States before their colonial past: Practice in addressing responsibility

Rachele Marconi[*]

1. *Introduction*

Over the past few decades, prominent claims brought by former colonies and indigenous populations against former colonial powers[1] have brought to the foreground the profound implications of colonialism on the development of international law.[2] Tracing the evolution of this State practice is crucial to identifying patterns of argumentation and the scope of international law discourses when addressing issues stemming from colonialism.

[*] Postdoctoral research fellow, University of Macerata. This study is part of the activities of the Research Project funded by the Ministry of University and Research under the PRIN 2017 call for proposals (D.D. 3728/2017) on 'Reacting to mass violence: Acknowledgment, denial, narrative, redress' (Protocol 2017EWYR7A).

[1] Turning point for substantive claims was the World Conference against Racism, Durban, South Africa (30 Aug. 2001–7 Sept. 2001) pursuant to the United Nations (UN) General Assembly (GA) Res 52/111 (18 February 1998). See <www.un.org/WCAR/e-kit/backgrounder1.htm>. See, among others, the Caribbean Community (CARICOM) Reparation Commission, set up by the CARICOM Conference of Heads of Government in September 2013. For its establishment, see CARICOM Secretariat 'News Feature' (October 2014) <www.caricom.org>, and for its 'ten point plan for slavery reparations' see <www.leighday.co.uk >. In December 2022, the African Commission on Human and Peoples' Rights (ACHPR) adopted its first Resolution on Africa's Reparations Agenda and The Human Rights of Africans In the Diaspora and People of African Descent Worldwide, see ACHPR Res 543(LXXIII) (9 November 2022).

[2] Third World Approaches to International Law (TWAIL) have already largely discussed the matter. See, among others, A Anghie, BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 Chinese J Intl L 77; A Anghie, 'Towards a Postcolonial International Law' in P Singh, B Mayer (eds), *Critical International Law: Postrealism, Postcolonialism and Transnationalism* (OUP 2014) 123; N Tzouvala, *Capitalism As Civilisation: A History of International Law* (CUP 2020).

This contribution analyses State practice in addressing issues arising from colonialism, attempting to answer the question: how do former colonial powers deal with their colonial past and what role does international law play on their decisions? Based on an examination of the wide variety of States' conduct, the research shows that there is an emerging trend of seeking to break colonial 'amnesia'.[3] What is important for present purposes, however, is that former colonial powers are beginning to acknowledge their colonial injustices without accepting any legal responsibility.[4] States seek forms of redress to come to terms with their colonial conduct, which they consider to be unjust, but not international wrongs. Rather than being presented as the result of a legal obligation to make amends for violations of the law, these new forms of redress are carefully phrased and framed as voluntary measures to face up to a moral and historical responsibility.

In the present context, an analysis of State practice in relation to colonialism appears particularly relevant for two reasons. First, the application of international rules, such as those on reparations, to the colonial past is highly contested.[5] Indeed, over the years, many legal arguments have been employed to preclude remedies for colonial abuses,[6] such as

[3] C Stahn, 'Confronting Colonial Amnesia: Towards New Relational Engagement with Colonial Injustice and Cultural Colonial Objects' (2020) 18 J Intl Crim Justice 793.

[4] See eg the position of Germany with regard to its colonial past, expressed by Foreign Minister Maas on the conclusion of negotiations with Namibia: 'Given Germany's historical and moral responsibility, we will ask Namibia and the descendants of the victims for forgiveness', German Federal Foreign Office (28 May 2021) <www.auswaertiges-amt.de/en/newsroom/news/-/2463598>.

[5] As Tomuchat put it: 'By attempting to analyse epochs of the past based on the modern concepts of today one ends up with a multitude of logical contradictions that would require a comprehensive review of the legal order'. C Tomuchat, 'The Relevance of Time in International Law' (2021) 41 Polish YB Intl L 9, 27.

[6] For an overview of the main legal arguments to exclude reparations for colonial crimes, see generally JF Quéguiner, S Villalpando, 'La réparation des crimes de l'histoire: Etat et perspectives du droit international public contemporain' in L Boisson de Chazournes, JF Quéguiner, S Villalpando (eds), *Crimes de l'histoire et réparations: les réponses du droit et de la justice* (Bruylant 2004) 39; DL Shelton, 'Reparations for Historical Injustices' in DL Shelton (ed) *Remedies in International Human Rights Law* (2nd edn, OUP 2006) 428. On this issue see Salvadego's contribution in this Zoom-out. Some authors have tried to fill this vacuum by excluding the applicability of certain international law norms, in so sustaining that States involved in colonial injustices have an obligation to provide reparation to the descendants of the victims. D Diop, 'La réparation des crimes contre l'humanité en Afrique. Impératif catégorique ou devoir contingent ?' in L Boisson

the statute of limitations for colonial crimes,[7] the principle of intertemporality,[8] the intergenerational dimension of restorative claims,[9] the impossibility of calculating losses and damages suffered by the former colonies. Second, an analysis of State practice can reveal whether or not it can be understood as a series of isolated practices, or rather as practices that can be enclosed within a common framework of procedures and acts that States believe they must follow in such cases.

This article aims to identify elements of consistency in State practice in order to determine whether there is a trend towards standardisation of State behaviour in dealing with issues related to colonialism. The research does not address State conduct related to the restitution of cultural property stolen during colonial times due to the complexity of legal issues involved.[10] Moreover, it will not address claims of indigenous peoples settled within the State's territory of the former colonial power,[11] where ad-

de Chazournes et al (eds), *Crimes de l'histoire et réparations: les réponses du droit et de la justice* (Bruylant 2004) 263.

[7] For cases in which former colonial powers have used statute of limitations arguments to reject colonial descendants' claims, see UNGA Res 74/321 (21 August 2019), paras 48-49, and UNGA Res 76/180 (19 July 2021) paras 23, 27-29.

[8] Art 13 Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), 'Report of the International Law Commission on the Work of Its Fifty-third Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 (2001) II/2 YB ILC 57. J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002). For an attempt to stretch the dogmas of intertemporal law in dealing with historical injustices, see A von Arnauld, 'How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality' (2021) 32 Eur J Intl L 401; E Martin, *The Application of the Doctrine of Intertemporality in Contentious Proceedings* (Duncker & Humboldt GmbH 2021).

