REPARATIONS AND INTERNATIONAL LAW: HOW ARE REPARATIONS TO BE DETERMINED (PAST WRONG OR CURRENT EFFECTS), AGAINST WHOM, AND WHAT FORM SHOULD THEY TAKE?

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The author looks at the issue of reparations for slavery in Africa as a way of framing a discussion for reparations payments for past injustices more generally. The paper examines international law principles of State responsibility, crimes against humanity and genocide, and posits reparations as a means of restitution, compensation, and satisfaction for breaches of international norms. The author suggests that slavery reparationists may have greater success if they advance political strategies and arguments for a global moral economy in which to position legal claims based on reparation for past injustices.

L'auteur considère la question de réparations de l'esclavage en Afrique comme moyen d'organiser une discussion sur les paiements en réparation d'injustices passées de façon plus générale. L'article examine les principes de responsabilité de l'état, des crimes contre l'humanité et du génocide en droit international, et avance l'idée de réparations comme moyen de restitution, de compensation et de satisfaction pour des manquements aux normes internationales. L'auteur suggère que ceux qui prônent la réparation de l'esclavage pourraient avoir plus de succès s'ils proposent des stratégies politiques et des arguments en faveur d'une économie morale globale dans le contexte de laquelle pourraient être situées des demandes légales fondées sur la réparation d'injustices passées.

I. INTRODUCTION

Around two centuries ago the anti-slavery movement of the 19th century campaigned to abolish the slave trade that had become a part of "civilised" European and American life.[1] While the anti-slavers and their movement

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This note was prepared for the Commonwealth Legal Education Association's Reparation Conference held in Windsor, Ontario, 12-14 June 2003 and draws extensively from an article written by the same author and published as "Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery"(2003) 25(3) Hum. Rts. Q. 625.

1 See in general L. Henkin "International Law: Politics, Values and Functions" (1989) 216(4) Collected Courses of Hague Academy of International Law 13 at 208, cited in Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2d ed. (Oxford: Claredon Press, 2000) at 127.

achieved victory in their campaign to outlaw slavery and the trade, a new campaign is currently underway. That crusade – driven by a group that I shall term "reparationists" – is for compensatory justice for the acts of slavery committed in previous centuries.[2] The stakes in this crusade are high, and the issues are controversial.[3]

This paper discusses reparation for slavery[4] as a vehicle for discussion about reparation claims for past injustices. The perspective is that of an international lawyer. In the context of slavery reparation, as is the case with many other contexts involving reparation claims for mass atrocities, international law principles are engaged and often expressly relied upon. As we shall see in the slavery context, for instance, African States are claiming reparation against Western States, and are casting their claims in the language of international law – State responsibility, crimes against humanity, genocide – and calling for reparation in the form of restitution, compensation, and/or satisfaction, terms that are reflected in the international law rules on State responsibility.[5]

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2 As an example of the campaigning, see the website of the Africa Reparations Movement, on line: http://www.arm.arc.ac.uk. For an example of collected material and relevant web links see the Social Science Information Gateway hosted by the British Library of Political and Economic Science, London School of Economics, on line: <http://www.sosig.ac.uk/roads/subject-listing/World/slavery.html>.

3 The recent events in Durban at the United Nations World Conference against Racism, Discrimination, Xenophobia and Related Intolerance, to which South Africa played host in 2001, illustrate the level and intensity of debate. One of the most divisive issues at the Durban Conference, an issue that threatened at first to prevent the Conference from taking place, and then nearly derailed the Conference once it got underway, is that of reparation for slavery. The United States, for instance, insisted that it would not attend the Conference if the agenda included the item of reparation for slavery. See Duncan Campbell "America may boycott racism summit" *The Guardian* (28 July 2001), on line: <www.guardian.co.uk/unracism/story/0,1099,541530,00.html>. The US eventually capitulated and chose to attend, but then, along with Israel, walked out of the Conference over the issue of Israel's treatment of the Palestinians. After their walk out, talks between African and European Union countries on the subject of slavery and reparations moved higher up on the Conference agenda. However, these talks soon ran into deep difficulties after African nations hardened their position with the result that European diplomats at the Conference expressed doubts about whether an agreement could be reached on the topic. See "Conference split on slavery issue" *BBC News* (5 September 2001), on line: <http://.bbc.co.uk/hi/English/world.africa/newsid_1526000/1526511.stm>.

Hereinafter the Conference will be referred to as the "Durban Conference". The text of the Declaration that emanated from the Conference is on line: <http://www.un.org/WCAR/>, and will hereinafter be referred to as "the Durban Declaration".

4 Claims made by reparationists are loosely referred to as claims for reparation for "slavery" but it is clear that reparationists are using that expression to refer to an umbrella concept which encompasses the policy of slave-trading, acts committed during the execution of that policy (such as the horrors of the Middle Passage), the continuing deprivation of liberty and treatment of slaves after arrival in the West, and the effects of slavery on succeeding generations in the form of social and economic inequality. For ease of reference I will be referring to reparation for "slavery" and the "slave trade" interchangeably in this paper.

5 Some short disclaimers before I begin. The issue of reparation for slavery is at once overwhelming and complex. It is overwhelming because of the scale on which slavery was practised. During the Atlantic slave trade period alone (1440–1870), it is estimated that at least 13 million Africans were illegally transported from the shores of West Africa to the Western Hemisphere. Of those thirteen million, only an approximate number of 11,328,000 were delivered to the New World, with the result that around 1,672,000 persons died en route (See Hugh Thomas,

Although I express my doubts about the viability of a claim for reparation for slavery from within the current international law paradigm of State responsibility, a brief discussion of the international law on responsibility remains relevant. The paradigm provides the frame of reference for any slavery reparation claim, and indeed, the forms of reparation that exist in the legal paradigm are the forms of retributive and compensatory justice which reparationists argue for when pursuing their claims. Because of the weaknesses identified in respect of legal claims for slavery reparation, as an alternative I have considered ways in which political strategies might be employed to achieve reparation. In so doing, I have considered the difficulties that face slavery reparationists in their

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The Slave Trade: The Story of the Atlantic Slave Trade, 1440–1870 (US: Simon & Schuster, 1997) at 804–805). It is complex because of the number of different scenarios in which claims could ostensibly arise in the African context. Africa, for instance, has experienced a triple heritage of slavery – indigenous, Islamic and Western, giving rise to the possibility of multifarious inter-state claims (see A. Mazrui "Global Africa: From abolitionists to reparationists" (1994) 37(3) *Africa Studies Review* 1 at 1).

As a result, rather than attempting a comprehensive trawl of all the historical scenarios that might found reparation claims, my aim here is somewhat more modest. My focus is limited to those claims for reparation which arise out of the Atlantic slave trade, a historical period which spans some four centuries from 1440-1870. And, as I have said, my concern is the call for reparation made by Africa against those Western states that historically perpetrated acts of slavery.

