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How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality

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Abstract

Attempts to legally tackle cases of historical injustice are often confronted with the problem that the events in question were not considered illegal at their time and that, in general, legal rules should not be applied retroactively. The present article suggests a conceptual framework to carefully stretch the dogmas of intertemporal law by introducing, via ethical principles as part of positive law of the time, contemporary contestation of inhumane actions and practices. Even though such contestation might not yet be enough to overturn a widely shared apologetic view among lawyers and states, it is argued that the violation of ethical-legal principles as such should give rise to a duty to give satisfaction under the law of state responsibility. In most cases of historical injustice brought to court, members of victimized groups aim at acknowledgment of their plight and at a reappraisal of the past that includes their experiences. In line with this objective, the present article makes a special case for a state obligation to negotiate with the victims of historical injustice or their descendants.

1 The Spectres of the Past

The spectres of the past continue to haunt us. The brutal killing of George Floyd on 25 May 2020 by members of the Minneapolis police has sparked a series of mass protests all over the world. The 'Black Lives Matter' protests are no longer addressing structural racism only in US police departments, but are directed against racism in the Western world in general – and its roots in slavery and a colonial past that have been all too

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conveniently 'whitewashed' by the dominant (and mostly well-intentioned) narratives of liberal equality and inclusion. The monuments of prominent Confederate soldiers and politicians who fought in the US Civil War against the abolition of slavery have been toppled or dismantled; on 7 June 2020 protesters in Bristol took down the monument of 17th-century slave trader Edward Colston and rolled it into the harbour.[1] The emotions involved in historical injustice show the need for a reappraisal of past events that still have effects today, a reappraisal that takes into account the perspectives and experiences of those that have been victimized by and through those acts of injustice. When legally addressing a historical past, however, we encounter a problem: applying modern human rights law or humanitarian standards to past actions seems to violate a well-known general principle, the principle of non-retroactivity of the law.

In this article, I propose a conceptual framework to solve the dilemma that the principle of non-retroactivity can pose when it comes to confronting historical cases of grave violations of human rights and humanitarian standards (Section 2). For cases in which the prevailing legal opinion of the day did not subscribe to the idea of the illegality of such acts, I will argue for a less 'monolithic' conception of 'what the law was', by relying on ethical principles enshrined in the *lex lata* of the time, such as the Martens clause in the Preamble to the 1899/1907 Hague Conventions on Land Warfare.[2] Such principles being not the exclusive domain of lawyers, I will reconstruct – building on insights from a social history approach and from 'law and literature' – with the help of contemporary legal and non-legal documents, such as media, records of public debates, as well as literary works, 'public outrage' (*colère publique*) against certain grave cases of historical injustice (Section 3.A). This 'outrage' serves as testimony that the conduct in question was widely held to be unethical (and therefore also illegal) already at the time (Section 3.B), thus making room for a moderate lifting of the veil of intertemporality in the field of state responsibility (Section 3.C). Where public outrage conflicted with an apologetic 'prevailing view' among lawyers of the time, however, it is problematic to qualify the acts as either 'illegal' or 'legal'. The still ongoing semantic struggle over the meaning of the law as well as the normative properties of those ethical-legal principles speak against a state obligation to financially compensate the victims or their descendants (Section 4.A). The breach of such ethical-legal principles, however, should entail an obligation to give satisfaction to them (Section 4.B). Given the intrinsic connection between experiences of injustice, collective identities and narratives, I will make a special case for a state obligation to negotiate with the victims in order to acknowledge their status and dignity and to listen to their version of (the) (hi)story (Section 4.C). Though the aim of the article is mainly conceptual, I will address some questions of operationalization at the end (Section 5).

[1] For an updated list, see Selvin and Solomon, 'Toppled and Removed Monuments: A Continually Updated Guide to Statues and the Black Lives Matter Protests', *ArtNews* (11 June 2020), available at www.artnews.com/art-news/news/monuments-black-lives-matter-guide-1202690845/ (accessed 19 May 2021).

[2] Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277; Treaty Series No. 539, Preamble, para. 8 (hereinafter 'Hague Convention IV'). See already Convention with Respect to the Laws and Customs of War on Land, 29 July 1899, 32 Stat. 1803; Treaty Series No. 403, Preamble, para. 8 (hereinafter 'Hague Convention II').

2 Exposing the Dilemma: Intertemporal Law and Historical Injustice

The (first) principle of intertemporality appears to be a bedrock of international law, if not of law as such.[3] For international lawyers, the canonical reference is Max Huber's famous words in the *Palmas* arbitration award of 1928: '[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.'[4] This principle has been taken up repeatedly by the International Court of Justice (ICJ), in cases such as *Minquiers and Ecrehos*[5] or *Cameroon v. Nigeria.*[6] The Institut de Droit International essentially reaffirmed it in its 1975 Wiesbaden Resolution.[7] The International Law Commission (ILC) substantially subscribed to it in the field of state responsibility in Article 13 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[8] There are close links to the non-retroactivity of international treaties[9] and the principle *nulla poena sine lege praevia* in human rights law[10] and in international criminal law.[11] All these principles are traced back to a general principle of law,[12] which reads, in unassailable Latin, *tempus regit actum*.[13]

Establishing 'what the law was' at a certain point in history is not an easy task if undertaken diligently. When cases of historical injustice are taken to court, the judge will be confronted with differences of opinion between governments, courts and scholars, then as now.[14] Following the rules of the game, she will attempt to distil from the contemporary data the 'prevailing view' of the day. Whoever prevailed then

3 On the second principle, see Section 4.C.2. below.

4 *Island of Palmas*, Award, 4 April 1928, II RIAA (1928) 829, at 845.

5 *Minquiers and Ecrehos (France v. United Kingdom)*, Judgment, 17 November 1953, ICJ Reports (1953) 47, at 53–54.

6 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 10 October 2002, ICJ Reports (2002) 303, at paras 31–38.

7 Institut de Droit International, Resolution: The Intertemporal Problem in Public International Law, 11 August 1975, *Annuaire de l'Institut de Droit International* 6 (1975) 536, para. 1 (hereinafter 'Wiesbaden Resolution').

8 [Draft] Articles on the Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), chp.IV.E.1 (Nov. 2001), repr. with commentaries, II-2 *Yearbook of the International Law Commission* (2008) (hereinafter 'ARSIWA').

9 Cf. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 28 (hereinafter 'VCLT').

10 Cf., e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, 18 October 1961, 213 UNTS 262, Art. 7 (hereinafter 'European Convention on Human Rights'); International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 15.

11 Cf. Rome Statute of the International Criminal Court (hereinafter 'Rome Statute'), 17 July 1998, 2187 UNTS 3, Art. 22.

12 Elias, 'The Doctrine of Intertemporal Law', 74 *American Journal of International Law* (*AJIL*) (1980) 285, at 285–286. See also Wiesbaden Resolution, *supra* note 7, para. 1.

13 Tavernier, 'Relevance of the Intertemporal Law', in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (2010) 397, at 397.

14 Instructively shown by Goldmann, 'Anachronismen als Risiko und Chance: Der Fall *Rukoro et al. gegen Deutschland*', 52 *Kritische Justiz* (2019) 92, at 106–109.

will also prevail now: the replication of power structures is implied in the process of adjudication.[15] Such a replication becomes hard to bear, however, where cases of historical injustice are addressed and decided according to a view that, from today's perspective, violates fundamental humanitarian standards. Take the war (an 'uprising', according to the point of view of the colonizers) between German colonial forces and the Ovaherero and Nama in 1904 in what was then German South West Africa.[16] Today, it is hard to accept that the virtual extermination of those indigenous peoples should not have violated the Hague Regulations of 1899,[17] because according to the European understanding of that time they only applied to wars between 'civilized' nations – a notion used to exclude peoples under colonial rule.[18] Take the atrocities committed by Belgians in the 'Independent State of the Congo' (or 'Congo Free State'). To maintain that King Leopold's sovereign rule, as recognized by the United States and the European powers at the Berlin Conference in 1884–1885, entailed neither obligations towards the population nor to the international community, thus virtually denying any legally binding force to those articles of the Berlin General Act that referred to the well-being of the 'native populations',[19] must shock our conscience today. Or take, as a more recent example, the forced labour to which 600,000 so-called 'Italian Military Internees' were subjected by Germany in World War II. That they should not have been granted the protection of prisoners of war on the grounds that the German government did not recognize the effective Italian government under *maresciallo* Badoglio they were fighting for, but instead Mussolini's German satrapy, the Repubblica di Salò,[20] is difficult to accept. Also justifying atrocities committed by the German Waffen-SS and Wehrmacht in World War II – such as the shooting of

15 Cover, 'Nomos and Narrative', 97 *Harvard Law Review* (1983–1984) 4, at 18, speaks of the 'social organization of law as power'.

16 'Ovaherero' is the plural form of 'Herero' in Otjiherero.

17 Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention II, *supra* note 2.

18 Kämmerer and Föh, 'Das Völkerrecht als Instrument der Wiedergutmachung? Eine kritische Betrachtung am Beispiel des Herero-Aufstandes', 42 *Archiv des Völkerrechts* (2004) 294, at 315; Kämmerer, 'Das Völkerrecht der Kolonialzeit', 39 *Verfassung und Recht in Übersee* (2006) 397, at 413–414, 417–419; S. Eicker, *Der Deutsch-Herero-Krieg und das Völkerrecht: Die völkerrechtliche Haftung der Bundesrepublik Deutschland für das Vorgehen des Deutschen Reiches gegen die Herero in Deutsch-Südwestafrika im Jahre 1904 und ihre Durchsetzung vor einem nationalen Gericht* (2009), at 117–133, 144–170, 501.

19 General Act of the Berlin Conference on West Africa, 26 February 1885, 165 Consolidated Treaty Series (CTS) 485 (hereinafter 'Berlin General Act'). Arguing against any violation of international law Nys, 'L'état indépendant du Congo et les dispositions de l'acte générale de Berlin', 2/V *Revue de droit international et de droit comparé* (1903) 333, at 367–380. It is doubtful, however, if this partisan position can be regarded as the prevailing view at that time: see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), at 159–166. Relying on such protective clauses in specific treaties can indeed be a way around the lack of humanitarian standards in 19th- and early-20th-century customary international law. See Roscini, 'Establishing State Responsibility for Historical Injustices: The Armenian Case', 14 *International Criminal Law Review* (2014) 291, at 291.