[9] C Kukathas, 'Who? Whom? Reparations and the Problem of Agency' (2006) 37 J Social Philosophy 330, 331.

[10] The legal analysis of the negotiations for the restitution of cultural property looted in colonial times involves a range of issues (such as the procedure for the repatriation of the property), norms (such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972)) legal categories (eg the classification of cultural property as public property subject to inalienability) and actors (such as museums or private entities claiming ownership of the property). See Caligiuri's contribution on the matter in this Zoom-out.

[11] Examples of ethnic groups that underwent colonisation but remained within the territory of the former colonial power include, among others, the Australian Aborigines, the Maoris in New Zealand, and the natives in Canada.

ditional issues for the protection of the human rights of indigenous peoples arise. The study concludes that while State practice is fragmented and inconsistent, certain common elements emerge from a careful examination of the initiatives taken by States to address issues related to colonialism. State practice offers indications that States deal with the colonial injustices primarily as a moral and political responsibility[12] rather than as a matter of legal obligation, ie States frame measures to reconcile with their past based on moral and political pressure rather than out of a belief that they are legally obliged to recognise or due to evolving legal standards and procedures. From this perspective, this article is also a contribution on the broader issue of responsibility and reparations for historical abuses.

The rest of the article is structured as follows. Sections 2 systematizes the main recent State practice for dealing with colonial injustices, underlying elements of consistency, while Section 3 proposes some reflections on the possible implications of this 'reconciliation without responsibility' approach for the legal framework, particularly examining whether these practices can provide the basis for extracting binding legal standards.

2. *Analysis of State practice*

From the outset, the investigation of State practice in relation to colonial issues revealed a multiplicity of conduct that differ from one another in many ways. While recognising the risk of using overly strict criteria that might gloss over the diversity of this conduct, a criterion to systematize the practice was deemed necessary. Therefore, the conduct of former colonial powers were classified according to the degree of State involvement, a criterion that guarantees a closer correspondence to the classification of forms of reparation. On the basis of this criterion, State practice is placed on a continuum, starting from the 'simple' investigation of potential colonial wrongdoings and ending with the adoption of practical measures to rectify some of these wrongdoings. In this way, three groups of State conduct can be identified: those focused on fact-finding, those consisting of unilateral recognition and presentation of apologies,

[12] E Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Norton 2000).

and those involving bilateral negotiations leading to the ultimate assumption of obligations.

2.1. *State practice devoted to ascertaining the facts: The truth commissions*

In parallel with the definition of a truth commission[13] used in the field of transitional justice,[14] for the purposes of this contribution we envisage a body set up to investigate the past history of mass atrocities in a particular country. Commonly established in post-conflict and post-authoritarian contexts to address the aftermath of large-scale violence in conflict settings,[15] truth commissions have also been set up by some former colonies to address a history of mass abuses which occurred during colonial rule.[16] However, none of the Commissions established by former colonies has been supported by the respective former colonial power.

The first example of a truth commission set up by a former colonial power is very recent, dating back to June 2020, when the Belgian Parliament[17] established a special parliamentary Commission[18] to launch an enquiry into Belgium's overseas colonial legacy and to consider appropriate

[13] A truth commission is commonly defined as a 'body set up to investigate past history of violations of human rights in a particular country – which can include violations by the military or other government forces or armed opposition forces'. P Hayner, 'Fifteen Truth Commissions--1974 to 1994: A Comparative Study' (1994) 16 Human Rights Q 597, 600. See also RG Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights J 69; M Freeman, *Truth Commissions and Procedural Fairness* (CUP 2006).

[14] Transitional justice is defined as '[t]he full range of processes and mechanisms associated with a societies' attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation', UN Security Council (SC) 'The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary- General' UN Doc S/2004/616 (23 August 2004) para 8.

[15] P Hayner, *Unspeakable truths: Transitional justice and the challenge of truth commissions* (2nd edn, Routledge 2011).

[16] Among them, the Truth and Justice Commission of Mauritius (2009-2011) examined the impact of the legacy of slavery from 1638 onwards, including the various colonial periods; the Truth and Dignity Commission (2014) in Tunisia included the period before independence in its mandate; the mandate of the Burundi's Truth and Reconciliation Commission (2014) was extended to investigate colonial crimes committed since 1885.

[17] See <www.lachambre.be/FLWB/PDF/55/1462/55K1462001.pdf >.

[18] Commission spéciale chargée d'examiner l'État indépendant du Congo (1885-1908) et le passé colonial de la Belgique au Congo (1908-1960) au Rwanda et au Burundi (1919-1962) ses conséquences et les suites qu'il convient d'y réserver.

reparations. As a temporary, State-established body that focuses its work on the past and investigates a series of abuses related to a defined historical period – both violations of the physical integrity of the affected populations and violations of social and economic rights committed with the aim of economic exploitation by the former colonial power – the Commission fulfils the main characteristics of transitional justice's truth commissions applied in an 'aparadigmatic context'.[19] The Commission's mandate reflects truth-seeking and reconciliation language, as well as the four-pillar structure of transitional justice.[20] Composed of 17 Parliamentarians appointed according to proportional representation of the political groups,[21] the Commission operates on the basis of a parliamentary mandate – which is both a source of legitimation and a risk of political interference.[22] The same parliamentary resolution also provides for a scientific committee of ten associated experts to 'éclairer les décisions qui reviennent aux membres de la Commission spéciale' with the publication of a first report aimed at providing historic research, including from the victims' viewpoint and understanding the relationship between colonialism and racism.[23]

Delivered in October 2021, the first Report of the group of experts did not offer a basis for a subsequent political consensus in the Commission for the adoption of recommendations including an official apology to the victims.[24] Instead of using the term 'excuses' the Commission ended up

[19] The truth commission is applied here to a consolidated democracy. For the current proliferation of transitional justice mechanisms to atypical contexts, see generally T Destrooper, LE Gissel, KB Carlson (eds), *Transitional Justice in Aparadigmatic Contexts: Accountability, Recognition, and Disruption* (Routledge 2023).