This is one of the main contexts in which the issue of reparation for slavery was debated at the UN World Conference in Durban and accordingly attracts my attention. Aside from the international context, various domestic claims by nationals of States against their governments for participation in slavery can likewise be envisaged. A good example of such a claim is that of the African-Americans who claim reparation for slavery from the United States government. Similar claims can be envisaged by Africans against their governments/rulers for slavery perpetrated against them by predecessor governments/rulers. As a South African, for instance, I am aware that calls for reparation for slavery might be made by South African slave descendants against the South African government for the slavery that was practiced there during the early years of the nation's existence (for an historical account of slavery practiced within South Africa, see Dougie Oakes (ed.), *Illustrated History of South Africa*, 3rd ed. (SA: Reader's Digest, 1994) at 48-53; Paul Lovejoy, *Transformations in Slavery: A History of Slavery in Africa* (Cambridge, UK: Cambridge Univ. Press, 1983) at 232–234; and Frank Welsh, *A History of South Africa*, revised ed. (UK: Harper Collins, 2000) at 59–61. However, I am not concerned here with such domestic claims directly except in so far as they provide examples and guidance for a discussion of international claims for reparation on behalf of Africa as against the West.

One last point, there is a measure of definitional generalisation in the paper. Reparationists loosely use the term "the West" to denote a collective of largely developed entities that as colonial powers involved themselves in slavery. But it should be immediately apparent that not all "Western" entities were guilty of slavery. Some powers in the West did not partake in the activity and the measure of guilt between those that did is by no means uniform; likewise, not all African regions were subjected to slavery, and some lost more than others to the trade (for a detailed work setting out facts and figures as regards participation in the slave trade and data as to slave exports per African region, see Lovejoy, note 9 above at ch. 3. I do not even begin to consider the fact that some African groups during the Atlantic slave trade period assisted the Westerners in procuring fellow Africans for slavery. In this regard, see Lovejoy, *ibid.* at 66–87.

The practice of slavery, which stretches back so far into the past, implicates so many groups of people, and touched the lives of so many millions, defies neat definitions and descriptions for those interested in pursuing reparation. My ultimate concern is to investigate the feasibility of claims for reparation made by one group (African) against another (the West). To do so in a workable fashion, I have, along with reparationists, been forced to resort to labels.

attempts to secure reparation (in its various forms). While there are no firm answers, the suggestion here is that the topic of reparations requires creative and strategic thinking. And in discussing the various problems attendant to reparation for slavery, I hope to have given some idea of the complexities involved in answering the questions I have been set – how reparations might be determined, against whom, and what form they should take.

II. REPARATION FOR SLAVERY

A. Calls for reparation for slavery and international law

The strength of the moral argument for reparation for slavery appears to be unassailable. Historical evidence confirms – as delegates at the Durban Conference put it – that "slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and ... that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade".[6]

This section focuses on the argument of reparationists who suggest that there is a *legal* channel, which must be pursued in order to achieve reparation for slavery. Reparationists envisage various legal routes to reparation. In the domestic context, for instance, African Americans have brought actions against surviving businesses within the United States that profited from slavery.[7] At the international level, claims are envisaged by States (or international organisations on their behalf) against other States for their practice or endorsement of slavery during the Atlantic slave trade.[8] The latter is of primary interest to me in this paper, given that the call by Africa for reparation from the West is situated at the international level. This context, involving claims of guilt being levelled at States, ostensibly triggers issues of State responsibility in international law.

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6 See *supra* note 3 at Art. 13 the Durban Declaration. See also Tuneen Chisolm who, in the African American context, describes the Atlantic slave trade as follows: "The enslavement of Africans in America from 1619 to 1865 is one of the most callous, vexatious, near-genocidal violations of human rights in world history". (T. Chisolm "Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations" (1999) 147 U. Pa. L. Rev. 677 at 678).

7 See for instance, the recent class-action lawsuits filed against US companies that benefited from the slave trade. In March 2002 Aetna Inc., CSX Corp. and FleetBoston Financial Corp. were named in a lawsuit filed in the Brooklyn Federal Court on behalf of a black activist. In May a second lawsuit was filed in federal court in Newark, N.J., on behalf of a former director of the National Association for the Advancement of Colored People, against New York Life Insurance Co., Wall Street investment firm Brown Brothers Harriman & Co. and Norfolk Southern Corp. (Deborah Kong "2nd Lawsuit filed asking reparations" *The Washington Times* (2 May 2002), on line: <www.washtimes.com>).

8 Lord Anthony Gifford, for instance, a leading advocate of reparation for slavery, writes that the enslavement of Africans was a crime against humanity such that reparation, a concept which "is firmly established and actively pursued by states, on behalf of their injured nationals, against other wrongdoing states", is due under international law principles. See Gifford, "The Legal Basis of the Claim for Reparations" (1993) at 6, on line: <www.arm.arc.co.uk/legalBasis.html>, [Gifford "Legal Basis"].

International responsibility is commonly considered in relation to States, which are viewed as the normal subjects of international law.[9] Responsibility is today regarded as a general principle of international law and has formed the basis of an extensive study, lasting nearly 40 years, by the International Law Commission (ILC). Under the guidance of Professor James Crawford, the project has come to a close in the recent adoption by the ILC of its Articles on State Responsibility (2001).[10] Generally speaking, the principle of responsibility is a natural concomitant of the substantive rules of international law, and the law of responsibility is concerned with the happenings and consequences of illegal acts and the reparation which such illegal acts entail. As the PCIJ famously noted in the *Chorzow Factory (Jurisdiction) Case*: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."[11]

Reparationists worldwide intuitively cleave towards this idea of responsibility in their drive for slavery reparation and, as we shall see later, many of the forms of reparation they argue for mirror those, which are found in the international area of State-State responsibility.[12]

B. International law and the sobering doctrine of inter-temporal law

Assume that African States (loosely defined) intend to claim reparations from Western States (loosely defined) for the centuries of slavery and slave trading perpetrated against the people of Africa.[13] And assume that they are attempting to bring the claim on the basis of international law principles of State responsibility; that is, that certain Western governments remain responsible for the acts committed by their predecessors against African people.

Leaving aside for the moment the problems associated with the immensity of such a claim,[14] the most striking hurdle facing reparationists is one that prefigures any practical difficulties associated with its enforcement. In the language of State responsibility, reparationists face the task of proving that present-day Western States are "responsible" for the slavery practised during the Atlantic

9 Jan Brownlie, *Principles of Public International Law*, 3d ed. (Oxford: Clarendon Press, 1982) at 431.

10 See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (Cambridge, UK: Cambridge Univ. Press, 2002).

11 *Case concerning the Factory at Chorzow* (1927), PCIJ Series A No 9 at 21.

12 See for instance, *supra* note 8, Gifford, "Legal Basis" at 6, where he cites the *Chorzow Factory Case* and employs its description of reparation (as encompassing restitution and compensation) as relevant to his argument for slavery reparation.

13 The example is not unduly hypothetical. The African call for reparation in the past few years has been made by the OAU (now the AU) on behalf of African States. This strategy reflects a suggestion, made by Lord Anthony Gifford at the First Pan African Conference on Reparations, that "some form of appropriate, representative and trustworthy body" be identified that can process the claim on behalf of "all Africans, on the continent of Africa ... who suffer the consequences of the crime of mass kidnap and enslavement". As regards the defendants, Gifford suggests that the claim should be brought against the governments of those countries that promoted and were enriched by the African slave trade and the institution of slavery. See *supra* note 8, Gifford "Legal Basis" at 4.

14 *Ibid.* Lord Gifford himself concedes, "hundreds of millions of people, in different continents of the world, have an interest in this claim. Their losses seem almost impossible to quantify."

slave trade. Any attempt to pin responsibility on today's governments for the slavery committed by their predecessors runs into obvious difficulties involving complex questions of state succession, continuity and identity.[15] Perhaps more fundamentally, reparationists face the hurdle of showing that the conduct complained of was unlawful at the time it was committed. It is here that we need to pause for some while and consider the ILC Articles on State Responsibility (2001).