20 This was the German position communicated to the International Committee of the Red Cross (ICRC): A. Durand, *History of the International Committee of the Red Cross.* Vol. 2: *From Sarajevo to Hiroshima* (1984), at 434–435; A. Gillespie, *A History of the Laws of War*, Vol. 1 (2011), at 61.

civilians – via the legal institute of belligerent reprisal no longer fits into the moral coordinates of our time.[21]

The increasing attempts over the past 20 years or so to come to terms with historical injustice through legal action in national and international courts[22] are an expression of the unease with the traditional dogma of non-retroactivity. This unease was also expressed prominently (though without achieving consensus) in 2001 at the UN World Conference against Racism in Durban, whose agenda included 'effective remedies, recourses, redress, compensatory and other measures at the national, regional and international levels', with a view to colonialism and slavery as root causes of racism.[23] Taken as a general strategy, and notwithstanding singular cases where legal action seems appropriate, suing for compensation in court might not be the ideal way to come to terms with history. On the one hand, the consequences are difficult to assess and limit: there is the threat of an almost endless unwinding of history.[24] On the other hand, on a more general level, one must be careful when projecting today's ideas onto the past.[25] That the past must one day be put to rest and that legal peace should be established[26] is ultimately a demand that in turn has moral weight.[27] But where, due to the extent of injustice, no peace can be achieved, and where the experience of injustice continues to shape the identities of the victims or their descendants to this very day, international law should offer ways out of the dilemma in order to fulfil one of its most important tasks: to serve the resolution of – continuing – conflicts at the

21 Cf. *United States v. Wilhelm List and others*, Trial Judgment, Case No 7, 11 NMT 1230, 1253 (19 February 1948) (hereinafter '*Hostage* case'): 'It cannot be denied that the shooting of hostages or reprisal prisoners may under certain circumstances be justified as a last resort in procuring peace and tranquility in occupied territory . . . .' See also *Trial of General von Mackensen and General Maelzer*, British Military Court, 18–30 November 1945, Case No. 43, 8 *Law Reports of Trials of War Criminals* (1948) 1, at 3–7. The death sentence in this case was not based on the execution of civilians as such but – probably – on the judges' assessment that shooting 335 Italian civilians in the Ardeatine Cave in March 1944 in retaliation for a partisan attack on German police forces in Rome was an excessive reprisal.

22 See E. Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2000); Galater, 'Righting Old Wrongs', in M. Minow (ed.), *Breaking the Cycle of Hatred: Memory, Law and Repair* (2002) 107, at 107–109. For more recent cases, see 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* (*ZaöRV*) (2017) 409, at 410–411.

23 See UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Conference Agenda, UN Doc. A/CONF.189/1/Rev.1, 2 September 2001, at 89. The critical term 'compensatory' was footnoted as follows: 'The use of the word "compensatory" is without prejudice to any outcome of this conference.'

24 Waldron, 'Superseding Historic Injustice', 103 *Ethics* (1992) 4, esp. at 11–14; Galater, *supra* note 22, at 122.

25 Differentiated exposition of the pros and cons of using modern concepts when dealing with historical crimes by De Baets, 'Historical Imprescriptibility', 59–60 *Storia della Storiografia* (2011) 128, at 132–142, 146–148; de Haan, 'Knowing What We Know Now. International Crimes in Historical Perspective', 13 *Journal of International Criminal Justice* (2015) 783. The dilemma is neatly summed up by Galater, *supra* note 22, at 117 as 'choosing between ex post facto imposition and affirming the unreformed past'.

26 On this 'principle of finality', see Higgins, 'Time and the Law: International Perspectives on an Old Problem', 46 *International and Comparative Law Quarterly* (1997) 501, at 511–512.

27 Waldron, *supra* note 24, at 15–19; De Baets, *supra* note 25, at 145.

international level. For herein lies precisely the rub of our dilemma: that whoever addresses past injustices today actually also means the present.[28]

There are different ways of reacting to this moral dilemma: On a principled footing, one could treat law that is fundamentally unjust as non-law, as suggested by the German legal philosopher Gustav Radbruch in 1946 with a view to coping with extremes of National-Socialist legislation:

> Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.[29]

A similar path is chosen by those who want to deny the applicability of the non-retroactivity rule in cases where – according to modern standards – *jus cogens* rules have been violated, with peremptory norms transcending the limitations of time and space as the expression of a modern *jus naturae et gentium*.[30] While such approaches hold some appeal, their natural-law overtones and their 'presentist' stance directly challenge the intertemporal orthodoxy. Before cutting the Gordian knot, it is worth trying to untie it.

In some cases it might suffice to engage in a more careful reconstruction of contemporary legal discourse and practice to show that an allegedly prevailing view was not prevailing after all, or that a state misapplied its own recognized rules, for example by treating as *terra nullius* a territory that was in fact under the control of an organized native polity (in this case, according to European international law, a sovereign title could not be acquired by occupation).[31] Especially in the colonial context, an attempt can be made to include the views of the excluded to avoid re-enacting the exclusionary practice and to unsettle the arrogated hegemony of colonial law 'experts'.[32] However, there are inherent limits to such approaches. The views of the disenfranchised might be 'lost to history' due to lack of adequate documentation,[33] or the majority view of the time might be inacceptable to us even after a careful historical reconstruction of 'what the law was'.

[28] Waldron, *supra* note 24, at 7.

[29] Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' [1946], trans. Litschewski Paulson and Paulson, 26 *Oxford Journal of Legal Studies* (2006) 1, at 7. For a general discussion, see, e.g., Sartor, 'Legality Policies and Theories of Legality: From *Bananas* to Radbruch's Formula', 22 *Ratio Juris* (2009) 218; Bix, 'Radbruch's Formula and Conceptual Analysis', 56 *American Journal of Jurisprudence* (2011) 45. The application in the present context is considered, but ultimately rejected, by Buser, *supra* note 22, at 429–432.

[30] For a critical discussion, see Kämmerer, *supra* note 18, at 420–423; Buser, *supra* note 22, at 427–429.

[31] See Goldmann, *supra* note 14, at 106–114, for a combination of both strategies.

[32] See, e.g., M. van der Linden, *The Acquisition of Africa (1870–1914)* (2016), at 25–26, who cites African views on land law (*ibid.*, at 41–48) and sovereignty (*ibid.*, at 62–67), though she eventually bases her argument on a critical reading of 19th-century European international law, akin to Goldmann's (cf. *ibid.*, at 238–241).

[33] 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.

It is with respect to such cases that I want to suggest yet another attempt to untie the knot, an attempt that carefully stretches the dogmas of intertemporal law in order to address situations which threaten to perpetuate violations of fundamental humanitarian values and experiences of radical exclusion. As intimated at the outset, I will proceed in three steps. First, I will 'pluralize' the legal discourse of the day by introducing contemporary contestation of historical injustice into the language game[34] of international law via ethical principles as part of the international *lex lata* of the day (Section 3). Following the insights from a social history approach and from 'law and literature', I will not limit myself to law professionals and legal scholars, but will also include other forms of public contestation, inspired by Emile Durkheim's concept of *colère publique*. Second, I will ask how the law of state responsibility can be linked to such a 'pluralist' account of legal discourse (Section 4). While in cases where a practice (allegedly) not expressly forbidden by positive law is met by almost universal public outrage there are good reasons to hold the practice in question illegal already at the time of conduct, in less clear-cut cases such a solution would disregard the still ongoing semantic struggles (and thus the 'pluralist' approach chosen here).[35] Building on a rhetorical analysis of legal discourse, I will make a case that a violation only of ethical-legal principles, while not triggering an obligation to full reparation, does trigger a duty to give satisfaction; and that in most cases of historical injustice, the appropriate form of satisfaction is an obligation to negotiate with the victims or their descendants. In a last step, I will briefly comment on some of the most important aspects concerning an operationalization of the theoretical framework suggested in this article (Section 5).

3 A Conceptual Framework: Using Ethical Principles in International Law as Gateways for *Jurisgenesis*

The approach which is advocated here and which, as far as possible, avoids the anachronistic break with the principle of intertemporality cited at the outset is to use 'ethical' principles in international law as 'gateways for *jurisgenesis*'. I do not intend to enter into complex questions of the relationship between morality and international law as such.[36] For the purposes of the present article it is sufficient that '[o]ccasionally,

[34] Cf. L. Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (Blackwell, 3rd rev. ed. 1958), affirming the social-conventional character of communication and meaning (esp. *ibid.*, at 11, para. 23): 'Here the term "language-game" is meant to bring into prominence the fact that the speaking of language is part of an activity, or of a form of life.'

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

[36] Already with referring to this distinction I am building on the positivist paradigm that gradually superseded jusnaturalist approaches to law from the mid-18th century onwards, cf. E. Jouannet, *The Liberal-Welfarist Law of Nations* (2012), esp. at 12–27. Since the principles of intertemporal law refer back not only to the substantive rules of the day but also to the way these were conceived of and understood at the time, different methodologies would have to be applied to law which would follow a paradigm other than that of 'classical' positivism. Since my examples are taken from 19th-and 20th-century cases, I will thus limit myself to the positivist differentiation between law and morality that has dominated 'international law' as law between nation-states since the 19th century.

international law directly incorporates references to a quasi-metaphysical residue'.[37] Thus, by speaking of 'ethical principles in international law' (or, synonymously, 'ethical-legal principles'), I am referring here solely to principles of moral import that are referenced in 'positive' international law, be it treaty law, custom or a general principle of law. By focusing on this reference, I am also deliberately eschewing the question of how best to distinguish between rules and principles in international law.[38]

A *Pluralizing Discourse: Ethical-Legal Principles and Contemporary Discontent*

1 Ethical-Legal Principles: Mediating between Law and Public Morality

If we do not want to do away with the non-retroactivity of laws right from the outset, in dealing with the dilemmas of intertemporality the starting point should be principles linking law with morality that were already part of the international *lex lata* at the time. In the case of belligerent reprisals in World War II, for example, one could have recourse to the Martens clause in the Preamble to the Fourth Hague Convention of 1907:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[39]

As Antonio Cassese stated, '[t]he principal – and general – merit of the clause . . . is that it approached the question of the laws of humanity for the first time not as a moral issue but from a positivist (or, to put it more accurately, from an apparently positivist) perspective',[40] thus hinting at the specific mediating role of 'ethical-legal principles' between positive law and public morality. The Martens clause may also be helpful with regard to atrocities against native populations in imperialist colonial wars. Admittedly, Article 2 of the Fourth Hague Convention stipulates that the provisions of the Convention and the Regulations 'do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention'. However,

[37] Mégrét, 'International Law as Law', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (2012) 64, at 69.

[38] The canonical reference here is, of course, to Fitzmaurice, 'The General Principles of International Law considered from the Standpoint of the Rule of Law', 92 *Recueil des cours de l'Académie de droit international de la Haye* (*RCADI*) (1957) 7. See also Kolb, 'Principles as Sources of International Law', 53 *Netherlands International Law Review* (2006) 19. Add to this R. Dworkin's famous distinction in *Taking Rights Seriously* (1977), at 25–26, and Alexy's different take on the relationship, qualifying principles as 'optimization commands': Alexy, 'On the Structure of Legal Principles', 13 *Ratio Juris* (2000) 294.

[39] Hague Convention IV, *supra* note 2, Preamble, para. 8. See already Hague Convention II, *supra* note 2, Preamble, para. 8. For textual variants, see Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 *AJIL* (2000) 78, at 79.

[40] Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', 11 *European Journal of International Law* (2000) 187, at 188.

the Martens clause has an inherent normative overreach in that 'the "laws of humanity" and "public conscience" clearly establish universal standards that are independent of the status of an entity and its recognition as a civilized nation'; further, the clause refers to 'the minimum requirement[s] of humanity that were well established in international law and international relations at the time'.[41]

When it comes to the horrifying widespread abuses in the 'Congo Free State', the pledges to further 'the moral and material well-being of the native populations' and 'to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being' in the Berlin General Act of 1885 might serve as a point of entry.[42] Other colonial practices included abuse of the contractual form in the practice of 'treaties of protection', which suggested equality of rank but aimed at subjugation.[43] Such contradictory behaviour, which violated the trust of the other side,[44] was – when considered from an enlightened perspective – if not already a violation of the *pacta sunt servanda* principle[45] then at least hardly compatible with the principles of *bona fides*.[46]

2 Reconstructing Contemporary Discontent: Law, Literature and Beyond

'From an enlightened perspective': the suspicion remains that those ethical-legal principles are given here *ex post* an understanding that was not yet established at the time. In the case of colonial abuses, the principle of 'civilization' that served as the cornerstone of the *Jus Publicum Europaeum*[47] seems to sit squarely with such a reading. However, this reading is not completely anachronistic. Nineteenth- and early 20th-century legal opinion was far from undivided.[48] Some authors, for example, explicitly

41 Goldmann, *supra* note 14, at 116–117, also convincingly arguing against the all-too-convenient myth of a hyper-positivist international law around 1900.

