RECONCEIVING REPARATORY JUSTICE: TRANSATLANTIC ENSLAVEMENT, THE *MAANGAMIZI*, AND THE MAKING OF INTERNATIONAL LAW

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ABSTRACT

In recent decades, a groundswell of public and political attention has turned towards the injustices of the past, and the legacies of antecedent atrocities that resonate in the present. Gradually, presumptions of a linear historical progression (and thus an automatic process of 'moving on') are being displaced in favour of recognition of the potential for transgenerational transmission of wrongs. On this account, simply looking forward is insufficient. The past must be acknowledged and accounted for. In the history of international law, this necessarily involves engagement with European expansion into the 'New World', and the forced migration and enslavement of over twelve million Africans. Thus, centuries of advocacy and activism coalesce in the contemporary movement for reparatory justice for the system of transatlantic chattel enslavement.

While social, political, and philosophical discourse has evolved to engage with the increasing impetus for historical justice, international legal argumentation has evidenced little development, and the orthodox position has held steady. The system of transatlantic enslavement represents a feature of the morality and legality of the times, albeit a regrettable one, and thus is not amenable to judicial reparatory processes. Not only does this narrative preclude the operation of judicial mechanisms in response to the reparations case, but the *maangmamizi* – the African holocaust of chattel, colonial, and neo-colonial enslavement – is legitimised through its purported legality. A permissive rule of international law enabling enslavement is employed in denying the moral and political calls for redress, as well as the legal case. Yet, simultaneously, reparations activists and scholars rely on contrary assertions of international prohibition to cement their calls for justice within the judicial frame.

This thesis explores the limits of the international legal system, and the place of enslavement within it, reconsidering the development of modern international law to account for subaltern perspectives. The history of prohibition is resituated within the context of the marginalisation of African peoples in the birth of the nation State, the construction of civilisation, colonial encounters, and the longer history of enslavement's regulation in international law. Thus, the persistent assertion of uncontroversial legality is destabilised, providing an entry point for the reassessment of additional legal barriers to recovery in the face of widespread historical injustice, and for a broader understanding of reparatory justice premised on the international legal frameworks, but also transcending them.

> Were we ever to arrive at knowing the other as the same pulsing compassion would break the most orthodox heart.[1]

[1] Claudia Rankine, 'Coherence in Consequence' in Claudia Rankine, *Plot* (Grove Atlantic 2001).

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TABLE OF CONTENTS

Introduction: The Reparations Debate and International Law 1

1. International law in reparations debates 4

2. Framing the injustice 8

3. Transatlantic enslavement as a *sui generis* reparations case 15

Chapter 1: From the 'Transatlantic Slave Trade' to the *Maangamizi* 21

1.1. The limits of the long record of enslavement 23

1.2. The internationalisation of enslavement 28

1.3. The transformation of African 'supply' to meet external demand 34

1.4. The controversy of African complicity 37

1.5. The racialisation of transatlantic enslavement 40

1.6. The contemporary legacies of historical enslavement 44

Chapter 2: Transatlantic Enslavement in the Making of International Law 49

2.1. International law's 'Other' 51

2.2. Constructing responsibility in international law 57

2.3. Codifying abolition and prohibition 59

2.4. The expansion of enslavement in customary international law 63

2.5. African voices on transatlantic enslavement 69

2.6. International oscillations and legal lacunae 73

Chapter 3: Adjudicating the 'Past' 79

3.1. Attenuation, limitation, and acquiescence 81

3.2. Tracing the history of State responsibility 86

3.3. Attribution of internationally wrongful conduct 90

3.4. Continuity and succession 93

3.5. Invoking international responsibility 96

Chapter 4: Towards a Theory of Reparatory Justice 99

4.1. Remedy as an inherent power 99

4.2. The basis of redress – conceptions of (reparatory) justice 104

4.3. The elements of reparatory justice 117
4.4. The value of a theory of reparatory justice 132
Chapter 5: Crafting Reparatory Justice..... 135
5.1. Satisfaction 136
5.2. Restitution 142
5.3. Compensation 144
5.4. Cessation 148
5.5. Guarantees of non-repetition 150
5.6. Towards a progressive approach to reparatory justice 153
5.7. Reparations in the context of enslavement 158
Chapter 6: The Causal Chains Binding Past and Present..... 161
6.1. The place of causation in international law 162
6.2. Causation in fact 167
6.3. Causation in law 170
6.4. The harms of historical enslavement 173
6.6. The drawback of discretion in causation 178
Chapter 7: International Law in Transition..... 185
7.1. Framing transitional justice 186
7.2. The nature of reparatory justice in transition 191
7.3. The objectives of reparations in transition 194
7.4. The elements of reparatory justice in transition 204
7.5. Postitioning reparations in transition 223
Conclusion: The Reparations Debate Beyond International Law. 225
Bibliography..... 233
Jurisprudence of the International Court of Justice 233
Jurisprudence of the Permanent Court of International Justice 234
Jurisprudence of the European Court of Human Rights 235
Jurisprudence of the Inter-American Court of Human Rights 236
Jurisprudence of other international tribunals 237
Jurisprudence of domestic courts 238

International Instruments 239
Resolutions, Documents and Reports 241
Domestic documents 245
Works Cited 246

INTRODUCTION: THE REPARATIONS DEBATE AND INTERNATIONAL LAW

Giving voice to an evolving movement seeking redress for enslavement

The debate over reparations for transatlantic enslavement is not new. The movement for redress has a pedigree predating legal emancipation to the years of enslavement. It finds voice at the grassroots and filters up.[2] It speaks through Belinda's 1783 petition to the Massachusetts legislature for an annual pension from the estate of her ex-captor.[3] It underlies the thousands of signatures penned by previously enslaved persons on petitions demanding pensions for their years of unfree labour.[4] It is written in André Rebouças' 1875 Democracia Rural Brazileira and in Brazil's 1884 Dantas Bill (No 48).[5] It suffuses the continuing history of the transatlantic system of chattel enslavement from its inception. It is a persistent struggle championed by the subaltern against mainstream denials. It is far from new.

Nonetheless, since the mid-twentieth century, a palpable shift in public attitudes towards the commemoration of historic events has occurred.[6] This in turn supported the growth of a body of scholarship concerning collective and public memory, and an increased awareness of contested histories.[7] Further, the past three decades have seen a significant increase in memorialisation efforts relating to enslavement in the Americas, Europe, and Africa; increased engagement with issues concerning historical injustices; and a rising tide of political, media and academic attention on the case for reparations for 'historical' enslavement.[8]

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[2] Rhonda Magee, 'The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse' (1993) 79 *Virginia Law Review* 863, 913.

[3] See Roy E Finkenbine, 'Belinda's Petition: Reparations for Slavery in Revolutionary Massachusetts' (2007) 64(1) *William and Mary Quarterly* 95.

[4] See Mary Frances Berry, *My Face Is Black Is True: Callie House and the Struggle for Ex-Slave Reparations* (Alfred A Knopf 2005).

[5] Both documents emphasise the need to grant land to freed populations. Ana Lucia Araujo, *Reparations for Slavery and the Slave Trade: A Transnational and Comparative History* (Bloomsbury Academic 2017), 77 and 80.

[6] See Ana Lucia Araujo, *Public Memory of Slavery: Victims and Perpetrators in the South Atlantic* (Cambria Press 2010; Patrick Finney, 'The Ubiquitous Presence of the Past? Collective Memory and International History' (2014) 36(3) *The International History Review* 443; Chris Weedon and Glenn Jordan, 'Collective Memory: Theory and Politics' (2012) 22(2) *Social Semiotics* 143.

[7] This first wave of growth in recognition of pubic memory is closely tied to the memorialisation of the Shoah. See for instance, David Lowenthal, 'On Arraigning Ancestors: A Critique of Historical Contrition' (2009) 87(3) *North Carolina Law Review* 901, 905.

[8] Problematising the description of transatlantic enslavement as 'historical', see Section 2 below. On the increase in memorialisation from the 1990s, see Ana Lucia Araujo, *Shadows of the Slave Past: Memory, Heritage, and Slavery* (Routledge 2014). See also Alan Rice and Johanna C

From the opening of the 1990s through the first two decades of the new millennium, the global movement for reparations has surfaced in public discourse. In 1992, the Organisation of African Unity established the Group of Eminent Persons, to consider reparations for the damage done to Africa and the African diaspora as a result of enslavement, colonialism, and neo-colonialism.[9] In 1993, the Abuja Proclamation arising from the First Pan-African Conference on Reparations affirmed the international legal grounding of the claim for reparations and called for a range of measures, from internal action in Africa, to reparatory action by States in Europe and the Americas, and the restructuring of the international system in pursuit of justice.[10] In 2014, the promulgation of the CARICOM (Caribbean Community) Ten Point Plan for Reparatory Justice highlighted persistent harm and suffering connected to the history of transatlantic chattel enslavement, colonialism, and racial apartheid in the Caribbean, and the obligation on European governments to participate in remedying such.[11] Three months later, Ta-Nehesi Coates' 'The Case for Reparations' sparked a new wave of media attention and public discussion of the issue of redress for African-Americans for the history of chattel enslavement and the continuum of racialised injustice that followed in the United States.[12]

Despite the relative proliferation of literature concerning reparations for historical enslavement penned in the past three decades, a raft of uncertainties remain. For instance, throughout the history of reparations movements, significant voices have sought to ascribe a monetary value to the harms of enslavement, yet even superficial consensus within a single context has proven unattainable.[13] Moreover, the size of figures proposed,

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Kardux, 'Confronting the Ghostly Legacies of Slavery: The Politics of Black Bodies, Embodied Memories and Memorial Landscapes' (2012) 9(3) *Atlantic Studies* 245; John Oldfield, *'Chords of Freedom': Commemoration, Ritual and British transatlantic slavery* (Manchester University Press 2007); Nicola Frith, 'Saving the Republic: State Nostalgia and Slavery Reparations in Media and Political Discourses' (2015) 23(2) *Modern and Contemporary France* 213.

[9] See Rhoda Howard-Hassmann, 'Reparations to Africa and the Group of Eminent Persons' (2004) 173-174 *Cahiers d'études africanes* 81.

[10] 'The Abuja Proclamation' adopted at the Abuja Pan-African Conference on Reparations for African Enslavement, Colonisation and Neo-colonialism (Abuja, April 27-29 1993) <www.ncobraonline.org/the-abuja-proclamation/> accessed 22 May 2018. The conference was sponsored by the Group of Eminent Persons, the Commission for Reparations of the Organisation of African Unity, and the Nigerian Government.

[11] 'CARICOM Ten Point Plan for Reparatory Justice' (*CARICOM,* March 2014) <www.caricom.org/caricom-ten-point-plan-for-reparatory-justice/> accessed 1 June 2018; 'CARICOM Nations Unanimously Approve 10 Point Plan for Slavery Reparations' (*Leigh Day,* 11 March 2014) <www.leighday.co.uk/News/2014/March-2014/CARICOM-nations-unanimously-approve-10-point-plan> accessed 1 June 2018.

[12] Ta-Nehisi Coates, 'The Case for Reparations' *The Atlantic* (Washington D.C, June 2014) <www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> accessed 01 June 2018.

[13] See Bishop Henry McNeal Turner, 'Justice or Emigration Should Be Our Watch Word' in Marcus D Pohlmann (ed), *Integration Vs Separatism: The Colonial Period to 1945* (Routledge 2003)

particularly in the consideration of international reparations, illustrates the impracticability of ever obtaining a remedy proportionate to the violations.[14] Simultaneously, other commentators criticise the entire project of claiming reparations for severe and widespread injustices because of the impossibility of ascribing a monetary value to the resultant suffering.[15]

If divergence on quantum were not sufficient, it is not only the monetary value of necessary redress that is contested, but the very nature and scope of reparatory justice, the definition of reparations, their objectives, and their outcomes. In many instances, reparations are treated as synonymous with individual compensation, while in others compensation is entirely jettisoned in favour of symbolic or collective measures.[16] The clash between pan-African approaches to redress and nation or region specific pathways, the tension between separatist and integrationist visions, and disagreements over the ways in which victimisation ought to be situated in the histories and contemporary realities of people of African descent, all contribute to the disputed territory of reparations discourse.[17] Furthermore, legal assertions relating to reparations frequently blur the lines between law, politics and philosophy – through false analogies or assertions of precedent, introduction

93; Robert Browne, 'Achieving Parity Through Reparations' in Richard F America (ed), *The Wealth of Races: The Present Value of Benefits from Past Injustices* (Greenwood Press 1990); James Forman, 'The Black Manifesto' (1970) 1(1) *Review of the Black Political Economy* 36; Afrikan World Reparations and Repatriation Truth Commission, 'The Accra Declaration on Reparations and Repatriation' (*The African Descent International Diaspora*, 12 August 1999) <estooks.wixsite.com/the-adid/black-power-and-reparations> accessed 1 June 2018; Daniel Tetteh Osabu-Kle, The African Reparation Cry: Rationale, Estimate, Prospects and Strategies' (2000) 30(3) *Journal of Black Studies* 331.

[14] In 1839, Henry McNeal Turner, Bishop of the African Methodist Episcopal Church suggested that the United States owed African-Americans 'forty billion dollars for daily work performed' by enslaved persons—Bishop Henry McNeal Turner, 'Justice or Emigration Should Be Our Watch Word' in Marcus D Pohlmann (ed), *Integration Vs Separatism: The Colonial Period to 1945* (Routledge 2003) 93. Over a century later, Robert Browne estimated the value of reparations required to remedy the history of enslavement in America would be $1.4 - $4.7 trillion (USD)—Robert Browne, 'Achieving Parity Through Reparations' in Richard F America (ed), *The Wealth of Races: The Present Value of Benefits from Past Injustices* (Greenwood Press 1990). In 1969, the 'Black Manifesto' adopted at the Black National Economic Development Conference focused on religious institutions rather than the State, demanding $500 million (USD) in reparations for African Americans from 'white Christian churches and Jewish synagogues' for their role in the system of American enslavement—James Forman, 'The Black Manifesto' (1970) 1(1) *Review of the Black Political Economy* 36. Shifting from the national to the international context, the 1999 Truth Commission Conference held in Accra, Ghana declared that Africa was owed $777 trillion (USD) for the history of colonisation and enslavement, while in 2000 Daniel Tetteh Osabu-Kle argued it was $100 trillion (USD) that Africa was owed in compensation—ibid.

[15] See Claire Moon, '"Who'll Pay Reparations on My Soul?" Compensation, Social Control and Social Suffering' (2012) 21(2) *Social and Legal Studies* 187.

[16] See Boris Bittker, *The Case for Black Reparations* (Beacon Press 2003). Cf Nicola Frith and Kate Hodgson, 'Slavery and its Legacies: Remembering Labour Exploitation in the Francophone World' in Nicola Frith and Kate Hodgson (eds), *At the Limits of Memory: Legacies of Slavery in the Francophone World* (Liverpool University Press 2015).

[17] On the clash between separatism and integrationism see Magee, above n 2, 868-876. On entrenching victimisation, see David Horowitz, 'Ten Reasons Why Reparations for Slavery Is a Bad Idea – and Racist Too' (2001) 31(2) *The Black Scholar* 48.

of non-legal factors into legal analysis, or the conflation of law and justice.[18] Thus, the increased visibility of the reparations debate, and heightened academic interest, has not delivered theoretical clarity on the legal dimensions of the issue, particularly as relates to international legal frameworks and their application. This is the controversial and contested ground on which considerations of reparations for historical enslavement rest, and to which international legal arguments are central.

1. International law in reparations debates

In 1997 Antonio Cassese suggested that international criminal tribunals were the most 'directly effective and radical' mechanisms of human rights, for their aims of 'prosecuting and punishing the very authors of serious offences against human dignity.'[19] Then President of the International Criminal Tribunal for the Former Yugoslavia, Cassese framed prosecution and punishment of individual offenders as protective measures targeted towards victims, with the objective of halting and redressing crimes. Yet, the comparison between criminal trials directly engaging the perpetrators, and human rights mechanisms addressing the conduct of States, omits an important consideration in its assessment of direct effectiveness and radicalness – that the impact of justice processes on perpetrators is not the sole indicator of either metric. Particularly where justice *for victims* is identified as a driving force of judicial processes, the outcomes available to those individuals must be taken into account. Reparations are victim-centred measures of redress that alter the lens through which violations are viewed from a focus on the wrongfulness of the perpetrators' conduct, to place the harms suffered by victims in the foreground.[20] At least for victims, they are often the most directly effective mechanisms of human rights and international justice, as well as being the most sought after.[21]

[18] See Lord Anthony Gifford, 'The Legal Basis of the Claim for Reparations' First Pan-African Congress on Reparations, Abuja, April 1993) <www.shaka.mistral.co.uk/legalbasis.htm> accessed 4 June 2018. Despite limitations in the legal argumentation, Gifford's conclusions have served as the basis of many other commentators' views on the question of legality – see, for instance, Hilary Beckles, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (University of West Indies Press, 2013).

[19] Antonio Cassese, 'The International Criminal Tribunal for the former Yugoslavia and Human Rights', lecture delivered to the British Institute of Human Rights on 1 May 1997, published in 4 *European Human Rights Law Review* (1997) 329, 332.

[20] See Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook in Transitional Justice* (Edward Elgar Publishing 2017), 377; Pablo de Greiff, 'Repairing the Past: Compensation for Victims of Human Rights Violations' in Pablo de Greiff (ed), *The Handbook of Reparations*, (Oxford University Press, 2006) 1, 2.

[21] de Greiff, ibid.

In the case of historical enslavement, individual criminality is no longer justiciable, the abolition of 'slavery' and the 'slave trade' failed to effect meaningful change for many previously enslaved persons, and their descendants continue to live with the legacies of the system of abuse.[22] Although in domestic settings reparationists often avert to more general domestic laws, particularly equity and tort law, to formulate a legal claim in relation to historical enslavement, these are limited by the technicalities of national legal systems, such as rules of prescription, State immunity, and political question doctrines.[23] Moreover, the capcity of such frameworks to capture the injustices in their totality is critiqued. Brooks labels domestic tort law 'morally deficient' in decrying the full experience of chattel enslavement, Sebok argues that unjust enrichment claims render an 'impoverished understanding of slavery' by framing claims involving a complex series of harms as primarily about uncompensated labour, and Sherwin suggests that the juridification of issues of enormous public controversy through restitution claims is divisive and likely to result in resentment rather than repair.[24] Additionally, domestic laws are unable or unlikely to capture the international dimensions of transatlantic chattel enslavement central to understanding the injustice and formulating relevant claims, including relationships between colonising States and their ex-colonies, making international law an integral feature of many potential claims.[25]

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[22] Although some reparations activists continue to call for the case of historical enslavement to be tried at the International Criminal Court, this is precluded by the individualised nature of criminal responsibility, the principle of non-retroactivity, and the temporal jurisdiction of the Court. See UNGA Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Articles 11, 22, 24, and 25.

[23] See, in the American context, *In Re African-American Slave Descendants Litigation* 375 F Supp 2d 721 (ND Ill 2005); *In Re African-American Slave Descendants Litigation* (2006) 471 F Supp 3d 754 (7th Circ); *Cato v United States* (1995) 70 F Supp 3d 1103 (9th Circuit).

[24] Roy Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (University of California Press 2004); Anthony Sebok, 'Two Concepts of Injustice in Restitution for Slavery' (2004) 84 *Boston University Law Review* 1405; Emily Sherwin, 'Reparations and Unjust Enrichment' (2004) 84 *Boston University Law Review* 1443. This critique may also be levied against the juridification of claims relating to transatlantic enslavement in international law, although the affective dimensions of justice at the international level may vary from domestic law. On the other hand, Klimchuk and Dagan support the moral-expressive content of domestic tort claims, suggesting that it is an appropriate framework for reparatory justice. Dennis Klimchuk, 'Unjust Enrichment and Reparations for Slavery' (2004) 84 *Boston University Law Review* 1257, 1275; Hanoch Dagan, 'Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions' (2004) 84 *Boston University Law Review* 1139. However, Dagan recognises that such should not be the sole measures adopted.

[25] That key identified perpetrators are States, and victims are often formulated as foreign citizens, collectives, or other States means that domestic law failures to capture much of the wrongdoing identified. Some claims might nonetheless take place within the national jurisdiction, as is the case with domestic claims within the United States. However, the US claim context cannot be transplanted in many of the contexts in which reparations are an issue because claims exist between former colonies and European colonial powers. Moreover, the domestic US case does not capture the pre-independence conduct of colonial powers in that territory.

The 2001 World Conference against Racism held in Durban marked a landmark moment for reparations in the context of international law. Although the declaration that 'slavery and the slave trade are a crime against humanity and should always have been so' stops short of recognising transatlantic enslavement to have been internationally unlawful in its time, the partnering affirmation that Africans and people of African descent were victims of 'slavery and the slave trade' and 'continue to be victims of their consequences' connects contemporary suffering to the history of enslavement.[26] Yet the leap from the Durban Declaration to Anthony Gifford's contention that enslavement is a crime against humanity and always was so leaves several crucial links undeveloped.[27] The critical difference between the Durban Declaration and Gifford's conclusion being that Durban reaches a moral conclusion as to the way law *should* have been at the time, whereas Gifford asserts that the legal frameworks governing crimes against humanity *were* in force. This clash continues to manifest in political, activist, and academic discourse on the subject.[28]

On the other side of the debate, the presumption of the historical international legality of enslavement generally relies on contemporary positivistic approaches to international law, and seldom interrogates beyond finding ubiquitous practice.[29] While there has been some problematisation of the characterisation of enslavement as legal based upon the practices of

[26] 'Durban Declaration and Plan of Action, Adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' (Durban, 8 September 2001). The Durban Declaration was endorsed by the United Nations General Assembly in UNGA Res 56/266 (27 March 2002) UN Doc A/RES/56/66.

[27] Anthony Gifford, 'Pipe Dream or Necessary Atonement?' (2007) 36 *Index on Censorship* 89, 91. Similarly, Beckles also relies on the assertion that slavery was, at the time, a crime against humanity without interrogating the legal justification for this claim – above n 18. While Wittmann goes further in interrogating claims of the historic international legality of transatlantic enslavement, the relationship between contemporary formulations of 'crimes against humanity' and historic international humanitarian and criminal law norms remains underdeveloped. Nora Wittmann, *Slavery Reparations Time is Now: Exposing Lies, Claiming Justice for Global Survival, An International Legal Assessment* (Power of the TrInIty Publishers, 2013).

[28] See for instance, Jon M Van Dyke, 'Reparations for the Descendants of American Slaves under International Law' in Raymond A Winbush (ed), *Should America Pay?: Slavery and the Raging Debate on Reparations* (Harper Collins 2003); Molefi Kete Asante, 'The African American Warrant for Reparations: The Crime of European Enslavement of Africans and its Consequences' in Raymond A Winbush (ed), *Should America Pay?: Slavery and the Raging Debate on Reparations* (Harper Collins 2003); Patricia M Muhammad, 'The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law' (2004) 19 *Amherst University Law Review* 883; Richard Croucher and Didier Michel, '"Legal at the Time"?: Companies, Governments and Reparations for Mauritian Slavery' (2014) 58(1) *Journal of African Law* 89. Cf Andreas Buser, 'Colonial Injustices and the Law of State Responsibility: The CARICOM Claim for Reparations' (KFG Working Paper Series No. 4, Berlin Potsdam Research Group, 'The International Rule of Law: Rise or Decline?', August 2016); Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff 2013), 57-104; M Cherif Bassiouni, 'Enslavement as an International Crime' (1991) 23 *New York University Journal of International Law and Politics* 45.

[29] See for instance Max du Plessis, 'Historical Injustice and International Law: An Exploratory Discussion of Reparations for Slavery' (2003) 25 *Human Rights Quarterly* 624; Buser, ibid.

a European global minority, there has been little attempt to integrate the nuances of African complicity and its significance into this critical legal assessment.[30] Further, the impact of the predominant natural law philosophies of the time on the conclusion of legality seldom features in considerations, despite explicit reference to law as understood at the time.[31] Thus, although the moral and philosophical cases for reparations have been extensively explored, the legal frameworks governing and informing redress, and the implications of these in practice, have not been established.[32]

In engaging the international legal frameworks, the following chapters occupy a site of tension – the nexus between recognition of the problematic imperial foundations of international law and their continuing legacies, and the application of international law as a system through which universal justice is conceptualised and implemented. They simultaneously recognise the limits of the law and its power, presenting analysis acknowledging the flawed history of international legal frameworks, and account for the commitments made therein. In many ways, this is reflective of the discourse of reparations activists themselves, who call for promises of justice within the international legal order to be fulfilled in the case.[33] Moreover, it recognises the boundaries of international legal mechanisms, but does not treat these as a conceptual or moral bar to recovery. What is important in this regard are the spaces and tensions existing within international law, which offer a foothold for the rejection of the monolithic understanding of the legality and liability in favour of a more nuanced approach.

The history of international law has never been static. It has shifted and evolved to reflect changing ideologies, as well as global relations of power and influence.[34] This encompasses not only a changing understanding of the primary norms of the international legal system, but substantial shifts in its theoretical foundations. The claim for reparations for historical enslavement

[30] See, for instance, Wittmann, above n 27.
[31] See Buser, above n 28.
[32] See for instance Kete Asante, above n 28; Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Justice* (Polity 2002); Rhoda Howard-Hassmann and Anthony Lombardo, *Reparations to Africa* (University of Pennsylvania Press 2008).
[33] The Caribbean Community, for instance, has often referred to its intention to bring a claim before the International Court of Justice should European enslaver States refuse to engage in dialogue and negotiations on the question of reparations. See Samiha Shafy, 'Caribbean States Call for Slavery Reparations' (*Spiegel Online,* 21 March 2014) <www.spiegel.de/international/world/caribbean-states-want-reparations-for-western-europe-slave-trade-a-960109.html> accessed 19 November 2018; '14 Caribbean Nations Sue European Countries for Slavery Reparations' (*Aljazeera,* 27 September 2013) <america.aljazeera.com/articles/2013/9/27/14-caribbean-nationssueeuropeancountriesforreparationsoverslaver.html> accessed 19 November 2018.
[34] See, for instance, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007).

connects present legal frameworks to the centuries of development that produced them. It cannot be considered on the basis of contemporary assumptions alone, but likewise should not be assessed only against antecedent understandings. It relies on the premise that there is something more to international law than simply the oscillations of power; that there are embedded principles of justice that may be used as a lever to advance claims for justice beyond positivist limits and beyond the borders of technical legal mechanisms, particularly with consideration of historical jurisprudential thinking. Ultimately, this thesis destabilises the assertion that the corpus of international law through time precludes the reparations case, and highlights the ways in which underlying legal principles in fact provide a framework for, and support, a moral or political case.

2. Framing the injustice

Reparations advocates highlight the importance of language and framing when discussing the wrong committed against African peoples.[35] In the reparatory context, defining the wrong is particularly significant, as framing can impact both the identification of parties and whether social hierarchies perpetuating abuse are reinforced or resisted.[36] The dominant narrative of transatlantic enslavement continues to be defined by the States that participated in it as a legal 'trade'. Thus, expressions of abhorrence for the horrors perpetrated against African peoples frequently frame these abuses as regrettable, but only from the contemporary perspective. Tony Blair, then Prime Minister of the United Kingdom, in 2006 epitomised this account:

> The transatlantic slave trade stands as one of the most inhuman enterprises in history. At a time when the capitals of Europe and America championed the Enlightenment of man, their merchants were enslaving a continent. Racism, not the rights of man, drove the

[35] See for instance International Network of Scholars and Activists for Afrikan Reparations, 'Public Report: Launch of the International Network of Scholars and Activists for Afrikan Reparations (INOSAAR)' (London, October 2016), 6. <www.inosaar.llc.ed.ac.uk/sites/default/files/atoms/files/public_report_21_oct_2017.pdf> accessed 23 May 2018.

[36] On the impact of stereotypes of women in contemporary human trafficking discourse, see Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Postcolonial Feminist Legal Politics' in Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glasshouse 2005), 129. For an assessment related to victims/survivors of sexual abuse with strong analogy to victims/survivors of enslavement, see Jericho Hockett and Donald Saucier, 'A Systematic Literature Review of "Rape Victims" versus "Rape Survivors": Implications for Theory, Research, and Practice' (2015) 25 Aggression and Violent Behaviour 1. See also Wendy Brown, *States of Injury* (Princeton University Press 1995); Rebecca Stringer, *Knowing Victims: Feminism and Victim Politics in Neoliberal Times* (Routledge 2014; Jan van Dijk, 'Free the Victim: A Critique of the Western Conception of Victimhood' (2009) 16 *International Review of Victimology* 1.

> horrors of the triangular trade… It is hard to believe that what would now be a crime against humanity was legal at the time.[37]

This prevailing presumption of legality and the insertion of moral relativism is characteristic of the contemporary approach of the European powers that perpetrated the abuses in question. While recognising the brutality of enslavement, these descriptions reinforce public amnesia of the atrocities by framing them as a 'trade' understood as morally acceptable at the time. Maulana Karenga highlights this categorisation of enslavement and associated conduct as sanitising the abuses committed against African people by making the violence commercial rather than moral; 'mass murder or genocide' is presented as 'simply collateral damage of a commercial venture gone bad.'[38]

The commodification of African people and their descendants was driven, at least in large part, by economic motives and carried out as a global trade, leading some commentators to support the continued use of this label. On this account, it is only accurate to characterise the system of transatlantic chattel enslavement as 'slave trade' and those persons held captive within it as 'slaves'; which cannot therefore be a denial of historical experiences. Moreover, slavery and the slave trade are the specific practices prohibited by international and domestic law, making them the appropriate terms for discussion of the relevant legal frameworks.[39] Why then problematise these terms in discussing historical enslavement?

First, to recognise the placement of enslavement in a broader framework of violence committed against African and indigenous peoples. Transatlantic enslavement did not occur in a vacuum. It was one element of a global system of imperial domination of Africans and people of African descent. In order to recognise this framework of violence, the term *'maangamizi'* – the African holocaust – will be used throughout the following chapters. This term places the specific injustices within their broader context, recognising not only that individuals were victims of enslavement, but also that this treatment was intentionally perpetrated, widespread, specifically targeted

[37] Tony Blair, 'PM's Article for the New Nation Newspaper' (27 November 2006) <webarchive.nationalarchives.gov.uk/20040105034004/http://number10.gov.uk/page10487 > accessed 1 November 2016.
[38] Maulana Karenga, 'The Ethics of Reparations: Engaging the Holocaust of Enslavement' (Coalition of Blacks for Reparations in America Conference, Baton Rouge, 22-23 June 2001).
[39] On the terms of international treaties, see Chapter 2, Section 3.

towards Africans and their descendants, and interwoven with a range of related abuses.[40]

Designations of the Shoah as the 'crime of crimes' are well-established. Since Hannah Arendt described the Nazi crimes as 'exploding the limits of the law' – 'guilt beyond crime' – the phrase has found increasing purchase in discourse surrounding mass atrocities.[41] Although the law has developed various mechanisms to secure its own seams in these contexts, the rhetorical power of the terms holocaust and genocide have imprinted upon public consciousness – not just as legal phenomena but as social constructs. Yet, despite the sheer number of victims, and the mass industrialisation of murder and atrocity that constituted the system of transatlantic chattel enslavement, conceptions of these abuses within these categories of atrocity are relatively rare, and in particular struggle to find purchase in the rhetoric of those States that created and operated the system. 'Slavery' and the 'slave trade' remain the institutions of the dominant discourse, and it is against this language that reparations activists assert the term '*maangamizi'*.[42]

Understanding the *maangamizi* as a continuum of harm against people of African descent, and as a morally monstrous system of abuse, exploitation, and mass murder shifts the narrative to provide recognition of the nature of the wrong and the impact upon victims and victim populations. The term is advocated by people of African descent currently fighting within grassroots, activist organisations for recognition of the injustices.[43] It therefore exists within a framework consistent with the aim of reparations to acknowledge agency, experience, and identity. Giving voice to those most affected by injustice in this context reflects the objectives and elements of reparatory justice articulated in this thesis.

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[40] See Gifford, 'Pipe Dream', above n 27, 93; Durban Declaration, above n 26, Article 158; Karenga, above n 38.

[41] Lotte Kohler and Hans Saner (eds) *Hannah Arendt – Karl Jaspers Correspondence 1926-1969* (Robert Kimber and Rita Kimber trs, Harcourt Brace and Jovanovich 1992) 54. See also Austin Sarat, Lawrence Douglas and Martha Merrill (eds), The Limits of the Law (Stanford University Press 2005).

[42] Karenga, above n 38. See also Reparations Scholar, 'What is the International Social Movement for Afrikan Reparations (ISMAR)?' (20 February 2015) <reparationsscholaractivist.wordpress.com/2015/02/20/what-is-the-ismar/> accessed 21 October 2016; Ludovica Laccino, 'Stop the Maangamizi: Africans '"Never Received Even an Apology for Slavery"' (2 August 2016) <www.ibtimes.co.uk/stop-maangamizi-africans-never-received-even-apology-slavery-1573817> accessed 1 November 2016.

[43] See for instance Esther Stanford-Xosei, 'What is the *Maangamizi'* (From the Transatlantic Slave Trade to Egnaging the Maangamizi: Historical Injustice and Reparations Conference, Belfast, 29-39 June 2016); International Steering Committee for Stop the Maangamizi: We Charge Genocide/Ecocide, 'About' (*Stop the Maangamizi*) <stopthemaangamizi.com> accessed 1 June 2018.

While *maangamizi* is well suited to capture atrocities associated with the system of transatlantic chattel enslavement and colonialism as a whole, this thesis is particularly focused on the place of 'slavery' and the 'slave trade' as defined concepts in international law. Moreover, while not precluding consideration of other instances of widespread historical enslavement, the following analysis is generally confined in scope to the consideration of enslavement taking place within the context of the transatlantic relationships and interactions between Western Europe, Africa, the Americas, and the Caribbean. Thus, a variety of more specific terms are employed to discuss this extreme form of human exploitation and the specific instances of such that occurred during what is otherwise labelled the 'transatlantic slave trade'. These will predominantly feature in the language of 'the system of transatlantic enslavement', or 'transatlantic enslavement' and the 'transatlantic system' in brief. Where the terms 'slavery' and 'slave trade' are required to indicate the specific terms of law, the regulated commerce in enslaved persons, or where they are drawn directly from references or introduced in relation to a particular discussion of the issues involved, their external origin is indicated by use of inverted commas. The inclusion of these terms is not intended to serve as an affirmation of their uncritical use in discourse, but rather as a critical acknowledgement of their prevalence.

Until recently, much of the academic analysis of issues concerning enslavement failed to take account of the significance of the language employed in defining and discussing the topic, or to respect the voices of people of African descent who continue to experience the legacies of racialised chattel enslavement today and who renounce these labels.[44] Yet, the language of oppression and survival serves an important function in the reformation of ravaged communities and identities.[45] Therefore, this thesis seeks to not only be comprehensive and thorough in its coverage of the legal issues surrounding reparations, but also internally consistent with the theories presented and developed. Thus, the second reason the language of the 'slave trade' and 'slaves' is avoided is to acknowledge the humanity of the millions of people enslaved within the transatlantic system, and define them by that humanity rather than by their enslavement. It therefore employs the term 'enslavement' over 'slavery', and 'enslaved person' over

[44] See INOSAAR, above n 35.
[45] The symbolic and affective dimensions of injustice are considered in depth in Chapters 4, 5 and 7.

'slave', to recognise exploitation as a condition imposed upon a person by another, rather than as definitive of the individual.[46]

Third, the continuation and transmission of the legacies of enslavement and the *maangamizi* necessitate a nuanced understanding of the impact of these injustices on both collective memory and lived experience. This need is particularly acute in contexts where official narratives are constituted variously of sanitisation and forgetting, and the converse: representations of 'black history' as defined by the horrors, brutality, and humiliation of mass enslavement.[47] The tension of these two portrayals of history can reinforce the dehumanisation of enslaved Africans and entrench the notions of moral relativism simultaneously. As Sepúlveda Dos Santos identifies, the suffering can become a 'distant and objectivised image from the past' that appears as fate rather than culpable wrongdoing:

> …there was nobody to be held responsible for their suffering. Slaves were victims of a mistaken regime from the past. The following generations have inherited the identification with the victims, but have found no way to escape this position, since there is no one to blame apart from the regime itself.[48]

When the nature and choices of the regime are conceived as symptoms of the time, seemingly conflicting narratives come together to 'sanitise' the moral history of transatlantic enslavement. Moreover, they continue to neglect the significance of African people in shaping the future as actors and not merely bodies for exploitation.[49] Reparations claims generally seek to redress not only the material suffering identified as connected to enslavement and the maangamizi, but the extensive symbolic and cultural harms the inculcation of racialisation and othering of African people entrenched, reconstructing history to reflect the experiences and

[46] The term 'enslavement' is used in its rhetorical, rather than legal sense throughout, as enslavement as a crime against humanity under the Rome Statute of the International Criminal Court, and associated legal frameworks, are not substantively considered in this Thesis.
[47] See Mneesha Gellman, 'Only looking Forward: The Absence of War History in Sierra Leone' in Denise Bentrovato, Karina Korostelina, and Martina Schulze, *History Can Bite: Histoy Education in Divided and Postwar Societies* (V&R Unipres 2016), 143-152; Omar Encarnación, *Democracy without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014);
[48] Myrian Sepúlveda Dos Santos, 'The Repressed Memory of Brazilian Slavery' [2008] 11(2) *International Journal of Cultural Studies* 157, 167.
[49] As Waterhouse, advocating for total recall of the systems of American slavery and the role of enslaved Africans on the development of the nation, notes: the 'neglect, minimization, and denial of the indispensable role enslaved Africans played in the construction and development of America represent the norm.' Carlton Waterhouse, 'Total Recall: Restoring the Public Memory of Enslaved African-Americans and the American System of Slavery through Rectificatory Justice and Reparations' [2011] 14 *The Journal of Gender, Race and Justice* 703, 704.

contributions of people of African descent.[50] Thus, language and framing are central to the project of reparatory justice discussed in the following chapters, providing an additional justification for conscious choices in this regard.

Fourth, terms used in discussing transatlantic enslavement are problematised to avoid the presumption of legality in a highly nuanced debate explored throughout this thesis. The recognition of enslaved persons as 'slaves' and transatlantic enslavement as a 'slave trade' implies uncritical acceptance of their legal status, running counter to the objectives of this thesis, which aims to interrogate prevailing assumptions. Finally, with appreciation for the fact that the discussion does not take place in the context of the nineteenth century world, but in a twenty-first century that recognises the atrocity regardless of its legal status. In accepting that legality and illegality do not always align with the interests of justice and equality, this thesis adopts an approach to framing that accepts possible disjunct between the two, but recognises injustice nonetheless.

With regard to the limits of the period of transatlantic enslavement, the exact timeframe discussed cannot be definitively fixed, and indeed the concept of *maangamizi* embraces the continuum of chattel, colonial, and neo-colonial enslavement as three parts of a single whole. Moreover, the function of this inquiry is not to formulate a particular legal claim, and thus the exact details in question need not be articulated with absolute certainty. Yet, some degree of clarity as to the relevant period being discussed is necessary in order to frame the historical legal analysis and the questions of attribution, succession, and causation. Therefore, the period of 'historical' transatlantic enslavement is presented as opening with colonial encounters at the conclusion of the fifteenth century. This is consistent with the United Nations General Assembly Resolution on the 'commemoration of the two-hundredth anniversary of the abolition of the transatlantic slave trade', and Anthony Anghie's identification of Christopher Columbus' first voyage claiming sovereignty over the 'Indies' as a 'founding moment of modern international law'.[51]

[50] See, for instance, CARICOM Reparations Commission, above n 11.
[51] UNGA Res 61/19 (28 November 2006) UN Doc A/RES/61/19 defining the period of the 'transatlantic slave trade' as between the fifteenth and the late-nineteenth centuries; Antony Anghie, 'International Law and the Pre-History of Globalisation' (2015) 33 *Singapore Law Review* 3, 10; Antony Anghie, 'LatCrit and TWAIL' (2011-12) 42 *California Western International Law Journal* 311, 317.

An exact end date for 'historical' enslavement is difficult to set at the international level, for 'the slave trade' and 'slavery' were generally prohibited domestically at different times and followed by the continuation of legally coerced labour in various forms, as well as *de facto* enslavement. Further, colonial domination as an element of the *maangamizi* continued through the twentieth century. However, in considering State responsibility for transatlantic enslavement specifically, this thesis focuses on the period in which widespread State activities supported *de jure* enslavement. The termination date for consideration is therefore taken as 1956, marking the definite crystallisation of the prohibition of 'slavery' and the 'slave trade' in international law, preceded by domestic abolition by European enslaver States in the nineteenth century.[52] Yet, the harms of enslavement are recognised as continuing, and thus there is no end date for the consideration of reparatory justice in international law or transitional justice.[53] The labelling of this phenomenon as 'historical' enslavement is not intended to present it as completed and confined to the past but to recognise that the acts of direct enslavement occurred in relation to generations of persons no longer alive today.

As this thesis does not seek to be prescriptive in relation to possible claims, the terms 'enslaver States' and 'European enslaver States' are used generally to refer to States who participated in, and perpetuated, the system of transatlantic enslavement. Exactly which States qualify within this category is outside the scope of this thesis, although is necessary for the consideration of specific claims. In general terms, the primary States under consideration in relation to international legal claims are France, the Netherlands, Portugal, Spain, and the United Kingdom, as the States with the most significant involvement in the transatlantic system.[54] However, Hilary Beckles, chair of the CARICOM Reparations Committee also identifies Denmark, Germany, Norway, Russia, and Sweden as potentially bearing obligations with regard to Caribbean reparations claims, and cases within States that continued their involvement in enslavement after independence may also be formulated.[55] The following analysis relies only upon the

[52] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3. This is a clear point in the historical record at which the prohibition was firmly established, although arguments for earlier crystallisation are considered in Chapter 2.
[53] Issues of historicity with regard to reparatory justice are further considered in Chapters 3 and 6.
[54] See Emory University, 'Estimates Tables' (*The Transatlantic Slave Trade Voyages Database,* 2013) <slavevoyages.org/assessment/estimates> accessed 27 October 2018.
[55] Beckles, above n 18, 164-65.

presumption that the States falling within the category of 'European enslaver States' were substantially involved in the system of transatlantic enslavement and, relatedly in many cases in imperial domination in Africa and the Americas. Given the historical record, this prerequisite appears to be an acceptable leap for analysis of international obligations and frameworks in the general sense.

3. Transatlantic enslavement as a *sui generis* reparations case

The claim for redress for transatlantic chattel enslavement and the *maangamizi* cannot be equated with existing widespread reparations programmes and awards.[56] To discuss these cases as if they were parallels – as is often done in the rhetoric of reparations proponents – is to operate under a false pretence. These examples, commonly listed as precedent for the case for reparations for transatlantic enslavement without caveat, are relevant but far from decisive.

It is not the large-scale of the atrocities committed within the system of transatlantic enslavement that sets it apart from the listed examples, but more acutely the nature of the identified beneficiaries. The vast majority of reparations programmes awarded for systematic and widespread abuses have been applied in respect of direct victims and their immediate families. The 'comfort women', 'stolen generations', and Japanese-American and Japanese-Canadian victims of arbitrary internment all remained eligible for reparations only if they were surviving at the time awards programmes were instituted.[57] Many more reparations programmes limit eligibility to only one additional generation beyond direct victims – although these prescriptions are generally political, rather than legal, constructions.[58] Thus, the nature of the connection between people of African descent today and those

[56] On the Asian Women's Fund, see Tomiichi Murayama, 'The Statement by President of the Asian Women's Fund at the Final Press Conference' (*Digital Museum: The Comfort Women Issue and Asian Women's Fund,* 6 March 2007) <awf.or.jp/e3/dissolution.html> accessed 28 May 2018. On the 'Stolen Generations': 'Reparations to Stolen Generations Survivors' (*NSW Government,* 2 December 2016) <www.nsw.gov.au/news-and-events/news/reparations-to-stolen-generations-surviviors/> accessed 28 May 2018; Stolen Generations of Aboriginal Children Act 2006 (Tasmania); Department of State Development, 'Stolen Generations Reparations Scheme' (*Government of South Australia*) <statedevelopment.sa.gov.au/aboriginal-affairs/stolen-generations-reparations-scheme> accessed 28 May 2018.

[57] See Shellie K Park, 'Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum' (2002) 3 *Asian-Pacific Law and Policy Journal* 23, 45; on 'Stolen Generations' eligibility, see above n 56; Wendy L Ng, *Japanesse American Internment During World War II: A History and Reference Guide* (Greenwood Publishing 2002), 95-114; Roy Miki and Cassandra Kobayashi, *Justice in Our Time: The Japanese Canadian Redress Settlement* (Talonbooks 1991).

[58] See Chapters 3 and 6 on the impact of time.

historically enslaved must be interrogated in a way extant examples do not guide. Unique questions of causation in this context, and the rightful place of these queries in the international legal frameworks, are therefore crucial elements of the following analysis that distinguish the case of enslavement from claimed precedents. Thus, international law and transitional justice norms assist in unpacking the issue.

In establishing the *sui generis* character of the case for reparations for the system of transatlantic enslavement, chapter 1 of this thesis considers the conduct of European enslaver States, the process of 'othering' of non-European peoples, and the internationalisation of enslavement on a mass scale. Rather than shying away from difficulties in constructing the relationship between enslaver States and States in which people were enslaved, this analysis engages with the complicity of African political figures, as well as resistance to the institution of chattel enslavement. This consideration of the place of transatlantic enslavement and the *maangamizi* in the long global history of enslavement provides the foundation for the consideration of legal and extra-legal frameworks governing contemporary reparations claims. Further, it places these considerations in the context of the encounters between European and non-European peoples that form the bedrock of the modern international legal system.

The birth of the 'nation State' during this encounter was an act of violence against African peoples, with enslavement and exploitation at its heart. Thus, the consideration of the international prohibition of slavery during the period of transatlantic enslavement and the degree to which this may be characterised as universal, is central to the formulation of a viable legal case. Yet, substantial ambiguities infuse legal understandings of the status of international law itself, as well as the placement of enslavement within this system. Chapter 2 therefore reconsiders the evolution of international law governing the enslavement of human beings. Moving beyond purely positivist approaches, this chapter destabilises settled notions of the status and development of international law at the time, questioning whether the process of European expansion and domination could be considered as the basis of a universal legal system, in light of the predominant legal principles of the time.

The consideration of the chronology of enslavement in international law raises additional questions, beyond the crystallisation of prohibitive norms, when approaching the question of responsibility from the present. Chapter

3 therefore contemplates the impact of the passage of time on the liability of States in international law, rejecting approaches that treat time alone as barriers to recovery, but engaging issues of limitation and acquiescence. Attribution, continuity, and succession are also assessed in constituting responsibility, distinct from the invocation of such. Thus, procedural bars to adjudication are severed from the question of responsibility itself, presenting challenges to the justiciability of reparations claims, but enabling the affirmation of norms and an entry point for the consideration of reparatory justice.

Reparations are an integral feature of law itself, yet the understandings of reparatory justice underlying differing viewpoints on the question of redress are far from coherent. In order to clarify this confusion, chapter 4 explores the nature and scope of reparations in the international legal system, considering the historical context and development of redress. It analyses dominant justice frameworks and theories, synthesising understandings of international law's corrective, economic, transformative, and distributive dimensions to develop a conception of reparatory justice consistent with international instruments and jurisprudence.

This fuller formulation of the foundations of remedial action recognises the fluid boundaries of reparatory justice in international law, stretching beyond the orthodox territory of monetary redress and declaratory judgements to recognise multiple possibilities for redress. Thus, chapter 5 reviews the various modalities of redress available in international law, and the impact these may have on the construction of reparatory justice. In addition to presenting a comprehensive framework of remedies, and philosophy of reparatory justice, this analysis considers the centrality of reparations in understandings of justice extending beyond positive legal frameworks to possess moral weight.

In both moral and legal cosiderations, the justification for the application of these frameworks in the context of transatlantic enslavement relies upon the relationship between historical injustice and contemporary harms. Thus, chapter 6 assesses the frameworks governing the extent of reparatory obligations, which arise subsequent to the recognition of wrongdoing, through consideration of causation. Many reparations detractors argue that the passage of time and attenuation of causation leave the history of chattel

enslavement in the past. Yet, injustice in the present does not occur in a vacuum. As Ana Lucia Araujo articulates:[59]

> In both Africa and the Americas, the Atlantic slave trade and slavery left behind a trail of blood, death, disease, sexual violence, and trauma, experiences that although hard to measure were unquestionably transmitted to later generations. Still today the legacies of these atrocities remain alive in the collective memory of the various populations who were victims of these extreme and complex forms of violence.

The immensity of the injustices associated with the system of transatlantic enslavement and the *maangamizi* could hardly do anything but leave a substantial mark on both world and legal history. The othering and dehumanisation of African peoples and their descendants developed to justify enslavement paved the way for decades of racial discrimination up to the present; as Thomas Alenikoff summarises: 'plunder in the past made plunder in the present efficient'.[60]

Whether a legal claim for reparations is viable or successful is not the determining factor in establishing the continued existence of legacies of the transatlantic system, nor is it determinative of the moral case. Yet, as a central feature of reparations discourse entailing symbolic signalling functions of its own, a coherent understanding of the law severed from allegiances is crucial to the advancement of the discourse.[61] Thus, the final chapter of this thesis considers the potential for extra-legal resolution of reparations claims, through the rubric of transitional justice. It is in this context that many widespread reparatory justice programmes have been adopted and implemented in practice, and thus these frameworks provide guidance to the consideration of transatlantic enslavement. Further, the transitional imperative constructed within the paradigm of metamorphosing authoritarian regimes moving from conflict to peace, stability, and democracy, offers new lessons for the consideration of the international legal system, and the demand for international law to reckon with its own history of violence, exploitation, and expropriation.

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[59] Araujo, *Reparations*, above n 5, 42-43.
[60] Nehisi-Coates, above n 12.
[61] Wenger argues that 'remedy and injury are mutually constitutive' and therefore that people do, to some extent, 'define injury backward from the existence of a legal remedy'. Kaimipono David Wenger, '"Too Big to Remedy?": Rethinking Mass Restitution for Slavery and Jim Crow' (2010) 44 *Loyola Los Angeles Law Review* 177.

Reparations claims grapple with the history of atrocity permeating not only individual nations but also the international legal order as a whole, deny the attempt to minimise or legitimise brutality solely on the basis of its pervasiveness, and disrupt continuing injustices that find their roots in historical conduct but continue to grow and evolve. This thesis cross-examines current legal conclusions and the assumptions on which they are based, works through the relevant international frameworks, and recognises their limitations, opening a space for deeper consideration of the demands of reparatory justice in relation to historical enslavement and the *maangamizi.* This does not represent a concluded legal case for or against reparatory justice, but rather reconceptualises the relevant justice frameworks to address reparations claims absent presumptions regarding reparability. If race-neutral approaches 'simply postpone our society's inevitable rendezvous with its history of racism', an open and meaningful discussion of historical injustices, their legacies, and the demand for repair serves the opposite purpose.[62] Thus, serious consideration and discussion of redress itself becomes reparatory.

[62] Thomas Alexander Aleinikoff, 'A Case for Race-Consciousness' (1991) 91 *Columbia Law Review* 1060, 1122.

CHAPTER 1: FROM THE 'TRANSATLANTIC SLAVE TRADE' TO THE *MAANGAMIZI*

The long history of enslavement and its transatlantic evolution

Identifying the injustice to which reparations claims speak is central to understanding their continued relevance in the contemporary world and to the consideration of their merits. The narrative of the *maangamizi* – a continuum encompassing chattel, colonial and neo-colonial enslavement – engages reparations activists by echoing their lived experience of the world and their heritage.[1] It also speaks to a conceptualisation of the wrongs beyond individual interactions between enslavers and enslaved persons, to recognise the systematic and structural violence committed against Africans and people of African descent in the diaspora.[2] Irrespective of the language employed to frame their demands, the sense of wrongdoing, continuity, collective memory, and pervasive structural harms suffuse reparations discourse.[3] Moreover, the particular dynamics of the system of transatlantic enslavement are seen as differentiating it from other instances of historical enslavement and injustice, requiring a tailored response that does not automatically open the floodgates to an infinite stream of historical cases.

This chapter contextualises contemporary reparations claims by working through the history of transatlantic enslavement, unpacking the *maangamizi,* and reconsidering the ways in which injustices were addressed, continued, and reiterated after the formal conclusion of European support for 'slavery' and the 'slave trade'. It considers the transatlantic system within

[1] See Esther Stanford-Xosei, (*Vimeo,* 3 July 2018) '"Stop the Maangamizi!" Campaign Message' <vimeo.com/278175852> accessed 29 October 2018.

[2] Randall Robinson, for instance, speaks of the evisceration of culture, language, religion, and custom in addition to the plunder, rape and commodification of African peoples and the destruction of African social and economic institutions – Randall Robinson, 'African Americans Are Owed for Years of Bottomness' *LA Times* (Los Angeles, 6 February 2000) <articles.latimes.com/2000/feb/06/opinion/op-61518> accessed 23 October 2018. Maulana Karenga suggests that the Holocaust of transatlantic enslavement expresses itself through the destruction of human life, culture, and possibility – Maulana Karenga, 'The Ethics of Reparations: Engaging the Holocaust of Enslavement' (The National Coalition of Blacks for Reparations in America Convention, Baton Rouge, June 2001) <www.ncobraonline.org/wp-content/uploads/2016/02/Karenga-THE-ETHICS-OF-REPARATIONS.pdf> accessed 23 October 2018.

[3] See Boris Bittker, *The Case for Black Reparations* (Beacon Press 2003); Charles P Henry, *Long Overdue: The Politics of Racial Reparations from Forty Acres to Atonement and Beyond* (New York University Press 2009); Hilary Beckles, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (University of the West Indies Press 2013); J Angelo Corlett, *Heirs of Oppression* Rowman & Littlefield 2010); Randall Robinson, *The Debt: What America Owes to Blacks* (Dutton 2000); William Kweku Asare, *Slavery Reparations in Perspective* (Trafford 2002).

the long global history of enslavement, not simply as a translation of this record in a specific case, but as a *sui generis* phenomenon characterised by the specific ways in which the commodification of human beings was accomplished. The European Union in 2007 highlighted this separation of transatlantic enslavement from the thousands of years of exploitation preceding it, recognising it as distinguishable in scale, character, and context:

> The barbarism of the transatlantic slave trade stands out in the history of humanity in terms of its magnitude, organised nature and especially its negation of the human dignity of the victims. While Europe was pioneering the Age of Reason and Enlightenment, European merchants took off to enslave the African continent.[4]

This perspective promulgated by European States, including those most deeply implicated in the transatlantic system, is consistent with the characterisation of transatlantic enslavement as a 'dark chapter' in the historical record that stands out from those surrounding it; rhetoric echoed by political actors and scholars alike.[5]

Consistent with this formulation of the *maangamizi*, the following analysis presents an understanding of the wrongs of enslavement beyond discrete individualised cases to engage with collectivised victimisation and perpetration, including the role of States. It addresses the long history of enslavement, African and European involvement, and forms of dominance supported not only by violent force, but by structural, political, and diplomatic pressures. Both reparations proponents and detractors often present these issues as a binary phenomenon. Either enslavement existed in Africa prior to European expansion, or it was introduced by European

[4] 'Declaration by the Presidency on behalf of the EU on the commemoration of the 200th anniversary of the abolition of the transatlantic slave trade' (Brussels, 26 March 2007) P/07/23; 7735/1/07 Rev 1 (Presse 60) <europa.eu/rapid/press-release_PESC-07-23_en.htm> accessed 25 October 2018.

[5] The following paragraph of the Declaration specifically frames the period of transatlantic enslavement as a 'dark chapter in history – this is echoed throughout many public statements, academic commentaries, and political addressed on the topic. Baroness Amos, for instance, then Leader of the UK House of Lords, in 2007 labelled transatlantic enslavement 'one of the darkest and most uncomfortable chapters in British history' – Alexis Akwagyiram, 'Poignant Site to Remember Slave Trade' *BBC News* (26 March 2007) <news.bbc.co.uk/1/hi/uk/6494097.stm> accessed 25/10/2018. The Mayor of Nantes, Jean-Marc Ayrault in 2012 echoed this language – Stefan Simons, 'French City Confronts its Brutal Past' *Spiegel Online* (Nantes 24 April 2012) <www.spiegel.de/international/europe/nantes-opens-memorial-to-slave-trade-a-829447.html> accessed 25/10/2018. The Danish Foreign Minister also employed this language – Astrid Nonbo Andersen, '"We Have Reconquered the Islands": Figurations in Public Memories of Slavery and Colonialism in Denmark 1948-2012' (2013) 26(1) *International Journal of Politics, Culture and Society* 57

enslavers.[6] Either race-based enslavement was constructed by and for the transatlantic system, or it was simply a further example of the alienation that had been used to justify the treatment of human beings as property for millennia.[7] Either the legacies of transatlantic enslavement continue to manifest and impact the lives of contemporary citizens, or it is 'in the past' and people should now 'move on'.[8] Yet, the historical record belies these clear dichotomies. Institutions of exploitation and dependency may be both different and alike in various ways; Africans both participated in and resisted enslavement; experiences in the past may nonetheless echo in the present. This chapter explores the complexities of the transatlantic system rather than shying away from them, grappling with the *maangamizi* in its multiple dimensions and in context.

1.1. The limits of the long record of enslavement

Enslavement infuses human history, from Ancient Greece, Rome, and the Near East, to the Sassanian, Abyssinian, and Akkadian Empires, from the first 'global economies' in the Indian Ocean and Asian worlds, to early Islamic law, Hindu Rajyas, medieval Korea, and early Christianity.[9] Seldom does a text considering the history of enslavement conclude without reference to the prevalence of the institution at every stage of human history. Systems of enslavement took root in Mesopotamia as early as the third millennia BCE.[10] In the ancient Near East, from a very early period, persons were, and

[6] See David Horowitz, 'Ten Reasons Why Reparations for Slavery Is a Bad Idea – and Racist Too' (2001) 31(2) *The Black Scholar* 48. *Cf* Walter Rodney, 'African Slavery and Other Forms of Social Oppression on the Upper Guinea Coast in the Context of the Atlantic Slave-Trade' (1966) 2(3) *Journal of African History* 431.

[7] See, for instance, Nora Wittmann, *Slavery Reparations Time is Now: Exposing Lies, Claiming Justice for Global Survival, An International Legal Assessment* (Power of the TrInIty Publishers, 2013). *Cf* Patterson's recognition of racial differences in systems of enslavement in a 'significant number of other societies ranging from the Ethiopians, the Bemba, and even the Lozis of Africa, to the Gilyaks and Lolos of Eastern Asia' – Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Harvard University Press 1982), 58.

[8] See, for instance Corlett, above n 3. *Cf* Lord Chesham's statements in the House of Lords debate on reparations in 1996 declaring that the problems of poverty and under-development in Africa have 'nothing to do with the slave trade' and that 'Slavery has not had the enduring effect claimed for it' - HL Deb, 14 March 1996, vol 570, cols 1057-1062.

[9] See generally Gad Heuman and Trevor Burnard (eds), *The Routledge History of Slavery* (Routledge 2011); Patterson, above n 7. On slavery in ancient Greece, Rome, and the Near East see Keith Bradley (ed), *The Cambridge World History of Slavery: The Ancient Mediterranean World* (Vol I, Cambridge University Press 2011); Niall McKeown, 'Greek and Roman Slavery'; Nicolas Fisher, *Slavery in Classical Greece* (Bristol Classical Press 1993). On slavery in Asia, see Anthony Reid, *Slavery, Bondage and Dependency in Southeast Asia* (University of Queensland Press 1983); James Watson, *Asian and African Systems of Slavery* (University of California Press 1980). On Islamic law of slavery see Bernard Freamon, 'Definitions and Conceptions of Slave Ownership in Islamic Law' in Jean Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford University Press 2012); On slavery in early Christianity, see Jennifer Glancy, *Slavery in Early Christianity* (Oxford University Press 2002).

[10] Jack Goody, 'Slavery in Time and Space' in Watson, ibid, 18.

could be, bought and sold within a framework fitting the 'traditional definition of slavery', involving the imposition of social death and dishonour.[11] In ancient Rome, mass enslavement and the growth of the 'slave society' took root in the third century BCE, and escalated rapidly in the second to reach between twenty and thirty per cent of the population by the late first century BCE.[12] In ancient Greece, the 'slave trade was everywhere', both physically and ideologically, and enslavement, 'slave-trading', and the commodification of human beings were normalised practices.[13] It is this historical ubiquity that leads David Eltis and Stanley Engerman to argue that it is the paradigm of free labour, not enslavement, that constitutes the historical exception and, until the twentieth century, institutionalised coercive relationships represented the norm.[14]

Yet, despite the apparent universality of enslavement as a 'recurrent historical dialectic', different forms of exploitation have manifested in different contexts at different times.[15] As Pierre Dockès suggests:

> The nature of slavery changes from one period of history to another, and, within a given period, it varies from one region to the next. Even in one particular spot at one moment in time, quite different kinds of slaves are found...[16]

The equation of all other institutions of enslavement with the system of transatlantic enslavement can be misleading, particularly where evidence suggests that other regimes of enslavement and servitude did not resemble the transatlantic system.[17] Thus, the long history of enslavement should not automatically be taken as an argument in favour of treating all historical systems as synonymous. The starting point for consideration should not be

[11] Daniel Snell, 'Slavery in the Ancient Near East' in Bradley, *The Cambridge World History,* above n 9, 4-5.
[12] This equated to a figure of 1 to 1.5 million enslaved persons in a population of 5 to 6 million. Sandra Joshel, *Slavery in the Roman World* (Cambridge University Press 2010), 55-56.
[13] David Braund, 'The Slave Supply in Classical Greece' in Bradley, *The Cambridge World History*, above n 9, 112-113.
[14] David Eltis and Stanley Engerman, 'Dependence, Servility, and Coerced Labour' in David Eltis and Stanley Engerman (eds), *The Cambridge World History of Slavery* (Vol 3, Cambridge University Press 2011), 3.
[15] Joseph Miller, 'Slaving as an Historical Process: Examples from the Ancient Mediterranean and the Modern Atlantic' in Enrico Dal Lago and Constantina Katsari (eds), *Slave Systems: Ancient and Modern* (Cambridge University Press 2008), 70.
[16] Pierre Dockès, *Medieval Slavery and Liberation* (Arthur Goldhammer tr, University of Chicago Press 1982), 49.
[17] Campbell and Alpers, for instance, argue that regimes of servitude and enslavement in Indian Ocean Africa and Asia 'varied greatly both geographically and over time, rarely approximating to the image of New World plantation slavery except in a few sectors' - Gwyn Campbell and Edward Alpers, 'Slavery, Forced Labour and Resistance in Indian Ocean Africa and Asia' (2004) 25(2) *Slavery and Abolition* ix, x.

a presumption of analogy, but an exploration of the nature of the system in question, albeit within the context of the longer history.

It is clear from the historical record that the commodification of human beings was not a new phenomenon in Africa when the Portuguese began their involvement in raids and kidnappings in Senegambia in the fifteenth century.[18] Paul Lovejoy suggests that enslavement within Africa, including indigenous practices enabling the buying and selling of human beings, predates documented history, and it was ubiquitous on the continent as it was elsewhere in the world.[19] J J Crooks supports this characterisation of African enslavement as an ancient institution without reference to the transatlantic system.[20] J D Fage notes that the earliest European accounts of the West African coast often mention enslaved persons being offered in trade, suggesting that African societies already included an enslaved population that could be subjected to transfer.[21]

In these contexts, enslaved persons were treated not only as economic assets, but as social and political capital.[22] Suzanne Miers and Igor Kopytoff characterise enslaved persons as the 'currency of political transaction', used as tributes for chiefs, gifts between rulers, and rewards to subordinates.[23] This political positioning of servile labourers is reflected in early relations between African political leaders and Europeans, wherein enslaved people were included in the gifts bestowed upon travellers and sent across the seas to European rulers.[24] Moreover, there existed a recognition of legal or legitimate paths to enslavement – primarily for captives taken in war and

[18] Ana Lucia Araujo, *Reparations for Slavery and the Slave Trade: A Transnational and Comparative History* (Bloomsbury Academic 2017), 15.
[19] Lovejoy, 'Slavery in Africa', above n 9.
[20] J J Crooks, *A History of the Colony of Sierra Leone, Western Africa* (reprint, Brown & Nolan 1903).
[21] J D Fage, 'Slaves and Society in Western Africa, c. 1445 – c. 1700' (1980) 21 *Journal of African History* 289, 297. Fage highlights the consistency of early European accounts identifying enslaved persons as a social category in Africa in support of the conclusion of enslavement's indigeneity, highlighting the lack of existing literature and related stereotypical associations of Africa with enslavement available to influence these writers' assessments. However, this fails to acknowledge the infusion of such ideas from the Muslim world that occurred during the medieval period considered further in Section 5.
[22] Paul Lovejoy highlights the fact that 'slavery was integrated into the political economy and social structures of African society' prior to European expansion. Lovejoy, 'Slavery in Africa', above n 19, 38.
[23] Suzanne Miers and Igor Kopytoff, *Slavery in Africa: Historical and Anthropological Perspectives* (University of Wisconsin Press 1977).
[24] See, for instance, Linda M Heywood, 'Slavery and Its Transformation in the Kingdom of Kongo: 1491-1800' (2009) 50(1) *The Journal of African History* 1.

those found to have committed grave crimes.[25] These persons might then be traded, bought, sold, and exploited as if they were property.