[20] UN Secretary General (n 14).

[21] For an overview of the critics to the timeline, pace, agenda, and composition of the commission, see T Destrooper, 'Belgium's "Truth Commission" on Its Overseas Colonial Legacy: An Expressivist Analysis of Transitional Justice in Consolidated Democracies' (2023) 22 J Human Rights 158.

[22] J Sarkin, R Kumar Bhandari, 'Why Political Appointments to Truth Commissions Cause Difficulties for these Institutions' (2020) 12 J Human Rights Practice 1.

[23] Commission Spéciale chargée d'examiner l'État indépendant du Congo et le passé colonial de la Belgique au Congo, au Rwanda et au Burundi, ses conséquences et les suites qu'il convient d'y réserver 'Rapport des experts Chambre des Représentants de Belgique' (26 October 2021) 621 <www.dekamer.be/FLWB/PDF/55/1462/55K1462002.pdf>.

[24] For the proposed recommendations see <www.lachambre.be/kvvcr/pdf_____sections/pri/congo/20221122%20 Aanbevelingen%20voorzitter%20def%20 (004) pdf>.

with the expression 'plus profonds regrets'.[25] The Commission's work thus has focused on raising greater historic awareness of the injustices committed under Belgian colonial rule, but has failed to open up to a discourse on reparations and reconciliation as expected in its methodological plan.[26]

A similar effort has been made by the two heads of State of France and Algeria, who, on the occasion of the French President's visit to Algeria in August 2022, decided to set up a joint commission of French and Algerian historians to study France's colonial history in Algeria and provide for the opening of confidential French archives[27] relating to that period.[28] The establishment of this Commission is just one of the areas of cooperation and strategic dialogue between the parties, as provided for in the Algiers Declaration of 2022 for a renewed partnership between France and Algeria.[29] On the one hand, the momentum towards a future of reconciliation between the parties seems evident, to the extent that the issue of colonial memory can be dealt with alongside (and on an equal footing with) issues of economic relations and cooperation between the parties. On the other hand, the relegation of aspects of Franco-Algerian colonial past to the 'Histoire et mémoire' Section of a general declaration of partnership seems to be a clear sign of the irrelevance, at least at this stage, of international law, and in particular the law of State responsibility, in addressing the French colonial abuses in Algeria. This assessment seems to be supported by the mandate of the Commission, which refers to the shared colonial past as 'des problématiques liées à la mémoire' to be addressed 'dans le respect de toutes les mémoires'.[30]

[25] 'Passé colonial belge: le mot « excuses » ne sera pas écrit' *Le Vif* (28 December 2022) <www.levif.be/belgique/passe-colonial-belge-le-mot-excuses-ne-sera-pas-ecrit/>.

[26] See <www.dekamer.be/kvvcr/pdf_sections/news/0000012375/202112_20_methodologie_websitefr2.pdf>.

[27] On the long-lasting disputes between the parties about French Algeria, see S Slyomovics, 'Repairing Colonial Symmetry: Algerian Archive Restitution as Reparation for Crimes of Colonialism?' in J Bhabha, M Matache, C Elkins (eds), *Time for Reparations: A Global Perspective* (Pennsylvania UP 2021) 201.

[28] See <www.elysee.fr/emmanuel-macron/2023/04/19/premiere-reunion-de-la-commission-mixte-dhistoriens-francais-et-algeriens>.

[29] The text of the Declaration is available in French on the Elysée official page <www.elysee.fr/admin/upload/default>.

[30] ibid (italics by the author).

The Commission met for the first time in April 2023,[31] and officially started its mandate in Constantine the 21st November 2023, where it agreed on the restitution to Algeria of the 'symbolic property' of Emir Abdelkader and on further historic work.[32] In contrast to the parliamentary Commission established by Belgium, this Commission is not political and sees the direct participation of both sides. It is in fact expertise-based, composed of ten historians, five from the Algerian side and five from the French side.[33]

The two commissions, the Belgian and the Franco-Algerian, are only the beginning of a process of recognition of the colonial acts committed by the two former colonial powers. It is therefore a matter of historical research aimed at bringing the parties together on facts and events that have hitherto remained unclear or disputed.[34] This is evident in the Belgian group of experts' Report, that points out that: 'Le but du présent rapport n'est pas de prendre des décisions mais d'éclairer les décisions qui reviennent aux membres de la Commission spéciale'.[35] It seems difficult to foresee now 'les conséquences sur la base d'un travail scientifique' that the parties will get out of the two Commissions.[36] What seems clear is that memory rather than reparation, and reconciliation rather than responsibility seem to be the coordinates within which colonial issues are framed between the parties.

[31] See <www.elysee.fr/emmanuel-macron/2023/04/19/premiere-reunion-de-la-commission-mixte-dhistoriens-francais-et-algeriens>.

[32] F Bobin, 'Historiens français et algériens relancent le dialogue mémoriel à Constantine' *Le Monde* (23 November 2023) <www.lemonde.fr/afrique/article/historiens-francais-algeriens-relancent-le-dialogue>.

[33] The French historians are: Prof Benjamin Stora, co-president of the commission, Florence Hudowicz, Prof. Jacques Frémeaux, Prof Jean-Jacques Jordi and Prof Tramor Quemeneur.

[34] It is no coincidence that the Belgian group of experts' Report distinguishes between disputed facts and facts on which there is consensus between the parties.

[35] Commission Spéciale chargée d'examiner l'État indépendant du Congo et le passé colonial de la Belgique au Congo, au Rwanda et au Burundi, ses conséquences et les suites qu'il convient d'y réserver 'Rapport des experts Chambre des Représentants de Belgique' (26 October 2021) 11.

[36] French President Macron's speech on the sidelines of the signing of the 2022 Algiers Declaration. See <www.elysee.fr/emmanuel-macron/2022/08/27/declaration-dalger-pour-un-partenariat-renouvele-entre-la-france-et-lalgerie>.

