The European Journal of International Law Vol. 34 no. 4

The Third World and the Quest for Reparations: Afterword to the Foreword by Antony Anghie

Andreas von Arnauld*

Abstract

In his Foreword, Antony Anghie contrasts two systems of reparations: the Third World system, which is about reparations for colonial expropriation and disenfranchisement, and the Western system, according to which, in the context of decolonization, newly independent states were allowed to expropriate foreign corporations only in return for full compensation. While the Western system has been firmly anchored in international law through the law of aliens and – later – investment law, the Third World system still meets with resistance in international legal discourse. Convinced that international law should be instrumental in overcoming its own colonial origins, I attempt in the following article to explore possible legal foundations by countering the main arguments raised against demands for reparations from the global South: their disruptive effects on today's societies, conceptual and technical legal obstacles, as well as the doctrine of non-retroactivity of the law. Not being a TWAIL scholar myself, I hope that this might serve as a constructive contribution to a common cause.

1 In Search of the Right Afterword

What a Foreword! Antony Anghie has presented us with an authoritative *tour d'horizon* of the Third World approaches to international law (TWAIL) movement, its chief aims and topics, history and future. Including a survey of the most influential books and articles, this 'Foreword' in the size of a small monograph will serve as an ideal entry point for students interested in TWAIL. Far more than a mere introduction, though, Anghie's text also stimulates with his probing thoughts and reflections on two topics that are currently in the focus of his research (the colonial origins of human rights and the Third World and the reparations campaign) as well as on TWAIL as a cosmopolitan project.

* Professor of Public Law, International and European Law, University of Kiel, Germany; Director, Walther Schücking Institute for International Law, Kiel, Germany. Email: arnauld@wsi.uni-kiel.de. For valuable feedback, I am indebted to the participants of our institute's regular research colloquium and, especially, to Thomas Kleinlein and Moritz Rhades.

How to comment on this rich article? Confessions first: I am no TWAIL scholar myself, but (hopefully) open enough to have learned from TWAIL over the last decade or so. For an illustration: after having taken up my current position in Kiel in 2013, my first seminar there was on the 'international law of development' (*Entwicklungsvölkerrecht*);[1] my most recent seminar dealt with similar topics but went under the title (and perspective) of 'postcolonialism and international law'. Also, whoever might venture to compare the last (fifth) edition (2023) of my textbook on international law with the first from 2012 (please spend your time on more valuable projects!) would notice some changes attesting to that personal learning curve. They were ever so slight, but, admittedly, textbooks are hardly the best-suited genre for iconoclasm (as I remember Gleider Hernández confessed in a workshop report on his own textbook at the European Society of International Law's 2018 Manchester conference).

Forced to choose from the panoply of topics offered by Anghie, I opted for one that connects with questions that have occupied my mind for quite some time now: how to redress past injustice (which is, of course, never 'past' if its consequences can still be felt today) through international law. So, naturally, I was drawn to section 6 of the Foreword and immediately intrigued by Anghie's tale of 'two systems of reparations'.[2] Interpreting his article as an invitation to join the debate, the following pages will be devoted to a critical analysis of the arguments usually raised against the Third World reparation campaign. For obvious reasons, as a trained and tenured international law scholar, I should not want to do away with international law as such because of its colonial roots, but there is more to it than professional conformism. Being convinced that law should be geared towards realizing fairness and justice (which I would deem a moderately 'utopian' perspective),[3] I would subscribe to Mohammed Bedjaoui, as cited by Anghie himself: 'But now the task of the law will be prospective and above all it will be more complex. Its object is now twofold for it must also help in its own transformation and contribute to eliminating that part of it which is resistant to change.'[4]

2 The Tale of Two Systems

A *Reparation Is Not Like Reparation: Reinforcing the Dynamic of Difference*

In the section on the Third World reparation campaign, Anghie juxtaposes what he calls two systems of reparations: 'The first is the "Third World system", which is still

[1] In line with a trending academic interest at the time in Germany, *cf.* P. Dann, S. Kadelbach and M. Kaltenborn (eds), *Entwicklung und Recht: Eine systematische Einführung* (2014).

[2] Anghie, 'Rethinking International Law: A TWAIL Retrospective', 34 *European Journal of International Law* (*EJIL*) (2023) 7, at 93–102.

[3] I am writing this article while also working on a presentation on the relationship between international law and fairness for the European Society of International Law's (ESIL) 2023 Aix conference, which might explain the confessional mode.

