

Wrongs of the Past, History of the Future?

Pierre d'Argent*

Ulrich, George and Louise Krabbe Boserup (eds), ***Reparations : Redressing Past Wrongs, Human Rights in Development Yearbook 2001***, The Hague/London/New York: Kluwer Law International/Oslo: Nordic Human Rights Publications, 2003. Pp. 447.

Boisson de Chazournes, Laurence, Jean-François Quéguiner and Santiago Villalpando (eds), ***Crimes de l'histoire et réparations : les réponses du droit et de la justice***, Collection de droit international, vol. 57, Brussels: Bruylant/U.L.B. 2004. Pp. 401.

Simma, Bruno and Hans-Peter Folz, ***Restitution und Entschädigung im Völkerrecht. Die Verpflichtungen der Republik Österreich nach 1945 im Lichte ihrer außerpolitischen Praxis***, Österreichische Historikerkommission, Band 6. Wien/München: Oldenbourg Verlag, 2004. Pp. 496.

Bottiglieri, Ilaria (eds) ***Redress for Victims of Crimes under International Law***. Leiden/Boston: Martinus Nijhoff, 2004. Pp. 304.

To what extent can history be written in advance? This naïve question lies at the heart of international law as a normative system. It explains why doubts about the possibility of its very existence are endlessly raised and reconsidered. It explains why it is – intrinsically and not only procedurally – so very ‘political’, and, for that very reason, either praised as an indispensable common language or disregarded as a dangerous illusion. Whilst not explicitly raised, and certainly not answered, this naïve question could well be the common thread binding the four books under review.

1. Four Different Books

The first two books listed above address, through collections of essays generally taking an interdisciplinary approach, the emergent claim to reparations for slavery and colonialism. The bulk of the essays in the volume edited by George Ulrich and Louise Krabbe Boserup [hereinafter *Reparations*] were prepared for a conference hosted in April 2001 by the Danish Centre for Human Rights in anticipation of the World

* Professor, University of Louvain. My thanks go to David A. Westbrook for his useful remarks and suggestions. Email: dargent@int.ucl.ac.be

Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), held in Durban in September 2001. The book is published as the 2001 volume of the *Human Rights in Development Yearbook*, which is the result of a joint research project involving no less than eight well-established human rights centres and institutes, mostly in Northern Europe.¹ The book is divided into four parts: 'Reparations at the National and Regional Levels' (six contributions), 'Precedence and Standing of International Law' (four contributions), 'The Moral and Social Aspects of Reparation' (three contributions) and 'Reflections' (two contributions, including the concluding observations by Theo van Boven). The Bassiouni Principles on the right to remedy and reparation for victims of violations of human rights and humanitarian law, as they stood in 2000, are included as an annex to the volume.²

The volume edited by Laurence Boisson de Chazournes, Jean-François Quéguiner and Santiago Villalpando [hereinafter *Crimes de l'histoire*] also examines the subject of reparation claims for slavery and colonialism. While published as Volume 57 of the *Collection de droit international* of the University of Brussels, it actually results from a conference sponsored by UNESCO and hosted by the Law Faculty of the University of Geneva in March 2002 as a follow-up to the Durban conference. The first part of the book includes six contributions which address the legal regime of reparations for 'crimes of history' (*crimes de l'histoire*). Thereafter, four papers deal with procedural aspects of those reparation claims, studying in more detail different instances of contemporary practice. The third part of the book examines reparation claims for slavery and slave trade. Six contributions, including the *Conclusions générales* by Luigi Condorelli, discuss this highly controversial issue in the aftermath of the Durban conference. The last 90 pages of the book reproduce various documents.

The book by Bruno Simma and Hans-Peter Folz [hereinafter *Restitution*] is a monumental inquiry into the Austrian efforts to make good the damages and losses resulting from persecutions of the Nazi era. Following World War II, as is well known, Austria was in the very peculiar situation of having been, between 1938 and 1945, both victim and accomplice of the German Reich. The first part of this book, published as Volume 6 of the works of the Austrian Commission of Historians relating to reparations for the Nazi era, is dedicated to Austria's legal situation during and after the *Anschluss*. The second part details the settlement as enshrined in the State Treaty of 1955, in particular the duty to re-establish nationals of the Allied Powers (Article 25) and victims of Nazi persecutions (Article 26) in their rights and possessions. The third part of the book is concerned with Austria's implementation of those provisions of the State Treaty. Statutes, regulations and cases are thoroughly documented.