Yet, the degree to which international institutions of dependency and exploitation within the African continent could be classified as directly analogous to the form of chattel enslavement that characterised the transatlantic system are contested. Although various forms of servility, including enslavement, existed in West Africa prior to the arrival of Europeans in the region, their presence alone does not speak to its extent, character, or dynamics.[26] In particular, the reports of early European travellers should not be considered conclusive in determining the nature of indigenous institutions, for they often risked conflating other forms of servility, and relationships of dependency, with enslavement.[27]

Several commentators suggest that the nature of African relationships of dependency and forms of servile labour were fundamentally different to those that developed within the transatlantic system. Joseph Inikori asserts that the characterisation of indigenous forms of dependency as enslavement mislabels these social relationships, which are better described using local language.[28] Hilary Beckles contends that indigenous forms of enslavement did not represent a legal categorisation of a person as non-human, perpetual property, or reproductive chattel.[29] Nora Wittmann suggests that African forms of servile labour cannot be treated as synonymous with enslavement within the transatlantic system.[30] Ali Mazrui goes further to contend that the transatlantic system and enslavement in the Americas were comparable neither to domestic enslavement within Africa prior to European involvement, nor to the trans-Saharan system and enslavement in the Muslim Arab world.[31] However, other commentators disagree with this characterisation of the trans-Saharan system as less worthy of moral opprobrium, seeing little to differentiate trans-Saharan from transatlantic

[25] See P E H Hair, 'Sources on Early Sierra Leone: Barreira on Just Enslavement, 1606' (1975) 6 *Africana Research Bulletin* 52, 67. On legitimate pathways to enslavement, see further Chapter 2, Section 4.
[26] G Ugo Nwokeji, 'Slavery in Non-Islamic West Africa, 1420-1820' in Eltis and Engerman, above n 14, 81.
[27] Ibid, 82-83.
[28] Joseph Inikori, 'Slavery in Africa and the Transatlantic Slave Trade' in Alusine Jalloh and Stephen Maizlish (eds), *The African Diaspora* (Texas A&M University Press 1996), 39-40.
[29] Beckles, above n 3, 18.
[30] Wittmann, above n 7.
[31] Ali Mazrui, *Black Reparations in the Era of Globalization* (Institute of Global Cultural Studies 2002).

enslavement, and suggesting that any divergence in the degree of abuse does not erase the wrongs of Islamic enslavement of Africans.[32]

Distinctions between indigenous African forms of enslavement and the transatlantic system focus not only on the nature of exploitation in the individual case, but also on the placement of the institution in the broader societal context. Paul Lovejoy suggests that although enslavement was one of the many forms of dependency that existed in pre-colonial Africa, this was essentially a social feature rather than a central economic institution.[33] That servile relationships were embedded in kinship based societies, wherein political influence was connected to the size of social groupings, is central to this positioning, with the 'acquisition' of persons closely related to this demand.[34] Despite the potential for commodification of human beings in these contexts – enslaved persons could be, and in fact were, bought, sold, and otherwise treated as a form of property – the social structures in which these relationships were embedded are identified as increasing the likelihood of integration into the kinship unit over time.[35] Further, commentators suggest that enslaved persons in these contexts were much more likely to be treated as a part of the family unit, their children were less likely to be automatically enslaved, and there were greater restrictions on the treatment of dependents than there were in the context of economically motivated transatlantic enslavement.[36]

Despite these professed distinctions, to deny the history of African forms of enslavement misrepresents the historical record. Although these relationships of dependency may, in general, have been less severe than the brutalities of the transatlantic system, they nonetheless involved the commodification of human beings, descent-based social stratification, othering and marginalisation (including social death), and acquisition through violence in a range of instances.[37] However, the contextual

[32] See Wole Soyinka, *The Burden of Memory, the Muse of Forgiveness* (Oxford University Press 1999), 53-55. The exact dynamics of the Trans-Saharan system are beyond the scope of this Thesis.
[33] Paul Lovejoy, *Transformations in Slavery: A History of Slavery in Africa* (Cambridge University Press 2011), 13.
[34] Ibid.
[35] See Lovejoy, *Transformations,* above n 33, 12-13.
[36] Walter Rodney argues that these African forms of enslavement involved the inclusion of the enslaved person as a member of the master's household, protection from sale except in the case of serious offences having been committed, rights to a proportion of their own labour and often their own plots of land, the ability to marry, rights of inheritance for their children, and a distinct status for children born of one free parent – Rodney, above n 6, 431-2.
[37] Miller confirms that men, women, and children in West Central Africa were considered and treated as capital at least as early as the fifteenth century – Joseph Miller, *Way of Death: Merchant Capitalism and the Angolan Slave Trade, 1740-1830* (University of Wisconsin Press 1988), 42-43.

investigation of these indigenous institutions reveals a further distinction with regard to their positioning in society, and the way this changed as the transatlantic system took root. Finley frames this transformation as a fundamental shift in the way that enslavement was embedded in social formations; a metamorphosis that may be characterised as the transformation of African States from societies in which enslavement existed to 'genuine slave societies' wherein enslavement operated as the foundation of socioeconomic structures.[38] While there were some pre-existing institutions in place enabling enslavement, it was the pull of the European market that drove this transformation, shifting indigenous practices premised on kinship relationships into institutions based on the role of enslavement in the larger economy.[39]

1.2. The internationalisation of enslavement

In light of the characterisation of transatlantic enslavement as the 'largest forced migration in human history', and the assertion of Europe's key role in the intense growth of African enslavement, scale itself is a fundamental characteristic of the transatlantic system.[40] The extent to which people were enslaved, bought, sold, forcibly migrated, and exploited is substantially different in the comparative between pre-colonial Africa and the period of transatlantic enslavement. Prior to both Islamic and European expansion within the African continent, slavery was marginal.[41] At the beginning of the sixteenth century, Africans and people of African descent represented only a minority of the global enslaved population.[42] However, by the opening of the eighteenth century, they constituted a substantial majority.[43]

In the early years of European exploration of West Africa there was little demand within Europe for enslaved persons and thus trade was

[38] Moses Finley, *Ancient Slavery and Modern Ideology* (expanded edn, Brent D Shaw ed, Markus Wiener Publishers 1998), 271-275. See also Noel Lemski and Catherine M Cameron (eds), *What is a Slave Society? The Practice of Slavery in Global Perspective* (Cambridge University Press 2018).
[39] Lovejoy, *Transformations,* above n 33, 18. Likewise, Nora Wittmann concludes that it was European involvement in the continent that changed the nature of African systems of servile labour - Wittmann, above n 7, 10-139. See also Inikori, above n 28; Rodney, above n 6.
[40] See Johannes Postma, *The Atlantic Slave Trade* (ABC-CLIO Inc 2003); Jon F Sensbach, 'Charting a Course in Early African-American History' (1993) 50(2) *The William and Mary Quarterly* 394, 399; Ronaldo Munck, 'Slavery: Exception or Rule?' in Gillian Wylie and Penelope McRedmond (eds), *Human Trafficking in Europe: Character, Causes and Consequences* (Palgrave Macmillan 2010)
[41] Lovejoy, *Transformations*, above n 33, 21; Nwokeji, above n 26, 86. See also Manning, highlighting the limits of internal African markets and institutions on the numbers of persons internally enslaved – Patrick Manning, 'Why Africans? The Rise of the Slave Trade to 1700' in Gad Heuman and James Walvin, *The Slavery Reader* (Routledge 2003).
[42] Manning, 'Why Africans?', above n 41, 32. See also Lovejoy, *Transformations,* above n 33.
[43] Ibid.

predominantly focused on gold and ivory.[44] Imperial expansion into the continent was limited, with the establishment of trading stations along the coast the primary incursion into African territories.[45] Thus, prior to the fifteenth century, Europe exerted little influence over the nature and extent of African institutions of enslavement.[46] This changed dramatically with European 'discovery' of the Americas, at which point the exploration of the African coastline and existing trade relationships opened the gateway for the establishment of commercial relations between West Africa and the Americas.[47]

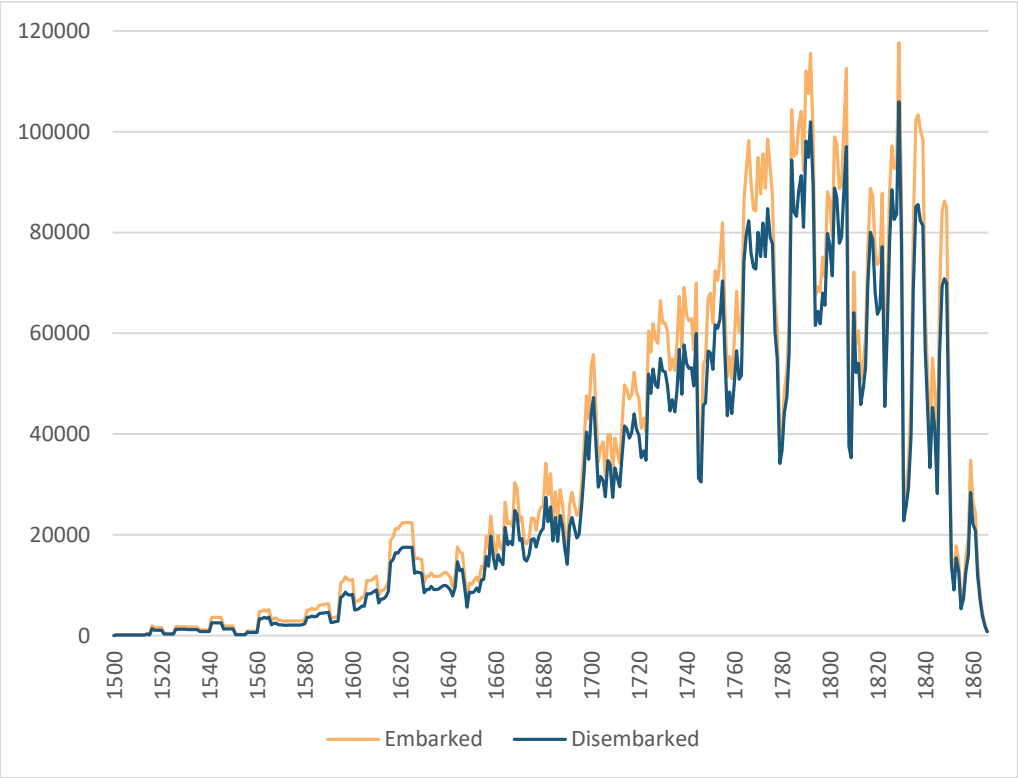
It was European expansion into the Americas that drove the demand for enslaved Africans.[48] Initially, processes of European colonial domination were imposed upon indigenous populations in the Americas, including the extraction of enslaved labour throughout the sixteenth century.[49] However, indigenous resistance, disease, and competition with the Jesuits seeking to convert local populations resulted in the depletion of local sources of coerced labour, creating a gap to be filled through the importation of an external labour force.[50] Thus, international demand fuelled the rise in the enslavement and forced migration of Africans; the growth and evolution of African servile institutions directly correlated to European incursions into the African continent in conjunction with expansion in the Americas.

Focusing on the role of Europeans in African enslavement, the number of enslaved persons forcibly migrated from West Africa to the Americas speaks to the exponential rise of enslavement alongside the development of the transatlantic system. In the first five years of the sixteenth century, only an estimated 950 enslaved persons were transported on voyages within the transatlantic system.[51] In just under three centuries, this number rose to over 500,000 enslaved persons transported from the African coast to the Americas on vessels flying European flags within a five-year period (see Fig

[44] J D Fage, *Introduction to the History of West Africa* (Cambridge University Press 1955), 48.
[45] Ibid.
[46] See Lovejoy, *Transformations,* above n 33, 11; Fage, *Introduction*, above n 44, 39.
[47] See Daniel Mannix, *Black Cargoes: A History of the Atlantic Slave Trade, 1518-1865* (Longmans, Green and Co 1962).
[48] J D Fage, 'Slavery and the Slave Trade in the Context of West African History' (1969) 10(3) *Journal of African History* 393.
[49] Patrick Manning highlights the 'first impulse' of Spanish in the Americas as the enslavement of Native Americans, however, high mortality rates and continuing 'hope of escape made them unsatisfactory slaves'. Manning, 'Why Africans?', above n 41, 33.
[50] John Monteiro, 'From Indian to Slave: Forced Native Labour and Colonial Society in São Paulo During the Seventeenth Century' in Patrick Manning (ed), *Slave Trades, 1500-1800: Globalization of Forced Labour* (Variorum 1996), 110-111.
[51] These 950 enslaved persons were transported from Senegambia and the off-shore Atlantic, although only 670 of those persons would arrive at their destinations in the Spanish Americas.

1).[52] While these numbers do not speak to the extent to which internal enslavement preceded the transatlantic system, they do indicate the degree of European involvement in enslavement and forced migration on a massive scale.

Fig 1. Number of Captives Embarked and Disembarked per Year[53]

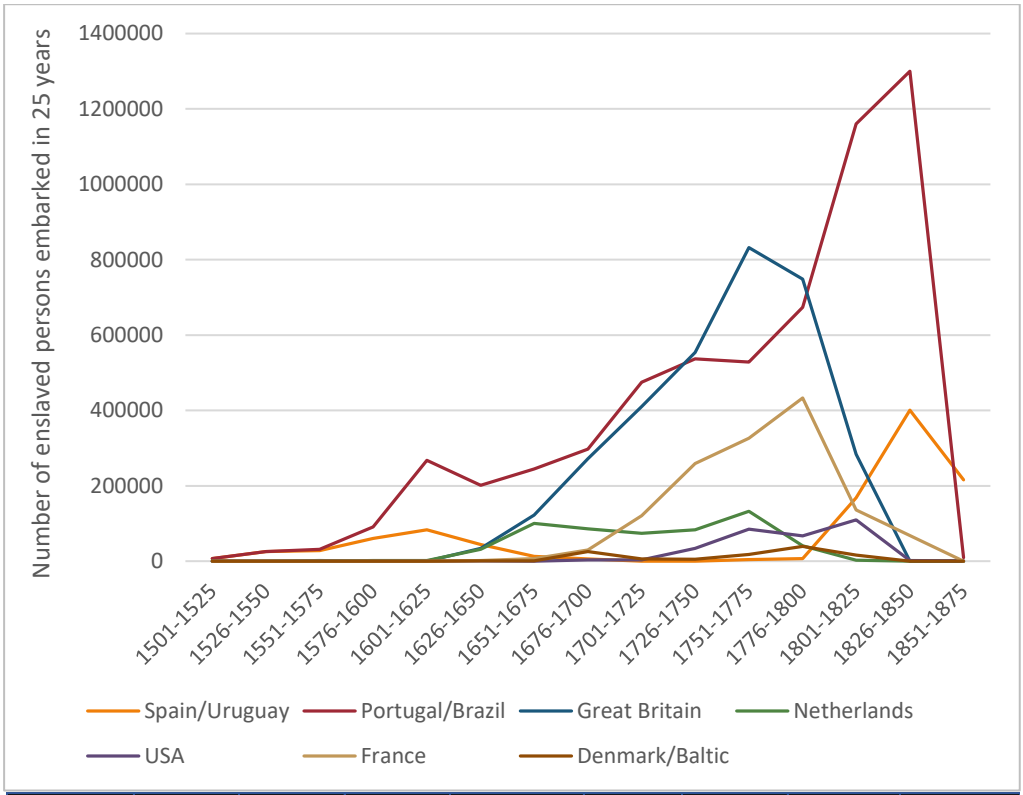


Although it is impossible to accurately calculate the number of enslaved persons transported from Africa to the Americas, or the total number enslaved within American colonies, the Transatlantic Slave Trade Database provides substantial insights into the flows of the transatlantic system and those States embedded within it.[54] These estimates reveal the scale of forced migration and the significance of European involvement in the enslavement of African peoples. Dutch ships participated in the forced transport and exploitation of over half a million African people. Spanish and French ships were responsible for over a million each, British for over three million, and

[52] From 1786-1790, an estimated 505,335 people were embarked upon transatlantic voyages, with an estimated 63,433 of those people never disembarking – these figures also include persons transported on ships under US flags, from 1641 onwards.
[53] Emory University, 'Timeline: Number of Captives Embarked and Disembarked per Year' (*The Transatlantic Slave Trade Voyages Database,* 2013) <slavevoyages.org/assessment/estimates> accessed 27 October 2018.
[54] David Eltis, David Richardson, Stephen Behrendt and Manolo Garcia Florentino were the main contributors to the online database, which expands upon an earlier compilation. The database includes around 80 per cent of all voyages occurring within the transatlantic system, and thus produces robust estimates – David Richardson, 'Involuntary Migration in the Early Modern World, 1500-1800', in Eltis and Engerman, above n 14, 572.

Portuguese for almost six million (see Fig 2). Twelve million Africans were taken from their homeland to lives of endless labour and brutality at the hands of European masters. Almost all of these individuals, and millions of their descendants, would die on foreign shores without ever living a day of freedom from their enslavement.

Fig 2. Embarkations by flag country of transporting ships[55]



	Spain / Uruguay	Portugal / Brazil	Great Britain	Netherlands	USA	France	Denmark / Baltic	Totals
1501-1525	6363	7000	0	0	0	0	0	13363
1526-1550	25375	25387	0	0	0	0	0	50762
1551-1575	28167	31089	1685	0	0	66	0	61007
1576-1600	60056	90715	237	1365	0	0	0	152373
1601-1625	83496	267519	0	1829	0	0	0	352844
1626-1650	44313	201609	33695	31729	824	1827	1053	315050
1651-1675	12601	244793	122367	100526	0	7125	653	488065
1676-1700	5860	297272	272200	85847	3327	29484	25685	719675
1701-1725	0	474447	410597	73816	3277	120939	5833	1088909
1726-1750	0	536696	554042	83095	34004	259095	4793	1471725
1751-1775	4239	528693	832047	132330	84580	325918	17508	1925315
1776-1800	6415	673167	748612	40773	67443	433061	39199	2008670
1801-1825	168087	1160601	283959	2669	109545	135815	16316	1876992
1826-1850	400728	1299969	0	357	1850	68074	0	1770978
1851-1875	215824	9309	0	0	476	0	0	225609
Totals	1061524	5848266	3259441	554336	305326	1381404	111040	12521337

[55] Emory University, 'Estimates Tables' (*The Transatlantic Slave Trade Voyages Database,* 2013) <slavevoyages.org/assessment/estimates> accessed 27 October 2018.

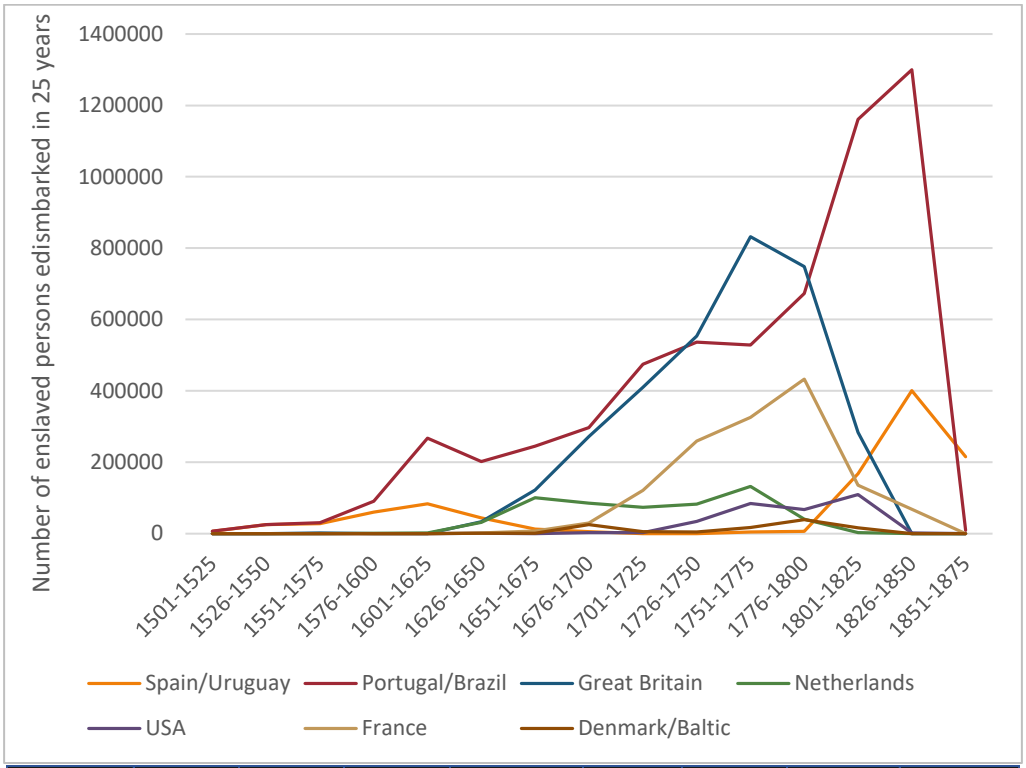
Not all twelve million Africans extracted from the continent of their birth would make it through the voyage itself. Almost two million Africans forced onto European ships would never make it to the Americas. The marked difference between embarkation and disembarkation figures testifies to the conditions on board vessels travelling from Africa to the Americas, supported by first-hand accounts of the conditions in which enslaved persons were kept during these journeys (see Figs 2 and 3). Olaudah Equiano, accounting his own experience on board such a vessel, described conditions in the following passage:

> The closeness of the place, and the heat of the climate, added to the number in the ship, which was so crowded that each had scarcely room to turn himself, almost suffocated us. This produced copious perspirations, so that the air soon became unfit for respiration, from a variety of loathsome smells, and brought on a sickness among the slaves, of which many died -- thus falling victims to the improvident avarice, as I may call it, of their purchasers… The shrieks of the women, and the groans of the dying, rendered the whole a scene of horror almost inconceivable.[56]

While some chose to commit suicide rather than live a life of enslavement on a foreign continent, many more fell to the unsanitary, unsafe, and brutal conditions imposed upon them.[57]

[56] Olaudah Equiano, *The Interesting Narrative of the Life of Olaudah Equiano, Or Gustavus Vassa, The African* (8th edn, Norwich 19794), 51-52.
[57] See Richard H Steckel and Richard A Jensen, 'New Evidence on the Causes of Slave and Crew Mortality in the Atlantic Slave Trade' (1986) 46(1) *Journal of Economic History* 57.

Fig 3. Disembarkations by flag country of transporting ships[58]



	Spain / Uruguay	Portugal / Brazil	Great Britain	Netherlands	U.S.A.	France	Denmark / Baltic	Totals
1501-1525	4462	4914	0	0	0	0	0	9376
1526-1550	17763	17771	0	0	0	0	0	35534
1551-1575	19720	22174	1188	0	0	50	0	43132
1576-1600	42037	67879	168	1160	0	0	0	111244
1601-1625	58445	214808	0	1577	0	0	0	274830
1626-1650	31422	166017	26315	26106	702	1479	836	252877
1651-1675	9464	209690	93209	81918	0	5456	544	400281
1676-1700	4670	261523	208431	74878	2548	22265	20374	594689
1701-1725	0	421232	339007	62477	2612	95357	3882	924567
1726-1750	0	470236	455284	71268	27500	216213	3820	1244321
1751-1775	3634	476596	682454	117855	70624	278479	14711	1644353
1776-1800	5601	623298	673590	35202	56601	369121	33215	1796628
1801-1825	151367	1037342	253678	2475	89990	117969	14351	1667172
1826-1850	354813	1099018	0	324	1662	58579	0	1514396
1851-1875	181526	7318	0	0	413	0	0	189257
Totals	884924	5099816	2733324	475240	252652	1164968	91733	10702657

These figures explain the scale of the transatlantic system, and the extent of European involvement in the enslavement of millions of Africans. Yet, their limitation in recognising the scope of the system is that they only report those persons exported from the coast of Africa, and not those who died as a result of raids, forced migration within the continent, and conditions prior to embarkation on European vessels, nor those born and enslaved in the

[58] Emory University, 'Estimates Tables', above n 55.

Americas.[59] Thus, they do not reveal in specific detail the ebbs and flows of the transatlantic system as a whole. However, they do speak to the widespread involvement of Britain, France, the Netherlands, Portugal, and to a lesser extent Denmark and the newly independent United States, in the forced migration of twelve million Africans, and the deaths of two million through transportation alone. The scale of these voyages further indicates the impact of transatlantic enslavement on the African continent.

1.3. The transformation of African 'supply' to meet external demand

Significant structural changes occurred within African societies as a result of European demand for enslaved Africans to be imported to the Americas, and various forms of political, economic, and military manipulation were employed by Europeans to facilitate this. As the system grew, enslavement and relationships with Europe became so central to internal African politics that the emergence, rise, and decline of African States was closely associated with the transatlantic system; in short, African societies that engaged in the external trade in enslaved persons achieved political ascendancy over time.[60] The superiority of arms gained by trading with Europeans enabled enslaver States to overwhelm their neighbours, with the result that participation in the transatlantic system soon became necessary for survival in the region.[61] Thus, the commercial organisation of relationships between Europe, Africa, and the Americas drove military operations, which in turn fed the trade in enslaved persons.[62]

Conflict was the primary source of enslaved persons for export, creating direct and cyclical relationships between enslavement and warfare within Africa.[63] The increasing conflict in West and West Central Africa, and the

[59] Lovejoy suggests that perhaps as many enslaved persons as were exported in the transatlantic and Muslim systems combined never left the continent, many of whom having died in the processes of enslavement, internal migration, and captivity that proceeded export – Lovejoy, *Transformations,* above n 33, 63.
[60] Robin Law, *The Slave Coast of West Africa 1550-1750: The Impact of the Atlantic Slave Trade on an African Society* (Clarendon Press 1991); Lovejoy, *Transformations,* above n 33, 22.
[61] The King of Kongo, Nzinga Nkuwu, for instance, accepted a Portuguese alliance involving supplying captive Africans in exchange for European military assistance to wage war against neighbouring kingdoms, as well as conversion to Catholicism – John K Thornton, *A Cultural History of the Atlantic World, 1250-1820* (Cambridge University Press 2010), 183. See also Toby Green, *The Rise of the Trans-Atlantic Slave Trade in Western Africa, 1300-1589* (Cambridge University Press 2012).
[62] Linda Heywood and John Thornton, *Central Africans, Atlantic Creoles, and the Foundation of the Americas, 1585-1660: The First Generation of African Americans in North America and the Caribbean, 1619-1660* (Cambridge University Press 2007). See also Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff 2013), 63.
[63] See Toby Green, 'Cycles of War and Trade in the African Atlantic, circa 1550-1580' in green, above n 61.

growing demand for enslaved labour in the Americas, created insecurity not only between African societies, but also within them.[64] Where previously foreign prisoners of war satisfied the bulk of internal demand, thus protecting freeborn subjects, the transatlantic system created significant risks of internal capture and enslavement.[65] Instability within African societies was thus driven by the transatlantic system, and the cycle of violence paved the way for further European incursion, and sustained presence, in the region.[66]

Where the opening of the sixteenth century saw both African enslavement and European involvement in the continent as marginal, the end of the nineteenth marked the enslavement of over twelve million people and almost the entirety of West Africa was ruled by European governments.[67] The path to colonial domination was paved by the system of transatlantic chattel enslavement and the substantial impact this had upon African societies and political structures.[68] The destabilisation of West African political institutions in particular served as an entry point for colonial administration.[69] The significance of transatlantic enslavement on African politics culminated in the fact and ubiquity of enslavement within Africa being used as an indicator of a lack of civilisation, justifying European division of African territories.[70]

During the period of transatlantic enslavement, indigenous and internal slaveries existed alongside the transatlantic and trans-Saharan systems, and expanded as a result of the influence of these external markets.[71] The number of persons enslaved within the continent increased dramatically, driven in large part by the growth of the transatlantic system.[72] Enslaved

[64] Walter Hawthorne, *From Africa to Brazil: Culture, Identity, and an Atlantic Slave Trade, 1600-1830* (Cambridge University Press 2010), 64.
[65] Araujo, *Reparations,* above n 18, 15.
[66] Ibid, 42.
[67] Fage, *Introduction,* above n 44, 39.
[68] See Warren Whatley, 'The Transatlantic Slave Trade and the Evolution of Political Authority in West Africa' (2012) IDEAS Working Paper Series from RePEc <ideas.repec.org/p/pra/mprapa/44932.html> accessed 29 October 2018. This is discussed further in Section 4 below.
[69] Ibid.
[70] JF Ade Ajayi, 'The Policy of Reparation in the Context of Globalization', (2004) *African Studies Papers* 173-174, <journals.openedition.org/etudesafricaines/4524> accessed 31 October 2018, 44.
[71] Nwokeji, above n 26. In relation to the scale of the trans-Saharan system of enslavement, Austen estimates that over five million enslaved Africans were transported to the Muslim world – Ralph Austen, 'The Mediterranean Islamic Slave Trade out of Africa: A Tentative Census' in Elizabeth Savage (ed), *The Human Commodity: Perspectives on the Trans-Saharan Slave Trade* (Frank Cass, 1992); Ralph Austen, 'The Trans-Saharan Slave Trade: A Tentative Census' in Henry Gemery and Jan Hogendorn (eds), *The Uncommon Market: Essays in the Economic History of the Atlantic Slave Trade* (Academic Press 1979).
[72] Roquinaldo Ferreira, 'Slaving and Resistance to Slaving in West Central Africa' in Eltis and Engerman, above n 14.

persons not purchased by Europeans remained captive on the continent, and in general were utilised for the economic gain of their (typically) African captors.[73] John Matthews' eighteenth century account describes 'slave towns' of up to 1000 enslaved inhabitants ruled by Mandinga chiefs on the Upper Guinea Coast.[74] Other contemporary accounts suggest that these collectives of enslaved persons also existed in other West African areas.[75] Thus, the significance of enslavement within Africa changed dramatically from its prior marginal positioning, creating an internal population of millions of enslaved persons.[76]

The boom in demand for enslaved persons also altered the initial processes of enslavement, through the extension of existing mechanisms and development of new methods to enslave free people.[77] This included firstly the expansion of warfare as a key means of producing enslaved persons, as well as decreasing the threshold for enslavement through other established pathways. As Francis Moore identified in the early eighteenth century, the development of the external 'trade' resulted in all punishments being changed to enslavement, where previously this would only have attached to more serious offences.[78] Moreover, in order to meet external demand, internal violence proliferated and previously uncommon or unknown pathways to enslavement were developed.[79] Raids and *razzias* became substantially more common, involving subjecting those who could not be legally or legitimately enslaved to captivity.[80] Outside influences shaped this transformation, yet it was generally internal actors that rose to meet external demand. The role of these African participants in the enslavement

[73] Rodney, above n 6, 435.
[74] John Matthews, *A Voyage to the River Sierra Leone* (B White & Son 1788).
[75] See, for instance A G Laing, *Travels in the Timammee, Kooranko and Soolima Countries* (1825), 221; P Marty, 'Islam in French Guinea' (1936) 29 *Sierra Leone Studies* 49.
[76] Patrick Manning suggests that this internal population rivalled or outstripped the Muslim system, and 'reached a volume of at least half' that of the transatlantic system – Patrick Manning, *Slavery and African Life* (Cambridge University Press 1990), 41. This should be contrasted against the marginal position of slavery in African society identified in Sections 2 and 3 above.
[77] José Curto, 'Experiences of Enslavement in West Central Africa' (2008) 41(82) *Histoire Sociale/Social History* 381, 382.
[78] Francis Moore, *Travels into the Inland Parts of Africa* (London 1738), 42.
[79] Curto recognises the proliferation of violence as an important feature of processes of enslavement, ibid, 383. This is reflected in the broader literature concerning the impact of transatlantic and trans-Saharan demand on African societies – see Dennis D Cordell, 'Warlords and Enslavement: A Sample of Slave-raiders from Eastern Ubangi-Shari, 1870–1920' in Paul Lovejoy (ed), *Africans in Bondage: Essays Presented to Philip D Curtin on the Occasion of the 25th Anniversary of the African Studies Program* (University of Wisconsin Press 1986); John K Thornton, *Africa and Africans in the Making of the Atlantic World, 1400–1800* (2nd edn, Cambridge University Press 1998); Manning, *Slavery and African Life,* above n 76.
[80] Curto, above n 77.

of Africans should not be overlooked in considering the system of transatlantic enslavement from a holistic perspective.

1.4. The controversy of African complicity

Discourse concerning African involvement in the capture, commodification, and forced migration of enslaved African people is one of the most fraught issues in the consideration of the historical record of transatlantic enslavement, and is often seen as crucial.[81] The very characterisation of the system of transatlantic enslavement as 'trade' relies on the premise that European involvement primarily featured the exchange of commodities for already internally enslaved people: that 'Africa "produced" slaves, traded them and consumed its own people.'[82] In other words, early Europeans travelling to the coast of Africa were not involved in the initial acts of enslavement, but only the 'trade' in already internally enslaved persons – if 'black people were bought by whites, they were sold by African leaders too.'[83] This is further captured in Lord Chesham's speech to the UK House of Lords in 1996, in which he argued that the claimed imposition of the system of transatlantic enslavement by Western States on 'powerless African communities' represents a denial of African political history.[84] This account further alienates responsibility from European nations by suggesting that individual traders and companies, and not the State, conducted these 'trades'.[85]

The above consideration of the expansion of enslavement within the African continent, and internal adaptations made to meet external demand, make it clear that the transatlantic system was built by African leaders as well as by forced African labour. Indigenous relationships of dependency and enslavement existed on the continent prior to European engagement, and early contact between European travellers and African political figures involved the transfer of internally enslaved persons.[86] African leaders and opportunistic individuals alike participated in the enslavement of African peoples to feed the external markets. This contributes to a broader rhetorical strategy characterising enslavement as both legal and globally accepted at

[81] See, for instance, HL Deb, above n 8.
[82] Lovejoy, 'Slavery in Africa', above n 19, 37.
[83] Lang Fafa Dampha, *Reparation for Slavery and Colonialism: The Teachings of Durban* (CreateSpace 2015), 50.
[84] HL Deb, above n 8, cols 1057-1062.
[85] Ibid.
[86] See Section 1 above.

the time.[87] Yet, historical review of European involvement in the internal machinations of African politics, as well as physical incursions into the continent, requires a more nuanced perspective than the simple assertion of the indigeneity of enslavement as a basis for moral acceptability and the denial of European responsibility.

A significant history of African resistance to European enslavement at both the political and the individual level attests to the complexity of characterising enslavement as either an established institution or an alien imposition. The ubiquity of resistance throughout the entire period of transatlantic enslavement, at every stage of the process from the African interior to the Americas, is addressed in a growing body of literature highlighting African agency and action in overthrowing systems of exploitation.[88] From the initial processes of enslavement, to internal migration, at 'slave forts' on the coast, aboard canoes and transatlantic vessels, on plantations, in the fields, the mills, and the houses of the 'masters', Africans and their descendants resisted their denigration to the status of chattels.[89] This long history of rebellions, large and small, led Herbert Aptheker to contend that it is resistance, rather than acquiescence, that is at the core of the history of transatlantic enslavement.[90]

Yet, resistance does not address the full story of African action within the transatlantic system. While many African political leaders opposed the European system of enslavement, this was not determinative, for these rulers were then destabilised and destroyed in order to enable the European imposed system to take root in the continent.[91] The resistance of African leaders, including kings in Jolof, Benin, and Kongo, could not protect against the lure of external markets:

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[87] See, for instance, HL Deb, above n 8, cols 1057-1062.

[88] Herbert Aptheker, for instance, highlights the centrality of resistance in African responses to enslavement in the Americas - Herbert Aptheker, *American Negro Slave Revolts* (Columbia University Press 1943). Roquinaldo Ferreira also emphasises the significance of resistance in the history of transatlantic bondage, particularly in the internal African context – above n 72. See also Michael Mullin, *Africa in America: Slave Acculturation and Resistance in the American South and the British Caribbean, 1736-1831* (University of Illinois Press 1992); Richard Hart, *Slaves Who Abolished Slavery: Blacks in Rebellion* (University of the West Indies Press 2002); On rebellions aboard vessels transporting enslaved persons, see David Richardson, 'Shipboard Revolts, African Authority, and the Atlantic Slave Trade' (2001) 58(1) *The William and Mary Quarterly* 69; Eric Robert Taylor, *If We Must Die: Shipboard Insurrections in the Era of the Atlantic Slave Trade* (Louisiana State University Press 2006); Maggie Montesinos Sale, *American Slave Ship Revolts and the Production of Rebellious Masculinity* (Duke University Press 1997).

[89] See ibid.

[90] In Michael Craton, *Testing the Chains: Resistance to Slavery in the British West Indies* (Cornell University Press 2009), 11.

[91] Beckles argues that in fact the majority of African leaders adopted this stance of resistance, above n 3, 168.

> It only required a few greedy or opportunistic persons, who felt they should enrich themselves rather than resist the inexorable pressures of supply and demand, to keep the slave trade alive. Those suppliers, in turn, rapidly became wealthy enough to become a focus of power to whom others had to accommodate.[92]

The transatlantic system initially required only a limited number of African participants. These individuals derived significant economic gains and political power from European support, enabling their gradual ascension and thus the continued expansion of the institution on the African continent.[93]

Characterising the system of transatlantic enslavement as an entirely European endeavour erases significant African actors in the history of the institution's development. Yet, simultaneously, framing this complicity as the conclusion of consideration of the nature of triangular transatlantic interactions also overlooks the nuances of the historical record. Firstly, Hilary Beckles and Verene Shepherd identify a qualification on the significance of early African involvement, arguing that the fundamental distinction between enslavement in African communities and in European colonies changes the nature of African complicity.[94] The system in which Africans were complicit, characterised with regard to the extant understandings of African actors in the early years of engagement, is thereby framed as a different institution than that which was inflicted upon enslaved Africans in the Americas.

While different understandings of the nature and conditions of enslaved labour do not obviate African participation, particularly once conditions in the Americas became evident, it does contextualise early participation of African actors in the transfer of enslaved persons to European masters. In later years, the military, economic, and political power secured by those who participated in the system enabled its continuation in the face of extensive resistance. In other words, the system once established was more easily maintained than overthrown. Moreover, it was not only these evolving internal asymmetries that characterised the transatlantic system, but substantial variance in the power dynamic between Africans and Europeans.

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[92] Manning, 'Why Africans?', above n 41, 36.
[93] Araujo, *Reparations,* above n 18, 42.
[94] Beckles and Shepherd argue that, although Africans engaged in 'slave raiding, wars, and other contests, in order to procure captives for sale to Europeans', the 'racist colonial culture into which [Africans] were imported, that questioned their very humanity and sought to enforce their inferiority to whites, was entirely new to them.' Hilary Beckles and Verene Shepherd, *Trading Souls: Europe's Transatlantic Trade in Africans* (Ian Randle 2007), 5.

Ajayi presents this disjunct as an issue of significant inequality that changed the nature of the relationship and thereby responsibility:

> The difference is that the Europeans controlled the capital in terms of transportation, ammunition and goods. Africans who participated in this trade were victims not only because they had no initiative, but also because they were participating, as traders, in an extremely unequal exchange that impoverished them gradually so that he enriched their so-called business partners.[95]

Viewing the dynamics of transatlantic enslavement from the macro perspective, as well as on the basis of individual interactions, changes the way the institution as a whole is perceived. While not erasing African participation in the system, it highlights the degree to which this was manipulated or constrained by European action. The basic distinction between Europeans and Africans within the system ran deep, substantially impacting the way that relations played out in discrete instances and on the whole.

1.5. The racialisation of transatlantic enslavement

Moses Finley, Orlando Patterson, and Paul Lovejoy argue that race is not central to enslavement; that, throughout history, it is marginality rather than race *per se* that enables and entrenches exploitation.[96] On this account, the racialisation of transatlantic enslavement is not the defining feature of the system, but simply the focal point for the process of othering in the specific case. Yet, the premise of these studies is the attempt to formulate a conceptualisation or definition of 'slavery' that encompasses the institution as a singular phenomenon, in its various manifestations, throughout history. Thus, it is the broad commonalities that are highlighted rather than the distinctions. With this in mind, engaging with the particularities of transatlantic enslavement and the *maangamizi* more broadly enables a

[95] Ajayi, above n 70, 20.

[96] Finley speaks of the attribution of 'outsider status', Patterson of 'othering', and Lovejoy of alienation in justifying the differentiation between free persons and those enslaved. Moses Finley, 'Slavery' in *Encyclopaedia of the Social Sciences* (Vol 14, Macmillan Co and Free Press 1968), 307-313; Patterson, above n 7; Lovejoy *Transformations,* above n 33. Kopytoff and Miers also define slavery by the 'institutions of marginality', while Meillasoux emphasises alienation – Igor Kopytoff and Suzanne Miers, 'African Slavery as an Institution of Marginality' in Miers and Kopytoff, above n 23; Claude Meillassoux, *The Anthropology of Slavery: The Womb of Iron and Gold* (University of Chicago Press 1991).

perspective that accounts not only for enslavement as an institution existing throughout history, but the circumstances of this particular case.

The categorisation of African peoples as black, and negative associations with this description, were not created by or for the system of transatlantic enslavement, but rather far predate it.[97] Yet, it was the transatlantic system that institutionalised and inculcated the negative characterisation of blackness, overriding or obviating positive representations that had existed alongside these symbolic devaluations of the colour black and those peoples characterised as such.[98]

Previous systems of enslavement were based upon patterns of marginalisation and othering that denigrated outsider peoples on the basis of broad assertions of barbarism, animalistic qualities, or a lesser degree of civilisation.[99] The transatlantic system adapted this practice to focus on a single indicium as determinative of this range of characteristics and the humanity of the population of almost an entire continent: race.[100] This externally imposed, morally arbitrary factor was not associated with 'otherness' in general, or with religious distinctions.[101] Rather, than justifying enslavement on the basis of othering broadly, this approach narrowed down the enslaveable 'other' to those racialised as black. The conflation of blackness with the characteristics necessary for the justification of enslavement came to serve as the basis on which people were enslaved, independent of pre-existing understandings of the legitimate conditions in which free people might be enslaved.[102]

This racialisation of enslavement was not solely related to the transatlantic system, but built upon the gradually developing association between blackness and the most degrading forms of unfree labour that gained traction in the medieval Muslim world.[103] The system of trans-Saharan enslavement associated with Islamic expansion into Africa fuelled racial

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[97] See Kwesi Tsri, *Africans are not Black: The Case for Conceptual Liberation* (Routledge 2016).
[98] See David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (Oxford University Press 2006).
[99] See Brion Davis, above n 98, 48-64. This is consistent with Finley and Patterson's assumptions about the nature of the institution of enslavement – Finley, *Ancient Slavery*, above n 38; Patterson, above n 7.
[100] See James Sweet, 'The Iberian Roots of American Racist Thought' (1997) 54 *William and Mary Quarterly* 159, 166.
[101] Race is here classified as an 'externally imposed' factor because prior to the characterisation of Africans as 'black', and indeed of the homogeneity of 'Africans' as a single group of people, there was no pan-African identity. See Law, above n 60, 13-32. On differentials in the impacts of the transatlantic system on different African societies, see Joseph Inikori (ed), *Forced Migration: The Impact of the Export Slave Trade on African Societies* (Hutchinson & Co 1982).
[102] The conditions are considered further in Chapter 2, Section 4.
[103] Brion Davis, above n 98, 60-64.

prejudices in Northern Africa, in turn developing racialised enslavement.[104] By the fifteenth century, and through to the nineteenth, there was a close association between 'blackness and slavery' on the frontiers of North and sub-Saharan Africa.[105]

The interchange of stereotypes between the medieval Muslim and Christian worlds created an international stereotype of the 'African', perceived as a single race rather than a multiplicity of different ethnic groups, which aligned with the characteristics required to justify their enslavement *en masse*.[106] Thus, by the beginning of the sixteenth century, the archetype was sufficiently cemented in the European consciousness to serve as a basis for Bartolomé de Las Casas' arguments for the protection of Native Americans through the mass exploitation and enslavement of Africans.[107] By the mid-sixteenth century, Iberians conceived of blackness and enslavement as synonymous, creating an almost exclusively racialised institution.[108]

At a time when the enslavement of other Europeans was considered contrary to international and domestic law in the European States that engaged in the transatlantic slave system, the characterisation of African societies as barbarous, savage, and uncivilised enabled the treatment and exploitation of Africans as if they were property.[109] In this period, being outside the religious order ceased serving as the primary justification for exploitation, replaced by racial hierarchies.[110] Thus, for Africans, conversion to Christianity would not serve as a defence against enslavement despite pre-existing standards preventing the enslavement of fellow Christians. Many international legal scholars were comfortable accepting or justifying exceptions to the general prohibition of enslavement within the Christian world on the basis of stereotypes of race-based inferiority.[111]

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[104] Chouki El Hamel, *Black Morocco: A History of Slavery, Race, and Islam* (Cambridge University Press 2013).
[105] Rudolph T Ware III, 'Slavery in Islamic Africa, 1400-1800' in Eltis and Engerman, above n 14, 48.
[106] Ibid, 73.
[107] Bartolomé de Las Casas, *A Short Account of the Destruction of the Indies* (Nigel Griffin trans, Penguin 1992). See also Lawrence Clayton, *Bartolomé de Las Casas and the Conquest of the Americas* (John Wiley & Sons 2010). At the end of his life, de Las Casas came to renounce his own position on the enslavement of Africans, then framing it as equally unjust as the enslavement of indigenous Americans – *History of the Indies* (Andrée Collard trans, Harper & Row 1971).
[108] Araujo, *Reparations*, above n 18, 18.
[109] The juridification of European racialised enslavement in the writings of international jurists is considered in Chapter 2, Section 4.
[110] Jurists in the Muslim world had maintained the recognition that legitimate enslavement relied upon the enslavement of non-Muslims in the medieval period, despite practice to the contrary, while Christian jurists similarly maintained that only those outside the Christian world could be lawfully enslaved. See Brion Davis, above n 98.
[111] See Chapter 2, Section 4.

To paraphrase Sartre for the transatlantic context, it was not the experience of African peoples and civilisations that produced either the concept of blackness or the association of Africa with barbarism. Rather, it was the idea of the 'savage negro' cemented to justify colonialism and enslavement that explained the experience (both intellectual and physical) of interactions between Europeans and Africans. If the 'savage negro' did not exist, the white supremacist would invent him.[112] This relationship between the construction of the African and experience is evident in David Goldenberg's reflections on the transformation of interpretations of the biblical story of the curse of Canaan, frequently used as a justification for racialised enslavement.[113] The enslavement of 'Ham's black descendants' was not justified by an inherently racist biblical text, but rather that interpretation of the script was racialised by the inculcation of the enslavement of Africans.[114] Blackness was not merely correlated with the enslavement of Africans and their descendants, but in many ways causative, and likewise 'whiteness' and white pathology were not only the cause of racialised enslavement, but were also produced by it.[115]

The construction of blackness and its correlation with enslavement had far-reaching and multitudinous effects that grew beyond the institution of chattel enslavement alone. While racial distinctions were developed in relation to the expansion of enslavement, they were not restricted to it. As Locksley Edmondson emphasises, transatlantic enslavement consolidated patterns of international, political, and economic race relations, resulting in the 'triumph of white-world racism'.[116] These racialised dynamics infused social and international interactions to a significant degree, and are yet to be eradicated.[117]

While understandings of race were not static or monolithic during this period, demonstrating evolution and fluctuations, the trajectory of the dominant construction of the African was shaped by the transatlantic system. The racialised dynamics that developed in the medieval Muslim world, and which

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[112] Jean-Paul Sartre, *Anti-Semite and the Jew* (George J Becker tr, Schocken Books 1974), 13.
[113] David Goldenberg, *The Curse of Ham: Race and Slavery in Early Judaism, Christianity, and Islam* (Princeton University Press 2005).
[114] Ibid, 175-76.
[115] Ronald Salzberger and Mary Turck, 'Slavery's Insults: The Continuing Nonmaterial Injuries of Slavery' in Ronald Salzberger and Mary Turck (eds), *Reparations for Slavery: A Reader* (Rowman & Littlefield 2004), 48.
[116] Locksley Edmondson, 'Tran-Atlantic Slavery and the Internationalization of Race' (1976) 22 *Caribbean Quarterly* 5.
[117] See Alexis de Tocqueville, *Democracy in America* (J P Mayer and Max Lerner eds, George Lawrence trans, Harper & Row 1966), 294.

took root, grew, and were tended to by the racialisation of transatlantic enslavement, continue to bear strange fruit despite decades having passed since the system of legal enslavement itself was abolished.

1.6. The contemporary legacies of historical enslavement

At the heart of reparations claims is an understanding of the system of transatlantic enslavement that did not end in the nineteenth century when major European powers abolished the institution within their territories.[118] Laura Hein articulates this relationship between past and present, suggesting that 'demands for redress are really about claiming humanity in the present by demonstrating that this status was unjustly denied in the past'.[119] Thus, calls for reparations are focused on reframing present structures and institutions so that historical victimisation and its legacies are addressed.[120] United Nations General Assembly Resolution 61/19 acknowledged that transatlantic enslavement is at the core of situations of 'profound social and economic inequality, hatred, bigotry, racism and prejudice' existing today, echoing the Durban Declaration's recognition of the contemporary legacies of the transatlantic system.[121] Thus, the moral significance of reparations claims rests not only upon historical injustice, but upon the impact wrongdoings continue to have on the present.[122]

The legacies of the transatlantic system manifest in the social, economic, and political development of African and diasporic States, as well as in symbolic and immaterial harms to people of African descent. Lord Judd highlighted the impact of structures of plantation-based enslavement on African and Caribbean development, noting that 'traditional, balanced self-sufficiency' with established coping mechanisms for systemic shocks were ousted during the centuries of colonial enslavement and replaced by 'over-dependence on a single commodity', making these States extremely vulnerable to global market fluctuations.[123] Similarly, Sidney Mintz

[118] France, Great Britain, the Netherlands, Portugal, Spain, and the United States all effected legal abolition in the forty year period between 1834 and 1873.
[119] Laura Hein, 'War Compensation: Claims against the Japanese Government and Japanese Corporations for War Crimes' in John Torpey (ed), *Politics and the Past: On Repairing Historical Injustices* (Rowman & Littlefield 2004).
[120] Ibid. This characterisation of reparations is further explored in Chapters 4-7.
[121] UNGA Res 61/19 (28 November 2006) UN Doc A/RES/61/19, preamble; 'Durban Declaration and Plan of Action, Adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' (Durban, 8 September 2001), Article 158.
[122] Waldron argues that the moral significance of past events is tied up in the difference it makes in the present – Jeremy Waldron, 'Superseding Historical Injustices' in Salzberger and Turck, above n 115, 208.
[123] Lord Judd, HL Deb, above n 8, col 1055.

emphasises that the plantation system developed by colonial powers shaped the economic character of Caribbean States far beyond the abolition of enslavement, with elements of coercion and deception remaining central.[124] Similar economic repercussions can be identified in other European colonies.[125]

On the individual and community level, post-emancipation conditions continued to subordinate people of African descent.[126] Disparities in intergenerational wealth transfers between people of African descent in the diaspora and other racial groups are highlighted as continuations of the dispossession of transatlantic enslavement.[127] Moreover, the failure to provide redress upon abolition is characterised as cementing the gap between the descendants of enslaved persons and enslavers.[128] As Randall Robinson declared:

> No nation can enslave a race of people for hundreds of years, set them free bedraggled and penniless, pit them, without assistance in a hostile environment, against privileged victimizers, and then reasonably expect the gap between the heirs of the two groups to narrow.[129]

Legal freedom did not constitute the realisation of substantive freedom, nor could it serve as the foundation for equality without further measures.[130] Yet, adding to a pattern of exploitation and denial, the further measures actually adopted in the aftermath of abolition were not those that would support the recovery of previously enslaved persons, as demanded by the frameworks of reparatory justice.[131] Rather, structures put in place in the

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[124] Sidney Mintz, *Caribbean Transformations* (Aldine Publishing 1974), 31.
[125] See Herbert Klein, *African Slavery in Latin America and the Caribbean* (2nd edn, Oxford University Press 2007); Jeremy Adelman, *Colonial Legacies: The Problem of Persistence in Latin American History* (Routledge 1999); John Coatsworth, 'Inequality, Institutions and Economic Growth in Latin America' (2008) 40 *Journal of Latin American Studies* 545; Victor Bulmer-Thomas, *The Economic History of Latin America Since Independence* (2nd edn, Cambridge University Press 2003).
[126] Salzberger and Turck, 'Slavery's Insults' above n 115, 51.
[127] See Darrell Gaskin, Alvin Headen and Shelley White-Means, 'Racial Disparities in Health and Wealth: The Effects of Slavery and Past Discrimination' (2005) 32 *The Review of Black Political Economy* 95; Palma Strand, 'Inheriting Inequality: Wealth, Race, and the Laws of Succession' (2010-2011) 89 *Oregon Law Review* 453; William Collins and Marianne Wanamaker, 'Up from Slavery? African American Intergenerational Economic Mobility since 1880' (2017) <www.nber.org/papers/w23395> accessed 31 October 2018
[128] See, for instance, Melinda Miller, 'Land and Racial Wealth Equality' (2011) 101 American Economic Review 371; Rhonda Magee, 'The Master's Tools from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse' (1993) 79 *Virginal Law Review* 863.
[129] Robinson, *The Debt*, above n 3, 74.
[130] Watson Branch, 'Reparations for Slavery: A Dream Deferred' (2002) 3 *San Diego International Law Journal* 177, 185.
[131] The frameworks are considered in Chapters 4 and 5.

years following emancipation enabled the continued exploitation and marginalisation of people of African descent.

Enslavement was not eradicated, but reformed. New forms of exploitation arose to enable the continued extraction of the labour of people of African descent under coercive conditions – what Beckles labels the 'continuation of most criminal violations against blacks'.[132] Structures of embedded racism, collective memories of enslavement, and collective identities born from this system also continue to have direct impacts on the lives of Africans and people of African descent.[133] Persistent structures of white supremacy and the stigmatisation of blackness that had evolved to support the institutions of racialised enslavement compounded economic deprivation, making recovery for freed persons and their descendants a much more difficult endeavour.[134] Janna Thompson highlights the ways in which contemporary experiences are shaped by historical injustices on the collective level:

> Members of nations whose ancestors were the victims of unrequited historical wrongs often suffer from despair, depression and loss of both confidence and hope for the future. Even the material disadvantages that result from historical injustice are viewed by the people who suffer them from the perspective of their history.[135]

Reparations claims seek to address these structural and institutional failures created, supported, or compounded by the injustices in question, as well as responding to the connections between historical injustices and the lived experiences of people of African descent.

Severing enslavement from the broader context of injustices committed against African peoples and their descendants impoverishes understandings of the realities of the system of transatlantic chattel enslavement. Such artificial partition of the abuses committed against Africans as peoples and as individuals not only fails to capture the broader picture of European

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[132] Beckles, above n 3, 169. See also Douglas Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (Icon Books 2012).
[133] Allen Jr and Chrisman suggest that the descendants of enslaved person are still subjected to social constructions of racial identity, and thus continue to suffer the 'institutional legacies of slavery' – Ernest Allen Jr and Robert Chrisman, 'Ten Reasons: A Response to David Horowitz' in Salzberger and Turck, above n 115, 134. Brophy argues that reparations aim to address these racial dynamics, by working to eradicate or reduce the 'caste system established during slavery, which continues to the present' - Alfred Brophy, 'The World of Reparations: Slavery Reparations in Historical Perspective' (2002) 3 *Journal of Law in Society* 105, 109.
[134] Salzberger and Turck, above n 115, 51. See also Robert Westley, 'Many Billions Gone: Is It Time to Reconsider the Case for Black Reparation?' (1998) 40 *Boston College Law Review* 429.
[135] Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Polity 2002), 66.

interactions with Africa, but creates a false equivalence between the *maangamizi* and other systems of enslavement operating throughout history. Moreover, such an approach fails to grapple with the continuities connecting contemporary experiences of people of African descent with the history of racialised chattel enslavement.

The historical record is littered with examples of systems of enslavement premised upon the alienation of particular peoples. Many of these have involved forced migration, they are often effected through violence, and some have demonstrated racial denigration. Nonetheless, the *maangamizi* has unique dimensions that should not be overlooked when considering the case for reparations – for it is these features to which calls for redress speak. It is the system of transatlantic chattel enslavement, in its particularities and in context, that is the subject of these claims. Echoing Rhonda Magee's characterisation of the transatlantic system as a 'super-wrong', and the notion of this as a 'dark chapter' in history, Randall Robinson separates the enslavement of Africans and their descendants as its own chapter in the historical record and a *sui generis* injustice:[136]

> Like slavery, other human rights crimes have resulted in the loss of millions of lives. But only slavery, with its sadistic patience, asphyxiated memory, and smothered cultures, has hulled empty a whole race of people with inter-generational efficiency. Every artifact of the victims' past cultures, every custom, every ritual, every god, every language, every trace element of a people's whole hereditary identity, wrenched from them and ground into a sharp choking dust. It is a human rights crime without parallel in the modern world. For it produces victims ad infinitum, long after the active state of the crime has ended.[137]

It is this broad understanding of the system of transatlantic chattel enslavement that serves as the starting point for the consideration of reparations.

[136] Magee, above n 128, 901.
[137] Randall Robinson, *The Debt,* above n 3, 216.

CHAPTER 2: TRANSATLANTIC ENSLAVEMENT IN THE MAKING OF INTERNATIONAL LAW

The evolution, devolution, and terms of abolition

Transatlantic enslavement and the *maangamizi* are complex phenomena defined in many ways by ambiguity and nuance, blurring the boundaries between issues of law, politics, and morality. For some commentators, law is perceived to experience an existential crisis in such contexts, as the conflict between positive law and justice demands the sacrifice of one in favour of the other.[1] For others, the nature and extent of atrocities render law impotent or inadequate.[2] Yet, despite these professed limitations, it is often to the law that victims and survivors turn for justice, whether they seek a concrete system in which a complete legal claim may be brought to bear and adjudicated, or simply a framework against which to assess alleged wrongdoing.[3] Thus, an alternative understanding emerges in which legal frameworks do not suffer paralysis in the face of massive or grave injustice, but rather are an imperative and indispensable response in the aftermath of abuse.[4]

Discourse concerning reparations for transatlantic enslavement demonstrates the centrality of legality in considering not only the justiciability of claims, but also their morality. This is true of reparations proponents, who employ the language of criminality and justice to support their claims, and of reparations detractors exploiting the rhetoric of legality as a moral defence.[5] The claim to contemporary legality can be as persuasive

[1] See for instance the jurisprudential debate between HLA Hart and Lon Fuller which defines law by this very distinction. HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994); Lon Fuller, *On the Morality of Law* (Yale University Press 1964).
[2] As Hannah Arendt famously opined in relation to Nazi crimes, atrocities might explode the very limits of the law, overstepping and shattering all legal systems. Lotte Kohler and Hans Saner (eds) *Hannah Arendt – Karl Jaspers Correspondence 1926-1969* (Robert Kimber and Rita Kimber trans, Harcourt Brace and Jovanovich 1992), 54.
[3] The demand for justice, whether legal or political, is considered further in Chapters 4 and 7.
[4] A growing body of literature supports the centrality of reparations in the aftermath of atrocity. See Carla Ferstman, Mariana Goetz, and Alan Stephens, *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place, Systems in the Making* (Martinus Nijhoff 2009); Koen De Feyter, Stephan Parmentier, Marc Bossuyt, and Paul Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005); Pablo de Greiff, *The Handbook of Reparations* (Oxford University Press 2008); Max Du Plessis and Stephen Peté, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (Intersentia 2007).
[5] See, for instance, Hilary Beckles, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (University of the West Indies Press 2013); Nora Wittmann, *Slavery Reparations Time is Now: Exposing Lies, Claiming Justice for Global Survival, An International Legal Assessment* (Power of the TrInIty Publishers, 2013); Anthony Gifford, 'Pipe Dream or

an argument as cries of injustice, and often proves to be more so in the consideration of claims to reparations for historical enslavement specifically, and the *maangamizi* more broadly.[6] Thus on both sides of the reparations debate, it is often to legal systems that those seeking to assert or deny wrongdoing and responsibility for historical injustices avert. Engaging with the ways transatlantic enslavement and the *maangamizi* interact with the international legal system is therefore vital to the development of an understanding of present duties of redress.

Although enslavement itself is often the primary point of reference for reparations movements, a range of injustices inextricably linked to processes of enslavement occurred within, or related to, the transatlantic system. Yet, discourse on post-colonial redress and the consideration of reparations for chattel enslavement remain largely disparate.[7] This separation may be explained by the disparities between the nineteenth century movement for the abolition of slavery and the mid-twentieth century push for decolonisation. The legitimacy of the two institutions was not seen as fundamentally intertwined for the purposes of their elimination, and thus the movements gained traction in different time periods, with different actors, targeting distinct agendas, and utilising different methods.[8] Yet, despite the differentiation in movements to eradicate or overcome particular injustices, it is important to recognise the extent to which European colonial abuses were entangled at inception, and during their respective periods of dominance. The following analysis will therefore address the injustice of chattel enslavement of African people and people of African descent both in isolation and in the context of the *maangamizi* – recognising the imperial roots of international law.

In considering the crystallisation of international law, understandings of enslavement within the systems of *jus naturale* and *jus gentium,* the existence of limitations on enslavement as a specific category of legal

Necessary Atonement?' (2007) 36 *Index on Censorship* 89. Cf Lord Chesham, HL Deb 14 March 1996, vol 570, cols 1057-1062; Tony Blair, 'The Shame of Slavery' (27 November 2006) *New Nation* 2, <www.ligali.org/truth2007/learning/tony_blair_statement_of_sorrow_new_nation_27_nov_06.pdf> accessed 2 March 2018.

[6] A number of commentators conclude that the legality of enslavement at the time renders reparations inappropriate. See, for instance, HL Deb, above n 5; Blair, above n 5.

[7] See John Torpey, *Making Whole What Has Been Smashed: On Reparations Politics* (Harvard University Press 2006), 3.

[8] The international movement towards global abolition of the slave trade and slavery primarily took place during the nineteenth and early twentieth century, while decolonisation was more highly concentrated in the latter half of the twentieth century when a plethora of 'new' post-colonial States were incorporated into the international community.

wrongdoing, and the development of abolition and prohibition will be evaluated. Tracing the roots of modern international law reveals that a singular, positive prohibition against enslavement in the general sense is only one part of a larger whole. This chapter will therefore consider the centrality of the *maangamizi* and colonialism in the evolution of a global legal system, and question whether the limits of legality and justice ought now to be assessed against this framework.