[4] M. Bedjaoui, *Towards a New International Economic Order* (1979), at 110; Anghie, *supra* note 2, at 39.

nascent and uncertain and beset by numerous legal obstacles. The second system, which is less recognized, is what I would call the "Western law of reparations", one that is already in place, established and operating with great effect and consequence.'[5] The Third World campaign is aiming at redress for exploitation by the former colonial powers, whose definition of 'property' and 'sovereignty' enabled them to take land and resources from the colonized and claim it as their own. Anghie notes pointedly 'that the ingenious expansion of property rights through international law, and through the expansion of private property rights, was simultaneous with the dispossession of entire peoples of their lands, their territories, their very persons. The relationship is almost asymptotic, the property rights of European entities expanding as the non-European peoples were deprived of their lands and means of existence'.[6] While this first, original expropriation was never remedied, reparation claims were raised as soon as the newly independent states wanted to expropriate in turn those corporations that had previously received their concessions by the former colonial powers. The basis for their claims was the law of aliens, which Anghie deconstructs in section 5 of his Foreword as a tool developed exactly for this purpose.[7] Not granting a full compensation under the law of aliens would amount to a violation of international law and trigger an obligation to compensation as reparation under the law of state responsibility. A Catch-22 between primary and secondary rules of international law.

This differential treatment is grounded in what Anghie calls the 'defensive dimension' of the 'Western system', which 'blocks and denies Third World claims for reparations' by arguing why the two expropriations cannot be compared under international law.[8] In the following, I want to focus on this 'defensive dimension', for the arguments brought against the Third World claims for reparation contribute to what Anghie aptly terms 'the dynamic of difference'.[9] There are three main arguments raised against a Third World claim for reparation:[10] first, that whatever the colonizers did was not illegal at the time and is thus shielded by the doctrine of non-retroactivity; second, that there are practicalities and legal technicalities that speak against redress for wide-scale 'historical' abuse; and, third, large-scale reparation schemes would be disruptive for today's societies. I will work my way backwards through these arguments.

B *Disruptive Reparations? Of Present Generations and the Contingencies of History*

As for the disruptive effects of potentially large-scale reparation schemes, Anghie cogently makes the point himself. While such reparations certainly come as an inconvenience to the former metropolitan powers, the consequences of colonialism and enslavement and the 'Western law of reparations' are disrupting the social order of

[5] Anghie, *supra* note 2, at 93.
[6] *Ibid.*, at 96.
[7] *Ibid.*, at 82–93.
[8] *Ibid.*, at 94.
[9] *Ibid.*, at 28.
[10] *Cf.* K. Schwarz, *Reparations for Slavery in International Law: Transatlantic Enslavement, the* Maangamizi*, and the Making of International Law* (2022), at 3–4.

peoples of the global South even today.[11] Avoiding the former disruption by maintaining the latter seems to have little (if any) moral weight. Nevertheless, this position is widely maintained, usually backed up by a twofold argument against reparations: a lack of responsibility on the part of current generations and a supersession of events.

A common trope is that current generations bear no responsibility for the 'sins of the past' and thus should not be held accountable. In his monographic treatment of the subject, Nahshon Perez bases this argument on the 'separateness of persons' and continues: '[A]ttempts to redress historical injustice(s) are applied to individuals who were not involved in the original wrong. Ignoring this point may end up burdening, sometimes severely, individuals who were not involved in the wrong.'[12] From a strictly individualist standpoint, this certainly rings true. However, it obliviates the fact that wealth and prosperity of the global North are as much influenced by the economic boost brought about by colonialism and imperialism as is the adverse economic situation of most people in the global South. While most people in the former metropolitan states might not have been actively involved in the historic wrongs, and, even less, can be held personally responsible at present, 'Northern' societies can still be regarded today as the beneficiaries of 'evil'.[13] This is, of course, a generalization. If we disaggregate the state,[14] the benefits (and burdens) derived from colonialism are unevenly distributed within the population of any given state. Anghie himself acknowledges that the dynamics of globalization have led to another split – between the rich and the poor – across the globe;[15] migration has turned persons from the global South into residents of the North,[16] which any concept of collective responsibility is forced to disregard. On a normative basis, however, international law pushes towards a generalizing aggregation, in that it translates a collective of groups into the singularity of the state for the purpose of international responsibility. That descendants of victims of former colonial practices today live in a former metropolitan state or that poor people exist in such states cannot bar claims by post-colonial states (or peoples from such states) based on state responsibility under international law.

Another question is how within such states the financial burden of reparations should be borne. International law is traditionally blind for the distribution of burdens engendered through international responsibility and liability.[17] While, generally,

[11] Anghie, *supra* note 2, at 102.

[12] N. Perez, *Freedom from Past Injustices* (2012), at 3. Similarly, *cf.* Posner and Vermeule, 'Reparations for Slavery and Other Historical Injustices', 103 *Columbia Law Review* (2003) 689, at 698–711 (from the vantage point of 'ethical individualism').