¹ Christian Michelsen Institute, Bergen; Danish Centre for Human Rights, Copenhagen; Icelandic Human Rights Centre, Reykjavik; Ludwig Boltzmann Institute of Human Rights, Vienna; International Centre for Human Rights and Democratic Development, Montreal; Netherlands Institute of Human Rights, Utrecht; Norwegian Institute of Human Rights, Oslo; Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund and Åbo Academy University, Åbo.

² E/CN.4/2000/62.

Ilaria Bottigliero's monograph [hereinafter *Redress*], which stems from her doctoral research at the Graduate Institute of International Studies in Geneva, was revised and updated to November 2003. After an introductory chapter largely concerned with the definition of important concepts (redress, victims, crimes under international law), Chapter II surveys the origins of the victims' right to redress and aims to show the existence of a 'historical swing from restoration to retribution and back to restoration', something that Robert Roth also highlights elsewhere.³ Chapter III examines the ways in which reparation claims are dealt with by domestic courts, notably under particular procedures (class actions) or heads of jurisdiction (such as the US Alien Tort Claims Act and similar laws). This includes the issue of the recognition and enforcement of foreign judgments. Chapter IV reviews some inter-state reparation mechanisms, with a view to determining in each case whether individuals may or not benefit from them. Chapter V is central to the book and analyses the evolution of the right to redress through universal and regional treaties and jurisprudence. The right to redress under international criminal law as may be applied by the United Nations *ad hoc* Tribunals and the International Criminal Court (ICC) is addressed in chapter VI.

Since this book is the work of a single author, it is worth going a little beyond this brief account and commenting on some of its general arguments. Bottigliero's arguments are, on the face of it, fairly consensual. On the one hand, she argues that in order to develop more effective ways of redressing major crimes to the benefit of their victims, the fragmented approach so far developed in practice must be abandoned in favour of a more coherent and comprehensive regime. That regime would encompass domestic, regional and universal solutions, applying a set of principles in a non-discriminatory way in order to provide redress promptly and fairly to all victims. On the other hand, the author argues that such a regime for redress 'must reach beyond the context of the relationship between perpetrator and victim, and that the way towards a more comprehensive redress regime must involve the active participation of the international community at large, including civil society and victim's groups, human rights NGOs, Governments, and international organizations' (at 4). The first argument is substantive, while the second may be labelled 'procedural' in the sense that it provides the method for achieving the substantive doctrinal proposition of the book. It is difficult to see how the rather descriptive chapters of this monograph really serve to demonstrate the fundamental arguments outlined at the outset, only the very brief Chapter VII actually develops these arguments. This last serves as a concluding chapter, as if everything written in earlier chapters by obvious necessity leads to those core doctrinal propositions and validates them. But such necessity is not so self-evident and one would have liked to find a more critical, or at least more demonstrative, discussion.

Despite their different contents and formats, the four books under review raise similar fundamental issues (Section 3) in the context a common backdrop (Section 2).

³ Roth, 'Le juge et l'histoire', in L. Boisson de Chazournes, J.-F. Quéguiner, and S. Villalpando (eds), *Crimes de l'histoire* (2004), at 3–11.

2. A Common Context

With the end of the Cold War, claims relating to past wrongs that had not been given voice for many decades were suddenly brought back to life, or simply heard for the first time. Conditioned by the economics and politics of the period immediately following World War II, the post-war settlements were indeed mostly partial compared to the damages suffered.⁴ Half a century later, following the major geopolitical changes of the early 1990s, many individuals decided to challenge those settlements and claim reparations.

There have been many such claims, including those made against Japan by former British and Dutch prisoners of war, against Japan by Korean ‘comfort women’,⁵ against Germany or Austria in US, Italian and Greek courts for reparations for forced labour or for massacres of civilians, against Swiss banks for dormant accounts, and for the restitution of cultural property and looted works of art. All these claims, some of which are carefully discussed in the books under review, are instances of the same global phenomenon of elderly victims or their heirs contesting the old cosy interstate settlements or silence. As a result, they pushed for new legal settlements that would be more commensurate with the gravity of the wrongs suffered.