42 Berlin General Act, *supra* note 19, Preamble and Art. 6. Cf. also Goldmann, *supra* note 14, at 115–116.

43 For the contradictory practice of such treaties between the colonizing European powers and native polities, see Alexandrowicz, 'The Partition of Africa by Treaty' [1974], in C. H. Alexandrowicz, *The Law of Nations in Global History*, ed. D. Armitage and J. Pitts (2017) 230; Koskenniemi, *supra* 19, at 136–143. For an in-depth study, see van der Linden, *supra* note 32.

44 For African treaty-making practice and the expectations into the binding character of treaties, see Alexandrowicz, 'The Role of Treaties in the European-African Confrontation in the Nineteenth Century' [1975], in Alexandrowicz, *The Law of Nations in Global History*, *supra* note 43, 259, at 281–288. See also Hess, 'Italian Imperialism in Its Ethiopian Context', 6 *The International Journal of African Historical Studies* (1973) 94, at 102–108.

45 See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment (Counter-Claims), 10 October 2002, ICJ Reports (2002) 303; *ibid.*, 474, at 480 (Koroma J., dissenting).

46 On the close connection of these principles, cf. van der Linden, *supra* note 32, at 82–84, 236–238.

47 Koskenniemi, *supra* note 19, at 102–106, 132–136; Obregón, 'The Civilized and the Uncivilized', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 917. On the multifaceted notion of the *jus publicum europaeum*, see von Bogdandy and Hinghofer-Szalkay, 'Das etwas unheimliche *Ius Publicum Europaeum*: Begriffsgeschichtliche Analysen im Spannungsfeld von europäischem Rechtsraum, *droit public de l'Europe* und *Carl Schmitt*', 73 *ZaöRV* (2013) 209.

48 On the question of colonial disenfranchisement and exclusion, see only Craven, *supra* note 33, at 20–21; Eicker, *supra* note 18, at 197–199. For an in-depth study of the complexities and contradictory patterns of colonial rule, see L. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002).

criticized the idea that native peoples in Africa should only be bearers of moral but not of legal rights.[49] In a leading French textbook of the time, Paul Fauchille wrote:

> Absolute respect is as much due to the independence of the wild or barbarian tribes as to their property rights. Men of all races, white or black, red or yellow, however unequal they may be in knowledge, wealth and industry, must be considered equal in law. . . . To deny to tribes or peoples who have freely occupied the land for thousands and thousands of years, the right to independence, to sovereignty, is inadmissible.[50]

However, it is not only the writings of contemporary scholars or state practice and *opinio juris* that should be taken into account in the reconstruction of international law at the relevant time. Law is not an autonomous institution, but is intricately embedded in the social and political world it inhabits. Thus, not only expert opinions matter, but also the appeal to international law by people outside the legal staff. These insights from a social history of international law[51] are especially fruitful when they concern ethical principles linking international law and public morality. After all, determining their content is not an exclusive domain of lawyers, since these principles refer to a collective conscience not limited to specialists of law. While it is certainly deplorable that there was a 'blind spot among international lawyers towards the atrocities' in the colonies in general[52] (and some scholars even turned apologists of their respective national policies[53]), atrocities such as those committed by Germans in South-West Africa and by Belgians in the Congo caused an outcry outside the legal profession.

The actions of German colonial troops in the Ovaherero 'uprising' 1904 were intensely debated in the German Reichstag. Even before the infamous General von Trotha was sent to South-West Africa, the leader of the Social-Democratic Party, August Bebel, called the German methods of warfare 'not only barbaric, but beastly', insisting that they should 'provoke the most resolute protest of any civilized person',[54] thus evoking almost *verbatim* the Martens clause. When von Trotha's extermination

[49] M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (1926), at 45.

[50] H. Bonfils and P. Fauchille, *Manuel de droit international* (5th ed. 1908), at 329, para. 547: '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.'

[51] Witt, 'A Social History of International Law. Historical Commentary, 1861–1900', in D. Sloss, M. Ramsey and W. Dodge (eds), *International Law in the U.S. Supreme Court: Continuity and Change* (2011) 164, at 177, 179–181; Vadi, 'International Law and Its Histories: Methodological Risks and Opportunities', 58 *Harvard International Law Journal* (*Harv. Int'l L.J.*) (2017) 311, at 329–330; Benton, 'Beyond Anachronism. Histories of International Law and Global Legal Politics', 21 *Journal of the History of International Law* (*JHIL*) (2019) 7, at 17–29; Katz Cogan, 'A History of International Law in the Vernacular', 22 *JHIL* (2020) 205. See also Koskenniemi, 'Expanding Histories of International Law', 56 *American Journal of Legal History* (2016) 104, at 107.

[52] Koskenniemi, *supra* note 19, at 165–166.

[53] *Ibid.*, at 160–163.

[54] Session of 17 March 1904, 213 *Reichstagsprotokolle* (1904–1905), at 1892.

order became public in Germany, Bebel stated that 'any butcher's assistant could conduct a war in this manner'.[55] Especially outspoken in this respect was the Social Democrat, Georg Ledebour, who even addressed questions of international law: 'Whether the enemy is considered an insurgent or a belligerent power cannot make any difference to a civilized State; the principles of humanity must be upheld under all circumstances.'[56] Once again paraphrasing the Martens clause, Ledebour called von Trotha a 'man who blatantly violate[d] all ideas of the conduct of war as held by the German people'[57] and commented on his orders: 'This is such a monstrous infamy that every German, and especially every German soldier, should be ashamed of General von Trotha's decrees.'[58] In the Reichstag, the oppositional Social Democrats – who, despite a discriminatory election law, had scored an impressive 31.7% of the votes in the general elections of 1903 – were the leading voices condemning the atrocities, and they could cite sympathetic opinions from the press. Even a strictly conservative (and vociferously anti-Semitic) parliamentarian like the former imperial court chaplain Adolf Stoecker spoke of the 'mark of Cain' and a 'bloodstain' on the German army's 'shield of honour'.[59]

Public outrage about the atrocities and genocidal acts perpetrated by Belgians in the 'Independent State of the Congo', was first stirred in Britain by journalist Edmund Morel, and his Congo Reform Association, who successfully lobbied for a 1903 resolution of the House of Commons urging that 'natives should be governed with humanity'.[60] This outrage was further fuelled the following year by a report of the British consul in the Congo, Roger Casement.[61] Two years later, in 1906, a Belgian legal scholar, Félicien Cattier, published a critical study on the situation in the Congo[62] which 'created a shock in Belgian political milieus'[63] and contributed to the formal annexation of the 'Congo Free State' by Belgium in 1908, thus ending the gruesome personal rule of King Leopold II.[64]

We need not, however, limit ourselves to legal opinions, public records or journalism in reconstructing opposition to inhumane practices. A valuable source for

55 Session of 30 January 1905, 213 *Reichstagsprotokolle* (1904–1905), at 4104.

56 Session of 6 April 1905, 213 *Reichstagsprotokolle* (1904–1905), at 5887.

57 Session of 25 May 1905, 213 *Reichstagsprotokolle* (1904–1905), at 6159.

58 Session of 2 December 1905, 214 *Reichstagsprotokolle* (1905–1906), at 91.

59 Session of 8 March 1904, 213 *Reichstagsprotokolle* (1904–1905), at 1646. That remark referred already to the events before von Trotha was sent to 'quell' the 'uprising'.

60 UK House of Commons, 20 May 1903, 122 Hansard 1289, at 1332.

61 Report of the British Consul, Roger Casement, on the Administration of the Congo Free State, 62 British Parliamentary Papers (1904) Cd. 1933. Published in full (with its appendix) by J.-L. Vellut and D. Vangroenweghe (eds), *Le Rapport Casement (Enquêtes et documents d'histoire africaine)* (1985). See further S. LeFanu, *Something of Themselves: Kipling, Kingsley, Conan Doyle and the Anglo-Boer War* (2020), at 274–277; Koskenniemi, *supra* note 19, at 158–159.

62 F. Cattier, *Étude sur la situation de l'État indépendant du Congo* (1906).

63 Koskenniemi, *supra* note 19, at 160. To Cattier's previous apologetic stance, see Koskenniemi, *supra* note 19, at 159–160.

64 On that infamous rule, see A. Hochschild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (1998).

contemporary discontent can also be found in literary fiction.[65] Julie Stone Peters urges us 'to look at the intertwined histories of modern literature and modern rights, histories that are . . . inextricably linked from the eighteenth century onward'.[66] While some proponents of the 'law and literature' movement[67] have mined 19th- and 20th-century narrative literature to enhance our present-day sense of justice[68] – Richard H. Weisberg prominently calling for a 'poethics', which 'in its attention to legal communication and to the plight of those who are "other", seeks to revitalize the ethical component of the law'[69] – others have shown the potential for literature to engage with the history of institutions in national legal orders.[70] In international legal scholarship, 'law and literature' still seems to be in its infancy;[71] however, a turn to literature can yield insights in an inquiry into the history of international law, as well,[72] including in the cases under discussion here. While most contemporary writers in Germany dealt

65 Krueger, 'Law and Literature and History', in K. Dolin (ed.), *Law and Literature* (2018) 58.

66 Peters, '"Literature," the "Rights of Man," and Narratives of Atrocity: Historical Backgrounds to the Culture of Testimony', 17 *Yale Journal of Law & the Humanities* (2005) 253, at 256. For a closer analysis of these 'intertwined histories', see L. Hunt, *Inventing Human Rights: A History* (2007).

67 This is not the place to expand on this multifaceted movement. For an overview of different strands and approaches, see G. Binder and R. Weisberg (eds), *Literary Criticisms of Law* (2000); K. Dolin, *A Critical Introduction to Law and Literature* (2007). For a brief survey, see von Arnauld, 'Recht', in M. Martínez (ed.), *Erzählen: Ein interdisziplinäres Handbuch* (2017) 173, at 185–187. As the focus is here on literary takes on legal questions, references are limited to works that are usually bracketed as 'law in literature'; whereas 'law as literature' deals with a deconstruction of traditional legal methodology. For this classification and its limits, see I. Ward, *Law and Literature: Possibilities and Perspectives* (1995), at 3–27. In this sense, the rhetorical analysis in Section 4.A and the recourse to Robert Cover's critique of adjudication in Section 5.C incorporate strands of 'law as literature'.

68 R. H. Weisberg, *Poethics and Other Strategies of Law and Literature* (1992); M. C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (1995). For a more critical take on legal institutions based on literature, see R. West, *Narrative, Authority, and Law: Law, Meaning, and Violence* (1993). On the debate about how much these publications (and others in the 'law and literature' field in the 1990s and 2000s) were linked to a specific moment in United States-based legal theory and on the potentials of a de-Americanization of 'law and literature', see Olson, 'Futures of Law and Literature: A Preliminary Overview from a Culturalist Perspective', in C. Hiebaum, S. Knaller and D. Pichler (eds), *Law and Literature In-Between: Contemporary Inter- and Transdisciplinary Approaches* (2015) 37.