2.2. *State practice consisting in a unilateral recognition of the conduct and presentation of apologies*

The study of the official apologies offered by States for atrocities committed under colonial regimes was conducted using a database that collects all apologies offered by States from the post-World War II period to the present.[37] A comprehensive and multidisciplinary-approach-based project, the database comprehends both official apologies, which are considered forms of reparation in legal terms, and political apologies, which are expressions of regrets without legal implications.

The research shows that although requests for, or offers of, an apology are a fairly frequent feature of diplomatic practice,[38] especially in what has been called 'the age of apology',[39] in only a still relatively small number of apologies (around 58, as of 2022), or about 12%, States make apologies for their former colonial rule. The analysis of these apologies for colonial abuses shows three recurrent elements: the reluctance of the former colonial power to expressly acknowledge wrongdoings committed during its colonial rule; the already mentioned failure to recognise legal responsibility for conduct in the context of colonial regimes; and the inclusion of expressions addressed to the victims, aimed at expressing regret for the suffering caused to them.

With regard to the first common element of apologies, namely the reluctance to explicitly acknowledge colonial abuses, the relationship between Japan and the Republic of Korea (ROK) is indicative. Initially, very general terms were used, referring to a vague 'unfortunate period'[40] or 'difficult period'[41], in which indistinct 'serious damage was done in the past'[42]. It was only in November 1993, on its 12th official apology to the ROK, that Japan, represented by Japanese Prime Minister Morihiro Hosokawa on a diplomatic visit, made an official apology to South Korean President Kim Young Sam for the suffering caused during the colonial

[37] The website used for the analysis is <www.politicalapologies.com>.
[38] See (2001) II/2 YB ILC 107.
[39] M Gibney, RE Howard-Hassmann, JM Coicaud, N Steiner (eds), *The Age of Apology. Facing Up to the Past* (Pennsylvania UP 2008).
[40] Official apology from Japan to the ROK on 22 June 1965.
[41] Official apology from Japan to the ROK on 30 March 1989.
[42] Official apology from Japan to the ROK on 28 August 1982.

period, specifying 'various forms of intolerable pain and suffering', including the inability to use their language at school, being forced to change their name to a Japanese-style name, and the requisitioning of military 'comfort women'.[43] With regard to this last colonial military practice, which can be qualified as a system of sexual slavery of the euphemistically named 'comfort women', Japan's reluctance to acknowledge its conduct is even more evident. The first official apology dates back to January 1992, almost 50 years after the commission of the events, when the then Prime Minister Kiichi Miyazawa made an apology and expressed remorse over the 'comfort women' issue at a press conference.[44] It was not until Cabinet Secretary Koichi Kato's 1992 statement that the Japanese government's involvement in the establishment, construction, operation and maintenance of 'comfort stations', as well as the recruitment and control of 'comfort women', was acknowledged for the first time.[45] Despite subsequent apologies, Japan continues to this day to deny the authenticity of certain fundamental aspects of the historic accounts and, above all, avoids classifying the conduct as sexual slavery.[46]

The initial lack of detail with regard to the colonial nature of the situation referred to, as well as the vagueness of the type of violations committed is also clearly visible in more recent apologies. For example, in 2005, the Dutch Foreign Minister Ben Bot issued the first apology to Indonesia, expressing regret for the 'large-scale deployment of military forces' in 1947, stating: 'a large number of your people are estimated to have died as a result of the action taken by the Netherlands', thus not specifying that it was a massacre nor the estimated number of victims. Even when more detail is present, it is often not so clear whether the

[43] Official apology from Japan to the ROK on 7 November 1993.

[44] See <https://kls.law.columbia.edu/content/japanese-government-statements-and-ministry-foreign-affairs-statements>.

[45] Statement by Cabinet Secretary Koichi Kato on the issue of so-called 'wartime comfort women' from the Korean peninsula (6 July 1992) <www.awf.or.jp/e6/statement-01.html>.

[46] For an up-to-date summary of Japan's position on the issue, see the official website of the Ministry of Foreign Affairs of Japan <www.mofa.go.jp>. In particular, Japan does not agree on the allegations of 'forceful taking away' of comfort women, on their number (around 200.000), as well as on their 'sexual slaves' connotation. See, among others, Parliamentary Vice-Minister for Foreign Affairs Horii explained Japan's position regarding the comfort women issue in his statement at the High-Level Segment of the Human Rights Council (February 2018) <www.mofa.go.jp/fp/hr_ha/page4e_000776.html>.

apology is issued in personal capacity or on behalf of the State,[47] thereby generating 'a sort of artful ambiguity'[48] that can put into question the genuine intention of the apologizer.

A series of rhetorical strategies – such as the use of verbs in the passive form and the focus on the victims' suffering – to avoid qualifying the nature of the violations and to elude identifying the perpetrators seem to bring these apologies closer to forms of political rather than official (legal) apologies. This aspect is also well evident in the apology made in 2019 by then British Prime Minister Theresa May for the Amritsar massacre in India, where expressions of regret were not accompanied by an acknowledgement of the UK's involvement,

> But 2019 also marks the centenary of an appalling event – the Jallianwala Bagh massacre in Amritsar. No one who has heard the accounts of what happened that day can fail to be deeply moved. No one can truly imagine what the visitors to those gardens went through that day one hundred years ago.[49]

The second frequent aspect in the analysed apologies, namely the non-recognition of legal responsibility, is usually implicit. However, at least a couple of former colonial powers, Japan and Germany, have set out their exclusive moral responsibility for colonial crimes to avoid bolstering any legal claim. In particular, Germany has repeated this several times in the case of the genocide of the Herero and Nama peoples by German troops between 1904 and 1908, during the period of German colonial rule in South-West Africa. In 2004, the then German Minister for Development

[47] See eg King Filip's expression of 'deepest regrets' for the suffering caused by the Belgian colonial enterprise on the occasion of the 60th anniversary of the Democratic Republic of Congo's independence in Kinshasa in 2020 <www.monarchie.be/en/agenda/speech-by-his-majesty-the-king-esplanade-of-the-palais-du--peuple>. On the 31th October 2023, King Charles expressed his 'greatest sorrow and deepest regret' for atrocities suffered by Kenyans during their struggle for independence from British colonial rule. For the video of his speech, see <www.reuters.com/world/africa/britains-king-charles-visits-kenya-with-colonialisms-scars-focus-2023-10-31/>.