In Chapter II of the Articles[16] the International Law Commission stipulates that one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. The general rule is that the only conduct attributable to the State at an international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs. Without more, this general rule would serve to catch the conduct of all nations who through their agencies involved themselves in the slave trade, making such conduct attributable to the nation in question. However, such attribution is only the first step in the process of imputing international responsibility. As a normative question, attribution must be clearly distinguished from the characterisation of conduct as internationally wrongful.[17] In order to establish whether such conduct amounts to a breach of an international obligation of the State concerned, one is obliged to consider the general conditions of State responsibility set out in Chapter III of the Articles. And it is at this point that reparationists have to confront the sobering doctrine of inter-temporal law. Article 13 of Chapter III provides as follows:

> An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 13 states the basic principle that, for international responsibility to exist, the breach must take place at a time when the State is bound by the obligation, and is a guarantee for States against the retrospective application of international law in matters of State responsibility.[18] International human rights law

15 Many of the Western States singled out for reparation claims are a mere shadow of their former colonial selves. In any event, the dominant theory of rights would frustrate claims being brought against existing States for conduct committed by predecessor governments and over which they had no control. See the discussion further below under section II(c)(ii).

16 The Articles deal with responsibility in a logical sequence, starting with a definition in Chapter I of the basic principles of responsibility, and moving on in Chapter II to define the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned.

17 See the Commentary to ILC Articles (2001) Chapter II – Attribution of Conduct to a State in Crawford, *supra* note 10 at 92.

18 The most common use of this doctrine is in relation to the question of title to territory. Many States acquired title to territory through conquest, which was an accepted method of acquiring territory until after World War I. The inter-temporal law doctrine insists that these titles are to

adopts the same view.[19] Moreover, an examination of international practice and jurisprudence shows that this principle has hitherto been constantly applied, being either explicitly mentioned or implicitly followed.[20]

It is therefore clear that the lawfulness or wrongfulness of an act in international law must be established on the basis of obligations in force at the time when the act was performed.

What then of slavery and slave trading?[21] It appears clear that those who

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be judged by the law in force at the time the title was first asserted and not by the law of today. As stated by Judge Huber in the *Island of Palmas* case:

> "A juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or falls to be settled." (U. N., *Reports of International Arbitral Awards*, vol. 2 829 (1949) at 845).

See in general R. Higgins, "Time and the Law: International Perspectives on an Old Problem", (1997) 46 *ICLQ* 501.

19 See Art. 11(2) of the *Universal Declaration of Human Rights* (1948); Art. 7(1), of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950); and Art. 15(1), of the *International Covenant on Civil and Political Rights* (1966). All three Conventions provide that "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed."

20 The European Commission of Human Rights provides a clear statement on the subject in its decision on application 1151/61. A Belgian national, relying on art. 5(5) of the *European Convention on Human Rights,* claimed compensation from the German Government for the damage caused him by the detention and death of his father in a German concentration camp in 1945. The Commission rejected his claim, pointing out that:

> "While it is true that article 5, paragraph 5, of the Convention, relied on by the applicant, provides that "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation", the Commission has nevertheless found, on a number of occasions, that only a deprivation of liberty subsequent to the entry into force of the Convention for the respondent State can be effected "in contravention of" the aforesaid article 5 ...; and that the arrest and detention of the applicant's father, however blameworthy they may have been from the standpoint of morality and fairness, took place at a time when the Convention did not yet exist and to which the Contracting States have not made it retroactively applicable". (Council of Europe, European Commission of Human Rights Recueil des décisions de la Commission européene des droits de l'homme (Strasbourg) No. 7 (March 1962) at 119 (translation by the United Nations Secretariat).

21 I am focusing here on claims for the acts associated with slavery and slave trading. However, some reparationists argue that the reparation should be sought for the crime of genocide committed against the African people by way of slavery and the slave trade, on the grounds that "the numbers involved, their inhumane handling during transhipment, and their resultant deaths ... establish a prima facie case of genocide." (See R. Laremont, "Political versus Legal Strategies for the African Slavery Reparations Movement" (1999) 2(4) *Africa Studies Quarterly* at 2 and 3, on line: http://web.africa.ufl.edu/asq/v2/v2i4.htm.; see also Gifford "Legal Basis", *supra* note 8 at 4). Besides the fact that the crime of genocide which has developed in international criminal law would in all likelihood not be proved (genocide requires special intent to physically destroy a group in whole or in part and it seems clear that, while treatment of slaves was callous in the extreme, this special intent would be difficult to establish, not least of all because slaves were of economic value to slave traders and owners), these reparationists miss the point that genocide itself only became outlawed in international law after the Second World War (see in this regard

argue for reparation will be met with the refrain that these practices were not outlawed in international law during the period of the Atlantic slave trade. Principles of morality are not by themselves a sufficient condition for the emergence of an international law rule – there must be evidence of a wide State practice before a rule crystallises – and as late as 1825 therefore, the US Chief Justice was able to show in the *Antelope Case* that slave trading was lawful, notwithstanding international condemnation of its immorality, since it was then "sanctioned by the laws of all nations who possess distant colonies."[22] The general conclusion in the *Antelope Case* is echoed by Sirs Robert Jennings and Arthur Watts who, in one of the leading English works on public international law, indicate that in the early years of the nineteenth century customary international law did not condemn the institution of slavery and the traffic in slaves.[23] The United Kingdom abolished slave trafficking throughout its colonies in 1807, signed the Treaty of Paris in 1814 with France which led to cooperation in the drive towards the abolition of slavery, and in Vienna in 1815 succeeded in obtaining from the Powers a solemn condemnation of the slave trade in principal.[24] However, Jennings and Watts state that this was not enough to make the traffic in slaves a crime *jure gentium* at the time, and accordingly a number of treaties were entered into, beginning with the Treaty of London in 1841 (between the UK, Austria, France, Prussia and Russia) which aimed to ensure international cooperation in the suppression of the trade.[25]

So while it is undoubtedly clear that slavery and traffic in slaves are today prohibited in customary and conventional international law, the precise point at which these policies and practices became outlawed in international law is impossible to fix. In the words of Geoffrey Robertson,

> [T]here was no defining moment like the Nuremburg judgment, but rather an accumulation of treaties throughout the nineteenth century and a gradual abandonment by the Great Powers of their toleration of the practice, marked in turn by military offensives against traders ... and by domestic court declarations that freed any slave brought within the jurisdiction. The point came somewhere between 1885 (the Treaty of Berlin forbidding slave-trading) and

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Nina Jorgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford Univ. Press, 2000) at 32-35).

A more powerful argument, which deserves consideration by reparationists, is that presented by Geraldine Van Bueren. She argues that in 1823 Britain and the US agreed to classify the slave trade as a form of piracy. Van Bueren suggests that because piracy had been illegal under international law well before the 17th century, the agreement by the US and Britain to regard the slave trade as a form of piracy shows that at least from the early 19th century amounts to an expression of legal guilt (see Geraldine Van Bueren "It's Britain's guilty secret" *The Guardian* (25 May 2001)). This argument needs to be explored more fully by reparationists as it ostensibly allows reparation claims to be brought in international law for acts of slavery committed after 1823 by association with the crime of piracy.