The abolition of slavery was shaped by the resistance of Africans and people of African descent in the diaspora.[9] The influence of these actors should not be overshadowed by a narrative prioritising or aggrandising the actions of European abolitionists. However, in the positive international law of the nineteenth and twentieth centuries, European States engaged in a conscious movement towards international abolition that speaks significantly to the development of international law. This from the perspective of the central perpetrators from the sixteenth to the nineteenth centuries who constructed international law in this period as an almost exclusively Western European ideological framework. Thus, any focus on European State action in the following analysis should not be taken as disregard for the role of African people – both enslaved and free – in the process of abolition. Rather, attention is turned towards European conduct precisely because these States were the primary perpetrators in the system of chattel enslavement, which stripped millions of their lives and purported to deprive millions more of their humanity. Simultaneously, it was these States that generated the international legal structures of the past five centuries, including those identified as having permitted the *maangamizi.*

2.1. International law's 'Other'

According to Hugo Grotius, the European jurist often labelled the 'father of international law', *jus gentium* acquires obligatory force by virtue of the consent of all nations, or at least of several.[10] Thomas Lawrence similarly supported a conception of law based upon interactions between States and the rules observed in this context, rather than the recognition, interpretation, and application of transcendental rules of right, although with

[9] See, for instance, Douglas Egerton, 'Slave Resistance' in Mark M Smith and Robert L Paquette, *The Oxford Handbook of Slavery in the Americas* (Oxford University Press 2010), 447; Howard Jones, *Mutiny on the Amistad: The Saga of a Slave Revolt and Its Impact on American Abolition, Law, and Diplomacy* (Oxford University Press 1987); and Manisha Sinha, *The Slave's Cause: A History of Abolition* (Yale University Press 2016).
[10] In Henry Wheaton, *Elements of International Law* (Little, Brown and Co 1866), 10.

reference to the fundamental principles on which law was based.[11] In the age of expanding European 'civilisation', this consent-based theory developed to create a hierarchy in which the conduct of some States mattered, while others did not.[12] The doctrine of sovereignty, employed to exclude some peoples from Grotius' group of all nations, was constructed from the perspective of European jurists to 'account for relations between the European and non-European worlds' and, in particular, to justify colonial expansion and the exploitation of non-European lands and peoples.[13] European colonial States sought to control those outside Europe, involving stigmatising, marginalising, destroying, and dispossessing the 'other' of all they had.[14]

In light of the exclusion of a significant number of the world's peoples from the creation of this system of international law, it is worth reconsidering the extent to which this can be framed as truly international. While it may be established that a European regional law of nations came to dominance prior to the institution of transatlantic enslavement, shaping the international legal landscape for the majority of this period, the conclusion that this constitutes universal law is far from assured. Yet, it is the writings of European jurists that forged understandings of early-modern international law.[15] Further, these commentaries involved the global assertion of norms defined by a select group of States, directly and explicitly excluding other peoples, both as creators and subjects of international law. Therefore, the basis on which European-Christian States purported to impose a legal framework of norms onto the 'New World' must be interrogated.[16] As Anghie frames this fundamental question: 'How could it be claimed the European civilization, in all its avowed specificity, was somehow universal and binding on non-European States?'[17]

[11] Lawrence suggests that nineteenth century jurists turned international law into a science based on the observation of rules actually followed by States, to be classified with reference to the 'fundamental principles' on which they are based. Thomas Lawrence, *The Principles of International Law* (D C Heath 1895).
[12] Although Grotius did not make such a distinction between States, later jurists and the conduct of European colonial powers would entrench it. See for instance Wheaton, above n 10.
[13] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007), 3.
[14] Shelley Wright, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (Routledge 2001), 57.
[15] Contemporary historical reviews of international law generally highlight a selection of European jurists as the 'classics' of international law. For the most part, these influential texts are found in the Carnegie Institute's *Classics of International Law* series of 22 volumes edited by James Brown Scott, published between 1911 and 1950.
[16] See Wittmann, above n 5, 10-139.
[17] Anghie, *Imperialism,* above n 13, 4.

It was the lack of a conception of property, as understood in the European world, that served as the foundation for dispossession of African, aboriginal, and indigenous lands, and reinforced the associated treatment of these peoples.[18] Prominent jurists from the sixteenth to the eighteenth century came to define the very notion of sovereignty by the nature of the relationship between the people and the land, automatically excluding the possibility of indigenous sovereignty in many cases because inhabitants were considered to 'range over' rather than possess land.[19] The lack of sovereignty, in turn, legitimised a hierarchy of civilisation that situated African, indigenous, and aboriginal peoples as less than their European counterparts not only in terms of Statehood but in a much broader sense.[20] This European-constructed inferiority was employed to legitimise chattel enslavement for centuries.[21]

Not only did the distinction between civilised and uncivilised peoples reinforce the racial dynamic of the transatlantic system, but permitted the waging of wars that would provide enslaved persons for European exploitation. By justifying warfare and conquest through a self-defence argument premised on the fundamental, international legal right to engage in trade and commerce, jurists like Vitoria legitimised the enslavement of indigenous and African peoples on the basis of the classic *jus gentium* exceptional circumstance.[22] Provided jurists could find a justification for war, racialised natural law justifications for slavery were superfluous to requirements. Thus, even without accepting a racial hierarchy of civilisation, international law created the preconditions for mass enslavement and wars of conquest on the basis of an international right to commerce. However, it was the characterisation of African and indigenous populations as economically backwards, closed off to trade, and incapable of capitalising on the asset of their own territory, that provided the justification for the

[18] See for instance *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 concerning the acquisition of land in Australia on the basis of lack of a concept of property amongst aboriginal peoples.
[19] See Emer de Vattel, T*he Law of Nations* (Béla Kapossy and Richard Whatmore eds, Liberty Fund 2012) criticising Spanish conquest of Mexico and Peru but approving dispossession of Native Americans because of their relationship to the land. See also Francisco de Vitoria, 'The First Reflecto of the Reverend Father, Brother Franciscus de Victoria On the Indians Lately Discovered' in James Brown Scott, *The Spanish Origins of International Law: Francisco de Vitoria and His Law of Nations* (Clarendon Press 1934)
[20] On the racialisation and denigration of Africans and their descendants, see Chapter 1, Section 5. On aboriginal and indigenous peoples, see S James Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004), 15-48.
[21] See Chapter 1, Section 5.
[22] The positioning of enslavement as a *jus gentium* exception to the general *jus naturale* prohibiting enslavement is discussed further in Section 4 below. Vitoria based the distinction on the refusal of the 'Indians' to allow Spaniards to travel and trade within their territories, as the right to self-defence extended to international commerce. Vitoria, 'The First Reflecto', above n 19.

allowance of conquest and outright denial of sovereignty, and thereby enslavement.[23]

The marginalisation of Africans in the international legal order, and justifications for their enslavement, did not conclude with the legitimation of warfare. As a measure of human evolution, the claimed lack of political organisation and economic development of non-European peoples, in conjunction with religious and socio-cultural differences, fuelled the repositioning of enslavement from its place in *jus gentium* into a system resembling or constituting *jus naturale,* aligning with Aristotle's characterisations of the 'natural slave'.[24] Although international jurists continued to highlight necessary preconditions for lawful enslavement, the transatlantic system grew to accept and defend the enslavement of almost any person racialised as black, with few caveats.[25] Thus the definition of civilisation, and the denial of such in relation to non-European peoples, came to fundamentally alter the placement and parameters of enslavement in international law.[26]

The international legality of both colonialism and enslavement relied on the assumption that non-European States, and specifically societies in Africa and the Americas, did not have international legal personality – or at least not in the same way that European States did.[27] However, the characterisation of these peoples as lacking political organisation, 'uncivilised', and 'savage' has been revealed to have been inaccurate, self-serving, and unjust.[28] Accepting the developments of international law relating to enslavement and the *maangamizi* from this perspective alone is therefore problematic, for it relies on the recognition of these prejudicial conclusions as a legitimate foundation not only for European law, but for a universal legal framework applying equally to those peoples.

Acknowledging the political identity of non-European States denied Statehood on the basis of a lack of civilisation, and the humanity of non-

[23] The characterisation of legal forms of enslavement in the writings of international jurists are considered in Section 4 below.
[24] On the significance of Aristotle's 'natural slave' and its relationship to the racialisation of enslavement from the medieval to the modern period, see David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (Oxford University Press 2006), 48-76.
[25] See Chapter One, Section Five.
[26] The specific developments in relation to enslavement's position in international law are considered further in Section 4 below.
[27] See Anghie, *Imperialism*, above n 13, 101.
[28] See, for instance, the rejection of the *terra nullius* claim to sovereignty where such relied on the classification of indigenous peoples as sub-human - *Mabo and others v Queensland (No 2)* [1992] HCA 23.

European peoples, necessitates a reconsideration of the historical international legal status of transatlantic enslavement and the *maangamizi.* This is so as it was these presumptions on which the practices were legitimised. The starting point then is not the assumption of the universality of European international legal thought, but the recognition that such may have represented only a regional system of international law. Nora Wittmann, advocating this approach, goes further to suggest that the capacity of European States to impose norms upon the 'New World' was itself 'a consequence of the crime of transatlantic slavery.'[29]

Wittmann's conclusion, discussed in the previous chapter, is that international restrictions on enslavement were established prior to the birth of the transatlantic system, involving a collection of rights for enslaved persons contravened by transatlantic enslavement.[30] However, this position does not account for the situations in which enslaved persons were not afforded significant rights of their own, including those indigenous African systems of dependency and servility considered in chapter 1, nor does it foresee the potential for international law to evolve and change for the worse.[31] Nonetheless, the practice and opinions of African States and peoples in determining the reach or extent of European international law must be considered in framing universal norms. This approach is adopted in the consideration of developing customary international law below.

The conflicted history of enslavement also raises a fundamental question for the consideration of international law governing contemporary reparations for historical injustices committed against African, aboriginal, and indigenous peoples alike. Should the legal frameworks constructed by European States in order to justify dispossession and enslavement now be used to assess that same conduct? This concerns not only the consideration

[29] Wittmann, above n 5, 11.
[30] Ibid, 138. Enslavement in just war was also a primary justification for enslavement in the transatlantic system. However, as discussed in Chapter One, this was so widely abused and manipulated by both Europeans and Africans involved in the system that it cannot stand scrutiny. Interrogation of the legitimacy of the conditions in which Africans were enslaved was non-existent, the illegitimate circumstances of internal enslavement were widely known, Europeans themselves participated in raids and *razzias* outside the confines of 'just war', and European actors manipulated and involved themselves in African politics to ensure the continuation of conflict thus securing the supply of captives.
[31] As discussed previously, limitations on masters in Roman Law were not for the benefit of enslaved persons, and a master would suffer no consequence for killing an enslaved person over whom he exercised property rights. Moreover, in instances in which a master was killed by an enslaved person, Roman Law condoned the killing of all slaves in the household, irrespective of their involvement. Slaves were also often precluded from legal personality, and denied the ability to testify in courts of law. See WW Buckland, *The Roman Law of Slavery: the Condition of the Slave in Private Law from Augustus to Justinian* (Cambridge University Press 1908).

of subaltern perspectives in determining the development and existence of international norms, but the procedural elements of the legal system that impact the ways in which rules are established, recognised, and altered. The requirements of *opinio juris* and State practice in the formulation of customary international law, the doctrine of inter-temporal law, the specifications of attribution, and the parameters of causation are all features of a system constructed by European States.[32]

Despite the inequalities embedded in their foundations, engaging with the structures of European international law contributes to the reparations debate in several respects. It is these frameworks to which reparations detractors refer in justifying the denial of a case to answer in the legal context, but also with regard to the political and moral justifications for redress.[33] Destabilising these international legal arguments therefore creates space in which reparations discourse can occur with full acknowledgement of the complex and problematic infrastructure of international law, without treating such as a complete bar to recovery. Simultaneously, the procedural frameworks provide a point of reference for the consideration of historical injustices that speaks in the language of detractors. Thus, this approach reconceptualises accepted principles and approaches to account for the intricacies and nuances of the historical record, carrying the weight of these frameworks without blindly accepting them.

The question of universality and legitimacy in the establishment and evolution of international law from the period of colonisation, enslavement, and denial of Statehood is further complicated by abolition, decolonisation, and increasing recognition of post-colonial States and indigenous peoples. International law did not remain a static representation of European imperial domination, but rather evolved to recognise and integrate those States it had previously denied.[34] Post-colonial States did not simply remove

[32] See for instance, George Rodrigo Bandeira Galindo and César Yip, 'Customary International Law and the Third World: Do Not Step on the Grass' (2017) 16 *Chinese Journal of International Law* 251; Umut Özsu, 'An Anti-Imperialist Universalism? Jus Cogens and the Politics of International Law' in Martti Koskenniemi, Walter Rech, and Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (Oxford University Press 2017).
[33] See, for instance, Andreas Buser, 'Colonial Injustices and the Law of State Responsibility: The CARICOM Claim for Reparations' (2017) 2 *Heidelberg Journal of International Law* 409.
[34] See CG Weeramantry, *Universalising International Law* (Brill 2004); Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford University Press 2007); Rajat Rana, 'Symphony of Decolonisation: Third World and Human Rights Discourse' (2007) 11(4) *International Journal of Human Rights* 367. On the tensions between emancipatory ideas and the current structure of the international order, see Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 *Social and Legal Studies* 337; Nathaniel Berman,

themselves from the international legal order constructed through the colonial encounter, but rather acceded to it in many instances, demanding its adaptation in a variety of ways, but otherwise reinforcing its broader legitimacy.[35] While this does not serve as the foundation for uncritical acceptance of the system as a whole, and thus should not be taken as conclusive, contemporary de-colonial developments support its value in considering reparations claims.

Finally, in applying problematic international legal frameworks to claims demanding the redress of historical injustices that in part constitute this system, the underlying principles of international law serve as a point of reference. The promises of international law express a universal perspective; a system situated within broader understandings of justice, equality, and representation.[36] It is this aspiration to which reparations proponents speak when they call for international legal responses, and it is this ambition that frames the following consideration of the international legal dimensions of claims to reparations for transatlantic enslavement and the *maangamizi*, regardless of whether a legal claim is feasible in practice.

2.2. Constructing responsibility in international law

Notions of State responsibility in the past and the present are central to the consideration of international legal obligations to provide redress. Without a doctrine of responsibility and an understanding of what constitutes wrongdoing, a case for reparations cannot be formulated in either the moral/political or the legal context. Current international law in this regard is articulated in the Articles on the Responsibility of States for Internationally Wrongful Acts, under which responsibility rests upon the twin pillars of attribution and breach.[37] This second element, satisfied where international law has crystallised at the time of the breach, and frustrated where the

Passion and Ambivalence: Nationalism, Colonialism, and International Law (Brill 2011); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011); Sundhya Pahuja, 'The Postcoloniality of International Law' (2005) 46(2) *Harvard Journal of International Law* 459.

[35] Considering the tensions in post-colonial States' choice to join the existing international legal order, see Vasuki Nesiah, 'Placing International Law: White Spaces on a Map' (2003) 16 *Leiden Journal of International Law* 1.

[36] See, for instance, Wright, above n 14; and Pahuja's critique of this text – Sundhya Pahuja, '"This is the World: Have Faith"' (2004) 15(2) *European Journal of International Law* 381.

[37] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001) UN Doc A/56/10 (Articles on State Responsibility), Article 2. This approach is consistent with the approach taken by the International Court of Justice in *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 64.

relevant prohibition comes into force at a later date, is often at the very heart of reparations denials.[38] Wittmann asserts that the claim to contemporary legality – in conjunction with non-retroactivity – is the 'basic argument that European and US ex-enslaver States always come up with first and last'.[39] Similarly, Hilary Beckles suggests that European States' have persistently premised denials of the reparations case on the basis of historical legality.[40]

The nature of denials demonstrates the interaction between the requirement of a breach of an international obligation, and the doctrine of inter-temporal law, demanding such obligation be in force at the time of the conduct in question.[41] As *The Island of Palmas* case suggests: 'juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled'.[42] Yet, despite persistent denials by those in positions of global power, the international law governing historical enslavement is not as clear as reparations detractors suggest. Amongst activists, the claim that the institution was illegal during the period of transatlantic chattel enslavement is ubiquitous, supported by academics, and current Judge of the International Court of Justice, Justice Patrick Robinson.[43] Robinson concluded in response to Wittmann's monograph, that a '*prima facie* case for the illegality of slavery' had been established, 'notwithstanding the difference in the practice followed in the colonies'.[44] The justification for these assertions in the legal frameworks is therefore interrogated below.

The doctrine of inter-temporal law presents an additional challenge in the consideration of claims to reparations for historical enslavement beyond the

[38] The first element, attribution, will be considered in chapter 5, alongside an analysis of harm and causation. On the role of arguments concerning the historical legality of enslavement, see Blair, above n 5; HL Deb, above n 5.
[39] Wittmann, above n 5, 2.
[40] Beckles, above n 5, 167.
[41] Articles on State Responsibility, above n 37, Article 13. See also Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1970) 1155 UNTS 331, Article 28.
[42] *Island of Palmas Case (United States v the Netherlands)* (1928) 2 RIAA 829, 845. This case concerned a territorial dispute between the Netherlands and the United States. In light of the quoted passage, the Court proceeded to assess the question of the effect of 'discovery' of the island by Spain against the law in force in the first half of the 16th century. Ultimately, the Tribunal found in favour of the Netherlands by virtue of the continuous and peaceful display of sovereignty, as opposed to the US claim based on Spanish 'discovery' which lacked the actual exercise of authority.
[43] See also Richard Mitchell, 'Compensate Us for Slavery – Robinson' (*The Gleaner*, Kingston, 3 March 2015) <jamaica-gleaner.com/article/lead-stories/20150303/compensate-us-slavery-robinson> accessed 2 March 2018; Gifford, above n 5; Wittmann, above n 5; Beckles, above n 5; Verene Shepherd, 'Slavery, Shame and Pride: Debates over the Marking of the Bicentennial of the Abolition of the British Trans-Atlantic Trade in Africans in 2007' (2010) 56 *Caribbean Quarterly* 1
[44] In Wittmann, above n 5.

crystallisation and evolution of international norms and the problems of Euro-centrism addressed in Section 1 of this chapter. In demanding that the case for reparations be considered in light of legal understandings in effect at the time, a return to the predominant modes of legal thinking is mandated. In the context of historical abuses dating beyond the nineteenth century, this entails a fundamental shift in the way international law is conceived. While positivism is widely accepted in the present, international jurists from the fifteenth through to the end of the eighteenth century premised their understandings on natural law philosophies.[45] Thus, although the starting point for the following analysis is the codification of international law governing enslavement, the consideration of customary international law below integrates early-modern international jurisprudential thinking in engaging with the legal frameworks in place at the time.

2.3. Codifying abolition and prohibition

Attempting to backdate the abolition of enslavement in treaty law to precede the transatlantic system is a largely fruitless endeavour. Although enslavement had been abolished internally in a number of locations throughout history prior to European expansion into the 'New World', it was not until the twentieth century that a treaty of universal scope was adopted prohibiting 'slavery' and the 'slave trade'.[46] The League of Nations Slavery Convention of 1926 was the first universal international instrument establishing specific rules requiring the abolition of the slave trade and the institution of slavery, albeit 'progressively and as soon as possible' with regards to the latter.[47] The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, closed this transitional period, affirming a fully crystallised international prohibition against enslavement and trade in enslaved persons.[48] Ten years later the International Covenant on Civil and Political Rights identified the

[45] Thomas Lawrence, for instance, despite a consent-based understanding of international law, suggested that the organisation of international rules according to the 'fundamental principles' which they realise is a part of the business of international law, implying that legal norms reference overarching principles (naturalist norms) – above n 11.

[46] A small window of time in the early nineteenth century serves as a limited exception to this conclusion, wherein British Courts came to accept a natural law justification for a *jus gentium* right to visit foreign ships in times of peace in order to supress the 'slave trade'. Between the 1810 decision in *The Amedie* and the 1817 *Le Louis* case, however, this would shift to a strongly positivist perspective on international law requiring the consent of other States. See Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff 2013), 65.

[47] Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.

[48] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3.

prohibition of 'slavery' and the 'slave trade' in all their forms as non-derogable human rights.[49] Yet, enslavement was the subject matter of a multitude of treaty provisions prior to the drafting of the 1926 Slavery Convention, and in many cases treaties conducted between dominant enslaver States.

The 1919 Treaty of Saint Germain-en-Laye marking the conclusion of the First World War, the 1890 Brussels Conference Act, the 1885 General Act of the Berlin Conference, Act 15 of the 1815 Congress of Vienna, and the related 1814 Treaty of Paris, mark significant milestones in situating the 'slave trade' in international law from the perspective of European slaver States. Yet, these movements towards abolition do little for claims against these States, whose domestic law (for the most part) had already been brought into conformity with their terms.[50] Thus, at least in relation to codified international norms, rules were cemented after the practices that might constitute a breach had already ceased. Moreover, the requirements for suppression were generally couched in language allowing for gradual, rather than immediate, abolition, and treaty relationships were primarily between European powers.[51]

The 1815 Act of the Congress of Vienna is labelled the first international instrument dealing 'specifically with the slave trade in general', although it is probably more appropriate to classify it as the first multilateral agreement dealing with the abolition of the 'slave trade' in general.[52] The Declaration of the Powers, on the Abolition of the Slave Trade contained therein declared 'slave trading' 'repugnant to the principles of humanity and universal morality' as recognised by 'just and enlightened men of all ages', suggested that the public voice in all 'civilized' countries called for 'prompt suppression', and concluded that all the Powers had acknowledged the 'duty and necessity

[49] Article 8 contains the prohibition against slavery, the slave trade, and servitude while Article 4 makes this non-derogable – International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[50] France abolished slavery in 1794 only for Napoleon to renege on this position and reinstate in 1802, to then prohibit slave trading in 1818 and slavery in 1848; Great Britain prohibited the slave trade in 1807 and slavery in all its territories in 1834; the Netherlands prohibited slave trading in 1814 and slavery in 1863; Portugal prohibited slave trading in 1836 and slavery in 1869; Spain prohibited slave trading in 1817 and slavery in 1837 in all colonies bar Cuba, Puerto Rico and Santo Domingo not completing abolition in Puerto Rico until 1873. Denmark-Norway in 1792 declared the transatlantic slave trade illegal with effect from 1803, although it was not until 1848 that slavery in the colonies would be abolished.
[51] With the result being that a claim for breach of obligations must be brought between parties, and those outside the treaty relationship would have no recourse for violations of its terms.
[52] Preceding treaties between European powers having regulated transatlantic enslavement as opposed to prohibiting it. Joaquín Alcáide Fernandez, 'Hostes Humani Generis: Pirates, Slavers, and Other Criminals' in Bardo Fassbender, Anne Peters, Simone Peter and Daniel Högger (eds) *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 120, 131. See also Allain, *Slavery in International Law,* above n 46, 58.

of abolishing it'.[53] The plenipotentiaries therefore committed themselves to securing the universal abolition of the 'slave trade', however, allowing for an (undefined) transitional period in which suppression was scheduled to take place, to be determined by negotiation between the parties.[54]

Although the transitional period was limited by the requirement that parties not neglect proper means of securing the attainment of, and accelerating, complete abolition, the exact end date at which obligations became strictly binding is unclear. The 1885 Declaration Relative to the Slave Trade in the General Act of the Berlin Conference, on the other hand, declared 'trading in slaves' to be 'forbidden in conformity with the principles of international law as recognized by the Signatory Powers'.[55] Thus, the Plenipotentiaries bound themselves to employ all means at their disposal to bring an end to the 'trade', and to punish those involved. However, this provision specifically concerned the 'territories forming the Conventional basin of the Congo', rather than purporting universal effect.[56] Moreover, the more extensive provisions concerning enslavement found in the 1890 Full Act of the Brussels Conference, which were not subject to the same geographic limitation, reiterated the transitional period in relation to the suppression of the 'slave trade', with signatories consenting to proceed 'gradually, as circumstances may permit… with the repression of the slave-trade' within their own territories.[57] Thus the differential mandatory weight represents a distinction between the specific multi-lateral regime governing a particular territory in

[53] Declaration of the Eight Courts Relative to the Universal Abolition of the Slave Trade (adopted 8 February 1815) 63 CTS 473 (annexed to the General Treaty of the Vienna Congress as Act 15).
[54] The specification in the Treaty of Paris between the United Kingdom and France of a five-year period for universal cessation of the slave trade, and definitive cessation under any circumstances on the part of the French government may serve as an indicator of an appropriate timeframe for the transitional period in the Congress of Vienna Act, which makes explicit reference to this bilateral treaty, however should not be treated as determinative given the specific reference to negotiation between parties to the 1815 Declaration. A Definitive Treaty of Peace between his Britannic Majesty and his most Christian Majesty Louis XVIII (UK-France) (adopted 30 May 1814).
[55] General Act of the Berlin Conference on West Africa (adopted 26 February 1885), Article 9. Signatories to the treaty included the major enslaving States engaged in transatlantic chattel enslavement – Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Norway, Turkey, and the United States.
[56] Ibid.
[57] Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors (adopted 2 July 1890, entered into force 31 August 1891), Article 3 (Brussels Conference Act). Signatories included the major slaving powers of the sixteenth-nineteenth centuries: Austria-Hungary, Belgium, the Congo Free State, Denmark, France, the German Empire, Italy, the Netherlands, the Ottoman Empire, Persia, Portugal, the Russian Empire, Spain, Sweden-Norway, the United Kingdom, the United States of America, and Zanzibar.

Africa, and universal international norms, rather than the universal crystallisation in 1885.[58]

Until the adoption of the 1890 Final Act of the Brussels Conference, international agreements had maintained their focus on outlawing and repressing the 'slave trade', as opposed to dealing with the institution of 'slavery' more generally. Although evidence suggests that this approach was conceived as a window to complete abolition, the distinction between commerce and exploitation occurred both in international agreements and in domestic legislation, suggesting that the two prohibitions must be viewed separately for the purpose of establishing contemporary international rules.[59] The 1815 Final Act of the Congress of Vienna and the 1885 General Act of the Berlin Conference addressed the commerce in enslaved persons, but remained silent on enslavement itself, leaving the status of 'slavery' as an institution ambiguous.[60] Affirming the distinction, the 1890 Brussels Conference Act highlighted both the duty to supress the 'slave trade', and the responsibility of parties to liberate enslaved persons, and to protect them once liberated.[61]

Over time, 'slavery' was increasingly recognised in international instruments, extending abolition from the 'slave trade', however, the distinction between the two was continuously affirmed.[62] Like the 'slave trade' before it, the prohibition against 'slavery' in treaty law allowed for a transitional period between articulation and crystallisation, with the 1926 Slavery Convention presenting the obligation to 'prevent and suppress the slave trade' as immediate, while the abolition of slavery internally was

[58] Although Geraldine van Bueren suggests that the terms of the Berlin Conference Act indicated that the slave trade was already considered illegal as contrary to the principles of international law, this does not account for the limited geographic scope of the regime or the distinction between States' internal laws and international legal opinions. Geraldine van Bueren, 'Slavery as Piracy: The Legal Case for Reparations for the Slave Trade' in Christien van den Anker, *The Political Economy of New Slavery* (Palgrave Macmillan 2004), 239-240. On the flaws of this approach, see Allain, *Slavery in International Law,* above n 46, 72.

[59] See, for instance, Holger Lutz Kern, 'Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade' (2004) 6 *Journal of the History of International Law* 233. This supported by the distinctions between the domain of international law and that of sovereign States that, at the time, kept the internal affairs of States entirely removed from the international arena, except where States had consented to incursions.

[60] Declaration of the Eight Courts, above n 53; General Act of the Berlin Conference, above n 55.

[61] Article 7, for instance, allowed fugitive slaves to claim the protection of the signatory powers (and demanded that they provide it), Article 18 required contracting powers protect liberated slaves, Article 28 affirmed that taking refuge on a ship of the signatories would set an enslaved person free, and Article 29 gave enslaved people on certain native ships the right to demand their liberty. Brussels Conference Act, above n 57.

[62] See Convention Revising the General Act of Berlin, 26 February 1885, and the General Act and Declaration of Brussels, 2 July 1890 (adopted 10 September 1919) 15(4) *American Journal of International Law* 314, Annex to Article 1, Article 11 (Treaty of Saint-Germain-en-Laye); 1926 Slavery Convention, above n 47; Supplementary Slavery Convention, above n 48

allowed to occur 'progressively and as soon as possible'.[63] It was not until 1956 that the codified prohibition against 'slavery' itself no longer permitted a transitional period.[64] Thus, at this point, obligations to criminalise domestically and obligations to penalise subsidiary or related acts attached to both the 'slave trade' and 'slavery'. Thus while an international prohibition against the 'slave trade' can be identified as having crystallised with the 1926 Convention at the latest, recognition of an absolute prohibition against the institution would take longer, coming into effect in the 30 years between 1926 and 1956.

From the foregoing review, a lack of a definitive point at which the respective prohibitions crystallised becomes clear, due to the inclusion of transitional periods in most multilateral treaties dealing with enslavement. The start-date of 1956 for international prohibition against enslavement provided in international treaty law does little for the claim to reparations for transatlantic chattel enslavement, for the domestic law of enslaver States had already broadly coalesced into prohibition in the nineteenth century.[65] While there may be limited instances in which States were involved in enslavement subsequent to domestic prohibition and international codification, this does not provide an avenue for considering the involvement of these States in the centuries of enslavement and brutality that constituted the transatlantic system. Yet, 1956 does serve as a definitive starting point for consideration of the crystallisation of international norms in customary, rather than codified, international law.

2.4. The expansion of enslavement in customary international law

For most proponents of reparations for transatlantic enslavement, it is not treaty law upon which the international prohibition against enslavement relies. Rather, the prohibition is located in customary international law, in order to trace it beyond the period of positive prohibition of the nineteenth and twentieth centuries.[66] The orthodox account of the development of the prohibition against enslavement in customary international law dates crystallisation some time in the last 150 to 200 years. Capturing this sentiment, Robertson suggests:

[63] Slavery Convention, above n 47, Articles 1 and 2.
[64] Supplementary Slavery Convention, above n 48, Articles 3-7.
[65] On the dates of domestic prohibition, see above n 50.
[66] See above n 5: Gifford, 91; Beckles; Wittmann.

> ...there was no defining moment like the Nuremberg judgement, but rather an accumulation of treaties throughout the nineteenth century and a gradual abandonment by the Great Powers of their toleration of the practice, marked in turn by military offensives against traders ...and by domestic court declarations that freed any slave brought within the jurisdiction.[67]

Robertson concludes that the exact period in which the prohibition came to have legal force was some time between the Treaty of Berlin in 1885 and the conclusion of the Slavery Convention in 1926. Although this period undoubtedly marks a shift towards the positive abolition by European powers of the institution of transatlantic chattel enslavement they themselves had established, it takes the unrestricted legality of transatlantic enslavement as its starting point. In other words, it operates on the uninterrogated premise that the pervasiveness of enslavement during this period marked its international legality, and does not question the international legal status of enslavement prior to European expansion into the 'New World'.

Enslavement's occupation of the historical record – well beyond the transatlantic system – is pervasive and undeniable.[68] However, the question for legal scholarship turns not only upon the presence of enslavement, but upon the treatment of that situation in law, through time. In an international legal assessment, historical ubiquity and domestic legality are not decisive, although they may provide evidence of State practice and *opinio juris* required for the formulation of customary international law.[69] Moreover, customary international rules permit modification over time.[70] It is therefore necessary to consider whether international custom oscillated so

[67] Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (Penguin, 1999) at 209.
[68] See Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Harvard University Press 1982), vii. This is further considered in Chapter 1.
[69] See *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgement) [1969] ICJ Rep 3, 44; and *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Judgement) [1985] ICJ Rep 13, 29. See also generally Malcolm Shaw, *International Law* (8th edn, Cambridge University Press 2017), 53-69; and Hugh Thirlway, 'The Sources of International Law' in Malcolm Evans, *International Law* (4th edn, Oxford University Press 2014), 97-105
[70] On the status of internal law in considerations of international law, and the potential for the two regimes to exist in conflict rather than complementarity, see Articles on State Responsibility, above n 37, Articles 3 and 31; Vienna Convention on the Law of Treaties, above n 41, Article 27; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) [1932] PCIJ Rep Series A/B No 44, [62]-[63]. See also *Case of the Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* (Order of 6 December) [1930] PCIJ Rep Series A No 24, 12; *Case of the SS "Wimbledon" (United Kingdom, France, Italy, Japan v Germany)* [1923] PCIJ Rep Series A/B No 74, 29; and *The Greco-Bulgarian "Communities"* (Advisory Opinion) [1930] PCIJ Rep Series B No 17, 32.

significantly on the issue of enslavement that prohibition or restriction was established, usurped, and later established again.

In Roman Law – the foundation of much European and subsequently modern international law – enslavement was characterised as an aspect of *jus gentium,* despite its recognised contravention of natural law. Justinian's Institutes permitted this conflict between *jus naturale* and *jus gentium* by allowing enslavement as an alternative to death.[71] Enslavement might therefore arise when a person was convicted of a crime subject to capital punishment, as an escape from poverty and starvation (for a person selling themselves or their dependents into enslavement), or as a substitute for death in war. This justification for human enslavement predominated legal reasoning for over a millennium, featuring in the Islamic Law of Nations (*Siyar*), internal laws of Africa, and in the writings of many of the foundational authors of (Western) international law.[72] Rather than simply operating as a justification for the existence of enslavement in a system closely connected to natural law philosophy, this allowance of enslavement can be described as an exception to a general rule prohibiting it. In other words, enslavement in a general sense was prohibited as a contravention of *jus naturale,* while enslavement in defined circumstances (as an alternative to death) was permitted as a matter of *jus gentium.*[73]

In this understanding of the legal justification for enslavement, the collection of rights a person might claim are seen as subsidiary to, or derivative of, the fundamental right to life. At the point at which a person may lawfully be killed, or in some circumstances when they otherwise would have died, they lose their claim to the range of other legal rights normal citizens possess –

[71] As Girard suggests: 'The victor, having the right to kill the vanquished has *a fortiori* the right to make him his property.' Paul Frédéric Girard, *Manuel Élémentaire de Droit Romain* (A Rousseau 1929) 102-103. This reasoning also applies in instances of slavery as a punishment for a capital crime, and, with some alteration, to children sold into slavery as a result of poverty where death by starvation could be considered the natural course of events. On these two alternative situations in which slavery was considered permissible, see WW Buckland, *A Text-Book of Roman Law: From Augustus to Justinian* (Peter Stein ed, 3rd edn, Cambridge University Press 1963), 69-71.

[72] In *Sharia* law, the only two situations which permitted enslavement were the (relatively rare) slavery by birth, and capture of non-Muslims in war. See Majid Kaddhouri, *The Islamic Law of Nations: Shaybani's Siyar* (Johns Hopkins University Press 1966); Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1982), 127-130. On early African law, see Wittmann, above n 5, 34-85. In Western European international law, Vitoria's *On the Indians Lately Discovered,* Suárez's *De Legibus, Ac Deo Legislatore*, and Belli's *De Re Militari et Bello Tractatus, 1563,* all conceive of slavery as a permissible deviation from the laws of nature on the basis of such situations. Vitoria, 'The First Reflecto', above n 19; Pierino Belli, *De Re Militari et Bello Tractatus* (Clarendon Press 1936); Francisco Suárez, '*De Legibus, Ac Deo Legislatore, 1612'* in *Selection from Three Works of Francisco Suárez* (Vol 2, William S Hein & Co 1995).

[73] Note that this is a justification predominating the identified domestic legal systems, and not purely (or even primarily) an argument concerning international law.

in particular the natural law right to liberty.[74] Thus, enslavement in such a case may be viewed not only as a social death, but as a legal death as well – the loss of legal personality in favour of chattel status.[75] In Gentili's words, 'Slavery is all but death.'[76] Yet, for the general population not placed in a situation in which they would otherwise die, or might lawfully be killed, the prohibition against enslavement and the protection of their right to life, liberty, and property remained in effect. This formulation is not limited to Roman and European legal reasoning, but is consistent with African laws permitting certain forms of enslavement prior to European involvement in the continent.[77]

Later both Christian and Islamic jurists would begin to qualify their acceptance of this restricted practice of enslavement by limiting it to those peoples outside their own religious communities.[78] This religious international law created distinctions between people within the faith and those outside it, drawing borders not only on the boundaries of Statehood but along theological lines. This was true of the major evangelising religions predominating the period leading up to the institution of transatlantic chattel enslavement – Christendom and Islam.[79]

In Christendom, Gentili, Belli, Ayala, Legnano, and Grotius (among others) concluded that enslavement was impermissible in wars between Christian nations, but in wars with 'infidels' and 'pagans', the enemy could be lawfully enslaved.[80] In the Islamic law of nations, a similar understanding came to dominate, with a central distinction drawn between Muslims and non-

[74] This formulation of the nature of slavery is consistent with Buckland's characterisation of slavery as the manifestation of *dominum* – 'the ultimate right, that which has no right behind it' – over a person. Buckland, *A Text-Book,* above n 71, 54. See also Orlando Patterson's assertion that 'dominium constituted absolute power' including the right to 'derive the full economic value of a thing, to use (*usus*) and enjoy its fruits (*fructus*), as well as 'to use it up' (*ab-usus*), to alienate it, but perhaps most significantly… [to have] inner power over a thing beyond mere control.' Patterson argues that the very concept of *dominium* arose in relation to slavery – above n 68, 31. With regard to the right to life, masters retained the right to kill enslaved persons, and increasing restrictions on masters had nothing to do with the well-being of the persons enslaved. See Alan Watson, *Roman Slave Law* (Johns Hopkins University Press 1987) 120.

[75] At the point in which a person was captured in war, they were deemed to have died, suffering "*capitus deminutio maxima* – the 'greatest change of status'- involving the loss of freedom, citizenship and family". Paul du Plessis, *Borkowski's Textbook on Roman Law* (4th edn, Oxford University Press 2010), 91.

[76] Alberico Gentili, *De Iure Belli Libri Tres, 1612* (Clarendon Press 1933), 325.

[77] Above n 5.

[78] In Islamic law, this qualification was incorporated already into the *Siyar,* wherein only non-Muslims were to be subjects of enslavement. See Schacht, above n 72, 127-130.

[79] On the significance of the Islamic law of nations in this period of international legal development see Jean Allain, 'Acculturation through the Middle Ages: the Islamic Law of Nations and its Place in the History of International Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar Publishing 2011) 394.

[80] See Allain, *Slavery in International Law*, above n 46, 9-56.

Muslims in the 'Abode of War'.[81] Although this blurs the boundaries between the *jus gentium* justification for enslavement as an alternative to death, and a *jus naturale* understanding of some peoples as suited for a life of servitude, this understanding nonetheless maintained the classic caveats. Enslavement remained *prima facie* prohibited – even in relation to 'pagan', 'barbaric' or 'backwards' peoples – with an exception carved out for situations in which death could lawfully be meted out.[82]

Because the preconditions for lawful enslavement still applied in the context of religious distinction, increasing restrictions within religious communities on the treatment of captives of war can be characterised as the rise of a regional international law restricting enslavement within its borders. European jurists affirmed this development by continuing to frame enslaved persons as an exception to the rules of postliminy – 'the right to recovery of something in the possession of the enemy' – but exempting Christians who, as brothers, could not be enslaved by their captors.[83] The right to recovery of Christian prisoners therefore remained, and the rise of ransom payments provided an alternative for post-war treatment of these captives.[84]

Although the justification of enslavement within limited circumstances predominated the historical record prior to, and even during much of the period of transatlantic chattel enslavement, an alternative justification became increasingly significant with the growing racialisation of enslavement. This understanding of the institution considered in chapter 1, which would legitimise treating the colour of a person's skin as reason for their servitude, rested not upon slavery as a feature of *jus gentium,* but on an understanding of enslavement nestled in *jus naturale.* Yet, despite its meteoric rise in the latter half of the last millennium, characterising enslavement as an aspect of the natural order features in the subtext of

[81] Although, non-Muslims were not necessarily to be subjected to a life of servitude, but would be released when the 'Abode of Peace' was achieved. Despite the Quran's instruction that prisoners of war be freed at the conclusion of hostilities, Clarence-Smith notes that people increasingly found excuses to avoid this dictate, including through 'public interest' arguments based on other mandates of the Quran. William Gervase Clarence-Smith, *Islam and the Abolition of Slavery* (Oxford University Press 2006) 25. On the distinction between Muslims and non-Muslims see Kaddhouri, above n 72; Schacht, above n 72, 127-130; Allain, *Slavery in International Law*, above n 46, 17-20.

[82] Legnano maintained the *jus gentium* foundations of enslavement, however only permitted such in relation to 'enemy' States - Giovanni da Legnano, Tractatus *De Bello, De Represaliis et De Duello, 1390* (Thomas Erskine Holland ed, Oxford University Press 1917).

[83] Belli, *De Re Militari*, above n 72, 104 and 242.

[84] See Balthazar Ayala, *De Jure et Oficiis Bellicis et Disciplina Militari, 1582* (Carnegie Institution of Washington 1912), 40; Gentili, above n 76, 328-333; Legnano, above n 82.

many of the opinions regarding the institution throughout history, simply experiencing rises and falls in its conspicuousness.

The belief in a natural law justification for enslavement is often traced to Aristotle, who suggested that some humans were, by nature, not their own but 'of someone else'.[85] Although not stripping such humans of their status as humans entirely, Aristotle contended that they would be 'a piece of property… a tool for action separate from its owner.'[86] Reiterating this fourth century BCE opinion, Sepúlveda in the sixteenth century suggested that 'Indians were slaves by nature', and Pufendorf supported such in his seventeenth century descriptions of those people he considered to be naturally suited for a life of servitude.[87] This discourse centred the natural or biological predilection of certain persons towards servitude, encompassing the growth of 'scientific slavery', and rose to international prominence in discussions of European enslavement of African people, as well justifications of colonialism more generally.[88]

Alongside growing social and cultural understanding of blackness, legal frameworks evidenced increasing racialisation, disseminating the idea that Africans were best-suited for lives of enslavement.[89] Thus, the social consciousness of the white masses, cultivated by enslavers, came to associate 'blackness' with enslavement, and to accept race as a basis for legal discrimination.[90] So-called 'black codes' proliferated, persons of colour were subjected to legal presumptions of enslaved status, and 'negro' became a legal, as well as a social, classification.[91] No longer was enslavement primarily justified as an alternative to death, but now as a by-product of natural differences between men – a difference primarily defined by the

[85] On the increasing significance of Aristotle's understanding of the 'natural slave', see Brion Davis, above n 24.
[86] Aristotle, 'Politics' in John Gillies (ed) *Aristotle's Ethics and Politics* (Vol 2, A Strahan, T Cadell and W Davies 1797) 1-52 (Book 1).
[87] On Sepúlveda, see Allain, *Slavery in International Law,* above n 46, 28. Pufendorf describes such people as inherently stupid and lazy, lacking capacity to observe their own needs and conduct which would benefit them. Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo, 1672* (Clarendon Press 1934), 934.
[88] On biological determinism, or scientific racism, see Stephen Gould, *The Mismeasure of Man* (2nd edn, WW Norton & Co 1996).
[89] On social and cultural depictions of race, see Dana Van Kooy and Jeffrey N Cox, 'Melodramatic Slaves' (2012) 55(4) *Modern Drama* 459; Eric Lott, *Love and Theft: Blackface Minstrelsy and the American Working Class* (Oxford University Press 2013); Katrina Dyonne Thompson, *Ring Shout, Wheel About* (University of Illinois Publishing 2014).
[90] See generally Andrew S Curran, *The Anatomy of Blackness: Science and Slavery in an Age of Enlightenment* (Johns Hopkins University Press 2011).
[91] The United States' Constitution, for instance, famously counted 'negroes' as only three-fifths of a person for the purpose of apportioning representatives. Regardless of the reasoning behind this compromise, the legal category of 'negro;' was thereby affirmed. Constitution of the United States (1787). See also Annette Gordon-Reed, 'America's Original Sin: Slavery and the Legacy of White Supremacy' (2018) 97(1) *Foreign Affairs* 2.

colour of a person's skin.[92] Thus, the denial of the two basic and foundational human rights (freedom from enslavement and racial discrimination) identified in *Barcelona Traction* as *jus cogens norms* with obligations *erga omnes* coalesced.[93]

This shift in the justification for enslaving Africans and people of African descent was central to the system of racialised chattel enslavement, for it allowed the enslavement of Africans and people of African descent who had been converted to Christianity, baptised, given Christian names, and born and raised in Christian States. Africans who converted to Christianity either by choice, coercion, or force were not thereby ensured a life free from enslavement as prior restrictions on enslavement provided – in fact, there were many instances in which forcible conversions and baptisms were conducted in slave forts prior to forced emigration.[94] Thus, the 'law of nations' could no longer be seen as creating a system of international law with one system of treatment for those inside the regional or religious order, and another for those outside. The increasing secularisation of international law in the late nineteenth century saw religious boundaries deteriorating, but not in favour of a universal system. Instead, new boundaries were erected justifying the othering of African peoples, borders enforced by the concept of 'civilisation'.[95]

2.5. African voices on transatlantic enslavement

Given the significant bias of European institutions when it came to assessing and asserting the legality of enslavement, it is important to note the way that enslaved Africans and people of African descent spoke of their own situation. For many enslaved persons, the status of the institution was not perceived as a question of law, but of power.[96] Although enslaved people may have had to adapt to the system of brutality and perpetual servitude, acclimatisation is not necessarily an indicator of acquiescence. Rebellions

[92] See Chapter 1, Section 5.
[93] *Barcelona Traction* singles out slavery and racial discrimination in its discussion of *erga omnes* obligations. *Case concerning the Barcelona Traction, Light and Power Company Ltd (Belgium v Spain)* [1970] ICJ Rep 3, 32 at [34].
[94] See John W Catron, 'Evangelical Networks in the Greater Caribbean and the Origins of the Black Church' (2010) 79(1) *Church History* 77; Dominic Erdozain, 'The Secularisation of Sin in the Nineteenth Century' (2011) 62(1) *The Journal of Ecclesiastical History* 59; Ty Reese, '"Sheep in the Jaws of So Many Ravenous Wolves": the Slave Trade and Anglican Missionary Activity at Cape Coast Castle, 1752-1816' (2004) 34(3) *Journal of Religion in Africa* 348.
[95] Se generally Gerrit Gong, *The Standard of 'Civilization' in International Society* (Oxford University Press 1984).
[96] See for instance Gad Heuman and James Walvin, *The Slavery Reader* (Routledge 2003), 546-634.

within the system were common from the outset, in source countries, on board slave ships, and on plantations.[97] Thus, the characterisation of enslaved Africans as 'docile' and 'acquiescent' enslavers sought to project to reinforce race-based enslavement was refuted by enslaved people themselves, even in conditions where punishments for resistance were horrific.[98] Even beyond violent rebellion, enslaved persons found ways to indicate resistance against the assumption that their enslavement was lawful and legitimate, when they had a voice and the ability to consider enslavement beyond their own situation.

Historical reports explained revolts as demonstrations of Africans' belief that Europeans had no right to enslave them and carry them away from their home countries.[99] Enslaved people on plantations in the Americas often spoke of themselves and their kin as having been 'stolen' from Africa, or from some other location to which they attached themselves when slavery had become intergenerational.[100] Many accounts of the history of transatlantic enslavement include such identifications by enslaved persons. Baptist highlights the significance of this narrative framing, arguing that enslaved persons' frequent use of the word 'stole' indicated their understandings of illegality: 'they made it clear that this common story was a crime story. Buying and selling people was a crime. Buyers and sellers were criminals.'[101]

Not only was the presumption of lawfulness resisted through this language, but the provenance of enslaved persons having been forcibly migrated from Africa to the Americas was challenged. Thus, even in a world in which slavery may have been considered consistent with European international law in defined circumstances, enslaved people spoke of their own dubious

[97] On resistance, see Chapter 1, Section 4. See also Egerton, above n 9; Michael Craton, *Testing the Chains: Resistance to Slavery in the British West Indies* (Cornell University Press 2009); Eugene Genovese, *From Rebellion to Revolution: Afro-American Slave Revolts in the Making of the Modern World* (Louisiana State University Press 1979); David Richardson, 'Shipboard Revolts, African Authority, and the Atlantic Slave Trade' (2001) 58(1) *The William and Mary Quarterly* 69, 72. Richardson identifies 485 shipboard rebellions on French, Dutch and British ships between 1650 and 1860, although sources from which these were drawn were understandably limited, and thus the number should not be taken as indicative of the total number of shipboard rebellions that in fact occurred on ships belonging to these States.
[98] Genovese refers to this as the 'myth of slave docility and quiescence', ibid.
[99] James Towne in recounting a slave rebellion on board a ship which he had served indicated that Africans 'rejected the right of Europeans to enslave them and to carry them away "from their own country" and their "wives and children"'. In Richardson, above n 97, 71.
[100] See Edward E Baptist, '"Stol' and Fetched Here": Enslaved Migration, Ex-Slave Narratives, and Vernacular History' in Edward E Baptist and Stephanie M H Camp (eds), *New Studies in the History of American Slavery* (University of Georgia Press 2006).
[101] Edward E Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (Basic Books 2014), 187-9.

origins.[102] The characterisation of enslavement as legitimate international trade did not capture the violent and unlawful ways in which people were captured for enslavement, nor the role of European people and powers in this process.

While enslaved persons demonstrated opposition to their own enslavement, and spoke in the language of criminality in so doing, in the eyes of international law as formulated by European colonial powers, these voices could not be persuasive. International law during this period was concerned with the 'opinions' of States deemed sufficiently civilised so as to qualify for the recognition of sovereignty over their own territories.[103] This account suggests that individuals were only conceived as the subject-matter of international law indirectly, through the representation of their State of nationality.[104] For Africans and their descendants, as well as indigenous peoples in colonial territories, this rendered their voices invisible to the international legal system, for they possessed neither international rights of their own, nor citizenship in a recognised State through which to claim protection.

In order to establish African opposition, the political leaders of these States would need to have presented the uniform and consistent opposition required for the formation of international custom.[105] While resistance in this context need not be universal or absolute in its uniformity, inconsistent practice must be treated as a breach in order for a prohibitive norm to prevail.[106] Problematically, not only was opposition to slavery variable, with many African leaders engaging in enslavement, in some cases the very terms of resistance indicated against a universal prohibition based on morality, custom, or consent. In the early sixteenth century, the King of Kongo entreated Portugal's John III to cease engaging in enslavement and trade in enslaved persons in the territory:

> The merchants abduct our subjects, children of this country, sons of nobles and vassals, even people of our family... This corruption and this deprivation are so common that our land is entirely

[102] See Ibid, 191.
[103] See Thirlway, above n 69, 100; Gong, above n 95.
[104] See Shaw, above n 69, 204; Robert McCorquodale, 'The Individual and the International Legal System' in Evans, above n 69, 280; J G Starke, *Starke's International Law* (I A Shearer ed, 11th edn, Butterworths 1994), 51.
[105] Requiring 'constant and uniform usage practised by States' for the formation of customary norms, see *Asylum Case (Colombia v Peru)* (Judgement) [1950] ICJ Rep 266, 276.
[106] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 98.

> depopulated... It is our volition that this kingdom shall not be a territory neither of the trade nor of the transit of slaves.[107]

Framed in the language of pragmatism favouring internal interests, rather than moral condemnation, this letter highlights diplomatic necessity and the 'depopulation' problem as the basis for a request for the cessation of enslavement and trade in enslaved persons in and from the Kongo. Moreover, the specific geographic focus of the letter – a request for discontinuance only within the boundaries of the 'kingdom' – limits its significance as evidence of a belief in international prohibition. Such expressions indicate that the practice of non-European States was far from the threshold expected in the formation of international custom or in persistent objection to a growing permissive rule as formulated within the embryonic European system.[108]

Reference to African 'complicity' alone is insufficient to found an African *opinio juris* of the legality of enslavement in international law. However, the involvement of political figures and rulers speaks in support of the evolving international law allowing transatlantic enslavement. The relevance of the historical evidence of participation of African political entities in global enslavement is not in the conclusion that Africans occupied the same boat as European slave traders, but rather in reflecting the inchoate character of universal opinion at the time. It is not the practices of individual African enslavers that are relevant to this dialogue – African masters would be just as capable of contravening international law as individual Europeans – but the actions of official entities who could reinforce a conception of international law involving the *opinio juris* of States.

Even if, prior to the institution of transatlantic enslavement, international law evidenced a universal prohibition against enslavement with only limited permissive exceptions, the development of the transatlantic system in cooperation with African political leaders would likely constitute the changing of international custom, as opposed to nearly four centuries of near-constant breaches. It is the treatment of the conduct as normative, rather than as persistent violation, that contributes to the evolution of custom – in this case, the usurpation of existing restrictions on enslavement by racialised

[107] In Nora Wittmann, 'Slavery Reparations are a Must' (2009) 488 *New African* 24, 26.
[108] Thirlway suggests that in order to establish persistent objection to a developing rule of customary international law, state opposition must be 'established, widespread and consistent'. Thirlway, above n 69, 98.

exploitation.[109] African leaders' interactions with Europeans are far from decisive in decrying the system of transatlantic enslavement, and farther from a clear and consistent opposition in either positive conduct or abstention.[110] Thus, although European States' assertion of a lack of civilisation in the 'New World' cannot be decisive, fluctuating levels of participation and resistance presented by African political leaders make the claim to universal prohibition for the period of transatlantic enslavement similarly inadequate.[111]

2.6. International oscillations and legal lacunae

Perhaps the most persuasive message advanced by the oscillating practice of justifying and restricting enslavement throughout history, is the lack of clear and consistent narrative in the history of international law. This is true not only of international law regarding enslavement, but the development of the international legal system as a reflection of European interests more generally. The changing international legal conclusions drawn by jurists throughout the period of transatlantic chattel enslavement speak to their own institutional, national, and economic biases more than indicating a coherent international legal order. As Jean Allain highlights:

> …there is no true sense of evolution in international law where slavery is concerned. Instead, the texts speak to the specific interests of the authors, whether these are the meta-narrative of Grotius or the practical military manual of Ayala. In so doing, various justifications are marshalled over time to either expand or contract the space opened for slavery as constituting part of the contemporaneous international law.[112]

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[109] On the role of breaches on customary international law, see *Military and Paramilitary Activities in Nicaragua,* above n 106; Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2007), 44; Shaw, above n 69, 68.

[110] The *Lotus case* indicates that abstention is only likely to involve the recognition of a custom if based upon a conscious duty (of international law) to abstain – a standard which is unlikely to be reached in the case of those States not involved in transatlantic enslavement. *Case of the SS Lotus (France v Turkey)* [1927] PCIJ Series A No 10, 28. On African interactions with Europe, see Heuman and Walvin, above n 96, 30-102, 701-763.

[111] At the time of abolition by European States, the practice of enslavement was still present within the African continent, and United States Supreme Court expressed then the inappropriateness of extending its own laws on enslavement to Africa. In *The Antelope,* the court stated (perhaps ironically at this point): 'The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them. Throughout the world of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves.' *The Antelope* [1825] 23 US 66.

[112] Allain, *Slavery in International Law,* above n 46, 12.

What evolution can be gleaned from the changing landscape of international legal thought concerning enslavement fails to provide a stable foundation for a declaration of outright prohibition prior to the institution of the transatlantic system.

One of the greatest weaknesses in historical assessment of international law concerning enslavement is the high degree of ambiguity present in the practice and pronouncements of States in both the national and international spheres. When ambiguity suffuses treaty law as well as the practice and commentaries that might serve as evidence of the formulation of customary international law, it becomes difficult to draw a definitive conclusion on the status of international law at the time. Moreover, when a persuasive case rooted in appropriate sources of evidence can be made to justify either position, historical international law presents an enquirer with more questions than answers. Yet, in finding argumentation in the midst of a sea of uncertainty, the reality of the international legal order during and directly following the period of transatlantic enslavement becomes clearer.

The oscillations, the opacities, the vagueness and the contradictions of international law on the issue of enslavement and the *maangamizi* reveal the intimate connection between the development of a Euro-centric international legal order, and the dehumanisation of the native populations of three continents, racialised chattel enslavement, and exploitation.[113] The international legal texts themselves reveal this tension. These contradictions indicate that the reliance on the international legal order of the time, as the basis of obligations, may not be a reliable or desirable approach. However, they also suggest that advertence to present international law as the basis for a denial of obligations is a similarly problematic endeavour. An international legal order constructed by European slaver States in order to further their own economic interests is a questionable source from which to derive an understanding of universal obligations.

Recognition of the oscillations of international norms concerning enslavement does not provide a positive argument for a fully crystallised prohibition against enslavement in global international law, breached by imperial European 'Powers'. Rather, it is the denial of a denial. The deprivation of a common basis on which discussion of international obligations is rejected provides the opening of a space where meaningful

[113] See Anghie, *Imperialism,* above n 13.

moral and political discourse on the question can take place.[114] Perhaps ironically, the positivist doctrine of inter-temporal law provides an entry point for naturalist legal frameworks to influence this discourse, for it was these philosophies that predominated international jurisprudential thinking at the time.[115]

Enslavement has been recognised throughout history, albeit inconsistently, as contrary to fundamental rights and the laws of nature, with related assertions that contrary *jus gentium* may only be enacted through clear and deliberate positive law.[116] During the period of transatlantic enslavement, the language of antislavery campaigners and previously enslaved persons demonstrated this naturalist understanding of the criminality of enslavement, irrespective of its positive legal status. Thomas Clarkson, for instance, questioned enslavement's legality:

> Is there no crime in adopting a system which keeps down all the noble faculties of their souls, and which positively debases and corrupts their nature? Is there no crime in perpetuating these evils among their innocent offspring?[117]

Even in the early twentieth century, with positivism having taken a firm hold of international jurisprudential thought, the notion of enslavement as a contravention of fundamental values remained.[118]

The growth of positivist thought in the international legal order did violence to non-European peoples by enabling their denigration and conquest, and legitimising extreme violence, in the name of the civilising mission.[119] This capacity of international norms to support imperial expansion and dominance derived from the usurpation of fundamental norms premised on

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[114] This may then serve as the foundation for morally and politically motivated reparatory justice, as considered in relation to transitional justice in Chapter 7.
[115] See Shaw, above n 69, 36-39.
[116] See, for instance, *Somersett v Stewart* [1772] 98 ER 499, 510, asserting that 'the state of slavery' is 'so odious, that nothing can be suffered to support it, but positive law.
[117] Thomas Clarkson, *The History of the Rise, Progress, and Accomplishment of the Abolition of the African Slave-Trade by the British Parliament* (New impression, Frank Cass & Co Ltd 1968), 20-21.
[118] The British Government in negotiating the Slavery Convention advocated a notion of enslavement as a 'crimes against the human race' according to the international consensus of 'civilised' nations. League of Nations, 'Draft Convention on Slavery Recommended by the Sixth Assembly: Reply from the British Government' (1926) A.10.1926.VI; 8 *League of Nations Official Journal* 1031, 1032. However, other parties to the negotiations, though supporting the moral sentiment, expressed a distinction between the legal frameworks and moral principles in this regard. League of Nations, 'Draft Convention on Slavery Recommended by the Sixth Assembly' (1926) A.10(a).1926.VI; 9 *League of Nations Official Journal* 1140. See Allain, *Slavery in International Law,* above n 46, 81.
[119] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1, 17.

moral dictates through positive law.[120] Thus, developments in international law permitting and regulating enslavement and the *maangamizi* enabled the establishment and inculcation of European hegemony. Yet, in looking back to the root these injustices from an historical perspective consistent with positivist doctrine, naturalist norms reaffirm their relevance. Thus, the recognition of oscillations or lacunae in the history of international law governing enslavement may open the door to a naturalist presumption in favour of illegitimacy that may not have been overcome by the inconsistent, self-interested, and prejudicial practice of European States from the fifteenth to nineteenth centuries. This argument may not find voice in the positive legal mechanisms of the contemporary international legal system, but may nonetheless inform the moral and political case for reparations for historical enslavement and the *maangamizi.*

To claim enslavement was 'legal at the time', and therefore that it is inappropriate to condemn the conduct of European enslaver States, is to overlook the ways in which the racialised system of chattel enslavement of African, indigenous, and aboriginal peoples was constructed, altered, and perpetuated by European powers to advance their own interests. Even if the practice of enslavement was permitted in international law prior to European expansion into the 'New World', the foundations on which this was justified, and the conditions under which it could be conducted, were substantially modified. Therefore, it is important to separate the investigation of slavery from its widespread practice throughout history, in order to interrogate the terms and conditions of its permissibility.

Beyond questions of the terms on which slavery might have been permitted, it is necessary to consider the ways in which the growth and evolution of the institution of slavery from an exception to a racialised rule was the by-product not of universal consensus, but of the interests of a few. Not because this might help to conclude on the existence of universal prohibition, for *The Legality of the Threat and Use of Nuclear Weapons* speaks against such.[121] Rather, because this may assist in deconstructing the prevailing opinion that enslavement was positively legalised in universal international law – not only that there was no prohibition against slavery, but that participating in

[120] Detley F Vagts, 'Hegemonic International Law' (2001) 95 *Amherst Journal of International Law* 843, 845.
[121] In requiring those States with the most significant interest to be involved in the formulation of prohibitive universal custom, the International Court of Justice barred the formulation of norms without the support of those States most implicated in breaching an allegedly crystallising norm (in this case, nuclear States) – *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 255.

enslavement and trading in human lives as if they were property was a centrally protected property right in a global legal system. Finding a lacuna in international legal regulation should not be equated with a permissive rule. Not because it may result in legal consequences, for this requires a breach of a binding international rule. Rather, because it serves an important signalling function in the way that redress is approached in the contemporary age. Legality cannot be employed as a defence to a moral or political claim to reparations if there is no governing law.

CHAPTER 3: ADJUDICATING THE 'PAST'

The Impact of Time on Responsibility and Reparatory Justice

Substantial ambiguities in governing international legal frameworks create uncertainty as to the value international law provides in the consideration of reparations for historical enslavement and the *maangamizi*. From the purely positivist perspective, the result may be that they offer very little; absence of law creates a space entirely governed by other frameworks, involving a shift from legal to moral and political mechanisms.[1] Yet, the contested legal territory leaves open the possibility of judicial mechanisms operating to provide redress in historical cases, making the assessment of other requirements of these legal frameworks valuable. Moreover, legal conclusions continue to influence the discussion of moral and political obligations in reparations discourse; European international law is the legitimising framework for the *maangamizi* and contemporary refusals to seriously consider reparations claims. Thus, recognising the limits of the law does not automatically necessitate the disengagement of legal frameworks and reasoning, although it may require a reconsideration of their positioning.

For many commentators addressing the issue of reparations for transatlantic enslavement, historicity in itself is considered a legal bar to recovery. Often armed with nothing more than intuition, and influenced by a public discourse telling people of African descent that it is now time to simply 'move on' from the past, authors from a range of disciplines assert that the legal claim to redress has been frustrated by the passage of time.[2] Setting aside the question of whether an international norm can be said to have crystallised at the relevant time, issues of acquiescence, attribution, and succession are central to the justiciability of claims in the international legal arena. Although not embedded in the political frameworks, these considerations have bearing

[1] This is a position supported by Hart's conclusions on what should happen in the event of lacuna in the law – namely that these should be resolved through reform of the law or extra-legal mechanisms, and not through the inclusion of moral arguments in legal reasoning. See HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994).

[2] See The Rt Hon David Cameron, 'PM's Speech to the Jamaican Parliament' (*UK Government,* 30 September 2015) <www.gov.uk/government/speeches/pms-speech-to-the-jamaican-parliament> accessed 14 March 2018; HL Deb 14 March 1996, vol 570, col 1042. Vincene Verdun identifies that opponents tend to present the reparations claim as 'absurd, frivolous, or unworthy of serious consideration.' 'If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans' (1993) 67 *Tulane Law Review* 597, 625. Hilary Beckles also discusses this as a strategy of the British government in denying reparations claims in *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (University of West Indies Press 2013) 19.

on extra-legal processes, where the deconstruction of legal barriers has rhetorical and persuasive power.

This chapter considers the implications of the passage of time upon claims to reparations and examines whether related issues pose an absolute bar to recovery. Tracing the history of State responsibility and the construction of attribution, it contemplates different ways in which challenges to contemporary responsibility for historical injustice may be addressed, and ultimately questions whether history has closed the door on redress.

Because of the general, global scope of this thesis, this chapter does not present a comprehensive review of the range of possible claims that might be brought into legal fora in relation to the *maangamizi.* Independent assessments of the continuity of all possible defendant States and the succession of possible claimant States are not the focus of the analysis. Although specific rules of standing and jurisdiction might impact the applicability of international legal frameworks in particular formulations of prospective cases, these are likewise not systematically addressed. Instead, what follows is a holistic discussion of the disputes concerning redress for historical abuses and potential solutions to blanket oppositional arguments. This in recognition of the contested legal ground of reparations claims, and thus the likely engagement of political mechanisms. Absent additional analysis of discrete potential cases, this chapter does not provide a complete or solid foundation for legal argumentation in a case. It therefore cannot be considered conclusive on whether these potential cases have merit, or on the likelihood of their success.

In light of the critique of international legal frameworks considered in the preceding chapters, the following examination does not consider the application of procedural rules developed within this system to be determinative of broader moral and political claims. However, it does address many of the foundational challenges identified by reparations detractors as precluding the possibility of legal arguments in the affirmative. By opening a space in which these bars to recovery are identified as contested and contestable, this chapter highlights the ways dominant discourse side-lines legal frameworks, and simultaneously how legal frameworks are influenced by the dominant discourse. Thus, even absent a finding of prohibition in international law during the relevant period, this chapter contributes to the debates concerning reparations in both legal and extra-legal arenas.

3.1. Attenuation, limitation, and acquiescence

Reparations detractors often frame the passage of time itself – disconnected from any other element of legal responsibility – as frustrating claims for remedy. Beyond the predominance of these arguments in public and political discussion, many academics advance arguments placing the passage of time at the centre of reparations denials.[3] Burt Neuborne suggests that historicity distinguishes the case for reparations for slavery from litigation over the Jewish Holocaust, with the result that a legal approach is no longer appropriate in relation to the former.[4] Verdun argues that historical claims are problematic, for many of those who would be required to bear the cost have no connection to the perpetrators of the injustices.[5] Waldron asserts that the capacity of rights to 'fade' over time simply by virtue of their persistence is a widely recognised phenomenon.[6] Yet, the justifications for these rules of attrition are far from overriding, and their decisiveness far from predetermined.