Initiated in domestic courts by individuals or by groups of organized individuals, such claims, however, have rarely succeeded without some form of support by an influential state leading to a global out-of-court settlement. There is no need to recall here how instrumental the US administration has been in the settlement reached with Swiss banks⁶ or in the creation of the German foundation ‘Remembrance, Responsibility and Future’,⁷ and its Austrian counterpart.⁸ In each case, proceedings that started in American courts were brought to an end by global *ad hoc* settlements sponsored by the US. Those representations recently led to highly controversial developments in the field of state immunity, when norms considered to be peremptory were allegedly breached by the defendant state, notably in Greece⁹ and Italy.¹⁰ These developments are not analysed in the books under review, probably for reasons of timing.

⁴ Boisson de Chazournes and Heathcote, ‘Mise en œuvre de la réparation des crimes de l’histoire: une possible [ré]conciliation des temps passés, présents et futurs ?’, in *ibid.*, at 99.

⁵ Kikuchi, ‘Les “femmes de réconfort” devant la juridiction japonaise’, in *ibid.*, at 131.

⁶ Heiskanen, ‘CRT-II : The Second Phase of the Swiss Banks Claims Process’, in *ibid.*, at 147.

⁷ Wühler, ‘German Compensation for World War II Slave and Forced Labour’, in *ibid.*, at 163.

⁸ Kriebaum, ‘Restitution Claims for Massive Violations of Human Rights During The Nazi Regime – The Austrian Case’, in G. Ulrich and L. Krabbe Boserup (eds), *Reparations* (2003), at 165.

⁹ See Hellenic Supreme Court, 4 May 2000, *Prefecture of Voiotia v. Federal Republic of Germany*, reported by Gavouneli and Bantekas in 95 *AJIL* (2001) 198. See, however, *contra* Hellenic Supreme Special Court, 17 Sept. 2002, *Federal Republic of Germany v. Miltiadis Margellos*, reported in de Wet, ‘The Prohibition of Torture as an International Norm of jus cogens and its Implications for National and Customary Law’, 15 *EJIL* (2004) 97, n. 61.

¹⁰ Corte di Cassazione, *Ferrini v. Federal Republic of Germany*, 11 Mar. 2004, 87 *Riv Dir Int* (2004) 539; see de Sena and De Vittor, ‘State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case’, 16 *EJIL* (2005) 89. Among many writings on this subject, see Tomuschat, ‘L’immunité des Etats en cas de violations graves des droits de l’homme’ [2005] *RGDIP* 51.

The end of the Cold War led some African governments to support reparation claims for colonialism and the slave trade, traumatic events of an even more remote past. Those claims were also raised in Western states, notably in the US.¹¹ The way that such claims have been (ex)pressed has sometimes been so forceful¹² that the Durban conference¹³ turned into a diplomatic embarrassment; it closed in September 2001 (just three days before 9/11) with a fairly rhetorical and, on many accounts, legally ineffective,¹⁴ declaration.¹⁵

All of these developments took place during a decade marked by the triumph of human rights discourse in world politics: human rights, it was demanded, would not only be proclaimed but also effectively enjoyed, their violation repressed or at least redressed. In other words, attention turned from what states owed to individuals to what individuals who were victims of the violation of basic rights could demand. The plight of victims became so central to any notion of justice that it served as one of the arguments – albeit secondary – in favour of the creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the International Criminal Court. The Statutes of these courts address, though in different ways, procedural and substantial rights of victims.¹⁶ During the same period, over the course of about 12 years, the UN Human Rights Commission studied the issue, on the basis of reports by Theo Van Boven and Cherif Bassiouni. The Commission finally approved on 19 April 2005 a set of ‘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’.¹⁷ For obvious reasons of timing, the books under review do not give full account of those principles and guidelines, but they do take into account the works of the two rapporteurs.¹⁸

¹¹ Brooks, ‘African Redress Movement: The Quest for Atonement’, in Ulrich and Krabbe Boserup (eds), *supra* note 8, at 13.

