19, 1946-49 (1951), pp. 954-984.

property provided the taking is for a public purpose, non-discriminatory, and accompanied by appropriate compensation. A government, similarly, may lose rights to state property when recognition is withdrawn from it and transferred to another body.[137]

In the absence of a clear indication on the part of a law-making body, most national and international courts will presume non-retroactivity,[138] but they may "find" a new rule to govern prior conduct where necessary to resolve a dispute.[139] Implicit in the presumption of non-retroactivity is the notion of fundamental fairness, the idea that individuals may legitimately rely on legal norms in force:[140] 'Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'[141] Yet, reliance may not be legitimate if the rule is openly contested, in transition, or patently unjust.[142]

National law

National law claims, like those in international law, depend in large part on the constitutional and other norms in force at the time the acts occurred. Some historical injustices were clearly perpetrated in violation of positive law. Others, probably the majority, were sanctioned by laws in force at the time. However, retroactive application of constitutional principles and statutes is not uncommon. Such retroactivity may take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or conduct already past.[143] The United States Supreme Court sometimes gives retrospective application to its constitutional rulings or to statutes, weighing the merits and demerits of retroactive application of the law by looking to "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[144] The Court permits retroactive application of rules that are deemed "absolute prerequisites to fundamental fairness."[145] Accordingly, the judgment whether a particular statute acts retroactively should be informed and guided by considerations of fair notice, reasonable reliance, and settled expectations.

---

137 Statement of the United States on Withdrawal of Recognition from the Government of the Republic of China (Taiwan), 80 Dept. State Bull. 26, 1979

138 See, e.g., 'Retroactivity and Administrative Rulemaking,' 1991 *Duke L.J.* 106.

139 See, e.g. Trail Smelter Case (U.S. v. Canada), 3 UNRIAA 1911 (1941) acknowledging that 'No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But, here also, no decision of an international tribunal has been cited or has been found.' Despite this lack of precedent, the Tribunal was able to determine that Canada was liable for damage caused by the lawful activities of the Trail Smelter drawing upon analogies from inter-state cases in federal states.

140 Fallon, Richard H. Jr. and Meltzer, Daniel J.: New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1733, 1991

141 Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).

142 Meltzer: Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum L. Rev. 247, 1988

143 INS v. St. Cyr, 533 U.S. 289, 321 (2001).

144 Linkletter v. Walker, 381 U.S. 618, at 629 (1965)(No retroactive application of criminal statutes is permitted); Boule v. City of Columbia, 378 U.S. 347, 363 (1964)(retroactive application of criminal statute to conduct not criminal at the time it was undertaken denies due process).

145 Teague v. Lane, 489 U.S. 288 (1989) at 314-15; Stovall v. Denno, 388 U.S. 293 (1967) at 297.

International and national legal doctrine thus suggests that historical claims may warrant reparations in two circumstances. First, when the acts were illegal at the time committed and no reparations have been afforded.[146] Second, retroactive remedies may be justified where reliance on the earlier law was not reasonable and expectations were not settled because the law patently conflicted with fundamental principles then in force.[147]

Assessing Historical Injustices: Three Cases

This section describes current efforts to obtain reparations in three specific cases. The events date from hundreds of years to just over half a century ago. The numbers of claimants range even further, from hundreds to millions of individuals. The legal arguments are summarized to allow comparison of the cases.

Japanese actions during World War II.

Many cases have been filed in recent years in Japanese and other states' courts for un-redressed acts of the Japanese government during World War II, including slave labor, the 1937 Nanking massacre, deaths in biological and chemical warfare programs, and sexual slavery (the so-called comfort women).[148] Other suits have been brought by former prisoners of war and those injured by unexploded ordnance left behind in China.

Japan consistently argues that the Treaty of Peace (Sept. 8, 1951)[149] and subsequent bilateral agreements for the payment of reparations closed the door on the past and no individual claim may now be brought. The argument has succeeded thus far. In July 1999, California enacted a law to permit any lawsuit by 'a prisoner-of-war of the Nazi regime, its allies or sympathizers' to 'recover compensation for labor performed as a Second World War slave victim...from any entity or successor in interest thereof, for whom that labor was performed....'[150] The statute of limitations extends to 2010. Although Germany was the initial target, the language was drafted to allow suits against Japanese and Italian entities. U.S. and allied former prisoners of war and civilians filed some two dozen lawsuits against Japanese corporations that employed slave labor during the war.[151] The consolidated cases[152] were dismissed on September 21, 2000, the judge holding that the 1951 Treaty of Peace included a U.S. waiver of claims on behalf of all U.S. nationals against Japan and its nationals, including Japanese corporations. The judge

146 Traditionally states could and often did renounce claims on behalf of their nationals in time of war and peace. With the widespread recognition of the right to a remedy as a human right, it is open to question whether such waivers continue to be valid in international law without alternative means of redress.