22 (1825) 23 US (10 Wheat) 64 cited in Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: New York Press; distributed by W.W. Norton, 2000) at 209.

23 R. Jennings & Watts, *Oppenheim's International Law*, Vol. 1 *Peace*, 9th ed. (US: Longman, 1992) at 979.

24 *Ibid.*

25 *Ibid.*

> 1926, when the Slavery Convention confirmed that states had jurisdiction to punish slavers wherever they were apprehended.[26]

Any claims in international law for reparation for the Atlantic slave trade, be they from States against other States or citizens against their own States, will therefore have to overcome the doctrine of inter-temporal law.[27]

One argument put forward by reparationists in an attempt to overcome the problem of the inter-temporal law principle is that the acts of slavery committed *then* amount to a violation of fundamental norms of international law *now*. Put differently, reparationists point out that the prohibition against slavery has attained the force of a *jus cogens* norm in contemporary international law with the result that there is some form of retrospective responsibility for the States who perpetrated slavery in yesteryear. It is likely that this argument will remain attractive to reparationists in light of the decision of the delegates at the Durban Conference to define the slavery committed during the Atlantic slave trade as a "crime against humanity".[28] However, the ILC Articles on State Responsibility make it clear that such retrospective blaming is not possible. The Commentary to Article 13 provides as follows:

> (5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence ... this does not entail any retrospective assumption of responsibility. ...

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26 Robertson, *supra* note 22 at 209.

27 Of course, it is at least possible to argue that the doctrine of inter-temporal law fails to register the fact that international law has traditionally served the interests of the powerful. Thus, while Western States would be eager to rely on the fact that slavery was lawful in international law at the time it was practised, it is clear that Western States themselves determined the lawfulness of that practice. As the critical legal studies movement has shown, law has an obfuscatory quality, always hiding the power that animates any legal rule. In the international law context, this obfuscatory quality is identified by Roling, who says that:

> "In all positive law is hidden the element of power and the element of interest. Law is not the same as power, nor is it the same as interest, but it gives expression to the former power-relation. Law has the inclination to serve primarily the interests of the powerful. 'European' international law, the traditional law of nations, makes no exception to this rule. It served the interest of prosperous nations." (B.V.A. Roling, *International Law in an Expanded World* (Amsterdam: Djambatan, 1960) at 15).

It thus becomes plain that the notion of European international law provided legal concepts and systemic arguments justifying the interests of the emerging Western powers, one such interest being the procurement of slaves. Nonetheless, while one strategy of slavery reparationists might aim at subverting the doctrine of inter-temporal law along these lines, the radical nature of this strategy will meet with fierce opposition. A more plausible strategy therefore appears to be an argument based on justice and morality, which seeks to achieve reparations, by working outside of the existing legal framework. See below *infra* for detail.

28 Lord Gifford's paper pre-empts the Conference in its insistence that historians can show "without difficulty how the invasion of African territories, the mass capture of Africans, the horrors of the middle passage, the chattelisation of Africans in the Americas, the extermination of the language and culture of the transported Africans, constitute violations of [the international laws prohibiting crimes against humanity and genocide]". (See Gifford "Legal Basis", *supra* note 8 at 4).

> (6) Accordingly it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application.

It should be mentioned that Article 13 does not rule out the possibility of a State agreeing to make reparation for damage caused as a result of conduct which was not, at the time committed, a breach of any international obligation in force for that State.[29] However, retrospective assumption of responsibility is rare in international law,[30] and is unimaginable in the context of reparation for slavery. The position of Western States was made clear at the Durban Conference, and their delegates ensured that the wording of the final Declaration would form no basis for legal claims by African States for reparation from the West.[31]

In conclusion then, while human rights lawyers and reparationists may be eager to cast claims in legal language because of the currency of "rights talk", the legal path, at least insofar as international law is concerned, does not present itself as an attractive option to reparationists and is likely to continue to attract significant opposition from States.

C. Thinking outside the legal box – political strategies and arguments from morality and consciousness

Given the strictures of the legal paradigm, it appears that any feasible strategy for reparation for slavery must draw on moral argument to secure political settlement of reparation claims.[32] Political strategies for the pursuit of domestic and international justice are, of course, familiar tools in the hands of human rights lawyers. Such a strategy is discernible, for instance, in the OAU's decision

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29 See para. 6, Commentary to Article 13 of the ILC Articles on State Responsibility (2001), in Crawford, *supra* note 10 at 132–133.

30 Ibid.

31 At best the Declaration declares a "moral" obligation on Western States to respond to the practice of slavery. In Article 102 of the Declaration the delegates affirm that "[w]e are aware of the moral obligation on the part of all concerned States and call upon these States to take appropriate and effective measures to halt and reverse the lasting consequences of those practices".

See also A. Sebok "The hidden legal issues behind the U.N. racism conference" *FindLaw Forum* CNN.com, on line: <www.cnn.com/2001/Law/09/columns/fl.sebok.racismconference.0910/>. Sebok argues that due to the specter of current and future reparation demands, the nations of the EU and the US were very concerned, going into the Conference, about the tenor and content of any discussion of the legacy of the trans-Atlantic slave trade. "They wanted to avoid a scenario where such discussion could be used to fuel more Holocaust-style litigation, leading to more multibillion dollar settlements". After the US walked out, the EU was left to protect its interests alone, but, Sebok points out, the eventual draft offers no apology at all: "It 'acknowledges' that slavery, 'including the trans-Atlantic slave trade' were 'appalling tragedies.' Yet it does not say who was responsible for these tragedies – thus refraining from offering any confession of responsibility or blame that future plaintiffs seeking reparations could use in negotiation, court proceedings, or public statements."

32 As Graham Hughes concludes (using the language of the day) in the context of the African American claims, "[i]t is not possible to set up a viable argument for compensation payments to Negroes within the confines of existing legal theory, but there remains the question of the strength of the moral case for instituting both political and private schemes of compensatory nature". (G. Hughes "Reparations for Blacks" (1968) 43 N.Y.U. L. Rev.1063 at 1064, cited in V. Verdun "If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans" (1993) 67(3) Tulane LR 629 at fn 96).

to pursue a political, as opposed to purely legal, course to obtain reparation. In 1992, under the leadership of Chief Moshood Abiola, the OAU instigated the creation of the OAU Group of Eminent Persons for Reparations. The Group was charged with pressing the *political* agenda for reparation for the African slave trade and in 1993 convened the First Pan-African Conference on Reparations in Abuja, Nigeria, where it adopted the Abuja Declaration that officially committed the OAU to obtain reparation for slavery from the West.[33]

In considering these political, or moral, arguments for reparation, we begin to focus on the intricacies of how reparations are to be determined; against whom, and what form they should take.

i. A moral global economy as incentive for reparation

Slavery presents the West with a peculiar dilemma. As a loose confederation of states emphasising the need for international relations grounded upon democracy and human rights,[34] the West has to face the problem of how to deal with its own past and the historical injustices of the slavery and colonialism it practised.[35] This dilemma allows reparationists their first opening to argue that reparation for slavery is a prerequisite of a moral global economy, and they have done so by pointing to a growing trend in the international community for governments to provide reparation to victims of historical human rights abuses.[36] The examples are well known and include Germany's enactment since World War II of several measures to pay victims more than US $50 billion in post-war reparation.[37] More recently, the Japanese government announced a US $1 billion programme to undertake cultural and vocational projects as a token of apology for wrongs committed against former "comfort women".[38] In 1990 Austria made payments to the total of $25 million to Jewish survivors of the

33 See Laremont, *supra* note 21 at 1.

34 There is a wide literature on the emerging right to democracy in international law. In particular see T. Franck "The Emerging Right to Democratic Governance" (1992) 86 AJIL 46 and J. Crawford "Democracy in International Law" (1992) 64 Brit. Ybk Int.L 539. See too the recent and excellent work by Susan Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford, UK: Oxford Univ. Press, 2000).