¹² Sala-Molins, ‘Esclavage: peut-on juridiquement envisager de ne pas réparer ?’, in Boisson de Chazournes, Quéguiner, and Villalpando (eds), *supra* note 3, at 179.

¹³ Chakma, ‘The Issue of Compensation for Colonialism and Slavery at the World Conference against Racism: A fine Balance Between Rhetoric and Legality’, in Ulrich and Krabbe Boserup (eds), *supra* note 8, at 57; Hazan, ‘Durban : le repli victimaire’, in Boisson de Chazournes, Quéguiner, and Villalpando (eds), *supra* note 3, at 277.

¹⁴ Brown, ‘Etat des lieux des droits de l’homme, du droit international humanitaire et du droit international pénal face aux requêtes en ‘réparation’ des crimes de l’histoire: bilan prospectif’, in *ibid.*, at 73, 82.

¹⁵ The declaration ‘acknowledge[s] that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences.’: A/CONF.189/12, Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, para. 13.

¹⁶ I. Bottiglieri, *Redress* (2004), at 193.

¹⁷ E/CN.4/Res/2005/35. 40 votes to none, with 13 abstentions. See www.unhcr.org. The Basic Principles were approved without a vote by the General Assembly on 10 Nov. 2005 (A/C.3/60/L.24).

¹⁸ On the reports of T. Van Boven and C. Bassiouni, see Bottiglieri, *supra* note 16, at 179–182; Novak, ‘The Right to Reparation of Victims of Gross Human Rights Violations’, in Ulrich and Krabbe Boserup, *supra* note 8, at 282–284.

3. Similar (Legal) Issues

It would be impossible to address here the variety of political and moral arguments made in favour of a global settlement of claims relating to slavery and colonialism. Some of the arguments are balanced and carefully crafted. Others go as far as to suggest, albeit in the name of realism, a transformation, if only partially, of the art of politics in the 21st century into ‘the art of grievance’, as nicely phrased by Rhoda E. Howard-Hassmann.¹⁹ Some of the most outspoken activists implicitly consider opposition to their claims as expressions of sheer racism that can only lead to an outburst of violence²⁰, and openly invite, in the name of the abolition of double standards, a reconsideration of the place of ‘Auschwitz’ on the scale of martyrdom.²¹ Others base their claims on a form of unjust (and prolonged) enrichment of the former colonial powers, and claim that human rights cannot be truly enjoyed today in Africa as long as reparations for colonialism are not forthcoming.²²

Whatever the ignominious character of the past events that have given rise to these latest assertions, the least one can say is that they are not unproblematic, even when apparently supported by a very personal anthropological analysis.²³ In that regard, despite their interdisciplinary approaches and with the (partial) exception of two papers,²⁴ *Crimes de l'histoire* and *Reparations* disappointingly lack in-depth discussions of the intergenerational arguments which form the basis of the reparation claims for ‘crimes of history’. This is despite the fact that such intergenerational arguments form the core of many demands for reparations, the idea being that (what is regarded today as) crimes committed by past generations have benefited their states and, because of the continued existence of the latter, an obligation exists for current generations to pay. Contemporary philosophical thinking on intergenerational justice, however, may not reinforce the moral foundations of such reasoning.²⁵ Distinguishing between the ‘responsibility’ of current generations and the ‘guilt’ of past generations, as George Ulrich²⁶ suggests, might sound lexically attractive and probably helps to lessen the intrinsic antagonism between claimants and defendants in

¹⁹ Howard-Hassmann, ‘Moral Integrity and Reparations to Africa’, in *ibid.*, at 343, 367.

²⁰ Plumelle-Urbe, ‘Les crimes contre l’humanité et le devoir de réparation’, in Boisson de Chazournes, Quéguiner, and Villalpando (eds), *supra* note 3, at 187, 199–200.

²¹ *Ibid.*, at 199; Diop, ‘La réparation des crimes contre l’humanité en Afrique: impératif catégorique ou devoir contingent ?’, in *ibid.*, at 263, 266.

²² Thipanyane, ‘Current Claims, Regional Experiences, Pressing Problems: Identification of the Salient Issues and Pressing Problems in an African Post-colonial Perspective’, in Ulrich and Krabbe Boserup, *supra* note 8, at 35.