147 See e.g. Altmann v. Republic of Austria, 317 F.3d 954 (2002)(giving retroactive application to the expropriation exception to the Foreign Sovereign Immunities Act, 28 U.S.C. sec. 1605(a)(3) on the ground that Austria could not have had any settled expectation that the State Department would have recommended immunity for the wrongful appropriate of Jewish property in the 1930s and 1940s.).

148 Yoshiaki, Yoshimi: Comfort Women: Sexual Slavery in the Japanese Military during World War II, New York: Columbia University Press, 2000; Yu, Ton: Reparations for Former Comfort Women of World War II, 36 Harv. Int'l L. J. 528, 1995

149 3 U.S.T. 3169, 136 U.N.T.S. 45.

150 Cal. Civ. Proc. Code §. 354.6 (West 2000).

151 See <http:www.law.whittier.edu/sypo/final/lawsuit.htm>.

152 In re World War II Era Japanese Forced Labor Litigation, 114 F. Supp2d 939 (N.D. Cal. 2000).

noted that Article 14(b) of the Treaty bars not only reparations, but "other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." The same waiver would apply to bar claims by British, Australian and New Zealand prisoners of war, whose nations signed the 1951 Treaty.

Although Chinese, Filipino and Korean civilian internees were not citizens of countries that signed the treaty, their claims were also dismissed. The judge held that the claims were time-barred and that the California law was an unconstitutional infringement of federal foreign affairs powers. The U.S. government supported the dismissal, taking a very different approach to the one it had previously taken in litigation against Germany and German companies, where it supported reparations. The U.S. government also argued for dismissal of the 'comfort women' case.[153]

The procedural barriers are significant. Japanese courts have proven unsympathetic and actions cannot be brought against Japan elsewhere because of its sovereign immunity;[154] thus the efforts to hold companies liable. However, signatories to the 1951 Treaty of Peace could reopen the issue of reparations on the basis of the most favored nation clause, Art. 26 of the Treaty of Peace. It provides that 'Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.' Japan paid reparations pursuant to provisions of post-war bilateral treaties it concluded with Sweden, Spain, Burma, Denmark, the Netherlands and Russia. The most favored nation clause thus could allow reparations claims to be made by signatories to the 1951 Treaty of Peace. On the other hand, it is unlikely that private individuals have any standing to assert the treaty rights of the states parties. As with the German Holocaust cases, the remedy for World War II abuses of civilians and prisoners of war is likely to come only through inter-state action, which depends on public opinion and political pressure on behalf of the victims.

On the merits, Japan had treaty obligations prohibiting force labor.[155] Based on these agreements, the Federation of Korean Trade Unions requested the International Labor Organization to rule that 'comfort women' were forced laborers. The ILO Committee of Experts agreed despite Japanese contentions that the agreements did not apply to 'colonial territories' such as occupied Korea.[156] Other relevant treaties include the 1929 Geneva

153 Hwang Geum Joo v. Japan, *supra* note 79.

154 In Hwang Geum Joo, *id.*, the federal court of appeals held that the "commercial activity" exception to the Foreign Sovereign Immunities Act should not be given retroactive effect because of the "settled expectations" of sovereign states prior to 1952.

155 In 1925 Japan ratified the International Convention for the Suppression of the Traffic in Women and Children (1921); the International Agreement for the Suppression of the White Slave Traffic (1904); and the International Convention for the Suppression of the White Slave Traffic of 1910 as reaffirmed in 1921. Japan was not a party to the 1926 Convention to Suppress the Slave Trade and Slavery, 46 Stat. 2183, 60 L.N.T.S. 253.