[48] EA Posner, A Vermeule, 'Reparations for Slavery and Other Historical Injustices' (2003) 103 Columbia L Rev 689, 730. Along with the authors, this technique 'allows the speaker simultaneously conflicting to appease two conflicting audiences, giving the wronged group something more than obstinate silence while assuring opponents of reparations that non formal admission of wrongdoing has been tendered'.

[49] The video of the apology is at <www.youtube.com/watch?v=nWI6SsIXknU>.

Cooperation Heidemarie Wieczorek-Zeul acknowledged for the first time that 'The atrocities of that time were what today would be called genocide …We Germans accept our historical-political and ethical-moral responsibility and the guilt the Germans were guilty of at the time'.[50] The same approach is also maintained in the formulated apology included in the 2021 Joint Declaration of Reconciliation between Germany and Namibia, which will be discussed shortly.

The third recurrent aspect in apologies for those countries' colonial pasts is the inclusion of expressions directly addressed to the victims, not only the State entity that represents them, aimed at voicing regret for the suffering caused to them. For example, in his 1993 public letter, Japan's then Chief Cabinet Secretary Yohei Kono apologised on behalf of the Japanese government to the comfort women, stating:

> The Government of Japan would like to take this opportunity once again to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women.[51]

While at first glance these expressions of regret seem to uphold the victim-centred approach endorsed in the field of transitional justice, on closer inspection they appear to be 'used to obviate or otherwise interfere with the rights of victims to justice, truth or reparations' instead of 'as one route to the delivery of those rights, including by enabling victims to exercise their agency in the preparation and delivery of apologies'.[52] This seems particularly true when this third recurring aspect is considered in relation to the others. In other words, these expressions of regret towards the victims or their descendants seem to be an (easy) way of seeking redemption with little effort and circumventing any discourse on reparations.

[50] Italics and English translation by the author, the German version is at <www.dhm.de>.

[51] The English translation of the statement is at <www.awf.or.jp/e6/statement-02.html>.

[52] UNGA F Salvioli 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' 'Report on apologies for gross human rights violations and serious violations of international humanitarian law' UN Doc A/74/147 (12 July 2019) para 3.

Acknowledgement of the breaches, expressions of regret and formal apologies as forms of satisfaction[53] imply the recognition of the international wrongful conduct establishing State responsibility. According to the logic of the law of international responsibility, the determination of the existence of an international wrongful act/omission is always prior or contextual to the question of reparation.[54] The practice of the rather timid apologies and expressions of regret by former colonial powers for colonial abuses to date seems to be more a form of '*ex gratia* apology', ie a means of redressing a non-illegal harm and possibly a way of avoiding potential future claims on the matter, rather than a form of reparation. However, as discussed below, some apologies have provided the basis for negotiations and a subsequent agreement between the parties and the definition of other forms of redress for the (descendants of) victims.

2.3. *State practice involving bilateral negotiations leading to the ultimate assumption of obligations*

The typology of State conduct that has required the most involvement is engagement in bilateral negotiations that lead to the former colonial power accepting certain obligations. These are inter-State negotiations or negotiations between the former colonial power and the (legal representatives of the) victims. The 2015 Joint statement between Japan and the ROK and the 2021 Joint Declaration between Germany and Namibia belong to the first type of negotiations. Indeed, there is only one example of the second type of negotiation, namely the settlement agreement between the United Kingdom and the Mau Mau representatives.

The Joint statement between Japan and the ROK was concluded on 28 December 2015 to address the issue of the few surviving former 'com-

[53] Art 37(2) ARSIWA, 'Report of the International Law Commission on the Work of Its Fifty-third Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 (2001) II/2 ILC YB 105.

[54] That is why a judgment in favour of the injured party that recognises 'a formal finding by the Court of the unlawfulness by the act' can also be 'an appropriate form of satisfaction'. ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3.

fort women', one of the main sources of tension between the two countries.[55] The legal nature and consequent binding character of the agreement, which consists of two separate oral statements read out by the two foreign ministers, Japanese Minister Kishida and his South Korean counterpart Minister Yun, have been widely contested.[56] The agreement provided for the establishment by the ROK of a fund to be administrated by the Reconciliation and Healing Foundation[57] with Japanese funding. This public redress mechanism was intended to create the much-discussed Asian Women's Fund, a private structure established by the Japanese Government in 1995 and funded by private donors.[58] The Japanese government pledged a one-off contribution of one billion yen ($8.3 million) to the new fund. However, this was an *ex gratia* payment and, in line with its previous conduct,[59] Japan did not acknowledge its legal responsibility. The fund established was therefore not intended as a form of reparation.

The 2021 Joint Declaration by the Federal Republic of Germany and the Republic of Namibia 'United in Remembrance of Our Colonial Past, United in Our Will to Reconcile, United in Our Vision of The Future'[60] is the result of a 5-year inter-State negotiations toward the pacification of

[55] English translations of the two unilateral declarations are available on the official page of the Japanese Ministry of Foreign Affairs <www.mofa.go.jp>.

[56] See Constitutional Court of Korea, *2016 Hun-Ma 253* [2019]. For the English version of the ruling see <https://library.ccourt.go.kr/site/conlaw/download/case_publications>. After a detailed analysis of the 2015 Agreement applying the general principles of interpretation of the Vienna Convention, the Court concluded that the 2015 Agreement 'is hardly considered a legally binding agreement', 104.

[57] The Foundation, established by the South Korean government with Japanese funding, was dissolved and began a liquidation process on 5 July 2019. See P Jin-Won, 'Japan-funded wartime sex slavery's victim's foundation dissolved' *The Korea Times* (5 July 2019) <www.koreatimes.co.kr/www/nation/fb_comment>.