²³ Nahoum-Grappe, ‘Vertige de l’impunité ou l’impasse du rêve de justice’, in Boisson de Chazournes, Quéguiner, and Villalpando (eds), *supra* note 3, at 13.

²⁴ Howard-Hassmann, *supra* note 19, at 343–367; Ulrich, ‘The Moral Case for Reparations: Three Theses about Reparations for Past Wrongs’, in Ulrich and Krabbe Boserup, *supra* note 8, at 371.

²⁵ See for instance, as introductory reading, Meyer, ‘Intergenerational Justice’, in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2003 edn.), available at <http://plato.stanford.edu/archives/sum2003/entries/justice-intergenerational/>.

²⁶ Ulrich, *supra* note 24, at 377–379.

order that they may engage in a dialogue with a spirit of moral reciprocity. But does such lexical nicety really address and solve these difficult intergenerational issues?

Leaving aside the desirability, in political or moral terms, of settling slavery and colonialism claims – possibly by resorting to debt cancellation²⁷ or the creation of special funds²⁸ – there is generally no doubt that the prerequisite of any legal process of reparation is the existence of an illegal act. As far as ‘crimes of history’²⁹ are concerned, much of the debate (and proponents of a settlement will add: much of the hypocrisy, since if Europeans had been victims of the same practices, those practices most likely would have been illegal³⁰) invariably centres on the general principle that the legal status of an act must be judged according to the law in existence at the time the act occurred. It is difficult to see how one could escape such elementary legal logic.³¹ Consequently, and while the illegality of the Nazi persecutions does not seem too difficult to establish, much effort is spent trying to establish that slavery and colonialism were illegal from the start, or should now be considered as having always been illegal. The best argued and documented study on the *tempus commissi delicti* in relation to the slave trade is certainly offered by Nerina Boschiero.³² Reporting treaties, domestic statutes and case law, she clearly shows how, within the relatively short period of the first two decades of the 19th century, a practice of more than four centuries came to be outlawed. It is, of course, only if one considers that slavery has not always been illegal, but became so at a certain point in history, that it makes sense to suggest that it should be treated today as retrospectively illegal. As shown by Nerina Boschiero³³ and by Luigi Condorelli³⁴, this is theoretically not impossible, even if statements like the Durban Declaration reported above do not include such content.

Going a step further, one could add that accepting responsibility for past behaviour, and even agreeing to pay compensation, is not sufficient to make an act retroactively illegal and consequently create the duty to make good today the damage caused yesterday. In order to make a claim for reparation as a matter of law (as opposed to morality or politics), one would have to demonstrate the emergence of a new, presumably customary, rule affirming that slavery is now considered to have always been illegal. Without such a rule, nothing really distinguishes contemporary endorsements of responsibility from *ex gratia* promises. I would suggest that such a rule

²⁷ See, e.g., Boschiero, ‘La traite transatlantique et la responsabilité internationale des Etats’, in Boisson de Chazournes, Quéguiner, and Villalpando (eds), *supra* note 3, at 203, 261.

²⁸ Boisson de Chazournes and Heathcote, *supra* note 4, at 127.

²⁹ On this notion, see the interesting discussion by Quéguiner and Villalpando, ‘La réparation des crimes de l’histoire: état et perspectives du droit international public contemporain’, in Boisson de Chazournes, Quéguiner, and Villalpando (eds), *supra* note 3, at 39.

³⁰ Thipanyane, *supra* note 22, at 47.

³¹ Quéguiner and Villalpando, *supra* note 29, at 58–60.

³² Boschiero, ‘La traite transatlantique et la responsabilité internationale des Etats’, in Boisson de Chazournes, Quéguiner, and Villalpando (eds), *supra* note 3, at 203.

³³ *Ibid.*, at 256 ff.

³⁴ Condorelli, ‘Conclusions générales’, in Boisson de Chazournes, Quéguiner, and Villalpando (eds), *supra* note 3, at 291, 305.

cannot be deduced solely from endorsement statements, even if these can form a sufficient basis for redress schemes based on the voluntary acceptance of claims.