69 Weisberg, supra note 68, at 46.

70 Cf., e.g., K. Dolin, *Fiction and the Law: Legal Discourse in Victorian and Modernist Literature* (1999); S. Lettmaier, *Broken Engagements: The Action for Breach of Promise of Marriage and the Feminine Ideal, 1800–1940* (2010).

71 The last years have, however, seen a growing number of contributions to an international legal 'poethics': see E. Morgan, *The Aesthetics of International Law* (2007); Krivenko, 'International Law, Literature and Interdisciplinarity', 9 *Law and Humanities* (2015) 103; Krivenko, 'Engaging International Law and Literature with Kafka, Deleuze and Guattari', in A. Reinisch, M. Footer and C. Binder (eds), *International Law and . . .: Select Proceedings of the European Society of International Law, 2014* (2016) 393. A panel at the American Society of International Law (ASIL) annual conference in 1997 has been a pioneering event, with brief presentations by Anderson, Peters and Meron: see Symposium: *International Law and Literature*, 91 *Proceedings of the American Society of International Law Annual Meeting* (*ASIL Proc.*) (1997) 116.

72 Focusing on the coevolution of early-modern literature and international law, see C. Warren, *Literature and the Law of Nations, 1580–1680* (2015); C. Tang, *Imagining World Order: Literature and International Law in Early Modern Europe, 1500–1800* (2018).

with the 1904 Ovaherero war from a colonizer's perspective,[73] there is the notable exception of Franz Jung's expressionist short story 'Morenga' which portrays one of the leaders of the Ovaherero as a fearless fighter against an unjust colonial rule.[74] The Congo case, in turn, was critically taken up and popularized, among others, by Joseph Conrad in his 1899 novella 'Heart of Darkness',[75] and turned into accusatory verses by the US poet Vachel Lindsay in his poem 'The Congo' in 1914:

> Listen to the yell of Leopold's ghost,
> Burning in Hell for his hand-maimed host.
> Hear how the demons chuckle and yell,
> Cutting his hands off, down in Hell.[76]

Taken together with dissenting legal opinions, political and other institutional opposition and criticism in the press and other media, literary (and other artistic[77]) reactions to grave breaches of ethical-legal norms can thus add up to a powerful *J'accuse . . .!*

That many of the early 20th-century critics of colonial practices and outright atrocities were harbouring racial prejudices themselves and recycled dominant stereotypes of 'savage tribes' and the 'dark continent', or condescendingly compared yet-'uncivilized' natives to children, is part of an ambiguous legacy.[78] Nevertheless, their criticism serves testimony to a widespread contemporaneous discontent at least with certain practices considered (or portrayed) as legal by the 'prevailing' apologetic international law professionals of the time. Furthermore, when dealing with such cases of colonial abuses, the contemporaneous view of the 'periphery' must also be taken into account. Where these views are documented, such an 'inclusive' approach not only avoids re-enacting past Eurocentrism but can help to lead the way out of the trap of intertemporality.

B *Conceptualizing Normative Change: Durkheim's* Colère Publique *Revisited*

In his 1893 *chef d'oeuvre*, *De la division du travail* [*The Division of Labour in Society*], which had a profound influence on the concept of law in the works of Léon Duguit and Georges Scelle, the great French sociologist Emile Durkheim, in developing his theory

[73] See F. Meister, *Muhérero rikárera!* (1904); G. Frenssen, *Peter Moors Fahrt nach Südwest* (1906). On the treatment of the Herero war in German literature in general, see S. Hermes, *'Fahrten nach Südwest': Die Kolonialkriege gegen die Herero und Nama in der deutschen Literatur (1904–2004)* (2009).

[74] Jung, 'Morenga', 3 *Die Aktion* (1913) 1143.

[75] On personal links between Conrad, Casemenet and Morel, see Zins, 'Joseph Conrad and British Critics of Colonialism', 12 *Pula: Botswana Journal of African Studies* (1998) 58.

[76] Lindsay, 'The Congo: A Study of the Negro Race', in V. Lindsay, *The Congo and Other Poems* (1914), 3, at 5.

[77] See, e.g., I. Patterson, *Guernica and Total War* (2007), at 2 (stating that 'Picasso's painting in response to the bombing made Guernica the most famous image of total war, and articulated the terror of it so potently that the picture has become almost synonymous with a sense of outrage and condemnation').

[78] Koskenniemi, *supra* note 19, at 99–110, 129–130, 140–142. On Conrad's novel, see Curtler, 'Achebe on Conrad: Racism and Greatness in *Heart of Darkness*', 29 *Conradiana* (1997) 30.

of collective conscience, contrasted modern society's 'organic solidarity', arising from a division of labour, with a pre-modern 'mechanical solidarity', which still finds its place in modern societies in the field of criminal law. This kind of solidarity expresses itself in instances of *colère publique* (public anger):

> Crime . . . draws honest consciousness together, concentrating them. . . . A common indignation is expressed. From all the similar impressions exchanged and all the different expressions of wrath there rises up a single fount of anger, more or less clear-cut according to the particular case, anger which is that of everybody without being that of anybody in particular. It is public anger.[79]

While for Durkheim the concept of *colère publique* was linked to a generally shared public morality that gives diffuse support to penal sanctions, whereas the penal code as such is administered in an organized fashion,[80] he at least hinted at a possible disconnect between the 'intrinsic nature of these feelings' and the extrinsic character of the formalized penal code.[81] This disconnect was taken up later by Niklas Luhmann to develop Durkheim's *colère publique* into a concept to explain the process of 'law-creation via public outrage'.[82] Luhmann writes about the *jurisgenesis* of human rights on the international level:

> What one can observe is . . . a very primal way of generating norms on the basis of scandalous incidents to which the mass media gives global coverage. Whether there are texts that forbid such acts . . . hardly plays a role in the matter. . . . On a much more immediate level, scandal itself can generate a norm (that was not previously formulated at all) in cases like forced deportation and resettlement, the traceless disappearance of persons accompanied by state obstruction, illegal incarceration and torture, as well as political murder of every type . . . . The generation of norms follows the Durkheim model, it avails itself of public outrage (colère publique). A juridical bestowal of form, a regulation in accordance with international law, can only attach itself to this but not act as source of law.[83]

The Durkheim–Luhmann concept of *colère publique* provides a useful tool blurring the binary distinction between *lex lata* and *lex ferenda*. I will not be so bold as Luhmann and posit that public anger creates new international law by itself.[84] I would rather take it up as a concept within a framework of '*jurisgenesis*'[85]; a framework that conceives of

79 E. Durkheim, *The Division of Labour in Society*, ed. and introd. S. Lukes, trans. W. D. Halls (Palgrave, 2nd ed. 2013), at 79.

80 *Ibid.*, at 55.

81 *Ibid.*, at 63–67. On a similar differentiation in G. Scelle, *Théorie juridique de la révision des traités* (1936), at 47, see Koskenniemi, *supra* note 19, at 331.

82 Fischer-Lescano, 'Global Constitutional Struggles: Human Rights between colère publique and colère politique', in W. Kaleck, M. Ratner, T. Singelnstein and P. Weiss (eds), *International Prosecution of Human Rights Crimes* (2007) 13, at 20: 'law-creation via scandalization'.

83 Luhmann, 'Are There Still Indispensable Norms in Our Society?' [1993], trans. Cesaratto, 14 *Soziale Systeme* (2008) 18, at 33. Cf. also G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012), at 127–128.

84 This point has been criticized by Ladeur and Viellechner, 'Die transnationale Expansion staatlicher Grundrechte: Zur Konstitutionalisierung globaler Privatrechtsregimes', 46 *Archiv des Völkerrechts* (2008) 42, at 52 n. 62.

85 On the concept of *jurisgenesis*, see Cover, *supra* note 15, at 40.

normative change as a process, a process which also allows for a 'bottom-up interpretation' of law and makes it possible to 'develop new vocabularies of public claim making, and to anticipate new forms of justice to come'.[86]

The focus on an actual change in international law is consistent with our intertemporal dilemma. For it is the disconnect between the legal opinion prevailing at the time of the events and present-day international law that creates the sense of frustration in the first place. Thus, by taking up the concept of *colère publique* I am not arguing for a general inclusion of the *vox populi* in the theory of norms. Admittedly, there were large portions of the general public around 1900 that actually endorsed, or at least condoned, the abusive practices in the colonies; most probably, these also represented the majority view. Taking the cue, however, from the dilemma of historic (in)justice, it is only the voices of those who expressed ethical-legal views in line with our present-day international law and morality that are of interest here conceptually.

Where contemporaries already protested against cruel and inhumane practices by appealing to ethical standards that are the moral foundation of today's international legal rules, and where those protests actually contributed to an express illegalization of the conduct in question, so the *jurisgenetic* argument here goes, we might consider loosening the intertemporal strictures somewhat. Thus, we can feel entitled to extend the verdict of illegality to practices that had already been denounced by contemporaries whose protests contributed to bringing about the express illegalization of such practices.

This less stringent approach to the rules of intertemporality does not amount to a retroactive application of modern international law. For example, I would not argue that General Lothar von Trotha's infamous order of 2 October 1904 should be regarded as a command to commit a genocide in the legal sense – decades before the concept of genocide entered international law; even less would I measure the actions of the German colonial troops against the specific elements of the 1948 Genocide Convention or Article 6 of the Rome Statute.[87] I would argue that what they did was a violation of the 'the laws of humanity, and the dictates of the public conscience', as was widely held by contemporaries who protested vehemently against the treatment of the Ovaherero and Nama.

What is important is to stress once more that these ethical-legal principles were part of the contemporaneous *lex lata*. Thus, the appeal to 'humanity' and 'public conscience' by contemporaries would be misrepresented if it were understood only as a claim *de lege ferenda*. It must also be recognized as a protest against a violation of law already in force. What was lacking at the time of events were, arguably, specific rules illegalizing the inhumane conduct in question. But that does not mean that contemporary protesters could not rely on more general legal rules and principles to make

[86] S. Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (2011), at 15.

[87] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277 (hereinafter 'Genocide Convention'); Rome Statute, *supra* note 11.

their legal claim.[88] This is where those ethical-legal principles come into play – very much so as today we do not need specific rules against the 'traceless disappearance of persons' mentioned by Luhmann, if we can declare forced disappearance illegal by recourse to more general and already established human rights guarantees, such as the rights to life, liberty, family, etc.[89]

In line with this approach, I have attempted in the preceding section to reconstruct widespread and powerful instances of contestation contemporaneous with the perpetrated acts. This is the first step of an analysis that aims at deconstructing an overly 'monolithic' conception of 'what the law was'.[90] In a second step, in line with the concept of *jurisgenesis* through *colère publique*, in order to distinguish legal processes 'that have "direction"' from those 'that "drift"',[91] we need to link contemporary contestation with an express illegalization of the acts in question in today's international law. For example, it was precisely the blatant violations of the 'laws of humanity' and the 'dictates of the public conscience' during World War II that led to the new regulation of broad areas of the law of armed conflict in the four Geneva Red Cross Conventions of 1949.[92] Belligerent reprisals were thus largely banned from post-war international humanitarian law.[93]

As to the instrumentality and causality of contemporary protests, one should not demand too high a standard of proof. The approach presented here is, after all, not historiographical, but one that 'does' international legal history as 'a decidedly

[88] For the identification of different types of norms in the process of contestation, see A. Wiener, *The Invisible Constitution of Politics, Contested Norms and International Encounters* (2008), at 66. See further A. Wiener, *A Theory of Contestation* (2014).