The central justification for Waldron's acceptance of the supersession of historical injustices is not in the impact of time itself, but the attenuation of causal relationships between wrongdoing and suffering, and the entrenchment of certain protected expectations.[7] Verdun's assertion that contemporary defendants are not perpetrators engages with the reality of a new generation of citizens, but fails to acknowledge the continuity of the State as a single legal and political entity. Neuborne is correct that distinctions must be drawn between claims concerning the Shoah – and likewise Japanese-American internment, the 'Mau Mau' rebellion, the Rawagede massacre and most other instances of successful reparations awarded to living direct victims – and claims for historical injustice crossing generations.[8] Yet, this does not account for those instances in which trans-generational claims are recognised.[9] Moreover, lack of analogy, in itself,

[3] See for instance Cameron, above n 2; HL Deb, above n 2, col 1042; W F Tyman, 'We Must Let Go of Grudges from Slavery' (*Chicago Tribune,* 6 November 2017) <www.chicagotribune.com/news/opinion/commentary/ct-perspec-slavery-reparations-white-supremacy-1107-20171106-story.html> accessed 23 April 2018.

[4] Burt Neuborne, 'Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement' (2003) 58(4) *NYU Annual Survey of American Law* 615.

[5] Although not entirely dismissing reparations claims, Verdun argues that, post-slavery immigrants (for instance) cannot be connected to a wrong associated with slavery and thus cannot be made to bear a part of the costs of a present claim for reparations in relation to it. Verdun, above n 2, 630.

[6] Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103(1) *Ethics* 4, 15.

[7] Ibid.

[8] In support of this proposition, see Introduction, Section 3.

[9] For intergenerational claims, see for instance reparations by the Chilean National Corporation of Reparation and Reconciliation under Law 20.405, 10 December 2009. See also Ernesto Verdeja, 'A Normative Theory of Reparations in Transitional Democracies' (2006) 37

does not constitute an argument against reparations. Such suggestions concerning the impact of time should therefore be taken on the basis of their internal reasoning, and not on the conclusion that time alone overrides the requirements of justice.

The attenuation of causal relationships and the attribution of historical conduct to a contemporary State are assessed on the facts, rather than on the basis of a general rule drawing a line after a specific period of time.[10] The question that remains in considering the impact of time upon the claim for redress is: "does a general rule of limitation operate to frustrate liability after a specified period of time?" In general international law, historicity does not constitute a circumstance precluding wrongfulness, nor is there a general limitation period in public international law.[11] Some international rules go so far as to preclude the domestic application of limitation periods in relation to certain crimes under international law.[12] Where time may impact on the operation of the rules of State responsibility is in the entitlement of States to invoke the responsibility of the State allegedly in breach of its obligations, if the Claimant State has validly waived the claim or, by its conduct, acquiesced in the lapse of the claim.[13] In this context, these rules of attrition operate not as a defence to a claim of wrongful conduct, but as a barrier to the claim for reparations.

Metaphilosophy 449, 459. See also the Peruvian Comprehensive Reparations Plan – Reglamento de la Ley Nº 28592*, Ley Que Crea El Plan Integral de Reparaciones* (Pir), Decreto Supremo Nº 015-2006-JUS, Article 7(c); the practice of the Waitangi Tribunal – Janine Hayward and Nicola Wheen (eds), *Treaty of Waitangi Settlements* (Bridget Williams Books 2015).

[10] Attribution is addressed in Section 3 below, while causation is discussed in Chapter 6.

[11] Chapter Five of the Articles on State Responsibility identify the six 'circumstances precluding wrongfulness' in the law of State responsibility as consent, self-defence, countermeasures in respect of an internationally wrongful act, *force majeure*, distress, and necessity. Chapter V, International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' (November 2001) UN Doc A/56/10 (Articles on State Responsibility).

[12] The recognition of the inapplicability of limitation periods in relation to crimes against humanity and war crimes, for instance, is recognised as a norm of customary international law in relation to international and non-international armed conflicts. See ICRC, 'Rule 160/ Statutes of Limitation' *Customary IHL Database* <ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160> accessed 23 April 2018. This is supported by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted 26 November 1968, entered into force 11 November 1970) A/RES/2391(XXIII). The Statute of the ICC also denies the application of statutes of limitation to the crimes under its jurisdiction – Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90/37, Article 29. See also Bogdan Bîrzu, 'Considerations Regarding the Non-Applicability of Statutory Limitations to Genocide, Crimes against Humanity and War Crimes' (2015) 11 *Acta Universitatis Danubius Juridica* 96.

[13] Articles on State Responsibility, above n 11, Article 45. This Article reflects the text of Article 45 of the 1969 Vienna Convention dealing with the loss of the right to invoke a ground for invalidating, terminating, withdrawing from, or suspending a treaty - Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. It also echoes a history of jurisprudence recognising estoppel and acquiescence as principles which might preclude the invocation of responsibility on the facts of the case.

Waivers must be explicit, clear and unequivocal – conduct that is unlikely to arise in most cases of significant historical injustice.[14] Acquiescence, on the other hand, may result from the failure of the State to take action against the breach, and may be satisfied by unreasonable delay, but is not achieved by the passage of time alone.[15] The International Court of Justice explicitly recognised in *Certain Phosphate Lands in Nauru,* that there was no specific time limit in international law that would amount to acquiescence, instead favouring a determination on the circumstances of the case.[16] The question of whether the Claimant State has acquiesced in the lapse of the claim must therefore be determined on the facts at hand in light of the relevant legal rules, rather than on the basis of the passage of a specific period of time.

According to the principle *qui tacet consentire videtur si loqui debuisset ac potuisset* (he who keeps silent is held to consent if he must and can speak) that served as the basis of the International Court of Justice's determination in *Temple of Preah Vihear:*

> It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error. [17]

Thus, what is required to establish acquiescence is knowledge of the relevant facts, failure to act when there is an expectation on the Claimant State to

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[14] See *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) (1992) ICJ Rep 240, 247. The threshold for estoppel, however, may not be so clear cut. In the *Chagos Marine Protected Area Arbitration,* the Tribunal recognised that representations serving as the basis of estoppel may be by words, conduct or silence – *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, PCA (2015), 174 [438]. Thus the boundaries between waivers, estoppel and acquiescence cannot be characterised as clear or distinct. In the *Gulf of Maine Case* the Court explicitly recognised the close relation between estoppel and acquiescence, suggesting that the same facts are likely to serve as evidence for both – *Gulf of Maine Case (Canada v United States of America)* (Merits) [1984] ICJ Rep 303.

[15] International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) 2(2) *Yearbook of the International Law Commission* 31, 121-123 (Commentaries to the Articles on State Responsibility).

[16] This in relation the obligation to rehabilitate lands which served as phosphate mines under Australian administration of Nauru prior to its independence – *Certain Phosphate Lands in Nauru*, above n 14, 253-254.

[17] *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Judgement) [1962] ICJ Rep 6, 26. In this case, Thailand disputed an inaccurate rendering of the boundary line between Thailand and Cambodia contained in a treaty of 1904, but was found to have acquiesced to this error because it had knowledge of the inconsistency and opportunity to object but failed to do so. The Court therefore concluded that Thailand had aroused expectations by its own conduct on which Cambodia ought to be able to rely**,** with the additional suggestion that no interested person could have failed to see what the map was purporting to do, and any failure to independently investigate the map was the fault of the Siamese authorities. See also Sven Miβling, 'A Legal View of the Case of the Temple Preah Vihear' in Brigitta Hauser-Schäublin (ed), *World Heritage Angkor and Beyond: Circumstances and Implications of UNESCO Listings in Cambodia* (Göttingen University Press 2011) 61.

do so, or conduct of the Claimant State affirming the state of affairs constituting the breach (including prolonged abstention).[18] Further articulating the requirements of acquiescence, Nuno Sérgio Marques Antunes identifies five features characterising a situation in which a State may be considered to have acquiesced in the lapsing of a claim:

> Acquiescence only emerges where it refers to facts that are (or ought to be) known by the acquiescing State (*notoriety*), where such facts are of direct interest for the acquiescing State (*interest*), when these facts have existed for a significant period (*lapse of time*) without significant change of context and the meaning conveyed (*consistency*), and in cases in which the conduct is attributable to a relevant representative of the State (*provenance*).[19]

Conversely, a lack of knowledge of relevant facts and continuing, though not constant, affirmations of breach by relevant parties mitigate against a finding of acquiescence.

The 'complex background circumstances' of the case may be accounted for in determining whether acquiescence occurred, including external factors limiting the capacity of a State to assert its rights.[20] For instance, in the *Case concerning Sovereignty over certain Frontier Lands,* the Court considered the intervention of World War I to be relevant to the question of whether Belgium had acquiesced to the loss of its sovereignty over the land in question by the non-assertion of rights.[21] Thus, in considering whether States have validly acquiesced in the lapse of a right to bring a reparations claim for historical enslavement, the history and continuity of reparations claims from the time of purportedly 'legal' enslavement to today must be acknowledged.

Far from being something new that States have only recently begun undertaking, calls for redress for the enslavement of African people and their

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[18] For additional support for this proposition, see *Fisheries Case (United Kingdom v Norway)* (Judgement) [1951] ICJ Rep 116, 139; *Arbitral Sentence of the King of Spain Case (Honduras v Nicaragua)* (Merits) [1960] ICJ Rep 192, 213; *Island of Palmas case (Netherlands v United States of America)* [1928] 2 RIAA 829, 868-869; *The Grisbådarna Case (Norway v Sweden)* (Award of the Tribunal) (1910) *American Journal of International Law* 226.

[19] Nuno Sérgio Marques Antunes, 'Acquiescence', *Max Planck Encyclopedia of Public International Law* (2006) < opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1373> accessed 18 April 2018, [21].

[20] See *Case concerning Sovereignty over certain Frontier Lands (Belgium v Netherlands)* [1959] ICJ Rep 209.

[21] The Court ultimately concluded that the circumstances of the case indicated against acquiescence by Belgium, and thus that the Netherlands had not obtained sovereignty over the land in question, ibid.

descendants have an historical pedigree.[22] Although it would not be appropriate to label reparations efforts over time continuous or systematic, the denial of acquiescence does not necessarily require constant sustained effort on the part of the Claimant State. What is required is some display by the Claimant State to 'counter-balance or annihilate' the conduct constituting the breach.[23] Repeated assertions of the right to reparation for the injustices committed within the system of transatlantic chattel enslavement from the period of purported legality to today may be seen as a refusal to accept the lapsing of the claim, thus keeping the right to invoke responsibility alive.[24] The particulars of this question must be assessed in light of the specific Claimant State in question, and no universal conclusion can be reached as to whether any or all potential Claimant States did, or did not, acquiesce in the lapse of their claim to reparations. However, it is possible to make some general observations against acquiescence.

The question of acquiescence is assessed against the complex milieu of circumstances that coalesce to deprive Claimants of the capacity to assert their rights through official channels. The caveat contained in the principle of *qui tacet consentire videtur si loqui debuisset ac potuisset* – if they must and can speak – should not be overlooked or presumed simply by virtue of the passage of time.[25] When viewed in conjunction with the body of international jurisprudence concerning acquiescence, the determination of obligations on the Claimant State to speak or protest derive from the specific convergence of facts, and not a general rule.[26] Thus, although acquiescence may affirm substantial incursions on international legal arrangements, including going so far as to override pre-existing territorial boundaries of States, it is not a foregone conclusion simply by virtue of a substantial period of time.[27]

The capacity of potential claimant States to bring a claim for redress in practice is a relevant consideration in determining whether failure to do so

[22] See Ana Lucia Araujo, *Reparations for Slavery and the Slave Trade: A Transnational and Comparative History* (Bloomsbury Academic 2017).
[23] *Island of Palmas case*, above n 18, 868.
[24] On the history of reparations claims, see Araujo, above n 22.
[25] In the *Fisheries case,* for instance, it was the requirement of a history of protest that had not been met in the case that served as the basis for acquiescence, and not the period of time that had elapsed itself. *Fisheries Case,* above n 18.
[26] A direct comparison between the *Fisheries case* and *Case concerning Sovereignty over certain Frontier Lands* reveals this distinction. *Fisheries Case,* ibid. Cf *Case concerning Sovereignty over certain Frontier Lands,* above n 20.
[27] In the *Temple of Preah Vihear* the Court acknowledged the error in the demarcation but nonetheless found acquiescence, the result being that in the case Thailand's territorial integrity could be superseded by silence. *Case concerning the Temple of Preah Vihear*. Above n 17. The same conclusion (on different facts) was reached in *Island of Palmas case,* above n 18.

could constitute acquiescence. Colonised States continuing under the rule of European enslaver States, those going through the processes of freeing themselves from colonial rule, and newly independent States were unlikely to be in a position to contest the history of enslavement in international legal fora. Moreover, for many States, the possibility of claiming redress was not actualised until the twentieth century, when they gained legal recognition in international law.[28] Even then, the lack of clarity in international legal thought concerning the status of enslavement, and a dominant discourse precluding such claims, ought to be considered as a factor contributing to any identified failure to consistently assert the rights in question.

Acquiescence derives from a principled conception of the requirements of certainty and justice in the legal system – good faith and equity.[29] When accounting for the complex history and continuing hegemony of European enslaver States in international law, it may be more difficult to conclude that Claimant States accepted the lapse of potential claims on the basis of equity and good faith. This because the international legal system to which they would have to avert was constructed by European States to enable the very exploitation and marginalisation about which claims relate.[30]

3.2. Tracing the history of State responsibility

Limitation and acquiescence are not the only problems historicity poses to contemporary calls for reparations, as the history of the secondary rules of international law is not comprised of a single set of constant norms. The modern framework of State responsibility – predominantly set out in the International Law Commission's Articles on State Responsibility – cannot be juxtaposed throughout the history of international law without consideration of the rules and legal understandings of relevant time periods. While some provisions of the Articles on State Responsibility may constitute the

[28] The growing body of literature discussing the role of colonialism in developing modern international law provides support for the suggestion that post-colonial States would not have been in a position to resist or oppose the hegemonic international legal system crafted to protect the interests of enslaver States. See for instance Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2007); Sundhya Pahuja, *Decolonising International Law* (Cambridge University Press 2011); Antony Anghie, Bhupinder Chimni, Obiora Okafor and Karin Mickelson (eds), *The Third World and International Order: Law, Politics, and Globalization* (Kluwer Law International 2003). Haiti's independence debt may serve as testimony of the post-emancipation realities facing potential claimant States. See generally Charles Forsdick, 'Haiti and France: Settling the Debts of the Past' in Kate Quinn and Paul Sutton (eds), *Politics and Power in Haiti: Studies of the Americas* (Palgrave Macmillan 2013) 141; Paul Farmer, *The Uses of Haiti* (3rd edn, Common Courage Press 2005); Robert Debs Heinl and Nancy Gordon Heinl, *Written in Blood: The Story of the Haitian People 1492-1995* (revised edn, University Press of America 2005).
[29] Antunes, above n 19, [27].
[30] See Chapters 1 and 2.

'progressive development' of international law, on the whole, the Articles set out existing rules as accepted by the international community.[31] However, tracing the claim for reparations for transatlantic enslavement, requires consideration of centuries of international legal thought and practice, which cannot be presumed to be encompassed by the International Law Commission's twenty-first century text.

Within the European tradition, it is often suggested that the roots of public international law are to be traced to Roman Law.[32] Therefore, the principles of responsibility and reparation in this context serve as a suitable starting point in tracing the concepts, even if this account is not entirely satisfactory. In Roman Law, the now established principle of *restitutio in integrum* arose as a development from earlier retaliatory and self-help remedies. This shift is seen to have taken place with the enactment of *Lex Aquila* in the late second century BCE.[33] This principle found its way into the reasoning of international tribunals in the twentieth century – notably the *Chorzów Factory case* highlighting *restitutio in integrum* as the fundamental reparatory obligation in international law.[34] Likewise, the introduction of *culpa* as an element of wrongfulness in Roman Law some 150 years after the enactment of *Lex Aquila* continues to echo through the history of international law, demonstrating an actor-centred understanding of legal responsibility consistent with the placement of attribution in determining wrongfulness, and the separation of assessment of harms to the determination of damages.[35] Thus both concerns with attribution (defining

[31] The opening paragraph of the commentaries to the Articles indicates the dual focus of codifying and progressively developing the basic rules of international law concerning State responsibility. Commentaries to the Articles on State Responsibility, above n 15, 31.Their adoption in General Assembly Resolution 56/83 of 12 December 2001 evidences widespread State support for their general terms. For the acceptance of the Articles on State Responsibility as reflective of customary international law, see for instance *Noble Ventures, Inc. v Romania* (Award) (2005) ICSID Case No ARB/01/11; *LG&E Energy Corp and ors v Argentina* (Decision on Liability) (2006) ICSID Case No ARB 02/1, [31]; *CMS Gas Transmission Company v Argentina* (Award) (2005) ICSID Case No ARB/01/8, [315].

[32] Arthur Nussbaum, 'The Significance of Roman Law in the History of International Law' (1951–2) 100 *University of Pennsylvania Law Review* 678, 681. See also Hannis Tylor, *A Treatise on International Public Law* (Calaghan & Company 1901).

[33] The orthodox account suggests that 287 BCE was the date of enactment – see Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 2 (Juta 1990). Honoré, however, argues the timeline for enactment lies between 195 and 209 BC – Anthony Honoré, 'Linguistic and Social Context of the *Lex Aquilia*' (1972) 7 *Irish Jurist* 138, 150.

[34] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A No 17, [47]. The place of *restitutio in integrum* in international law can also be traced through the peace treaties of Westphalia including provisions for the restoration of lands – see Randall Lesaffer, *Peace Treaties and International Law in European History* (Cambridge University Press 2004). This principle is considered in greater depth in Chapter 6.

[35] See David Ibbetson, 'How the Romans Did for Us: Ancient Roots of the Tort of Negligence' (2003) 26 *University of New South Wales Law Journal* 475.

wrongfulness) and causation can be located in Roman Law.[36] Yet, these principles were not directly transplanted from Roman to international law by European States.

The doctrine of State responsibility derives from the adaptation and amalgamation in Europe over time of private law concepts (from Roman Law and elsewhere) as well as early international law for the protection of foreign nationals, reprisals, denial of justice, and the practice of international protection.[37] Much like the shift in Roman Law from retaliatory and self-help remedies to the incorporation of reparations as an alternative, advertence to reparations in early European public law serves, in part, as a substitute for reprisals.[38] Where reprisals might predominate in systems lacking strong, centralised power, the growing significance of alternative mechanisms intertwined with the development of international law as a system of governance.[39] Moreover, the entitlement to engage in reprisals presumes the existence of a system of international wrongdoing that can be ascribed to States. Grotius, Gentili, and Legnano's recognition of *déni de justice* and *défi de justice* as conditions allowing reprisals presumed the existence of international wrongdoing (international delict) and thus attribution in some form.[40] Despite the changing dominance of self-help mechanisms, the obligation to make reparation for breaches was one of the few constants of differing theorisations of international responsibility.[41] Aquinas, for instance, highlighted the obligation to make *restitutio* and seek *satisfactio* in the event

[36] Causation is further considered in Chapter 6.
[37] Borzu Sabahi, 'A Concise History of the Law of State Responsibility and Reparation in International Law' in Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press 2011) 7, 7-9.
[38] See Borzu Sabahi, 'A Concise History of the Law of State Responsibility and Reparation in International Law' in Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press 2011) 7, 34-38.
[39] In discussing the significance of reprisals in Roman Law, Bartolus suggested that their importance rose and fell in an inverse relationship with the strength of central authority. See Hans Spiegel, 'Origin and Development of Denial of Justice' (1938) 32 *American Journal of International Law* 63, 70.
[40] See Hans Spiegel, 'Origin and Development of Denial of Justice' (1938) 32 *American Journal of International Law* 63, 70-73.
[41] Although the exact nature of the reparatory obligation differed somewhat between theorists, the obligation to provide redress in the instance of wrongdoing was a feature of both canonist thinking (prioritising *damnum injuria datum*) and the work of theologians (focusing on penance and restitution). Borzu Sabahi, 'A Concise History of the Law of State Responsibility and Reparation in International Law' in Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press 2011) 7, 25.

of wrongdoing, based on *culpa.*[42] This in turn influenced the School of Salamanca and later Grotius.[43]

The shift from theorising responsibility in the context of specific causes of action to formulating a general theory of liability occurred in Christian canon law (often adapting Roman Law) and subsequently the work of theologians incorporating principles of Roman and canon law, including Aquinas in the thirteenth century.[44] Grotius in *Rights of War and Peace* made substantial progress in formulating a general theory of international responsibility, advancing a general doctrine of liability based on fault and concluding that wrongful conduct (whether by positive act or omission) gives rise, by the law of nature, to an obligation to 'make good' the damage caused.[45]

Perhaps ironically, according to Francesco Parisi, this shift in focus from the fault of the wrongdoer to the 'need to compensate the innocent victim' severs the consequences of wrongdoing from the formulation of fault which was the central function of this part of Grotius' treatise.[46] That is to say, that *culpa* becomes an element of determining wrongfulness and not a consideration embedded in the causal analysis of damage – detracting from the effort to formulate a general theory of liability based on fault. However, rather than undercutting a general theory of liability, this may be seen as an early example of the approach taken in the 2001 Articles on State Responsibility wherein the question of fault (*culpa*), or the finding of internationally wrongful conduct, is severed from the determination of its consequences.[47] Thus, the causal analysis of injuries resulting from the breach occurs subsequent to the determination of the breach itself.[48]

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[42] In this context, *restitutio* constituted the restoration of that which the victim had been deprived of (whether material or immaterial), while *satisfactio* was concerned with the wrongdoer seeking forgiveness for their wrongdoing. See Harry Dondorp, 'Crime and Punishment: *Negligentia* for the Canonists and Moral Theologians' in Eltjo Schrage (ed), *Negligence: The Comparative History of the Law of Torts* (Duncker & Humblot 2001) 101, 117.
[43] See Gero Dolezalek, 'The Moral Theologian's Doctrine of Restitution and Its Juridification in the Sixteenth and Seventeenth Centuries' (1992) *Acta Juridica* 104.
[44] See Eltjo Schrage (ed), *Negligence: The Comparative History of the Law of Torts* (Duncker & Humblot 2001); Arthur von Mehren and James Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (2nd edn, Little, Brown & Co 1977) 569.
[45] Hugo Grotius, *The Rights of War and Peace* (Richard Tuck trans, Vol 2, Liberty Fund 2005) chapter 17.
[46] Francesco Parisi, 'Alterum non Laedere: An Intellectual History of Civil Liability' (1994) 39 *American Journal of Jurisprudence* 317, 341.
[47] Sabahi argues that the focus on the need to compensate the innocent victim 'seems to undercut the fault-based liability theory itself, as it does not allocate a sufficient role to fault in determining *consequences.'* Borzu Sabahi, 'A Concise History of the Law of State Responsibility and Reparation in International Law' in Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press 2011) 7, 29. Emphasis in original.
[48] The question of causation consistent with this approach is considered in Chapter 6.

Although not an exact facsimile, the parity between Grotius' approach to State responsibility and that formulated in the Articles on State Responsibility supports the application of this approach in assessing responsibility for transatlantic enslavement. Despite oscillations in the exact formulation of responsibility from the fifteenth through to the twenty-first century, attribution of wrongful conduct to a State (in addition to the existence of an international norm) and causal connection between the wrong and reparable harms remained features of international legal theorisations. Therefore, it is not necessary to find the entirety of the terms of the Articles on State Responsibility to have been constant throughout history in order to apply their core approach to responsibility to the history of international law from the inception of the transatlantic system. In relation to the particular norms engaged in the question of responsibility for transatlantic enslavement, and notably questions concerning attribution and causation, international law has evidenced sufficient constancy (or rather sufficiently limited oscillation) to assess the historical claims within its rubric.[49]

3.3. Attribution of internationally wrongful conduct

International and domestic law are not equivalent for the purpose of establishing the existence of a justiciable breach of law, for injury and fault are not elements of State responsibility under international law.[50] The Articles on State Responsibility conclude that wrongful conduct and the attribution of such to a State are the only necessary components of an internationally wrongful act, which necessarily entails international responsibility.[51] In the Western tradition, Grotius' inclusion of *culpa* as an element determining wrongfulness rather than an aspect of the question of causation of damages likewise severs the question of damage and injury from the determination of wrongfulness.[52] Thus, harm and associated

[49] Recognising these continuities, Daillier and Bories' observations concerning the changing landscape of international responsibility need not be seen as extending to the particular norms in question. Patrick Daillier, 'The Development of the Law of Responsibility through the Case Law' in James Crawford, Alain Pellet, and Simon Olleson (eds) *The Law of International Responsibility* (Oxford University Press, 2010) 37, 37; Clémentine Bories, 'The Hague Conference of 1930' in James Crawford, Alain Pellet, and Simon Olleson (eds) *The Law of International Responsibility* (Oxford University Press, 2010) 61, 62.

[50] León Castellanos-Jankiewicz, 'Causation and International State Responsibility' (2012) SHARES Research Paper 07, ACIL 2012-07, 4 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2419913> accessed 10 April 2018.

[51] Articles on State Responsibility, above n 11, Articles 1 and 2.

[52] Hugo Grotius, *The Rights of War and Peace* (Richard Tuck trans, Vol 2, Liberty Fund 2005) chapter 17.

questions of causation need not be established in order to reach a finding of internationally wrongful conduct.[53] The 'anti-legal nature' of the conduct in question – the violation of law – is, in itself, a form of damage on the international plane.[54] In formulating responsibility in this way, Roberto Ago (an early architect of the Articles on State Responsibility) affirmed the role of international law in upholding the international legal order.[55] In other words, legal redress is conceived not merely as a response to injuries flowing from wrongdoing, but as a means of rectifying the moral injury of the wrongdoing itself – what Brigitte Stern labels the 'objective control of legality'.[56] The jurisprudence of international tribunals throughout their respective histories concluding with declarations of a breach absent any other form of reparations are a testament to this understanding of international wrongdoing.[57]

Arguments over the harms suffered by potential contemporary beneficiaries of reparations for historical injustices, and the causal links between wrongdoing and injury (discussed in chapter 6) are relevant only to the question of the necessary consequences of wrongdoing and not to the establishment of wrongdoing in the first instance. Thus, the question that must be considered in determining the existence of internationally wrongful conduct is: "is conduct amounting to a breach of international law attributable to the State?"[58]

Conduct of State organs, persons, and entities exercising governmental authority, conduct directed or controlled by the State, and conduct

[53] Such elements are rather considered in determining those injuries that must be repaired, and are considered in Chapter 6.
[54] See Dionisio Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers' (1906) 8 *Revue Générale de Droit International Public* 5, 13. Ian Brownlie likewise argued that 'The duty to pay compensation is a normal consequence of responsibility, but is not conterminious with it.' Ian Brownlie, *Principles of Public international Law* (6th edn, Oxford University Press 2003) 421.
[55] UNGA, 'Report by Mr R Ago, Chairman of the Sub-Committee on State Responsibility' (1963) UN Doc A/CN.4/152, 250.
[56] Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet and Simon Olleson, *The Law of International Responsibility* (Oxford University Press 2010) 193, 194.
[57] See for instance *Phosphates in Morocco (Italy v France)* (Preliminary Objections) [1938] PCIJ Rep Series A/B No 74 [28] wherein the Court noted that international responsibility was established "immediately as between the two States" upon commission of an internationally wrongful act by one State against another. This is further considered in Chapter 5, Section 1.
[58] For support of the status of the requirement of attribution prior to the development of the Articles, see *Phosphates in Morocco (Italy v France)* (Judgement) [1938] PCIJ Rep Series A/B No 74; *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 64; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43.

acknowledged and adopted by the State as its own are all attributable to the State as an entity in international law.[59] Conduct in this context may refer to actions or omissions by the State, or a combination of the two.[60] Although borderline cases of attribution might be susceptible to variations in understandings of its parameters, cases concerning direct conduct of State organs in their official functions have always fallen directly within the ambit of international legal attribution – 'from the perspective of the outside, all organs and servants of the state are "the state"'.[61]

Targeted attempts to build a case for reparations against particular States for defined activities would require a thorough accounting of which conduct was attributable to that State and on what basis it was to be imputed. However, analysis of the general viability of claims need not be so methodical. Many of the actions and omissions involved in the system of transatlantic system were not marginal cases. European enslaver States created entire regulatory regimes to enable enslavement. States instituted licensing and permit systems within which enslavement was required to take place, imposed taxes and levies upon traders in enslaved persons, granted private contracts to businessmen to facilitate the system, and set up public corporations engaging directly in enslavement.[62] On the international level, European States regulated the transatlantic system between them, constructing a regional-international framework for the enslavement and forced migration of Africans.[63] Consistent with the ruling of the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia,* determining that legal decisions and administrative measures 'express the will and constitute the activities of the State', this tableau of

[59] Articles on State Responsibility, above n 11, Articles 4, 5, 8 and 11.
[60] Ibid, Article 2. International Jurisprudence also supports the contention that attribution of responsibility is possible without direct State participation where the State fails to take measures to address acts which are being committed when there is an obligation to do so. See *Corfu Channel (United Kingdom of Great Britain and Northern Ireland) (Merits)* [1949] ICJ Rep 1, 22-23 where the Court found Albanian responsibility in the fact that it knew, or must have known, of the presence of the mines in its territorial waters but failed to take action to make third states aware of them. See also *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 64, 3 where Iranian responsibility was premised upon the inaction of authorities who failed to take appropriate steps when such were called for.
[61] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994), 151.
[62] See generally Moses Finley, *Classical Slavery* (Taylor & Francis 2014); Justin Roberts, *Slavery and Enlightenment in the British Atlantic* (Cambridge University Press 2013); Gad Heuman and James Walvin, *The Slavery Reader* (Routledge 2003); James Walvin, *Atlas of Slavery* (Taylor & Francis 2014).
[63] See Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff 2013), 20-56; Jean Allain, 'What We Know Today: A Contemporary Understanding of the Atlantic Slave Trade' in Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (Brill Nijhoff 2015), 37.

official conduct constituting the transatlantic system is uncontroversially attributable to the State in the most direct sense.[64]

Even without the deep and multifaceted engagement of European enslaver States themselves with the transatlantic system, their liability might be founded upon their allowance of enslavement and related practices.[65] If enslavement was contemporaneously prohibited as a contravention of the most basic and fundamental norms of naturalist international law, the failure of States to take action against widespread enslavement and brutality committed by their own nationals and within their territories could be framed as a breach by omission.[66]

The attempt to locate conduct amounting to breaches of an international prohibition against slavery in the annals of history, and attribution of such involvement to relevant enslaver States, is likely satisfied by the thoroughly documented history of European involvement in the system of transatlantic chattel enslavement. A legal case would require an accounting of injustices and the relevant States' relationships to those abuses – both for the determination of attribution and for the assessment of necessary reparations. However, in general, the nature of State participation in the atrocities committed within the transatlantic system leaves little question as to the attributability of relevant conduct to the State. Moreover, the evidential barriers which may present substantial challenges to other cases of historical injustice are not overwhelming in the case of transatlantic enslavement because of the degree to which the conduct occurred within the public arena, with international treaties, domestic legislation, and historical records reflecting the role of States in the system. Where claims are formulated within political mechanisms, evidentiary burdens may be further decreased.

3.4. Continuity and succession

Where attribution and the impact of time coalesce is in the consideration of the transmission of State Responsibility through time, regulated by the rules

[64] This with regard to the Polish Government's intention to liquidate certain estates in Poland owned by German companies – *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) [1926] PCIJ Series A No 7, 19.
[65] International law allows liability for omissions in circumstances where States have a duty to act which they fail to fulfil. See for instance *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4; *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 64.
[66] Failure to prevent or punish private acts might constitute a breach of international law. See for instance *Laura M B Janes et al (United States of America v United Mexican States)* [1925] 4 RIAA 82.

of continuity and succession. On the issue of continuity, critics of reparations suggest a dissociation between historical and contemporary States as legal entities to support their conclusion of a break in responsibility.[67] However, this perspective wrongly conflates the nature of individual liability with State responsibility. The liability of nations is not premised upon the individual conduct of those operating as part of its mechanisms, nor does it cease when those individuals occupying official positions within the regime change. The very structure of State responsibility requires the abstraction of liability. As León Castellanos-Jankiewicz recognises: 'there are no activities of the state which can be called "its own" from the point of view of natural causality' and thus responsibility must be translated from natural persons to the legal person of the State.[68] In other words, the State as an entity is necessarily held responsible for the actions of particular individuals operating as agents of the State. Thus, from the perspective of international law, the status of international legal personality is to be assessed within the frameworks of continuity of States and State succession, and not merely on the basis of time having passed and different individuals having filled positions within the machinery of the State.

The significance of a finding of continuity or succession in the context of responsibility for historical injustice lies in the general principle that continuing States remain responsible for unlawful acts, while successor States are not generally liable for the international wrongdoing of their predecessor.[69] Although there are no concrete rules of international law operating to determine the application of continuity or succession, governing principles are applied on a case by case basis in light of the circumstances.[70] Moreover, the rule precluding liability of successor States is not absolute, as States may adopt the breaches of their predecessors and thus bear responsibility.[71] Succession may therefore be considered either partial or

[67] See, for instance, Verdun, above n 2, 630.
[68] León Castellanos-Jankiewicz, 'Causation and International State Responsibility' (2012) SHARES Research Paper 07, ACIL 2012-07, 16 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2419913> accessed 10 April 2018. As the commentary to the Articles on State Responsibility highlight, the state is treated as a unity, consistent with its recognition as a single legal person in international law'. Commentaries to the Articles on State Responsibility, above n 15, 35.
[69] Malcolm Shaw, 'State Succession' in Malcolm Shaw, *International Law* (8th edn, Cambridge University Press 2017) 725, 762.
[70] Ibid, 727.
[71] See for instance the *Lighthouses Arbitration (France v Greece)* (1956) 12 RIAA 155; 23 ILR 659 in which Greece was found to have adopted the wrongful conduct of Turkey and Crete.

total, and the facts of the case determine the degree to which responsibility is transmitted.[72]

The range of situations involving political turmoil in which the identity of the State is nonetheless considered to continue in international law supports the argument for continuity in considering the responsibility of enslaver States for their role in transatlantic enslavement. Over time, State practice affirmed the irrelevance of internal political changes (including coups d'états and other situations of revolutionary activity) and military occupations by third States in determining membership in treaties and liability for international debts.[73] Likewise, State identity can survive significant territorial changes, although, at some point along the spectrum, the rules of succession as opposed to continuity will be triggered.[74] In general terms, in cases of loss of part of a State's territory (through independence or merger with a third State), responsibility continues unless a 'clear, direct and intrinsic link between the consequences of the act and the territory and population of the part of the state' severed exists.[75] Even 'failed States' lacking central governmental authority for a prolonged period of time, and characterised by extensive civil conflict between groups absent legitimate government, retain international legal personality unless the state of affairs has become 'permanent and decisive'.[76]

In the context of European enslaver States, the continuity of States is, for the most part, straightforward. Despite the loss of significant amounts of colonial territory, and some internal political reconfigurations, the States in question have persisted in their international identity, retaining historically determinative territory and self-identity. Zimmermann argues that the 'self-proclaimed will of a State to continue the international legal personality of a given State and the acceptance of such claim by third States (both within and outside international organizations) play a decisive role.'[77] European

[72] See Patrick Dumberry, *State Succession to International Responsibility* (Martinus Nijhoff 2007), 17.
[73] Andreas Zimmermann, 'Continuity of States' *Max Planck Encyclopedia of Public International Law* (2006) <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1389> accessed 02 May 2018, [9-10].
[74] See DP O'Connell, *State Succession in Municipal Law and International Law* (vol 2, Cambridge University Press 1967).
[75] Malcolm N Shaw, 'State Succession' in Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 725, 762.
[76] Andreas Zimmermann, 'Continuity of States' *Max Planck Encyclopedia of Public International Law* (2006) <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1389> accessed 02 May 2018, [11].
[77] Andreas Zimmermann, 'Continuity of States' *Max Planck Encyclopedia of Public International Law* (2006) <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1389> accessed 02 May 2018, [15].

enslaver nations, including Denmark, France, the Netherlands, Portugal, Spain, and the United Kingdom, may therefore be appropriately characterised as continuing States, resulting in an unbroken chain of responsibility.[78]

3.5. Invoking international responsibility

The attribution of responsibility to a continuing State does not necessarily entail the jurisdiction of any international court to adjudicate on a matter. European States identified as potential defendants in such a case may not accept the compulsory jurisdiction of the International Court of Justice, or have reservations in relation to justiciable time periods. For instance, the United Kingdom's acceptance of the compulsory jurisdiction of the International Court of Justice is limited to disputes arising after 1 January 1987 in relation to situations or facts subsequent to this date, and excludes disputes with Commonwealth States (present or past).[79] Reciprocity requirements are also common under the Optional Clause system, with many European States permitting jurisdiction only in cases where the claimant State also accepts the same obligation, which may be the case for some potential reparations claims, but not all.[80]

The successful formulation of liable perpetrators in the present legal landscape is only half of the battle in levelling the playing field for a meaningful reparations debate to occur. A legal claim necessarily has two sides, relating not only to the breach but to the identification of those entitled to bring a claim, the beneficiaries of potential reparatory measures, and reparable harms. Although individuals are now receiving some degree of recognition as subjects in international law, particularly within international

[78] Of course, this assessment must also be tempered by the recognition that the continuity of each potential defendant State in a formulated claim must be considered on the basis of its own history, and no general conclusion may be drawn concerning all relevant slaver States.

[79] United Kingdom of Great Britain and Northern Ireland, 'Declaration recognizing the jurisdiction of the Court as compulsory' (22 February 2017). Likewise, Spain's reservation bars jurisdiction for events before 1990, Portugal's before 1974, and Belgium before 1948. The Netherlands, for its part, prevents claims relating to conduct occurring over one hundred years before the dispute is brought, while Denmark, Austria, Norway and Sweden express no such reservations. Spain, 'Declaration recognizing the jurisdiction of the Court as compulsory' (29 October 1990); Portugal, 'Declaration recognizing the jurisdiction of the Court as compulsory' (25 February 2005); The Netherlands, 'Declaration recognizing the jurisdiction of the Court as compulsory' (21 February 2017); Belgium, 'Declaration recognizing the jurisdiction of the Court as compulsory' (17 June 1958); Denmark, 'Declaration recognizing the jurisdiction of the Court as compulsory' (10 December 1956); Austria, 'Declaration recognizing the jurisdiction of the Court as compulsory' (19 May 1971); Norway, 'Declaration recognizing the jurisdiction of the Court as compulsory' (24 June 1996); Sweden, 'Declaration recognizing the jurisdiction of the Court as compulsory' (6 April 1957).

[80] Notably, Jamaica has not deposited a declaration recognising the jurisdiction of the Court as compulsory pursuant to Article 36(2). See International Court of Justice, 'Declarations recognizing the jurisdiction of the Court as compulsory' (*International Court of Justice* 2018) <www.icj-cij.org/en/declarations> accessed 14 March 2018.

human rights law, the classical formulation of the international legal framework permits only inter-State claims.[81] Thus, injuries to individuals are only amenable to an international legal claim where the injury to that individual is adjudicated via State-State mechanisms. This is reflected in Part Three of the Articles on State Responsibility, concerning the implementation of the international responsibility of a State, recognising only the right of States to invoke responsibility.[82]

The determination of internationally wrongful conduct, and identification of a State (or States) entitled to invoke responsibility in international law, is a separate issue to the question of the legal consequences of the breach. The division of these questions is significant not only because it allows for a finding of wrongfulness without specific harm, but also because it allows for the responsibility of a wrongdoing State absent a right to invoke such responsibility. In other words, the finding of wrongdoing, determination of the content of the international responsibility of the State, and the right to invoke responsibility are distinct legal issues. The formulation of these dimensions of State responsibility are reflected in the Articles on State Responsibility, Part One of which addresses international wrongdoing, Part Two the content of responsibility, and Part Three the invocation of responsibility.[83] Although contingent upon a finding of internationally wrongful conduct, the right to invoke responsibility is not, therefore, a prerequisite of international responsibility itself and the consequences of a breach may be considered independently of questions of standing and jurisdiction.

Presumptions about justiciability often lead to historical injustices being framed as entirely unlike typical reparations claims. Consideration of these cases is frequently premised on distinction, with the question being one of

[81] Vattel, for instance asserted the basis of international responsibility for harm to individuals by declaring that harm to individuals constituted an injury of their home State. Hans Spiegel, 'Origin and Development of Denial of Justice' (1938) 32 *American Journal of International Law* 63, 74-75. Individuals or private actors might now also achieve subjecthood in international law through international investment law where treaties might grant standing to investors to bring a claim. See generally Christoph Schreuer, 'Consent to Arbitration', in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 830; Christopher Dugan, Don Wallace, Jr, Noah Rubins, and Borzu Sabahi, *Investor State Arbitration* (Oxford University Press 2008) 27–8. The absence of a treaty providing standing, however, may result in the denial of the right to bring a claim and the recognition of private claimants in this context ought not to be considered to be reflective of general international law on the issue – see for instance *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v Italy)* [1989] ICJ Rep 15.

[82] The primary formulation is for the invocation of responsibility by an injured State itself, although Article 48 permits the invocation of responsibility of a State other than the injured State when the obligation in question involves a collective interest which the invoking State is a part of. Articles on State Responsibility, above n 11.

[83] Articles on State Responsibility, above n 11.

the degree of analogy which might nonetheless be established. In other words, the starting point for analysis is the presumption that the passage of time alone detracts from claims to reparations for historical injustices. This, in turn, influences the analysis of procedural rules, supporting conclusions on limitation, acquiescence, attribution, and continuity based on presumptions as to justiciability, rather than the legal frameworks themselves. This approach presents these requirements as both legal and political barriers to reparations claims, for settled legal bars mitigate against political claims. This circular reasoning alone ought not to be taken as determinative of the legal position, yet often serves as the basis for refusal to engage in serious consideration of the reparations question.

Shifting from the deductive to an inductive approach displaces many of the presumed bars to recovery posed by the procedural rules of international law. The passage of time itself is no longer characterised as sufficient grounds for a conclusion on responsibility for conduct within the transatlantic system, and the governing rules of the international system are engaged. While this does not provide a foundation for the justiciability of historical cases in any particular legal forum, it does destabilise reparations denials based on these legal barriers. Thus, space is created in which specific reparations cases may be considered within the legal frameworks. Moreover, this contributes to the broader discourse on reparations in extra-legal processes, wherein legal structures have rhetorical and persuasive impact.

CHAPTER 4: TOWARDS A THEORY OF REPARATORY JUSTICE

International law's justice in the aftermath of atrocity

In the event of wrongdoing, reparations are the means by which international law effects justice, both in individual cases and holistically. While establishing attributable wrongful conduct is a prerequisite to the engagement of reparations, the jurisprudence of redress provides an independent, substantive framework for the consideration of the consequences of responsibility. This interrogation shifts the focus from the violation itself to its victims – those harmed by the wrongdoing – whether States themselves, individuals, or collectives.[1] This chapter explores reparations practice and theory in international law to develop an understanding of the nature and scope of reparatory justice, which may then be applied in cases of both historical and contemporary injustice.

The theory formulated in this chapter is built upon the legal frameworks governing redress, but also transcends them. It speaks to the contours of reparations in international law to identify the underlying philosophy explaining their operation, a framework that contributes not only to legal claims, but also to the moral and political cases. Acknowledging potential gaps in positive international legal frameworks, reparations as a formulaic legal mechanism may be insufficient to address calls for redress. However, a deeper understanding of the nature and scope of reparations in international law, and the positioning of different understandings of justice within reparations theory, enables a more nuanced consideration of claims to redress for historical injustices irrespective of their justiciability in legal fora.

4.1. Remedy as an inherent power

Reparation is not a new concept but the product of centuries of jurisprudence obliging wrongdoers to redress the damages caused by their actions. In this broad sense, reparations are not concerned automatically with severe injustices, atrocities, and human rights abuses but with the simple proposition of law that a 'breach of an engagement involves an obligation to

[1] Potential forms redress might take are considered in the following Chapter.

make reparation in an adequate form.'[2] The very legitimacy of the law is often characterised as contingent on the ability of judicial tribunals to provide a remedy in the instance of a breach, and the validity of law is seen to be undermined where breaches entail no legal consequences.[3] *Ubi jus, ibi remedium* – where there is a right, there is a remedy, and a correlative right to have the infringement addressed in the courts. Thus, both domestic and international courts have consistently recognised their inherent power to grant remedies in the instance of a breach of law within their jurisdiction.[4]

In the fifteenth century, Grotius recognised the need for legal rights to be enforceable in courts of law, noting that self-help ought only to occur in exceptional circumstances, and that wrongdoing States must be 'compelled to make restitution'.[5] Grotius thus made clear the synchronicity between domestic and international practice in enforcing an obligation to remedy, further dedicating a whole chapter of his treatise to the reparatory obligation.[6] Austin, for his part, placed legal consequences at the very heart of law's definition, shaping the recognition of law by reference to the presence of sanctions in the instance of a breach.[7] Ancient legal sources similarly paired the promulgation of rights with the need to provide remedies upon their breach. Rome's *Twelve Tables*, Justinian's *Digest*, and the *Code of Hammurabi* all contemplate various remedies, both explicit in relation to particular offences, and at the discretion of the court.[8] Through the consistent requirement of remedy for breaches of law, regardless of whether

[2] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A No 17, 29.
[3] See, *Lusitania Cases (United States v Germany)* (1923) 7 RIAA 32, 36. Stern makes this point by arguing that the obligation to make reparation is not the consequence of international responsibility, but rather that international responsibility is the obligation to make reparation – Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet and Simon Olleson, *The Law of International Responsibility* (Oxford University Press 2010), 194.
[4] See for instance *Case Concerning the Factory at Chorzów (Germany v Poland)* (Jurisdiction) [1927] PCIJ Rep Series A No 9; *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4; and *Ahmadou Adio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation) [2012] ICJ Rep 103. See also in English law, *Ashby v White* (1703) 92 ER 126 (KB), 135-37 (Holt CJ dissenting); and in US jurisprudence, *Paxton's case* 1 Quincy 51 (Mass. 1761), 57.
[5] Hugo Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (Batoche Books 1999), 19.
[6] Hugo Grotius, *The Rights of War and Peace, in three books. Wherein are explained, the law of nature and nations, and The Principal Points relating to Government. Written in Latin by the learned Hugo Grotius, and translated into English. To which are added, all the large notes of Mr. J. Barbeyrac, Professor of Law at Groningen, and Member of the Royal Academy of Sciences at Berlin* (London 1738) book 2, chapter 17 (*The Rights of War and Peace*).
[7] John Austin, *The Province of Jurisprudence Determined* (2nd edn, J Murray 1861).
[8] Allan Chester Johnson, Paul Robinson Coleman-Norton and Frank Card Bourne, *Ancient Roman Statutes: Translation with Introduction, Commentary, Glossary and Index* (Clyde Pharr ed, University of Texas Press, 1961); Alan Watson ed, *The Digest of Justinian* (University of Pennsylvania Press, 2011); Chilperic Edwards, *The Hammurabi Code, and the Sinaitic Legislation; with a Complete Translation of the Great Babylonian Inscription Discovered at Susa* (Kennikat Press, 1971).

such is explicated in the legal text, the futility of laws without redress has been reaffirmed across jurisdictions for millennia.[9]

Much like domestic law, international law intertwines legal rights with remedies, having recognised throughout its history that breaches of international law require sanctions of some kind to maintain the international legal system.[10] Like in national systems, reparation is recognised in the law applied by international courts and tribunals as a 'logical consequence flowing from the very nature of law and is an integral part of every legal order'.[11] This fundamental quality of the reparatory obligation in international law was pronounced by the Permanent Court of International Justice in *Factory at Chorzów*:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.[12]

Thus, the Court framed the obligation as not merely a means of resolving disputes confined to the texts of positive law instruments, but as an essential counterpart of primary rules, existing regardless of whether it was explicitly provided for in the relevant treaty. Further, the reparatory obligation is recognised as more fundamental to the international legal order than protecting the State from legal consequences, overriding 'undue invocation' of State sovereignty and immunity.[13]

Codifying this existing principle of international law, the International Law Commission's Articles on State Responsibility recognise that the international responsibility of a State, entailed by an internationally wrongful act, necessarily involves legal consequences.[14] The central obligations deriving from such responsibility are threefold: cessation of continuing breaches; provision of assurances and guarantees of non-repetition; and full

[9] Shelton affirms the existence of this inherent right of courts to remedy breaches of law, with no further restrictions than that the case is within their jurisdiction. Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015), 238.
[10] See above n 4.
[11] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge 1953), 170.
[12] *Factory at Chorzów* (Jurisdiction), above n 4, 21.
[13] See *Ahmadou Adio Diallo*, above n 4, Separate Opinion of Judge Cançado Trindade, 40.
[14] International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' (November 2001) UN Doc A/56/10, Article 28 (Articles on State Responsibility).

reparation for injury caused by the wrongful act, as appropriate in the case.[15] While this formulation *prima facie* draws clean lines between the three identified secondary obligations, the boundaries between these consequences in practice blur, overlap, and disappear.[16] Measures ordered as guarantees of non-repetition and satisfaction as a form of reparations in particular evidence substantial intersection in both form and justification.[17]

The automatic character of the obligation to make reparations pursuant to an internationally wrongful act reinforces its primacy and the difficulty of completely severing it from the primary rule.[18] Although the principle does not require explicit pronouncement in international instruments to operate, it is nonetheless a central feature of a large number of international human rights law treaties and international declarations.[19] Notably, in 2006 the United Nations adopted the Basic Principles and Guidelines on the Right to a Remedy for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNBPG) which, after a long period of development and negotiation, codify existing principles on redress in these fields of international law.[20] These Principles give shape to

[15] Ibid, Articles 30 and 31.
[16] Reparations, cessation, and guarantees of non-repetition are considered secondary legal obligations, for they arise only in the instance of a breach of a primary norm.
[17] On overlapping modalities, see Chapter 5.
[18] The reparatory obligations is characterised as automatic because it is not contingent upon specific treaty provisions stating the obligation or upon a demand for redress by another State. International Law Commission, 'Report of the International Law Commission on the Work of its Fifty-Third Session' (2001) 2(2) *Yearbook of the International Law Commission* 31, 91. See also *Corfu Channel,* above n 4.
[19] See Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), Article 8; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 2; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Article 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, Article 14. On regional instruments, see European Convention for the Protection of Fundamental Rights and Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, Article 12; Charter of Fundamental Rights of the European Union (7 December 2000) OJ C 83/02, Article 47; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36, 9 ILM 99 (1969), Article 25; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), Article 7; Arab Charter on Human Rights (adopted 15 September 1994, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), Article 9. In international declarations, see UNGA 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (21 March 2006) UN Doc A/RES/60/147 (UNBPG); UNGA 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (29 November 1985) UN Doc A/Res/40/34; UNGA 'Declaration on the Protection of all Persons from Enforced Disappearance' (18 December 1992) UN Doc A/Res/47/133, Article 19.
[20] UNBPG, ibid, preamble.

customary norms with regard to reparations, making them a useful reference point in considering the contours of the obligation.[21]

The status of the reparatory obligation as a customary international norm is supported both by its ubiquity in treaties and by the approach of international courts and tribunals to situations where it is not explicated.[22] As well as highlighting the inherency of the reparatory obligation in primary rules, authoritative international bodies have sustained their capacity to order remedies and determine the appropriate measures of redress where they have jurisdiction over the merits of the case. This irrespective of whether States have specifically agreed to the Court's jurisdiction over the determination of redress.[23] As the International Court of Justice determined in *Corfu Channel,* 'it follows from the establishment of responsibility that compensation is due', and it would be a vain exercise if the Court were empowered to make a determination of the status of the law, and find a breach, without the power to order remedy.[24]

In *Blake v Guatemala,* the Inter-American Court of Human Rights recognised the right to remedy as one of the basic pillars not only of the American Convention, but of the rule of law and democracy.[25] The Articles on State Responsibility and the UNBPG affirm the status of the reparatory obligation as a norm of customary international law which they merely codify.[26] The Permanent Court of International Justice and International Court of Justice both consistently rely on the inherent power to grant remedies for violations of international legal rights, irrespective of whether such is explicated in the text of the relevant treaty, affirming Dionisio Anzilotti's observations at the turn of the century that the obligation to provide a remedy in the instance of a breach (and the correlative right) is a norm of customary international

[21] See Theo Van Boven, 'Victims' Right to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Carla Ferstman, Mariana Goetz and Alan Stephens, *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill 2009).
[22] The repetition of a norm in treaty law serves as evidence of State practice and *opinio juris* in the formulation of customary international law, and thus the consistent repetition in treaty law supports the finding of customary status. See, for instance, *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v the Netherlands)* (1969) ICJ Rep 3, 38-42; *Case Concerning Continental Shelf (Libyan Arab Jamahiriya v Malta)* (1985) ICJ Rep 13, 29-30. See also Mark Villiger, *Customary International Law and Treaties: A Study of their Interactions and Interrelations* (Brill 1985); R R Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965-1966) 41 *British Yearbook of International Law* 275.
[23] See *Corfu Channel,* above n 4.
[24] Ibid, 23-24.
[25] *Blake v Guatemala* (Merits) IACHR Series C No 36 (24 January 1998); *Blake v Guatemala* (Reparations and Costs) IACHR Series C No 48 (22 January 1999). The case concerned the abduction, murder, and forced disappearance of a US journalise in Guatemala.
[26] Articles on State Responsibility, above n 14, preamble; UNBPG, above n 19, preamble.

law.[27] Thus the foundation for legal redress is defined as an implicit reality of the legal system; rights without remedies are futile, demanding reparatory obligations. However, without the strict bounds of written provisions and codified terms, the defining features of redress and reparations are open to interpretation – the boundaries are amorphous, objectives not explicated, and potential forms of redress not prescribed, although existing frameworks governing the forms of redress can provide guidance. Thus, an interrogation of the theoretical foundations of redress can support a clearer understanding of its objectives and parameters.

4.2. The basis of redress – conceptions of (reparatory) justice

In reparations discourse, all meanings depend on the key of interpretation; exactly what is meant by reparation differs significantly depending on the context in which it is discussed, and the underlying objectives and desires of the speaker. Although often publicly conceived of as synonymous with compensation, reparations encompass a broader range of measures designed to redress wrongdoing, both within the legal process and beyond.[28] The exact scope and boundaries of reparations remain fluid, and the extent to which non-monetary forms of redress are recognised varies depending on the context. The interplay between reparations and other justice mechanisms continues to fuel these uncertainties, posing challenges to a fully coherent understanding of the concept and its place in a broader scheme of justice. Moreover, it is not only the nature and scope of reparations as a justice mechanism that remains contentious, but the very conception of justice against which they must be assessed. Therefore, it is necessary to consider the interplay between reparations and established conceptions of justice in order to determine the boundaries of reparatory justice.

That the notion of justice is central to the formulation of reparations is affirmed by principle 15 of the UNBPG, characterising reparations as measures intended to promote justice through redress.[29] Exactly what differentiates between effective judicial remedy (justice) and insufficient redress, however, is unaddressed by the text. Richard Falk similarly notes that reparations in international law are a part of an overall commitment to

[27] Dionisio Anzilotti, *General Theory of State Responsibility in International Law* (Firenze 1902).
[28] Modalities of redress are considered in Chapter 5.
[29] UNBPG, above n 19.

'global justice'.[30] Beyond the centrality of redress and restitution to this 'global justice' agenda and the fact that it is carried out in 'global arenas' with reference to 'global standards and procedures', what characterises 'justice' in this context is again unclear.[31] Theo van Boven in his final report submitted to the UN Economic and Social Council remarks that redress, by definition, entails 'full justice' being done vis-à-vis society as a whole, the persons responsible, and the victims.[32] However, other than declaring compensatory measures an element of a 'policy of justice', how justice is to be measured in relation to these three parties again remains unarticulated.

In order to formulate a coherent understanding of the purpose of reparatory justice, and what this entails, it is therefore necessary to probe these conclusions and the underlying assumptions on which they rest. The foundations and objectives of redress, assessed against established theories of justice – namely corrective justice, economic analysis of law, transformative justice, and distributive justice – help to uncover a more comprehensive conception of the purpose and scope of justice in the context of reparations, and reparations in the context of justice. When considering marginal cases such as historical enslavement, existing within ambiguous legal frameworks themselves implicated in injustice, where natural law principles may be engaged, this theory of reparatory justice becomes central to the consideration of the case.[33]

(a) Reparations and corrective justice

The primary objective of reparations and the determination of judicial awards is frequently framed as *restitutio in integrum* – measures ordered ought to be designed to restore the victim to the position they were in prior to the breach, the *status quo ante.* As identified by the Permanent Court of International Justice in its famous ruling in *Factory at Chorzów:*

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of

[30] Richard Falk, 'Reparations, International Law, and Global Justice: A New Frontier' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2008) 478, 497.
[31] Ibid.
[32] UN Sub-Commission on the Promotion and Protection of Human Rights, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Fundamental Rights and Freedoms: Final Report Submitted by Theo van Boven, Special Rapporteur' (2 July 1993) E/CN.4/Sub.2/1993/8, [188].
[33] On the legal frameworks and relevance of natural law theories, see Chapter 2.

> the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[34]

The dominance of this idea in reparations discourse and judicial decisions reveals the centrality of corrective justice thinking in defining redress.

Corrective justice suggests that a wrong alters the relationship between parties, and aims to return them to equality – equality in this case being relative to the wrongdoing. As Aristotle framed the issue in *Ethics*: judges aim to do justice by returning parties to a situation of equality through the imposition of penalties on the perpetrator proportionate to the illegitimate gains, and the provision of redress to victims proportionate to their loss.[35] Equality in this context is not the absolute equality which might be advocated by distributive justice ideals, but a return to the prior status of the parties vis-à-vis one another. In short, corrective justice aims to restore relationships between victims and perpetrators by redressing the wrong. Thus, in the context of reparations, the corrective approach has three dimensions, affecting which circumstances give rise to reparatory rights and duties, who can be required to pay reparations, and who is entitled to receive them.

Corrective restoration of equality relies on specific wrongful acts or omissions. This notion of a violation creating a legal entitlement is connected to ideas of injury or harm, but not premised upon physical or quantifiable damage – moral and symbolic harm may create an (intangible) imbalance between the parties that demands redress in the same manner as material injury.[36] The nature of the wrong, rather than the injury, is determinative of the nature of reparations required; a legal wrong creates a concomitant legal reparatory right/duty, while a moral wrong may only give rise to a moral reparatory right/duty (albeit a moral duty which might in some circumstances be satisfied through the creation of law). As Naomi Roht-Arriaza and Katharine Orlovsky note, 'reparations are distinguished first by their roots as a legal entitlement based on an obligation to repair harm, and second by an element of recognition of wrongdoing as well as harm, atonement, or making good.'[37] Reparations under a corrective justice

[34] *Factory at Chorzów* (Merits), above n 2, [124].
[35] Aristotle, *The Ethics* (J A K Thompson tr, 1955), 148-9.
[36] See Shelton, above n 9, 39. See further Chapter 5, Section 1 on symbolic redress.
[37] Naomi Roht-Arriaza and Katharine Orlovsky, 'A Complementary Relationship: Reparations and Development' in Pablo de Greiff and Roger Duthie (eds) *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009), 172.

framework thus operate within the bilateral (or multilateral) relationships created by wrongdoing.

The context of the perpetrator-victim relationship defines who can be party to reparations on both sides. Whether injustice is attributable to a State, private actors, or a combination of the two, the reparatory obligation rests with the perpetrator of abuses (although the justiciability of claims against that perpetrator in any given court or tribunal is an entirely separate matter).[38] Conversely, the recipient of reparations must be a victim of the wrongful conduct with sufficient proximity to the violation to justify redress. In the Articles on State Responsibility, injury caused by an internationally wrongful act, whether material or immaterial, is subject to an obligation to make full reparations without further qualification, framing victims as any actors suffering harm.[39]

The approach of international tribunals in assessing damages is consistent with the corrective justice approach, with the objective being to match remedies to injuries and provide proportionate redress. As the tribunal in the *Lusitania* arbitration noted, 'remedy must be commensurate with the injury received… The compensation must be adequate and balance as near as may be the injury suffered.'[40] The idea of proportionality is intimately connected to the idea of balancing the wrong and returning parties to equality. In the context of international criminal law, the *Lubanga Principles* developed by the International Criminal Court in the *Case of Lubanga Dyilo,* echo this requirement, asserting:

> a convicted person's liability must be proportionate to the harm caused and, inter alia, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.[41]

[38] Principle 15 of the UNBPG, above n 19, makes this clear in specifying that the legal duty attaches to the State only when the actions in question are attributable to that State, and the duty resides with a private legal person where they are found liable of the abuses. On invocation of responsibility, see Chapter 3, Section 5.
[39] Above n 14, Article 31. See also reparations practice under the mandate of the International Criminal Court, contingent on a perpetrator being convicted, victim eligibility, and on harm 'personal to the victim' - *The Prosecutor v Thomas Lubanga Dyilo* (Decision establishing the principles and procedures to be applied to reparations) ICC-01/04-01/06-2904 (7 August 2012) (*Lubanga Principles*), Principles 1-3. Likewise, the UNBPG frame parties to reparations within the victim-perpetrator paradigm, with victims being individuals or collectives suffering direct or indirect harm as a result of violations – above n 19, Principle 8.
[40] *Lusitania Cases,* above n 3, 36.
[41] Principle 5, *Lubanga Principles,* above n 39.

The *Lubanga* formulation evidences dual considerations in determining the extent of liability for reparations, considering not only the injury received, but the extent of participation in the relevant international crimes of the perpetrator before the International Criminal Court. This displays a more nuanced approach to the perpetrator-victim relationship, which in fact may involve multiple perpetrators and/or multiple victims, as well as a spectrum of culpability and connected harm.

The requirement of proportionality connected to the notion of *restitutio in integrum* provided in *Factory at Chorzów* maintains the objective of redress as the re-establishment of the situation that would, in all probability, have existed if that act had not been committed.[42] This approach anticipates the construction of a fictional world absent the wrongdoing, and the direct comparison of such against actual outcomes, to determine the consequences of the wrongdoing that must be redressed.[43] In this vein, Nozick assumes that the purpose of reparations is to create in the present, the closest possible situation to that which would have occurred without the injustice, advocating a 'best estimate' approach to the determination of redress based upon available information and probability distribution.[44] While this method of assessing damage and determining redress is apt to ensure the objectives of corrective justice are met in theory, in practice the attempt at return can be problematic or incomplete. Where measures aim to condemn unlawful behaviour or vindicate victims, and where violations are recognised as being beyond any attempt at return, the counterfactual approach becomes unfit to describe the objective of reparations, even within the bounds of corrective justice theory.

Many authors addressing the subject of reparations for historical injustices have become embroiled in the difficulties of establishing a counterfactual, particularly where the abuse serves as the foundation of the current social order.[45] In such cases, the magnitude of uncertainty as to the position

[42] *Factory at Chorzów* (Merits), above n 2, [47].
[43] This approach is adopted by a number of commentators considering reparations for historical injustice, and often seen as a barrier to claims relating to abuses that alter the counterfactual to such a degree that claimants no longer exist, making it impossible to consider their relative positions in the two worlds. On counterfactual reasoning, see Jeremy Waldron, 'Redressing Historic Injustices' (2002) 52 *University of Toronto Law Journal* 135; Stephen Kershnar, 'Are the Descendants of Slaves Owed Compensation for Slavery?' (1999) 16(1) *Journal of Applied Philosophy* 95; David Lambert 'Black-Atlantic Counterfactualism: Speculating about Slavery and its Aftermath' [2010] 36 *Journal of Historical Geography* 286.
[44] Robert Nozick, *Anarchy, State and Utopia* (Basic Books 2013).
[45] Jeremy Waldron recognises the difficulty of dealing with the counterfactual approach in 'Redressing Historic Injustices' 52 *University of Toronto Law Journal* 135 (2002). Kershnar also highlights the significant challenges posed by counterfactual reasoning, sidestepping the problem entirely in formulating his case for reparations by developing an inheritance-based

plaintiffs would be in lacking the injustice precludes the quantification of damages, thus presenting a barrier to reparatory awards.[46] However, while the counterfactual approach to the objective of *restitutio in integrum* can be parcelled into the corrective justice framework, it should not be characterised as the outer limit of measures designed to restore parties to equality. Equality may be re-established by returning parties to the position they would have been in but for the violation – the counterfactual – but may also be achieved by redressing the consequences of wrongdoing.[47] In fact, this approach may more appropriately address victims' suffering by recognising the lived experience of violations, and more adequately dealing with continuing consequences, particularly in the context of severe abuses. As Kelsen opined in 1938, the significance of redress:

> …does not lie with the fact that through such reparation — as its name implies — a wrong that has already happened will be repaired, as this is impossible. The wrongful behaviour cannot be made to disappear from the world. Its significance lies with the fact that through it, pursuant to a rule, the onset of the consequences of the wrong is made impossible.[48]

Evaluating a completed set of events is often more efficient and likely to yield results than engaging with a 'controversy about future probabilities', particularly when considering non-monetary remedies.[49] This recognises harm as a continuous and contextually specific experience, which in many cases cannot be effaced, only mitigated or mediated.