[58] On the limits and shortcomings of the system of the Asian Women Fund, see CEDAW NGO Shadow Report 'Japan. The Comfort women issue' (44th Session 2009) <www2.ohchr.org/english/bodies/cedaw/docs/ngos/ComfortWomen.Japan_cedawpd>.

[59] For an overview of the Japanese position on the matter, see the Japanese Foreign Policy official page 'Issues regarding history' 'Issue of comfort women' <www.mofa.go.jp/policy/postwar/index.html>.

[60] Notably, the original English version of the 2021 Joint Declaration is available on the official website of the Namibian Parliament, but not on the official German Parliament or Government's websites. See <www.parliament.na/wp/content/uploads/Joint-Declaration-Document-Genocide-rt.pdf >.

'the darkest period of [our] shared history'.[61] In particular, the two States sought to address the sensitive issue of the qualification of the German operations to exterminate the Herero (also known as Ovaherero) and Nama populations that took place between 1904 and 1908, during the period of German colonial rule in South-West Africa. Significantly, in this case as well, the intention of the parties to create rights and obligations under the agreement concluded is not clear.[62] Although some formal and substantive elements, as well as the conduct of the parties after its signature[63] would suggest the legal nature of a gentleman's agreement,[64] there is no doubt that the Joint Declaration is a bilateral treaty with important, albeit not decisive, implications in the relations between Germany and Namibia on the issue of colonial abuses.

The Joint Declaration contains clear obligations for Germany. In particular, the former colonial power commits itself to make payments totalling approximately EUR 1.1 billion over the next 30 years, of which EUR 1,050 million is set aside for reconstruction and development support projects for the descendants of affected communities and EUR 50 million is set aside for reconciliation, remembrance, research and education projects on the subject (para 20). These funds will be allocated to the economically weaker regions of Namibia, with a strong Herero and Nama populations presence, and will be managed and implemented on the basis of regular audits and impact assessments with the participation of local representatives (paras 16 and 19). The precise definition of the amount of funds, the timing and methods of disbursement, as well as the specific regions and sectors in which reconstruction and development projects are to be implemented make this agreement the largest commitment ever made by a former colonial power to come to terms with its

[61] German Foreign Minister Maas on the conclusion of negotiations with Namibia, <www.auswaertiges-amt.de/en/newsroom/news/-/2463598 >.

[62] On the relevance of this intention, see PK Menon, *The Law of Treaties between States and International Organizations* (Lewiston 1992).

[63] Art 18 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980).

[64] On the elements in favour of the legal or purely political nature of the agreement, see R Marconi, 'Il passato (coloniale) che non passa: la Dichiarazione congiunta di riconciliazione fra Germania e Namibia del 2021' (2022) 16 Diritto internazionale e diritti umani 400.

colonial past. However, even in this case Germany's payments are intended as 'measures to heal the wounds of the past' (para 15) and as a 'grant' (para 18), and not as a compensation in legal terms.

Finally, the Mau Mau case was the first time that the UK recognised the right of victims of colonialism to seek compensation from the British government for abuses suffered under the British colonial rule. The case began in 2009 when some victims of the violence perpetrated by the British colonial administration during the Mau Mau insurrection (1952-1963) in Kenya filed a lawsuit in the High Court in London. When the Court rejected the Government's arguments,[65] the British Government reached a settlement agreement with the solicitors acting on behalf of the Mau Mau to pay £19.9 million in compensation to 5,228 Mau Mau claimants, to issue a statement of regret,[66] and to fund the construction of a memorial in Kenya to the victims of colonial-era torture.[67]

Three elements unite these settlement agreements. First, all three agreements include an economic aspect. However, the financial allocation is intended by Japan as a 'one-time contribution' through the budget of the foundation established by the ROK, by Germany as a 'grant' (para 18) for 'reconciliation and reconstruction' (para 11), and by the UK as a 'settlement sum'. Therefore, the payments are not considered a form of compensation in legal terms but *ex gratia* payments.

Second, the three former colonial powers issued a formal apology and recognised only a moral, not a legal, responsibility. Specifically, while the expressions of 'most sincere apologies and remorse' by the Japanese Prime Minister and the 'British government sincerely regrets' are accompanied by a general acceptance of 'responsibilities' in the first case and a 'deny[al of] liability on behalf of the Government and British taxpayers'

[65] The first argument was based on the idea that the Kenyan government had 'inherited' legal responsibility for these abuses when it became independent, and the second was based on the statute of limitations. For the details of the case, see Royal Courts of Justice, *Ndiku Mutua & and Others v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB) <www.judiciary.uk/wp-content/uploads/JCO/Documents>.

[66] The Foreign Secretary's Statement to Parliament of 6 June 2013 on the settlement of claims of Kenyan citizens relating to events during the period 1952-1963 <www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims>.

[67] The permanent memorial was unveiled in Nairobi in 2015. See <www.gov.uk/government/news/launch-of-memorial-to-victims-of-torture-and-ill-treatment>.

in the second case, Germany expressly acknowledges its 'moral responsibility for the colonization' and 'accepts a moral, historical and political obligation to tender an apology for this genocide' (para 11).

Third, these three cases suggest that the payment of money has been used here to foreclose other eventual future claims. This is well evident in the 2015 Japan-ROK Joint Statement, where both Prime Ministers state that the announcement 'finally and irreversibly' settles the issue, and in the 2021 Germany-Namibia Joint Declaration, where both Governments agree that the arranged sums 'settle all financial aspects' of the past issues referred to in the Joint Declaration (para 20). Moreover, the British Prime Minister points out that the settlement with the Kenyan claimants does not set 'a precedent in relation to any other former British colonial administration',[68] so to exclude any future claim not only by Kenyan citizens, but also by any other claimants from English former colonies.

Leaving aside the question of whether a State has the right to waive future individual claims through agreements,[69] this last aspect seems to run counter to the consolidation of a certain State practice to provide redress to the (descendants of the) victims of their colonial past. The acceptance of the need to offer voluntary payments seem here to be intended as an *ad hoc* form of settlement, valid only with the cases at hand. In other words, these first three attempts at negotiations and final settlements, including *ex gratia* payments, seem so far to have been a last resort for the former colonial power to move forward in these specific situations characterized by strong political and international pressures,[70] rather

[68] See <www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims>.