156 See ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Forced Labour Convention, 1930 (No. 29), Observation 2000. The Committee found that the "unacceptable abuses" should give rise to appropriate compensation, but noted that it had no power to order relief. The Committee also recognized that as a matter of law, the compensation issues had been settled by treaty, but noted "developments" in how claims for compensation are handled, including a resolution of the UN Sub-Commission on Human Rights expressing its view that "the rights and obligations of States and of individuals . . . cannot, as a matter of international law, be extinguished by treaty, peace agreement, amnesty or by any other means." UN Doc. E/CN.4/Sub.2/RES 1999/16.

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, whose art. 3 entitles prisoners of war to respect for their persons and honor, and specifically guarantees that women to be treated with all consideration due to their sex.

Unlike the other cases discussed in this section, the claims against Japan involve few problems of evidence, retroactivity of law, and identification of claimants or perpetrators. Many of the victims are still alive, humanitarian law protection for civilians and prisoners of war was well established by World War II, and slavery was outlawed by treaty and customary international law. The acts were committed by government agents and as part of government policy. As historic injustices, these claims remain current.

The Herero claim against Germany

What can only be called the genocide of the Herero took place almost a century ago. The President of Germany asserted in 1998 that no international law existed at the time under which ethnic minorities of a state could get reparations.[157] The argument seems to suggest either that genocide as part of colonialism was legal, or that ethnic minorities at the time lacked standing to present a claim. Although the Hague Convention of 1899 on land warfare prevented reprisals against civilians, the Convention did not apply to the Herero war, because Art. 2 limited its application to wars between contracting parties.[158] However, if the Hague Convention represented customary international law, then its rules should have applied because the Herero had not relinquished their full sovereignty. Their chief had signed an agreement giving Germany control over their foreign affairs and the right to trade without hindrance. In return, the German government promised to respect native customs and abstain from any act that would be illegal in its own country.[159] At a minimum, therefore, German law should have applied to state action in Namibia.

Hereros today are asking for reparations for genocide and breaches of the laws of war. The Hague Convention of 1899 required prisoners of war be honorably treated (Art. 4). Article 23 says that it is especially prohibited to kill or wound treacherously individuals belonging to the hostile nation or army, to declare that no quarter will be given, and to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessity of war. Article 46 demands respect for family honor and rights, individual lives and private property.

The reparations sought amount to approximately US $10,000 for each victim. Those who support the Herero claim argue that while 'common sense suggests that there must be some time limit on reparations claims,' this was a twentieth century war of genocide only three or four generations removed.[160] In addition, the claim was effectively blocked until Namibian independence in 1990. One problem is that since independence, Namibia has received some 1 billion DM in preferential financial support from Germany, which may be seen to constitute a type of reparation. A political problem is that the Herero today constitute only about 8

---

157 Harring: *op. cit.* note 20, at p. 406. Note, however, that even the German Chancellor at the time, Count von Bulow, called the extermination order a 'crime against humanity.' See infra note 78.

158 Hague Convention II with Respect to the Laws and Customs of War by Land, July 29, 1989, art. 2.

159 Pakenham: *op. cit.* note 20, at p. 605.

160 Harring: *op. cit.* note 20, at p. 409.

percent of the population of Namibia and neither its government, made up of other tribes, nor the German government want to see the current order altered because land allocation is a major issue in the country.[161] Thus the claim is being pressed through lawsuits against private actors in U.S courts.

Slavery and the trans-Atlantic slave trade

The morality and legality of slavery was contested almost as soon as the trans-Atlantic slave trade began, but international law was slow to enact positive law against it. The English Case of Somerset (1772),[162] one of the first decisions against slavery, was brought by advocates of emancipation. They obtained a ruling that any slave who touched British soil was automatically set free, but the decision prohibited neither the slave trade nor colonial slavery.[163] Nor did existing slave owners in England release all the slaves they held. Vermont was the first American territory to declare slavery illegal, in 1777, after it already had existed for more than 150 years. In 1778 Virginia banned trafficking of slaves into the commonwealth while two years later the Massachusetts state constitution declared descendants of slaves to be citizens.

Abolition of the African slave trade took hold only at the beginning of the 19th century in the United States (1808), the Netherlands (1814), and France (1815). The 1814 Treaty of Ghent between the United States and Great Britain (Dec. 24)[164] made clear the moral and increasingly legal opposition to the slave trade, stating 'Whereas the traffic in slaves is irreconcilable with the principles of humanity and justice and whereas both His Majesty and the United States are desirous of continuing their efforts to promote its entire abolition, it is hereby agreed that both the contracting parties shall use their best endeavors to accomplish so desirable an objective. In 1815, the Congress of Vienna annexed a Declaration of the Eight Courts (Austria, France, Great Britain, Portugal, Prussia, Russia, Spain and Sweden) relative to the Universal Abolition of the Slave Trade.[165] The Declaration called slavery 'repugnant to the principles of humanity and universal morality' but stopped short of declaring a legal ban, because parties decided to negotiate a date for the complete cessation of the trade.