[89] Cf. von Arnauld, 'New Human Rights in Regional Human Rights Institutions', 93 *Die Friedens-Warte: Journal for International Peace and Organization* (2020) 44, at 47–49.

[90] Cf. also the plea to 'critically reread international law's past without changing it' made by Goldmann, 'Decolonizing Intertemporal International Law', Völkerrechtsblog (13 November 2019), available at https://voelkerrechtsblog.org/de/decolonizing-intertemporal-international-law/.

[91] Hartog, 'Response: A Muddle in the Middle', 44 *Law & Social Inquiry* (2019) 534, at 544.

[92] See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, Art. 4A(3) (hereinafter 'Geneva Convention III') (reacting to the treatment of the Italian military internees by the German authorities in World War II). See also J. de Preux, *Commentary on the Geneva Conventions of 12 August 1949*, gen. ed. J. S. Pictet, Volume 3: *Geneva Convention Relative to the Treatment of Prisoners of War*, trans. A. P. de Heney (1960), at 61–64. See also Geneva Convention III, *supra*, Art. 50 (limiting the kind of work prisoners of war might be compelled to do by the detaining power).

[93] See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31, Art. 46 (hereinafter 'Geneva Convention I'); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85, Art. 47 (hereinafter 'Geneva Convention II'); Geneva Convention III, *supra* note 92, Art. 13(3); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Art. 33(3) (hereinafter 'Geneva Convention IV'). See, however, the critical analysis of the generalizing arguments of the International Criminal Tribunal for the former Yugoslavia (ICTY), Judgment, *Kupreškić and others* (IT-95-16), Trial Chamber, 14 January 2000, paras 527–536, by Kuhli and Günther, 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals', in A. von Bogdandy and I. Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (2012) 365.

instrumental pursuit'.[94] The basic idea is that reading those ethical principles within historical international law is (a) in line with widespread (but, in contrast to Durkheim, not necessarily 'general') contemporary contestation, which (b) in the end contributed to formal amendments of international legal norms in an effort to unequivocally illegalize the types of acts in question. On a narrower understanding, *colère publique*, public outrage, will typically be triggered by specific cases of grave abuses, not so much by long-term practices, even though such cases will always be embedded in structural injustice. On a wider understanding, however, a consistent and widespread contestation of certain practices over a longer period of time could broaden the concept of 'law creation via public outrage' so as to include structural violence, like slavery.

C *Loosening the Strictures: Intertemporalities and the Law of State Responsibility*

The approach suggested here is not without precedent. The Nuremberg Trials come to mind. In his opening statement in the trial of the main war criminals, Robert H. Jackson said: 'The refuge of the defendants can be only in the hope that International Law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law.'[95] Reaching beyond the specifics of the *lex scripta*, he claimed that international law was more than 'a scholarly collection of abstract and immutable principles'.[96] In a way, I have attempted so far to sketch a theoretical framework that makes sense of these statements, but without their natural law overtones. In this context, it might be interesting to remember that in some of the Nuremberg Trials, the Martens clause did actually play a role in setting up the charges against the defendants.[97] In particular, in the *Krupp* case, the US Military Tribunal stated:

> The preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity, and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.[98]

Deviations from a strict application of Huber's first principle of intertemporal law are even easier to justify in the context of state responsibility than in the case of the Nuremberg Trials. In the criminal law context, the prohibition of retroactivity serves

[94] For the different rationales, see Bederman, 'Foreign Office International Legal History', in Craven, Fitzmaurice and Vogiatzi (eds), *supra* note 33, at 43; Orford, 'On International Legal Method', 1 *London Review of International Law* (2013) 166.

[95] International Military Tribunal (IMT), *USA, France, UK, and USSR v. Hermann Göring and others*, Opening statement of the Chief Prosecutor of the USA, 21 November 1945, *2 Trial of the Major War Criminals before the International Military Tribunal* (1947) 98, at 155 (Jackson, J.).

[96] *Ibid.*, at 147.

[97] Meron, *supra* note 39, at 80.

[98] *Trial of Alfried Felix Alwyn Krupp and others*, Judgment, 31 July 1948, 9 *Trials of War Criminals Before the Nuremberg Military Tribunals* (1950) 1327, at 1341. On the rather singular character of the treatment of the Martens clause in this judgment, see Cassese, *supra* note 40, at 202–208.

to protect the accused from arbitrary prosecution and therefore will, in general, call for a stricter application.[99] There are no comparable protective interests in the law of state responsibility.[100] Nor is there any particular interest in the stabilization of legal facts, as is characteristic of the original context of Huber's principles of intertemporal international law. That the law to be applied in cases of acquisition of territory (as in the *Palmas* case) should be the one in force at the time of the acquisition is intended to prevent inter-state territorial conflicts wherever possible – a concern that permeates international law whenever it deals with borders and boundary treaties.[101] Otherwise, treaty law is characterized by a certain flexibility: In accordance with the principle of consensus, Article 28 of the Vienna Convention on the Law of Treaties (VCLT) leaves the parties free to attach retroactive effect to a treaty and establishes the exclusion of retroactivity only in the case of silence as the rule.[102] There exists therefore a strong case for treating problems of time and international law not in an abstract and generalizing manner, but in a differentiated way according to the specific features of the respective subject areas.[103]

4 Legal Consequences: Redressing Violations of Ethical-Legal Principles

A *Where to Start: Of Semantic Struggles and the Vagueness of Legal* Topoi

Before we can get to the secondary rules, i.e. the legal consequences of a violation of ethical-legal principles, another blurring of binary distinctions is warranted, namely between legality and illegality. The blurring of the lines between *lex lata* and *lex ferenda* by way of the concept of *colère publique* comes at a price: If we were to simply base our legal assessment on those voices that denounced the conduct in question and contributed to its express illegalization, we would ignore the fact that at the same time there were others who held the view that international law had not been violated. The conceptual framework of *jurisgenesis*, as understood here, does not allow for overriding

[99] Cf. Lamb, '*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law', in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute for an International Criminal Court: A Commentary*, Vol. 1 (2002), 733; Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 99 *Journal of Criminal Law & Criminology* (2009) 857.

[100] On the reluctance of the ILC to deal with intertemporal questions in the commentaries to ARSIWA (*supra* note 8), see Tavernier, *supra* note 13, at 397–403.

[101] See, e.g., VCLT, *supra* note 9, Art. 62(2)(a); Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, 1946 UNTS 3, Art. 11. See generally Shaw, 'Boundary Treaties and Their Interpretation', in E. Rieter and H. de Waele (eds), *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens* (2011) 239.

[102] Cf. Dopagne, 'Article 28: Non-Retroactivity', in O. Corten and P. Klein (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2011) 718, at 725, no. 24; von der Decken, 'Article 28: Non-Retroactivity', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd ed. 2018) 503, at 510, no. 8.

[103] Higgins, *supra* note 26, at 519.

one opinion that seems unjust and outdated today with a contemporaneous opinion that is more 'in synch' with present-day morality.

Instead, in turning 'from sources to communicative practice',[104] *jurisgensis* aims to borrow concepts developed by Ingo Venzke, to deconstruct the 'semantic authority' that is inherent in the idea of a 'prevailing opinion' of 'what the law was' and to make visible the contemporary 'semantic struggles' over the meaning of international law.[105] Thus, I do not intend to deny that probably most states and lawyers around 1900 held that the laws of armed conflict did not apply to colonial wars, but I want to highlight that this position was widely challenged at that time by reference to *topoi* such as 'humanity' and 'public conscience' which, via the Martens clause, were already part of positive international law. I also do not intend to deny that these *topoi* were used differently by those who defended colonial abuses, either because they saw no inhumane treatment in the first place or they thought that some higher goal might have justified certain 'regrettable' actions. Thus, the focus of this article is not on a finalized definition of what notions like 'humanity' entailed at the time in question, but on the contested 'meaning-in-use' at the time.[106]

In fact, the vague and indeterminate[107] nature of concepts like 'humanity' and 'public conscience' makes them susceptible to divergent uses in legal argumentation. Relying on a rhetorical analysis of legal discourse, in particular as developed by Theodor Viehweg,[108] such *topoi* with a high level of generality open up a semantic field in which the properties of the *topos* as a 'focal point of a horizon of meaning'[109] can be played out.[110] These properties have been identified by the German literary scholar Lothar Bornscheuer as habituality, potentiality, intentionality and symbolicity.[111] *Topoi* such as 'humanity' are 'habitual' since they are conceptually grounded in communicative practices: Only because 'humanity' was an established, 'habitual' concept, did it become possible in the Reichstag to debate whether the treatment of the Ovaherero

[104] Venzke, *supra* note 35, at 29. See similarly J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2011), at 195–220 (on law ascertainment being grounded in social practices).

[105] Venzke, *supra* note 35, at 37–63.

[106] Cf. Wiener, 'Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations', 35 *Review of International Studies* (2009) 175. Wiener's concept of 'meaning-in-use' explicitly builds on Wittgenstein's notion of meaning as the use of words: Wittgenstein, *supra* note 34, para. 43 ('the meaning of a word is its use in the language').

[107] For a typology of forms of vagueness in international law, see Kulick, 'From Problem to Opportunity: An Analytical Framework for Vagueness and Ambiguity in International Law', 59 *German Yearbook of International Law* (2016) 257, at 269–271.

[108] T. Viehweg, *Topics and Law: A Contribution to Basic Research in Law*, trans. W. C. Durham (Peter Lang, 1993) (1974). For a fine revindication of the turn to rhetoric from the perspective of international law, see Scobbie, 'Rhetoric, Persuasion and Interpretation in International Law', in A. Bianchi, D. Peat and M. Windsor (eds), *Interpretation in International Law* (2015) 61. For an in-depth treatment of Viehweg's brand of rhetorical analysis, see von Arnauld and Theilen, 'Rhetoric of Rights', in A. von Arnauld, K. von der Decken and M. Susi (eds), *The Cambridge Handbook of New Human Rights* (2020) 34, at 36–39.

[109] L. Bornscheuer, *Topik: Zur Struktur der gesellschaftlichen Einbildungskraft* (1976), at 105.

[110] C. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. J. Wilkinson and P. Weaver (University of Notre Dame Press, 1969) (1958), at 74–79, 133–138.

[111] Bornscheuer, *supra* note 109, at 95–108 (with a succinct summary *ibid.*, at 107).

and Nama was 'inhumane'. It is not necessary that there was agreement on that issue. For *topoi* in general, even more for those of a high level of generality, it is characteristic that they lack a clearly defined sense. It is exactly their 'polyvalent interpretability' that Bornscheuer describes as their 'potentiality',[112] their potential for innovation, or, differently put, their propensity to legal disputes.[113] Since such disputes centre on a cause, the application of *topoi* to a specific problem and their use as an argument *for something* – in our example, against the merciless slaughtering of the Herero and Nama peoples – directs their use and brings their 'intentional' character to the fore.[114] Finally, ethical *topoi* such as 'humanity' and 'public conscience' have a high degree of 'symbolicity'; they act like a hypnotizing 'incantation' that exerts an almost magical appeal.[115] It is the high moral resonance of these ethical-legal *topoi* that makes them particularly suited to expressing 'public anger'.