35 See in this regard E. Barkan, "Payback Time: Restitution and the Moral Economy of Nations" (Sept. – Oct. 1996), TIKKUN 52 at 58. Barkan writes about the moral economy incentive in the context of African American calls for reparation for slavery but this idea is reflected in much of the thinking of African reparationists in their struggle for reparation from the West.

36 See, for instance, David Love "US needs to pay reparations for slavery" *The Progressive Media Project* (26 January 2000), on line: <http://www.progressive.org/mpbvlo00.htm>. This argument is most evident in the claims made by African Americans against the US government. As an example see the websites of the African American Reparation Action Network (<http://www.angelfire.com/super/freedom/>) and the National Coalition of Blacks for Reparations in America (<http://www.ncobra.com/>), both of which list all the past claims for reparation which have been settled as an attempt to exert moral pressure for reparation for slavery. Of course, this strategy of the African Americans in their pursuit of reparation from the US government is equally appropriate to the claims made by African States as against the West.

37 T. Yu "Reparations for Former Comfort Women of World War II" (1995) 36 Harvard International Law Journal 528 at 537.

38 See Yu *ibid* at 528. Beginning in 1932 and continuing through World War II, Japan established a system of military brothels called "comfort stations" throughout Asia. These comfort stations were staffed by comfort women – taken from Korea, China, the Philippines and other Asian countries by force or deceit – who provided sexual services to Japanese soldiers.

Holocaust.[39] And it is not only the original Axis powers that have begun to provide reparation. Within the United States itself, the Civil Liberties Act of 1988[40] provides reparation for the World War II internment of Japanese Americans.[41] The Act provides for an acknowledgment and apology for the grave injustices done, and grants: (1) compensation in the amount of $20,000 to individuals of Japanese ancestry who were interned, and living on the date of the enactment of the Act (or to their living heirs); and (2) a public education fund to facilitate public awareness of the internment and prevent a recurrence.[42]

According to reparationists, in a moral economy of nations, reparation is essential to achieve two goals. First, and most obviously, it provides a means to rectify historical injustices.[43] Secondly, it serves to facilitate higher awareness of

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39 Gifford "Legal Basis", *supra* note 8 at 2.

40 50 U.S.C. app. § 1989-1989d (1994).

41 During World War II, all individuals of Japanese ancestry living in the United States were excluded from military zones and subject to forced relocation to detention centres pursuant to Executive Order 9066. In the 1980's a Commission was established to study the effects of Executive Order 9066 on Japanese American citizens. As a result of the Commission's finding that there were "fundamental violations of the basic civil liberties and constitutional rights" of the internees, Congress passed the Civil Liberties Act. The Act also provided reparation to the Aleuts, a group of civilian residents of the Pribilof and Aleutian Islands who were relocated to temporary camps in isolated regions of Alaska.

42 See Chisolm, *supra* note 6 at 713–715. African Americans who call for reparations for slavery draw heavily on the Civil Liberties Act in support of their claim, arguing that the Act "established a precedent for legislative compensation to a particular racial group that suffered unique injuries due to racially motivated law enforcement" (Chisolm, *ibid* at 716).

43 Another way of putting the moral global economy argument is in terms of justice principles. It is clear that the moral global economy is premised on the idea of righting past injustices. For reparationists to point out the hypocrisy of Western efforts to promote human rights and democracy without contemporaneous Western acknowledgment of past injustices is to force the West into the justice cul-de-sac, be it the libertarian theory of Robert Nozick, or the liberal theory of John Rawls. As is well known, in terms of Robert Nozick's libertarian "entitlement theory of justice" the justice of any distribution of goods depends on the history of the transaction. In other words, the justice of distributing goods is assessed not by where they end up but by how the distribution itself came about. We are to, therefore, look at the history of the acquisition and transfer of the goods in question: if the transactions of acquisition and transfer were freely entered into without force or fraud, then a just distribution of goods has taken place. Nozick's entitlement theory of justice thus works from a hypothetical assumption that everyone in a given society at point T is entitled to the goods they currently possess. However, writes Nozick, "not all actual situations are generated in accordance with the two principles of justice in holdings: the principle of justice in acquisition and the principle of justice in transfer. Some people steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose." (Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 152). When this occurs, Nozick accepts that the State may intervene in the rights of others to provide distributive justice. This is done in accordance with Nozick's principle of "justice in rectification". He does not elaborate on this principle, but accepts that "past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them." (Nozick, *ibid.* at 231).

The liberal theory of justice advanced by John Rawls would arguably also support a claim for reparation. Unlike Nozick's theory, which suggests a focus on correcting the injustices of the past, Rawls' theory is concerned with correcting existing inequalities in pursuit of what Rawls calls "justice as fairness". The inequality between the West and Africa, a legacy (whatever the measure) of slavery, places Africa and Africans in the position of "disadvantaged" members of global society. In accordance with Rawls' difference principle, such disadvantage needs to be redressed:

public morality through the use of market mechanisms, and in the process both parties' histories are given recognition, ultimately leading to a transfer of economic resources.[44] Such a transfer occurs through the conclusion of agreements that are entered into voluntarily between the parties, although this willingness to enter into such agreements often results from political pressure, which draws on moral argument.[45] While this political approach is not without its criticisms,[46] reparationists draw inspiration from the examples mentioned above and others to argue that there is a moral obligation to provide reparation for slavery. To them such reparation is an integral part of any moral global economy, for without it, the injustices of slavery are not dealt with and the history of Africa not legitimised.[47] But the political arm-twist comes from the argument

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> "[W]e may observe that the difference principle gives some weight to the principle of redress. That is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are underserved, these inequalities are to be somehow compensated for. Thus the principle holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favourable social positions ...Those who have been favoured by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out." (John Rawls, *A Theory of Justice* (Cambridge, Mass: Bekknap Press of Harvard University Press, 1972) at 100–101).

The existing Western States that deny responsibility for the slavery committed by their predecessors find themselves nonetheless favoured by the inheritance of enviably stable and prosperous economies. These States are thus held to Rawls' principle of redress: having been so favoured, they may only continue to gain from their good fortune on terms that improve the situation of those who have lost out. Such terms must include reparation for the Africans who have been born into the less favourable positions in the world, and who have, moreover, contributed historically to the prosperity of the Western economies through the institution of slavery. In this regard see also David Johnson, Steve Pete, Max du Plessis, *Jurisprudence – A South African Perspective* (Butterworths: Durban, 2001) at 187.

44 Barkan argues that if "the success of the moral economy of restitution is measured 'by the degree to which it enables the victims to claim a share of the economic pie ... and legitimize their side of history', then America cannot hope to achieve an equal society without granting reparations to African Americans." See Barkan, *supra* note 35 at 57.

45 *Ibid.* at 54.