In the US the Congressional Act of 1820 declare slave trading to be piracy and punishable by death.[166] In 1841, in United States v. The Schooner Amistad,[167] the United States Supreme Court recognized the right to resist "unlawful" slavery. It was not until 1862, however, that the United States and Great Britain took effective action to enforce the ban by signing the Treaty for the Suppression of the African Slave Trade.[168] It allowed the mutual inspection of

---

161 See United Nations Institute for Namibia: *Namibia: Perspectives for National Reconstruction and Development* 106 (1986). See also Pankhurst, Donna: A Resolvable Conflict: The Politics of Land in Namibia, Bradford, 1996; Adams, Fiona, Werner, Wolfgang & Vale, Peter: The Land Issue in Namibia: An Inquiry, Namibia Institute for Social and Economic Research, Windhoek, 1990

162 Cited in Sir MacMunn, George: Slavery Through the Ages, London: Nicholson & Watson: 1938 p. 98-99.

163 Id. at p. 100.

164 Treaty of Peace, Dec. 24, 1814, Gr. Brit. – U.S. art. 10, 8 Stat. 218, 63 Consol. T.S. 421.

165 Declaration (Vienna Feb. 8, 1815) Annexed to the General Treaty of the Congress (Annex VI to the Treaty of Vienna), 3 Consol. T.S. 473.

166 Act of May 15, 1820, ch. 113, Rev. Stat secs. 5375, 5376, 3 Stat. 600 (1820).

167 40 U.S. (15 Pet.) 518.

168 Treaty for the Suppression of the African Slave Trade (Apr. 7, 1862), U.S.-Br. Brit, 12 Stat. 1225, T.S. No. 126.

each state's vessels to determine whether the vessel was engaged in the slave trade. The right of search was coupled with Mixed Courts of Justice to decide disputes arising out of inspections. Slaves found on inspected ships were immediately to be set free.

The General Act of Berlin of 1885 became the first multilateral instrument banning the slave trade.[169] Five years later the General Act for the Repression of the African Slave Trade[170] was signed by Austria-Hungary, Belgium, Denmark, France, Germany, Italy, Congo, the Netherlands, Persia, Portugal, the Ottoman Empire, United States, Zanzibar, Russia, Sweden, Norway and Great Britain. Taken together, the two agreements provided for cooperation to suppress the slave trade, while acknowledging that slavery remained legal under the domestic law of some states.[171] Only in 1926 did the international community fully agree to abolish the slave trade (defined as every act of trade or transport in slaves) with adoption of the Convention to Suppress the Slave Trade and Slavery.[172] It required states parties to adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon all vessels flying their respective flags.[173]

Slavery itself was abolished in many parts of Latin America between 1810 and 1830. The United States emancipated slaves in 1863. The US also adopted the Thirteenth Amendment to the Constitution and made it part of the Bill of Rights in 1865. In Europe, Britain adopted the Slavery Abolition Act in 1833. France followed in 1848 with an emancipation decree and Netherlands abolished slavery in 1863. Other states continued the practice of slavery until close to the end of the century; Brazil did not proclaim emancipation until 1888.

The Act of St. German en Laye effective in 1920 was the first international agreement to call for the complete suppression of slavery in all its forms.[174] The UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956,[175] expanded the covered practices to include debt bondage and sale of women for marriage. Thus, slavery became illegal under international law slowly and in piecemeal fashion, starting over a century after the trans-Atlantic slave trade began and as a result of opposition that existed from the start and grew stronger over time.

Given the long period of slavery and the slave trade, the numbers and the abuses involved, it is not surprising that its legacy has been a subsequent century of racism, segregation and denials of civil rights.[176] These are ongoing harms that cannot be separated from the early slave status, which commodified a race of human beings and denied their humanity.

---

169 The General Act of the Conference of Berlin Concerning the Congo, Feb. 26, 1885, 10 Martens Nouveau Recueil (ser. 2) 414, reprinted in 3 Am. J. Int'l L. 7 (1909).