[13] *Cf.* R. Meister, *After Evil: A Politics of Human Rights* (2011). I am indebted to Eric Loefflad for pointing me to Meister's triadic approach to human rights violations.

[14] From a liberal epistemic standpoint, see Perez, *supra* note 12, at 60–98.

[15] Anghie, *supra* note 2, at 39–40, 109–110.

[16] Perez, *supra* note 12, at 90 (who gives the example of 'a British citizen born in London to Pakistani immigrants in 1990 … expected to bear the burden of redressing the broken promise made to indigenous people in 1840').

[17] Emphatically defended by Crawford and Watkins, 'International Responsibility', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 283; accepted *faute de mieux* by Murphy, 'International Responsibility', in Besson and Tasioulas, *ibid.*, 299; for an in-depth discussion, see S. Fleming, *Leviathan on a Leash: A Theory of State Responsibility* (2020), at 41–45.

the state budget – that is, all taxpayers – will provide the financial resources, more differentiated manners of burden sharing can be imagined.[18] Thus, the Foundation Remembrance, Responsibility and Future (EVZ), established by the German Parliament in August 2000 for compensating World War II internees for being subjected to slave labour, is partly funded by the Federal Republic of Germany and partly by (albeit voluntary) contributions of private companies that were actively involved in, or directly profited from, slave labour.[19]

The second argument – supersession of events – points to the contingency of the present-day situation. Individual and sovereign decisions taken since the historic wrongs were committed have impacted the course of history; also, change of circumstances can give reasons why a situation created by an original violation might no longer be deemed to be in need of correction. This line of argument has been prominently expounded by Jeremy Waldron who criticized the counterfactual reasoning behind the reparation of historic wrongs: 'The trouble with this approach is the difficulty we have in saying what would have happened if some event (which did occur) had not taken place.'[20] Retrospectively trying to disentangle the effects from historic injustice from superseding events and intervening exercises of human choice is presented as an impossible, and thus futile, endeavour. It has to be noted, however, that Waldron does not argue against all forms of reparation but only against restitution[21] and 'full' reparation, as advocated by Robert Nozick, which is aimed at bringing the victims to a level of well-being that they would have enjoyed had the wrong not occurred.[22] In the context of the Third World campaign addressed by Anghie, restitution is not in the focus, nor is compensation *Chorzów* style.[23] Thus, supersession does not alter the fact that some effects from colonialism and the first, 'original' expropriation persist, which can very well be addressed in the language of state responsibility.

Speaking of state responsibility, finally, underlines that the argument made is based on reparatory or corrective justice, which should be distinguished from distributive justice, even if the tools employed might be similar.[24] While it is certainly possible to take account of past wrongs within the framework of distributive justice, this framework is normatively anchored in an idea of a fairer distribution of wealth and life

[18] For a theoretical framework, *cf*. Fleming, *supra* note 17, at 160–168, building on Pasternak, 'The Distributive Effect of Collective Punishment', in T. Isaacs and R. Vernon (eds), *Accountability for Collective Wrongdoing* (2011) 210; S. Collins, 'Distributing States' Duties', 24 *Journal of Political Philosophy* (2016) 344.

[19] See Stiftung EVZ (Erinnerung Verantwortung Zukunft), https://www.stiftung-evz.de/en/ (last visited 4 November 2023).

[20] Waldron, 'Superseding Historic Injustice', 103 *Ethics* (1992) 4, at 8.

[21] Perez, *supra* note 12, at 22–23 (who is correct, though, to point out that Waldron's example – property of land, which now serves as the basis for the living of other people – is different from other cases of restitution claims – for example, works of art – and also does not exclude the possibility of partial supersession and future arrangements of joint possession as an answer to such claims).

[22] R. Nozick, *Anarchy State and Utopia* (1974), at 57.

[23] Cf. *Case Concerning the Factory at Chorzów (Germany v. Poland)* (Merits), 1928 PCIJ Series A, No. 17, at 47.

[24] Roht-Arriaza and Orlovsky, 'A Complementary Relationship: Reparations and Development', in P. de Greiff and R. Duthie (eds), *Transitional Justice and Development: Making Connections* (2009) 172; Schwarz, *supra* note 10, at 116–118.