The threshold for such difficulties is not necessarily high – abuses of a range of human rights and humanitarian laws are broadly understood to defy total restitution.[50] In this context, the lack of equivalence between monetary compensation and the lives of victims makes it an imperfect substitute incapable of even approximating the *status quo ante.* If victims are deprived of a chosen, specific pursuit in their lives, receiving money to pursue an

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claim – Stephen Kershnar, 'Are the Descendants of Slaves Owed Compensation for Slavery?' (1999) 16(1) *Journal of Applied Philosophy* 95.

[46] See David Lambert 'Black-Atlantic Counterfactualism: Speculating about Slavery and its Aftermath' [2010] 36 *Journal of Historical Geography* 286. See also David Horowitz, *Uncivil Wars: The Controversy Over Reparations for Slavery* (Encounter Books 2002).

[47] Consistent with this approach, Waldron suggests that even where the wrongdoing itself cannot be altered, it may be possible to interfere with the normal course of its consequences. Jeremy Waldron, 'Superseding Historic Injustice' in Ronald Salzberger and Mary Turck, *Reparations for Slavery: A Reader* (Rowman and Littlefield 2004), 208.

[48] Hans Kelsen, cited in *Ahmadou Adio Diallo* (Separate Opinion of Judge Cançado Trindade), above n 4, 37.

[49] Shelton, above n 9, 304.

[50] See Section 3 below.

alternative is not a true substitute. 'Where the choices and values are incommensurable,' Shelton explains, 'a loss is sustained for which full compensation is impossible.'[51] This is particularly true in relation to violations resulting in the death of victims, for some rights and experiences cannot be bought out or exchanged through compensation or other reparatory measures with anything resembling equality; 'most people would not exchange their lives for anything less than an infinite sum of money if the exchange were to take place immediately.'[52]

Shifting away from a purely restitutionary framework built upon the desire to return victims to the *status quo ante* does not entail a slippery slope into an abyss of responsibility as many reparations detractors suggest, but rather a distinct set of limits curtailing liability. The Inter-American Court of Human Rights, the international tribunal evidencing the greatest willingness to be expansive in its reparations awards, notes that the duty to provide redress is not infinite.[53] This despite the fact that the Court is explicit in stating that compensation must be sufficient to remedy all the consequences of the violations that took place without reference to the position that the victims would otherwise have been in.[54]

Returning victims to the *status quo ante,* is only one potential way in which the corrective dimension of the reparatory obligation manifests in international law, although it is the most proliferate in judicial and academic commentaries. Measures of satisfaction, moral damages, and awards designed to indicate the court's condemnation of wrongdoing open avenues for redress not premised upon the possibility of describing a plausible counterfactual or achieving a return to the *status quo ante*.[55] Official apologies, expressions of regret, and acknowledgements of responsibility are premised not upon return, but on recognition of the injustices and reaffirmation of the status of the victims.[56] Measures may be targeted towards damage suffered as a consequence of a violation irrespective of alternative scenarios in order to avoid the counterfactual quagmire, but may also be based upon efforts to recognise wrongdoing, vindicate victims, and

[51] Shelton, above n 9, 43.
[52] Richard Posner, *Economic Analysis of Law* (2nd edn, Little Brown & Co 1977) 197.
[53] *Aloeboetoe and ors v Suriname* (Reparations and costs) IACHR Series C no 15, [1993] IACHR 2, [47]-[48].
[54] Ibid, [47]. See further Chapter 6, Sections 3-5 on the role of role of remoteness and foreseeability in reparations.
[55] See Chapter 5, Section 1.
[56] See Articles on State Responsibility, above n 14, Article 37.

transform society to better achieve absolute equality – objectives which fall outside of the corrective paradigm.

(b) The economic approach to redress

Reparations in many circumstances evidence dual aims – to repair and restore damaged relationships, and to address the wrongs themselves.[57] Proportionality requirements in public international law, international human rights law, and international criminal law all consider the nature and gravity of the violations as a factor in determining redress. This differentiates the notion of 'addressing the wrongdoing' from the restitutionary objectives of corrective justice.[58] A purely corrective approach would require the restoration of equality through redress and encapsulate dealing with the violation as an aspect of that discrete relationship between victim and perpetrator. The economic approach, on the other hand, differentiates between discrete instances of wrongdoing and the relationships they create, and the wider function of reparations in dealing with wrongdoing more generally.[59] According to the economic approach, redress must serve a deterrent function in order to be effective, and thus goes beyond the aim of returning parties to equality.[60]

Economic analysis, relying on the presumption that people on the whole act rationally, concludes that properly quantified reparations will impact an individual's cost-benefit analysis with regard to violation in order to deter wrongdoing.[61] This attaches both to the individual defendant in the case, and to other potential perpetrators. If the conditions are right – namely the cost of violations is set high enough, damage awards adequately replicate the true cost of violations, and sanctions are certain – the presumed result is the 'product' (wrongdoing) being priced out of the market.[62] Given that sanctions cannot be made certain, inflating the cost of violations is necessary to create an effective market deterrent. Thus, economic analysis of redress may demand that reparations exceed compensatory or corrective measures

[57] Lorie Graham, 'Reparations, Self-Determination, and the Seventh Generation' (2008) 21 *Harvard Human Rights Journal* 47, 77.
[58] UNBPG, above n 19, Principle 15.
[59] The English Court in *Wilkes v Wood,* for instance, noted that damages "are designed not only as satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself" and could therefore be greater than the injury received. *Wilkes v Wood* [1763] 98 Eng Rep 489.
[60] See Shelton, above n 9, 28.
[61] Ibid.
[62] Ibid, 42.

to ensure potential violators are deterred by potential costs.[63] Consideration of the wealth of the perpetrator, and the existence of patterns of violation in determining exemplary damages display the concern with making violations too costly to repeat, both for the perpetrator at hand and potential future wrongdoers.[64]

That legal penalties ought to serve a deterrent function as well as set to rights the relationship between the discrete perpetrators and victims takes redress beyond the objective of returning the victim to the position they were in prior to the wrongdoing.[65] Cases involving the disgorgement of profits wrongfully gained may in fact leave the plaintiff better off than they would have been but for the breach, yet may be necessary to condemn wrongful conduct and deter similar violations.[66] Thus, deterrence measures can be seen not only as non-reparatory elements of judicial remedies, but as reparatory elements of the attempt to do justice for victims operating in the same way as guarantees of non-repetition and satisfaction.

Like corrective justice paradigms, punitive damages consistent with the economic approach have an historical pedigree and continuity. Justinian's Digest declares that the law aims to make men good through fear of penalties.[67] Anzilotti differentiated between satisfaction and reparation as elements of redress: satisfaction in this context involving punishing the violation while reparation made good damage sustained.[68] Both elements, he declared, would be present in any judicial award, although the relative proportions might vary. Similarly, Vattel affirmed that redress, appropriately set, ought to both punish and deter:

> …the offended party have a right to provide for their future security, and to chastise the offender, by inflicting upon him a punishment capable of deterring him thenceforward from similar aggressions and of intimidating those who might be tempted to imitate him.[69]

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[63] See Louis Kaplow and Steven Shavell, 'Accuracy in the Assessment of Damages' (1996) 39 *Journal of Law and Economics* 191.
[64] See Linda Schlueter and Kenneth Redden, *Punitive Damages 3* (3rd edn, Butterworth Legal Publishers 1995). In practice, see for instance *TXO Production Corp. v Alliance Resources Corp.* 113 S.Ct. 2711 (1993).
[65] See generally Michael Rustad and Thomas Koenig, 'The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers' [1993] 42 *American University Law Review* 1269.
[66] See generally Peter Jaffrey, *The Nature and Scope of Restitution: Vitiated Transfers, Imputed Contracts and Disgorgement* (Hart 2000).
[67] Alan Watson, *The Digest of Justinian* (Vol 1, University of Pennsylvania Press 2011) 72.
[68] Anzilotti, above n 27, 425.
[69] Emer de Vattel, *The Law of Nations* (Béla Kapossy and Richard Whatmore eds, Liberty Fund 2012), Book 2, Section 52.

In international law, remedies are aimed both at repairing injury resulting from violations and with sanctioning violations of law, as distinct objectives, supporting the relevance of the economic approach in defining the aims of reparations.[70] This approach places reparations measures in the broader context of international law as a system, upholding the validity of norms through punishment and deterrence at the same time as having reparatory significance for victims, accounting for the status of States themselves (as well as individuals) as victims of the breach. That these functions need to be satisfied concomitantly, rather than alternatively, indicates that both corrective justice and economic approaches contribute to the notion of reparatory justice.

(c) Reparations and transformative justice

In some situations, an over-focus on corrective, or economic punitive justice can entrench rather than redress marginalisation. In response, Pablo de Greiff, current UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, recognises the centrality of social transformation in justice procedures, thereby foregrounding the need to interrupt cycles of violence that entrench existing structures of marginalisation.[71] Such transformation can be particularly important in transitional contexts following significant societal upheaval, however, it can also be vital to attempts to deal with injustices in non-transitional contexts where violations are connected to entrenched social, cultural, and political norms.[72]

The notion that reparations ought to address not only the symptoms of unjust social relations (specific abuses of people's rights), but also the underlying causes of injustice is connected to ideas of equality, as well as preventing violations in the future, and guaranteeing non-repetition.[73] For instance, the United Nations Truth Commission Report on El Salvador

[70] See the Commentary to the Articles on State Responsibility, above n 18, 32 (commentary to Article 1) which notes the prevailing view as to the nature of state responsibility is that "consequences of an internationally wrongful act cannot be limited either to reparation or to a 'sanction'." See also L Oppenheim, *International Law: A Treatise*, *Volume 1, Peace* (8th edn, H Lauterpacht ed, Longmans, Green and Co 1955) 352-354.

[71] Pablo de Greiff, 'Articulating the Links between Transitional Justice and Development: Justice and Social Integration' in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009) 29.

[72] This has been particularly noted in relation to the situation facing women and girls following violations of their rights. See International Meeting on Women's and Girls' Right to a Remedy and Reparation, 'Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation' (Nairobi, 21 March 2007), Principles 1(D) and 3.

[73] See for instance Principle 4 of the ICC's *Lubanga Principles,* above n 39, which highlight that reparations "need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes."

explicitly highlighted the need to 'avoid any risk of reverting to the *status quo ante*' in order to assist transition to democracy with respect for human rights and the rule of law.[74] Transformative measures explicitly reject *restitutio in integrum* and return to the *status quo ante,* and thus represent a significant break from the traditionally recognised objectives of corrective justice and the economic approach to judicial redress.

Where transformative measures aim towards the improvement of society, and are not tied to remedying specific violations or preventing those breaches in the future, they fall outside the purview of reparatory justice.[75] However, where reform is connected to preventing the repetition of violations and guaranteeing non-recurrence, it may constitute an element of reparations. Satisfaction, cessation, and guarantees and assurances of non-repetition may cross the borders between transformative and reparatory justice, connecting to specific instances of wrongdoing existing in the past and committing to a future absent such violations.

For victims, transformative reparations can be the most significant form of reparations available. Particularly in situations of instability involving official violations, the future conduct of the State can be more important to victims than any other form of redress – particularly nominal awards of compensation.[76] Such measures represent the affirmation and restoration of the victims' status as rights-bearers, as well as a significant transformation where the *status quo* was a situation of marginalisation or oppression enabling the offences in the first instance.[77] Such awards may also be more appropriate in relation to historical violations with continuing structural harms, because they directly target the ongoing damage rather than the original violations. Thus transformation may, in some circumstances, fall within the scope of reparatory justice, but only insofar as it eschews notions of absolute equality in favour of the restoration and enforcement of legal rights of victims.

(d) Reparations and distributive justice

The removal of the foundations of redress from the distributive fields of aid and assistance is regularly viewed as a prerequisite for classification as

[74] UNSC, Annex, 'From Madness to Hope: The 12-Year War in El Salvador: Report of the United Nations Commission on the Truth For El Salvador' (1 April 1993) U.N. Doc. S/25500.
[75] This is considered further in Chapter 7, Section 3.
[76] Christine Gray, *Judicial Remedies in International Law* (Clarendon Press 1987) 217.
[77] See Christian J Tams, 'Recognizing Guarantees of Non-Repetition: LaGrand and the Law of State Responsibility' [2002] 27 *Yale Journal of International Law* 441.

reparatory measures. Transformative justice is thus only characterised as reparatory where it deals with specific instances of wrongdoing, and not with achieving equality more generally. Aristotle made the distinction between restorative justice – which related to legal rights and entailed entitlements to justice in the instance of a breach – and distributive justice involving discretionary moral, rather than legal claims.[78] Grotius reframed these concerns as expletive and attributive justice, but maintained the fundamental distinction: that the former was the subject of legal rights and entitlements while the latter concerned 'those virtues which have as their purpose to do good to others, as generosity, compassion, and foresight in matters of government' and entailed only moral rights and duties.[79] Measures undertaken within these divergent categories of justice may take similar or identical forms, but are distinguished by the basis upon which they are assumed.

That reparations are targeted towards specific instances of wrongdoing (requiring unlawful conduct in the context of legal reparations) means that they should not be conflated with distributive justice measures, despite the fact that they may possess distributive qualities. Roht-Ariazza and Orlovsky highlight this distinction:

> What distinguishes reparations from assistance is the moral and political content of the former, positing that victims are entitled to reparations because their rights have been violated by the state (through acts or omissions).[80]

Even in the context of non-legal reparations programmes instituted by political or other non-judicial mechanisms, measures labelled reparations are segregated from distributive justice initiatives. Notions of wrongdoing, obligation and entitlement still permeate political reparations packages, differentiating between the general population and those entitled to redress by reference to these indicators.[81]

In international human rights law, reparations play an important role and may be combined with assistance and development measures. However,

[78] Aristotle, *The Nicomachean Ethics* (David Ross tr, Oxford University Press 2009).
[79] Stephen Neff ed, *Hugo Grotius on the Law of War and Peace* (Cambridge University Press 2012) 27.
[80] Naomi Roht-Arriaza and Katharine Orlovsky, 'A Complementary Relationship: Reparations and Development' in Pablo de Greiff and Roger Duthie (eds) *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009), 179.
[81] See Chapter 7, Section 3(a).

they are not to be conflated with such processes.[82] General social programmes aimed towards the development of all citizens, or not targeted specifically towards the victim population in question, are not considered to qualify as reparations.[83] General duties of States to provide for citizens and alleviate suffering are distinguished from the obligation of a wrongdoer, having committed atrocities, to provide a remedy to victims for the harms associated with that conduct. This is true in public international law, wherein foreign aid is distinguished from the reparatory obligation.[84] Similarly, in international criminal law, the practice of the International Criminal Court's Trust Fund for Victims is characteristic of this differentiation.[85] Further, the distinction has symbolic and psychological dimensions, with aid and distributive justice measures reinforcing relationships of dominance and dependency, while reparations turn the 'plea for aid into a demand for justice.'[86]

While differentiation between assistance and reparations – distributive and reparatory justice – remains steady, the nuances of this divergence are not often methodically addressed. Peter Dixon identifies five intersecting frameworks distinguishing between reparations and assistance measures: (1) ascription of responsibility; (2) recognition of victims and their status as rights-bearers; (3) the nature of processes dealing with eligibility and receipt of benefits; (4) form of support addressing harms or needs; and (5) goals and impact.[87] In all these elements, reparations bear some degree of differentiation from distributive justice, although not all bear equal significance. It is therefore necessary to carry these distinctions forward in consideration of the elements of reparatory justice, interweaving features of corrective and transformative justice with the economic approach.

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[82] Peter Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' [2016] 10 *IJTJ* 88.
[83] See Brandon Hamber 'Narrowing the Micro and the Macro: A Psychological Perspective on Reparations in Societies in Transition' in *The Handbook of Reparations,* above n 30, 560 at p575.
[84] Where aid is given and taken on the basis of political and diplomatic relations, reparations are a legal obligation incumbent upon wrongdoing States.
[85] The TFV was established by Article 79 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90/37 (Rome Statute). Rule 98 of the Rules of Procedure and Evidence and the Trust Fund's own Rules and Regulations separate assistance – which may include material, psychological or physical aid – from the judicial process, whereas reparations (material and symbolic) are ordered against a perpetrator found guilty by the Court to individuals or collectives recognised as victims of the crime by the Court. ICC 'Rules of Procedure and Evidence of the International Criminal Court' (9 September 2002) ICC-ASP/1/3 10; and ICC 'Regulations of the Trust Fund for Victims' (3 December 2005) ICC-ASP/4/Res.3.
[86] Anthony Gifford 'Pipe Dream or Necessary Atonement' (2007) 36 Index on Censorship 89, 94.
[87] Dixon, above n 82, 95.

4.3. The elements of reparatory justice

Moving beyond the general theoretical basis of reparatory justice to identify specific features of reparations assists in formulating a more comprehensive and workable understanding of redress. While notions such as full reparation, *restitution in integrum,* and deterrence may guide a general theory of remedies, they fail to provide practical guidance on the elements that should guide determinations in cases, or the development of claims practice.[88] The following analysis will therefore highlight the key elements of reparatory justice that distinguish it from other conceptions of justice, recognising the locations of intersection, and defining its scope.

These elements might be realised through a range of modalities of redress, both legal and extra-legal.[89] However, the forms reparations might take are likely to be influenced by the different elements of reparatory justice identified. Thus, understanding these elements at the theoretical level enables the consideration of novel or atypical cases, and the determination of appropriate modalities of redress to meet the objectives of reparatory justice. Where established jurisprudence fails to provide clear answers, and where legal reasoning is employed in an extra-legal context, this holistic understanding of what constitutes reparatory justice is vital for nuanced consideration of claims that builds upon the existing frameworks.

(a) Responsibility and violation

Violation, or wrongdoing, represents the threshold of reparations, below which lies distributive justice and above which sits corrective and reparatory justice. Responsibility, as a feature of reparatory justice, relates to the perpetrator's share in the relationship of wrongdoing, recognising culpability for wrongful acts (or omissions), and the consequences thereof. Thus, the element of responsibility has three dimensions. Firstly, it requires that there be a violation for which an identifiable perpetrator is responsible, fortifying the corrective paradigm. Secondly, it involves liability and the ascription of responsibility to the wrongdoer, enforcing accountability and distancing reparations from distributive justice.[90] Thirdly, where wrongdoing has resulted in little or no material damage, responsibility may demonstrate the operation of the economic approach to redress in fulfilling punitive or

[88] Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 *American Journal of International Law* 833, 845.
[89] Modalities of redress are considered further in Chapter 5.
[90] See Luke Moffet, *Justice for Victims before the International Criminal Court* (Routledge 2014) 147.

deterrence-based objectives. By demanding redress on the basis of responsibility for wrongful conduct alone, moral and symbolic rights are redressed, and deterrence relates not to the extent of the injury but to the severity of the wrongdoing itself.

The distinction between duties of perpetrators and duties of States more generally identified in the UNBPG highlights the importance of responsibility in the reparations framework. While upholding the importance of ensuring harms to victims are sufficiently dealt with to provide for recovery, the UNBPG maintain a distinction between the general obligations of a State towards vulnerable groups within society and the obligations of a perpetrator to redress the suffering they caused by their actions. This division is highlighted by the different burdens imposed by Principles 15 and 16 making reparations a mandatory legal duty for perpetrators and an aspirational obligation for States without direct liability.[91] State programmes are clearly identified as distinct and secondary to the obligations of perpetrators through this language, as well as through the maintenance of perpetrator liability where State initiatives have been undertaken – the perpetrator's duty to provide reparations is not extinguished simply because the needs of victims are met by the State.[92]

Where there is a lacuna in the area of attribution of responsibility for wrongdoing unfilled by impartial mechanisms to deal with injustices, alternative narratives may creep in. These alternatives may reinforce the abdication of responsibility for wrongs committed, thereby entrenching hierarchies of power and the marginalisation of victimised populations that served as the preconditions for the violations.[93] Such counter-narratives enable 'scapegoating' – the avoidance of responsibility by the real perpetrators – and thereby the continuation of structures of marginalisation and violence. The assertion that the 'Vietnamese' were the architects of the Khmer Rouge regime, for instance, is identified as a pervasive narrative within Cambodian society that continues to legitimise the structures of power that facilitated the atrocities committed.[94] Clear identification of wrongdoers and attribution of responsibility in the public domain can prevent this evasion

[91] The language of Principle 16 requires that States 'endeavour' to establish programmes where the perpetrator does not, or cannot, meet the obligation, UNBPG, above n 19.
[92] In such a case, the perpetrator becomes liable to the State to compensate for reparations paid by that State to victims. UNBPG, above n 19.
[93] See for instance Inter-American Commission of Human Rights, 'Uruguay Report' (1992) 13 *Human Rights Law Journal* 340.
[94] Aafke Sanders, *The Evil Within: Genocide, Memory and Mythmaking in Cambodia* (Radboud University 2006) 89.

of culpability. Moreover, such responsibility ought to be situated within the complex social hierarchies and cultural norms of the environment in which atrocities occurred in order to ensure they respond both to the violence itself and to its causes.[95]

The notion of responsibility is inextricably connected to recognition of the victims (further discussed below). As Danieli notes, acknowledgement and culpability in the reparatory context possess a symbolic power engaged in vindicating the victims and their experiences:

> It's not the money but what the money signifies – vindication. It signifies the governments' own admission of guilt, and an apology… The money concretises for the victim the confirmation of responsibility, wrongfulness, he is not guilty, and somebody cares about it. It is at least a token. It does have a meaning.[96]

The foregrounding of responsibility and recognition as central to the reparations claim reflects the idea of harm to the moral character and dignity of the victims – the idea that injustice has an 'affective dimension' which demands a remedy just as material repercussions do.[97] This affective dimension varies depending on the context. Where the State in international law is the primary victim, injuries are predominantly pecuniary, or damages limited, the most notable impact of the breach may be in undermining the primary rules and the legal system itself.[98] Redress in such a case aims towards re-establishing and affirming the integrity of the primary rules.[99] However, where citizens have suffered severe violations, the symbolic dimensions of the wrongdoing attach not only to the legal system as a whole, but to the integrity and dignity of people. As elements of reparations, both responsibility and recognition respond to these affective dimensions of injustice.

By recognising the possibility for damages not connected to direct physical or economic harms, courts throughout history have given weight to the idea

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[95] On the need for responsiveness, see Chapter 7, Section 4(d).
[96] Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill, 2009), 59-60.
[97] See Frank Haldemann, 'Another Kind of Justice: Transitional Justice as Recognition,' [2008] 41(2) *Cornell International Law Journal* 678.
[98] See for instance *Campbell Case* 2 RIAA 1158 (10 June 1931); *Maal Case* 10 RIAA (1 June 1903), 732-33; *Rainbow Warrior II (New Zealand v France)* (1990) 20 UNRIAA 215; *Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation, Judgement No 3)* PCIJ Series A No 3 (1924), 9.
[99] See Chapter 5, Section 1.

of human dignity as having value in practice; the contravention of a person's rights, integrity, and autonomy is recognised as necessitating some form of redress, while the culpability of the perpetrator is confirmed.[100] The legal wrong for which an award is granted in the context of moral damages is not a tangible injury, and the reparation granted is not directly connected to a particular worldly harm. Harm is presumed from the wrongdoing itself and must be premised on the assumption that individuals have a right to a remedy for wrongs committed against them without any further qualification.[101] This represents an acknowledgement, throughout history, of the affective dimension of injustices and the need for responsibility and recognition irrespective of material damage. This is particularly acute in the context of gross and serious violations of human rights and humanitarian law where the UNBPG recognise violations that, by virtue of their gravity, constitute an affront to human dignity – acknowledging that the severity of the abuses necessarily entails a degradation of dignity.[102]

The centrality of human dignity and the symbolic face of wrongdoing has been recognised through time within human rights and humanitarian law.[103] Moreover, the notion of dignity has a long history in philosophy and law, appearing in various forms through time.[104] Hugo Grotius in the seventeenth century indicated the universality and inalienability of human dignity within the laws of war in discussing the importance of funeral rites. Grotius connected the right of burial (which could not be denied 'even to enemies') to the 'dignity of man' – an inalienable right of nature and of men.[105] Although early ideas of human dignity were primarily connected to religion, the development of thought over time has established that the concept can be supported outside the religious paradigm, and therefore need not be severed at the root.[106] The growth in universal conceptions of human rights

[100] The UNGA 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' above n 19, for instance, affirmed universal and effective recognition of, and respect for, the rights of victims as a standalone, necessary and important function of justice processes post-abuse.
[101] See Jason Taliadoros, 'The Roots of Punitive Damages at Common Law: A Longer History' [2016] 64 *Cleveland State Law Review* 251
[102] Preamble to the UNBPG above n 19.
[103] See Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013).
[104] See Christopher McCrudden, 'Human Dignity and the Interpretation of Human Rights' 19 EJIL 655 (2008).
[105] Grotius, *The Rights of War and Peace*, above n 6, Bk II, chap. 19.
[106] Pico della Mirandola in 1486 suggested that the root of dignity arose from the ability to choose what he wants to be. Although he connected this to religion in labelling it a gift from god, the notion remains stable absent religious influence. See Pico della Mirandola, *On the Dignity of Man* (C Glenn Wallis tr, Hackett Publishing Company 1965), 5. Immanuel Kant developed notions of dignity which, though contested by Kantian scholars clearly were not reliant on religion, and are premised on the idea of dignity as autonomy demanding that individuals be treated as ends in and of themselves and not simply means to an end. See

saw an associated rise in the explication of the concept of dignity as central to humanity. Further, in Europe and Latin America, dignity was deeply rooted in discourse surrounding the abolition of slavery, as well as playing a significant role in the civil rights movement in the United States.[107] The Universal Declaration of Human Rights was central to the popularisation of the notion of dignity within human rights dialogue, a concept which was also central to the United Nations Charter.[108] Human dignity now plays a significant role in human rights discourse, and both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights identify the inherent dignity of the human person as the basis of all human rights.[109] As the mechanism through which rights are vindicated in the instance of a breach, reparations are a vehicle for the ascription of responsibility for violations of human dignity, as well as ways in which such is recognised in the face of injustice.

(b) Recognition

The identification of the symbolic or affective dimensions of injustice and the recognition of dignity as an element of justice impacts both sides of the relationship of wrongdoing. While responsibility focuses upon the perpetrator, ensuring justice is done against wrongdoers, the nucleus of recognition as an element of reparatory justice is the victims, and the moral injuries they suffer as a result of violations. Particularly in the context of international law, where failure to respect the honour and dignity of a State can be just as significant in international relations as financial injury in the true sense of the term, injury caused by a violation is often of a moral rather than material character.[110] Anzilotti therefore suggests that a 'violation of a rule always constitutes trespass upon the interest which the rule protects

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Giovanni Bognetti, 'The Concept of Human Dignity in European and U.S. Constitutionalism' in Georg Nolte (ed), *European and US Constitutionalism* (Council of Europe Pub. 2005), 75.

[107] Simón Bolivar in Bolivia, for instance, identified slavery as a 'shameless violation of human dignity' and called for the abolition of the sacrilegious laws which perpetuated it. See Simón Bolivar, 'Message to the Congress of Bolivia (Lima, 25 May 1826)', quoted in Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights ' (2003) 25 *Human Rights Quarterly* 281, 301.

[108] UDHR, above n 19; Charter of the United Nations (26 June 1945) 59 Stat 1031, UNTS 993. The first sentence of the UDHR's preamble notes that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world", Article 1 recognises that all human beings are "born free and equal in dignity and rights", and Article 22 goes on to note that that each citizen is entitled to the realisation of the economic, social and cultural rights "indispensable for his dignity and the free development of his personality".

[109] ICCPR, above n 19; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[110] Anzilotti, above n 27, 13-14.

and, consequently, upon the subjective right of the person whose interest is affected'.[111]

The right to a remedy in international law is not contingent upon a State having suffered actual or material damage as a result of a violation. Rather, an internationally wrongful act of a State automatically gives rise to a concomitant obligation to remedy on the part of the wronged State, because any breach of international law causes moral injury to the State whose interests have been infringed.[112] This is equally true of individual victims of violations who may also suffer similar symbolic harms irrespective of material loss.

Frank Haldemann frames violations as acts of 'misrecognition', through which victims of wrongdoing are differentiated from the corpus of humanity by the denial of their rights.[113] Violations degrade the identity of the victims as individuals, rights-bearers, agents, and citizens, particularly where abuses are widespread or target particular communities. This constitutes a specific moral wrong with symbolic dimensions that States, as artificial legal persons, might also suffer. It is for this reason that the symbolic value of reparations are often considered particularly important and, in some instances, of greater significance than material redress.[114] Pablo de Greiff highlights the significance of recognition within the context of grave and widespread abuses in particular:

> The type of recognition that is relevant is one that acknowledges the victims' status as victims and the abuses to which they were subject, gives public space to their stories, and tries to reverse the marginalisation which they typically suffer. But this is not all. In fact, it is even more important to recognize their status as rights bearers, ultimately, as co-participants in a common political project, that is, as citizens.[115]

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[111] Ibid.
[112] The automatic character of the obligation to remedy was affirmed in *Phosphates in Morocco (Italy v France)* (Preliminary Objections) [1938] PCIJ Rep Series A/B No 74 [28] wherein the Court noted that international responsibility was established "immediately as between the two States" upon commission of an internationally wrongful act by one State against another. On moral injury, see FV Garcia-Amador, *The Changing Law of International Claims* (Vol 2, Oceana Publications 1984) 567.
[113] Haldeman, above n 97.
[114] The focus on truth-telling in post-conflict or post-atrocity settings displays such preference for the recognition of victims' experiences, even at the expense of accountability.
[115] Pablo de Greiff, 'Transitional Justice and Development,' www.developmentideas.info/website/wp-content/uploads/Ch24_TransitionalJustice_PablodeGreiff_2013.pdf (accessed 20 October 2016), 22–23.

Recognition is a notably victim-centric aspect of reparations, shifting focus from the wrongdoing, the perpetrator, and punishment, to the impact violations have upon victims. The concern with providing awards, whether designed to address material or immaterial harms, to victims of wrongdoing necessarily brings them to the fore, reinforcing the underlying objective of redressing injustice *for victims* and not for society at large. Reparations are, by their nature, victim-centred forms of redress; the centrality of the victim in reparations both defines and derives from their nature and form.[116] In the context of mass atrocity, this victim-centric approach moves reparations away from traditional criminal objectives of punishment and deterrence, recognising that the injustices in question explode the limits of such goals and therefore demand a different, multifaceted approach.[117] This makes reparatory justice more relevant to historical cases, for it broadens the understanding of injustice beyond the individualised victim-perpetrator relationship.

Recognition serves a corrective function in ensuring that parties are returned to equality and victims' status as rights bearers is affirmed, thus returning them to the legal *status quo*. Further, it engages with the realities of wrongdoing and atrocity in a more nuanced way, recognising injustice as well as striving towards justice. Preoccupation with the accountability of perpetrators and the attempt to impose punitive measures that reflect the gravity of the offending can prioritise justice to such an extent that it risks overshadowing the contours of injustice.[118] Injustice in this context stands in for the lived experiences of the victims, which cannot be recanted or effaced. When the irreparability of some forms of wrongdoing is recognised, traditional measures of redress focused on return to the *status quo ante* become inadequate. Recognition, and measures designed to ensure it, fill this lacuna in redress by grappling with injustice without presuming the possibility of correction. Recognising the experiences and suffering of victims, and reaffirming their dignity and equal status as citizens, are vital to recovery from atrocities, and treat victimisation as temporary rather than permanent.[119]

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[116] See Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge 2014), 43.
[117] Austin Sarat, Lawrence Douglas and Martha Merrill (eds), *The Limits of the Law* (Stanford University Press 2005).
[118] Judith Shklar 'Giving Injustice its Due' [1989] 98 *Yale Law Journal* 1135.
[119] See Rachel López The (Re)collection of Memory after Mass Atrocity and the Dilemma for Transitional Justice' [2015] 47 *New York University Journal of International Affairs and Politics* 799.

Acknowledgement of responsibility constitutes an aspect of recognition distinct from the principle of responsibility and can also be a form of reparations in and of itself.[120] While acknowledgement by the perpetrator is not a prerequisite for reparations or reparatory justice, it can contribute to the recognition of victims as rights-bearers, and do so with symbolic significance. Particularly where the perpetrators hold and maintain social, cultural or political power, a lack of acknowledgement by the wrongdoer can undermine the efficacy of reparations measures. For instance, Vann Nath, a former S-21 detainee of the Khmer Rouge regime in Cambodia and complainant in Extraordinary Chambers in the Courts of Cambodia Case 001, highlighted the limitations of such failures:

> It is hard for reconciliation [sic] because there are no admissions from the perpetrators that they committed wrongdoings, and that they can face what they have done… they never say they were wrong.[121]

In the Cambodian context, the urge for broader acknowledgement of the wrongs committed under the Khmer Rouge is widely documented, and connected to a culture of secrecy that defined the regime.[122]

Recognition of victims may be stymied by dominant social narratives sanitising or euphemising wrongdoing; acknowledgement may therefore become increasingly important the more influence the perpetrator holds over society.[123] State acknowledgement in particular can act as an 'official sanction' of knowledge and truth about the violations, helping the recognition of victims to enter the public realm and aiding in rehabilitation of victims in society.[124] Recognition cannot be achieved internally by the victims, for it requires that the perpetrator or institutions that enabled the injustices recognise the wrongdoing and thereby the humanity and dignity of the victims.[125] Thus, reparatory measures are critical in achieving

[120] UNBPG, above n 19, Principle 22(e) identifies public apologies, including acknowledgement of the facts and acceptance of responsibility as a form of satisfaction within the reparations framework.
[121] Chheng Niem, Duong Keo and Sin Putheary, *Behind the Darkness: Taking Responsibility or Acting under Orders?* (Youth for Peace 2011) 3-4.
[122] See Phuong Pham et al So We Will Never Forget: A Population-Based Survey on attitudes about Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia (Human Rights Centre, University of California, 2009); Jaya Ramji 'Reclaiming Cambodian History: The Case for a Truth Commission' (2000) 24(1) Fletcher Forum of World Affairs 137.
[123] Official narratives downplaying abuses committed by the Japanese State, including the continued language labelling victims of sexual enslavement 'comfort women', led to survivors' rejection of compensation. See Nishino Rumiko, Kim Puja, and Onozawa Akane, *Denying the Comfort Women: The Japanese State's Assault on Historical Truth* (Routledge 2018).
[124] IACHR, above n 93.
[125] See Thema Bryant-Davis, 'Healing Requires Recognition: the case for Race-Based Traumatic Stress' [2007] 35 *The Counselling Psychologist* 135.

recognition, which may be supported through meaningful engagement with victims as rights-bearers and decision-makers.

(c) Procedural justice

While Dixon identifies procedural justice as a central feature of reparations distinguishing it from assistance measures, the importance of this feature cannot be confined to reparatory justice. Participation in processes designed to bring about societal and distributive change are often vital in combating marginalisation of excluded and disadvantaged communities. Connections between social and cultural exclusion and economic deprivation make involving the voices of targeted communities in measures designed to address such issues imperative – whether those measures take place within the realm of distributive or reparatory justice.[126] Thus the importance of procedural justice should be viewed not as a distinguishing feature of reparatory justice, but as an important element of effective justice measures in both contexts.

Procedural justice aims to improve victims' satisfaction with measures undertaken by treating them with respect, ensuring fairness, and valuing their input.[127] While procedural justice concerns may arise in a number of contexts, they are particularly acute in reparations discourse where participation of victims is central to the fulfilment of reparatory objectives. The definition of reparations provided by REDRESS, a prominent non-governmental organisation focused on seeking reparations for survivors of torture, explicitly acknowledges the importance of process, defining reparations as 'the range of measures that may be taken in response to an actual or threatened violation; embracing both the substance of relief as well as the procedure through which it may be obtained.'[128] With regard to historical enslavement, this would require meaningful engagement with affected communities and reparations activists at all stages of reparatory processes.

Consultation with victims in formulating reparations is an integral part of ensuring procedural justice, and, in conjunction with their influence in the design and implementation of awards and procedures, can be decisive of the

[126] See Kjell Törnblom and Riël Vermunt, *Distributive and Procedural Justice* (Taylor and Francis 2007).
[127] Jo-Anne Wemmers, 'Victims' Need for Justice' in R Letschert et al. (eds) *Victimological Approaches to International Crimes: Africa*, Intersentia (2011), 145–152.
[128] REDRESS, *Reparation: A Sourcebook for Victims of Torture and Other Violations of Human Rights and International Humanitarian Law* (REDRESS 2003), 8.

overall success of reparations from the perspective of victims.[129] The additional care paid to victims within this context, and the focus on ensuring victims are recognised and empowered as agents and rights-bearers, raises the threshold for consultation and participation beyond that traditionally provided by judicial proceedings. As noted by REDRESS:[130]

> …for victims, justice is an experience. It is as much about the way that they are treated, consulted and respected procedurally throughout the reparation process, as it is about the substantive remedy, material or otherwise, they may be granted as part of the end result.

In international as well as domestic proceedings, fairness and justice often require that victims are empowered to request reparations for violations on their own behalf, and supported throughout the relvant processes.[131]

The *Lubanga Principles* highlight the importance of victim participation in reparations procedures at the International Criminal Court, recognising that victims, their families, and communities that meet the eligibility requirement for reparations should be able to participate in the process.[132] Moreover, the Principles assert that victims should receive adequate support in order to make this participation 'substantive and effective', and the Court should consult with victims on issues concerning identification of beneficiaries and priorities.[133] At minimum, the right of victims to information concerning violations and reparations mechanisms is generally recognised and upheld. Principles 11 and 24 of the UNBPG affirm the entitlement of the victims to information, and the duty of the State to ensure that the public is informed of available rights and remedies.[134] Further, international human rights treaties contain a number of guarantees for victims to ensure they are provided the necessary avenues of redress.[135]

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[129] Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia 2011).
[130] REDRESS, 'Collective Reparations: Concepts and Principles,' <www.redress.org/downloads/events/CollectiveReparationsMG.pdf> accessed 11 November 2016, 1.
[131] Richard Falk, above n 30, 497. Further, the case of *Ahmadou Adio Siallo,* above n 4, guarantees the right to remedy in international law for individual harms arising from breaches of human rights law.
[132] *Lubanga Principles,* above n 39, Principle 8.
[133] Ibid.
[134] UNBPG, above n 19.
[135] See, for instance, above n 19: ICCPR, Article 2; American Convention, Article 25; European Convention, Article 12; African Charter, Artticle 7; and Arab Charter, Article 9.

Although procedural justice and participation remain somewhat amorphous in their mechanisms and exact requirements, their centrality in the construction of effective reparatory justice is frequently reaffirmed by commentators.[136] This may be viewed as an extension of the element of recognition as constructed above, targeting the misrecognition of victims and denial of their status as rights-bearers and prioritising their agency to ensure effective recovery from violations. Official acknowledgement of victims' narratives and perspectives on their victimisation affirms their dignity and the wrongfulness of the harm they suffered.[137] This may be particularly important in the context of gross violations of human rights where victims are denied basic humanity through the abuses, and where impunity often attaches to wrongdoing.[138] Procedural justice can therefore be viewed not only as an element of reparatory justice, but as a form of reparation in its own right, and a means of achieving the recognition of victims as rights-bearers.[139]

Given that the focus of public international law remains claims between States, it is unsurprising that standards of procedural justice for individual victims are not as thoroughly articulated in this context as they are in international criminal, human rights, and humanitarian law. Yet, the principle of full and effective reparations remains central to awards in this arena; an objective that, in many instances, cannot be satisfied in terms of recognition, responsibility, and responsiveness, without some degree of procedural justice.[140] The harms to be redressed in international law are not

[136] Then Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Theo van Boven, for instance, highlights the importance of victims' perspectives in reparations discussions and asserts that their needs and wishes should be central in reparatory processes. UNCHR, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr Theo van Boven, Special Rapporteur' (1993) UN Doc E/CN.4/Sub.2/1993/8, [133] and [137]. See also Edgar Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Springer 1988), 31-34; Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press 2006); Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff 2009), 66.

[137] Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' in C. Ferstman, M. Goetz, and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making,* (Martinus Nijhoff 2009) 41-78, 47.

[138] Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in C Lawther, L Moffett and D Jacobs, *Research Handbook on Transitional Justice* (Elgar, *forthcoming* 2017).

[139] Danieli frames inclusion of victims in justice processes as 'an opportunity for redress and healing' in itself, above n 137, 66.

[140] The obligation to make full reparation for injury caused by an internationally wrongful act is contained in Article 31 of the Articles on State Responsibility, above n 14, affirming the determination of the Permanent Court of International Justice in *Factory at Chorzów (Jurisdiction)* and *(Merits),* above n 4, 21 and n 2, 47.

only those directly incurred by States party to the proceedings, but all injuries caused by the internationally wrongful act, including moral injury to individuals.[141] Thus, developments concerning the construction of effective remedies for individual harms, and particularly those of a symbolic nature, in other international legal contexts, may appropriately infuse approaches to reparations in public international law.

(d) Form

Dixon's fourth principle, the principle of form, often degrades in practice as reparations and assistance measures are frequently alike – even indistinguishable – in shape. This is particularly true where the modalities of reparations are recognised as encompassing a wide range of different possibilities.[142] The distinction is based on the conclusion that reparations target harms, while assistance measures target needs.[143] Harms to victims are converted to rights within the reparatory framework by virtue of the wrongdoing, and often represent the needs of victims following injury. Yet, the nature of needs within distributive justice frameworks may bleed into concepts of rights, particularly where the State has obligations to protect citizens from certain forms of deprivation and ill treatment.[144] Thus, the theoretical differences between the two are not necessarily evident in the measures ultimately adopted, and even this theoretical distinction degrades at its borders. Dixon's principle of form may therefore be more accurately conceived as concerned not with the modalities of redress, for these may be the same in both the reparatory and the distributive context, but with the injuries to be redressed, and the way in which remedies are crafted. It is this basis for shaping reparations that separates them from distributive measures, and not whether the response takes a particular form.[145]

The distinction between forms is connected to the idea that reparations must fully return the victim to the *status quo ante* – wiping out all consequences of the illegal act – while assistance measures are intimately tied to the availability of resources.[146] That reparations must be 'more significant' than assistance measures belies the reality of situations in which such measures

[141] Articles on State Responsibility, above n 14, Article 31.
[142] See Chapter 5.
[143] Dixon, above n 82, 100.
[144] The protection of socio-economic rights in particular may have a distinct distributive character, yet the deprivation of such may also be described as a breach of rights requiring State action to remedy.
[145] For further consideration of the need for responsiveness, see Chapter 7, Section 4(d).
[146] This distinction degrades in the context of transitional justice, where political and practical compromises may be required. See Chapter 7, Section 4(e) and (f).

are adopted, and in practice assistance measures may be just as extensive as reparations.[147] While judicial practice tends towards ordering damages proportionate to the injury irrespective of the perpetrator's ability to pay, reparations programmes in which the State is the perpetrator of abuses often account for resource limitations.[148] García Amador, then Special Rapporteur on State Responsibility, emphasised the potential subsidiarity of the proportionality requirement in assessing remedies, noting that 'cases and situations in which compensation does not cover the full value of the expropriated property must be regarded as valid and effective'.[149] This in the context of State responsibility in international law.

In many situations, full reparation for injuries caused is impossible, for reasons of both moral irreparability and practicality. Igor Lukashuk argued that not only was it generally impossible to provide full compensation for major disasters such as the Second World War and aggression by Iraq against Kuwait, in many instances it would be undesirable to order such.[150] The memory of the Treaty of Versailles and its consequences weighing heavy on his mind, Lukashuk declared that partial rather than full restitution ought to be the model in such situations, giving primacy to guarantees of non-repetition and democratic development. Indeed, the Iraqi reparations to Kuwait ordered by the UN Security Council involved consideration of 'the requirement of the people of Iraq, Iraq's payment capacity… and the needs of the Iraqi economy' and therefore limited compensation to the value of 30 per cent of annual petroleum exports.[151] Even given this restriction, the reparations ordered by the Security Council were criticised as overly harsh, breaking from established doctrine concerning war reparations developed out of the ashes of the Treaty of Versailles.[152]

While full reparations ought to be the starting point, and the presumptive objective of judicial redress in line with the legal obligations to provide

[147] Under the mandate of the ECCC for instance, the Court was only empowered to award moral and collective reparations to victims and could not award individual compensation or redress. See Extraordinary Chambers in the Courts of Cambodia, 'Internal Rules (Rev 9)' 16 January 2015.
[148] See for instance litigation under the Alien Tort Claims Act in the US wherein the Courts have consistently ordered large sums to be paid. It is worth noting, however, that awards under the legislation are rarely ever paid out.
[149] F V García Amador, 'Fourth Report on State Responsibility' (1959) UN Doc A/CN.4/119, 2 *Yearbook of the International Law Commission* 1, [89].
[150] International Law Commission, 'Summary Record of the 2392nd Meeting' (1995) 1 *Yearbook of the International Law Commission* 88, [31]-[37].
[151] UNSC, 'Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687' (3 April 1991) UN Doc S/Res/687, [7]; and UNSC Res 705 (15 August 1991) UN Doc S/Res/705 [2].
[152] See for instance Andrea Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations' (2002) 13 *European Journal of International Law* 161.

redress proportionate to the harm, legal mechanisms should not be taken completely in isolation from their context. Firstly, legal violations for which full redress is impossible nonetheless demand judicial remedies. The range of forms of reparation available within the legal framework offer an opportunity to ensure appropriate redress in such cases, responding to the specific wrongdoing and injuries evidenced in the case and dealing with these insofar as is possible.[153] Yet, these represent instances in which the law cannot provide full redress, and must accept some degradation of the principle of proportionality. Secondly, where external considerations intersect with legal frameworks, including in the consideration of moral and political claims guided by legal principles, other factors may necessitate some sacrifices be made with regard to the extent of reparations awards. As in the case of Kuwait considered above, other factors outside legal considerations may impact the form and extent of redress. However, this relates to extra-legal mechanisms and not to the form of reparations in legal proceedings.[154]

(e) Impact

The principle of impact, as an element of reparatory justice, is an observation of a feature of reparations distinguishing them from other forms of justice, rather than a consideration for courts crafting reparatory measures. According to Dixon, the symbolic value of reparations sets them apart from other forms of justice – at least changing their impact compared to assistance measures, and potentially elevating reparations in their transformative capacity.[155] It is difficult to confirm the contention that reparations have a greater symbolic impact upon victims than do measures of assistance, particularly given that programmes are often imperfect in practice. Yael Danieli's interviews with survivors of the Shoah indicate that reparations processes inefficiently conducted can make victims feel more frustrated than vindicated.[156] Despite this finding, there is a large body of research upholding the idea that reparations properly administered have a unique moral and affective dimension which separates them from measures of assistance.[157]

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[153] Different modalities of redress available are discussed in Chapter 5.
[154] This is considered further in Chapter 7, Section 4(f).
[155] Dixon, above n 82, 101.
[156] Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice,' in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, ed. Carla Ferstman, Mariana Goetz and Alan Stephens (Brill, 2009).
[157] See for instance: Yael Danieli, 'Preliminary Reflections from a Psychological Perspective,' in Neil Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes,*

In both domestic and international contexts, the distinction between assistance and reparations can be incredibly important to victims. Calls for reparations by communities of injured people often draw a stark distinction between reparations and aid, highlighting the claim to justice inherent in reparations demands that affirms the status of victims rather than entrenching existing power dynamics. Rodney Coates, framing the calls for reparations for transatlantic chattel enslavement, centred this distinction:

> It is in the spirit of justice that I write – not for a hand-out but a pay check, not for welfare but our fair share, not for crumbs that fall from the massa's table – but for the wealth represented by the houses built by Africans. No, in the spirit of liberty we make our just demands.[158]

Thus, the importance of responsibility and recognition also manifest in the impact of reparations on victims, perpetrators, and their societies. Reparations and aid both impact relations between parties, public perceptions, and the material lives of victims. However, the implications of such transfers flow in different directions.[159] In the international arena the weight given to declaratory judgements as a form of reparation speaks to the significance of the symbolic dimensions of redress.[160]

Re-establishing respect for legal norms is a central function of reparations both in international and in domestic contexts, and an impact distinct from that which might be provided by other forms of justice. The restoration of the *status quo ante*, paying of damages, and awards of other forms of redress, combined with the deterrent function associated with these measures, are formulated not only to vindicate the rights of the victim, but to serve a signalling function to the legal community reinforcing and maintaining primary rules. The political community, as well as communities

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Volume 1: General Considerations (US Institute of Peace Press 1995); and Brandon Hamber, 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition,' in *The Handbook of Reparations*, above n 30.

[158] Rodney Coates, 'If a Tree Falls in the Wilderness: Reparations, Academic Silences, and Social Justice' 83 *Social Forces* 841, 842.

[159] Gifford notes that when European governments respond to injustices by way of development aid, it often carries an 'overtone of condescension: the Africans are suffering because their leaders have messed things up, but we still help.' This relationship is upset when measures are framed as an entitlement rather than a gift. Anthony Gifford, 'Pipe Dream or Necessary Atonement?' (2007) 36 *Index on Censorship* 89, 94.

[160] See for instance *Corfu Channel*, above n 4; *Case of the French Postal Vessel "Manouba" (France v Italy)* (1913) PCA Case No 1912-01; and *Case of Suárez Rosero v Ecuador* (Merits) IACHR Series C No 35 (12 November 1997).

of victims, are reconstructed through reparatory justice and formal legal responses, recognising the status of victims as rights bearers.[161]

Cessation, guarantees and assurances of non-repetition, and the measures undertaken therein to ensure non-recurrence, are central to the fortification of the legal system and can thus take primacy in judicial considerations. For instance, in the case of *El Amparo* before the Inter-American Court of Human Rights, the Inter-American Commission of Human Rights emphasised the importance of re-establishing respect for international norms and thus focused upon reform of the Code of Military Justice as the primary form of redress required.[162] Although the Court did not make orders relating to the Code as its provisions had not been applied in the case, it did recognise the acceptance of responsibility by Venezuela as the primary form of reparations for violations of the rights for which the reform was advocated.[163] While measures of assistance may improve the material conditions of recipients, they do not uphold legal norms and thus the impact of reparations on this level cannot be equated with distributive justice.

4.4. The value of a theory of reparatory justice

Understanding the theoretical foundations of reparatory justice, and the elements constituting such, is fundamental to the consideration of atypical claims. Widespread historical injustices built upon contested legal grounds, characterised by lacunae in positive norms, and evidencing conflicting principles are such cases. The lack of clarity with regard to the applicable law, or indeed the very existence of relevant international norms, creates a space in which answers cannot be derived simply from positive legal frameworks and determinate rulings of authoritative international bodies. A coherent theory of reparatory justice, based upon centuries of jurisprudential development, provides a lens through which these cases can be considered. While the decisions concerning the relevant fora for determination rest upon consideration of the development of legal prohibition, attribution, standing, rules of competence, and other technical legal questions, a theory of reparations based upon international legal frameworks can be applied irrespective of the arena. This approach is therefore relevant in moral and political cases as well as in legal proceedings,

[161] Ruti G Teitel, *Transitional Justice* (Oxford University Press 2002) 127.
[162] *Case of El Amparo v Venezuela* (Reparations) IACHR Series C No 28 (14 September 1996).
[163] Ibid.

encouraging the application of principles of justice and established elements of reparations in the case for redress for transatlantic and the *maangamizi.*

This theory also provides guidance in relation to the question of *whether* reparatory justice ought to be considered in relation to specific wrongdoing, by explaining its theoretical legal foundations and its constituent features. Reparations are conceived as both corrective and transformative. They are premised on the attempt to return parties to equality vis-à-vis one another, and by the need to prevent future wrongdoing against victims. Fundamental to this formulation is the notion of responsibility and violation – that victims were 'wronged and not merely harmed'.[164] This is both the prerequisite condition for the engagement of reparatory justice, and a key feature of its operation through the assertion of responsibility against perpetrators. This is particularly germane in considering the influence of naturalist principles in constructing responsibility.

Acknowledgement of injustice and responsibility by perpetrators themselves is an important step in the long-term impact of reparatory justice with regard to satisfaction and guarantees of non-repetition.[165] Yet the imposition of reparatory justice through legal mechanisms, and assertions of social and political pressure on the basis of legal frameworks, can also serve in recognising the status of victims as agents and rights-bearers undeserving of violations committed against them.[166] Thus, recognition of victims, and responsibility of perpetrators, are not only elements of redress, but definitive of reparatory justice, carrying value themselves. As Alan Cairns highlights:

> …recognition in itself is a component of justice. And furthermore, if we can explain why they were deprived of human dignity, their culture viewed as a dead end, or their lives treated as expendable, we will have provided a modicum of retrospective dignity to their lives and fates.[167]

Procedural justice is a mechanism through which this recognition of agency and dignity is realised; through meaningful participation in the processes

[164] Bernard Boxill, 'Black Reparations', *Stanford Encyclopaedia of Philosophy* (Winter edn, 2011) <stanford.library.sydney.edu.au/archives/win2011/entries/black-reparations/> accessed 13 November 2018.
[165] Thompson suggests that reparatory justice always requires acknowledgement by the perpetrators, in order for those wronged to believe that they are 'confronting their history and will henceforth treat them with respect.' Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Justice* (Polity 2002), 96.
[166] See de Greiff, 'Transitional Justice and Development', above n 71.
[167] Alan Cairns, 'Coming to Terms with the Past' in John Torpey (ed), *Politics and the Past: On Repairing Historical Injustices* (Rowman and Littlefield 2003), 84.

concerning their own rights, victims are able to reform their own identity and voice. No legal mechanism can translate the suffering of millions of people into a package of reparatory measures and thereby efface those violations. The theory of reparatory justice nonetheless gives voice to the question of what these mechanisms ought to do in the face of such injustices.

CHAPTER 5: CRAFTING REPARATORY JUSTICE

Expanding understandings of reparability through multiple modalities of redress

The objectives and elements of reparatory justice have shaped the modalities of redress available, informing both judicial and political practice in constructing and delivering reparations. While compensation tends to dominate understandings of what constitutes reparation, options are far more extensive than monetary redress. International law has recognised multiple modalities of redress both in the broad category of obligations arising from internationally wrongful conduct (including cessation and guarantees of non-repetition) and the narrower formulation of reparations as understood in the Articles on State Responsibility (constituted by restitution, compensation, and satisfaction).[1] These frameworks are not simply discrete formulations of modalities tethered to their specific context, but manifestations of the underpinning theory of reparatory justice and the elements of such. They build upon centuries of reparatory justice in practice, and the jurisprudence of authoritative international bodies.

In examining the impact of underpinning theories and objectives of reparatory justice on the forms of redress available, a reciprocal relationship between the two begins to emerge. It is not only theory that informs practice; the manifestation of reparatory justice in specific cases of injustice also influences the development of the underlying theories. Considering the modalities of redress available within the context of reparatory justice is not simply a matter of assessing what measures might be adopted in the construction of reparations for historical enslavement. Rather, this process invites a reconsideration of the limitations imposed upon reparatory justice – particularly with regard to causation and the questions of legal policy involved in this interrogation.[2] It opens the door for a different

[1] International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' (November 2001) UN Doc A/56/10, Articles 28-37. The ICC reparations principles and UNBPG replicate the recognition of these various forms of reparations, additionally separating rehabilitation as a distinct modality rather than as an aspect of other forms - *The Prosecutor v Thomas Lubanga Dyilo* (Decision establishing the principles and procedures to be applied to reparations) ICC-01/04-01/06-2904 (7 August 2012) (*Lubanga Principles*), Principle 9(c); UNGA 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (21 March 2006) UN Doc A/RES/60/147 (UNBPG), Principle 18.

[2] This is considered in further detail in Chapter 6.

understanding of appropriate redress in historical cases, based on the possibility of constructing responsive, multi-modal reparations packages targeting different kinds of injury. Thus, the modalities of redress, crafted to meet the needs of reparatory justice, in turn speak to the threshold questions of reparability, and those injustices that ought to be redressed within the framework of primary rules.

This chapter considers the various forms of redress available within international legal frameworks, their historical roots, and developments in reparations practice, to reconceptualise the presumptive boundaries of reparability. This is not a new legal framework, for these forms of redress are embedded in the relevant legal mechanisms. Rather, it is a new way of assessing the influence of these frameworks on approaches to the question of reparations for historical injustice. This interrogation speaks to the boundaries of decisions of legal policy and the scope of primary rules, made by judges in specific cases. However, it also informs broader moral and political reparations discourse, expanding the spaces in which reparatory justice might occur and moving the conversation beyond the boundaries of compensation.

5.1. Satisfaction

Accounting for the centrality of recognition and accountability in reparatory justice, it is not only the material impact of injustice that matters, but what this signals about victims' relation to perpetrators and society, and the way this echoes through their communities.[3] For widespread abuses in particular, it is often the affective dimensions of injustice that continue to impact the lives of descendants, including in their structural dimensions.[4] In such instances, where restoration is often impossible, satisfaction enables measures targeted towards irreparable and moral injuries.[5] Accounting for the indirect and structural nature of harms in historical cases, the capacity to award purely symbolic measures may have significant implications for the consideration of whether reparations ought to be awarded, and not only what shape they might take.[6] In this regard, the interplay between

[3] See Chapter 4, Section 3(b).
[4] Shelton notes that compensation is 'especially inadequate' where the violation causes irreparable injury, and where violations are ongoing or likely to be repeated. Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015), 379.
[5] Jean Personnaz, *La Reparation du Prejudice en Droit International Public* (Librairie du Recueil Sirey 1939), 298.
[6] This contributes substantially to the consideration of the question of the appropriate scope of reparatory obligations in historical cases, considered in Chapter 6, Sections 3-5.

recognition of immaterial harms, and responsive measures of satisfaction is crucial.

International judicial bodies recognise the affective dimensions of injustice by affirming the possibility of awards in the instance of a breach with no material consequences; in international law there is no requirement of material or economic damage in order to find a violation of law. All that is required to construct an internationally wrongful act of a State is conduct attributable to a State, which constitutes a breach of an international obligation.[7] Damage is only a prerequisite of international responsibility when it forms a constituent part of the primary obligation – when it is an element of the primary rule – and thus cannot be considered a prerequisite of international responsibility for a wrongful act generally.[8] The corollary of this conclusion is that it is similarly unnecessary for a State to have suffered damage in order to claim reparations for a breach of international law. International tribunals reflect this approach to damages by including moral damages in awards of compensation, and recognising symbolic injuries to States.[9]

Irrespective of other elements of symbolic harm suffered as a consequence of a breach, the violation itself can be recognised as a symbolic harm requiring reparations. For instance, in the *Rainbow Warrior II* arbitration, France contended that a central element of international responsibility was damage, and that New Zealand's claims therefore did not show a basis for liability as they had not indicated 'the slightest damage had been suffered, even moral damage'.[10] However, the Tribunal affirmed the possibility of moral and legal damage in international law, determining that:

> …in inter-State relations, the concept of damage does not possess an exclusive material or patrimonial character. Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate

[7] Articles on State Responsibility, above n 1, Article 2.
[8] International Law Commission, 'Report of the International Law Commission on the Work of its Fifty-Third Session' (2001) 2(2) *Yearbook of the International Law Commission* 31, 36.
[9] On moral damages in compensation awards, see *Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation, Judgement No 3)* (1924) PCIJ Series A No 3, 9. The arbitral tribunals made similar rulings in *Maal Case* (1903) 10 RIAA 730, 732-33; and *Campbell Case* (1931) 2 RIAA 1158. Cases recognising symbolic injuries to States include violations of sovereignty or territorial integrity as in *Rainbow Warrior II (New Zealand v France)* (1990) 20 UNRIAA 215. See also *Corfu Channel,* above n 22.
[10] *Rainbow Warrior*, ibid, [107].

reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.[11]

This conclusion is consistent with corrective justice aims of returning the parties to equality, recognising that violations can create moral or legal inequalities as well as producing material harm. This provides the entry point for measures of satisfaction.

Despite the recognition of moral and symbolic harms, and thus the aptitude of equivalent measures to redress such in certain situations, many commentators confine their understanding of satisfaction to the forward-facing deterrent function inherent in the economic approach to redress. Bernhard Graefrath describes satisfaction as all 'measures taken by the author State of an internationally wrongful act to affirm the existence of the affected obligation and to prevent continuation or repetition of the wrongful act.'[12] Similarly, Edwin Borchard identifies the function of satisfaction as inducing the delinquent government to improve its behaviour and assuring the claimant government that such violations will be prevented in the future if possible.[13] These definitions highlight the overlap between satisfaction and guarantees of non-repetition by focusing on the preventive dimension of such orders, but fail to account for the corrective dimensions of satisfaction. That these measures are not only forward-facing and socially oriented, but also backwards-facing and victim-centric is confirmed by their existence as a secondary obligation connected to a violation and awarded specifically to the victims of such. Thus, satisfaction provides not only assurances for the future, but specific redress for wrongdoing, which may take a forward-facing form.

The lines between measures of satisfaction and cessation are often blurred, although the limits of cessation are much clearer. Measures of cessation are restricted to continuing violations of obligations still in force.[14] Satisfaction, on the other hand, is not bound by these preconditions and may be required where a breach has concluded and the obligation is no longer in force. Where a violation is continuing, the alteration of that situation, including the denial of rights and the application of legislation contravening international law, could equally be framed as a measure of cessation or as a guarantee of non-

[11] Ibid, [109].
[12] Bernhard Graefrath, *Responsibility and Damages Caused: Relationship between Responsibility and Damages* (Nijhoff 1985), 17.
[13] Edwin Borchard, 'Important Decisions of the Mixed Claims Commission, United States and Mexico' (1927) 21 *American Journal of International Law* 516, 518.
[14] On cessation specifically, see Section 4 below.

repetition.[15] Moreover, where an obligation is no longer in force, precluding measures of cessation, the completed performance of the original obligations may be characterised as a form of satisfaction. For instance, New Zealand's request for the return of French agents to detention in *Rainbow Warrior II* might more effectively have been framed as a measure of satisfaction, given that the detention period required by the agreement breached had expired. The Tribunal determined that the return of the agents to detention was not an appropriate measure of cessation in the case because the obligation was no longer in force, however left open the possibility that such might have been considered within the boundaries of satisfaction had the parties made arguments to this effect.[16]

The focus on immaterial harms itself is not a qualifier on the forms of redress that might be constructed in relation to this injury, for monetary redress can signal recognition and accountability in important ways.[17] As in many other situations concerning the taxonomy of redress, the boundaries between differently classified modalities are fluid and occasionally permeable. However, given the inclusion of moral damages in the categorisation of compensation discussed below, this Section considers satisfaction as those measures beyond monetary awards transferred from the perpetrator to the victim.[18]

In the Articles on State Responsibility, satisfaction is defined non-exhaustively, with potential forms listed including acknowledgement of breach, expressions of regret, and formal apologies.[19] The UNBPG are more comprehensive in listing potential forms of satisfaction, including:

(a) measures aimed at the cessation of continuing violations;
(b) verification of the facts and full and public disclosure of the truth;
(c) searches for disappeared persons, bodies of those killed, and the identities of abducted children;

[15] Special Rapporteur Arangia-Ruiz, for instance, identified potential forms of satisfaction as including 'demands of abrogation of discriminatory, racial or segregational legislation, popular consultations such as free elections or plebiscites, restoration of fundamental rights and freedoms, etc.' – all of which could equally be framed as forms of cessation. UNGA, 'Seventh report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur' (1995) UN Doc A/CN.4/469.
[16] *Rainbow Warrior II,* above n 9.
[17] Personnaz, for instance, includes monetary redress targeted towards moral injuries in his description of satisfaction, above n 5.
[18] This approach is also consistent with the formulation of satisfaction in the Articles on State Responsibility, Article 37, and UNBPG, Principle 22, above n 1.
[19] Above n 1.

(d) official declarations and judicial decisions restoring the dignity, reputation, and rights of the victim and of persons closely connected with the victim;
(e) public apologies, acknowledgement of facts and acceptance of responsibility;
(f) sanctions against perpetrators;
(g) commemorations and tributes to victims; and
(h) the inclusion of an accurate account of the violations that occurred in training and in educational material at all levels.[20]

These various considerations of the forms satisfaction may take are not in conflict, but rather indicate the divergent scope of the two instruments. The Articles on State Responsibility focus on measures of satisfaction for violations committed by States, briefly and within a more general text, while the UNBPG focus specifically on the issue of remedy and reparation in the context of severe human rights and humanitarian law violations. Thus, the UNBPG can be viewed as supplemental to the non-exhaustive list provided in the Articles on State Responsibility, rather than as separate regimes.