Theodor Meron vividly frames the foregoing discussion with respect to the Martens clause:

> It is articulated in strong language, both rhetorically and ethically, which goes a long way toward explaining its resonance and influence on the formation and interpretation of the law of war and international humanitarian law. These features have compensated for the somewhat vague and indeterminate legal content of the clause.[116]

This 'formation and interpretation' needs to be understood as a process of semantic struggle, in which an established semantic authority (e.g. 'killing civilians can be justified as a belligerent reprisal under certain circumstances') is challenged by a *colère publique*, which in turn leads to the establishment of a new semantic authority ('killing civilians can never be justified as a belligerent reprisal'). The framework of *jurisgenesis* as applied here focuses on 'law as an arena of conflict between contending normative orders';[117] it highlights the phase in-between, and the 'potentiality' of the central *topoi* enshrined in ethical-legal principles. Legal discourse, taken as a whole, is already moving towards a position that agrees with our present-day morality, but there are still ongoing semantic struggles over the meaning-in-use of fundamental *topoi* of law such as 'humanity' or 'good faith': The same conduct is decried as profoundly illegal by some while it is still defended by others.

B *Which Kind of Reparation: A Case for Satisfaction*

What then are the practical consequences of this pluralist blurring of the lines between *lex lata* and *lex ferenda*, between legality and illegality? This question demands a differentiated answer. There might be (comparatively) 'clear' cases, cases in which

[112] *Ibid.*, at 105.

[113] Succinctly put by Scobbie, *supra* note 108, at 71: 'There is often more agreement on the initial starting topic of an argument than on its ultimate outcome.'

[114] Bornscheuer, *supra* note 109, at 100–102.

[115] *Ibid.*, at 103.

[116] Meron, *supra* note 39, at 79. See similarly Cassese, *supra* note 40, at 188.

[117] Hartog, *supra* note 91, at 536.

'apologetic' lawyers could only argue that an especially blatant and excessive violation of ethical-legal principles was not specifically and explicitly outlawed at the time it was committed (in a crude application of the '*Lotus* Principle'), even while it triggered almost universal contemporary outrage. In such cases, the 'apologetic' position was shallow from the outset, and the acts in question should be considered as illegal, thus overruling the 'apologetic' view. The egregious crimes against humanity committed by Germans in extermination camps between 1941 and 1945 could serve as an example. In such cases, criminal convictions are warranted; it is also possible to hold the state internationally responsible and liable for reparations in the form of compensation.[118]

These legal consequences, however, are problematic with respect to the principles of intertemporality in less clear-cut cases. Here, while widespread contestation, linked to ethical-legal principles in force at the time, provides us with good reasons to treat the practices in question as illegal for the purposes of state responsibility, it does not yet provide sufficient reasons to disregard the fact that the (arguably) prevailing opinion of the day held them to be legal. Overruling an established legal opinion of the day would presuppose a hierarchy between these different types of norms that international law then lacked (today, we might feel more encouraged to make a *jus cogens* case). In such cases, a state duty to compensate would disregard the still ongoing semantic struggle as well as the normative properties of those ethical-legal principles with their potential for a critical as well as for an apologetic use – especially if one agrees to some leeway when it comes to the questions of how widespread contemporary discontent was, and to what degree it actually contributed to further legal development, to trigger the concept of *jurisgenesis* via *colère publique*. After all, compensation (like restitution) is aiming 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'.[119] This very idea of 'full reparation'[120] seems to be conceptually too closely linked to an established illegality *ab initio*[121] to tackle the kind of normative ambiguities highlighted here, i.e. to appropriately address cases where there were already ongoing semantic struggles about the meaning of the relevant norms of international law but the new semantic authority had not yet been established.

On the other hand, denying any form of reparation would disregard the fact that, according to a widely held contemporaneous view, ethical principles, which formed

[118] The thorny question of an individual entitlement to compensation under international law is beyond the topic of this article. On this, see only Stöckle, 'Victims Caught between a Rock and a Hard Place: Individual Compensation Claims against Troop-Contributing States', 88 *Die Friedens-Warte: Journal for International Peace and Organization* (2013) 119; Tomuschat, 'State Responsibility and the Individual Right to Compensation Before National Courts', in A. Clapham and P. Gaeta (eds), *Oxford Handbook of International Law in Armed Conflict* (2014) 811; D. I. Odier-Contreras Garduño, *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* (2018); Symposium: *Reparation for Victims of Armed Conflict: Impulses from the Max Planck Trialogues*, 78 *ZaöRV* (2018) 519.

[119] *Factory at Chorzów*, Merits, Judgment No. 13, 1928 PCIJ, Series A, No. 17, at 47.

[120] ARSIWA, *supra* note 8, Art. 31(1).

[121] Cf. *ibid.* at 47 (the Permanent Court of International Justice stating that the principle is essentially 'contained in the actual notion of an illegal act'); cf. also *ibid.*, at 29.

part of the *lex lata* at the time, had indeed been violated, even though the letter of the law as it stood might have been respected. In such cases, I suggest that the responsible state be considered under obligation to give satisfaction for the injury suffered. This form of reparation seems appropriate not only because of its classic link to moral damage and violations of 'dignity' (a term far more fitting for humans than for states), but especially because with the rise of the concept of 'legal damage', satisfaction has come to serve 'as a means to restore and to ensure the integrity of the international legal order'.[122] What is at stake here is precisely the integrity of international law, to be salvaged by mending the disconnect between more formal and ethical principles of historical international law, the disconnect between opposing views materialized in contemporaneous semantic struggles and the intertemporal disconnect.

C *Which Kind of Satisfaction? A Case for an Obligation to Negotiate*

The modalities of satisfaction are manifold and depend on the circumstances.[123] While an apology or a formal admission of wrongdoing, both well-established forms of satisfaction between states, might also seem fitting for cases of historical injustice at first sight, the appropriate modality for most of the cases dealt with here is an obligation to negotiate[124] with the victims, as will be developed now.

1 *Victimization and Identities: To Make One's Story Heard*

When those affected by a historical injustice appeal to the courts, their prime concern is not usually money, or even a court ruling. They are motivated by an urge to 'set the record straight',[125] with the help of narratives of past injustices serving as 'micro-resources of mobilization'.[126] Our individual identities are developed in the context of, and in relation to, the collective identity of the group to which we belong.[127] Building on the works on collective memory by the French sociologist Maurice Halbwachs,[128] the German Egyptologist Jan Assmann shows how collective identities are formed

[122] Hoss, 'Satisfaction', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (April 2011), para. 38.

[123] ARSIWA, *supra* note 8, Art. 37, commentary para. 5.

[124] For a vindication of such (at first sight: 'mere') procedural obligations in general, see Rogoff, 'The Obligation to Negotiate in International Law: Rules and Realities', 16 *Michigan Journal of International Law* (1994) 141; Barnidge, 'The International Law of Negotiation as a Means of Dispute Settlement', 36 *Fordham International Law Journal* (2013) 545; K. Wellens, *Negotiations in the Case Law of the International Court of Justice: A Functional Analysis* (2014); see also Owada, '*Pactum de contrahendo, pactum de negotiando*', in Wolfrum (ed.), *supra* note 122 (April 2008).

[125] Cf. Galater, *supra* note 22, at 122. For a related reconstruction of international criminal justice, see C. Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (2020).

[126] Cf. Harris, 'Collective Memory, Collective Action, and Black Activism in the 1960s', in Minow (ed.), *supra* note 22, at 154.

[127] Straub, 'Telling Stories, Making History: Toward a Narrative Psychology of the Historical Construction of Meaning', in J. Straub (ed.), *Narration, Identity and Historical Consciousness* (2005) 44, esp. at 64–66.

[128] See especially M. Halbwachs, *Les cadres sociaux de la mémoire collective* (1925); M. Halbwachs, *La mémoire collective* (1950). Halbwachs, an erstwhile student of Durkheim, was greatly influenced by the latter's concept of a *conscience collective*. Halbwachs was murdered in the Buchenwald extermination camp in March 1945.

through the medium of foundational narratives that often relate to historic events.[129] 'This connective structure is the aspect of culture that underlies myths and histories. Both the normative and the narrative elements of these – mixing instruction with storytelling – create a basis of belonging, of identity, so that the individual can then talk of "we".'[130] In this process, there is a close interrelation between the foundational narratives and perceptions of justice, as Assmann explains: 'The past is only remembered to the degree in which it is needed, and can be filled with meaning and importance (i.e. semioticized). We singled out the concept of connective justice – the link between action and consequence – as a vital factor in such meaning.'[131]

In the case of a collective identity that is built on past experiences of injustice, foundational narratives will refer to the historical moment of victimization (or alienation).[132] Such groups develop a 'counter-identity' which 'arises and persists as a counter not to cultureless chaos, but to another, dominating culture and is typically to be found among minority groups'.[133] For these groups, collective remembrance turns into a strategy of resistance and oppositional 'counter-history' into a means to 'produce and maintain nonsimultaneity'.[134] This (omni)presence of the past for victimized groups underscores once more that addressing historical injustice is very much aimed at the present. As Judith N. Shklar reminds us, '[t]he perceptions of victims and of those who, however remotely, might be victimizers, tend to be quite different. . . . These people are too far apart to see things in the same way.'[135] The uncomprehending reactions from some quarters to the 'Black Lives Matter' protests bear witness and testimony to this. What might seem distant from a majority (or outsider) perspective is very present to those affected, as confirmed by the US psychologist Kenneth J. Gergen: 'In the broadest sense . . . historical accounts are only manifestly "about the past." The creation of this past gains its chief significance in terms of its contribution to contemporary cultural life and the range of values that it instantiates.'[136]

Where victimized groups want to come to terms with the past (as evidenced in the recent surge in claims brought up in and outside courtrooms), it becomes vital to restore their dignity through an act of acknowledgment.[137] Such an act acknowledges

[129] J. Assmann, *Cultural Memory and Early Civilization: Writing, Remembrance, and Political Imagination* (2011), esp. at 111–124.

[130] *Ibid.*, at 2–3.

[131] *Ibid.*, at 271.

[132] On the concept of alienation, see C. Lu, *Justice and Reconciliation in World Politics* (2017), at 36–37. On the impact of historical injustice on personal and collective identities, see Waldron, *supra* note 24, at 5–6.

[133] Assmann, *supra* note 129, at 134.

[134] *Ibid.*, at 67, 10.

[135] J. Shklar, *The Faces of Injustice* (1990), at 1.

[136] Gergen, 'Narrative, Moral Identity, and Historical Consciousness: A Social Constructionist Account', in Straub (ed.), *supra* note 127, at 117–118.

[137] Shklar, *supra* note 135, at 86; Mégret, 'Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice', 16 *Buffalo Human Rights Law Review* (2010) 1, at 31–34; Campisi, 'From a Duty to Remember to an Obligation to Memory? Memory as Reparation in the Jurisprudence of the Inter-American Court of Human Rights', 8 *International Journal of Conflict and Violence* (2014) 61, at 66; Lu, *supra* note 132, at 275–281.

not only wrongdoing on the part of the responsible state, but – even more importantly – the group members' moral status as victims and their 'legitimate feelings of resentment and anger'.[138] Acknowledgment might be achieved partly through apology; a duty to enter into negotiations, however, has the advantage of actively including the victims in the reparation process. The importance of such a procedural solution[139] to come to terms with cases of historical injustice has been stressed by historian and IR scholar Elazar Barkan:

> Restitution as a theory of international relations proposes a process, not a specific solution or standard. It underscores a milieu in which many nations and minorities see greater benefits to themselves in conducting dialogues and reconstructing shared pasts as the basis for both recognition of their identities and reconciliation.[140]

Negotiations also give the victims or their descendants the opportunity to 'tell their own story'. Where courts have been appealed to in cases of historical injustice in recent times, the desire to give expression to the historical experience of exclusion has been a driving force. As Nancy L. Rosenblum confirms, in order 'to break the cycle of hatred' in cases of grave injustices, '[t]he common element of any adequate response . . . is to listen to survivors' accounts of injustice. The injured must have an opportunity to make their stories public, even if the justice meted out to the perpetrators does not, in the end, fully satisfy them.'[141] In legal narratology, the term 'counter-storytelling' has been used in this context.[142] We have come to know its role from experiences with transition processes in the wake of civil wars or rogue regimes.[143] In such situations, it is precisely the opportunity for the victims to make their own experiences of oppression and disenfranchisement heard that makes an important contribution to the reconciliation.