chances. As such, it looks primarily at the present and is orientated towards the future; past events can only form the background of the present distribution. Corrective justice, on the contrary, directly aims at addressing (and, to the extent possible, rectifying) past injustice. The past wrongs thus become the very ground and reason for the corresponding duty to provide redress. Certainly, when looking for an appropriate form of redress, aspects of a fair distribution might also be considered; the two frameworks are not mutually exclusive. However, in this case, the redistribution is triggered by the need to remedy past wrongs. Thus, corrective justice moves the past injustice from the background to the foreground. While this is a merit in itself, the corrective justice framework has further advantages if the past wrong was a breach of law. In this case, the demand for redress becomes, indisputedly, a legal claim for reparation. While legal claims could also be derived from the concept of distributive justice, such claims tend to be far more contested if one thinks only of 'Western' approaches to social and economic rights. It is not far-fetched to assume that this is also intended when claims for redress for colonialism and enslavement are turned into a matter of welfare and social policy or, in the interstate context, development assistance.[25] The legal claim is here turned into a question of discretion and generosity. It suffices to remind one of the more than 50 years in which economically advanced states have failed to live up to their commitment to a 0.7 per cent quota of their national income for official development assistance to illustrate the point.[26]

C *Legalistic Obstacles: The Public–Private Divide and the Specificity of Reparation Claims*

While the disruption argument pertains to primarily moral considerations, the legalistic barriers erected to counter reparation claims from the Third World have led to frustration and disillusionment with international law in many quarters. Makau Mutua summarizes that 'law's career as a tool of liberation is at worst disappointing, and at best mixed' and remarks that 'victories' of the poor and marginalized in using the rights idiom 'are partial, at best'.[27] Nevertheless, looking for avenues to frame these claims in the language of international law is far from futile, not only to 'destabilize' the international legal arguments of 'reparations detractors' (as a strategy of 'denial of a denial'):[28] if, as a moral imperative, law in general (and, therefore, also international law) should strive for fairness, it is the lawyers' moral responsibility to apply the legal framework in a manner that includes the legitimate claims of the marginalized. This applies all the more if one considers how this framework has been twisted to exclude Third World reparation claims. This 'twist' can be seen when contrasting the two systems of reparations juxtaposed by Anghie and how they are presented, legally,

[25] Perez, *supra* note 12, at 83–87.

[26] UN General Assembly, International Development Strategy for the Second United Nations Development Decade, Resolution 2626 (XXV), 24 October 1970, para. 43 (expecting 'donor' states to have reached this goal by the mid-1970s).

[27] Mutua, 'Reparations for Slavery: A Productive Strategy?', in J. Bhabha, M. Matache and C. Elkins (eds), *Time for Reparations: A Global Perspective* (2021) 19, at 29–30.

[28] As phrased by Schwarz, *supra* note 10, at 56–57, 75.

as fundamentally different by those objecting to Third World reparation claims: the dynamic of difference in action.

1 Arguing the Public–Private Divide

The first difference is based on the public–private divide as constitutive of the liberal concept of rights. While I do not want to challenge this trope as such, when transferred from its original, constitutional context to the international plane, a change of function has to be acknowledged, and the trope has to be applied in good faith. As Anghie shows, both have been disregarded *vis-à-vis* the colonized and in the process of decolonization. First, those who were dispossessed in the colonies to be were conveniently left in limbo between public and private. Theirs was conceived as a kind of 'pre-political' ownership that was neither acknowledged as private property nor devised by the colonizers as public (sovereign) possession of territory.[29] Second, in preparing for decolonization, the divide was instrumentalized to mask colonialism's character as a (in modern parlance) 'public–private partnership'. The role of colonial companies and of settlers' economy and the function of concessionaires in administering the colonies were conveniently obfuscated.[30]

One of the major shifts occurred with what Anghie describes as the 'receding' of the corporation 'as an explicit actor in the world of international law' and 'the emergence of a new body of law through which the corporation inserts its presence in the international system – the law relating to the rights of aliens'.[31] After decolonization, this deliberate shift allowed corporations that had been granted concessions by the colonial power to be portrayed as private investors, seemingly at the mercy of the newly independent states. Matthew Craven has analysed how this move necessitated 'a profound reorganization of existing relations of property, contract, and debt'.[32] This reorganization was conceptualized during the wake of the period of decolonization by David O'Connell, especially, in three bold steps:[33] by framing the concessions as 'foreign' investments; by casting the concessionaires as 'private' agencies; and by presenting the concessions as legally extinguished while leaving an equity-based claim to compensation for 'acquired rights', focused only 'on inputs, not profits, dividends or repatriated capital'.[34]

While, in his Foreword, Anghie puts an emphasis on the role of corporations, it is worthwhile also to look in the direction of the metropolitan state, whose role and share in the exploitation through (sometimes only partly) private corporations was equally obfuscated by this reframing along the public–private divide. Given the contractual relationship between metropolitan power and concessionaires at the moment of

[29] *Cf.* Anghie, *supra* note 2, at 95–96.
[30] *Cf.* Craven, 'Colonial Fragments', in J. von Bernstorff and P. Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019) 101, at 104–109.
[31] Anghie, *supra* note 2, at 88.
[32] Craven, *supra* note 30, at 103.
[33] O'Connell, 'Economic Concessions in the Law of State Succession', 27 *British Yearbook of International Law* (1950) 93. For the following analysis, see Craven, *supra* note 30, at 118–122.
[34] Craven, *supra* note 30, at 122.