The most widely awarded and universally recognised measure of satisfaction in judicial practice is an authoritative pronouncement by the courts. In many cases involving moral or legal injury, authoritative international bodies have declared the judgement alone sufficient redress for the breach of law. Edwin Borchard declares:

> The adjudication, not the command, is the essence of judicial power, and in our civilized communities, it is the adjudication, and not the command, which evokes respect and official sanction, because it is a determination by the societal agent appointed to perform that function, and thus irrevocably fix legal relations.[21]

Authoritative international bodies have affirmed the appropriateness and sufficiency of declaratory judgements as a form of satisfaction, including where parties sought additional measures such as official apologies by State perpetrators and non-pecuniary damages for political and moral prejudice.[22]

[20] UNPBG, above n 1, Principle 22.
[21] Edwin Borchard, *Declaratory Judgements* (reprint, W S Hein 1941), 10.
[22] See *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4 *Corfu Channel*, [23]; *Case of the French Postal Vessel "Manouba" (France v Italy)* (1913) PCA Case No 1912-01; *The "Carthage" (France v Italy)* ICGJ 398 (PCA 1913). In *Corfu Channel*, the International Court of Justice judged that the declaration of a violation of Albanian Sovereignty by the United Kingdom was in itself appropriate satisfaction, despite the fact that Albania contended that it was entitled to an apology. Albania also requested the Court to consider whether monetary satisfaction was due despite the fact that there was no material damage caused. In the *Case of*

In *The "Carthage",* the tribunal went further, judging that there existed a general rule in international law that damages proportional to material loss in conjunction with the declaration itself constituted sufficient redress in most cases.[23] Thus, the Permanent Court of Arbitration declared a presumption against other forms of satisfaction beyond the declaration of the authoritative body. However, the decision also recognised the potential for special circumstances justifying additional awards recognising the offence, and providing satisfaction for moral and political injury.[24] This may bear particular relevance in the consideration of injustices entailing significant symbolic harms that manifest in material consequences, but with significant intervening contributory causes or some attenuation in causation.[25] Declaratory judgements, as a form of satisfaction, are means of restoring dignity, reputation, and rights, whether the victim is a State or an individual.[26]

Measures of satisfaction manifest the two primary elements defining reparatory justice considered in chapter 4 – responsibility and recognition. These forms of redress are fundamentally concerned with the affective dimensions of injustice over material and economic consequences that are the subject of restitution and compensation. Despite its relative scarcity in reparations discourse and practice, satisfaction may be prioritised over material and economic redress. For instance, the Extraordinary Chambers in the Courts of Cambodia was only empowered to award collective and moral reparations to Civil Parties and not monetary payments.[27] This despite the fact that admission of Civil Parties was contingent upon the individual having suffered physical, material, or psychological injury as a direct consequence of a crime alleged against the charged person.[28] Likewise, during the transition from apartheid in South Africa, truth-telling, transition, and indemnities were prioritised over the provision of actual awards for

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the French Postal Vessel "Manouba" the tribunal rejected the French Government's demand for damages for non-pecuniary damage to the French flag and political and moral prejudice resulting from the violation of international law, considering that the arbitral award itself constituted a serious sanction which was adequate in the circumstances. In *The "Carthage"*, the tribunal declared that 'in case a Power should fail to fulfil its obligations, whether general or special, to another Power, the statement of this fact, especially in an arbitral award, constitutes in itself a serious penalty' made heavier by the requirement to pay for material losses.

[23] Ibid.

[24] Ibid.

[25] For further consideration of causation and attenuation, see Chapter 6.

[26] *Case of Suárez Rosero v Ecuador* (Merits) IACHR Series C No 35 (12 November 1997). The applicant in the case foregrounded the need for an official judgement or exculpatory declaration in fulfilling these objectives.

[27] Extraordinary Chambers in the Courts of Cambodia, 'Internal Rules (Rev 9)' 16 January 2015, rule 23 *quinquies.*

[28] Ibid*,* rule 23 *bis.*

individuals suffering violations, although this in the context of transitional justice mechanisms.[29] In such cases, remedying the affective dimensions of injustice, ensuring responsibility and recognition, and accounting for the scale of abuses, are acknowledged as bearing greater importance than material redress. This may further extend to cases of historical injustice, in which material injuries have substantially attenuated, but significant moral and symbolic harms persist.

5.2. Restitution

Traditionally, restitution is the starting point for considering reparations, as famously declared by the Permanent Court of International Justice in *Factory at Chorzów*. Giving primacy to the principle of restitution after confirming the essential principle that reparation must, insofar as possible, wipe out all the consequences of wrongdoing and return parties to the position that would have existed absent the breach, the Court concluded that restitution in kind, or the value equivalent to such, determines the amount of compensation due for internationally wrongful conduct.[30] Thus, the Court framed restitution in kind as the primary remedy in international law, with proportionate compensation as the secondary remedy in such a case. This formulation of the nature of obligations has been consistently reiterated in international judicial decisions, reports, and declaratory documents.[31]

Although the restitutionary framework is often conflated with measures of monetary compensation, it is important to maintain a distinction. Restitution and compensation constitute distinct measures of redress – restitution involving in kind restoration, while compensation awards an equivalent monetary value. On the other hand, the restitutionary framework, defined by the principle of *restitutio in integrum,* is concerned with returning victims to the *status quo ante* – the position they would have been in *but for* the violation of their rights – and can consist of a wide range of different measures. Thus, measures effectively designed to compensate for material

[29] Christopher Colvin, 'Overview of the Reparations Program in South Africa' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006).
[30] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) [1928] PCIJ Rep Series A No 17, [47].
[31] On judicial decisions, see the more recent international arbitral decision in *Texaco Overseas Petroleum Co v Libya* (1977) International Arbitral Tribunal 17 ILM 3. On reports, UNGA, 'Second Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles), by Mr Willem Riphagen, Special Rapporteur' (1981) UN Doc A/CN.4/344; 2(1) *Yearbook of the International Law Commission* 79, 81-101. In declaratory documents, see Articles on State Responsibility, above n 1, Articles 35 and 37, recognising restitution as the primary remedy, providing for the avoidance of such obligation only where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from restitution instead of compensation.

damage, and those aimed at re-establishing a situation of legality, are separate concerns.[32] To resolve this difficulty, Pierre-Marie Dupuy characterises the restitutionary framework as the notion of 'restoration', separating it from discussion of forms of redress, including restitution. In this context, restoration demands both the reinstatement of the initial material position of victims and the legal situation that existed prior to the violation.[33] This notion of restitution as restoration is affirmed by the UNBPG, noting that restitution should restore the victim to the original situation before the violations occurred.[34] The Articles on State Responsibility similarly note that restitution aims to re-establish the situation that existed before the wrongful act was committed.[35] Thus, while restitution is guided by restorative objectives, it may more simply be conceived of as in-kind reparation.

Restitution can take a number of different forms relating directly to the situation the victim would have been in had the violation never occurred. For instance, the UNBPG recognise that restitution can include restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.[36] The *Lubanga Principles* note that restitution may include returning a victim to their family, home and previous employment; providing continuing education; and returning lost or stolen property.[37] As a form of restitution in the *Loayza Tamayo v Peru* case, the Inter-American Court of Human Rights ordered that Peru take the necessary measures to reinstate the victim in her public sector teaching position with equivalent salary and benefits to that which she had received prior to her detention.[38] That the Court also required that she be ensured full retirement benefits accounting for the period of detention makes clear that the Court aimed not merely to put the victim into the position that she was in prior to the breach, but to account for the position that she would have been in *but for* the violation.[39] These manifestations of restitution evidence the potential of such measures to cross into territory also occupied by satisfaction, cessation, and guarantees of non-repetition, further highlighting the fluidity of categories

[32] Pierre-Marie Dupuy, 'The International Law of State Responsibility: Revolution or Evolution?' (1989) 11(1) *Michigan Journal of International Law* 105, 120.
[33] Ibid, 120-121.
[34] UNBPG, above n 1, Principle 19.
[35] Articles on State Responsibility, above n 1, Article 35.
[36] UNBPG, above n 1, Principle 19.
[37] *Lubanga Principles,* above note 1.
[38] *Loayza Tamayo v Peru* (Merits) IACHR Series C No 33 (17 September 1997).
[39] Ibid.

of redress and the difficulty of severing cessation and non-repetition from the reparatory framework.

Restitution, shepherded as it is by ideas of restoration, does not constitute a punitive remedy despite the fact that the quantum of the award may be shaped by the nature of the act creating the need for restitution. The essential function of restitution is simply to return to the victim something to which they are entitled, and of which the wrongdoer deprived them.[40] Restitution thus adheres to the corrective conception of justice, focusing on re-establishing the prior situation of the victim, and returning the relationship between victim and perpetrator to equality.[41] By affirming the status of restitution as the primary remedy, with equivalent compensation as an appropriate substitute when restoration is impossible or would be disproportionate to the breach, courts reinforce the corrective paradigm and the objective of restoration. Moreover, this represents a recognition of the fact that money is not automatically equivalent to a victim's legal entitlements, and that primary obligations ought to be upheld where practicable.

Despite the presumption in favour of restitution, in many instances historical injustices are likely to fail to meet the threshold condition for the award of such measures, namely that restitution should be awarded where appropriate. The impossibility of returning victims to the *status quo ante* with regard to widespread historical injustices, engaging the counterfactual quagmire, makes designing measures of restitution difficult, if not impossible.[42] However, restitution may be constructed with consideration for the consequences of wrongdoing, rather than those outcomes which otherwise would have arisen. In practice, this requires a consideration of specific opportunities denied, and harms imposed, as occurred in *Loayza Tamayo v Peru,* and the construction of in-kind restitution to fill these gaps.

5.3. Compensation

Despite the judicially affirmed primacy of restitution in international law, compensation is often considered the dominant remedy available to courts and tribunals, and predominates actual awards granted. The assumption articulated by Grotius in the seventeenth century that 'money is the common

[40] Shelton, above n 4, 298-314.
[41] The corrective justice paradigm is considered in Chapter 4, Section 2.
[42] See David Lambert 'Black-Atlantic Counterfactualism: Speculating about Slavery and its Aftermath' [2010] 36 *Journal of Historical Geography* 286. For further consideration of the limits of counterfactual reasoning, see Chapter 4, Section 2(a).

measure of valuable things' including intangibles such as legal rights infuses international and domestic law, as well as reparations discourse.[43] Awards of damages are built upon both the corrective and the economic approaches to justice, transferring benefits from the perpetrator to the victim in an amount purportedly equivalent to the injuries suffered to return the parties to equality, and occasionally requiring additional sums to ensure deterrence at an effective level. Monetary awards, in general, maintain the focus on providing the closest possible alternative to *restitutio in integrum,* thus reinforcing the restorative paradigm, and may also respond to the affective dimensions of injustice through moral and punitive awards.

The role of compensation in redressing violations is well established in international law, with the starting point for considering compensation being financially or economically assessable damages.[44] As an example, the International Criminal Court recognises that compensation should be considered when economic harm is sufficiently quantifiable, it would be appropriate and proportionate in the circumstances, and is feasible.[45] Qualifying material damage may include loss or damage to property, lost earnings, lost opportunity to work, unpaid wages or salaries, and loss of savings.[46] Legal services, medical expenses and psychological assistance are similarly uncontentious in their amenability to economic quantification.[47] Thus, the costs of rehabilitation are built into compensatory measures.

Although material damages – both direct and consequential – are the most amenable to determination and quantification by a judicial body, legal analysis does not stall at this point. Courts have a long history of awarding multiple forms of damages in situations requiring varying degrees of arbitrariness in determining the quantum of an award.[48] Awards for physical harm beyond medical expenses require an arbitrary determination of

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[43] Hugo Grotius*, The Rights of War and Peace, in three books. Wherein are explained, the law of nature and nations, and The Principal Points relating to Government. Written in Latin by the learned Hugo Grotius, and translated into English. To which are added, all the large notes of Mr. J. Barbeyrac, Professor of Law at Groningen, and Member of the Royal Academy of Sciences at Berlin* (London 1738) book 2, chapter 17, 437.

[44] Articles on State Responsibility, above n 1, Article 36, notes that compensation should cover all financially assessable damage including lost profits. See also UNBPG, above n 1, Principle 20; and the *Lubanga Principles*, above n 1, Principle 9.

[45] Principle 9(a), *Lubanga Principles*, above n 1.

[46] See for instance *Ayder and Others v Turkey* (Merits and Just Satisfaction) App No 23656/94 (ECtHR, 8 January 2004), [141]-[152]; and *Case of El Amparo v Venezuela* (Reparations) IACHR Series C No 28 (14 September 1996), [28]-[30].

[47] See for instance *Loayza Tamayo v Peru*, above n 38, [129]; and *Case of Barrios Altos v Peru* (Reparations and Costs) IACHR Series C No 87 (30 November 2001), [42].

[48] Judicial awards redressing multiple forms of damages are documented as early as 2000BCE. See James Sales and Kenneth Cole, 'Punitive Damages: A Relic That Outlived Its Origins' [1984] 37 *Vanderbilt Law Review* 1117, 1119. See also Linda Schlueter and Kenneth Redden, *Punitive Damages 3* (3rd edn, Butterworth Legal Publishers 1995).

appropriate quantum of compensation, but are internationally accepted as an appropriate remedy.[49] Similarly mental and emotional suffering are recognised as compensable harms, despite their failure to meet the requirement that harm be financially or economically assessable.[50] Lost opportunities in employment, education and social benefits, loss of status and harm to reputation, and interference with legal rights can also serve as the basis of compensatory awards.[51]

The widely recognised availability of compensation for a range of material and immaterial harms upholds the capacity of courts to attach a monetary value to non-monetary harms.[52] Moreover, the recognition of immaterial harms is consistent with the forms of restitution available whereby redress relates not only to tangible or quantifiable property (places of residence, employment, property) but to immaterial rights, including restitution of liberty, enjoyment of human rights, identity, family life and citizenship.[53] The award of moral damages is symbolic, designed to deal with harm presumed from the breach of the rights of the victim.[54] It need not be quantifiable or economically assessable in order for the court or tribunal to nominate an award.[55] Pecuniary damages may therefore address the

[49] See for instance *Velásquez Rodríguez v Honduras* (Merits) IACHR Series C No 4 (29 July 1988), [156], [175], and [187]; and *X and Y v the Netherlands* (Merits and Just Satisfaction) App No 8978/80 (ECtHR, 26 March 1985), [22].
[50] See for instance *Garrido and Baigorria v Argentina* (Reparations and Costs) IACHR Series C No 39 (27 August 1998), [49]; *Case of the Plan de Sánchez Massacre v Guatemala* (Reparations) IACHR Series C No 116 (19 November 2004), [80]-[89]; *Case of the "Juvenile Reeducation Institute" v Paraguay* (Judgement) IACHR Series C No 112 (2 September 2004), [295]. For ECtHR decisions on the same issue see *Selmouni v France* (Merits and Just Satisfaction) App No 25803/94 (ECtHR, 28 July 1999), [92], [98] and [105]; and *Aksoy v Turkey* (Merits and Just Satisfaction) App No 21987/93 (ECtHR, 18 December 1996), [113].
[51] See, for instance, in the jurisprudence of the European Court: *Campbell and Cosans v the United Kingdom* (Merits) App No 7511/76; 7743/76 (ECtHR, 25 February 1982), [26]; *T P and K M v the United Kingdom* (Merits and Just Satisfaction) App No 28945/95(ECtHR, 10 May 2001), [115]; and *Thlimmenos v Greece* (Preliminary Objection, Merits and Just Satisfaction) App No 34369/97 (ECtHR 6 April 2000), [70].
[52] Compensable injury contains the same basic elements in virtually all legal systems, (1) Medical and other expenses; (2) Lost of past and future earnings; (3) Loss of or injury to property, including lost profits; (4) Pain and suffering and injury to health; (5) Funeral expenses in wrongful death cases; (6) Loss of the services of the deceased. Moral damages are also widely recognised, including claims for 'non-pecuniary injury such as harm to reputation, dignity, and other wrongs for which monetary value must be presumed as it cannot be assessed'. Shelton, above n 4, 317-318.
[53] See for instance UNBPG, above n 1, Principle 19.
[54] See generally Dennis Klimchuk, 'Unjust Enrichment and Reparations for Slavery' [2004] 84 *Boston University Law Review* 1257, recognising the core of the disgorgement claim is the indictment of the defendant's misconduct, thereby making the claim for restitution morally expressive.
[55] The Court in *Rainbow Warrior II,* for instance, declared that monetary compensation for serious moral and legal damage was possible, but concluded that no award of compensation could be made in the case because New Zealand had not requested such and France had not had the opportunity to address this in its written pleadings or oral arguments. Above n 9, [118].

affective dimensions of injustice, ensuring the recognition of victims as rights bearers and supporting notions of human dignity.[56]

Despite the primary recognition of States as the subjects of international law, in the consideration of reparations due, damage caused to private parties may equally be the foundation of compensation awards. This is true at all levels of international law and is not limited to the corpus of human rights law, which specifically recognises the individual as a subject of international law. For instance, in the case of the *French Postal Vessel "Manouba"* in 1913, the Tribunal found that damages were due to private parties for the delay caused to the *"Manouba"* by its wrongful capture and rerouting to Cagliari, awarding damages of 4,000 francs to the interested parties represented by the French government.[57] Likewise, in *The "Carthage"*, the Tribunal fixed indemnities due to two private companies – the Compagnie Générale Transatlantique and the aviator DUVAL – as well as the passengers and shippers, which were to be paid by the Italian government to the French government (then be dispensed to the private parties).[58] Compensation in international law therefore covers substantial ground, capable of providing redress for both private and public injuries for harms of a material or immaterial nature.

The focus of courts on awarding compensation proportionate to the injury suffered, even where that injury is moral or legal only, reinforces the corrective justice underpinnings of compensation and its deterrent functions. The award is tailored to equal the harms and thus in some equivalent way to return the parties to the *status quo ante*. If damages were limited to such injury (whether moral or material) it would be possible to consider corrective justice to be the defining feature of awards. There is, however, an additional dimension, both to moral damages and to the recognition of punitive damages, which indicates an explanation beyond relationships in the discrete case.

Exemplary or punitive damages are designed not to repair any particular element of harm or suffering, but to indicate the condemnation of the Court for the perpetrator's behaviour, and deter similar conduct in the future. Exemplary damages provide a clear example of a court's deviation from the

[56] Yudoff notes that 'society's interest in human dignity is so great that the recovery may exceed any plausible estimate of economic injury'. Mark Yudoff, 'Liability for Constitutional Torts and the Risk-Averse Public School Official', (1976) 49 *Southern California Law Review* 1322, 1379-1380.
[57] *Case of the French Postal Vessel "Manouba",* above n 22.
[58] *The "Carthage",* above n 22.

idea that awards may only be granted with the corrective justice objective of returning the defendant to the position they were in prior to the wrongdoing.[59] The recognition of multiple forms of redress going beyond actual damage suffered have historical continuity, tracing far beyond the period of transatlantic enslavement.[60] In relation to fundamental international wrongs in particular, the protection of norms may require the imposition of punitive damages to signal moral opprobrium and deter future violations.[61] In instances in which damages to victims may be difficult to establish or quantify, including in historical cases, the capacity of authoritative bodies to award punitive damages against perpetrators may provide an avenue for redress.[62]

5.4. Cessation

The obligation to cease wrongful conduct, and the capacity of tribunals to order such in the event of a positive finding, are vital in responding to violations of law. In many situations, particularly related to gross, serious or widespread violations, the primacy of cessation over any other measures is highlighted.[63] In cases of mass atrocities condemned by the United Nations General Assembly or Security Council, the pragmatic emphasis in the immediate situation is often on 'cessation and guarantees of non-repetition over reparation'.[64] In part, this reflects the reality of such atrocities – that it is impossible to return the victims to the position that they would have been in absent the violations because of the very nature of those breaches. However, emphasis on cessation also recognises the fundamental interest of victims in recognition and the affirmation of their status as citizens and rights-bearers – if the violations do not cease, the denial of victims' status cannot be remedied.

Competent tribunals have the inherent power to issue an order for cessation or discontinuance of a wrongful act or omission when such relates to a continuous breach of an international obligation that continues to be in

[59] See Michael Rustad and Thomas Koenig, 'The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers' [1993] 42 *American University Law Review* 1269.
[60] See Sales and Cole, above n 48, 1119.
[61] See, for instance, the consideration of torture in *Flilartiga v Pena-Irala* 577 F Supp 860 (1980), 863.
[62] On the positioning of punitive and exemplary damages in the theory of reparatory justice, see Chapter 4, Section 2(b).
[63] The ICJ has recognised that cessation can be more important than reparation. See for instance *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Merits) [1974] ICJ Rep 175, 201–205.
[64] Christine Gray, *Judicial Remedies in International Law* (Clarendon Press 1987), 216-17.

force.[65] The requirement of a continuing violation distinguishes cessation from the paradigm reparations order, leading some commentators to consider cessation an element of the primary rule, disconnected from secondary rules concerning redress in the instance of a breach. For instance, Christian Dominicé asserts that the duty of perpetrators to cease continuing wrongful conduct does not constitute a form of reparation, but only 'a return to the initial obligation'.[66] Thus, Dominicé concludes that the obligation to provide *restitutio in integrum* in the general sense 'does not actually mean reparation'. Likewise, in the *United States Diplomatic and Consular Staff in Tehran,* the International Court of Justice characterised the call to ensure the release of consular staff as a measure of cessation of a continuing violation rather than as a form of restitution – assuming a distinction between the two.[67]

Despite repeated efforts to entirely sever cessation from other measures of redress following wrongful conduct – to frame it exclusively as an element of the primary obligation and not as a secondary obligation – measures of cessation continue to straddle the divide between primary rule and secondary obligation. Like the obligation to provide a remedy, which is both accepted as a secondary obligation and recognised as indispensable to the primary rules, cessation only arises subsequent to a breach of law. Thus, cessation is always incidental to the principal duty – to comply with the rule in the first instance – and only arises in the event that the main obligation is not fulfilled. Yet, cessation cannot be fully characterised as a remedy given that the only secondary obligation created is the fulfilment of a primary duty, and this only when that obligation continues in force.

What this formulation of cessation as entirely distinct from reparatory justice does not account for, are the symbolic dimensions of injustice that may be remedied by measures such as judgements on the merits, official declarations of wrongdoing and responsibility, apologies, memorials, and reforms to ensure rights are respected. Such measures consistently fall within the category of satisfaction (discussed above) and, like these

[65] *Rainbow Warrior II,* above n 9, 270. See *also United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3, [38-41]; and *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, [292].
[66] Christian Dominicé, 'Observations on the Rights of a State that is the Victim of an Internationally Wrongful Act' in *Droit International 2* (Pedone 1982) 15, 27.
[67] *United States Diplomatic and Consular Staff in Tehran*, above n 65, 44-45. The Court found the actions of Iran to be a breach of international law, called upon Iran to put a stop to the continuing detention of embassy staff and declared the obligation of Iran to compensate the United States.

measures, the cessation of violations focus on ensuring the status of victims within society and their right to be free from violations.[68] Therefore, for victims, measures of cessation can have a crucial reparatory function, and serve as a precondition for the efficacy of all other reparatory measures.

Injuries to victims continue to accrue where violations are ongoing, and cannot be displaced by measures of restitution, compensation, or satisfaction when the wrongful conduct itself has not ceased. Failures in cessation preclude the realisation of recognition and responsibility – rendering reparations mechanisms incapable of meeting the fundamental elements of redress. Moreover, specific compliance – or a return to compliance through the cessation of continuing violations – is a restorative act, which ensures a return to a situation of legality, much like restitution. Thus, measures of cessation may be considered as a form of reparatory justice, and should be considered as central to efforts to redress historical injustice.

5.5. Guarantees of non-repetition

The Articles on State Responsibility tie guarantees of non-repetition to the cessation of ongoing violations through Article 30, wherein wrongdoing States are under dual obligations to cease continuing acts or omissions, and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.[69] Both requirements aim to restrain a State from continuing to violate legal rights, and safeguard the underlying legal rule still in force. However, cessation focuses on the 'negative aspect of future performance' while assurances and guarantees fulfil a 'preventive function and may be described as a positive reinforcement of future performance'.[70] Thus, guarantees and assurances are not premised upon the requirement of continuing obligation as is the case for measures of cessation. This places guarantees more comfortably within the dominant reparatory paradigm although the distinctions should not be regarded as rigid.

In some contexts, violations continue and repetition is likely for various reasons, including the continuation of structural underlying causes of victimisation. While it is possible to simply support compensation in every

[68] See Christian J Tams, 'Recognizing Guarantees of Non-Repetition: LaGrand and the Law of State Responsibility' [2002] 27 *Yale Journal of International Law* 441
[69] The commentary to Article 30 of the Articles on State Responsibility notes that the obligations are 'separate but linked issues' - International Law Commission, 'Report of the International Law Commission on the Work of its Fifty-Third Session' (2001) 2(2) *Yearbook of the International Law Commission* 31, 88-91.
[70] Ibid, 88.

situation of breach, the economic deterrent function can be imperfect and insufficient to prevent future violations, particularly where these result from social, cultural, and political systems that defy rational cost-benefit calculations.[71] Yet, in some situations, the nature of violations can make repetition unacceptable. Dinah Shelton identifies the weakness of purely compensatory measures in such an environment:

> With damage awards, the government can continue to violate rights as long as it is willing to pay… While money is an acceptable substitute for many recognized interests, it is not adequate to allow the wrongdoer simply to pay for the injury if the claim is of great importance.[72]

Where States need only pay monetary compensation, they may in effect be able to buy the privilege of breaching rules, and the norm *pacta sunt servanda* would cease to have any real meaning.[73] Thus, measures of specific performance may be necessary to prevent continued or repeated violations against existing victims, and the victimisation of others. This reinforces the recognition of victims as rights-bearers, acknowledging that rights may not be simply 'bought out', but must be respected.

The possibility of assurances and guarantees of non-repetition as legal remedies consequential upon an internationally wrongful act was affirmed in *LaGrand,* regarding the failure to provide notice of the right to consular assistance to death row inmates.[74] This formulation makes it clear that such measures constitute a form of redress for violations – a response to a breach – and not merely a requirement in fulfilment of the primary obligations. In *LaGrand,* the Court noted that there were a number of ways in which the United States could fulfil the obligations outlined by the Court in the instance of a future breach, and thus it refused to be prescriptive in its orders.[75] The UNBPG, however, provide significant guidance as to potential measures associated with guarantees of non-repetition, noting that such should include, where applicable, any or all of the following:

(a) Ensuring effective civilian control of military and security forces;

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[71] As Alexander Pires succinctly frames this argument, money is necessary but not enough. 'Making the Case for Racial Reparations: Does America Owe a Debt to the Descendants of its Slaves? – A Forum' in Ronald P Salzberger and Mary C Turck, *Reparations for Slavery: A Reader* (Rowman and Littlefield 2004), 275.
[72] Shelton, above n 4, 379.
[73] *Rainbow Warrior II,* above note 9, [111].
[74] *LaGrand (Germany v. United States of America)* (Judgement) [2001] ICJ Rep 466.
[75] Ibid*,* 513, [125].

(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
(c) Strengthening the independence of the judiciary;
(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.[76]

These measures highlight the broad scope of potential mechanisms for satisfying the obligations associated with guaranteeing non-repetition, and place prevention at the centre of efforts to redress wrongdoing. Moreover, the approach taken by the International Court of Justice, alongside the Articles on State Responsibility and the UNBPG, makes it clear that guarantees and assurances are not limited to mere promises, but involve practical measures designed to ensure the promise is fulfilled. In relation to multi-faceted, historical injustices involving the continued marginalisation of victims, significant structural reforms to ensure non-repetition may be crucial to the reparatory project. This reflects the focus on structural and institutional measures evidenced in calls for redress for historical enslavement.[77]

[76] UNBPG, above n 1, Principle 23.
[77] See, for instance, CARICOM, 'CARICOM Ten Point Plan for Reparatory Justice' (*CARICOM,* March 2014) <www.caricom.org/caricom-ten-point-plan-for-reparatory-justice/> accessed 1 June 2018.

5.6. Towards a progressive approach to reparatory justice

The power to award a remedy in the instance of a breach, as an inherent power of international judicial bodies, may be exercised in a variety of ways. Reparations are not prescribed or curtailed by specific rules. Rather, international jurisprudence establishes the freedom of judges and arbitrators to determine appropriate redress.[78] Courts consistently seek to avoid condoning or upholding a situation in which rights do not possess corresponding remedies, and may do so irrespective of whether specific empowering provisions enabling and shaping the reparation they may order exist. While some courts have demonstrated a reluctance to issue orders beyond declarations of illegality and monetary compensation, others have recognised multiple forms of redress, and the necessity of outlining the requirements of compliance with international obligations, in their decisions.[79] In relation to systemic or widespread violations in particular, expecting the State to enact the necessary reforms without further direction can be overly optimistic. Shelton notes that general international practice concerning remedies has been 'partial and unimaginative', typically failing to resolve the problems that led to the victim bringing the case.[80] Yet, in many instances, States require 'guidance and direction on the measures necessary to afford redress'.[81]

The idea that reparations ought to be in an adequate form, enunciated by the Permanent Court of International Justice in *Factory at Chorzów,* provides support for judges to order responsive reparations.[82] In many instances, this ought to include consideration of the affective dimensions of injustice and the insufficiency of purely pecuniary damages in redressing grave violations. Kaimipono David Wenger notes that monetary awards in particular, may imply the reduction of grave violations to a commodity that may be purchased by perpetrators, and where awards are nominal, purchased at a

[78] Ladislas Reitzer, *La Reparation Comme Consequence De L'Acte Illicite en Droit International* (Librairie du Recueil Sirey 1938).
[79] The jurisprudence of the European Court of Human Rights discussed above demonstrates this reluctance, while the jurisprudence of the International Criminal Court (particularly the *Lubanga Principles*, above n 1) and the Inter-American Court of Human Rights evidence a more responsive and multi-faceted approach.
[80] Dinah Shelton, *Remedies in International Human Rights Law* (1st edn, Oxford University Press 1999), 37.
[81] Shelton, above n 4, 238.
[82] *Case Concerning the Factory at Chorzów (Germany v Poland)* (Jurisdiction) PCIJ Rep Series A No 9, 21.

low cost.[83] The nature of the harms of enslavement – centred on the commodification of human beings – exacerbates the problems associated with trading money for violations. Therefore, recognition that some forms of wrongdoing entail consequences beyond the material ought to open the door to correlative forms of redress that more adequately match the wrongdoing and the injuries suffered.

As research into the area of reparatory justice grows, international courts have increasingly permitted different forms of redress, to more adequately achieve their objectives. The Articles on State Responsibility and UNBPG recognise multiple avenues of redress, including collective and symbolic measures.[84] For instance, the International Criminal Court's reparations principles permit the ordering of payments to legal entities that benefit members of the victim community and allow for symbolic, preventative, or transformative reparations.[85] The measures that ought to be adopted necessarily depend on the nature of the situation at hand, and the prevalence of the general caveat 'when appropriate' reinforces the idea that awards ought to be responsive rather than formulaic. Guidance on appropriate modalities tends to be indicative rather than prescriptive – with open-ended lists of potential measures to be undertaken – supporting a flexible approach that adapts to new circumstances and new understandings.[86]

No court has engaged so thoroughly with the possibilities for adaptive, responsive redress, utilising the multiple modalities discussed above, as the Inter-American Court of Human Rights. The Court has contributed significantly to reparations jurisprudence through its interpretation of the remedy provision of the American Convention on Human Rights, as well as being receptive to expanding research. Article 63 of the American Convention declares that, in the instance of finding a violation, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated and, where appropriate, that the consequences

[83] Kaimipono David Wenger, '"Too Big to Remedy?": Rethinking Mass Restitution for Slavery and Jim Crow' (2010) 44 *Loyola Los Angeles Law Review* 177.
[84] UNBPG, above n 1, Principle 18; Articles on State Responsibility, above n 1, Articles 30 and 31.
[85] Principle 1(8) of the *Lubanga Principles,* above n 1, permits payments to legal entities including micro-financing organisations, cooperative and building societies, NGOs, charities, public schools, and hospitals while Principle 9 recognises the legitimacy of forms of reparation beyond restitution, rehabilitation and compensation, including those with a symbolic, preventative or transformative value.
[86] The Articles on State Responsibility, above n 1, UNBPG, above n 1, and *Lubanga Principles,* above n 1, all contain non-exhaustive lists of potential measures.

of the measure or situation that constituted the breach be remedied and fair compensation paid to the injured party.[87] *Prima facie*, this provision resembles the plethora of other remedy provisions found in international law and could have been applied to provide only awards of monetary compensation, consistent with the approach of the European Court of Human Rights.[88] However, the Inter-American Court has recognised the need to go beyond pecuniary awards in redressing violations, particularly in relation to grave violations of human rights. As the Court declared in the *Case of the Plan de Sánchez Massacre*: 'reparations are not exhausted by compensation for pecuniary and nonpecuniary damage; other forms of reparation must be added.'[89]

The Inter-American Court's approach to reparations situates *restitutio in integrum,* or equivalent alternative measures, as central to re-establishing respect for international norms.[90] The focus on 'setting things straight' in communities, and restoring the dignity of victims highlights the corrective nature of redress within this system and acknowledges the significance of responsibility and recognition in recovery from violations.[91] Symbolic reparations, in particular, are 'intended to repair the shame and humiliation previously inflicted on victims and to restore their reputation and equal status in the public eye.'[92]

The notion of life projects in assessing restitution emphasises the importance of agency and recognises the difficulties of re-establishing the *status quo ante* in what has become a radically different context for victims. Assessing the role of life projects in shaping redress involves valuing the future plans, potential, goals, and desires of victims, as well as their capacity to choose their own path. In the *Case of the 'Las Dos Erres' Massacre v Guatemala,* concerning the execution of 251 members of the 'Las Dos Erres' community,

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[87] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36, 9 ILM 99 (1969).
[88] On the approach of the European Court to 'just satisfaction', see *Zanghi v Italy* (Merits and Just Satisfaction) App No 11491/85 (ECtHR 19 February 1991), 48, wherein the Court noted that 'it is for the State to choose the means to be used in its domestic legal system to redress the situation that has given rise to the violation of the Convention'. See also *Aksoy v Turkey* [1996] ECHR 68, [98]; *Case of McCann and others v the United Kingdom* (Merits and Just Satisfaction) App No 18984/91 (ECtHR 27 September 1995); *Kaya v Turkey* (Merits and Just Satisfaction) App No 22729/93 (ECtHR 19 February 1998); *Selçuk and Asker v Turkey* (Merits and Just Satisfaction) App No 23184/94 (ECtHR 24 April 1998).
[89] *Case of the Plan de Sánchez Massacre* (Reparations), above n 50, [93].
[90] *Case of El Amparo v Venezuela,* above n 46.
[91] See Lisa Magarrell, 'Reparations for massive or widespread human rights violations: Sorting out claims for reparations and social justice' (2003) 22 *Windsor Yearbook of Access to Justice* 85, 91.
[92] Ruti G Teitel, *Transitional Justice* (Oxford University Press 2002), 126-7.

and acts of rape, forced abortion, and violence by Guatemalan armed forces, the Court declared:

> …it is evident that the victims of prolonged impunity suffer different infringements in their search for justice, not only materially, but also other suffering and damages of a psychological and physical nature and in their life projects, as well as other potential alterations of their social relations and to the dynamics of their families and communities.[93]

Thus, the Court recognises that wrongdoing impacts not only upon the material conditions of victims, but also on their freedom to pursue their own goals, achieve their desires, and design their lives.[94]

The willingness of the Inter-American Court to order reparations spanning all recognised modalities sets it far beyond other international tribunals, including regional equivalents elsewhere in the world. Like the European Court of Human Rights, the Inter-American Court recognises the procedural dimensions of effective protection of enunciated fundamental rights.[95] However, unlike the European Court, the Inter-American Court has not only recognised this effectiveness criterion as an element of the primary rule, but also as a secondary obligation that may be the subject of a judicial order. In *Velásquez-Rodríquez,* the Court suggested that the failure to investigate wrongdoing and compensate victims may constitute continuing violations in themselves for which the State and its successors are liable.[96] In *Neira Alegría et al*, the Court declared the Government had an obligation to 'do all in its power to locate and identify the remains of the victims and deliver them to their next of kin' as a form of moral reparations.[97] In *Caballero-Delgado and Santana v Colombia* the Court recognised the continuation of judicial proceedings inquiring into the violation, and punishment of those

[93] *Case of the 'Las Dos Erres' Massacre v Guatemala* (Preliminary Objection, Merits, Reparations and Costs) IACHR Series C No 211 (24 November 2009) [226].
[94] *Case of Loayza Tamayo v Peru* (Reparations and Costs) IACHR Series C No 42 (27 November 1998), [147].
[95] Pasqualucci suggests that reparations in international law were not developed to deal with 'large-scale violations of human rights or situations in which the government refuses to investigate the abuse or punish the violators', creating a distinction between the European and Inter-American systems on the basis that the former engages isolated instances of abuse, while the latter is confronted with gross and systematic abuses. Jo Pasqualucci, 'Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure' (1996) 18 *Michigan Journal of International Law* 1, 6. This is then employed in explaining the difference in the reparations practice of the two systems. Yet, this does not necessarily explain the distinction where violations within the European system have many of the symbolic and affective dimensions of the widespread or systematic cases.
[96] *Velásquez Rodríguez* (Merits), above n 49.
[97] *Neira Alegría et al.* (Reparations and Costs), IACHR Series C No 23 (19 September 1996), [69].

responsible as a form of reparations and demonstrated its willingness to order States adopt such measures.[98] Furthermore, the Court has not shied away from declaring a State must reform its domestic laws to conform to the American Convention as a measure of reparation for violation, as well as a guarantee of non-recurrence.[99]

The Court has consistently supported its statements as to the requirements of the law with concomitant orders as to what remedies must be provided. This simultaneously decreases the implementation gap wherein victims must rely on State action to deliver the procedural requirements of their rights or simply accept compensation as an alternative, reinforcing the inherent power of the Court to award appropriate redress. The orders made in the *Case of the Moiwana Community v Suriname* are characteristic of the breadth of remedies awarded by the Court.[100] In a case concerning the razing of the village of Moiwana, the massacre of 40 men, women, and children, and the exile and forced displacement of the remaining members of the community, the Inter-American Court ordered a number of measures against Suriname to vindicate the rights of the victims and recognise the wrongdoing. These included the construction of a memorial in a suitable public location, the investigation of the facts of the case and prosecution of responsible parties, the adoption of legislative and administrative measures to protect the property rights of the community, guarantees of safety for community members choosing to return to the village, and a public ceremony in which Suriname would recognise its international responsibility and issue an apology for the violations.[101] This case demonstrates how responsive reparations awards may be developed in order to target multiple dimensions of injustice, including material, immaterial, individual and collective harms.[102]

This multi-layered and multi-modal approach to redressing violations begins to acknowledge, and seeks to grapple with, the multi-dimensional impact of injustices, particularly in the context of mass atrocity. In international law, the potential for reparations practice that responds to the specific

[98] *Case of Caballero-Delgado and Santana v Colombia* (Merits) IACHR Series C No 22 (8 December 1995).
[99] See *Case of Loayza Tamayo v Peru* (Merits), above n 38.
[100] *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACHR Series C No 124 (15 June 2005).
[101] Ibid, 66-87.
[102] On the Court's increasing engagement with collective remedies in the context of indigenous communities, see Diana Contreras-Garduño and Sebastiaan Rombouts, 'Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights' (2011) 27 *Utrecht Journal of International and European Law* 4.

circumstances of a case, adapts to new realities with equivalent forms of redress, and engages with affective as well as material consequences, is built into the system. Not only does this approach enable responsive justice in the case of widespread injustice, but may also extend to engage the complexities of such cases after the passage of significant periods of time.

The shape of remedies and the capacity of judicial tribunals to order such is not based purely on prescriptive instruments, but on the inherent power of the court to give efficacy to primary obligations. Thus, it is not attached to any particular treaties, or the time periods associated with these. Compensation and decisions on the merits need not be all that there is – international law recognises more. The Inter-American Court may be blazing a trail, but it is a trail that employs the tools already built into international jurisprudence. Tools that more adequately respond to the understanding of injustice that permeates the international system, and which achieve a more complete version of reparatory justice.

5.7. Reparations in the context of enslavement

While the modalities considered above may guide the construction of reparations for historical enslavement and the *maangamizi,* and the approach taken to the question of reparability itself, it would be inappropriate here to provide concrete suggestions as to the measures which ought to be adopted. The centrality of procedural justice and victim participation in shaping such mechanisms, discussed in chapter 4, requires meaningful engagement with victim communities in the consideration and construction of reparatory programmes.[103] The design of reparations ought to be a reciprocal process in which affected communities have their voices heard and accounted for, recognising and reaffirming their agency, as well as ensuring measures adopted respond to their suffering and meet their needs.[104] Additionally, these frameworks should be applied in context, in response to the specific circumstances of victims, and the case formulated.

[103] See, for instance, UN Commission on Human Rights, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by Mr Theo van Boven, Special Rapporteur' (1993) UN Doc E/CN.4/Sub.2/1993/8, [133] and [137].

[104] Muraszkiewicz notes that the inclusion of victims in proceedings responds directly to the loss of dignity inherent in the violations, contributing to the restoration of agency and indicating that their concerns are as important as those of the State – Julia Muraszkiewicz, 'Article 12 of the EU Human Trafficking Directive: Fulfilling Aspirations for Victim Participation in Criminal Trials?' (2016) 7(3) *New Journal of European Criminal Law* 331, 341. McKay further considers the potential impact of procedural justice on the effectiveness and efficiency of measures adopted, ensuring that reparations take the right form for the victims - Fiona McKay, 'What Outcomes for Victims?' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law*, (Oxford University Press 2013), 922.

This makes broad, universal conclusions as to appropriate measures inutile.[105] It is for these reasons that specific consideration of transatlantic enslavement and the *maangamizi* in the preceding analysis is limited. This chapter does not seek to prescribe what might constitute appropriate modalities of redress in response to the case of historical enslavement. Rather, it provides an outline of the forms reparations might take, and the international legal foundations underpinning the various modalities of redress, with emphasis on the importance of symbolic as well as material measures.

In the context of widespread historical injustices with continuing legacies, developing multi-faceted, responsive reparations programmes is particularly important. As Rhonda Magee notes, the pervasive and insidious nature of the problems in contemporary society built upon transatlantic enslavement demand 'no less than a panoply of remedial solutions.'[106] Whether reparations are ultimately formulated within legal mechanisms, or in extra-legal fora, the legal foundations of reparations practice can substantially inform the choices made in designing redress. These frameworks provide guidance as to potential formulations of reparations programmes, assist in justifying the utilisation of a range of responsive measures beyond monetary awards, and support the realisation of the underlying philosophy, objectives, and elements of reparatory justice considered in chapter 4.

The multiple modalities of redress provided in international law speak to the claim for redress for historical injustices not only at the point of designing reparations programmes, but also at the outset, when considering whether reparations are mandated, necessary, or appropriate. Recognition of the full range of options in the form such redress may take assists in responding to questions concerning the relationships between antecedent abuses and contemporary suffering, the threshold for sufficiently proximate harm, and the degree to which recognition opens the 'floodgates' to a near-infinite stream of historical injustices.[107] If material suffering has attenuated, moral injuries might nonetheless be sustained and recognised. If residual harms related to the original wrongdoing are symbolic only, the availability of purely symbolic forms of redress speaks to the appropriateness of reparatory justice in this context. If the burden of reparatory awards shifts from the

[105] On responsiveness, see Chapter 7, Section 4(d).
[106] Rhonda Magee, 'The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse' (1993) 79 *Virginia Law Review* 863, 882.
[107] These elements of the reparations claims are considered in greater depth in Chapter 6.

economic to the moral in the context of historical injustices lacking material contemporary harms, the burden of a flood of such claims is substantially lessened.

The multiple modalities of redress considered in this chapter provide the entry point for the fulfilment of the objectives of reparatory justice in complex historical cases. Moving beyond individualistic understandings of redress focused only on monetary awards emphasises the damaged relationships arising from wrongdoing that endure when there is no attempt to reckon with the past, or to address its persistence in the present. This is not necessarily a zero-sum game or a confrontation, but rather a quest for justice, the pursuit of equality, and a 'search for unity'.[108]

[108] Hilary Beckles, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (University of the West Indies Press 2013), 17.

CHAPTER 6: THE CAUSAL CHAINS BINDING PAST AND PRESENT

Connecting historical enslavement to contemporary redress

In 1847, Frederick Douglass – an abolitionist leader who escaped enslavement in the American South – argued that 'the man who has suffered the wrong is the man to demand redress'.[1] While in general international law, the invocation of responsibility must be mediated by the State, the formulation of both the persons suffering the wrongs and the injuries themselves necessarily bring victims into the formulation of these proceedings.[2] This does not occur at the inception of cases, nor in establishing wrongful conduct and attributing this to the State. Rather, the suffering of those harmed falls to the consideration of what remedies are due, subsequent to the establishment of responsibility for internationally wrongful conduct. This is fundamentally a question of the relationship between wrongful conduct and its consequences. It is this interaction between breaches of law and their effects that determines what reparations are due within the frameworks considered in chapters 4 and 5, and to whom they must be directed.

What must be assessed to determine the reparatory obligations in the specific case of historical enslavement, are those injuries that can be characterised as having been caused by the internationally wrongful acts in question.[3] Thus, this chapter engages with the issue of causation in international law, examining the boundaries of the causal inquiry, and the relationships between historical enslavement, the *maangamizi,* and contemporary harms. The presumption of attenuation in the case of widespread historical injustices is problematised, and the role of collective harms and remedies considered.

The question of the relationship between transatlantic enslavement and the contemporary experiences of people of African descent is critical in reparations discourse. As in the consideration of rules of attrition and attribution (considered in chapter 3), the passage of time is often conceived

[1] Frederick Douglass, 'To Eric Clay, The North Star, December 3, 1847' in Philip S Foner (ed), *Frederick Douglass: Selected Speeches and Writings* (Chicago Review Press 2000), 91.
[2] Procedural justice, as considered in Chapter 4, Section 3(c), is also an entry point for victims in reparations proceedings at all stages.
[3] International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' (November 2001) UN Doc A/56/10 (Articles on State Responsibility), Article 31.

as fatal in the construction of the causal relationship between historical injustice and contemporary suffering. George Sher suggests that the passage of time attenuates the connection between present harms and historical injustices, with the result that it becomes 'increasingly implausible' to frame conditions in the present as consequences of the wrongdoing.[4] The presumption that this mitigation occurs automatically lacks theoretical grounding in the legal frameworks. Yet, it continues to influence the causal investigation in both legal and extra-legal considerations of the reparations case. This chapter therefore recognises the limitations of legal frameworks and judicial reasoning in constructing and interpreting the requirements of causation, conscious of the adaptive possibilities of reparations construed with reference to chapters 4 and 5.

6.1. The place of causation in international law

Reparations discourse often employs a perceived lack of causal connection between contemporary harms and historical injustices as a bar to assertions of justiciable wrongdoing. That is to say, the question of causation is engaged at the initial stage of the reparations claim, when commentators consider the existence of internationally wrongful conduct that might be the subject of a judicial (or political) decision. However, the law of State responsibility does not include harm in the elements of internationally wrongful conduct.[5] Wrongfulness itself is not qualified through a requirement of damage or causation, although these may constitute elements of the primary rule.[6] Although criticised by some, this approach engages the distinction between international and domestic law, for the rules of attribution and requirements of the primary obligations themselves serve as a replacement for causation in determining the existence of internationally wrongful conduct.[7] This system of pseudo-strict liability reinforces the role

[4] George Sher, 'Ancient Wrongs and Modern Rights' (1981) 10 *Philosophy and Public Affairs* 3, 10-12.
[5] See Articles on State Responsibility, above n 3, Article 2, which requires only attribution and breach.
[6] International Law Commission, 'Draft Articles Proposed by the Drafting Committee on Second Reading' (2000) 1 *Yearbook of the International Law Commission* 386, 388 (Proposed Draft Articles).
[7] For critique, see Brigitte Stern, 'The Obligation to Make Reparation' in James Crawford, Alain Pellet, and Simon Olleson (eds) *The Law of International Responsibility* (Oxford University Press, 2010) 563, 570. León Castellanos-Jankiewicz, 'Causation and International State Responsibility' (2012) SHARES Research Paper 07, ACIL 2012-07, 4 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2419913> accessed 10 April 2018, 5.

of international law as a normative order, as opposed to being solely concerned with remedying wrongs.[8]

While causation of damage in international law is not a prerequisite to establishing wrongful conduct, it does enter the law of State responsibility at the stage of determining the legal consequences of international responsibility – consequences that arise in the instance of internationally wrongful conduct, but are not determinative of the status of the breach itself.[9] Thus, the relevance of harm and causation lies in the determination of what reparatory measures are due in international law, and to whom these should be directed by the Claimant State. This, as the requirement to provide reparations relates only to those injuries 'caused by the internationally wrongful act', and not to the preliminary investigation of whether there was internationally wrongful conduct in the first instance.[10] Nonetheless, causation relies on the determination of wrongful conduct in accordance with chapters 2 and 3. Only acts constituting wrongful conduct can serve as the basis of a causal chain connecting abuses with contemporary effects.[11]

In relation to historical enslavement, determinations on the lawfulness of the multiplicity of acts constituting the *maangamizi* might impact not only the determination of justiciable breaches of law, but also the determination of reparable consequences. To the extent that conduct of European enslaver States cannot be contemporaneously categorised as a breach of international law, the harms related to that conduct cannot form the basis of legal responsibility. Although conduct might form part of a general pattern of conduct of a State committing breaches, it is only the actions constituting the breach themselves that serve as the basis of a finding of causation in law. Thus, connecting the harms associated with the legacies of transatlantic enslavement requires an assessment of the international legality of not only enslavement itself, but of the myriad of other abuses committed by States during the colonial encounter.[12] Despite reliance on specifically formulated

[8] Supporting the understanding of international law as a normative order, see Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet and Simon Olleson, *The Law of International Responsibility* (Oxford University Press 2010) 193, 194; Dionisio Anzilotti, *General Theory of State Responsibility in International Law* (Firenze 1902); UNGA, 'Report by Mr R Ago, Chairman of the Sub-Committee on State Responsibility' (1963) UN Doc A/CN.4/152, 250.

[9] Articles on State Responsibility, above n 3. Responsibility under Article 2 requires only attribution and breach, as considered in Chapters 2 and 3. Article 31 requires states make full reparation for injury caused by their internationally wrongful acts, a requirement given further elaboration in Articles 36 and 37 in relation to compensation and satisfaction respectively.

[10] Ibid, Article 31.

[11] Fleming James and Roger Perry, 'Legal Cause' 60 *Yale Law Journal* 761, 789.

[12] This project is beyond the scope of this Thesis, requiring determination on the specific facts of the case under consideration, and not general rules.

wrongdoing, the nature of the causal inquiry can be interrogated, to assess the frameworks governing the relationship between wrongdoing and its consequences that must be applied in relation to historical injustices. The stringency of these frameworks may, however, be relaxed in the context of moral and political claims.

Causation remains an element of the assessment of remediable harms throughout the history of modern international law, from its Roman roots to the present.[13] In Roman Law, awards of damages evolved from formulaic approaches to the calculation of damages to account for the circumstances of the case, including damaged expectations.[14] Causation also featured in Aquinas' *Summa Theologica,* wherein the obligation to make *restitutio* contained an inherent causal requirement to identify what had been 'taken' (whether material or immaterial) and thereby what required restoration.[15] The requirements of *restitutio* and *satisfactio,* supported by moral theologians in the fifteenth and sixteenth centuries, necessarily involved consideration of what damages must be redressed.[16] By the seventeenth century, Grotius cemented the integral role of causation in the determination of damages by framing obligations in relation to damage caused by legal fault.[17] Thus, the evolution of international law affirms the requirement of causation in relation to the assessment of reparations throughout the period of transatlantic enslavement.[18]

Despite the central role of causation in determining reparations for a breach, the causal inquiry in international law has not been thoroughly developed as it has in relation to domestic law, and international adjudication has been neither comprehensive nor consistent in this regard.[19] Authoritative international bodies have demonstrated an *ad hoc* approach to the question of causation, failing to formulate a clear, principled understanding of

[13] On the relevance of Roman Law, see Chapter 3, Section 2.
[14] See William Burdick, *Principles of Roman Law* (Lawyers Cooperative Publishing 1938), 637-675; Reinhard Zimmermann, *The Law of Obligations: Roan Foundations of the Civilian Tradition* (Juta 1990), 771-825; Rudolph Sohm, *The Institutes: A Textbook of the History and System of Roman Private Law* (James Crawford Ledlie trans, 1970), 369; J A C Thomas, 'Review' (1964) 54 *Journal of Roman Studies* 211.
[15] See Harry Dondorp, 'Crime and Punishment: *Negligentia* for the Canonists and Moral Theologians' in Eltjo Schrage (ed), *Negligence: The Comparative History of the Law of Torts* (Duncker & Humblot 2001) 101, 126.
[16] See E L Kendall, *A Living Sacrifice: A Study of Reparation* (Westminster Press 1960).
[17] Hugo Grotius, *The Rights of War and Peace* (Richard Tuck trans, Vol 2, Liberty Fund 2005) chapter 17, [1].
[18] On the continuity of relevant rules of State Responsibility more generally, see Chapter 3, Section 2.
[19] See Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26(2) *European Journal of International Law* 471, 473. See also Michael Straus, 'Causation as an Element of State Responsibility' (1984) 16 *Law and Policy in International Business* 893.

causation that could give meaning to the terms of international norms requiring it. Ilias Plakokefolos labels the approach of international adjudicatory bodies 'rudimentary', 'haphazard and unprincipled'.[20] Michael Straus suggests that 'common-sense, rough-hewn, and sometimes vague doctrines' are used to cut off liability, as opposed to a clear conception of causation.[21] The International Law Commission, for its part, explicitly refused to elaborate on the content of causation beyond the distinction between factual and legal causation, suggesting rather that the requirement would differ depending on the international obligation in question.[22] Notions of 'directness', 'proximity', 'foreseeability', and 'remoteness' are employed in international legal decisions to explain causation.[23] Further, the International Law Commission suggests that the harm having been deliberately caused, or being 'within the ambit of the rule being breached' might also have bearing.[24] The lack of attention on the specificities of causation beyond these observations, provides little solid ground for the common assertions of attenuation in cases of historical injustice.

The limited guidance provided by the Articles on State Responsibility in relation to the causal inquiry, asserts a distinction between 'causality in fact', and the question of scope of responsibility limiting causation, mirroring the orthodox explanation of causation in domestic law.[25] This differentiates between causation as a question of fact, and as a question of law: the former involves a factual investigation into the relationship between wrongdoing and harm; and the latter a policy decision as to the appropriate scope of the obligations in question. Hart and Honoré describe this bifurcation of causation:

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[20] Plakokefalos, ibid, 473.
[21] Straus, above n 19, 894.
[22] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) 2(2) *Yearbook of the International Law Commission* 31, 93 (Commentaries to the Articles on State Responsibility). This decision to leave causation largely unexplained was justified on the following basis: 'The Drafting Committee had considered a number of suggestions for qualifying that causal link, but, in the end, it had taken the view that, since the requirements of a causal link were not necessarily the same in relation to every breach of an international obligation, it would not be prudent or even accurate to use a qualifier. The need for a causal link was usually stated in primary rules. It sufficed to state that the injury should be the consequence of the wrongful act.' Proposed Draft Articles, above n 6, 388.
[23] On 'directness', see for instance UNSC Res 687 (3 April 1991) UN Doc S/RES/687, [16]; on foreseeability, see *Portuguese Colonies (Naulilaa incident)* (1928) 2 RIAA 1011; *Naulilaa Case (Portugal v Germany)* (1949) 2 RIAA 1011, 1031; on 'proximity', see *Administrative Decision No. II* (1923) 7 RIAA 23, 30; on 'remoteness', see *Trail Smelter* (1938, 1941) 3 RIAA 1905, 1931. See also Commentaries to the Articles on State Responsibility, ibid, 93.
[24] Commentaries to the Articles on State Responsibility, ibid, 93. See *The Islamic Republic of Iran v The United States of America* (1998) 34 Iran-USCTR 105.
[25] On causation in domestic law, see HLA Hart and Tony Honoré, *Causation in the Law* (2nd edn, Oxford University Press 1985).

> The single question typically confronted by the courts: 'Was this harm (*Y*) the consequence of this act or omission (*X*)?' is divided into two questions. *First*: 'Would *Y* have occurred if *X* had not occurred?' *Second*: 'Is there any principle which precludes the treatment of *Y* as a consequence of *X* for legal purposes?'[26]

Although Hart and Honoré discuss causation in the context of domestic law, their theoretical approach to the question of causal connection is relevant to an international discourse that consistently refers to domestic approaches. International tribunals have frequently used the language of tort law in discussing the chain of circumstances connecting actions with consequences.[27] The International Law Commission's commentaries to the Articles on State Responsibility on the issue of causation make several references to domestic and comparative law.[28] Further, commentators often draw from the well-developed jurisprudence of causation in national courts in discussing causation in the determination of international damages.[29] Therefore, it is appropriate to include commentaries and decisions concerning causation in domestic law in the analysis of its place in international law, and its application to the case of historical enslavement.

The division of factual and legal causation explains the approach of judicial bodies to the causal inquiry with greater clarity, yet does not represent a paradigm shift from approaches blurring the boundaries between the two questions. Throughout the history of both domestic and international decisions, the question of causation has been approached both as a bipartite test (involving the separation of factual and legal causation) and as a single interrogation. Roman Law, for instance, treated causation not by the duality of separate factual and legal tests, but took a more holistic, common-sense based approach.[30] Despite the recognition of the dual test in international law, international jurisprudence often approaches causation as a single question, or undertakes the same considerations under both headings.[31]

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[26] Ibid, 110.
[27] The reference to *aquilan* liability in *Chorzów Factory*, for instance, is a direct link to Roman domestic law deriving from the Roman *Lex Aquila - The Factory at Chorzów (Germany v Poland)* (Decision on Indemnity) [1928] PCIJ Series A No 17. See also *Naulilaa Case,* above n 23.
[28] Commentaries to the Articles on State Responsibility, above n 22, 92-93.
[29] See for instance, Plakokefalos, above n 19; Stern, above n 7, 563; Straus, above n 19.
[30] Zimmermann, above n 14, 991. Although initially considered only circumstances in which the damage was a direct result of the wrongful act with no intervening events, causal relationships in Roman law developed to encompass situations in which damage was indirectly caused by the conduct in question - Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press 1962), 219.
[31] Plakakefalos highlights the tendency of international adjudicatory bodies to conflate the two tests despite the theoretical recognition of bifurcation in international law, above n 19, 475.

Thus, under either approach, the investigation involves consideration of both factual and legal causation, as questions of policy are always engaged in the determination of what relationships are to be considered sufficiently related to the wrongdoing to justify an obligation to remedy.

6.2. Causation in fact

Consideration of causation in fact entails a number of judgements as to the necessity and/or sufficiency of the action in bringing about the relevant consequences. This inquiry distinguishes causes from conditions, attaching additional value to certain conditions contributing to an outcome to characterise them as causative factors.[32] Causal relationships can be complex regardless of the length of time that has passed since the identified act of wrongdoing. The actions of the perpetrator interact with a milieu of other circumstances, and often the conduct of third parties; multiple factors combine to produce particular outcomes.[33] Judges in a range of cases, both domestic and international, are nonetheless required to make sense of these intricate questions of fact. Thus, although the passage of time might enable the contribution or intervention of other factors, these ought to be considered on their terms rather than presuming that time alone has frustrated claims.[34]

Although the question of causation in fact is often articulated as the 'but for' test, or as a question of conditions *sine qua non,* this approach is not sufficient to capture the full spectrum of causal relationships relevant to international law. The equivocal sentiment expressed by the International Law Commission in relation to the explanation of causal relationships, that it is inappropriate or impossible to provide a single formula to describe causation in all cases, reflects the division of theories of causation into multiple forms. [35]

The equivalence theory of causation queries whether the conduct amounting to the breach was necessary for the production of the damage in question, while the adequacy theory questions whether the probability of the damage sustained was increased by the breach.[36] Even within the equivalence

[32] Castellanos-Jankiewicz, above n 7, 4. See also Hart and Honoré's summary of Birkmeyer's efficiency theory – above n 25, 438-442.
[33] See, for instance, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 64; *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 244; *The Zafiro case* (1925) 6 RIAA 160.
[34] The impact of time on reparations claims is further considered in Chapter 3.
[35] Proposed Draft Articles, above n 6, 388.
[36] See Castellanos-Jankiewicz, above n 7, 4.

theory, multiple forms of causation can be found, forming three primary subsets:

1. The conduct amounting to the breach is necessary for the production of the outcomes in question (*condition sine qua non* or 'but-for' causation);

2. The conduct amounting to the breach forms a necessary element of a set of conditions sufficient to bring about the outcomes in question (necessary element of a sufficient set); or

3. The conduct amounting to the breach forms a substantial factor in, or contributes to, the production of the outcomes in question – this approach may be more relevant in situations of interventions and contributions by third-parties, or in cases in which multiple factors related to different parties cause the relevant damage.[37]

In considering the role of historical enslavement in contributing to harms suffered by contemporary claimants, it is necessary in each proposed case to assess the specific harms identified as causally connected to the wrongdoing. Different combinations of pre-existing circumstances and intervening factors are likely to exist in the different contexts in which a claim might be formulated. For the purposes of the present evaluation, it is sufficient to note that many of the legacies of enslavement that continue to impact upon the lives of people of African descent, considered in chapter 1, satisfy the three tests of causation identified above. Although susceptible to the quagmire of counterfactual reasoning, the conditions of people in the African diaspora fully meet the requirements of 'but for' causation – mass forced migration of people from the African continent to the Americas is a *conditio sine qua non* of the suffering of their diasporic descendants.[38]

Because enslavement did not occur in a vacuum but in an environment of extensive abuses committed against African and indigenous peoples, it may be impossible to classify it as the singular cause of identified suffering. Harms resulted both from enslavement and from other abuses, with the result that they may not satisfy the 'but for' test. Yet, independently, both of these forms of abuse would constitute sufficient causes of the identified

[37] See Castellanos-Jankiewicz, ibid; Hart and Honoré, above n 25, 26-129; Antony M Honoré, 'Causation and Remoteness of Damage' in A Tunc (ed), *International Encyclopedia of Comparative Law,* (Mohr 1983); J L Mackie, *The Cement of the Universe: A Study of Causation* (Clarendon Press 1980).

[38] The exception to this conclusion being those people of African descent whose ancestors voluntarily migrated to the diaspora.

harms. Therefore, enslavement may be considered to satisfy the 'necessary element of a sufficient set' test, wherein wrongdoing is identified as sufficient to result in the identified harms alone, although alternate actions committed by third parties also occurred and may themselves have been sufficient to cause the identified damage, or which otherwise contributed to the harms.[39] The characterisation of factual causation as manifesting in different ways accounts for additional causes beyond the wrongdoing in question, allowing wrongdoing be a necessary element of a jointly sufficient set, rather than independently sufficient.[40] To some degree, this blurs the line between the second and third identified forms of causation.[41]

Transatlantic chattel enslavement played a significant role in the inculcation of white supremacy globally and within the boundaries of nation States through their various iterations.[42] The racialisation and subsequent denigration of people of African descent justified, and was justified by, chattel enslavement in a self-affirming cycle. Although early accounts of the African continent and African peoples (predating mass enslavement) already engaged in the rhetoric of racialisation, the mechanisms of mass transatlantic enslavement were a substantial factor in the globalisation and entrenchment of racial discrimination as it manifests today, likely meeting the requirements of the third causal test.[43] Because the systematic enslavement and dehumanisation of Africans and people of African descent constituted a substantial factor in the development and inculcation of racism, which continues to manifest in contemporary harms to new generations, the

[39] R W Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1987-1988) 73 *Iowa Law Review* 1001, 1018.
[40] Intervening causes, which may interfere with this causal relationship are considered further in Section 4 below.
[41] Hart and Honoré, for instance, prioritise sufficiency over necessity – above n 25.
[42] See Chapter 1, Section 5.
[43] For a discussion of racialisation in early travel narratives of Africa see Katrina Dyonne Thompson, 'The Script: "Africa Was But a Blank Canvas for Europe's Imagination' in Katrina Dyonne Thompson, *Ring Shout, Wheel About* (University of Illinois Publishing 2014), 13. See also Peter Mancall (ed), *Travel Narratives from the Age of Discovery* (Oxford University Press 2006). Although it is not within the ambit of his Chapter to explore the expansive literature discussing the contributions of the system of transatlantic chattel enslavement to present racial discrimination, the continuity of racism in different environments ought to be acknowledged. See generally Douglas Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (Icon Books 2012); Hilary Beckles, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (University of West Indies Press 2013); Maria Suzette Fernandes Dias, *Legacies of Slavery: Comparative Perspectives* (Cambridge Scholars Publishing 2007); Maurits S Hassankhan, Lomarsh Roopnarine, Cheryl White and Radica Mahuse (eds), *Legacy of Slavery and Indentured Labour: Historical and Contemporary Issues in Suriname and the Caribbean* (Routledge 2016); Rebecca Shumway and Trevor Getz (eds), *Slavery and Its Legacy in Ghana and the Diaspora* (Bloomsbury Academic 2017); William Link and James Broomall (eds), *Rethinking American Emancipation: Legacies of Slavery and the Quest for Black Freedom* (Cambridge University Press 2015).

transatlantic system could be characterised as a factual cause of these harms in line with the third abovementioned form of causation.[44]

These examples are illustrative rather than prescriptive, indicating the plausibility of factual causal connections being established between historical enslavement and contemporary harms. For the purposes of the present analysis, considering reparations claims on the whole and not in their specificities, it is sufficient to identify the plausibility of the recognition of an identifiable, extant causal chain from historical enslavement to contemporary suffering of the descendants of enslaved persons and people of African descent. However, this does not necessarily support a finding of causation in law, which operates to narrow the scope of liability based on factual causation through the application of limiting principles.