Once the rule and its violation are established, the next requirement for establishing a legal claim for reparation is to determine to whom reparations are due. As far as crimes of history are concerned, this raises an extremely difficult question, which is intrinsically linked to the definition and scope of the 'damage' to be made good. Part of the legal difficulty stems from what constitutes a major evolution for a traditionally state-centred legal system; namely that individuals, and not only states, are now, as a matter of principle, considered to have a right to claim and benefit from reparations following the breach of a rule of international law aimed at their protection.³⁵ The affirmation, in general international law, of the right of individuals to claim reparations often derives from a careful study of the jurisprudence of established human rights bodies, such as the Inter-American Court, the Committee on the Elimination of All Forms of Racial Discrimination, the UN Human Rights Committee, the Human Rights Chamber for Bosnia and Herzegovina, the European Court of Human Rights, the ICTY and ICTR or the ICC,³⁶ or other domestic mechanisms.³⁷ It is also in those *fora* that a refinement of the concepts of 'victims' and 'reparations' has occurred, to their benefit, leading to the development of the contemporary notion of 'redress'. The scope of that notion has become very large, since it includes not only questions of restitution, reparation and compensation *sensu stricto*, but also the ways in which victims are treated, rehabilitated and their fate reported, their access to justice, and their right to know the truth through effective, prompt, thorough and impartial investigations. This is at least how the 'Basic Principles and Guidelines' recently adopted by the UN Human Rights Commission consider the right of redress. There is no doubt that the creation of a universal framework will be considered to be a great achievement by those who, like Ilaria Bottiglieri, argue in favour of a comprehensive redress regime that would replace the fragmented approach applied to date. This said, these 'Basic Principles and Guidelines' leave many problems unresolved, not least their precise content and legal status.

The affirmation of a right of redress to the direct benefit of victims of grave breaches is one thing, the concrete implementation of such right is another. As a technical matter, in order to determine jurisdiction and applicable law, it would be necessary to resort to the rules of private international law,³⁸ because the rules on the international

³⁵ See recently, *Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion [2004] ICJ Rep 136, at 198, para. 153.

³⁶ Madrigal-Borloz, 'Damage and Redress in the Jurisprudence of the Inter-American Court of Human Rights (1979-2001)', in Ulrich and Krabbe Boserup, *supra* note 8, at 211; Novak, *supra* note 18, at 277; Myntti, 'The Right to Reparation of Victims of Racial Discrimination in Human Rights Law', in Ulrich and Krabbe Boserup, *supra* note 8, at 311; Bottiglieri, *supra* note 16, at 111, 193.

³⁷ Krabbe Boserup and Mohammed Cissé, 'Accessibility – A Precondition for Reparation? The Case of the Nigerien Commission on Human Rights and Fundamental Freedoms', in Ulrich and Krabbe Boserup, *supra* note 8, at 139.

³⁸ Kessedjian, 'La réparation des crimes de l'histoire vue sous l'angle du droit international privé', in Boisson de Chazournes, Quéguiner, and Villalpando (eds), *supra* note 3, at 85–96.

responsibility of states do not govern the enforcement, under domestic law, of a right conferred by international law to individuals.³⁹ As a more fundamental matter, the dramatic transformation that the traditional concept of reparation undergoes when incorporated into the inclusive notion of 'redress' blurs attempts to identify and evaluate 'damages', and renders full performance of the debtor's obligations almost impossible. More ambitiously still, the individuals' rights to access justice and to 'learn the truth',⁴⁰ which are part of the right of redress, potentially require a transparent, even democratic regime. In some circumstances, after episodes of abuses, litigation would seem to be the vehicle for a regime-changing politics. The all-encompassing notions of transitional and restorative/reparatory justice⁴¹ entailed in the right of redress make it somewhat foolish to understand redress as a set of rules to be rigorously 'applied' to any and all specific situations, despite their differences.⁴² The vast scope of the right of redress also raises questions about the desirability of resorting to courts in order to reach global settlements⁴³ for crimes that have so profoundly marked the history of entire nations and communities, leaving countless victims. This is not to say that law has no role to play in this arena, nor that similar wrongs could be treated differently without good reason. But resort to a bargaining process seems almost inevitable in such cases, so that a certain degree of flexibility in the application of those 'Principles and Guidelines' will occur and must, as a matter of principle, be preserved. Moreover, such 'projects of negotiation' can only be successful as a 'form of cultural politics' – to use the words of Elazar Barkan⁴⁴ – if legal settlements are trusted, i.e. if they are widely considered to be definitive once agreed.