decolonization, compensation claims should have been addressed to the metropolitan state that had become unable to fulfil its part of the agreement (by relinquishing the administration of the territory), not to the newly independent states. This is precisely why, in the grand reframing exercise, the concessionary rights (with their contractual link to the metropolitan state) had to be imagined as extinguished while, at the same time, detaching the value of the 'private investment' from its contractual basis via the doctrine of acquired rights.[35] Though the reframing was challenged from within the global South,[36] its political acceptance, if only for the time being, became a necessity in the struggle for independence. Later attempts to change the law from within would prove futile.[37] However, going back to the moment where the conditions for achieving independence were defined: would it be too far-fetched to ponder, by a structural analogy to the International Court of Justice's reasoning in its *Chagos* opinion,[38] whether such acceptance was made still under the authority of the colonial powers and 'not based on the free and genuine expression of the will of the people concerned?'.

2 Arguing the Specificity of Claims

The second difference between the two systems of reparation relates to the specificity of claims. While the expropriation of a foreign corporation can be neatly reconstructed in an unbroken chain of causalities leading up to a monetary compensation, calculated on the basis of its market value, this is hardly the case for reparation claims based on structural and systemic violence. Thus, unsurprisingly, reparations for colonialism and enslavement have been rejected 'because of the lack of specificity of the claims and claimants'.[39] After the return of colonized territory, what is the harm inflicted, how to assess causality, how to determine potential compensation? These are valid questions, but not unassailable objections. The law of state responsibility knows a broad range of remedies.[40] Beyond restitution and full compensation, there are less stringent requirements when it comes to the assessment of harm and causality.[41] Here, there is no need for the counterfactual approach criticized by Waldron.[42] Applying those rules to collective harms can build on the 2005 UN 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[43] – non-binding in themselves but at least, in part, a specification of existing legal obligations – and on

[35] *Ibid.*, at 120–121.

[36] See only, as singled out by Anghie himself, Roy, 'Is the Law of State Responsibility for Injuries to Aliens a Part of Universal International Law?', 55 *American Journal of International Law* (1961) 863; C.F. Amerasinghe, *State Responsibility for Injury to Aliens* (1967); and the efforts by Mohammed Bedjaoui to that effect in the International Law Commission.

[37] Craven, *supra* note 30, at 101–104, 123–124.

[38] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports (2019) 95, para. 172.

[39] Mutua, *supra* note 27, at 32.

[40] Schwarz, *supra* note 10, at 137–163 (criticizing the 'myopic focus on compensation' [at 17]).

[41] *Ibid.*, at 164–187, with further references.

[42] See section 2.B.

[43] GA Res. 60/147, 16 December 2005.

case law, especially by the Inter-American Court of Human Rights.[44] The injustices of colonialism are well known and well documented, and their effects on the Third World can be traced to an extent to support, at the least, a claim for just satisfaction.[45]

I hold it as important to stress these more flexible and 'progressive' elements within the secondary rules on reparation in order to challenge overly formalistic objections and not to focus too much on the *Chorzów* case as the 'starting point' and model.[46] If anything, it was a model for compensation claims of a specific kind. The general principle stated in the 1927 judgment on jurisdiction – that the 'breach of an engagement involves an obligation to make reparation in an adequate form'[47] – can also serve as a basis for the Third World campaign.[48] And the famous phrase in the 1928 judgment on the merits – that 'reparation must, as far as possible, wipe out the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed'[49] – serves as a regulative ideal as far as feasible. International practice is characterized more by flexibility and adaptability when it comes to reparation than by strict adherence to a *Chorzów* standard.[50] The fact that, in cases of extended widespread violence, a more flexible approach is needed, and, indeed, applied, is witnessed by the practice of wartime reparations. Some attempts at a precise offsetting of war damage and losses notwithstanding (the Treaty of Versailles being the most notorious example[51]), questions of equity, as well as of practicality, have oftentimes led to lump sum payments as reparation.[52] To maintain that the law

[44] For an in-depth study, see D. Odier-Contreras Garduño, *Collective Reparations: Tensions and Dilemmas between Collective Reparations with the Individual Right to Receive Reparations* (2018).

[45] Schwarz, *supra* note 10, at 181–182.