170 General Act for the Repression of the African Slave Trade, July 2, 1890, 27 Stat. 886, T.S. No. 383, 1 Bevans 134.

171 Art. LXII.

172 Convention to Suppress the Slave Trade and Slavery. 46 Stat. 2183, 60 L.N.T.S. 253.

173 Id., Arts. 1(2), 3.

174 The Convention Revising the General Act of Berlin and the General Act and Declaration of Brussels, opened for signature, Sept. 10, 1919, 49 Stat. 3027, T.S. No. 877.

175 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S. T. 3201, 266 UN.T.S. TIAS 6418.

176 Branch, Watson: Reparations for Slavery: A Dream Deferred, 3 San Diego Int'l L. J. 177, 2002

The Dred Scott judgment of the US Supreme Court demonstrates how fully slavery created and reinforced racism.[177] The Court called members of the "negro African race" "beings of an inferior order" who had "no rights which the white man was bound to respect."[178] With perhaps a hint of irony, the Court noted the discrepancy between the proclamation of human rights in founding documents of the United States and the treatment afforded those enslaved. The Court noted that the words of the Declaration of Independence 'would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted.'[179]

The failure to afford reparations for two hundred fifty years of slavery was coupled with continued discrimination that constituted an intergenerational heritage of deprivation. Jon van Dyke, among others, argues that the duty to address violations of fundamental rights continues as long as the consequences of those violations continue to scar a community.[180] In this regard, although slavery was lawful in the U.S. from 1619 to 1865, many reparations claims can be based on the additional century of racial discrimination that extended beyond emancipation, the adoption of equality provisions in the U.S. constitution, and the proclamation of the Universal Declaration of Human Rights.

Indeed, the continuing effects of slavery can be seen today in institutionalized racial bias that permeates the employment sector, housing, education, and especially the criminal justice system.[181] Despite these on-going effects of slavery, governments have shown hostility to affirmative action as a means of rehabilitation or remediation for past and present discrimination.[182] As a result many slave descendents lack adequate education, safe and decent housing, full participation in the political process, and equal economic opportunity.
In response, common law actions have been filed in the U.S. based in contract, trust, restitution and tort.[183] The contract theory of unjust enrichment seeks compensation for labor performed. A claim for unjust enrichment must possess the following elements at common

---

177 A. de Tocqueville noted the impact of slavery on racism in 1835: "The Negro makes a thousand fruitless efforts to insinuate himself into a society that repulses him; he adapts himself to his oppressors' tastes, adopting their opinions and hoping by imitation to join their community. From birth he has been told that his race is naturally inferior to the white man and almost believing that, he holds himself in contempt. He sees a trace of slavery in his every feature, and if he could he would gladly repudiate himself entirely." *Democracy in America*, Ch. XVIII.

178 Dred Scott, 60 U.S. 406-7.

179 *Id* at 410.

180 Jon van Dyke: Reparations for the Descendants of American Slaves under International Law, Winbush, *op. cit.* note 12, p. 57, at 58.

181 Branch, *op. cit.* note 176 at p. 189 and notes 54-61. See also Alcausin Hall, 'There is a Lot to Be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race that Impact the Fate of Africa American Reparations,' 2 *Scholar* 1, 2000(asserting that slavery gave rise to continuing racism and racial discrimination and that 'persisting real and perceived racial barriers continue to exist in business, politics, education, and in many other areas.').

182 Powell, Cedric Merlin: Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction, 51 *U.* Miami L. Rev. 1992, 1997; Wummel, Rose Mary: Escaping the Dead Hand of the Past: The Need for Retroactive Application of the Civil Rights Act of 1991, 19 J. Legis. 223, 1993

183 Ozer, Irma Jacqueline: Reparations for African Americans, 41 How. L. J. 479, at 488-92, 1998

law: (1) an enrichment to the defendant; (2) at the expense of the plaintiff and (3) an element that the enrichment is unjust.[184] The standard of injustice is whether or not the defendant's retention of the benefit would offend notions of fairness or equity – illegality is not necessary, although it is one basis on which to find injustice.[185] Sometimes the result is merely a matter of a balancing of equities, involving circumstances like one party wrongfully securing or passively receiving a benefit that would be unconscionable for the party to retain without compensating the provider. Other relevant factors include mistake, ignorance, duress, exploitation, legal compulsion, necessity, failure of consideration, illegality, incapacity.[186]

Slavery can be framed as an issue of unjust enrichment:[187] "the debt owed to Blacks for the centuries of unpaid slave labor which built so much of the early American economy, and from the discriminatory wage and employment patterns to which Blacks were subjected after emancipation."[188] The main moral problem with unjust enrichment is that it focuses only on the labor, and does not address the status of slavery, the kidnappings, assaults, and destruction of families, languages and cultures.