[69] With respect to waivers of future claims through peace settlements, see A Bufalini, 'On the Power of a State to Waive Reparation Claims Arising from War Crimes and Crimes against Humanity' (2017) 77 ZaöRV 447.

[70] For the internationalisation of these cases, international movements and non-State actors have contributed. For the 'comfort women' case, see, among others, three Rep by UN special rapporteurs and by the International Law Commission of Jurists: UN Economic and Social Council R Coomaraswamy 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, submitted in Accordance with Commission on Human Rights Res 1994/45, on the Mission to the Democratic People Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime' (4 January 1996) UN Doc e/cn.4/1996/53/Add.1; UN Sub-Commission on the promotion and protection of Human Rights GJ McDougall 'Report of the Special Rapporteur on Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict. Appendix, An Analysis of the Legal Liability

than a way to set a framework of standards for future claims. It is precisely this 'last resort' attitude, together with the declared exclusion of possible future reparations,[71] that has contributed to the general perception of these settlements by former colonies and victims as an insincere effort at reconciliation and a way of 'buying' accountability.[72]

However, these agreements should not be underestimated, both for their achievements, which were unthinkable until recently, and for the two elements of restorative justice that most of them contain. First, the recognition of the victims' suffering is always included, albeit with varying degrees of intensity. The statement of the foreign minister of Japan is limited to a general regret for 'all the women who underwent immeasurable and painful experiences and suffered incurable physical and psychological wounds as comfort women', thus not specifying the violations committed and not qualifying the conduct against the 'comfort women' as acts of sexual slavery. In this sense, the German-Namibian Joint statement of 2021 and the Mau Mau-UK settlement appear more progressive, recognising that the German atrocities 'from today's perspective, would be called genocide' (para 10) and that 'Kenyans were subject to torture and other forms of ill treatment at the hands of the colonial administration'.[73] Second, two of the settlements recognise the value of the historical memory. In particular, Germany undertook to provide 50 Million Euros 'to the projects on reconciliation, remembrance, research and education'

of the Government of Japan for 'Comfort Women Stations' Established During the Second World War' (22 June 1998) UN Doc e/cn.4/Sub.2/1998/13; International Commission of Jurists U Dolgopol, S Paranjape 'Comfort Women: An Unfinished Ordeal: Report of a Mission' (1994). For the Namibian genocide case, see eg UN Human Rights Council (HRC) 'Report of the Working Group of Experts on People of African Descent on its mission to Germany' (15 August 2017) UN Doc A/HRC/36/60/Add.2; and the website of the NGO alliance 'No Amnesty on Genocide!' <http://genocide-namibia.net>. For the Mau Mau case, see the work of the Kenyan Human Rights Commission <www.khrc.or.ke/>.

[71] On the importance of a renewed relationship between *ex gratia* payments and reparations for a real reconciliatory potential of the first, see S van de Put, 'Ex Gratia Payments and Reparations: A Missed Opportunity?' (2023) 14 J Intl Humanitarian L Studies 131.

[72] For the rejection of financial aid and regret gestures by former Korean 'comfort women', see <https://womenandwar.net/kr/>. For the Namibian case, see A Bohne, 'Not Enough for True Reconciliation' (6 June 2021) Rosa Luxemburg Stiftung <www.rosalux.de/>.

[73] See the Foreign Secretary's Statement to Parliament of 6 June 2013.

(para 18) in Namibia, while the British government, as mentioned above, has supported the construction of a memorial in Nairobi. Both these two elements seem particularly close to memorialisation processes, recently referred to as the 'fifth pillar' of transitional justice, without which 'there can be no right to truth, justice, reparation, or guarantees of non-recurrence'.[74]

3. *Setting new standards?*

The development of the State practice on issues related to colonialism shows a increasing awareness on the part of former colonial powers of the lasting effects of colonialism and its legal implications. At this stage, however, no general approach to how States address their colonial past can be identified. It is necessary to take into account contextual issues such as the degree of involvement of the former colonial power, the form of reparation and the involvement of the (descendants of the) victims as claimants. This must be done in the knowledge that this is a domain where State practice is still evolving and therefore cannot provide a solid foundation for drawing definitive conclusions. Against this background, the present analysis of State practice offers the following contributions.

Current State practice seems to be the result of a compromise attitude, generally consisting of an initial acknowledgement of the past, eventually followed by attempts to provide for an apology and an indemnification, without recognising legal responsibility nor giving monetary payments in the form of compensation. Moreover, symbolic forms of redress seem to prevail, in the form of what has been called '*ex-gratia* apology', meaning apologies and expressions of regret that are not the consequence of a violation of international law. These forms of symbolic redress appear particularly relevant in the absence of an acknowledgment of responsibility.

The fact that States do not recognise their legal responsibility does not mean that their actions lack any value. As noted above, many acts of recognition of moral or historic responsibility have been precursors to apologies or negotiated settlements. The question that arises at this point

[74] UNHRC 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice' UN Doc A/HRC/45/45 (9 July 2020) para 21.

is how to interpret this relatively recent process of pioneering State practice. Should we regard these remedies for past wrongs as just 'a political rather than a legal issue'?[75] Recognising that a conduct is unjust even though lawful, and consequently seeking a means of redress, implies a different logic from the one of State responsibility. This logic can be framed in different ways: as an early stage in the emergence of a State obligation to provide for redress for cases of colonial abuses, as a series of case-by-case equitable settlements depending on the discretion of the parties, or within the framework of transitional justice.