[46] While I agree with Anghie as to expropriation issues being the driving force behind the law of aliens, and while I generally admire his ability to 'connect the dots', I am less convinced by the narrative that turns the *Chorzów* case into the defining moment for the legal protection of foreign corporations. Anghie, *supra* note 2, at 98–99. In this case, the Permanent Court of International Justice applied not the customary law of aliens but, rather, the general principles of law and equity, channelled through a bilateral treaty – the 1922 Geneva Convention between Poland and Germany, League of Nations Treaty Series No. 271, Volume IX, 466. Moreover, this treaty was, functionally, not the equivalent of modern investment treaties (the later aggregate state of Anghie's 'Western law of reparations'), in that it was part of a complex settlement after the Allied redrawing of the boundary between Germany and Poland in Upper Silesia. For a precise contextualization of the *Chorzów* judgments, I am looking forward to the publication of a paper presented at the 2023 ESIL's annual conference by Emmanuel Giakoumakis, 'A Standard That Is Fair or beyond Repair? Equitable Considerations in the Determination of Compensation under the Factory at *Chorzów* Standard'.

[47] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1927, PCIJ Series A, No. 9, at 21.

[48] Cited in this sense by Schwarz, *supra* note 10, at 102–103.

[49] *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928, PCIJ Series A, No. 17, at 47.

[50] Torres, 'Revisiting the *Chorzów Factory* Standard of Reparation', 90 *Nordic Journal of International Law* (2021) 190; *cf.* C. Brown, *A Common Law of International Adjudication* (2007), at 185–224; Gray, 'Remedies', in C. Romano, K. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (2014) 871.

[51] For a later example (within limits), see Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations', 13 *EJIL* (2002) 161.

[52] On the practice after World War II, see P. d'Argent, 'Reparations after World War II', in *Max Planck Encyclopedia of International Law* (May 2009).

of state responsibility is not capable of addressing wide-scale and gross violations of international law is, thus, a misrepresentation.

D *How to Avoid the Re-enactment of Injustice: Challenging Non-Retroactivity*

All of the preceding thoughts on the secondary rules are of little worth if one fails to establish a violation of a primary rule through the practices of colonialism. This is where the doctrine of non-retroactivity of the law comes into play. That historic conduct must be assessed only according to the then contemporaneous law is all too conveniently presented as a knock-down argument whenever historic injustice is being addressed. That the principle of non-retroactivity has never been understood as absolute in international law, however, can be seen from the Nuremberg and Tokyo trials.[53] That even in the field of international criminal law – where human rights considerations significantly strengthen the argument for non-retroactivity – exceptions could be made points to the need to apply the principle in a differentiated manner. Max Huber's famous dictum, according to which 'a 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 fails to be settled',[54] originated from the law on territorial acquisition where stability of the juridical facts has a special bearing on maintaining international peace. No comparable additional interests are at stake in the case of state responsibility if we exclude crippling financial burdens and other aggravating factors.[55]

But how to proceed? What seems clear from the outset is that the application, plain and simple, of a law that was created and construed to justify those colonial practices will only serve to shield the former metropolitan powers from accountability. Over the last years, several ways have been suggested to avoid this consequence. One option could be to treat fundamentally unjust law as non-law.[56] Such a move would create a legal vacuum that has to be filled to trigger state responsibility. Projecting, in the absence of applicable contemporaneous standards, modern human rights law and rules on territorial acquisition on historic cases might amount to an anachronism, but it could be morally justified. After all, this is not a historiographic exercise. Reconstructing pre-colonial indigenous law instead[57] can prove difficult where records are lacking (as a result of the bias of colonial archives).[58] Also, though to apply

[53] A point raised (and compared to our topic) by Mutua, *supra* note 26, at 22–26.

[54] *Island of Palmas*, 4 April 1928, reprinted in UNRIAA, Volume II, 829, at 845.

[55] For the case of wartime reparations, *cf.* D. Shelton, 'Reparations', in *Max Planck Encyclopedia of Public International Law* (August 2015), para. 5.

[56] Discussed, but ultimately rejected, by Buser, 'Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to Compensate Slavery and (Native) Genocide', 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2017) 409, at 429–433.

[57] See, e.g., M. van der Linden, The *Acquisition of Africa (1870–1914)* (2016), at 25–26 (who cites African views on land law [at 41–48] and sovereignty [at 62–67], though she eventually bases her argument on a critical reading of 19th-century European international law).

[58] *Cf.* Craven, 'Introduction: International Law and Its Histories', in M. Craven, M. Fitzmaurice and M. Vogiatzi (eds), *Time, History and International Law* (2007) 1, at 21.

the local laws of the oppressed might be morally better justified than to rely solely on the law of the oppressor, it turns out one-sided as well. Drawing from this – with valid reasons – that a truly 'international' law was lacking at the time leads to another legal vacuum, which Edward Martin recently suggested could be filled on the basis of equitable principles.[59] However, this solution makes it difficult to forge a link to the rules of state responsibility and reparation.