A related trust theory argues that descendants of slaves were deprived of inheritance because slaves were not paid for the work they did.[189] Similar, some argue for restitution on the asserted ground that the beneficiary of goods and services may not keep benefits without payment. These theories have led to lawsuits against corporate defendants like ship-builders who built slave ships and insurance companies that issued slave policies.[190]

While slavery and the slave trade may have been private enterprise they were condoned by the government which later ensured the continuation of second class citizenship through statutes, ordinances, and other official actions of racial segregation and discrimination that built on the racist justifications for slavery. It is also worth noting that slave taxes are said to have provided more revenue for US state, local and national governments from Colonial times to the Civil War than any other revenue source.[191]

Slavery, like apartheid more recently, created group-based inequalities that persist into the

---

184 Burrows, Andrew: The Law of Restitution 7 (OUP, 1993). Barker, Kit: Unjust Enrichment: Containing the Beast, 15 Oxford J. Legal Stud. 457, 1995. McBride, Nicholas and McGrath, Paul: The Nature of Restitution, 15 Oxford J. Legal Stud. 33, 1995

185 *Palmer's Law of Restitution* 1.7 at 26 (Cumulative Supp. No. 2 1996).

186 Hedley, Steve: Unjust Enrichment, 54 Cambridge L.J. 578, 1995 Dagan, Hanoch: Unjust Enrichment: A Study of Private Law and Public Values 14, 1997; Dagan, Hanoch: The Distributive Foundation of Corrective Justice, 98 Mich. L. Rev. 138, 1999 I.M. Jackman: Restitution for Wrongs, 48 Cambridge L.J. 302, 1989

187 Fagan, David N.: Note: Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations, *76* NYU L Rev. 626, 2001 Note that unjust enrichment can be one of the factual bases on which restitution is claimed. See Kull, Andrew: Rationalizing Restitution, 83 Cal. L. Rev. 1191, 1995 Beatson, Jack: The Uses and Abuse of Unjust Enrichment: Essays on the Law of Restitution 209, OUP, 1991 Laycock, Douglas: The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277, 1989

188 Browne, Robert S.: Wealth Distribution and Its Impact on Minorities, The Wealth of Races 3, Richard F. America, ed., 1990

189 One economist has estimated the present day value of slave labor in the US at between US $448 and 995 billion. Marketti, Jim: Black Equity in the Slave Industry, 2 Rev. of Black Pol. Econ. 43, 44, 1972 More recently, Richard America provided an estimate of between US$5 and 10 trillion. See Raspberry, Willimia: Calculating Reparations for Slavery, Chi. Trib. June 3, 1997, p 13

190 See In re African-American Slave Descendants Litigation, *supra* note 91.

191 Outterson, Kevin: Slave Taxes, Winbush, *op. cit.* note 12 p 135.

present. Reparations claims are based precisely on the present consequences of past systems of abuse and are linked to movements for social equality. What is common is the sense of discrimination and stigmatization by the dominant culture.

Those who oppose slave reparations assert that the violations occurred too long ago, and were remedied through emancipation, civil rights legislation and affirmative action. An argument frequently made is that the costs of implementing redress would be excessively high. However, "[f]or many Africans and African Americans. . . slavery remains an unhealed wound that is frequently, if not constantly, reopened by feelings of continued oppression, manipulation, and discrimination."[192] Since all law, including the law of remedies, mediates between the ideal and the real, it is necessary to balance the equities to reconcile public and private needs. While the need to balance is clearly there, the results of that process are likely to differ according to who is doing the balancing.