[138] Govier and Vervoerd, 'The Promise and Pitfalls of Apology', 33 *Journal of Social Philosophy* (2002) 67, at 69. See also Rosenblum, 'Justice and the Experience of Injustice', in Minow (ed.), *supra* note 22, at 77.

[139] Cf. also Shklar, *supra* note 135, at 124: 'Procedural justice is not only a formal ritual. . . It is a system that in principle gives everyone some access to the agencies of rectification and, more significantly, the possibility of expressing a sense of injustice to some effect. . . .'

[140] Barkan, *supra* note 22, at 320. The term 'restitution' must not be understood here in the technical legal sense, but rather as an act of 'restituting dignity'.

[141] Rosenblum, 'Introduction: Memory, Law, and Repair', in Minow (ed.), *supra* note 22, at 1, 10.

[142] Delgado, 'Storytelling for Oppositionists and Others', 87 *Michigan Law Review* (1989) 2411, at 2416–2426. See also Ball, 'Stories of Origin and Constitutional Possibilities', 87 *Michigan Law Review* (1989) 2280; P. Fitzpatrick, *The Mythology of Modern Law* (1992); von Arnauld, 'Norms and Narrative', 18 *German Law Journal* (2017) 309, at 317–320.

[143] Despite this, recent empirical studies have shown that the primary interest of victims of civil war-related violence seems to be in restitution and financial compensation: Robins, 'Challenging the Therapeutic Ethic: A Victim-Centred Evaluation of Transitional Justice Process in Timor-Leste', 6 *International Journal of Transitional Justice* (2012) 83, at 93–100; Adhikari and Hansen, 'Reparations and Reconciliation in the Aftermath of Civil War', 12 *Journal of Human Rights* (2013) 423, at 434–442. Cases of 'historical' injustice, however, have to be distinguished from the immediate aftermath of conflicts, where victims are in need of resources 'in order to survive or rebuild their lives' (Adhikari and Hansen, *supra*, at 441). For Timor-Leste, at least, Robins ascertained that 30% were asking for 'recognition or acknowledgment' of their plight already in the immediate post-civil war time: Robins, *supra*, at 94.

To make yet another point in favour of negotiations, negotiating with the victims or their descendants is also in line with needs and demands that are equally inherent in the recent claims for redress of historical wrongs: Discourse about mass atrocities can hardly avoid to subscribe to what Makau Mutua has called the 'savages-victims-saviors construction', representing the 'victim figure' as 'a powerless, helpless innocent'[144] and reducing their fate to a single historical moment of submission and overpowering. Against this backdrop, where the victims themselves demand redress using the language of law, we encounter an emancipatory act aimed at finally overcoming the framework of such constructions. Analysing the case of the Colombian Movement of Victims of State Crimes (Movice), Nadia Tapia Navarro has recently shown 'how the category of the victim from international law discourse is adopted and used *from below* by victims of mass atrocities':

> Building their identity around the category of victim and resorting to victims' rights are powerful tools for these local actors, not only because this allows them to frame these injustices as global issues, but also because the indeterminacy of human rights allows them to infuse them with different meanings. . . . In adopting the language of international law, Movice is not only advocating for the rights of victims as developed by international law, but it is also contesting the official narrative of the conflict and suggesting an alternative reading of the Colombian violence.[145]

Not all 'transitional justice' experiences are applicable to our problem of addressing more historically remote cases of mass atrocities and inhumane injustice. This observation, however, can help to explain the surge of claims for redressing historical wrongs over the last 20 years or so. These years have seen a new focus on the victims of mass atrocities and the shaping of a legal concept of victim and victims' rights that can be used to frame one's own claims.[146] What is more, it helps to understand these claims as an act of self-empowerment and as a challenge to 'the stereotype according to which victims are necessarily passive, defenceless and docile'.[147]

The need and demand to be heard and addressed on equal footing also explains why the ongoing conflicts could not be placated when Germany increased development aid to Namibia because of its historical debt to the Ovaherero and Nama,[148] or when, in the case of the Italian military internees during World War II, a foundation was set up to document the fates of individuals without the prior consent of the victims or their relatives.[149] However well-intentioned such gestures may be, if they are ordered *top-down* and not agreed in the context of negotiations, hearing is not granted and

[144] Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', 42 *Harv. Int'l L.J.* (2001) 201, at 203.

[145] Tapia Navarro, 'The Category of Victim "From Below": The Case of the Movement of Victims of State Crimes (MOVICE) in Colombia', 20 *Human Rights Review* (2019) 289, at 291.

[146] Cf. Galater, *supra* note 22, at 120–121.

[147] Tapia Navarro, *supra* note 145, at 291–292.

[148] Lu, *supra* note 132, at 175–176.

[149] On this impasse, see von Arnauld, 'Deadlocked in Dualism: Negotiating for a Final Settlement', in V. Volpe, A. Peters and S. Battini (eds), *Remedies against Immunity? Reconciling International and Domestic Law after Italian Constitutional Court's Sentenza 238/2014* (2021) 313, at 321–323.

acknowledgment only partially realized. This is why an obligation to negotiate is regularly the most appropriate form of reparation in cases of historical injustice dealt with here. The obligation to sit down with former victims or their descendants and listen to their stories is, finally, not just tailored here to meet their needs and expectations. It also corresponds to the 'narrative' character[150] of those ethical principles of international law for whose violation it is intended to offer redress – and it can re-enact the semantic struggle of the day under changed conditions.

2 Negotiating with Whom: A Legal Case for Direct Negotiations with the Victims

As stated in the previous section, negotiations should be conducted directly with the victims in order to guarantee due acknowledgment of their human dignity and to address their demand to be heard. This demand is not in contradiction with the subordinate ('mediated') place of the individual in international law at the time most violations occurred.[151] Going back to the *Palmas* case, Huber followed the first principle of intertemporal law cited at the beginning of this article with a second principle:

> As regards the question which of different legal systems prevailing at successive periods to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.[152]

This second principle provoked criticism and some puzzlement. While for some, Huber's commitment to an evolutionary-dynamic approach here seemed to jeopardize the stability that the principle of non-retroactivity was intended to achieve,[153] others wanted to restrict his second branch of intertemporal law to the possession of territory.[154] On a constructive reading, however, Huber separates the rules on which a claim is founded (here he calls for non-retroactivity) from those rules 'that govern the existence of a legal relationship over time'.[155] For the latter he calls for a dynamic approach. Applied to our problem, this would mean that to *establish* a violation of international law and the resulting duty to give satisfaction, we have to turn to the law 'as it was then', including the ethical-legal principles in force at the time. The *modalities* of the duty to give satisfaction, however, follow the evolution of international law. Otherwise, not only the question to whom satisfaction is owed would have to be determined according to historical standards, but also the manner in which it should be delivered. It is hard to believe that anyone would hold states under an obligation to stage late 19th-century diplomatic rituals in order to comply with the strictures of intertemporality.

[150] On the concept of 'narrative norms', see E. Jayme, *Narrative Normen im internationalen Privat- und Verfahrensrecht* (1993).

[151] But see to this effect Buser, *supra* note 22, at 441–442.

[152] *Island of Palmas*, Award, 4 April 1928, II RIAA (1928) 829, at 845.

[153] See the criticism by Jessup, 'The Palmas Island Arbitration', 22 *AJIL* (1928) 735, at 739–741.

[154] See, e.g., Higgins, *supra* note 26, at 516.

[155] Linderfalk, 'The Application of International Legal Norms over Time: The Second Branch of Intertemporal Law', 58 *Netherlands International Law Review* (2011) 147, at 156.

The cases under discussion here would today be framed as gross violations of human rights and of humanitarian standards. Here, the rise of individual rights can be taken up, which – starting with the 1948 Universal Declaration of Human Rights – has led to the strengthening of the legal status of the individual in international law.[156] The 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 ('Basic Principles'), adopted by the UN General Assembly in December 2005,[157] give expression to this evolution.[158] They remind states of their duty to provide effective legal protection in the event of gross human rights violations and call on them to provide adequate reparation to the victims in the event of serious violations of human rights and international humanitarian law. Among the various ways of offering victims redress is the restoration of the 'dignity, reputation and rights of the victim and his or her close relatives'.[159]

Even acknowledging that the Basic Principles might occasionally go beyond the status quo of human rights development, especially when it comes to the individual or collective right to compensation,[160] a duty to give satisfaction to victims of gross violations of human rights can at least be inspired by the jurisprudence of the Inter-American Court of Human Rights (usually labelled as 'guarantees of non-repetition').[161] This might yet fall short of an individual entitlement, but it obliges the state

[156] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, 10 December 1948. See also R. Hofmann (ed.), *Non-State Actors as New Subjects of International Law. International Law – from the Traditional State Order towards the Law of the Global Community* (1999); Hafner, 'The Emancipation of the Individual from the State under International Law', 358 *RCADI* (2013) 263; A. Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (2016); A. Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (2018).

[157] GA Res. 60/147, 16 December 2005. See further Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal', 24 *Netherlands Quarterly of Human Rights* (2006) 641; van Boven, 'Victim's Right to a Remedy and Reparation: The New United Nations Principles and Guidelines', in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (2009) 19; Campisi, *supra* note 137, at 64–66.

[158] Cf. Odier-Contreras Garduño, *supra* note 118, at 314, stating that reparations are today also owed to individuals according to her broad survey of jurisprudence and practice.

[159] Basic Principles, *supra* note 157, para. 22(d).

[160] Rosenfeld, 'Collective Reparation for Victims of Armed Conflict', 92(879) *International Review of the Red Cross* (2010) 731, at 736–742. To the normative tension between the 'individualist' human rights approach to compensation and to the politics of reparation in which international law plays but an indirect role, see Falk, 'Reparations, International Law, and Global Justice: A New Frontier', in P. de Greiff (ed.), *The Handbook of Reparations* (2006) 478. See also on these tensions the excellent study by Odier-Contreras Garduño, *supra* note 118, esp. at 326–333.

[161] With further references, see Carrillo, 'Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past', in de Greiff (ed.), *supra* note 160, 504; Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond', 46 *Columbia Journal of Transnational Law* (2008) 351; Campisi, *supra* note 137, at 66–72; P. Stöckle, *Guarantees of Non-Repetition: Die Anordnung struktureller Reformen durch den Inter-Amerikanischen Gerichtshof für Menschenrechte* (2021). On the effects of the Inter-American Court of Human Rights' (IACtHR) jurisprudence on 'transformative constitutionalism' in Latin America, see contributions in A. von Bodandy, E. Ferrer McGregor, M. Morales Antoniazzi and F. Poivesán (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New* Ius Commune (2017), part III; von Bogdandy, 'Überstaatlicher transformativer Konstitutionalismus: Bemerkenswertes vom Interamerikanischen System für Menschenrechte', 58 *Der Staat* (2019) 41.

to reach out directly to the victims whose dignity had been put into – and continues to be in – jeopardy.[162]

5 Questions to be Addressed: Some Aspects of Operationalization

The aim of this article was primarily to suggest a conceptual framework to solve the dilemma of confronting historical injustices in and through international law. It cannot be denied that there are still some loose ends that need further attention, especially when it comes to more practical issues.[163] For now, at least, some outlines seem necessary as to how the approach suggested here could be operationalized in practice.