46 For example, some argue that it is facile to lump claims for reparation for slavery together with claims for compensation for the Holocaust. It is true that in the 1990's the issue of historical reparation gained momentum with a series of lawsuits related to the Holocaust, but among the reasons for settlement of these claims is that Swiss banks and German businesses wanted to prevent themselves from being frozen out of the most lucrative markets in the world (notably that of the US) if they didn't settle. (See Jon Silberman "Compensation for slavery" *BBC News, World: Americas* (4 September 2001), on line: <http://news.bbc.co.uk//hi/english/world/americas/newsid_1523000/1523669.stm>). While one could speculate that the financial muscle of the black community in the US might provide similar leverage in relation to the slave trade, it is not obvious that African States have similar clout vis-à-vis the West when it comes to the issue of slavery reparations. This much is apparent from the outcome of the Durban Conference.

47 The idea of legitimising a party's history – of breaking the history of silence – is a powerful theme in human rights initiatives. This theme is apparent, for instance, in the creation of The Women's International War Crimes Tribunal 2000 for the trial of Japanese Military Sexual Slavery, established in response to Japan's continuing failure to prosecute, apologise and provide reparation for Japan's military institutionalisation of rape, sexual slavery, trafficking, torture and

that the West cannot endorse the notion of a just world order while simultaneously avoiding the issue of reparation for past injustices. For if it does not commit to reparation for slavery with the same zeal it has demonstrated in advancing human rights abroad, it runs the risk of being labelled hypocritical.[48]

ii. Past wrong, current effect, against whom? Looking towards a collective conscience

While reparationists might wish to pursue the argument for a moral global economy through the provision of reparation, the details of such a claim will invariably have to confront two difficult questions: first, *are reparations to be determined by focusing on the past wrong as opposed to the current and ongoing effects of that wrong*?; and secondly, *against whom should the claim be directed*?

One of the central obstacles to establishing a right – be it legal or moral – to reparation, is that of causation. That is true of any reparation claim that spans vast periods of time, and the obstacle is well illustrated by the problems that confront those who argue for reparation for slavery. In order to found liability for past wrongs in relation to slavery, reparationists need to show that current Western States bear responsibility for the actions of their predecessors during the period of the Atlantic slave trade. It is one thing to be able to show that the acts of Western powers at a certain point in history caused injury to the innocent victims of the slave-trade; it is quite another to insist that the breach perpetrated *then* carries through to found responsibility for Western States *now*.

In the national context this issue of "historical" causation has proven insurmountable to African-American legal attempts to claim compensation from the present-day US government for the acts of slavery perpetrated in the early years of the nation's existence. As yet, they have not successfully been able to sue for reparation in domestic US courts. For instance, in the first federal appellate court case to be heard on African-American reparations – *Cato v United States* – the plaintiffs sued the United States for damages for past and present injustices related to ancestral slavery. The court dismissed their claim for lack of an arguable basis in law, in particular, lack of causation and standing. [49]

Tuneen Chisolm, an American academic, writes that the standing doctrine and causation doctrine are barriers to African American reparation suits in tort, largely because of a dominant theory of rights.[50] Within this paradigm, each individual is responsible for his or her behaviour only. Thus vicarious liability for

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other forms of sexual violence against Asian "comfort women". One of the reasons for constituting the Tribunal was "out of the conviction that these failures must not be allowed to silence the voices of the survivors", its power, "like so many human rights initiatives, [lying] in its capacity to examine the evidence and develop an enduring historical record". See the summary of findings of the Tribunal on 12 December 2000 in the matter of *The Prosecutors and the Peoples of the Asia-Pacific Region v Emperor Hirohito et al. and the Government of Japan* at para. 5, on line: available at <www1.jca.apc.org/vaww-net-japan/e_new/judgement.html>.

48 It is significant that the Durban Declaration registers, albeit obliquely, the "moral" obligation on Western States to respond to the practices of the past. See *supra* note 51 at Art. 102 of the Declaration quoted above at fn 51.

49 70 F.3d 1103 (9th Cir. 1995) at 1110–11, cited in Chisolm, *supra* note 6 at 709.

50 Chisolm, *supra* note 6 at 710, drawing on the work of Verdun, *supra* note 32 at 597.

the actions of others is only applicable where the defendant has control over the offender; if no such control relationship exists, then there is no legal (or moral) responsibility for the actions of others. In keeping with the dominant perspective that the individual wrongdoer must pay for the wrong, the law accepts the corollary principle that a non-wrongdoer should not be required to pay for the wrong.[51] The death of the last slave and slaveholder, therefore, puts paid to reparations for slavery through judicial relief. As Chisolm concedes, "cases based in tort necessarily fail for lack of standing and/or causation. Therefore, the tort suit as a vehicle for African American reparations is not a viable option." [52]

There is no reason to believe that the position is different at the international level. The international law rules on State responsibility (both in the inter-State context and the international human rights context) presuppose that there is a connection between a past wrong and a present claim.[53] Similarly, any legal claim for reparation for slavery at the international level faces the seemingly insurmountable hurdle of proving that the present day Western States caused the injury complained of.

It is important to stress that the dominant theory of rights presents an obstacle not only to legal attempts to claim reparation, but also to political claims, and opponents of reparation to Africans (and African Americans) analyse the merits of the remedy from this dominant perspective. With their insistence that an actor should pay only for harm that is actually caused by that actor, and that only those victims that actually suffered should receive justice, such opponents conclude that the idea of reparation for slavery is "absurd, frivolous, or unworthy of serious consideration."[54]

Is there any way around this problem in the political pursuit of reparation for slavery? To reparationists, an answer lies in the idea of solidarity. In stark contrast with the dominant perspective, African Americans, for instance, frame their claims for reparation in terms of group identity.[55] This community is constituted through the experience of common struggle. Mari Matsuda describes the kinship wrought of common struggles in the following terms:

> Victims necessarily think of themselves as a group, because they are treated and survive as a group. The wealthy black person still comes up against the color line. The educated Japanese still comes up against the assumption of Asian inferiority. The wrongs of the past cut into the heart of the privileged as well as the suffering.[56]

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51 See Verdun *ibid.* at 622.

52 Chisolm, *supra* note 6 at 712. It should be noted that notwithstanding the legal problems associated with a claim for reparations, a team of lawyers in the United States (led by Johnnie Cochrane) are planning a lawsuit against the US government (see Julie Foster "Slavery reparations lawsuit brewing" *WorldNetDaily* (31 January 2001)). It is unclear how far advanced this litigation is.

53 See for instance Brownlie, *Principles of Public International Law* (1979) at 436.

54 Verdun, *supra* note 32 at 625.

55 Verdun, *ibid.* at 631.

56 Mari Matsuda "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harvard C.R.-C.L. L. Rev. at 323 376.

A similar strategy is evident in the political agenda of the OAU and its commitment to seeking reparation through some form of "appropriate, representative and trustworthy body" that represents the claims of all Africans.[57] At the level of community of African States, the OAU is able to advance what might be termed an "African consciousness". This African consciousness is reflected in the Preamble to the Draft Declaration of the African Preparatory Regional Meeting for the World Conference Against Racism:

> [T]he African peoples attach great importance to their values of brotherhood, solidarity, tolerance and multiculturalism, which constitute the moral ground and the inspiring source for our struggle.[58]

From this perspective group identity allows all Africans to perceive the call for reparation through the lens of communalism and collectivism, and to identify a continuing and uncompensated wrong to a corpus of Africans throughout the world. The result is that the same factor that would inhibit a claim for reparation from the dominant perspective becomes, instead, an empowering means for achieving reparation when viewed from the perspective of an African consciousness.