A way that I suggested myself in this journal two years ago tries to steer a mediating course.[60] It takes as a starting point the 'tainted' Western international law of the time, accepting that, genetically, it is the origin of today's public international law. However, it emphatically includes ethical principles enshrined in the *lex lata* of the day (such as the Martens clause or the principle of good faith). Based on these, it reconstructs a contemporaneous critique of such practices – local opposition (so far as recorded) as well as opposition 'from within'.[61] Concerning the colonial land-grabbing practices that Anghie addresses, we find in a leading French textbook of the time, for example, the following commentary:

> Un respect absolu est aussi bien dû à l'indépendance des tribus sauvages ou barbares qu'à leur droit de propriété. Les hommes de toutes races, blanches ou noires, rouges ou jaunes, si inégaux qu'ils puissent être en savoir, en richesses, en industrie, doivent être considérés comme égaux en droit.… Nier à des tribus ou peuplades qui occupent librement le sol, depuis des milliers et des milliers d'années, le droit à l'indépendance, à la souveraineté, est inadmissible.[62]

The attention is put here on semantic struggles[63] over the law at the time, from which our 'modern' understanding originates. Blurring the boundaries between *lex lata* and *lex ferenda*, between legality and illegality, I arrive at good reasons to treat the practices in question as illegal for the purposes of state responsibility but not yet at sufficient reasons to disregard the fact that the (arguably) prevailing opinion of the day held them to be legal. While this 'pluralist' result excludes, in general, claims for full compensation, a 'legal damage' remains that demands redress by giving just satisfaction.[64] As to the form, I have argued primarily for an obligation to negotiate with the victims or their descendants.[65] The objective of such negotiations can also be compensations as well as other forms of redress.

While I developed this approach with a view to specific incidents, which are more likely to trigger 'public anger' (I rely here on Émile Durkheim's concept of *colère publique*),[66] with some adaptation to include long-term criticism it should also be applicable

[59] E. Martin, *The Application of the Doctrine of Intertemporality in Contentious Proceedings* (2021).

[60] Von Arnauld, 'How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality', 32 *EJIL* (2021) 401.

[61] This is not limited to the discourse of legal specialists but includes debates in politics, media and the arts.

[62] H. Bonfils and P. Fauchille, *Manuel de droit international* (5th edn, 1908), at 329, para. 547.

[63] A concept borrowed from I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012).

[64] On this concept, see C. Hoss, 'Satisfaction', in *Max Planck Encyclopedia of Public International Law* (April 2011), para. 38.

[65] Von Arnauld, *supra* note 60, at 422–428.

[66] *Cf.* E. Durkheim, *The Division of Labour in Society*, edited and introduced by S. Lukes, translated by W.D. Halls (2nd edn, 2013), at 79.

to structural violence and the original, first expropriation, as the earlier quote from Fauchille's textbook might indicate. A possible point of entry into the ethical dimension of the *lex lata* of the day could be the abuse of the contractual form in the practice of 'treaties of protection', which suggested equality of rank but aimed at subjugation. Such contradictory behaviour, which violated the trust of the other side, was if not already a violation of the *pacta sunt servanda* principle,[67] at least incompatible with the principle of good faith. This model, it has to be admitted, operates exclusively within the positivist paradigm of international law. For previous eras, however, the *jusnaturalist* foundation of international law should make it easier rather than more difficult to include rights and interests of the then marginalized. That those who reject reparations for historic injustice, ironically, often also apply a late 19th-century positivism to earlier epochs has been succinctly remarked on recently by Katarina Schwarz.[68]

3 Through the Looking Glass of TWAIL

The reason why I expanded a little on what I suggested in my 2021 paper is less self-marketing than to highlight that international law, also in the heyday of colonialism and imperialism, was – then as it is now – far from monolithic and its interpretation far from uncontested.[69] The aim is not whitewashing Europeans or in any way relativizing how international law was used (and still is used today) as an instrument of subjugation, exploitation and marginalization. It is, however, to underline the plurality of voices and opinions that challenged this instrumentalization (in a landscape of international law that was far less institutionalized than it is today). Recent works on comparative international law have pointed out the variety of 'national' approaches to international law, also within the Western world;[70] the diversity of the 'European tradition in international law' has been (and hopefully continues to be) paraded in this journal in its eponymous series, covering such diverse scholars as Georges Scelle, Dionisio Anzilotti, Alfred Verdross, Charles de Visscher, Max Huber and Walther Schücking.[71]

On the surface, this might be seen as a contradiction to TWAIL's depiction of 'a' or 'the' Western international law. However, I do not think there is a contradiction. First, for obvious reasons, to make their fundamental critique, TWAIL scholars must resort to dichotomies and 'othering' techniques themselves in order to put an address to their challenge. Given the complicity of, practically, all European states in colonialism and

[67] In this sense, see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment (Counter-Claims), 10 October 2002, ICJ Reports (2002) 474, at 480 (Koroma J dissenting).