Conclusions

Historical injustices can involve legal claims for violations of national or international law at the time they were committed. Cases involving unlawful acts present fewer problems than do historical injustices based on actions that were lawful at the time they were done. In the latter instances, the question of whether or not to give retroactive effect to the law and afford reparations involves a balancing of the equities, the strength of the claims, the need for reconciliation, and the practicalities of devising appropriate reparations between appropriate entities and persons. When it is clear that there was considerable debate over the morality or legality of historical acts, it may be more justified to award reparations because reliance on the law at the time probably was not settled and those acting would have had some notice of the likelihood of change to bring the law into conformity with basic constitutional principles and emerging norms of human rights.

Experience thus far suggests that the resolution of claims that lack a firm legal foundation may still take place through the political process. Many factors will affect the likelihood of reparations being afforded for past injustices, most of them linked to the amount of time that has passed. First, it is more likely that reparations will be afforded if the perpetrators are identifiable and still living. Similarly and secondly, the victims should be identifiable and mostly still alive or their immediate descendants present. The size of the group will affect the amount, if not the fact of reparations; the larger the group and its claim, the more difficult it is to obtain redress. Thirdly, demands for reparations will probably only succeed with political pressure and strong, cohesive support by the victims themselves. Perhaps most importantly, the substance of the claim must be one that presents a compelling human injustice that is well documented. The claim will be even stronger where there is continued harm and a causal connection between present harm and the past injustice. The claims of Japanese Americans and Japanese Canadians to reparations for their World War II internment succeeded in part because (1) the evidence was clear – there was a specific executive order and enforcement of it led to harm; (2) existing law was violated; (3) the provable facts showed the violation of law (4) the claimants were easily identifiable individuals who were not too numerous; (5) causation

[192] Spitzer, Ryan Michael: The African Holocaust: Should Europe Pay Reparations to Africa for Colonialism and Slavery? 35 Vand. J. Transnat'l L. 1313, 2002

between the act and harm was easy to show; (7 damages were fixed and limited; and finally (7) payment meant finality.[193]

To most claimants, reparation is a moral issue involving a formal acknowledgement of historical wrong, recognition of continuing injury, and commitment to redress. Reparations are pursued because they are powerful acts that can challenge assumptions underlying past and present social arrangements. At the same time, they must avoid "entrenched victim status, image distortion, mainstream backlash, interminority friction and status quo enhancement."[194] A key issue is to determine what solutions to past abuses are most likely to provide a secure future while affording justice to the victims of the abuse. The alternatives range from doing nothing to a full social welfare or insurance system or public and private compensation or other assistance.

At their best, reparations may involve restructuring the relationships that gave rise to the underlying grievance, address root problems leading to abuse and systemic oppression.[195] This brings the notion of reparations close to the current idea of restorative justice as a potentially transformative social action. It also provides a reason why legislatures may be better suited to determine reparations: they are not bound by precedent and legal doctrine, but can fashion equitable remedies. Remedies thus become part of a healing process that may avoid the creation of future historical injustices.[196]

Dinah Shelton: Injustices historiques et réparation en droit international

L'article donne l'analyse comparé des multiples tentatives visant la réparation des injustices historiques. On peut trouver des réponses différentes – avec certaines similarités – au problème de la réparation des victimes de l'Holocaust nazie ainsi que des crimes japonais commis durant la Deuxième Guerre Mondiale contre les populations de l'Asie continentale ou des atrocités commises par les colonisateurs contre les peuples indigènes. On peut trouver des exemples à l'excuse, à la restitution, à la compensation mais aussi bien au refus. Un problème particulier est lié à la dilemme comment saisir la responsabilité non seulement des Etats mais aussi bien des particuliers et des sociétés ayant profité de l'exploitation criminelle des populations persécutées. En se fondant sur les jurisprudences américaine, interaméricaine et internationale, l'article donne une introduction aux différentes solutions ainsi qu'à la séparabilité des aspects juridiques de la question et des aspects historiques ou autres du problème.

193 Yamamoto, Eric: Racial Reparations: Japanese American Redress and African American Claims, 40 B.C. L. Rev. 477, 1998

194 *Id.*

195 *Id.* Yamamoto criticizes the view of reparations as forward looking and is skeptical of their potential for creating a new social arrangement, but he also rejects the notion that they are irrelevant to the process.

196 Ratner: New Democracies, Old Atrocities: An Inquiry in International Law, 87 Geo. L. J. 707, 1999; *Human Rights in Political Transitions: Gettysburg to Bosnia* (Carla Hesse & Robert Post, eds., 1999); Christie, Ken: The South African Truth Commission 44, 2000