What about the perpetrators of slavery? Against whom should the reparation claims be directed? From the standpoint of the African consciousness, the wrongdoer is similarly not limited to some prescribed set of individuals such as slave owners, or one guilty State in particular.[59] Rather, the more appropriate description of the wrongdoer is also to be drawn from an understanding of the collective: the West, through governments, laws, courts, consumers, producers, economic ideology and institutions perpetrated and perpetuated the institution of slavery. Thus the logic goes that the West as a collective must be held responsible for reparation. Furthermore, the West, unlike individuals, does not have a natural life. As a result, the African consciousness perspective becomes a vehicle for arguing against the dominant perspective of rights, which seals off claims for reparation along with the death of the last slaveholder. To do so, argue reparationists, is to ignore the fact that the countries that practised slavery are doing well and still reaping the benefits of slave labour.[60]

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57 For instance, see Lord Gifford who argues that "[t]he details of reparations settlement would have to be negotiated with an appropriate body of representatives of African people around the world" (Lord Gifford, House of Lords debate on reparations for slavery, 14th March 1996 (Hansard), (hereinafter referred to as Gifford "House of Lords", on line: <http://www.arm.arc.co.uk>).

58 See the Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Regional Conference for Africa (Dakar, 22-24 January 2001), on line: <http://www.un.org/WCAR/>.

59 Verdun, *supra* note 32 at 636.

60 See in this regard Verdun, *ibid.* at 638-9. Similar thinking is evidenced in a Human Rights Watch Report, prepared in anticipation of the Durban Conference and in connection with African American claims for reparation. The relevant passage reads:

> "We recognize that to hold [governments] responsible for past crimes is, as a practical matter, to hold today's citizens or taxpayers responsible. We believe this attribution of responsibility can be justified by reference to the economic benefits that these countries derived from, say, slavery or abusive colonialism – benefits that presumably helped to jumpstart their industrialization and

Having identified a collective victim and wrongdoer as part of an overall political strategy, reparationists are still faced with the question: what is the uncompensated wrong? This brings into sharp focus the issue of whether reparations are to be determined in accordance with past wrongs or current effects, and the slavery reparationists provide some useful cues for other reparation contexts.

In respect of the slavery context, various wrongs are identified as being unrepaired, but broadly they can be classed under three heads. *First*: the mass kidnap and enslavement of Africans. *Second*: the contribution made by slaves to the prosperity of the slave-owning nations. *Third*: the consequences of slavery which manifest themselves in continuing systemic discrimination.

The first injury is readily apparent from the historical evidence that documents the Atlantic slave trade. The injury is easily identified by historians and other experts who can reliably prove "the invasion of African territories, the mass capture of Africans, the horrors of the middle passage, the chattelisation of Africans in the Americas, the extermination of the language and culture of the transported Africans".[61]

The second injury would require historical, sociological, and economic evidence. Some experts argue, for example, that the slave trade was a principal factor, which contributed towards the generation of wealth by Western nations. For instance, Marketti, who developed a mathematical formula to determine the value of slave labour exploited from African Americans, writes:

> I am convinced that [the United States'] present day wealth, rather than a result of how economic activity was organized or of access to natural resources, is more attributable to the fact that at a crucial point in the development of the industrial United States, large amounts of free labor were deployed, from which surplus was extracted and filtered through various exchange mechanisms to nearly every budding industrial enterprise in the nation.[62]

While there is obvious disagreement about the extent to which slavery boosted economic development in the West, it is equally clear that an argument can be made that the use of slave labour was a significant contributing factor.[63]

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thus continue to the present. We note that this rationale would apply even to immigrants who arrived in a beneficiary country after these abusive practices ended, since they, too, presumably have benefited from the advanced economy they joined". (See "An Approach to Reparations" *Human Rights Watch* (19 July 2001), on line: <http://www. hrwatch.org> at 6).

61 Gifford "House of Lords", *supra* note 57.

62 See J. Marketti "Black Equity in the Slave Industry" (1972) 2 Rev. Black. Pol. Econ 43 at 43–44 and the other sources quoted in Verdun, *supra* note 54 at 630 fn. 99.

63 Note the comments of Gifford "Legal Basis", *supra* note 8 at 11 where he takes for granted, "[h]istorians will advise as to which countries have profited most from slavery and the slave trade. The major European maritime trading nations and the colonisers can be easily identified. So can the United States, as a country which grew rich on slave labour and the exploitation of African Americans". In the African American context, see Randall Robinson, *The Debt: What America owes Blacks* (Dutton, NY: Plume, 2001), and the other sources referred to in Tara Mack "Payback time" *The Guardian* (11 August 2001).

The third injury is perhaps the most contentious, and the one most difficult to prove.[64] Essentially, the argument runs that slavery has a continuing effect, which is manifested in racial inequalities, which exist not only as between individuals, but also as between nation blocs.[65] For instance, in the African American context Oliver and Shapiro argue as follows:

> Disparities in wealth between blacks and whites are not the product of haphazard events, inborn traits, isolated incidents or solely contemporary individual accomplishment. Rather, wealth inequality has been structured over many generations through the same systemic barriers that have hampered blacks throughout their history in American society: slavery, Jim Crow, so-called de jure discrimination, and institutionalized racism.[66]

Lord Gifford makes the same argument more generally:

> [T]here is a further element in the legacy of the slave trade which is the damage done within Britain, within the United States and other Western societies. The inhuman philosophy of white supremacy and black inferiority was inculcated into European peoples to justify the atrocities which were being committed by a Christian people upon fellow human beings. That philosophy continues to poison our society today.[67]

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64 As is conceded by Chisolm, "[t]he inequalities between blacks and whites ... often manifest themselves, and are therefore expressed, in terms that do not clearly relate back to slavery and the ensuing discrimination". See Chisolm, *supra* note 6 at 687.

65 The Durban Declaration tentatively suggests as much in Article 13. After acknowledging that slavery and the slave trade "were appalling tragedies" the Article states that these acts "are among the major sources and manifestations of [existing] racism ... and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences."

66 Melvin Oliver and Thomas Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (US: Routledge, 1995) at 12–13, quoted in Chisolm, *supra* note 6at 687. See also the charged assertion by Mazrui that "[t]he consequences of slavery in the United States did not end with the Emancipation Proclamation of 1863, but continue today in the disproportionate black presence in American jails, the disproportionate black infant mortality rates, the disproportionate self-destructive juvenile black violence. The damage of the past is in the present. The black community is chained to the bondage of its own tragic history." Mazrui, *supra* note 5 at 9. The same premise is evident in the report by Human Rights Watch, prepared in anticipation of the Durban Conference in connection with African American claims for reparation. The report states that "we would accept that most African-Americans continue to suffer the effects of slavery in the United States ..." and accordingly proposes that studies be undertaken to "reveal the extent to which a government's past practices contribute to contemporary economic and social deprivation, educate the public about this continuing effect, acknowledge responsibility for it, and propose methods for rectifying these effects and making amends." See Human Rights Watch Report, at 2.

67 Gifford "House of Lords", *supra* note 57. In different words, Verdun writes that the injury amounts to a "presumption of inferiority, devaluation of self-esteem, and other emotional injuries, pain, and suffering, that resulted from the institution of slavery". See Verdun, *supra* note 32 at 631–2.