A *First Question: Which Cases?*

The danger that we might end up negotiating historical events from prehistory up to a recent past should be avoided by adopting an approach that links ethical principles within contemporary international law with the concept of *colère publique*. The deeds that provoked public anger must have been widely considered to be violating ethical principles underlying international law already at the time of their commission.[164] What is more, the concept of public anger, if transferred to an international plane, presupposes an internationalized critical public discourse which will be difficult to establish before the mid-18th century. This is not only due to a potential scarcity of contemporary sources, but also linked to the media needed to constitute such a 'global' public sphere of discourse: journalism and literature with a potentially wide reach.[165]

Moreover, since the aim of moderately lifting the intertemporal veil is to resolve ongoing conflicts about historical events, cases will usually be confined to those grave events that left a significant imprint on the identities of the victims and their descendants. Over decades and centuries, however, new imprints are made; individual as well as collective identities are subject to change.[166] For this reason, the need to deal with

[162] See similarly Rosenfeld, *supra* note 160, at 745–746.

[163] Though the scenarios of transitional justice and of 'righting historical wrongs' differ, for some aspects of operationalization the experiences of including victims in the Colombian peace negotiations can be helpful. On these, see R. Brett, *La voz de las víctimas en la negociación: Sistematización de una experiencia* (2017).

[164] The concept of *colère publique* also presupposes that the inhumane practices in question were public knowledge while they were being carried out or became known soon thereafter (for example, the industrialized mass murders in German extermination camps during World War II) so as to trigger public outrage. While this might exclude atrocities that were uncovered only much later, I do not consider this an argument against the approach presented here as such. This approach is not meant to bring about perfect justice but rather to accommodate at least the most pressing cases that have been taken to courts over the last decades.

[165] On the origins of 'public opinion' as a cornerstone of the 'bourgeois public sphere', see J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. T. Burger with F. Lawrence (MIT Press 1989) (1962), at 89–101.

[166] Rosenblum, *supra* note 141, at 4; Galater, *supra* note 22, at 115. See also Waldron, *supra* note 24, at 18–19.

historically more remote acts of injustice is likely to be limited to those serious cases of violence and disenfranchisement that continue to shape the present and are likely to do so for generations to come.

As stated earlier, if the concept of *colère publique* is understood in a broader sense, it can also include widespread contestation of inhumane practices over a longer period of time. This would make it possible to cover not only specific events but also structural violence such as slavery or colonialism in general, at least conceptually. In practice, though, one would need to address the problem of reconstructing responsibilities, causalities and entitlements in what presents itself as 'a long, cumulative social process'.[167]

B *Second Question: Which Claimants?*

While the state side poses few problems when it comes to setting up negotiations, apart from questions of state succession that might bring up difficulties,[168] most of the loose ends concern the victims to whom the obligation is owed.[169] While the case of survivors of more recent historical atrocities is rather straightforward, it is less easy to determine present 'victimhood' in cases where none of the original victims remain alive. Here, the closest relatives and direct descendants are plausible candidates.[170] Taking into account the mechanics of collective identity as outlined out above, however, 'the only ones qualified are those who have maintained an identification with the original victims'.[171] This might not be easy to establish in every case, but can be helped by looking at mutual recognition between and within the relevant groups.

This, in turn, leads to another challenge: how to accommodate different 'histories' also on the side of the victims. From a modern Western perspective, victims of a historical injustice, especially in the context of European colonialism on the African continent, are often portrayed as a homogenous group with virtually identical experiences. This tends to hide frictions between African peoples and polities,[172] which can produce new exclusionary effects. When only certain groups are represented in the negotiations, their story prevails as the dominant counter-narrative. The creation of such a 'new hegemony' has to be avoided as far as possible. The responsible state will rarely be in a position to guarantee the participation of all groups of victims; sincere attempts, however, should be made.

[167] Cf. Galater, *supra* note 22, at 112. To the problems involved, cf. Odier-Contreras Garduño, *supra* note 118, at 329–331. For a comprehensive conceptualization of the exigencies of 'structural injustice' and 'structural reconciliation', see Lu, *supra* note 132, esp. at 33–38, 144–181, 248–281.

[168] Buser, *supra* note 22, at 437–438.

[169] For substantial criticism on this issue, see Galater, *supra* note 22, at 113–116.

[170] See Buser, *supra* note 22, at 442–443 (relying a little too much on the rather specific case of forced disappearances as adjudicated by the European Court of Human Rights and the IACtHR).

[171] Galater, *supra* note 22, at 114.

[172] On this, see Touval, 'Treaties, Borders, and the Partition of Africa', 7 *Journal of African History* (1966) 279, at 284–287; Gathii, 'Africa', in Fassbender and Peters (eds), *supra* note 47, 407, at 421; van der Linden, *supra* note 32, at 79–80.

An especially tricky question, prompted by the issue just raised, is what to do with victims or groups of victims that either do not feel represented by the negotiators[173] or for other reasons refuse to take part in the negotiations. Complete satisfaction for each and everyone according to their individual needs cannot be guaranteed. If we hold, however, as suggested earlier, that the *duty to give* satisfaction to the victimized group in cases of gross violations of human rights is not yet met by a corresponding individual *right to claim* satisfaction, this problem may be bypassed. While perhaps frustrating expectations of individual justice, this 'bitter but better approach'[174] seems appropriate also from a conceptual perspective. In the cases of historical injustice referred to here, we are dealing with grave cases of mass violations of rights which have affected the individual as part of a collective, for example as a member of the Herero and Nama peoples or as one of hundreds of thousands of Italian military internees in Germany. This collective dimension gives historical injustice such weight that the past cannot be allowed to rest; this collective dimension outweighs an 'intertemporal' legal peace, which would only be an apparent peace anyway, given the extent of the injustice. The focus is therefore not on individual justice, but on the conciliatory function of law.[175]

C *Third Question: What Procedure and What Outcome?*

The satisfaction owed by the responsible state is negotiation, not necessarily compensation. Compensation might be agreed on by the negotiating parties – though, in most cases, it will only be symbolic[176] (and thus, legally, also a form of satisfaction[177]) – as might formal apologies, commemorative schemes, etc. Negotiations are open-ended, and outcome is not decided in advance; this is consistent with the plea made above for a process-oriented approach to satisfaction in cases of historical injustice. As with all *obligationes de negotiando* in international law, however, the negotiations owed have to be meaningful and conducted in good faith.[178] Thus, structural power imbalances must not be used to shortcut the process. The manner in which the talks will be held

[173] On the conflicted selection of representatives of victims in the Colombian peace process, see Arenas, 'El viaje de las víctimas a La Habana desnuda el mayor problema de la Ley de Víctimas', *Lasillavacia* (14 August 2014), available at https://lasillavacia.com/historia/el-viaje-de-las-victimas-en-la-habana-desnuda-el-mayor-problema-de-la-ley-de-victimas-48419.

[174] Aptly phrased by Odier-Contreras Garduño, *supra* note 118, at 321. For a broader conceptual reasoning, see *ibid.*, at 321–333.

[175] On the inherent problems of an approach relying on individual justice when dealing with a large number of cases of human rights violations, see de Greiff, 'Justice and Reparations', in de Greiff (ed.), *supra* note 160, 451. His 'three goals', developed for intra-state transitional justice situations – recognition, civic trust and social solidarity – might be adapted for the cases under consideration here as recognition, pacification and (with a nod to Durkheim and Scelle) social solidarity.

[176] Waldron, *supra* note 24, at 6–7; Galater, *supra* note 22, at 119.

[177] ARSIWA, *supra* note 8, Art. 36, commentary para. 4.

[178] See, e.g., *North Sea Continental Shelf (Federal Republic of Germany v. Denmark)*, Judgment, 20 February 1969, ICJ Reports (1969) 3, paras 85–87; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Judgment, 25 July 1974, ICJ Reports (1974) 3, para. 78; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, paras 98–103.

and if third parties or mediators should be included will depend on the situation and should, sensibly, also be agreed upon by the parties.

In contrast, courts with their procedural strictures are hardly the appropriate forum for the kind of 'eye-level talks' advocated here. Even though it might be possible to 'tell one's story' before a court of law, the law of procedure distributes the roles between the parties and thus has a tendency to undermine the reconciliatory objective. There is yet another reason why the recent references to courts can turn problematic in cases of remote historical injustice:[179] deciphering 'history' is a job for which courts are ill equipped. David J. Bederman has described the relationship between international law and history in terms of three 'eternal truths':[180] that historical and legal truth are not the same and cannot be determined in the same way; that historical documentation is often incomplete; and that historical tradition is often ambiguous or even contradictory.[181] These insights explain why courts are problematic forums for dealing with a remote historical past. With their findings, they also 'establish', or better 'determine', what has to be accepted as 'truth': 'This, and nothing else, is what happened.' Beyond the narrow temporal confines of oral history,[182] there stretches a field where 'grand narratives' form collective identities[183] and create their respective *nomoi*.[184] Should courts in such cases create 'winners' and 'losers', by validating one identity-shaping narrative at the expense of another, they would truly carry out a 'jurispathic' office, as famously stated by Robert Cover in his 'law and literature' classic, *Nomos and Narrative*:

> Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.[185]

The approach suggested here would avoid such 'jurispathy' by allowing[186] courts to refrain from deciding the case in a binary either-or fashion. The judges could leave the question open whether an act of historical injustice was legal or illegal at the time it was committed – as long as there was a violation of ethical principles of international law, as supported by widespread contemporaneous criticism. Such an assessment would need a less stringent establishment of the facts. If one accepts – as is proposed

[179] For this concept, see De Baets, *supra* note 25, at 131–132.

[180] Bederman, *supra* note 94, at 62–63.

[181] Succinctly put by Hendrik Hartog: '[A] historiography that is founded on finding or establishing the singular meaning of any law at one particular historical moment requires a denial of the reality. . .': *supra* note 91, at 545.

[182] On the floating gap of about 80 years, see J. Vansina, *Oral Tradition as History* (1985), at 23–24.

[183] Assmann, *supra* note 129, at 50–69, setting apart ('epic') 'cultural' and (contemporaneous) 'communicative' memories.

[184] Cover, *supra* note 15, at 4–11.

[185] Cover, *supra* note 15, at 53.

[186] Potentially relevant questions of state immunity before foreign courts have deliberately been left aside for the purposes of this article. On these, see von Arnauld, *supra* note 149, commenting on the dispute between Germany and the Italian judiciary over violations of international law by German armed forces in World War II.

here – that a violation of ethical principles gives in itself rise to an obligation to negotiate, a court seized of a case of historical injustice would do no more and no less than order both sides to sit down and engage in meaningful negotiations in order to come to an agreed solution.

My considerations are therefore not about rewriting history with the help of international law, but rather about breaking with 'monolithic' conceptions of law and history. My aim is to find an appropriate response to flagrant and widespread violations of humanitarian standards that continue to shape collective and individual identities to this day. The spectres of the past will continue to haunt us if we do not find a way to exorcise them.