[68] Schwarz, *supra* note 10, at 7, 59, 64–70.

[69] *Ibid.*, at 8.

[70] A. Roberts *et al.* (eds), *Comparative International Law* (2018).

[71] Volume 1 (1990): Georges Scelle; Volume 3 (1992): Dionisio Anzilotti; Volume 6 (1995): Alfred Verdross; Volume 8 (1997): Hersch Lauterpacht; Volume 9 (1998): Hans Kelsen; Volume 11 (2000): Charles de Visscher; Volume 18 (2007): Max Huber; Volume 22 (2011): Walther Schücking; Volume 23 (2012): Nicolas Politis; Volume 25 (2014): Fjodor F. Martens; Volume 31 (2020): Camilo Barcia Trelles.

its abuses (which is not to say, all lawyers, politicians, artists and so on within those states) as well as in neo-colonial (or semi-colonial) practices, there is, second, nothing inherently unfair in this generalization. Third, TWAIL does cover what I perceive as a blind spot of the 'European tradition' (I stand to be corrected here), which is that form of a radical critique that questions the very institutions of international law and governance. Here, TWAIL indeed has provided us with 'the concepts, the intellectual vocabularies and the systems of thinking that have enabled international law scholars to pursue these intuitions'.[72] That said, building international law on international solidarity, as proposed by Georges Scelle,[73] could be one of several ways to offer alternatives to the neo-liberal capitalist framework of international law criticized by Anghie. It is important, however, to stress that this solidarity is not a natural given, as assumed by Scelle, but has to be actively realized through a purposeful application of the law.[74]

Here is, finally, where I see the deeper point of contact: stressing the plurality of voices – not only outside Europe and the West but also within the West – is an attempt to counter discursive hegemonies in international law, now and then. Then and now, apologists of power with their often closer ties to governments and state policies have attempted to define the law. To counter such appropriation, I highlight semantic struggles in order to focus on 'spaces and tensions within international law'.[75] Understood as a means to challenge dominant assumptions about the law, this reverts us back to our own responsibility as legal scholars. Recently, Naz Modirzadeh has challenged TWAIL for not living up to its claim to make a difference for the people of the global South, lacking a programmatic agenda and ideas how to implement change.[76] I do not wish to comment on that challenge, which she intends as a clarion call to the movement. Anghie himself admits that, 'while plurality might be one of the key attributes of TWAIL, this might be seen as a flaw, signifying an absence of a focused and directed approach to international law and its transformation'.[77] His suggestion of a 'cosmopolitan turn' of TWAIL – that is, to direct attention also to the 'Third World' within the 'First World'[78] – might further blur boundaries between TWAIL and 'a broadly progressive liberal international law approach, whose adherents also express deep concern for the well-being of the people of the Global South'.[79] However that may be,

[72] Anghie, *supra* note 2, at 103–104.

[73] His later ideas, at least. In his 1906 state thesis, *Histoire politique de la traite négrière aux Indes de Castille: Contrats et traités d'Assiento*, Scelle presented a crystal-clear analysis of the role of law in trading enslaved Africans to the Spanish colonies in America, based, however, on a strange naturalization of the forces of the market. On this, and Scelle's later turn to a more compassionate form of solidarity, see Martineau, 'Georges Scelle's Study of the Slave Trade: French Solidarism Revisited', 27 *EJIL* (2016) 1131. On Scelle's later views on colonialism and international law and his position among French international lawyers, see Norodom, 'Les internationalistes et la difficile appréhension du "phénomène colonial"', in J.-P. Bras (ed.), *Faire l'histoire du droit colonial: Cinquante ans après l'indépendance de l'Algérie* (2015) 203.

[74] A point realized in the field of international organizations and institutions by Walther Schücking.

[75] Schwarz, *supra* note 10, at 7–8.

[76] N. Modirzadeh, '[L]et Us All Agree to Die a Little: TWAIL's Unfulfilled Promise', *Harvard International Law Journal* (forthcoming), available at http://dx.doi.org/10.2139/ssrn.4406477.

[77] Anghie, *supra* note 2, at 108.

[78] *Ibid.*, at 109.

[79] Modirzadeh, *supra* note 76, at 19–20.

when it comes to specific projects, like the Third World campaign for reparations, I think it does not matter so much if one self-identifies as a TWAIL scholar as it does to work together towards the aim of breaking the 'dynamic of difference' by employing international law.[80]

[80] In this sense, *cf. ibid.*, *supra* note 76, at 64.