6.3. Causation in law

Having distinguished between conditions and causes through necessity, sufficiency, or contribution, the potential consequences that may be causally connected to a particular act may still be immense. In *Aloboetoe v Suriname,* the Inter-American Court of Human Rights articulated the problem of scope in determining legal redress, noting that every human act produces diverse and ever more imperceptible consequences.[45] Thus, the Court determined:

> To compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely impossible, since that action caused effects that multiplied to a degree that cannot be measured.[46]

Hart and Honoré go so far as to frame potential consequences of wrongdoing as an '*embarrass de choix* of literally cosmic proportions' to which law must apply limiting principles, entailing some degree of arbitrariness in distinguishing between reparable and non-reparable consequences.[47] International law therefore recognises that the duty to provide redress for

[44] This formulation is based on adequacy theory, and may be constructed in a variety of ways. Von Kries required that the contingency in question be a *sine qua non* of the harm and have increased the probability of the harm by a significant amount; Traeger required an increase in objective probability of harm accounting for circumstances which a perceptive observer would have noticed at the time and those which the wrongdoer actually did know; and Tarnowski focused on consequences the probability of which was knowingly increased by the wrongdoer (thus differentiating between causes and conditions). See Hart and Honoré, above n 25, 469-473.
[45] *Aloeboetoe and ors v Suriname,* (Reparations and costs) Inter-American Court of Human Rights Series C No 15 (10 September 1993), [48].
[46] Ibid.
[47] Hart and Honoré, above n 25, 110.

wrongful conduct is not infinite, but limited by the consideration of factors such as proximity, foreseeability, and remoteness.[48] This limitation is based upon a fundamental concern of legal equity: a distinction between those consequences a wrongdoer *ought* to bear the burden of, and those they should not.[49]

Rules are not only formulated in an abstract, normative setting but often comprehend the kinds of harm they are designed to protect against, and remedy.[50] Conversely, the purpose and terms of the rule in question might also indicate the harms intended to be outside the scope of the obligation. The nature of the breach itself, including the level of intentionality, may also impact on what consequences are determined to be sufficiently proximate or foreseeable.[51] In relation to transatlantic enslavement, this inquiry must be situated in the ambiguous legal territory of the fifteenth to nineteenth centuries, acknowledging the changing understanding of enslavement's position in positive international law, and countervailing considerations of its place in naturalist frameworks.

Ultimately, the tests of the sufficiency of the causal connection in question, foreseeability, and proximity are descriptive rather than instructive. Further attempts to elaborate on the substance of the inquiry, for instance the observation that the 'injury must flow from the wrongful conduct as a matter of course and in natural sequence', likewise offer limited additional support for a determination on the facts.[52] Absent a comprehensive framework of legal rules and guidance, it is the nature of the circumstances at hand that are determinative.

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[48] Sabahi narrows the issue of legal causation down to foreseeability or remoteness (with proximity being identified as the inverse of the latter). Borzu Sabahi, 'A Concise History of the Law of State Responsibility and Reparation in International Law' in Borzu Sabahi, *Compensation and Restitution in Investor-State Aribitation: Principles and Practice* (Oxford University Press 2011) 7, 19.

[49] Honoré suggests that all theories concerning causation incorporates consideration of equity as well as necessity, explanation, probability, and the norm in question, above n 37.

[50] Hart and Honoré favour consideration of the purpose of the rule, arguing that 'very often consideration of the purpose of a legal rule will show that certain kinds of harm alleged to have been caused by a breach of the rule are altogether outside its scope, since it is obvious that the rule is not concerned to give protection against that sort of harm.' Above n 25, 109.

[51] Brownlie recognised the significance of both the relationship between the primary rule and the determination of the question of legal causation, and the circumstances of the breach, stating that 'The particular context of a breach of duty, i.e. the nature of the duty itself and the mode of breach, may determine the approach to the question of damages.' Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003), 447. The International Law Commission articulates this point in the commentary to the Articles on State Responsibility by suggesting that the deliberateness of causing harm, and the intended scope of the rule are relevant to considerations of legal causation, above n 22, 93.

[52] Castellanos-Jankiewicz, above n 7, 46.

In considering directness in the causal relationship the contribution of alternative causes is crucial. Harms may be severed from the conduct attributed to the responsible State through the intervention of third parties.[53] In other words, causation may be altered, superseded, or suspended in ways that impact on the liability of the original wrongdoer for subsequent consequences. In instances of historical wrongdoing, the period of time during which external factors have the opportunity to intervene is extended, often resulting in in a more complex causal chain. It is this state of affairs that led Jeremy Waldron to conclude that historical injustices will often be superseded as time passes.[54]

The degradation of the causal chain connecting contemporary individual suffering with historical enslavement makes determining the degree to which the wrongdoing may be considered causative problematic. On this micro level, many other factors can be seen to directly contribute to the harms, including conscious actions of third parties. Thus, finding a sufficiently strong relationship between historical enslavement and the present suffering of individual people of African descent, and in particular the descendants of enslaved people, to satisfy the legal test is difficult. Yet, despite the increased probability of supersession in the case of historical abuses, the rupture of the causal chain should not be presumed. In cases of massive and widespread injustices, the greater level of abuse may result in a more robust chain because of the degree to which future outcomes are impacted by the wrongdoing. Thus, severe breaches may make a stronger case for continuing causation given the degree to which they are associated with harmful consequences. Moreover, wrongdoing need not be the only causative factor contributing to harm in order to found liability.

The responsibility of States to make reparation does not require sole causation; international law allows for situations in which multiple actors contribute to an injury, at which point the State in question may remain liable for the damage in whole or in part.[55] International jurisprudence is ambiguous on when a State might be held liable for the entirety of conduct to which another State or other third party contributed. For instance, in *Corfu Channel,* the International Court of Justice found Albania liable for the

[53] The Articles on State Responsibility allow some parts of the injury pleaded to be severed in causal terms from the conduct attributed to the State. Deliberateness of causing harm, and the intended scope of the rule are relevant to considerations of legal causation. Commentaries to the Articles on State Responsibility, above n 22, 93.
[54] Jeremy Waldron, 'Redressing Historic Injustice' 52 *University of Toronto Law Journal* 135 2002; Jeremy Waldron, 'Superseding Historic Injustices' 103 *Ethics* 4 (1992).
[55] See above n 33.

entirety of the damage caused to British vessels by mines in the Corfu Channel between Albania and Greece. This despite the fact that the Court did not find that Albania had laid the mines, and in fact suggested that Albania did not have the capacity for such, thus providing for the responsibility of Albania despite the fact that a third party substantially caused the damage.[56]

Despite the determination in *Corfu Channel,* the Articles on State Responsibility recognise the possibility of some part of the injuries caused being severable from the responsibility of the State, suggesting the State is responsible 'for all the consequences, not being too remote, of its wrongful conduct' unless 'some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State'.[57] The provision for responsibility for aiding, assisting, directing, controlling and coercing breaches by third States entails a division of liability for the consequences of such breaches, including recognising the dual responsibility of States in such circumstances.[58] It is therefore possible for alternative causative factors to contribute to the injury without breaking the chain of causation between the conduct of the State in question and identified harms. This is significant in the context of widespread historical injustices, for it allows the recognition of causation in relation to a proportion of contemporary harms, acknowledging interventions and contributions of external factors without completely dismantling the connection between historical wrongdoing and contemporary harms.

6.4. The harms of historical enslavement

The Declaration of the Durban Conference concluded by recognising the contemporary impacts of transatlantic chattel enslavement and colonialism:

> …historical injustices have undeniably contributed to poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, particularly in developing countries.[59]

[56] *Corfu Channel Case,* above n 33. Likewise, in *Case Concerning United States Diplomatic and Consular Staff in Tehran,* above n 33, Iran was held responsible for damage primarily related to the conduct of militant students, who were not agents of the State, on the basis of its failure to protect the embassy.
[57] Commentaries to the Articles on State Responsibility, above n 22, 93.
[58] Articles on State Responsibility, above n 3, Chapter IV.
[59] United Nations, *Durban Declaration and Plan of Action, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence* (8 September 2001), endorsed by UNGA Res 56/266 (15 May 2002).

Yet, despite this recognition, teasing out the causal relationship between the transatlantic system of chattel enslavement and contemporary harms is mired with difficulty. Relevant contemporary harms are not merely a result of discrete historical injustices, but a continuous history of racialised systems of discrimination and oppression. Across the African diaspora, similar evolution of abuses can be seen 'ex-slave States', whose histories of racial discrimination and institutionalised disadvantage occupy the nexus of a plethora of different factors, constituted by both deliberative actions and environmental conditions.[60] Racialised social relations and structures of power, as well as the economic systems put in place to enable enslavement, serve as the foundation for a continuum of interrelated harms and abuses. Thus, the entrenchment of plantation economies overly reliant on single commodities, early systems of prison labour and convict leasing, segregation, lynching, 'red-lining', intergenerational trauma, wealth disparities, education and health issues, and other forms of racial discrimination that continue to manifest in old and new forms, are characterised as the strange fruit of the transatlantic system.[61]

Consistent with the requirements of the causal inquiry in international law considered above, in considering historical injustices associated with transatlantic enslavement it is necessary to define the exact wrongs to which responsibility attaches, the parties allegedly suffering harms, and the nature of that harm before causation may be engaged. Although this requires consideration on the facts, some general observations may be made, based on predominant ways of framing reparations claims. These different formulations raise different issues in establishing an unbroken chain of causation, based on whether harms are characterised as individual or collective, and whether standing relies on contemporary suffering or the inheritance of historical entitlements.

Inheritance-based claims present little challenge in establishing causation; enslaved people themselves suffered a range of direct harms connected to their enslavement.[62] The difficulty of such claims lies in connecting historical harm to enslaved persons to those alive today through a contemporary right to inheritance. While the transmission of judicial damages through awards

[60] See for instance Beckles; Hassankhan, Roopnarine, White and Mahuse (eds); Shumway and Getz (eds) – above n 43.
[61] See Blackmon; Link and Broomall (eds); Fernandes Dias - above n 43. See further Chapter 1, Section 6.
[62] For an inheritance-based argument for reparations, see Stephen Kershnar, 'Are the Descendants of Slaves Owed Compensation for Slavery?' (1999) 16 *Journal of Applied Philosophy* 95.

to the victims' estate is possible, courts may distinguish between the different kinds of damages that may be transmitted.[63] For instance, while the Inter-American Court of Human Rights permits the automatic transmission of a deceased or disappeared victims' entitlement, the European Court exercises discretion over whether nonpecuniary damages are transmitted, only finding in favour of succession where such is necessary to advance 'the cause of justice'.[64] This might, in turn, infuse international judicial approaches to the consideration of suffering that may be the subject of reparations orders, despite this being mediated through the State as recipient. Further, this case law only considers whether entitlements can be passed through one level of succession—specifically to the spouses and children of direct victims—leaving the question of how far entitlements might be transmitted unresolved. Bernard Boxill's presumption that enslaved persons would have conferred their rights to ownership over the products of their labour to their descendants cannot stand unquestioned *ad infinitum.*[65]

Individualised harms, in the alternative, may be premised on contemporary suffering causally connected to ancestry or systems of racial oppression connected to chattel enslavement.[66] They might also be related to the denial of intergenerational wealth, a claim connected to inheritance but not based upon the passing down of an entitlement as in the case of claims relating to historical suffering.[67] A growing body of literature supports the existence of intergenerational trauma – psychological suffering transmitted from parent to child through multiple generations. Increases in depressive and anxiety disorders found amongst survivors of the Jewish holocaust, for instance, can

[63] Both the Inter-American Court of Human Rights and the European Court of Human Rights have granted awards for breaches committed against a person who was deceased at the time of the ruling to the estate of the victim – the victim's entitlement is thereby transmitted to their heirs by succession. In *Keenan,* for instance, the European Court of Human Rights awarded £7000 in damages for suffering associated with the breach of the right to be free from inhuman and degrading treatment to the estate of the victim who had committed suicide in custody – *The Case of Keenan v The United Kingdom* (Merits and Just Satsifaction) App No 27229/95 (ECtHR 4 March 2001). In the *Aloeboetoe Case,* the Inter-American Court recognised the transmission of entitlements through succession – above n 45, [54]. See also *Godínez Cruz Case* (Compensatory Damages) IACHR Series C No 8 (21 July 1989), [51-53]; *Case of Velásquez Rodríguez v Honduras* (Compensatory Damages), IACHR Series C No 7 (21 July 1989), [56-58].

[64] *Aloeboetoe and ors v Suriname,* above n 45, [54]. In the European Court, pecuniary damages are automatically passed on to the victim's successors, while nonpecuniary damages are presumed to be personal to the victim unless transmitting to successors is necessary to advance the cause of justice. Montserrat Enrich Mas, 'Right to Compensation under Article 50' in Ronald St J Macdonald, Franz Matscher, and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 775, 782.

[65] Bernard Boxill, 'Morality of Reparation' (1972) 1 *Social Theory and Practice* 113, 120.

[66] See J Angelo Corlett, *Heirs of Oppression* (Rowman & Littlefield 2010), 163-165.

[67] For analysis of the impact of slavery and racial discrimination on intergenerational wealth, see Darrell Gaskin, Alvin Headen Jr, and Shelley White-Means, 'Racial Disparities in Health and Wealth: The Effects of Slavery and Past Discrimination' (2005) 32 *The Review of Black Political Economy* 95.

result in damage to the coping strategies and an increase in such disorders amongst children of survivors. This can impact on the structure and mental health of families across generations.[68] In the context of Northern Ireland, research recognises that the transgenerational effect of conflict can manifest in the form economic hardship, psychological impact, and impact carer responsibilities for parents and grandparents of direct victims.[69] Moreover, the structures of transatlantic enslavement often relied upon the fracturing of family relationships, fundamentally changing the family dynamics of people of African descent in the diaspora.[70]

Intervening factors and issues of attenuation may be less persuasive with regard to collective claims to reparations, for suffering operates on a systemic level rather than concerning discrete instances of racial injustice perpetrated by a multiplicity of different actors. In this case, unlike in relation to individual harms, collective identity must first be established, and subsequently contemporary harms suffered by that collective causally connected to historical injustices committed against that same collective.[71] In the initial interrogation finding and defining collective identity, victimisation itself can operate as a collectivising force.[72]

While injury alone may be insufficient to create a collective, the notion of common bonds between victims and the destruction of common identity may distinguish between those victim groups that may be collectivised, and those that may not.[73] Thus, the racialised nature of the *maangamizi* – manifested in 'Black Codes', presumptions of slave status, segregation laws, anti-miscegenation laws, lack of capacity to testify in a court of law, lack of judicial protection, and a slew of other race-based distinctions constructed not only within the social consciousness, but within the law – reinforces the

[68] Pierre Fossion, Christophe Leys, Caroline Vandeleur, Chantal Kempenaers, Stéphanie Braun, Paul Verbanck and Paul Linkowski, 'Transgenerational transmission of trauma in families of Holocaust survivors: The consequences of extreme family functioning on resilience, Sense of Coherence, anxiety and depression' (2015) 171 *Journal Of Affective Disorders* 48.
[69] Emily Fitzgerald, Mark Given, Maighread Gough, Linzi Kelso, Victoria McIlwaine and Chloe Miskelly, 'The Transgenerational Impact of "The Troubles" in Northern Ireland' (Queen's University Belfast School of Psychology 2017) <www.qub.ac.uk/schools/psy/files/Filetoupload,784073,en.pdf> accessed 08 May 2018; WAVE Trauma Centre, 'Transgenerational Trauma and Dealing with the Past in Northern Ireland' (March 2014) <www.wavetraumacentre.org.uk/uploads/pdf/1404220890--100105-WAVE-transgen-report.pdf> accessed 08 May 2018.
[70] See for instance Wilma A Dunaway, *The African-American Family in Slavery and Emancipation* (Cambridge University Press 2003).
[71] See, for instance, Diana Contreras-Garduño and Sebastiaan Rombouts, 'Collective Reparations for Indigenous Communities before the Inter-American Court of Human Rights' (2011) 27 *Utrecht Journal of International and European Law* 4.
[72] See Mari Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323, 376
[73] Friedrich Rosenfeld, 'Collective Reparations for Victims of Armed Conflict' (2010) 92 *International Review of the Red Cross* 731, 743.

notion of people of African descent as a legally definable collective for the purpose of constructing reparations.[74]

Despite the broad, racialised collective harms imposed upon people of African descent by the system of transatlantic enslavement, formulations of collective remedies are often disparaged for clashing with traditional, individualistic rights theory.[75] However, they are increasingly finding a place in international law to recognise the harms committed against victim communities, particularly indigenous communities. The rise of collective remedies in the Inter-American Court of Human Rights and the International Criminal Court serve as testament to the increasing recognition of the complexity of harms associated with wrongdoing, particularly when considering widespread abuses.[76] Such reparations may be awarded in response to collective harms, even where the wrongdoing does not constitute a breach of specifically collective rights; the cultural bonds or collective experience of victims, as opposed to the specific right breached, may itself justify collective awards.[77]

Claims concerning collective victimisation and harm may weather the storm of history more intact than individualised claims, for the collective entity may continue in existence from the time of enslavement to the present. In this way, collective victims are analogous to the State, moral harm to which may be easier to establish where continuity or succession is found. Furthermore, the possibility of awarding responsive reparations packages tailored to the case at hand including community-based and symbolic measures mitigates the difficulties associated with recognising collective harms. In relation to both individualised and collective contemporary claims, the possibility for reparations awards specifically targeted towards multi-faceted and often symbolic harms, in conjunction with the recognition that causation may be

[74] Magee highlights the fact that people of African descent in the Unites States were marginalised from the legal system both on the terms of legal texts and in practice, noting that 'With rare and less than satisfying exceptions, eighteenth century African-Americans found the legal system essentially closed to them. Enslaved Blacks generally were denied jury trials; often they were punished differently for crimes, based on their race; they were not permitted to testify against a white defendant; and free Blacks were permitted to offer evidence against whites in only one state, Louisiana.' Rhonda Magee, 'The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse' (1993) 79 *Virginia Law Review* 863, 892.
[75] Ibid, 907.
[76] Under Rule 97(1) of the International Criminal Court's Rules of Procedure and Evidence, the Court may award reparations on a collective basis where it deems appropriate. International Criminal Court, 'Rules of Procedure and Evidence' (2000) UN Doc PCNICC/2000/1/Add.1. The Inter-American Court of Human Rights has granted collective reparations in a range of cases, particularly in relation to indigenous communities – see Contreras-Garduño and Rombouts, above n 71.
[77] See, for instance, *Case of the Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACHR Series C No 124 (15 June 2005).

established in relation to only a proportion of the contemporary injuries, may expand possibilities for recognition of causation.

In considering the strength of chains of causation over time, the distinction between different categories of harm and different modalities of redress considered in chapter 5 substantially impact analysis. Moral damage under Article 31(b) of the Articles on State Responsibility was conceived not only to respond to immaterial harms to victims but also to the legal injury suffered by States by virtue of the breach of international obligations owed to them.[78] Thus, even where establishing a sufficient causal link between historical wrongdoing and contemporary material suffering is impossible or unlikely, the same conclusion need not automatically be reached for the moral implications of the abuses in question. It is possible to conclude that claims in relation to material damage have attenuated over time to such a degree the legal connection between wrongful conduct with present harms has broken, yet still find the connection to continuing moral harms sufficiently direct and proximate. This is true both of the moral harms suffered by the State, and those experienced by individual and collective victims. Thus, the multiple modalities of reparations considered in chapter 5 can influence not only the construction of responsive reparations, but the consideration of causation.

6.6. The drawback of discretion in causation

Despite the possibility of framing arguments for contemporary redress within the confines of existing international legal frameworks, any attempt to achieve redress faces substantial barriers in obtaining judicial support. Because issues of causation in law are determined at the discretion of judges in the circumstances of the case, an international environment hostile to reparations claims is likely to influence the practical outcomes of any attempt to litigate historical enslavement, as well as legal reasoning in commentaries considering the claims.[79] Causation in law necessarily involves questions of legal policy that judges are expected to resolve – yet the basis on which these decisions are made in the corpus of international jurisprudence remains ambiguous.[80] Thus, the determinations of legal policy required by

[78] Proposed Draft Articles, above n 6, 388. See also Stern, above n 7, 569.
[79] The fact that 'slippery slope arguments' are commonly premised on a continuum fallacy has done little to deter the propensity of commentators to situate them at the core of reparations denials in relation to a range of historical injustices.
[80] See Plakokefalos, above n 19, 473; Straus, above n 19, 894; Castellanos-Jankiewicz, above n 7, 16.

these considerations represent a 'value-laden inquiry', the product of 'cultural as well as intellectual developments'.[81]

The scant domestic jurisprudence on the matter does not provide a promising foundation for the preservation of the causal chain in relation to historical enslavement. *In Re African-American Slave Descendants,* a case that attempted to hold private companies liable for their role in North American enslavement, the Court declared that the plaintiffs could not 'establish a personal injury sufficient to confer standing by merely alleging some genealogical relationship to African-Americans held in slavery over one-hundred, two-hundred, or three-hundred years ago.'[82] This argument not only dismisses the inheritance-based claim in this case, but, in declaring that the plaintiffs 'cannot' establish relevant injury, denies the possibility of such a claim in any case on the subject. The appellate court, upholding this determination, suggested that the causal chain was too long and had too many 'weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation.'[83]

In the decision at first instance, causation served as a question of standing and operated as a bar to judicial consideration in the first instance – a circumstance not translatable to the same questions in international law given the previously discussed positioning of causation on this level, yet indicative of a judicial approach to causation that might be mirrored in considering the consequences of wrongful conduct.[84] In the latter determination, the court indicated not only that the causal chain had been fatally weakened in the case, but also that the intervening factors contributing to harms were so extensive as to make a determination of measures of redress for slavery inappropriate or impossible.[85] This interrogation fits within the parameters of the causal inquiry in international law, and thus may shape the approach taken by international judicial bodies on the issue.

Although *In Re African-American Slave Descendants* is a domestic case, brought against private corporations, operating on a specific set of facts, and in a particular national environment, it provides insight into the way

[81] Martha Chamallas, 'Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument' (1994) 63 *Fordham Law Review* 73, 74.
[82] *In Re African-American Slave Descendants Litigation* (2005) 375 F Supp 2d 721 (ND Ill).
[83] *In Re African-American Slave Descendants Litigation* (2006) 471 F Supp 3d 754 (7th Circ).
[84] Above n 82.
[85] Above n 83.

judges may approach the question of causation for widespread historical injustices. The limited tapestry of cases in which judges have had to engage with historical enslavement indicates that a conservative approach to all questions of justiciability and causation is likely to prevail.[86] Further, international jurisprudence involving the determination of nonpecuniary reparations, and the prevailing commentary concerning the justiciability of historical injustices in international law, indicate a propensity for fidelity to classical understandings of the extent of causal relationships.[87] Yet, to suggest that past judicial choices determining what circumstances break the causal connection between wrongdoing and its consequences are immutable, is to entrench past understandings of the relationships between actions and reactions.

Antecedent interpretations of reality and legality are not inherently perspicacious, and in fact often replicate the dynamics of power of an international legal system premised on inequality. New and alternative understandings of what constitutes injury caused by the breach ought to be possible, for there is no objectively discernible distinction between those injuries caused in fact, and those that are reparable as a question of law. The latter half of the bifurcated causal inquiry involves the consideration of legal policy, and not the application of a clear legal framework. The causal chain is a metaphor, not a material reality, and is thus determined by the interpretation of judges in the context of specific cases.

The inclusion of the intended scope of the primary obligation as a factor in the determination of legal causation significantly impacts on the nature of the assessment undertaken, requiring that decisions in the case account for the range of possible cases which might be allowed in light of the ruling. Inherent in this understanding, is the assumption that not only are conceptions of appropriate remedies determined by the category of injuries, but the formulation of reparable injuries itself is constituted by some notion of what ought to be redressed. Marc Galanter suggests that the first part of

[86] American courts have been similarly conservative in other cases on the question. In *Johnson v McAdoo*, the court concluded that the United States government was the only appropriate defendant in a case brought by formerly enslaved persons seeking an equitable lien on funds drawn from cotton taxes held by the United States Treasury, and thus that the suit was barred on the basis of sovereign immunity – *Johnson v McAdoo* 45 App. D. C. 440 (1916). In *Cato v United States* the claim against the United States government was similarly barred on the basis of both sovereign immunity and statute of limitations grounds – *Cato v United States* (1995) 70 F 3d 1103 (9th Cir).

[87] On awards of satisfaction in international law, see Chapter 5, Section 1.

this proposition – that the determination of appropriate remedies is a reflection of a system of values – is widely accepted:

> We recognize that remedies are cultural constructs: it is not a natural given that an injury is adequately erased or cancelled or balanced by revenge, payment, condemnation, or apology. What satisfies our sense of an appropriate and adequate remedy clearly depends on the cultural presuppositions that we bring to the question.[88]

However, Galanter also suggests that injury and remedy both constitute 'moving frontiers' that change over time with the changing capabilities and sensibilities of human society.[89] Thus, injury too is a social construct often determined by those in a position to influence legal frameworks, with the result being that 'injuries affecting the powerful are exaggerated while those affecting the marginalized are downplayed'.[90] Wenger therefore suggests that the claim for reparations for transatlantic enslavement is rendered impossible by the legal system, for the system itself was constructed to protect the interests of those against whom the claim must be brought.[91] In Wenger's words: 'the blind spots line up with the power gaps'.[92]

Recognition of the 'moving frontiers' of injury and remedy in the legal system nonetheless provides the potential for the 'master's tools' to dismantle the 'master's house'. As the capabilities and sensibilities of the international community change, it is possible they could accommodate an understanding of injury maintaining the causal chain between transatlantic enslavement and its contemporary legacies. Advocating consideration of the legal claim to reparations for historical enslavement may require modification of the existing, dominant legal understanding of causation in order to allow for reparations claims, to account for new statistical methods of connecting cause and effect, to recognise the possibility of collective suffering, or to acknowledge more remote harms.[93] This need not involve a change to the

[88] Marc Galanter, 'The Dialectic of Injury and Remedy' (2010) 44 *Loyola Los Angeles Law Review* 1, 2.
[89] Ibid, 3-6.
[90] Mary Anne Francks, 'Injury Inequality' in Anne Bloom (ed) *Injury and Injustice* (Cambridge University Press 2018) 231.
[91] Kaimipono David Wenger, 'The Unconscionable Impossibility of Reparations for Slavery; Or, Why the Master's Mules will Never Dismantle the Master's House' in Anne Bloom (ed) *Injury and Injustice* (Cambridge University Press 2018).
[92] Ibid, 9.
[93] See for instance Matsuda, above n 72; Kaimipono David Wenger, 'Causation and Attenuation in the Slavery Reparations Debate' (2006) 40 *University of San Francisco Law Review* 279.

relevant legal frameworks, but merely a reconsideration of causation in light of new understandings of the relationships between actions and outcomes.

Yet, possibility and probability are not synonymous, and the likelihood of such occurring is questionable – particularly if domestic judicial responses to legal claims are taken as an indicator of international reception.[94] What then is the value of determining that the harms of historical slavery are potentially classifiable as causally relevant injury in the legal context?

The value of a finding of the international wrongfulness of transatlantic enslavement and associated brutality, and the recognition of causal connections between this injustice and contemporary suffering, are not premised on the capacity of States to invoke responsibility, or on particular reparatory obligations accruing. The characterisation of conduct as wrongful has value in itself. The probability that Courts will not find in favour of the survival of a sufficient causal chain linking historical injustices to contemporary suffering, does not entirely obviate the value of the recognition that legal arguments are possible, and perhaps plausible. Recognising the contested nature of causation, and thus the definition of reparable legal injury, acknowledges both the existing biases of the legal system and the ways in which this has assisted, or been complicit in, the injustices in question. Given the significance of recognition and cognitive justice within the framework of reparatory justice, even this small step ought to be valued.

Further, it is not only within judicial mechanisms that legal reasoning and the construction of causally connected suffering holds sway. Such conclusions may have social or political value beyond the confines of international legal thinking. As Wenger identifies:

> Because remedy and injury are mutually constitutive, people will to some extent define injury backward from the existence of a legal remedy. Under that definition, an injury is something that the legal system addresses. Thus, if there is no legal harm, then there was no foul to begin with…When a society decides that an injury really needs to be compensated, it will generally find a way to provide restitution…

[94] See for instance *Cato v United States* and the *In Re African-American Slave Descendants* litigation. *Cato v United States*, above n 86; *In Re African-American Slave Descendants Litigation*, above n 82.

> Ultimately, then, society makes policy choices about that exactly is too big to remedy.[95]

Identifying a relationship between historical injustice and contemporary suffering consistent with, or at least not contradicting, legal frameworks of causation, may change prevailing presumptions concerning historical enslavement, and provide a lever for extra-legal action. Ultimately, the conceptualisation of harms as causally connected, reparable consequences may open a door for States to make the political choice that such injuries ought to be remedied. The capacity for multi-modal and symbolic awards responding to a broader range of harms expands the possibilities in recognising causal connections between past and present. While time may influence the construction of causal relationships, this should not be presumed, 'quibbles about contingencies' should not outweigh the demands of justice, and the lived experiences of those suffering should be placed at the centre of consideration.[96]

[95] Kaimipono David Wenger, '"Too Big to Remedy?": Rethinking Mass Restitution for Slavery and Jim Crow' (2010) 44 *Loyola Los Angeles Law Review* 177.
[96] Janna Thompson, 'Historical Injustice and Reparations: Justifying Claims of Descendants' in Ronald Salzberger and Mary Turck, *Reparations for Slavery: A Reader* (Rowman & Littlefield 2004), 248.

CHAPTER 7: INTERNATIONAL LAW IN TRANSITION

Moving beyond the borders of legality and illegality

In some instances, injustices demanding redress fall outside the judicial paradigm, necessitating a more tailored approach that marries legal and moral justice with the peculiarities of the situation at hand. The instability of the legal territory governing the claim to reparations for historical enslavement, the priorities embedded in the construction of international law, and the limitations of judicial mechanisms, indicate that a positive legal conclusion on the matter may be unlikely in the foreseeable future. Yet, simultaneously, impetus to reckon with past injustices continues to take hold. Private institutions are increasingly interrogating their histories to expose connections to enslavement, including undertaking reparatory measures.[1] A growing number of churches have begun to engage with their connections to the transatlantic system.[2] A range of political bodies, at all levels, have grappled with, and apologised for, their role in transatlantic enslavement.[3] Further, the rise in memorialisation and commemoration marks the upturn in attempts to reckon with past injustices, and signals the demand for reparative action.[4] Thus, taking no action to deal with the past is becoming increasingly unpalatable, regardless of whether formalistic legal mechanisms accommodate claims.

In shifting beyond the boundaries of legality, transitional reparatory practices provide a framework for the consideration of processes that may not be legally required, but for which there is a strong moral imperative. If

[1] Universities in particular are engaging in this process, setting up centres and institutes for the study of their histories, making the connections to enslavement public, and adopting some forms of redress, and targeting the issues of race and inequality that are the legacies of enslavement. The Universities Studying Slavery Consortium, currently involving 46 member institutions, is a testament to the rise in this movement – 'Universities Studying Slavery' (*University of Virginia*) <slavery.virginia.edu/universities-studying-slavery/> accessed 17 November 2018.

[2] For instance, the Church of England in 2006 voted to apologise for its involvement in the transatlantic system – 'Church Apologises for Slave Trade' (*BBC News* 8 February 2006) <news.bbc.co.uk/1/hi/uk/4694896.stm> accessed 17 November 2018.

[3] See generally Mark Gibney, Rhoda Howard-Hassmann, Jean-Marc Coicaud, and Niklaus Steiner (eds), *The Age of Apology: Facing up to the Past* (University of Pennsylvania Press 2008).

[4] See, for instance, Alice Bellagamba, Sandra Greene and Martin Klein (eds), *African Slaves: African Masters: Politics, Memory, Social Life* (Africa World Press 2017); Ana Lucia Araujo (ed), *Politics of Memory: Making Slavery Visible in the Public Space* (Routledge 2012); Ana Lucia Araujo, *Public Memory of Slavery: Victims and Perpetrators in the South Atlantic* (Cambria Press 2010); Elisa Bordin and Anna Saachi (eds), *Transatlantic Memories of Slavery: Reimagining the Past, Changing the Future* (Cambria Press 2015); Katie Donington, Ryan Hanley and Jessica Moody (eds), *Britain's History and Memory of Transatlantic Slavery: Local Nuances of a 'National Sin'* (Liverpool University Press 2016).

the historical nature of wrongdoing presents a barrier to reparatory justice, experiences of transition may provide valuable guidance for the moral imperative to redress. If the scale of abuse makes repair incomprehensible, the practice of past processes engaging with widespread abuse may supply a roadmap for some degree of reconciliation. If the ambiguous legal grounding of the wrongdoing stymies attempts to achieve justice, States may follow in the footsteps of transitional reparatory justice to acknowledge the suffering of victims in a meaningful way.

Although transitional justice contains no strict legal requirements and imposes no legal obligations on States responding to serious abuses of rights, it nonetheless offers guidance for a theory of reparatory justice. A desire to learn from past reparations practice, and the outcomes these have precipitated, demands consideration of transitional justice, for it is in this context that the majority of large-scale reparations processes have taken place, and it is through this lens they are most frequently considered. Therefore, this chapter considers the contribution the practice of redress in transition makes to the broader theory of reparatory justice articulated in chapter 4. It situates the claim to reparations for historical enslavement within the context of the *maangamizi*, recognising the centrality of enslavement in the development of modern international law, and the impact of this upon the legitimacy of the international legal system. Thus, the international legal system itself is framed as transitional.

7.1. Framing transitional justice

Transitional justice is a field of study largely shaped by the context in which it takes place – seeking to uncover the particular requirements of justice arising in situations of transition.[5] Despite this reliance on conditions to shape the discipline, the exact meaning of transition has been problematised since its inception; the limitations and horizons of what qualifies as transitional have always been elusive and contested.[6] While paradigmatic transition moves from violent conflict towards peace and democracy, the

[5] See generally Ruti Teitel, *Transitional Justice* (revised edn, Oxford University Press 2002); Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, 'Justice Discourses in Transition' (2004) 13(3) *Social and Legal Studies* 305; International Center for Transitional Justice, 'What is Transitional Justice?' (International Center for Transitional Justice 2017) <www.ictj.org/about/transitional-justice> accessed 28 September 2017.
[6] See Bronwyn Leebaw, 'The Irreconcilable Goals of Transitional Justice,' (2008) 30(1) *Human Rights Quarterly* 101.

relationship between conflict and resolution is fluid and changes over time, a dynamic increasingly recognised in transitional justice scholarship.[7]

In perhaps the first comprehensive formulation of transitional justice, Neil Fritz in 1995 articulated a conception of justice targeted towards States that had ousted brutal, repressive regimes and subsequently had to cope with the legacies of their predecessors' abuse.[8] The context and primary objective of transitional justice at this time were defined in the subtitle of his three-volume series: emerging democracies reckoning with former regimes. This conception of transition represents the paradigm against which other scenarios are assessed; establishing sufficient similarity assures the application of transitional justice theories, while deviating too far from the prototypical case leads to the conclusion that a situation can no longer be considered transitional.

Despite this initially narrow scope, the development of the field demonstrated increasing recognition of the fluid boundaries of transitional justice, adaptation over time, and less selective application of transitional justice theories.[9] In 2003, Ruti Teitel characterised transitional justice as 'the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.'[10] *Prima facie,* Teitel requires the same kind of regime change demanded by Fritz, however it is the notion of radical political transformation, rather than replacement, which serves as the threshold for Teitel's transition - transformation from conflict, authoritarian rule, or significant State repression, in a 'liberalising direction'.[11] This formulation allows for the application of still evolving theories in a wider range of circumstances.

Echoing Teitel's broader definition, UN Secretary General Kofi Anaan in 2004 asserted the United Nations' normative conception of transitional justice as:

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[7] On paradigmatic transition, see Bell, Campbell, and Ní Aoláin, above n 5, 310. See also Neil Fritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (US Institute of Peace Press 1995). On evolution, see James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10 *International Journal of Transitional Justice* 332; Stephen Winter, 'Towards a Unified Theory of Transitional Justice' (2013) 7(2) *International Journal of Transitional Justice* 224; Fionnuala Ní Aoláin and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies' (2005) 27 *Human Rights Quarterly* 172.
[8] Fritz, ibid, Volume 1.
[9] Bell, Campbell, and Ní Aoláin, above n 5, 310.
[10] Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69.
[11] Ruti Teitel, *Transitional Justice*, above n 5.

> …the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[12]

Like an echo, this understanding of transition is a somewhat altered representation of the prevailing understandings of the time, incorporating the objectives of accountability, justice, and reconciliation (with stability and democracy unarticulated but presumed). Anaan's scale argument finds further elaboration in the observations of Pablo de Greiff, current UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, although de Greiff ties this to the extent of change underway, rather than the scale of abuses. Like Teitel, de Greiff relies on the idea of a shift in the liberal or democratising direction but eschews prescription in relation to prior context. Thus, de Greiff's transition is not premised upon a shift from conflict or authoritarianism; a significant shift in a liberalising or democratising direction may itself constitute transition.[13]

Basing theories on a normative shift rather than on specificities of the prior regime allows for the expansion of transitional justice into previously excluded territory, namely the application of transitional justice in so-called settled democracies.[14] Such reasoning displaces the notion that established democracies are sites of 'non-transition', and acknowledges the possibility of radical normative and political metanoia in the legitimating regime of democratic States.[15] An over-focus on paradigmatic transitions overlooks the potential for grave abuses in situations where liberal democratic norms and accountability mechanisms are established.[16] Stephen Winter thus contends that transitional justice frameworks ought to be applied in such circumstances, as 'grievous wrongdoing by a state burdens its legitimacy' and 'transitional justice works to resolve that burden', regardless of whether the wrongdoing culminates in or necessitates complete transformation of systems of government.[17] This expansion remains consistent with the

[12] UNSC, 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) UN Doc S/2004/616, [8].
[13] Pablo de Greiff, 'A Normative Conception of Transitional Justice,' (2010) 50(3) *Politorbis* 17.
[14] King and Page, for instance, apply transitional justice theory to the consideration of Black reparations in the American domestic context – Desmond King and Jennifer Page, 'Towards Transitional Justice? Black Reparations and the End of Mass Incarceration' (2018) 41 *Ethnic and Racial Studies* 739. See also above n 7: Gallen; Winter; Ní Aoláin and Campbell.
[15] Winter, above n 7.
[16] Patricia Lundy and Mark McGovern, 'The Role of Community in Participatory Transitional Justice' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing 2008), 101.
[17] Winter, above n 7, 226.

fundamental drive of transitional justice, for, despite varying definitions, 'all view transitional justice as the attempt to deal with past violence in societies undergoing or attempting some form of political transition.'[18]

Although the application of transitional justice in settled States may deviate from the paradigm, it nonetheless relies on the same kind of transformation both Teitel and de Greiff's formulations highlight: 'a normative shift in the principles underlying and legitimating the exercise of state power'.[19] The end goal in both contexts is stable democracy, while the starting point is a State recovering from past violence.[20] Yet, despite this parity, conflicted democracies (as Ní Aoláin and Campbell title these atypical transitional States) may pose additional challenges to those advocating reparations and other transitional measures. The international human rights system may have 'blind spots' (or at least a greater margin of appreciation) for violations occurring in established democracies, the appearance of the rule of law may mask the extent of State dysfunction, and legal and political institutions may be better able to resist reform or responsibility because of their democratic credentials.[21] Although these realities may decrease impetus for the enactment of transitional measures, they also underscore the necessity of such. Where accountability mechanisms suffer from system malfunction, democratic principles are severely undermined, and the need for transitional reparatory justice becomes more acute.

The expansion of transitional justice beyond the original paradigm, and the development of an organising principle based upon a shift towards more stable and democratic governance, not only allows for its application in settled democracies, it also allows for a wider chronology of transition. A State might uncontroversially be characterised as transitional for a matter of years while reckoning with the atrocities of a civil war or significant internal conflict, but what about States decades or even centuries removed from the primary atrocities giving rise to the potential transitional period? Given that transition is not defined by a specific set of events or contexts, but rather by the scale of abuses and the nature of necessary transformation, time alone is insufficient to satisfy the requirements of transition. Scholars advocate and accept the relevance of transitional justice

[18] Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field' (2009) 3 *International Journal of Transitional Justice* 5, 7.
[19] Ruti Teitel, *Transitional Justice*, above n 5, 213.
[20] Ní Aoláin and Campbell, above n 7, 174; Bell, above n 18, 7.
[21] Fionnuala Ni Aoláin, 'The Emergence of Diversity: Differences in Human Rights Jurisprudence' (1995) 19 *Fordham International Law Journal* 101; Ní Aoláin and Campbell, above n 7, 176 and 189.

discourse in considering historical abuses—including, in particular, the claims of indigenous peoples for wrongful appropriation of land, genocide, and other harms associated with settler colonialism.[22] Where the legacies of these injustices persist, and failures in recognition and accountability continue to fuel instability and undermine democracy, transition remains a *prima facie* imperative.[23]

The expansion of the boundaries of transitional justice both in terms of scope and time, and the permeability of definitional borders, make it vulnerable to the criticism that there is no meaningful distinction between transitional justice and ordinary justice.[24] Eric Posner and Adrian Vermuele suggest that the so-called 'dilemmas of transitional justice', conceived in this broader sense, are in fact, simple, more extreme manifestations of the quandaries of all criminal justice systems, and thus that transitional justice does not have a distinct identity.[25] However, ideas of scale and a particular kind of transformation nonetheless provide a meaningful basis for differentiation. The nature, objectives, and characteristics of reparations in transition deviate from the standard legal frameworks, in part because they serve a broader range of functions not required in situations of non-transition, and in part because they do so within a particular climate of large-scale abuse and atrocity. If responsiveness is truly a central feature of transitional justice then it would be imprudent to overlook the significance of the context in shaping transitional justice.[26]

This narrative of transition, based on the specific context, encompassing a range of different circumstances, and premised on the presumption that mass atrocities demand a particular kind of transformation, speaks to the case for reparations for transatlantic enslavement in two key ways. First, it provides an alternative framework for achieving justice internally, where

[22] See Rosemary Nagy, 'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission' (2013) 7 *International Journal of Transitional Justice* 52; Jeff Corntassel and Cindy Holder, 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala and Peru' (2008) 9 *Human Rights Review* 465.
[23] For transitional reparations programmes enabling claims across multiple generations, see for instance, the Czech Republic, Brazil, and Argentina, enabling reparations awards up to fourth kin. Law on Extrajudicial Rehabilitation (Large Restitution Law) 1991 (Czech and Slovak Federal Republic); Ignacio Cano and Patrícia Salvão Ferreira, 'The Reparations Program in Brazil' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006), 114; José María Guembe, 'Economic Reparations for Grave Human Rights Violations: The Argentinean Experience' in de Greiff (ed), 36.
[24] Eric Posner and Adrian Vermuele, 'Transitional Justice as Ordinary Justice' (2004) 117 *Harvard Law Review* 761.
[25] Ibid.
[26] On the centrality of responsiveness in transitional justice, see de Greiff (ed), *The Handbook of Reparations,* above n 23; Pamina Firchow and Roger Mac Ginty, 'Reparations and Peacebuilding: Issues and Controversies' (2013) 14(3) *Human Rights Review* 231, 235.

victim communities seek justice against the States in which they live. The application of transitional justice in 'settled' democracies that nonetheless have histories of enslavement within their borders follows the pathways explored by Winter, Ní Aoláin, and Campbell.[27] Second, the expanded chronology of transition enables consideration of a broader range of historical cases.[28] Beyond this relatively established application of transitional justice within States, this understanding of the transitional imperative also supports a more novel approach.

For centuries, the international legal system systematically excluded African and indigenous peoples, supporting and legitimising the imposition of enslavement, exploitation, and colonisation.[29] European colonial and enslaver States wrought significant violence against those deemed 'uncivilised', marginalising them from an international system that purported to encompass all of humanity. Although a gradual process of emancipation, decolonisation, and representation developed in the twentieth century, this did not substantially break from the past or reckon with injustices as transition demands.[30] Substantial attempts to reckon with this history have remained, for the most part, marginal. Thus, theories designed to grapple with officially mandated injustices on a large scale may be applied on the global level, for analogous injustice. In other words, the international legal system as a whole, may be characterised as transitional. For this reason, the following analysis takes both individual States, and the international community as a whole, as transitional units of measurement, and the reparations frameworks provided may be applied at both the national and international level.

7.2. The nature of reparatory justice in transition

Reparations are one constituent element of a broader selection of reforms associated with transitional justice processes, which operate in both directions, and are now recognised as a normative part of transitional justice.[31] Reparations in international law strike a balance between the

[27] Above n 7.
[28] Above n 22.
[29] See Chapter 2.
[30] On the need for a break from the past, see Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge University Press 2011).
[31] Luke Moffett, 'Reparations for Guilty Victims: Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms' (2016) 10 *International Journal of Transitional Justice* 146, 166. See also Rama Mani, 'Reparations as a Component of Transitional Justice: Pursuing "Reparative Justice" in the Aftermath of Violent Conflict' in Koen De Feyter, Stephan Parmentier,

significance of retrospective and prospective objectives. With the predominance of the corrective paradigm, retrospectivity and the return to equality are favoured over transformation.[32] Private law achieves a similar equilibrium, ruled by principles of restitution, rather than foregrounding future relations. Transitional justice, on the other hand, tips the scales towards prospectivity by centring, and in many cases prioritising, the achievement of peace and democracy over corrective justice.[33] Dealing with the past in transition thus consists of two dimensions: undoing the past, and accounting for the past.[34]

The efficacy of transitional justice processes is measured by their ability to serve the multiple interests of transition, interests that go beyond corrective justice to achieve broader peace, democracy, reconciliation, and transformation. Affirming this broader social and political function, de Greiff suggests, 'transitional justice measures work—to the extent that they do—only in virtue of their capacity for norm-affirmation.'[35] Like other mechanisms adopted in the transitional context, reparations are employed to serve the transitional agenda. That is, reparations are undertaken and constructed to assist in establishing or improving democracy and ensuring a stable, peaceful State. Thus, the very objectives of reparations are altered by their implantation in transitional justice contexts. Pamina Firchow and Roger Mac Ginty evidence this shift by framing the goals of effective reparations as providing structural and restorative elements to 'facilitate the process of reconciliation and the consolidation of peace', as well as being important in terms of direct impact upon victims – goals not inherent to reparations as a broader category of redress measures, but fundamental to the transitional project.[36]

In early transitional justice processes, consideration of reparations was overshadowed by discussions of amnesty and reconciliation. The South African case is a paradigm example of reparations following on the heels of

Marc Bossuyt, and Paul Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005), 79.

[32] See Chapter 4.

[33] De Greiff highlights the importance of contributing to the 'reconstitution or the constitution of a new political community' through measures designed to remedy past violations and prevent future victimisation. Pablo de Greiff, 'Justice and Reparations' in de Greiff (ed), *The Handbook of Reparations,* above n 23, 454. Teitel likewise highlights the 'multiple purposes' of transitional reparatory practices, labelling them 'backward-looking, in repairing victims of past state wrongdoing, but also forward-looking, in advancing the purposes of peace and reconciliation in the transition.' Ruti Teitel, *Transitional Justice,* above n 5, 127.

[34] See Bell, Campbell, and Ní Aoláin, above n 5, 314.

[35] de Greiff, 'A Normative Conception', above n 13, 22.

[36] Firchow and Mac Ginty, above n 26, 234. This further displaces Posner and Vermuele's critique of transitional justice as 'ordinary justice' – above n 24.

alternative processes, manifesting the gradual displacement of the forward-looking approach with a bifurcated perspective acknowledging and addressing the past as well as tending to the future. Excepting the Interim Constitution, none of the documents produced during negotiations, including the new democratic constitution, made even passing reference to reparations.[37] It was not until the passing of the Promotion of National Unity and Reconciliation Act creating the Truth and Reconciliation Commission that reparation and rehabilitation were finally recognised as one of three primary concerns.[38] Yet, despite the supposed centrality of these issues, the recommendations of the Committee on Reparations and Rehabilitations submitted in the Truth and Reconciliation Commission's 1998 report were not met by policy until 2003 when the government enacted a reduced version of the Committee's proposal.[39] Reparations were, at this time, coming to the fore as a central measure in situations of democratic transition.[40] Despite the initial prioritisation of truth processes, most victims appearing before the Truth and Reconciliation Commission indicated that money or compensation was their primary need and first priority, with investigations into abuses ranking second.[41] Reparations and rehabilitation, and truth processes alone, were necessary in order to counterbalance amnesties as well as being a prerequisite for reconciliation.[42]

In defining reparations, many authors within the transitional justice field consider only measures of compensation for victims, separate to trials, truth commissions, and other measures that might be adopted in transition.[43] However, bearing in mind the wider definition of reparations espoused in international law discussed in chapter 4, the following analysis favours the formulation of mechanisms offered by Luke Moffett, who identifies courts, truth commissions, reparation programmes, and inter-State procedures, as key reparatory measures in transitional settings.[44] Thus, this chapter considers both the reparations programmes adopted to provide direct

[37] Christopher J Colvin, 'Overview of the Reparations Program in South Africa' in de Greiff (ed), *The Handbook of Reparations,* above n 23.
[38] Promotion of National Unity and Reconciliation Act (No 34 of 1995) (South Africa).
[39] Colvin, above n 37.
[40] See Aurélien Pradier, Maxine Rubin, and Hugo van der Merwe, 'Between Transitional Justice and Politics: Reparations in South Africa' (2018) 25 *South African Journal of International Affairs* 301.
[41] Colvin, above n 37, 191.
[42] Truth and Reconciliation Commission of South Africa, *Final Report* (Vol 5, Truth and Reconciliation Commission 1998), 170.
[43] See for instance de Greiff*, The Handbook,* above n 23; Firchow and Mac Ginty, above n 26, 235.
[44] Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds) *Research Handbook in Transitional Justice* (Edward Elgar Publishing 2017), 35.

benefits to victims of abuses and/or victim communities, and additional measures, to the extent that these alternative processes form an element of reparatory justice.

7.3. The objectives of reparations in transition

The importance of responsiveness in transitional reparations programmes belies the attempt to make sweeping generalisations about the requirements of these measures.[45] It is nonetheless possible to identify a series of objectives that generally shape transitional reparations programmes. These objectives contribute to the broader transitional justice agenda of promoting peace and democracy, serving all three of Rama Mani's 'dimensions of justice in transition'—legal justice, rectificatory justice, and distributive justice—to varying degrees.[46] Yet, as goals in their own right, they are not exclusively concerned with the macro-objectives of transition, but instead build an understanding of reparatory justice in transition that contributes to the broader scheme of transitional justice itself. These objectives mimic international and private legal frameworks in many ways, whilst also diverging in some key areas. Thus, it is not sufficient to conflate such measures with judicial reparatory justice considered in chapter 4.

The following analysis will focus on six primary objectives drawn from transitional justice scholarship dealing with reparations:

(a) Responding to the suffering of victims of specific abuses of rights;

(b) Preventing future marginalisation or abuse of victimised communities;

(c) Disrupting cycles of violence which might transform victims into perpetrators;

(d) Reconciling victims with perpetrators;

(e) Reconciling victims with society at large; and

(f) Sending a message to society as a whole about the new regime.

[45] Richard Falk, 'Reparations, International Law and Global Justice: A New Frontier' in de Greiff, *The Handbook,* above n 23.
[46] On this account, legal justice is concerned with the restoration of the rule of law; rectificatory justice addresses specific abuses committed against individuals; and distributive justice grapples with structural and systematic inequalities. Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Polity Press 2002).

These objectives, though not exhaustive, frame the meaning and function of reparatory justice in transition.

Wendy Orr suggests that the understanding of reparations initially adopted by the Committee on Reparations and Rehabilitations in South Africa was drawn from the common international definitions of reparations, and considered in terms of the '5 R's: redress, restitution, rehabilitation, restoration of dignity, and reassurance of non-recurrence.'[47] Although these objectives are central to the understanding of reparations both in international law and in transition, they fail to fully encapsulate the multi-faceted aims of reparatory justice in transition more generally. This analysis seeks to address not only the victim-centricity of reparations as manifested in the '5 R's', but also their role in relation to perpetrators and society at large, encompassing both their backward and forward facing dimensions. Thus, the following analysis moves from the more traditional reparatory objectives considered in chapter 4 to the transitional, expanding the theory of reparatory justice accordingly.

(a) Responding to wrongful suffering

Despite being shaped by context and divergent objectives, reparations in transitional justice are still fundamentally defined by wrongdoing – that is, the effort to redress specific abuses of rights. The essence of this objective is twofold: firstly, reparations are victim-centric measures targeted towards victims of wrongdoing; and secondly, they respond to harms associated with that wrongdoing.[48] Thus reparations, even in transition, represent an adherence to notions of corrective justice through the separation of victims of specific wrongdoing from those suffering for other reasons. While distributive justice may have a place in a transitioning State, such measures remain severed from those mechanisms tailored towards redress. This is consistent with the place of corrective justice, responsibility, and violation in international legal reparations frameworks.[49] However, reparations programmes in transitional justice are abstracted from the victim-perpetrator relationship that forms the premise of redress in international law in a number of ways. Transitional reparations may therefore be viewed

[47] Wendy Orr, 'Reparations Delayed is Healing Retarded' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (University of Capetown Press 2000), 240-1.
[48] Moffett's definition frames this dual focus in labelling reparations as victim-centred measures targeted towards redressing harms caused to victims of wrongdoing. Luke Moffett, 'Transitional Justice and Reparations', above n 44, 1.
[49] See Chapter 4, Sections 2 and 3.

as existing along a spectrum within which corrective justice bears more or less relevance depending on the context of the abuses. It is the wrongdoing committed against victims, and concomitant suffering, which remains constant, and thus ought to be seen as the more universal reparatory objective in situations of transition.

Although the line between reparations and assistance in transitional justice is often blurred in practice, recognising the distinction is nonetheless crucial to understanding their purposes and functions; this divergence is consistently reaffirmed in scholarship and practice.[50] While the rights-based approach of reparations is often framed as indifferent to suffering and need, this ought to be caveated by recognising that such measures may be indifferent to suffering in an absolute sense, but are responsive to the harms and needs connected to wrongdoing.[51] Moreover, distributive justice programmes providing aid and support on the basis of need are not precluded by the existence of reparations programmes, nor are they undermined by such. Rather, reparations respond to the specific moral dimension and unique status of suffering caused by wrongdoing, as opposed to that resulting from more generalised situational factors.[52]

Although reparations in international law generally demand full and proportionate redress for all violations, reparations programmes in transitional States often define eligibility requirements on the basis of certain abuses of rights, thus providing only partial recognition of wrongdoing and victimisation.[53] In Argentina, the process of instituting, developing, and amending reparations programmes which incrementally addressed different abuses without ever dealing with all violations is indicative of both the nature and flaws of this process. Between 1986 and 2004, eligibility requirements delimiting abuses targeted by reparations, and to whom they were directed, changed at least five times.[54] Each successive expansion improved the comprehensiveness of reparations, but never encompassed the full universe of beneficiaries—a reality not unique to the Argentinean experience. The eligibility limits imposed on transitional mechanisms may undermine its

[50] Peter Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' (2015) 10 *International Journal of Transitional Justice* 88.
[51] Critiquing the rights-based approach, see Emily Camins, 'Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law' (2016) 10 *International Journal of Transitional Justice* 126, 140.
[52] See Dixon, above n 50.
[53] The need for compromise in the scope of reparations, see Sections 4(e) and (f) below.
[54] See Guembe, above n 23, 30.

efficacy with regard to the requirements of reparatory justice. However, the evolution of measures over time demonstrate the capacity of transitional reparations to respond to the context in which redress is sought, and expand to redress lacunae, in ways that judficial mechanisms may not.

Not only is wrong-responsiveness compromised where eligibility is built only upon selected violations, but the corrective justice paradigm is complicated by the transitional context. While some situations may be characterised by the discrete victim-perpetrator relationships traditionally remedied by reparations, more often wrongdoing is complex, responsibility is dispersed, and public/private distinctions begin to collapse. In particular, the extent of State complicity in abuses, and subsequently the degree to which they monopolise reparations processes, can muddy the waters of a clean definition of the relationships that must be corrected. Thus, transitional countries might adopt reparations programmes funded and administered entirely by the State, rather than constructed within a binary victim-perpetrator relationship and administered by courts.[55] In all such cases, the State bears some degree of responsibility for the wrongdoing. However, there may also be individual perpetrators responsible for decisions leading to and enacting the violations.[56] This framework enables redress in a broader range of circumstances involving third party contributions and interventions, and thus may more readily capture cases of widespread historical abuse with greater complexity in the causal chains.

(b) Combating marginalisation

Because transitional justice reparations cover widely varying scenarios, they cannot be defined purely in terms of corrective justice, righting a discrete relationship between victim and perpetrator. Instead, reparations in transition may be targeted towards the victims, to restore their status in a more general sense – that is to return them to a position of equality vis-à-vis society as a whole. As Jaime Malamud-Goti and Lucas Grosman highlight:

[55] South Africa, Chile and Argentina are examples of this practice. See Colvin, above n 37; Elizabeth Lira, 'The Reparations Policy for Human Rights Violations in Chile' in de Greiff (ed), *The Handbook of Reparations,* above n 23; Guembe, above n 23.
[56] On complex violations, see South Africa, Truth and Reconciliation Commission, above n 42, 170. Cf abuses entirely committed by the State in the case of Japanese-American internment – see Eric Yamamoto, *Race, Rights and Reparation: Law and Japanese American Internment* (Wolters Kluwer Law & Business 2013).

> …in the context of a transitional democracy, the specific goal of compensation to victims of human rights abuses is to restore their dignity and to reintegrate them into society as equal citizens.[57]

Restoration of the dignity of victims in this context—characterised by complex and ambiguous abuses—prioritises repairing victims as individuals and citizens over the correction of a binary relationship between victim and perpetrator.

Widespread abuses are not merely the result of a specific set of acts contravening the rights of a group of individuals, nor do they simply manifest the ill intentions of a limited number of perpetrators.[58] Rather, these violations frequently reflect wider prevailing conditions within a State, caused or enabled by structures of marginalisation and exclusion.[59] Although judicial redress may evidence elements of a transformational objective, the prevailing philosophy is one of return—putting victims back in the position that they were in prior to the wrongdoing.[60] With the introduction of peace-building and democracy-building as broader objectives to which reparations contribute within the transitional context, transformation becomes a much more significant aspect of reparatory justice.[61] In this context, reparations may be a vehicle for transformation through the subversion of pre-existing structural inequalities, addressing past injustice and working to prevent repetition through the recognition of victims as human beings and rights-bearers.[62] Thus, transitional reparatory justice may prioritise the symbolic, continuing harms of widespread historical abuses that contribute to structural inequalities in a manner excluded from legal considerations.

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[57] Jaime E Malamud-Goti and Lucas Sebastián Grosman, 'Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies' in de Greiff (ed), *The Handbook of Reparations,* above n 23, 541.

[58] See, for instance, Lauren Marie Balasco, 'Reparative Development: Re-Conceptualising Reparations in Transitional Justice Processes' (2017) 17(1) *Conflict, Security and Development* 1.

[59] Paul Farmer, for instance, frames grave violations of human rights as 'symptoms of deeper pathologies of power and are linked intimately to the social conditions that so often determine who will suffer abuse and who will be shielded from harm.' Paul Farmer, *Pathologies of Power: Health, Human Rights and the New War on the Poor* (University of California Press 2003), 7.

[60] Transformative justice in international legal reparations is considered in Chapter 4, Section 2(c).

[61] See for instance Uprimny Yepes who articulates a transformative reparatory justice process that overcomes the limits of corrective justice by advocating the deepening of democracy through reparations. Rodrigo Uprimny Yepes, *Between Corrective Justice and Distributive Justice: Reparations of Human Rights Violations in Times of Transition* (Utrecht University 2009), 5.

[62] Ruth Rubin-Marín, 'The Gender of Reparations in Transitional Societies' in Ruth Rubin-Marín (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge University Press 2009), 66.

Constructing 'fair, non-discriminatory redress' that responds to victims' experience 'as far as possible' is an important backward-looking dimension of reparations programmes targeted towards ensuring appropriate and proportional responses to abuses.[63] By addressing the marginalisation lying at the root of the atrocities, reparations deal with an important dimension of the abuse itself, and take a more nuanced approach to categorising wrongdoing.[64] This simultaneously reinforces the transformative dimension of reparatory justice, looking forward to prevent atrocity recidivism and ensure stability. Thus combating marginalisation can be seen as both transformative and traditionally reparatory, serving the dual aims of transition by combating the disunity which naturally arises from inequality and marginalisation, and by ensuring the inclusion of previously excluded communities in the society of the State and political processes.

Combating and preventing marginalisation creates the preconditions for civic involvement of citizens, contributing to the consolidation of an inclusive democratic regime.[65] By recognising the *entitlement* to a remedy rather than merely some form of eligibility for support, victims' status as citizens is affirmed, promoting social solidarity and inclusion as features of the new political community.[66] In redressing specific instances of wrongdoing, reparations are framed as rights rather than assistance, thus affirming the equality and dignity of citizens vis-à-vis the rest of society. Moreover, the significance of the majority in power 'standing by' marginalised communities post-atrocity can have reconstructive force, building trust within the political community. Absent reparatory measures, reconstruction in this sense may be hindered, particularly where abuses centre on dehumanisation and denial of citizenship, as in the case of transatlantic enslavement.[67] As de Greiff argues, the political perspective can construct citizenship through social solidarity, civil trust, and recognition.[68]

Despite their capacity for transformation, reparations should not be viewed as the primary vehicle for social transformation nor should this objective drive the construction of reparations programmes. Moffett warns against a preoccupation with transformation when formulating reparations

[63] Ibid, 101.
[64] See UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General' (2004) UN Doc S/2004/616, 8.
[65] Rubin-Marín, above n 62, 66.
[66] Moffett, 'Transitional Justice and Reparations', above n 44, 7.
[67] Reparations advocates stress the continued marginalisation of people of African descent as central to reparations claims. See Chapter 1, Section 6, and Chapter 6, Section 5.
[68] Pablo de Greiff, 'Justice and Reparations', above n 33.

programmes, concluding that systematic reform requires other measures and mechanisms, for instance, educational and employment law reform.[69] To over-state the transformational potential of reparations is to detract from the impetus for broader systemic change beyond the group of victims eligible for reparatory redress. Moreover, it might also degrade the reparatory objective of such programmes, which focus on repairing and recognising victims as 'human beings, whose fundamental rights have been violated.'[70]

The transformational dimension of reparations in transition must be recognised, without treating the two as synonymous. Reparations provide a foundation for distributive justice policies and programmes by mediating the 'repair of victims and communities, past and present', redressing past violence which cannot be entirely severed from broader marginalisation, but which also cannot represent the totality of exclusion.[71] While 'the transformation of social relations' may be a 'central objective of building peace', it should not be considered the guiding aim of reparatory justice processes, even in the context of transition.[72] However, combating forms of marginalisation intimately connected to the abuses, unlike transformation in general, is critical in constructing reparatory justice that grapples with the specific harms of the wrongdoing, and guaranteeing non-recurrence.

(c) Disrupting cycles of violence

Pablo de Greiff connects transformation both to the prevention of future marginalisation and to the advertence of cycles of violence.[73] While combating marginalisation serves to ensure victims are not re-victimised in the future and disrupts patterns of violence recidivism, another cycle of violence can arise whereby past victims become future perpetrators. The often repeated aphorism 'violence begets violence' can become a reality in situations of widespread atrocity and complex conflict; old wounds left untreated may heal in time, but may also fester into new grievances used to justify the continuation or resurgence of violence.[74] Recognition, acknowledgement, and other measures to disrupt the underlying structures

[69] Moffett, 'Transitional Justice and Reparations', above n 44, 9.
[70] CVR Final Report, cited and translated in Lisa Magarrell, 'Reparations for massive or widespread human rights violations: Sorting out claims for reparations and social justice' (2003) 22 *Windsor Yearbook of Access to Justice* 85, 95.
[71] Ruti Teitel, *Transitional Justice,* above n 5, 119-120.
[72] Andries Odendaal, 'An Architecture for Building Peace at the Local Level: A Comparative Study of Local Peace Committees' (United Nations Development Programme 2010), 4.
[73] Pablo de Greiff, 'Articulating the Links between Transitional Justice and Development: Justice and Social Integration' in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009) 29.
[74] Moffett, 'Reparations for Guilty Victims', above n 31, 167.

that contributed to the violence are crucial in the attempt to interrupt cycles of violence, whereas continued polarisation sparks disunity and increases the risk of future conflict.[75] As measures capable of combating marginalisation, prioritising recognition and acknowledgement, reparations may serve, in part, to disturb these processes of violent retaliation.