If settlements are understood to be fundamentally contractual rather than adjudicatory in nature, then 'redress' must be seen, in large measure, as a matter of treaty law. Specifically, in order to determine the scope of the redress available, it is necessary to determine the scope and validity of limitations of responsibility, especially renunciation of the right to make further claims, established by treaty. Ilaria Bottigliero does not mention that rather technical but nevertheless crucial issue, which is

³⁹ Within the European community legal order, see Joined Cases C-6 & 9/90, *A. Francovich v. Italy; D. Bonifaci and others v. Italy* [1991] ECR I-5415, at paras. 41–43; Joined Cases C-46 & 48/93, *Brasserie du pêcheur SA v. Bundesrepublik Deutschland; The Queen v. Secretary of State for Transport ex parte Factortame Ltd* [1996] ECR I-1163, at para. 67.

⁴⁰ Bottigliero, *supra* note 16, at 109.

⁴¹ Gloppen, 'Review Essay: Reparatory Justice – a Road to Reconciliation? On the Role of Reparations in Transitional Justice Theory', in Ulrich and Krabbe Boserup, *supra* note 8, at 387.

⁴² The difficulty of 'apply[ing] a compensation policy of the kind ... under debate in the Commission on Human Rights for cases of massive human rights violations in protracted conflicts' is shown by Strand, 'Bombs and Butter: Compensation Issues in Protracted Conflicts and the Case of Afghanistan', in *ibid.*, at 111, 133.

⁴³ Gareau, 'Insoutenable imprescriptibilité à la lettre: note sur l'interaction du temps, du droit et du symbole dans la problématique des crimes de l'histoire', in Boisson de Chazournes, Quéguiner, and Villalpando (eds), *supra* note 3, at 25–38. See also, as far as resort to traditional forms of criminal justice is concerned, Hvidt Thelle, 'The Gacaca Jurisdictions: A Solution to the Challenge of the Rwandan Judicial Settlement?', in Ulrich and Krabbe Boserup, *supra* note 8, at 75.

⁴⁴ Barkan, 'Legal Settlements as a Form of Cultural Politics: A Moral and Historical Framework for the Right to Reparations', in *ibid.*, at 407, 421.

approached by Jean-François Quéguiner and Santiago Villalpando⁴⁵ and treated with some care by Luigi Condorelli, who considers that victims' rights remain autonomous from states' rights and, for that reason, cannot be validly sacrificed by treaty.⁴⁶ On technical grounds, a different argument can be made, considering that (1) in general, the peremptory character of a rule does not entail a prohibition to renounce the reparation debt flowing from its violation; (2) in particular, no special rule of international law – not even common Article 51/52/131/148 of the Geneva Conventions if well understood – establishes such prohibition; (3) such renunciation can be decided by treaty even when the reparation debt is a personal right of the victim because, as masters of their legal order, States may bind themselves to limit in domestic law the enjoyment of individual rights conferred by international law if certain conditions (broadly speaking, of necessity and proportionality) are met; (4) states are free to agree not to raise claims when such limitations affect their nationals abroad.⁴⁷

More fundamentally, it is not only the fate of a collection of individuals which is at stake when redressing massive traumatic events of the past – it is also the present, and the future, of societies as such. As long as it is presumed and accepted that state authorities duly represent the interests of their people, history should not be written in advance by rigid international legal principles that would preclude final settlements. Nations should be left the right to choose how to construct their future, knowing, as Walter Benjamin pointed out,⁴⁸ that the past has its claims on the present.

⁴⁵ Quéguiner and Villalpando, *supra* note 29, at 69.

⁴⁶ Condorelli, *supra* note 34, at 300–301.

⁴⁷ P. d'Argent, *Les réparations de guerre en droit international public. La responsabilité internationale des Etats à l'épreuve de la guerre* (2002), at 759–774.

⁴⁸ Benjamin, 'On the Concept of History', in H. Arendt, *Illuminations* (1968), 254, quoted in Ulrich, *supra* note 24, at 374.