It seems premature to determine whether the State practice under consideration may constitute the basis for the emergence of a State obligation to provide redress for colonial abuses. Indeed, even in cases where States have engaged in negotiations, apologies, and concrete commitments to compensate their former colonies or the victims, they have insisted on couching it in the language of moral, not legal, obligation.[76] Particularly indicative of the absence of an *opinio iuris* are official State documents and government statements that show the position of former colonial powers on the inapplicability of conventional and customary international law norms at the time of the events.[77] At this stage, therefore, the variegated State practice does not emerge as a coherent framework of practices for addressing the issue of redress for colonial injustices. Nevertheless, this does not exclude the possibility that the presently prevailing political and moral considerations influencing governmental behaviours may also play a role in shaping shared expectations and fostering

[75] J Sarkin, 'Reparations for Past Wrongs: Domestic Courts Around the World, Especially the United States, To Pursue African Human Rights Claims' (2004) 32 Intl J L Information 426.

[76] See Draft conclusions on identification of customary international law, (2018) II/2 YB ILC 117.

[77] For the position of Germany, see Scientific Service of the Bundestag 'Der Aufstand der Volksgruppen der Herero und Nama in Deutsch- Südwestafrika (1904-1908) Völkerrechtliche Implikationen und haftungsrechtliche Konsequenzen' (27 September 2016) <www.bundestag.de/resource/blob/data.pdf>; Scientific Service of the Bundestag 'Zur völkerrechtlichen Zulässigkeit von freiwilligen Entschädigungszahlungen an Herero und Nama in Namibia' (11 October 2021) <www.bundestag.de/resource/blob/pdfdata.pdf>. For the position of Japan, see for example the Deputy Minister for Foreign Affairs Sugiyama speech at the Consideration of the Seventh and Eighth Periodic Reports by the Government of Japan (February 2016) under the Convention on the Elimination of All forms of Discrimination against Woman (CEDAW) (adopted 1 March 1980, entered into force 3 September 1981) <www.mofa.go.jp>.

predictability regarding State conduct on the matter, even if such conduct is not yet formalised within a legal obligation.

It seems even more problematic to reconcile the described State practice within the regime of State responsibility. Even if it is accepted that States will at some point recognise their legal responsibility, the question arises as to whether framing the question of redress for colonial atrocities within the law of State responsibility will enhance or hamper any claim. The main obstacle seems to be related to the legal consequences to be attached to the colonial conduct. The regime of State responsibility is designed to confront past conducts, to 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.[78] In such cases, the situation is obviously irreversible and a return to the *status quo* is impossible. With regard to compensation, the impossibility of calculating losses and damages suffered by the former colonies confirms the inadequacy of the law of State responsibility. However, recent international case law shows more flexibility in combining different forms of reparation[79] and more creativity in developing forms of reparation in relation to the typology of the international wrongful act and to the collective interest of the victims.[80] This could eventually be the basis for considering some of the reparation measures called for by some former colonies and (descendants of the) victims, i.e. measures that address the root causes of the harms

[78] *Factory at Chorzów (Germany v Poland)* (Judgment no 13) [1928] PCIJ Series A no 17, 47 [Italics by the Author].

[79] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Reparations) [2022] ICJ Rep 13. See B Bonafé, 'Assessing Reparations for International Crimes: The Case of the Armed Activities on the Territory of the Congo' (2022) 105 Rivista di diritto internazionale 761, 787 ff.

[80] See the jurisprudence of the Inter-American Court of Human Rights (IACHR), in particular: *Plan de Sanchez Massacre v Guatemala* (Reparations) IACHR Series C No 116 (19 November 2004); *Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACHR Series C No 124 (15 June 15 2005); *Mapiripàn Massacre v Colombia* (Merits, Reparations and Costs) IACHR Series C No 134 (15 September 2005); *Pueblo Massacre v Colombia* (Merits, Reparations and Costs) IACHR Series C No 140 (31 January 31 2006); *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations, and Costs) IACHR Series C No 146 (29 March 2006); *Ituango Massacres v Colombia* (Preliminary Objections, Merits, Reparations and Costs) IACHR Series C No 148 (1 July 2006). Among the case law of the International Criminal Court (ICC): *Prosecutor v Lubanga Dyilo* (Reparations Order) ICC-01/04-01/06-3129-AnxA (3 March 2015); *Prosecutor v Al Mahdi* (Reparations Order) ICC-01/12-01/15 (17 August 2017); *Prosecutor v Ntaganda* (Reparations Order) ICC-01/04-02/06-2659 (8 March 2021).

suffered and to improve the situation of former colonies and undermine existing inequalities and discrimination.[81]

Another consideration is whether this practice is part of a newly emerging framework for accountability that operates beyond the restraints of the State responsibility regime, as 'a reaction both to the limits of the conceptual structure that anchors the State responsibility regime and to the fact that States only rarely take the formal steps to invoking it'.[82] There are at least two aspects in which the accountability doctrine would help to appreciate the recent efforts by States to redress colonial atrocities. First, accountability is not limited to legal accountability, but it includes political, administrative and moral accountability. Since only legal accountability is governed by the consequences of the regime of State responsibility, the duties of a liable State in respect to colonial acts may take other forms than those of ARSIWA, for example by encompassing moral and historical responsibility. Second, while the law of State responsibility seeks to restore compliance with the international obligation breached by the wrongdoing State, especially through adversarial processes, accountability could allow for a shift towards a centralisation of a 'constructive dialogue' to encourage compliance.[83]

In sum, the significance of these advances in international law is probably still indirect, but the shift from the Global South's aspirational claim for reparations to the former colonial power's efforts at reconciliation represents an undeniable redirection. Even if it seems too early to qualify these developments in legal terms, they are the basis for the emergence of a 'reparation ethos',[84] that moves former colonial powers, especially when the (descendants of the) victims are involved, to remedy their colonial past outside and beyond the established frame and language of legal responsibility for internationally wrongful acts.

[81] See generally 'Final Declaration of the UN World Conference against Racism' Durban South Africa (8 September 2001) UN Document A/CONF.189/12.

[82] J Brunnée, 'International Legal Accountability Through the Lens of the Laws of State Responsibility' (2005) 36 Netherlands YB Intl L 21, 22.

[83] D Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 AJIL 833, 855. The author particularly focuses on compliance mechanisms in human rights and environmental fields.

[84] R Falks, 'Reparations, International Law, and Global Justice' in P De Grieff (ed), *The Handbook of Reparations* (OUP 2006) 478, 485.