(d) Reconciling victims and perpetrators

Particularly in situations where victims and perpetrators remain living in close proximity, interpersonal reconciliation for victims and their families is often vital to transition.[76] Without reconciliation, communities are far more likely to revert to situations of abuse, conflict, and instability. However, without some form of reparatory or restitutionary justice, efforts targeted towards reconciliation, including truth commissions and apologies in particular, are unlikely to be successful.[77] Andrew Rigby labels such measures, offered alone, 'cheap reconciliation' wherein the victim is expected to reconcile with their losses without the foundations of a sustainable settlement between the parties.[78] Reparations, on the other hand, enrich reconciliatory activities, ensuring that suffering and victimisation are not only recognised but redressed.

Forgiveness processes alone may perpetuate existing power imbalances that led or contributed to violence, as it is often the State that determines whether such measures are adopted and on what terms.[79] Kanien'kehaka scholar Taiaiake Alfred highlights the potential for these mechanisms to overwrite a history of unaddressed wrongdoing in relation to indigenous peoples:

> The logic of reconciliation as justice is clear: without massive restitution, including land, financial transfers and other forms of assistance to compensate for past harms and continuing injustices committed against our peoples, reconciliation would permanently enshrine colonial injustices and is itself a further injustice.[80]

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[75] Work Group of the International Work Group on Death, Dying and Bereavement, 'Breaking Cycles of Violence' (2005) 29 *Death Studies* 585.
[76] See, for instance the example of Rwanda, Daniel Bar-Tal, Lily Chernyak-Hai, Noa Schori, and Ayelet Gundar, 'A Sense of Self-Perceived Collective Victimhood in Intractable Conflicts' (2009) 91(874) *International Review of the Red Cross* 229.
[77] See Moffett, 'Reparations for Guilty Victims', above n 31, 166
[78] Andrew Rigby, *Justice and Reconciliation: After the Violence(Lynne Rienbner Publishers 2001)* 142.
[79] Mark Gibney and Erik Roxstrom, 'The Status of State Apologies,' (2001) 23 *Human Rights Quarterly* 911, 935.
[80] Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Broadview Press Ltd 2005), 152.

Where truth and apology mechanisms are set up to neutralise historical abuses, they not only neglect an opportunity to transform relationships between victims, perpetrators, and society, but also fail victims by detracting from the impetus for other responses.[81] Thus the restoration of the dignity of victims, and reaffirmation of their status as rights-bearers, may require a more complex understanding of the form of 'citizenship' that ought to be advanced by reparatory measures, founded on procedural justice principles.[82]

A positive process of collaborative reparations-building is required in order to ensure reconciliation. Engagement with victims in reparations processes is vital to ensure conflicts of meaning and representation do not replace original divides.[83] Failures of acknowledgement and a lack of responsiveness to victim and survivor perspectives in particular may substantially hinder reconciliation. Where States fail to meaningfully engage with victims, and construct reparations in such a way as to legitimise or sanitise abuses, victims are unlikely to accept them as measures of justice, and a foundation for moving forward. With regard to the *Madres de Plaza de Mayo* in Argentina, and surviving victims of Japanese sexual enslavement during World War II, such failures precipitated the rejection of reparations by victims and survivors.[84] Although it is important that reparations are not premised on reconciliation, they can be a prerequisite to it. In this way, legitimate grievances are dealt with, closing off potential avenues for future conflict and providing for more peaceful coexistence of victims and perpetrators.

(e) Reconciling victims and society

In transitional contexts, the broader objectives of peace, stability, and the inculcation of democracy require reconciliation not only within the direct victim-perpetrator relationship, but also between victims as persecuted groups, and society as a whole. This is evidenced in 'ex-slave States', wherein racial tensions continue to fuel social and cultural conflicts. Reparations can assist in serving this largely political function by reaffirming the dignity and equal status of victims vis-à-vis mainstream society,

[81] See Corntassel and Holder, above n 22.
[82] On procedural justice, see Chapter 4, Section 3(c).
[83] Colvin, above n 37, 208.
[84] Claire Moon, '"Who'll Pay Reparations on My Soul?" Compensation, Social Control and Social Suffering' (2012) 21(2) *Social and Legal Studies* 187, 194; Mariko Izumi, 'Asian-Japanese: State Apology, National *Ethos*, and the "Comfort Women" Reparations Debate in Japan' (2011) 62(5) *Communication Studies* 473.

recognising their suffering as deserving of response, and rebuilding the civic trust of victims.[85] The division and marginalisation of victims severs them not only from perpetrators, but from wider society, particularly where official actors have been complicit in the abuses, turned a blind eye, or perpetuated the conditions leading to the violations. Symbolic reparations in particular can have a 'constitutive effect on improving community relations' and affirm broader human rights values.[86]

The signalling functions of reparations programmes are central to their general acceptance within victim communities and society at large. Poorly designed and implemented reparations have the potential to increase conflict within victimised communities, thereby fuelling further antagonism between victims and the State administering the programmes.[87] However, creating comprehensive and complete reparations programmes that cover, so far as possible, the 'whole universe of potential beneficiaries' and the whole range of relevant crime offsets the potential for such conflicts.[88] Ensuring public education programmes and a consistently fair narrative of the atrocities and responses to them, as well as increased engagement of society might further interrupt tensions between victim and non-victim communities.

(f) Sending a message to society at large

An important element of transitional justice is the ability to draw a line between past and future—to signal a break between prior wrongs and present values, without denying the past.[89] Reparations may send such messages about the new regime by recognising the accountability of the State for antecedent failures, performing 'the acts and rituals associated with the legal system of the liberal state', and rectifying the 'derogation from equal protection under the law'.[90] Thus, reparations may simultaneously sever the new regime from its predecessor, whilst also creating legal continuity in recognising rights and obligations which arose in the past. The

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[85] Lisa Magarrell, above n 70, 91.
[86] Kris Brown, 'Commemoration as Symbolic Reparation: New Narratives or Spaces of Conflict' (2013) 14(3) *Human Rights Review* 273.
[87] See, for instance, the tensions fuelled by urgent interim reparations in South Africa – Anna Crawford Pinnerup, 'An Assessment of the Impact of Urgent Interim Reparations' in Brandon Hamber and Tlhoki Mofokeng (eds), *From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence in South Africa* (Centre for the Study of Violence and Reconciliation 2000), 2.
[88] De Greiff identifies 'completeness' and comprehensiveness' as two challenges, or ways of assessing, reparations programmes. Pablo de Greiff, 'Repairing the Past: Compensation for Victims of Human Rights Violations' in de Greiff (ed), *The Handbook of Reparations,* above n 23.
[89] Leebaw, above n 30.
[90] Ruti Teitel, *Transitional Justice,* above n 5, 134.

re-establishment of the rule of law is a central feature of transition, and must be accomplished in a myriad of ways, including structural and institutional reform.[91] Reparations signal the effective rehabilitation of the system through the practical application of justice. Reparations might also, however, challenge the attempt to create social harmony and entrench divisions by separating victim populations and perpetrators from the rest of society.[92] Careful negotiation of conflicts and the education of society are therefore crucial to ensuring the efficacy of reparations.

Signalling functions operate not only internally, within the transitional State, but also externally in its international relations. The notion of 'moral deficit' has weight at both of these levels, and in many cases the satisfaction of reparatory requirements is seen as necessary in order to 'recover' the morality of the nation. For instance, in the newly created Federal Republic of Germany, reparations were a way to demonstrate atonement to the international community and secure entrance into the international community.[93] Regaining this international credibility was vital to Germany's recovery from the atrocities committed in the eyes of the concert of nations.[94] Likewise, the potential for international condemnation is often recognised as an important causal factor in the establishment of a law on reparations in Brazil.[95] Nation-building, both domestically and globally, is often a central element of transition. Reparations in this context can help to address the moral shortfall of abuses, signalling to citizens and other States that the past has not only been recovered from, but redressed.

7.4. The elements of reparatory justice in transition

The ways in which reparations programmes achieve the above mentioned objectives involve valuing certain ideas within transitional processes, focusing on particular values, and featuring certain traits. Thus, the

[91] See Agnes Hurwitz and Reyko Huang (eds), *Civil War and the Rule of Law: Security, Development, Human Rights* (Lynne Rienner Publishers 2008); Catherine Turner, 'Delivering Lasting Peace, Democracy and Human Rights in Transition: The Role of International Law' (2008) 22 *International Journal of Transitional Justice* 126; Charles Call (ed), *Constructing Justice and Security After War* (United States Institute of Peace Press 2008); Elizabeth Andersen, 'Transitional Justice and the Rule of Law: Lessons from the Field' (2015) 47 *Csae Western Reserve Journal of International Law* 305.
[92] Rama Mani, 'Rebuilding an Inclusive Political Community after War' (2005) 36(4) *Security Dialogue* 511.
[93] Ariel Colonomos and Andrea Armstrong, 'German Reparations to the Jews after World War II: A Turning Point in the History of Reparations' in de Greiff, *The Handbook of Reparations,* above n 23, 392-3.
[94] Ruti Teitel, *Transitional Justice,* above n 5, 124.
[95] Cano and Salvão Ferreira, above n 23, 112.

elements of reparatory justice in transition may be separated both from the objectives discussed above, and from the elements of redress in international law considered in chapter 4. Six key characteristics of reparations in transition can be identified from both the literature and practice of these processes, namely: victim-centricity; recognition; accountability; responsiveness; political compromise; and practical compromise.

The first three identified elements are encapsulated within the international legal scaffold for reparations discussed in the chapter 4, and in Margaret Urban Walker's understanding of reparations as expressing acknowledgement, affirming responsibility, and rendering just treatment for victims.[96] Transformation and compromise, on the other hand, represent characteristic features of reparations in transition not prioritised within the traditional remedial framework, building instead upon the unique objectives and demands of transition. Optics and acoustics are central to reparatory justice that achieves the objectives discussed above; the impact of reparations programmes is often contingent upon how they are perceived both by victims and by society at large.[97] Thus, the identified elements of reparations in transition prioritise the affective dimensions of practical measures, as well as material relief.

(a) Victim-centric redress

One of the primary features of reparations in transitional justice is a multi-faceted concern with victims – the very notion of reparations in transitional contexts is defined by the centrality of victims in measures of redress.[98] Unlike criminal justice responses or economic and political reforms, reparations are primarily concerned not with the perpetrators of abuse, but with those who suffered from it. As de Greiff frames the dynamic: reparations are an effort on behalf of victims while criminal justice is, in the end, a struggle against perpetrators.[99] Approaches that place victims at the heart of reparatory measures in a meaningful, rather than merely tokenistic, way are crucial in marrying victim-centricity with the objectives of transitional reparatory justice, for which procedural justice is fundamental.

[96] Margaret Urban Walker, *What is Reparative Justice?* (Marquette University Press 2010), 19.
[97] Firchow and Mac Ginty, above n 26, 233.
[98] Moffett, 'Transitional Justice and Reparations', above n 44, 1. See also UN Commission on Human Rights, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by Mr Theo van Boven, Special Rapporteur' (UN Doc E/CN.4/Sub.2/1993/8 1993), paras 133 and 137.
[99] de Greiff, 'Repairing the Past', above n 88, 2.

As Mckay advises, it 'is not simply a question of whether any remedy or outcome is produced, but whether that remedy or outcome is the right one for the victim.'[100] By engaging victims in decision-making processes, official actors affirm their status and identity as actors and subjects rather than as objects that are acted upon, conveying public acknowledgement of suffering and adding to the symbolism attached to reparations.[101]

To realise victim-centricity, reparations must be conceived both in terms of processes and outcomes; victims should be enabled to assist in determinations of eligibility, apportionment of awards, and forms measures ought to take to be responsive to harms and needs.[102] The inclusion of victims in the processes through which redress is determined and delivered can improve the efficacy and efficiency of chosen programmes, as well as bearing psychological significance.[103] The views and concerns of victims, directly engaged, can impact the substantive outcomes of reparations increasing their capacity to understand and respond to the specific needs of victims taken in context.[104] Conversely, the effectiveness of reparations mechanisms and their ability to achieve the desired outcomes can be undermined when they fail to meaningfully engage victims in decision-making and negotiation.[105] Although it is often impossible to satisfy the needs and wishes of all victims in all situations, meaningful measures ensuring procedural justice can assist both in ensuring the best possible programmes are implemented in the interests of victims, and that victims might accept the justice of the process, even where they dispute the substantive outcomes.[106]

In order to ensure the full participation and inclusion of victims in reparations processes, outreach, support and education programmes are essential.

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[100] Fiona McKay, 'What Outcomes for Victims?' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013), 922.
[101] Brandon Hamber, 'The Dilemmas of Reparations: In Search of a Process-Driven Approach' in K. De Feyter, S. Parmnetier, M. Bossuyt and P. Lemmens (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 135, 141.
[102] Moffett, 'Transitional Justice and Reparations', above n 44, 34. The Brazilian Special Commission, protecting representation of the relatives of the victims, provides an example of such practice, wherein procedural justice measures had tangible impacts on reparatory processes. See Cano and Salvão Ferreira, above n 23, 114-118.
[103] See Edgar Lind, and Tom R Tyler, *The Social Psychology of Procedural Justice* (Springer 1988), 31-34.
[104] See Lind and Tyler, above n 103, 31-34.
[105] Carlton Waterhouse, 'The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs' (2009) 31 *University of Pennsylvania Journal of International Law* 257, 258. On the impact of failures in procedural justice in practice, see the disappointment of victims in the *Duch* case before the Extraordinary Chambers in the Courts of Cambodia, and the rejection of reparations by the so-called 'comfort women' - Phuong Pham and others, 'Victim Participation and the Trial of Duch at the Extraordinary Chambers in the Courts of Cambodia' (2011) 3 *Journal of Human Rights Practice* 264; Izumi, above n 84.
[106] See Hamber, above n 101.

Thus, the presence of NGO networks and civil society actors supporting civilians in claiming reparations can be a central feature in victims' capacity to claim reparations and to ameliorate the risks associated with making claims in situations following instability and conflict.[107] Without the operation of these mechanisms, victims might be unable or unwilling to make claims because of lack of knowledge, understanding, or support. As REDRESS highlights in their report on torture survivors:

> …without a fuller understanding of survivors' perceptions and without the necessary support structures in place we are in danger of encouraging people whose lives have been traumatized to exercise rights they are unclear about, through processes that they are not actively involved in and do not understand, which then produce outcomes that do not match their expectations.[108]

Beyond improving the responsiveness of reparations to victims' injuries and needs, procedural involvement of victims in peacebuilding and reparations processes can deepen democratic engagement, assist in transforming social relations, and help to address the structural causes of conflict, constructing a 'peace infrastructure' for the future.[109] By placing victims at the centre of transitional reparatory processes, and ensuring their involvement at all levels of decision-making, participatory reparations can transform the lives of survivors and rebuild their civic identities.[110]

(b) Recognition

Victim-centricity and procedural justice are intimately connected to the recognition of victims, their suffering, and the wrongdoing as central to individual and national recovery from abuses. Recognition can be viewed as a necessary condition for the satisfaction of all six of the above objectives of reparations in transition, affirming acknowledgment of abuses and resultant suffering as a prerequisite for healing, reconciliation, and prevention.[111] Recognition relates not only to the atrocities themselves, but also the status

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[107] Prakesh Adhikari, Wendy Hansen and Kathy Powers, 'The Demand for Reparations: Grievance, Risk, and the Pursuit of Justice in Civil War Settlement' (2012) *Journal of Conflict Resolution* 183.
[108] REDRESS, 'Torture Survivors' Perceptions of Reparation: Preliminary Survey' (*Redress Trust* 2001) <www.redress.org/downloads/publications/TSPR.pdf> accessed 10 October 2017, 9.
[109] Roddy Brett and Lina Malagón, 'Overcoming the Original Sin of the "Original Condition": How Reparations May Contribute to Emancipatory Peacebuilding' (2013) 14(3) *Human Rights Review* 257.
[110] See Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press 2006).
[111] See, for instance, the Chilean draft reparations Bill, defining transitional reparatory justice by recognition - *Diputados* cited in Lira, above n 55, 58.

of victims as citizens and human beings. The dominance of truth commissions in transitional settings marks the weight of recognition as a central value and feature of reparatory justice in transition.[112] As Jonathan Allen highlights, the truth and reconciliation commission 'embodies a commitment to the recognition of the equal dignity of all citizens.'[113] This element also manifests in memorialisation and commemoration measures targeted towards the recognition of victims and their experiences, which are increasingly adopted in both public and private sector.[114]

In practice, truth is sometimes considered more important than accountability or justice, although the two are intertwined.[115] For instance, Alan Terakawa suggests that hearings for Japanese-American survivors of internment during World War II meant more to victims, their families and communities than monetary compensation.[116] Similarly, in South Africa, negotiations focused on creating spaces for storytelling by victims and truth-telling by perpetrators, considering such to be vital to the process of rehabilitation and reconciliation because they offered recognition, psychological healing, and the reparatory opportunity to hear the truth.[117] Nonetheless, the practice of the South African Commission demonstrated that truth alone is insufficient in ensuring recovery and reconciliation.[118]

The official status of truth commissions—having been sanctioned, authorised or empowered by the State—ensures the narrative of the conflict or abuses is given special status and recognition.[119] Such official recognition embodies the difference between 'knowledge and acknowledgement', whereby the official sanctioning of knowledge – making it part of the 'public cognitive scene' – becomes a positive act of affirmation.[120] This recognition is both a feature of, and prerequisite to, reparations, as victims are unable to assert

[112] Truth Commissions have been created in a wide range of transitional situations across the globe. See Priscilla Hayner, 'Truth Commissions: A Schematic Overview' (2006) 88(862) *International Review of the Red Cross* 295.
[113] Jonathan Allen, 'Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission' (1999) 49(3) *University of Toronto Law Journal* 331.
[114] Cheryl Lawther and Luke Moffett, 'Researching Transitional Justice: The Highs, the Lows and the Expansion of the Field' in Cheryl Lawther, Luke Moffet and Dov Jacobs (eds), *Research Handbook in Transitional Justice* (Edward Elgar Publishing 2017) 1, 2.
[115] Lawrence Weschler, 'A Miracle, A Universe: Settling Accounts with Torturers' in Neil Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol 1, United States Institute of Peace Press 1995) 491, 491.
[116] Alan Terakawa, 'Commission Hearings Probe Reparations for Japanese-American WWII Internment' (1981) 67 *American Bar Association Journal* 1439, 1439.
[117] Graeme Simpson and Paul van Zyl, 'South Africa's Truth and Reconciliation Commission' (1995) 585 *Temps Moderne* 394, 398.
[118] See Section 2 above.
[119] Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd edn, Routledge 2011), 14.
[120] Weschler, above n 115, 492.

rights, or claim remedies for breaches, when they are unheard, unseen, or not recognised as rights-bearers.[121] Truth processes provide a platform for the acknowledgement of suffering and wrongdoing, presuming the equal status and dignity of victims, which may serve as the foundation of further redress.

This ensures not only that the perspective of victims is incorporated into the narrative of the conflict, but can also provide for a more unified theory of the abuses.[122] Conversely, the existence of a multiplicity of different versions of events can undermine efforts to repair wrongs and create a stable State; the risk of continuing a 'conflict-about-the-conflict' and thereby failing to recognise the experience of victims is acute in divided societies.[123] For instance, in Northern Ireland, Christine Bell and others critique State narratives as having 'obscured evaluation of the extent to which the state in Northern Ireland was not simply a bystander or referee in the conflict but a participant in it.'[124] Official, but at least partially independent, truth commissions can offset this danger of recognition deficit.

Despite their centrality, truth and apology alone are insufficient to ensure proper recognition and pave the way for reconciliation, stability, and democracy. Symbolic gestures require 'concrete action' if they are 'to be part of a lived relationship.'[125] As the South African Truth and Reconciliation Commission acknowledged in its final report:

> The granting of reparation awards to victims of gross violations of human rights adds value to the 'truth-seeking' phase by:
>
> (a) enabling survivors to experience in a concrete way the state's acknowledgement of wrongs done to victims and survivors, family members, communities and the nation at large;
>
> (b) restoring the survivors' dignity;
>
> (c) affirming the values, interests, aspirations and rights advanced by those who suffered;

[121] Patrick Hayden, 'The Human Right to Health and the Struggle for Recognition' (2012) 38 *Review of International Studies* 569, 576.
[122] Ibid.
[123] Such tension has manifested in the Northern Irish context, and in many ethic and quasi-ethnic conflicts. See John McGarry and Brendan O'Leary, *Explaining Northern Ireland: Broken Images* (Blackwell 1995); Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000); Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 *Modern Law Review* 317. On other ethic or quasi-ethnic context, see Bell, Campbell and Ní Aoláin, above n 5, 316.
[124] Bell, Campbell, and Ní Aoláin, above n 5, 311.
[125] Nagy, above n 22, 59.

(d) raising consciousness about the public's moral responsibility to participate in healing the wounded and facilitating nation-building.[126]

Often it is not the provision of financial reparations itself that is the issue, but the failure on the part of the State to provide them.[127] In other words, a government's persistent refusal to provide any form of material redress in the face of requests or demands for such can undermine their sincerity, and turn monetary payments into a moral indicator of commitment to victims. This is particularly true when money is considered as more than simply a material demand. As Moffett notes, 'money changes the nature of dealing with victimization, connoting material and symbolic messages about the worth and deservingness of, and social solidarity with, the victim.'[128] Thus compensatory or material measures can be just as concerned with recognition of wrongdoing and the associated harms as they are with dealing with material consequences.

While truth processes without concrete action are generally insufficient in satisfying the requirements of both individual and collective recognition, the converse is also true – reparations programmes unaccompanied by 'steps to ascertain the truth about past violations' tend to be counterproductive as they 'may be perceived as an effort to buy victims' silence'.[129] In Chile, beneficiaries emphasised this demand for a holistic approach, declaring their appreciation for the economic reparations provided and received, but demanding 'further recognition for the harms they had suffered, as well as vindication of the dignity and good names of their families. They emphasized that no benefits would appease the need for "justice and truth"'.[130] Truth, without action, is thus conceived as only partial recognition, and therefore insufficient in satisfying the objectives of transitional reparatory justice. In the context of historical injustices, this speaks to the need for action beyond apologies and expressions of regret, not only to combat the continuing marginalisation of victim communities, but to indicate the sincerity of attempts at redress and reconciliation.

(c) Accountability

[126] Truth and Reconciliation Commission, above n 42, 312.
[127] Colvin, above n 37, 206.
[128] Moffett, 'Reparations for Guilty Victims', above n 31, 166.
[129] Lisa Magarrell, *Reparations in Theory and Practice* (International Center for Transitional Justice 2007), 2.
[130] Lira, above n 55, 62.

Although most transitional justice scholars sever accountability mechanisms from consideration of reparations, accountability is an important element of reparatory processes not limited to criminal justice and individual penalties.[131] Through direct apologies and reparations payments, States may be held accountable for abuses even absent criminal prosecution of individual perpetrators. Even where monetary payments are offered and available, failure on the part of the State to recognise responsibility and connect material measures to wrongdoing in this way can undermine reparatory justice.[132] It is not only recognition of suffering that affirms the status of victims, but recognition of wrongdoing, necessitating responsibility be acknowledged or imposed.

Direct accountability mechanisms most frequently take the form of criminal prosecutions, with individual perpetrators being held to account for the abuses in which they participated.[133] International criminal prosecutions and domestic civil actions both possess the capacity to order reparations and damages be paid directly by perpetrators to victims. However, in the consideration of historical cases, criminal responsibility is no longer engaged. Further, while the liability of continuing entities may still be established, this is often complicated by contested legal terrain and issues in establishing causation. State responsibility might alternatively be recognissed through administrative reparations programmes which, though not occurring within the judicial framework, connect official responsibility to various forms of redress. Such programmes rely on political will, but may, nonetheless, provide for a measure of accountability in complex historical cases.

Despite their potential to overcome technical legal barriers, administrative reparations entail limitations in their capacity for affirming accountability. Entirely State administered and State provided redress can fail to capture the lived reality of collective violence, which is often committed by private

[131] Severing accountability mechanisms from reparations, see for instance de Greiff, *The Handbook,* above n 23; Firchow and Mac Ginty, above n 26, 235

[132] See, for instance, the rejection of reparations by the 'comfort women' on the basis of the State's vague and evasive approach to the matter of responsibility – Urban Walker, *What is Reparative Justice?,* above n 96, 23-24; Nishino Rumiko, Kim Puja, and Onozawa Akane, *Denying the Comfort Women: The Japanese State's Assault on Historical Truth* (Routledge 2018).

[133] Prosecutions have been pursued in Argentina, Chile, Colombia, Guatemala, Peru and Rwanda—see Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007). Prosecutions were also an element of Ugandan processes—see Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013). Peruvian President Alberto Fujimori was also arrested, tried and convicted by the Peruvian Supreme Court for crimes of corruption and human rights abuses occurring during his government—Jo-Marie Burt and Carlos Rivera (eds), *The National and International Significance of the Trial and Conviction of Alberto Fujimori* (Instituto de Defensa Legal 2011).

individuals, groups, or corporations, as well as the State.[134] Beyond affirming the corrective paradigm, accountability procedures and legal or quasi-legal for engaging civil responsibility of perpetrators can be important in rebuilding civic identity and legal personhood; as Winter proposes, to 'be a legal person is to have the claim to be dealt with according to the law.'[135] In the context of historical enslavement, this might involve the assertion of responsibility against continuing private entities that maintain connections to the profits of enslavement. Reparations constitute a form of accountability on the part of the entity obliged to pay by affirming a legal relationship of responsibility between that entity and beneficiaries. Thus, lacunae in accountability can be created where significant perpetrators escape any form of culpability.

(d) Responsiveness

Despite being shaped by international and private law frameworks, reparations in transitional contexts are sculpted within their particular political environment, with objectives extending beyond traditional legal relationships – what Moffett brands 'bespoke reparation programmes'.[136] The importance of responsiveness in reparations programmes and their victim-centricity are interconnected. Yet, responsiveness goes further than simply focusing on the needs and desires of victims and victim communities. Because transitional reparatory justice is concerned not only with redressing wrongdoing for victims, but doing so within the broader scheme of transition, the shape or reparations must respond to victims, to the context in which they are embedded, and to the vision of society to which the State aspires.[137] Teitel encapsulates the complexity of this dynamic in stating:

> The conception of justice that emerges is contextualized and partial: What is deemed just is contingent and informed by prior injustice. Responses to repressive rule inform the meaning of adherence to the rule of law. As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative.[138]

[134] Moffett, 'Transitional Justice and Reparations', above n 44, 8.
[135] Winter, above n 7, 238.
[136] Moffett, 'Transitional Justice and Reparations', above n 44. See also Quirine Eijkman, 'Recognising the Local Perspective: Transitional Justice and Post-Conflict Reparations' (2010) 10(3) *Global Jurist* 1.
[137] See Jemima Garcia-Godos, 'Victim Reparations in Transitional Justice – What is at Stake and Why' (2008) 26 *Nordisk Tidsskrift for Menneskerettigheter* 111, 112.
[138] Teitel, *Transitional Justice,* above n 5, 6.

Determining what combination of measures are appropriate is a matter of responding to the particular circumstances of the violations. The transformative potential of symbolic measures and commemoration (in particular) is contingent upon context, presentation, and the manner of introduction of these elements into the society.[139]

As in international law, reparations in transition may take a variety of forms depending on the requirements of a given situation; they may be individual or collective, material or symbolic, and involve a multitude of different specific measures targeting different dimensions of the wrongdoing and suffering.[140] Although Emily Camins suggests there is a conceptual distinction between material and symbolic reparations, monetary payments themselves may have affective dimensions.[141] Thus, the variety of reparations modalities ought to be considered in context, and in dialogue with one another, and the symbolic potential of material redress should not be overlooked.

Measures of direct restitution are the simplest form of responsive reparation, returning dispossessed property to victims and thereby directly repairing the substance of abuses.[142] Such measures may represent not only the best way of returning victims to something approximating the *status quo ante*, but also a means of transforming legal institutions and structures.[143] Thus restitution can serve not only as the closest possible solution in returning victims to the position that they would have been in absent the wrongdoing, but also as a means of addressing broader challenges of the transition.[144] However, restitution is not the only form of reparation that may be tailored to meet the specificities of a particular situation; all choices regarding the form and substance of reparatory processes may be sculpted to respond to

[139] Brown, above n 86.
[140] Reparations in transition mimic the multiple modalities of redress considered in Chapter 5.
[141] Camins, above n 51, 129. Camins relies upon Mégret's conclusions concerning reparations in the International Criminal Court, which were subsequently disproved by the Court in *Lubanga.* Frédéric Mégret, 'The International Criminal Court Statute and the Failure to Mention Symbolic Reparations' (2009) 16 *International Review of Victimology* 127; *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo* (Decision establishing the principles and procedures to be applied to reparations) ICC-01/04-01/06 (7 August 2012). For discussion of 'other modalities' see paras 237-241 of the judgement.
[142] See, for instance, Law 1448 Concerning Victims and Restitution of Land (2011) (Colombia); Czech Law on Extrajudicial Rehabilitation, above n 23.
[143] Land restitution in the Czech Republic, for instance, privatised the system of property ownership in the aftermath of imposed communist rule. Teitel, *Transitional Justice,* above n 5, 129.
[144] Restitution is further considered in Chapter 4, Section 2(1) and Chapter 5, Section 2.

the demands of justice and the needs of victims within their unique transitional context.[145]

The capacity to engage both collective and individualised reparatory mechanisms enables responsive programmes responding to collectivised harms, and capitalising on the symbolic value of certain collective modalities of redress. For instance, in both Morocco and Peru, collective reparations programmes were developed to address suffering arising from abuses committed against individual members of specific groups, with an additional cumulative effect. By ensuring that the basic needs of these groups were met where previously they had gone unfulfilled by the State, these mechanisms addressed the collective dimensions of the wrongdoing committed as a distinct feature of targeted abuses.[146] Nonetheless, it remains important that symbolic and collective measures do not eclipse individual and material benefits, which in many cases are prioritised by victims, where these are required by the circumstances of the wrongdoing and the suffering of victims.[147]

Preferences between individualised material redress and collective symbolic measures can manifest substantial divergence between victims themselves, and society as a whole.[148] Procedural justice mechanisms can therefore be vital in the initial design of reparations programmes, in ensuring that potential disjunct between victim perspectives and outside opinions are reconciled. The influence of such processes are evident in the practice of the

[145] See, for instance, the multiple responsive modalities of redress adopted in the Chilean reparations processes, including six distinct programmes initiated by the National Corporation for Reparations and Reconciliation, and ultimately additional memorial activities undertaken by the government. Law 19.123 'Establishes the National Corporation for Reparation and Reconciliation and Grants other Benefits to Persons as Indicated' enacted Febraury 8 1992 (Official Gazette No. 34,188) in de Greiff, *The Handbook,* above n 23, 748; Lira, above n 55, 60-62. Such measures might also respond to divergent short-term and long-term needs, particularly in relation to especially vulnerable victims whose harms may be compounded without immediate support. See, for instance, measures adopted in South Africa under the Promotion of National Unity and Reconciliation Act, above n 38, sections 4(f), 1(1)(xix)(a), and 1(1)(ix). On failures in Urgent Interim Reparations, and the impact of delay on transition, see Colvin, above n 37, 187-189.

[146] See Lisa Laplante and Kimberly Theidon, 'Truth with Consequences: Justice and Reparatrions in Post-Truth Commission Peru' (2007) 29(1) *Human Rights Quarterly* 228; Bettina Dennerlein, 'Remembering Violence, Negotiating Change: The Moroccan Equity and Reconciliation Commission and the Politics of Gender' (2012) 8(1) *Journal of Middle Eastern Women's Studies* 10. See also the provision empowering the Committee on Reparations and Rehabilitation in South Africa, allowing the Committee to consider community reparations – Promotion of National Unity and Reconciliation Act, above n 38, Section 4(h).

[147] On the overlooking of victims' needs in transitional justice processes, particularly trials and truth commissions, see Simon Robins, 'Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations' (2017) 11 *Human Rights and International Legal Discourse* 41. On the preference for compensation see above n 37.

[148] For instance, Wendy Orr, a Commissioner of the Committee on Reparations and Rehabilitation in South Africa, noted that while non-victims may have been reluctant to frame reparations in terms of monetary redress, victims themselves seemed to prefer direct compensation - Orr, above n 47, 241-2.

South African Committee on Reparations and Rehabilitation, which, after a year-long consultative process incorporated monetary redress as a central element of their recommendations, despite initially favouring collective and symbolic measures over financial provisions.[149] Direct payments and individualised measures not only respond to the wishes of victims in many cases, but also empower victims by allowing them to take control of their own recovery and to channel resources to the things that are most suitable for them in their individual circumstances. Broader programmes are seldom able to directly target the needs of individuals, and are far more likely to generalise the needs and desires of survivors.

Arguments supporting monetary payments to victims run counter to those situations in which payments are perceived as blood money and an insult to the victims, suggesting that what is most crucial is a process that includes victims in decision-making processes and ultimately formulates measures of redress on the basis of the views, needs, and wishes of survivors. Victim-centricity, procedural justice, and the inclusion of victims are vital to responsiveness, ensuring measures adopted respond to the lived experiences and suffering of victims, rather than their wants and needs perceived through the lens of the dominant majority. Empowering victims to engage in the construction of the programmes targeted towards them enables them to 'enact visions of state, society and government that respond directly to their self-defined and differential needs, priorities and cultural values.'[150] Where victims represent a particular political, cultural, or ethnic group, this direct engagement can additionally ensure that measures adopted complement their belief systems rather than representing an additional majority-centric approach to minority issues.[151] Thus, responsive consultation can help to ensure that the approach taken does not affirm *status quo* policies of the State marginalising victim communities and failing to account for the nature of majoritarian injustices.[152]

(e) Political compromise

[149] See Brandon Hamber, 'Repairing the Irreparable: Dealing with the Double-Binds of Making Reparations for Crimes of the Past' (2000) 5 *Ethnicity and Health* 221.
[150] Brett and Malagón, above n 109, 259.
[151] See, for instance, Nagy's critique of the Truth and Reconciliation Commission addressing the treatment of indigenous peoples in residential schools which highlights the potential for 'liberal democracy building' to entrench structural violence against indigenous victims and ignore the colonial dimensions of abuses. Nagy, above n 22.
[152] Corntassel and Holder suggest that political/legal rights-based approaches to reparations can reward, rather than redress, colonial injustices. Corntassel and Holder, above n 22.

The principle of *resitutio in integrum* targeted towards returning victims to the *status quo ante* or providing proportionate redress dominates reparations in international and private law, leaving little room for compromise or extraneous considerations. Transitional justice, on the other hand, often demands an accounting of a range of external factors, both political and practical.[153] Paul Gready therefore paints transitional measures as the 'art of imperfect solutions and difficult choices, in the context of competition for finite resources and delicate political dynamics.'[154] The pressing demand for peace and democracy often overrides corrective justice, requiring concessions and sacrifices be made by victims to ensure the success of transition. As Bell frames it, 'the question of law's relationship to political accommodation revolves around the issue of how to reconcile normative legal demands with the pragmatics of peace-making.'[155]

Amnesties, pardons, and the retention of official positions within a regime represent measures of political compromise often considered necessary for the establishment and maintenance of peace—measures directly contradicting the need for accountability and redress. Mark Freeman highlights amnesties as an area of significant contestation, suggesting that there are 'few issues of law and policy as complex and divisive as the question of when and whether to grant amnesties for atrocities.'[156] Amnesties and similar concessions are not only the price paid for the wider objectives of transition, but can also represent the clash between different transitional goals and measures. Truth-telling in particular can require some diminution in accountability processes in order to incentivise perpetrators to share their knowledge.[157] As Bell recognises in relation to the Truth and Reconciliation Commission in its inception, justice and reconciliation may be balanced as 'both necessary to the stability of any new political order'.[158]

By protecting those individuals directly responsible for atrocities, amnesties and pardons, as well as the protection of official positions within the new regime, can undermine the recognition of wrongdoing and acknowledgement

[153]Teitel highlights the external political aims advanced by transitional reparatory justice removing such measures from conventional corrective justice principles. Teitel, *Transitional Justice,* above n 5, 132.
[154] Paul Gready, *The Era of Transitional Justice, the Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge 2011) 1, 6-7.
[155] Bell, Campbell and Ní Aoláin, above n 5, 317.
[156] Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press 2009), 1.
[157] See Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon 1998). Minow suggests that these trade-offs are widely recognised as an aspect of truth commissions.
[158] Christine Bell, above n 18, 14.

of responsibility. When constructed to protect high-level perpetrators from accountability, amnesties may be framed as an affront to justice, not justified by the demands of transition.[159] Such measures may constitute a breach of a State's continuing duty to prevent, investigate and punish human rights violations—a duty that legally cannot be sacrificed to transitional interests, even where truth and reparations processes had been extensive.[160] Thus, the demand for legal reparatory justice and transitional objectives may conflict. However, in such cases, the legal imperative is not usurped or replaced by transitional measures that lack equivalence.

Although international and regional courts may be willing to rule amnesties and pardons a breach of the relevant Conventions, domestic courts may struggle to do so given their more limited relationship to the national parliament. For instance, where the Inter-American Commission denounced Argentinean amnesties as violations of the rights to justice, fair trials, and judicial protection, the Constitutional Court of South Africa upheld the constitutionality of the amnesty provisions of the Promotion of National Unity and Reconciliation Act.[161] The South African claim was dismissed by Judge Mahomed on three grounds: the cost of subjecting the State to civil claims for apartheid-era violations was prohibitive as it harmed the social welfare of the country; victims who could file a provable claim against the government were limited in comparison to the total pool of victims; and removing amnesty would withdraw the incentive for truth-telling.[162] Judge Didcott in his separate but concurring opinion upheld the amnesty provisions on the basis of the constitutionally enshrined aims of reconciliation, which would be harmed by long-running civil litigation against the State and the associated negative publicity.[163] Thus while international law may not consider transitional objectives as a relevant consideration in assessing the legality of amnesties, national courts embedded in the transitional context are more likely to do so—particularly where those objectives have been

[159] For instance, Argentinean laws pardoning members of the military *juntas* and select high-ranking officials and guerrilla leaders, as well as members of the military and armed forces under prosecution, were denounced by the Inter-American Commission on Human Rights as violations of the right to justice as well as the right to fair trial, and the right to judicial protection. Guembe, above n 23, 27; IACHR, 'Report No. 28/92, Cases 10.147, 10.240, 10.262, 10.309, and 10.311, Argentina' (2 October 1992) IACHR 1992-3 OEA/Ser.L/V/II.83 Doc 14 (12 March 1993), 44 petitioners, including the Fundación Servicio Paz y Justicia representing 90 cases, in six separate cases were considered by the Commission – highlighting the extent to which victims felt wronged by the enacted amnesties and pardons – see paras [40] and [42]-[50].
[160] Ibid, [40] and [42]-[50].
[161] Ibid.
[162] Judge Mahomed, *Judgement in Case CCT 17/96,* Constitutional Court of South Africa (1996), [42]-[45].
[163] Judge Didcott, ibid, [55], [57] and [59].

implanted into national legislation. Thus international frameworks and oversight remain crucial in ensuring justice in transition.

Both wrongdoing and victimhood may be abstruse, particularly where legality and morality are contested and the lines between victims and perpetrators are blurred. Perpetuation of confusion over right and wrong can give rise to continuing violence as different sides fight for the dominance of their narrative of the conflict.[164] Stabilising society in the aftermath of conflict can therefore demand concessions to the absolute conception of justice advanced in the context of international and private law reparations. As Firchow and Mac Ginty identify, the degree to which reparations are retributive as opposed to restorative – that is, focused on punishment versus reconciliation – affects their capacity to ameliorate the effects of conflict and prevent conflict recidivism.[165]

(f) Practical compromise

It is not only political compromises that must be made in transitional States to protect the interest in peace and stability; often severe resource constraints in the aftermath of atrocity impact on what is reasonably possible for a State to provide by way of reparations. Particularly in situations of widespread abuse and protracted conflict, transition often requires extensive rebuilding of institutions and infrastructure to ensure the wellbeing of citizens and the reestablishment of functioning democracy. The extent of injustices committed in the centuries of transatlantic enslavement compound this problem.[166] Resource constraints manifest in transitional reparatory projects in a number of ways, affecting what victims and wrongs are recognised as deserving of redress, the munificence of awards granted, and effectiveness of the administering body. These limits are manifestations of the need for pragmatic compromise in transitional contexts, where the very ability to construct reparations programmes can be contingent upon the perceived feasibility of proposals for redress, from the perspective of society as a whole.[167]

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[164] Moffett, 'Reparations for Guilty Victims' above n 31, 167.
[165] Firchow and Mac Ginty, above n 26, 234.
[166] This is further demonstrated in the figures advanced by reparations advocates as the sum of redress due, ranging between $500 million and $777 trillion USD - James Forman, 'The Black Manifesto' (1970) 1(1) *Review of the Black Political Economy* 36; Afrikan World Reparations and Repatriation Truth Commission, 'The Accra Declaration on Reparations and Repatriation' (*The African Descent International Diaspora*, 12 August 1999) <http://estooks.wixsite.com/the-adid/black-power-and-reparations> accessed 1 June 2018.
[167] Katherine B Starzyk, Danielle Gaucher, Gregory D B Boese and Katelin H Neufeld, 'Framing Reparation Claims for Crimes against Humanity' in Jo-Anne Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge 2014), 118.

In many ways, the aggregation of victims' claims into administrative rather than judicial procedures represents a compromise between the ideals of reparatory justice and pragmatism. Aggregating claims through specialised bureaucratic processes can provide a range of practical benefits: a greater number of victims may receive redress; benefits may be obtained with less delay; barriers to entry, procedural, and evidentiary requirements may be eschewed; the expense of procedures can be massively reduced through economies of scale; and a single administering body can ensure greater parity between awards granted to different victims.[168] However, the benefits of such processes for victims are contingent upon the terms of the reparations programme in question, and not inherent in administrative processes.[169]

The structural limitations of judicial systems can significantly interfere with the achievement of reparatory justice in transition. In Chile the inability to identify specific perpetrators often made judicial action impossible, for Chilean law requires actions to be addressed against a specific person, thus requiring investigation, which was barred by the Self-Amnesty Decree of 1978.[170] In Argentina, claims demanding indemnification for harms and damages resulting from wrongful detention were frequently rejected by courts on statute of limitations grounds.[171] Judicial processes may also be entirely inadequate to deal with reparations claims for widespread abuse in transitional States—in Guatemala, for instance the victims of State-sponsored violence reached hundreds of thousands.[172] Although class actions and aggregation of claims may be used to streamline redress in such cases, the structural limitations of judicial institutions make dealing with the sheer volume of claims in such circumstances problematic. In relation to

[168] See de Greiff, 'Justice and Reparations', above n 33, 458. On reduced evidentiary burdens, see for instance, Argentinean Law 23.466, above n 54. The treaty establishing the sovereignty of the Federal Republic of Germany likewise highlighted the need to account for evidentiary difficulties, many of which were created by the violations themselves – see Christian Pross, *Paying for the Past: The Struggle over Reparations for the Surviving Victims of the Nazi Terror* (Johns Hopkins University Press 1998), 20.
[169] The Brazilian Law of Victims of Political Assassination and Disappearance, for instance, was criticised for pushing the burden of proof onto victims' families – Cano and Salvão Ferreira, above n 23, 116.
[170] For fifteen years this Decree was interpreted as preventing both the punishment of perpetrators and the investigation of cases. Only in the mid-1990s was this interpretation challenged and a duty to investigate affirmed. Malamud-Goti and Grosman, above n 57, 545.
[171] Guembe, above n 23, 28-9. This approach is also evident in American jurisprudence on the question of reparations for historical enslavement – see *Cato v United States* (1995) 70 F Supp 3d 1103 (9th Circuit); *In Re African-American Slave Descendants Litigation* 375 F Supp 2d 721 (ND Ill 2005); *In Re African-American Slave Descendants Litigation* 375 F Supp 2d 721 (ND Ill 2005).
[172] Malamud-Goti and Grosman, above n 57, 542-3.

widespread historical injustices, these problems with judicial mechanisms are further compounded.

The scale of suffering alone may be used to deny the call for specific reparations, not just in the courts, but more generally, with many—particularly those from societal majorities—claiming that everyone suffers during a war or conflict, and thus no one ought to be singled out.[173] The degree to which governmental reparations rely on popular support makes them more susceptible to such populist understandings of widespread injustices, where judicial bodies may be insulated from such by institutional protections. In response to the challenge of societal perceptions of victimisation, reparations are frequently targeted towards those perceived to have suffered the most[174] The report of the Truth and Reconciliation Commission in Timor-Leste acknowledged both the universality of suffering and the prioritisation of certain abuses in declaring '[w]e are all victims but not all victims are equal. We must acknowledge this reality and lend a hand to those who are most vulnerable.'[175] However, majoritarian understandings of transition and political processes may skew the prioritisation of suffering against minority groups who have often suffered the most.[176]

The choice of restitutionary baseline—the wrongs or harms deemed compensable under State programmes—involves choosing between victims who have suffered varying kinds of persecution, to varying degrees, and at varying times, as well as balancing the demands of political interest groups.[177] Often the basis for differentiating between reparable harms, and those victims are simply expected to bear, is the civil or political dimension of the atrocities in question.[178] The State targets those wrongs that most severely undermine democracy and political inclusion in order to set the

[173] For instance, in *Lubanga,* the International Criminal Court noted that reparations programmes' meaningfulness may be contingent on the inclusion of all members of the community regardless of their connection to the crimes for which the person was convicted – *Prosecutor v Thomas Lubanga Dyilo* (Judgement on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2) ICC-01/04-01/06-3129 (3 March 2015), [215]. Further, polls conducted in post-World War II Germany suggested that the majority of Germans considered themselves victims of the war entitled to government assistance – Kurt Grossman, *Germany's Moral Debt: The German-Israeli Agreement* (Public Affairs Press 1954), 18-19.

[174] In the cases of Sierra Leone and Timor-Leste amputees, orphans, widows, victims of sexual violence, and victims of torture were prioritised as the most vulnerable victims – see *Lubanga,* ibid.

[175] Commission for Reception, Truth and Reconciliation in East Timor, 'Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste' (KPG 2005), Section 12.1.

[176] For instance, on Germans post World-War II creating a hierarchy that ranked Jewish victims well below a range of other beneficiaries, see Grossman, above n 173, 18-19.

[177] Ibid, 135.

[178] Teitel, *Transitional Justice,* above n 5, 134.

stage for the rebuilding of such. The tendency to prioritise civil and political rights can reduce the transformative potential of reparations by failing to account for the social and economic violations at the root of the conflict.[179] Moreover, it can overlook significant violations of rights that impact individuals and communities in devastating ways, thereby inhibiting the successful recovery of those victims.[180] However, where social and economic sufferings are targeted by social and economic reforms and support packages, a compromise on the scope of reparations is unlikely to have overwhelming practical effects. As previously discussed, the burden of transition is not borne by reparations alone, but rather is comprised of an interwoven series of measures targeted towards different levels of injustice and suffering in post-abuse societies.

The selection of certain wrongs and exclusion of others in official reparations programmes can create problematic lacunae in the application of justice, with the potential to further marginalise victimised communities. Reparations programmes with a severely limited scope run the risk of harming the credibility of the new regime and its attempt to establish rule of law by enlarging the gap between law and practice.[181] The signalling functions of reparations can be undermined where specific victimised groups are inadequately redressed through official channels, particularly given that official recognition in itself has symbolic dimensions.[182] The veneer of legal rights and recognition attaching to comprehensive reparations programmes transcends sides of a conflict, helping to legitimise the outcomes as measures associated with a sense of justice beyond the conflict, even where practical compromises must be made. Where reparations make a sincere and concerted attempt at recognition, they are likely to be seen as 'good enough', even where they do not fully repair the suffering caused by wrongdoing for the entire universe of possible beneficiaries.[183] Thus a compromise may still satisfy the psychological needs of victims and serve as a prelude to recovery

The impossibility, insufficiency, and inadequacy of any attempt to return victims to the position they were in prior to grave abuses makes any redress to some degree partial and symbolic.[184] Thus there will always be an element

[179] Brett and Malagón, above n 109, 258.
[180] Ibid.
[181] Camins, above n 51, 144.
[182] Urban Walker, *What is Reparative Justice?,* above n 96*,* 19.
[183] Hamber, above n 87, 137.
[184] See *Blake v Guatemala* (Reparations and Costs) IACHR Series C No 48 (22 January 1999).

of compromise in the acceptance of reparations. As Lawther and Moffett conclude:

> Regardless of resources, rhetoric or expertise, transitional justice mechanisms will not be acceptable to all and cannot offer the magic silver bullet of political harmony, full truth, complete physical and psychological healing or socio-economic rejuvenation.[185]

Even where reparations programmes are unable to redress the entire potential universe of beneficiaries and where awards cannot measure up to the scale of suffering inflicted upon victims, partial ameliorative acts and processes are an integral feature of corrective reparatory projects.[186] Thus, although the historical case manifests a more extreme example of resource limitations, transitional reparatory justice already accounts for the difficulties of constructing reparations for irreperable injustices.

That some degree of compromise on the basis of resource limitations may be acceptable to victim populations does not provide a State with blanket permission to decrease redress as it sees fit. However, reparations programmes are unlikely to be accepted as 'good enough' when there is a failure in recognition. In particular, when the State instituting the programme continues to deny or underplay its role in the conflict, refusing to accept responsibility for atrocities committed, victims are unlikely to find solace in compensation programmes.[187] The range of options available for pursuing reparatory justice make failure to provide such measures even more unacceptable—symbolic gestures in particular (where these are sincere and responsive) can account for resource constraints whilst still ensuring the recognition of victims.[188] Responsive forms of reparation can also offset the resource drain on recovering States.[189] While compromises on the basis of resource limitations may be an accepted feature of reparations in transition, willingness to accept less fair and meaningful redress is limited. As de Greiff underlines:

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[185] Lawther and Moffett, 'Researching Transitional Justice', above n 114, 4.
[186] Teitel, *Transitional Justice,* above n 5, 132.
[187] The *Madres de Plaza de Mayo* of Argentina, for instance, rejected reparations for this very reason, labelling compensation 'blood money' in the absence of accountability and recognition - Moon, above n 84, 194. See also Akane, above n 132 with regard to the 'comfort women'.
[188] Theo van Boven, Cees Flinterman, Fred Grünfeld, and Ingrid Westendorp 'Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross violations of Human Rights and Fundamental Freedoms: Summary and Conclusion' in Fritz, above n 7, Volume 1, 500.
[189] See, for instance, Argentina's distribution of government bonds to distribute the economic burden of reparations over time, thus postponing a portion of the costs while the costs of reconstruction were acute – see Guembe, above n 23, 33.

> …a state cannot simply ignore the claims of victims with the argument that there are no resources to cover the corresponding costs, or alleging that there is simply no way to overcome the problems described. This would be tantamount to acknowledging that it is in no position to sustain a fair regime.[190]

7.5. Postitioning reparations in transition

Transition paradoxically demands the reestablishment and bolstering of the rule of law whilst also necessitating that justice for victims be, to some extent, curtailed—reparations exist and are enacted at the cusp of this dilemma. While carrying out many of the objectives of traditional reparatory justice, reparations in transition are servants not only of the corrective justice framework, but of the transition, seeking to restore the dignity of victims and achieve their reintegration into society as equal citizens, as well as supporting the establishment of long-term stability.[191] Thus, transitional reparatory justice may directly grapple with the legacies of massive historical injustice, without being tethered to formal legal requirements. The practice of reparatory justice in transition provides guidance for the enactment of measures of redress for transatlantic enslavement.

The solutions found in transitional reparatory processes to contextual legal challenges highlight the potential for justice that engages with the lived experiences of victims and institutional limitations, without sacrificing the need for action. Further, transitional reparatory justice provides a call for justice in the face of massive and widespread injustice, where legal mechanisms fall short. In the context of transatlantic enslavement, occurring across multiple centuries, involving several States, featuring African complicity, and embedded in the foundations of the international legal system, judicial reparations may not sufficiently respond to the complexities of the case. Moreover, the contestation of the fundamental question of illegality identified in chapter 2 complicates attempts to achieve legal redress. However, transitional reparatory justice—in accepting the need for context-responsive processes as well as awards—may enable the reckoning reparations advocates seek.

[190] de Greiff, 'Justice and Reparations', above n 33, 459.
[191] Malamud-Goti and Grosman, above n 57, 541.

CONCLUSION: THE REPARATIONS DEBATE BEYOND INTERNATIONAL LAW

Creating space for the evolving movement for reparatory justice

International law is not a neutral system built upon a foundation of the rule of law, justice, or equality. Centuries of enslavement, colonialism, and imperial expansion constitute the bedrock of the modern international legal system.[1] Contemporary claims to universality may draw support from the notion of a global community of nations with equal participation and representation—of shared interests based on the precepts of shared humanity—however, the oscillations of power have substantially influenced the operation of international law from its inception. The founders of the system of European international law, purporting universality, created a jurisprudence of injustice, legitimising the marginalisation of African, indigenous, and aboriginal people, and the exploitation of their lands, their lives, and their labour.[2] Thus, transatlantic enslavement and the *maangamizi* are interwoven with the construction and evolution of international law.

For many years, scholars have questioned these foundations, and the inequalities embedded in the international legal order.[3] These commentators grapple with the historical development of international law, and the ways these anachronistic perspectives continue to permeate and shape international law in theory and in practice. Yet, the restructuring of the international system in response to this history remains elusive. The transition from hegemonic European dominance supported by violence, coercion, and the marginalisation of non-European peoples, remains

[1] This was recognised at Abuja in 1993, calling for the restructuring of the international system in pursuit of justice. 'The Abuja Proclamation' adopted at the Abuja Pan-African Conference on Reparations for African Enslavement, Colonisation and Neo-colonialism (Abuja, April 27-29 1993) <www.ncobraonline.org/the-abuja-proclamation/> accessed 22 May 2018.

[2] On the 'classics' of international law, see Chapter 2, Section 4.

[3] See Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2006); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007); Antony Anghie, Bhupinder Chimni, Obiora Okafor and Karin Mickelson (eds), *The Third World and International Order: Law, Politics, and Globalization* (Kluwer Law International 2003); Bhupinder Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Sage 1993); Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004); Martti Koskienniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge University Press 2002); Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2009); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011).

incomplete, despite the move towards decolonisation in the twentieth century.[4] International law has neither drawn a line in the sand, signalling a break from the prior regime, nor has it given effect to the requirements of reparatory justice in the aftermath of widespread abuse.[5]

Absent remedies in the instance of a breach, legal norms become meaningless, and thus reparations cannot be severed from the normative order.[6] In conjunction with obligations of cessation and guarantees of non-repetition, reparations are the means by which international law gives effect to justice internally, in direct response to wrongful conduct. As a normative system lacking centralised institutions possessing coercive power, the significance of normative legitimacy in international law is even greater than in the context of domestic systems. Reparations in this context affirm the validity of norms absent strict enforcement mechanisms or centralised legal sanctions.[7] Thus, the impact of widespread, unaddressed injustice within international law poses an existential problem for the system itself. With the continuation of harms through time, and a failure to effect a transition from a system of law premised on imperialism and European domination, this problem continues to manifest in international law, despite its historical roots.

The frameworks of the international legal system present significant barriers to attempts to achieve justice internally. Within the framework of positivist international legal thought, the doctrine of inter-temporal law alone destabilises reparations claims. The historical ubiquity of enslavement creates a platform for conclusions of legality, calls for moral relativity, and accusations of 'presentism'. On these accounts, the crystallisation of international law prohibiting enslavement at the time European States were involved in the forced migration and exploitation of twelve million African people is central to the construction of the reparations case. Yet, the

[4] See Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 *Social and Legal Studies* 337; Nathaniel Berman, *Passion and Ambivalence: Nationalism, Colonialism, and International Law* (Brill 2011); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011); Sundhya Pahuja, 'The Postcoloniality of International Law' (2005) 46(2) *Harvard Journal of International Law* 459.
[5] On the need for a break from the past in transition, see Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge University Press 2011).
[6] See *Case Concerning the Factory at Chorzów (Germany v Poland)* (Jurisdiction) PCIJ Rep Series A No 9, 21. See further Chapter 4, Section 1.
[7] See Brigitte Stern, 'The Elements of an Internationally Wrongful Act' in James Crawford, Alain Pellet and Simon Olleson, *The Law of International Responsibility* (Oxford University Press 2010) 193, 194; Dionisio Anzilotti, *General Theory of State Responsibility in International Law* (Firenze 1902); UNGA, 'Report by Mr R Ago, Chairman of the Sub-Committee on State Responsibility' (1963) UN Doc A/CN.4/152, 250.

evolution of international law with regards to enslavement fails to provide clear answers with regard to this most basic question.

In the long history of global enslavement, jurists have evidenced substantial fluctuation in their understandings of the positioning of the institution within the dominant legal frameworks. For centuries, enslavement was permitted in restricted circumstances within *jus gentium,* despite its recognised contravention of *jus naturale.* In the medieval period, restrictions on enslavement were seen to increase both within States and regionally, as the law of Christian and Islamic nations came to bar the enslavement of coreligionists, whilst maintaining existing caveats for those outside the religious order.[8] The transatlantic system fundamentally altered the nature and scope of enslavement and its positioning within jurisprudential thought. However, the claimed universality of this reasoning was primarily premised on European expansion, and the exclusion of peoples in the 'New World' from international legal personality.

The problematic imperial foundations of international legal thought with regard to enslavement, combined with preceding limitations, the understanding of enslavement in general as a contravention of *jus naturale,* and the predominant naturalist international jurisprudence of the time, combine to destabilise the claim to historical legality. This does not lead to the converse conclusion that a general prohibition against enslavement was an unchanging, and established element of universal law prior to, or throughout, the period of transatlantic chattel enslavement. Although such a position may be arguable on the basis of prevailing natural law principles of the time. However, it does frustrate claims that reparations are not morally mandated on the basis of the positive legality of enslavement at the time. In other words, the argument that enslavement was 'legal at the time' as a defence against the moral and political case for reparations is overthrown.

Despite the uneven legal terrain on which the reparations case stands with regard to the establishment of a breach, the frameworks of responsibility provided by international law offer insight and guidance in the moral and political case. Moreover, these elements are frequently utilised in reparations denials to refute claims for extra-legal reparatory processes. Thus, the additional elements of responsibility in international law remain relevant to

[8] See Chapter 2, Section 4.

the consideration of claims. Acquiescence, limitation, and attribution, considered on the facts of the case, and not on the presumption that historicity in itself will frustrate claims, can be eliminated as bars to recovery in relation to historical enslavement.[9] Yet, the international legal frameworks governing reparatory justice have more to offer the consideration of reparations claims than the deconstruction of obstructions to justice.

Reparations are inherent in, and fundamental to, the international legal system.[10] Reparatory justice, as a theoretical paradigm, grapples with injustices and their legacies within a framework shaped by wrongdoing, recognition, and responsibility—of setting wrongs to right. Thus, the centuries of jurisprudence regarding remedies speaks to the objectives that ought to be pursued in redressing the past. Moreover, the international legal frameworks themselves provide comprehensive guidance on the forms reparations might take. The multiple modalities of redress available in international law, and the different harms these target, enable a dialectic between theory and practice, cultivating a broader understanding of reparability itself. Thus, the potential for nuanced, responsive reparations programmes addressing a variety of harms may, in turn, influence the kinds of harms considered reparable.

In considering historical injustices, it is often the universe of potential claims, and not simply the case at hand, that shape understandings of what ought to be redressed. Yet, in reframing reparations as not simply individualised, monetary payments, but also collective and symbolic measures, the nature of the causal inquiry may change. Consideration of what harms must be redressed within the consideration of causation may be expanded to account for these existing frameworks, recognising a broader range of injuries within the determinations of legal policy already occurring.[11] The limits of the law in such cases ought to respond to the legal frameworks themselves, in this case requiring greater attention on the moral and symbolic injuries addressed through satisfaction.

The impetus for the application of reparatory justice in the case of historical enslavement is not drawn from the legal frameworks alone, and thus may be informed by a broader range of justice mechanisms. Historical injustices present challenges for legal mechanisms that may require the engagement

[9] See Chapter 3.
[10] See Chapter 4, Section 1.
[11] See Chapter 6.

of alternative processes. Thus, transitional justice provides a lens through which to consider the transformational demands on the international legal system as a whole, as well as in specific cases relating to transatlantic enslavement. These processes enable the balancing of competing interests, whilst upholding the fundamental need for responsibility, recognition, and reconciliation. Thus, transitional justice, in combination with the international legal frameworks, provides a rubric for the realisation of justice in the case of historical enslavement.

Massive and widespread injustices have significant impact on the way people formulate their identities, and as time goes on, their histories.[12] The centrality of large-scale abuses makes the refusal to grapple with the past not only an act of obfuscation or avoidance, but a form of violence. Lack of redress may entrench the 'non-personhood' of victims, cementing the affective dimensions of injustice through time, and constituting an injury in itself.[13] As Jeremy Waldron articulates:

> To neglect the historical record is to do violence to this identity and thus to the community that it sustains. And since communities help generate a deeper sense of identity for the individuals they comprise, neglecting or expunging the historical record is a way of undermining and insulting individuals as well.[14]

Thus, the refusal to grapple with the past becomes unacceptable from the perspective of reparatory justice. Where legal frameworks themselves are the mechanisms through which injustice is realised, the moral weight of purported legality ought not to be determinative.[15] Reparations overthrow the marginalisation and dehumanisation of victims of wrongdoing by recognising their humanity and status as rights-bearers.[16] This remains true whether the case engages five years, or five centuries of discrimination.

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[12] Thompson, for instance, identifies that 'Members of nations whose ancestors were the victims of unrequited historical wrongs often suffer from despair, depression and loss of both confidence and hope for the future.' Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Polity 2002), 66.
[13] Mari Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323, 390.
[14] Jeremy Waldron, 'Superseding Historical Injustice' (1992) 103(1) *Ethics* 4, 6.
[15] On the potential for law to legitimate abuse of power and violence, see Bronwyn Leebaw, 'The Irreconcilable Goals of Transitional Justice' (2008) 30 *Human Rights Quarterly* 95.
[16] Yael Danieli, 'Massive Trauma and the Healing Role of Reparative Justice' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff 2009), 66.

Claims to reparations for historical enslavement face a plethora of challenges in both legal and political arenas. The extent to which the *maangamizi* was foundational to the international system, and remains central to international relations, may make reparatory justice through official channels in the upcoming years unlikely, despite increasing global attention and support. Yet, even if legal and political systems remain silent, reparations discourse has broader value, particularly in the context of immatieral harms demanding symbolic or cognitive justice. As Ta-Nehisi Coates opines in relation to the question of reparations for the African-American experience of enslavement and its aftermath:

> No one can know what would come out of such a debate. Perhaps no number can fully capture the multi-century plunder of black people in America. Perhaps the number is so large that it can't be imagined, let alone calculated and dispensed. But I believe that wrestling publicly with these questions matters as much as—if not more than—the specific answers that might be produced. An America that asks what it owes its most vulnerable citizens is improved and humane. An America that looks away is ignoring not just the sins of the past but the sins of the present and the certain sins of the future. More important than any single check cut to any African American, the payment of reparations would represent America's maturation out of the childhood myth of its innocence into a wisdom worthy of its founders.[17]

Thus, there is value in considering, and speaking about, reparations even absent legal and political conclusions. Affirming the foundations of claims contributes to reparatory justice, through broader societal acknowledgement and recognition, even absent official action. The movement for reparatory justice, shaped by marginal and subaltern perspectives, is not denied value simply by virtue of mainstream denials. Yet, the affective dimensions of reparatory justice are premised not only on resistance, but on the society in which injustices were embedded listening. Thus, creating space in which the perspectives of those people previously marginalised may speak for themselves, and in which their voices are heard, is a reparatory act in itself.

[17] Ta-Nehisi Coates, 'The Case for Reparations' (*The Atlantic,* June 2014) <www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> accessed 25 June 2018.

Yes we hold the most spectacular Survival Record.
But we must hasten to remind ourSelves

that just to survive
simply to survive
merely to survive
barely to survive
is not & can
never be enough.

And so still we stand so tall among the cannonades
We smell of mists and of powdered memories

And those who took away our Voice
They are now surprised
They couldnt take away our Song.[18]

[18] Kofi Anyidoho, 'MEMORY & VISION' in Alice Bellagamba, Sandra Greene and Martin Klein (eds), *African Voices on Slavery and the Slave Trade* (Cambridge University Press)2013), xxii; originally published in Kofi Anyidoho, *Praise Song for the Land* (Sub-Saharan Publishers 2002).

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