Such racism, practised between people, is also perceived to be at work between nations. The following plea by Mazrui is indicative of a belief that Africa as a whole is being sidelined in global affairs:

> And why should all the permanent seats of the United Nations Security Council be given to countries which are already powerful outside the UN? Is there not a case for giving Africa a permanent seat with a veto[68] – not because Africa is powerful but because it has been rendered powerless across generations? ... There is a primordial debt to be paid to black peoples for hundreds of years of enslavement and degradation. Some of the causes of global apartheid lie deep in that history.[69]

While the connection between slavery and continuing patterns of racism needs to be examined in more detail, one cannot discount the fact that current social and economic inequalities between whites and blacks, and between the West and Africa, have some relation to past patterns of discrimination, foremost of which must be slavery.[70] Slavery, an institution supported by the belief that people were inferior and appropriately subordinated because of their race, is a practice that is inexorably linked with the ideology of racism.[71] To assume that the statistics reflecting inequities between the West and Africa have no relation to such past patterns of discrimination is to accept the argument that these statistics correctly reflect the inherent abilities or disabilities of Africa and its people.

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68 How the permanent African seat would be occupied on the Security Council is something that Mazrui suggests will have to be worked out between the UN and the OAU. For instance, the seat could rotate between East, West, Southern, Northern and Central Africa over a period to be agreed upon. See Mazrui, *supra* note 5 at 8.

69 Mazrui, *ibid.* at 16.

70 In the African American context, see Chisolm, *supra* note 6 at 689–702 for an analysis of the link between slavery in the United States and existing manifestations of racial discrimination. In the international context, the delegates at the Durban Conference have acknowledged this link obliquely. Art. 158 of the Durban Declaration provides that States recognise "that these historical injustices [slavery, colonialism, genocide, apartheid] have undeniably contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, in particular in developing countries".

71 In this regard see Verdun, *supra* note 54 at 633–4, who draws on the work of Charles Lawrence to argue that the origins of racism were in rational and premeditated acts such as slavery. Lawrence writes that:

> "Racism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something we called race. I do not mean to imply that racism does not have its origins in the rational and premeditated acts of those who sought and seek property and power... It is a part of our common historical experience and, therefore, part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities ... It is a malady that we all share, because we have all been scarred by a common history." (C. Lawrence, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 Stan. L. Rev. 317 at 330–31).

While it is plainly obvious that there are innumerable social and political factors, which contributed towards these inequities, it is equally as clear that the practice of slavery deserves inclusion high up on that list.

D. The reparations envisaged – what form should they take?

On the assumption that the political strategies for slavery reparation were to prove morally compelling, the next real difficulty lies in determining the exact nature of reparation, which ought to be claimed, and the mechanics of how such reparation is to be provided. It is at this stage that the context of slavery reparations might helpfully suggest answers to the final question I have been posed, namely, *what form should reparations take?*

As stated earlier, reparationists appear to have taken their cue from the current paradigm of State responsibility and consider that there are three forms of reparation to be entertained in the context of slavery – restitution, compensation, and satisfaction – either singly or in combination.[72] I have explained that any legal claim for reparation will face difficulties, perhaps insurmountable difficulties, were it to be premised on the rules of State responsibility in international law. Nonetheless, the State responsibility paradigm provides a common frame of reference for the parties involved and is useful in the political context in which the claims are advanced by Africa as against the West, or for that matter, any other context involving claims for reparation arising out of mass atrocity.

The ILC Articles on State Responsibility provide in Article 34, under the heading "Forms of reparation", that "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination ...".

Restitution in kind ("to re-establish the situation which existed before the wrongful act was committed"[73]) is the first form of reparation available to a State injured by an internationally wrongful act. It was granted for instance in the *Temple* case[74] where Thailand was ordered to return to Cambodia religious objects which it had taken illegally from a temple in Cambodia.[75]

Restitution in kind is granted only in exceptional cases, and monetary *compensation,* the second form of reparation, is far more commonly used as a means of "wiping out the consequences of the illegal act".[76] In this regard the ILC Articles provide that the State responsible for an internationally wrongful act is "under an obligation to compensate for the damage caused thereby, insofar as

72 While the assertion of these reparation claims would take place outside of the legal context of the ILC Articles, reparationists can nonetheless profit from the Articles' suggestion that the different forms of reparation are to be pursued with the goal of achieving "full reparation" for the wrong committed.

73 ILC Articles on State Responsibility, Art. 35, in Crawford, *supra* note 10 at 213.

74 ICJ Reports 1962 at 6.

75 It is clear that the obligation to make restitution is not unlimited, and the ILC Articles provide the following qualifications with respect to the grant of restitution. Restitution will not be granted where it is "materially impossible" (Article 35(a), in Crawford, *supra* note 10), and it may not be granted where it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation" (Article 35(b), in Crawford, *ibid,*).

76 D.J. Harris, *Cases and Materials on International Law,* 5th ed. (London: Sweet & Maxwell, 1998) at 518.

such damage is not made good by restitution".[77] Compensation in this context is granted for any "financially assessable damage including loss of profits insofar as it is established".[78] For instance, in the *Chorzow Factory Case* compensation was awarded to Germany for the wrongful dispossession by Poland of the Chorzow Factory – then owned by German companies – in breach of a treaty concluded between the two States. The PCIJ held that where restitution in kind was not possible, payment must be made of a "sum corresponding to the value which restitution in kind would bear".[79]

The third form of reparation to be found in the ILC Articles on State Responsibility and which bears relevance for reparationists, is that of *satisfaction*. The State responsible for an internationally wrongful act is obliged to "give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation".[80] Such measures may take the form of an "acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality".[81] Satisfaction provides reparation in particular for moral damage such as emotional injury, mental suffering, injury to reputation and similar damage suffered by nationals of the injured State.[82] It is not a standard form of reparation, in the sense that the injury to a State may be fully repaired by restitution and/or compensation, but its place is well-established in international law and it serves a useful role in providing reparation for those injuries, not financially assessable, which amount to an affront to the State.[83]

These three forms of reparation are called into service singly or in combination by reparationists in their arguments against the West. It is worthwhile noting that the ILC Articles themselves treat these forms of reparation as part of a coherent package aimed at providing "full reparation" for international wrongs. Article 31 of the Articles reads "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". Accordingly, the pursuit of "full reparation" involves the flexible use of each of the types of reparation mentioned, and to the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others become correspondingly more important.[84]

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77 Art. 36(1), in Crawford *supra* note 10 at 218.

78 Art. 36(2), *ibid.*

79 *Chorzow Factory Case*, supra note 11 at 29.

80 Art. 37(1), in Crawford, *supra* note 10 at 231.

81 Art. 37(2), *ibid.*

82 See the Commentary to Art. 37, ILC Articles on State Responsibility in Crawford, *supra* note10 at 231. An illustration of satisfaction as a form of reparation is provided in the *Borchgrave case* (PCIJ) Rep. Series A/B No 72 (1937). In that case a Belgian national working at the Belgian Embassy in Madrid was found dead on the roadside in Spain in 1936. The court listed the reparation sought by Belgium in diplomatic proceedings with Spain as follows: "In consequence, proceeding on the principles of international law relating to the responsibility of States, the Belgian Government demanded as reparation: (1) an expression of the Spanish Government's excuses and regrets; (2) transfer of the corpse to the port of embarcation with military honours; ... (4) just punishment of the guilty" (at 165).

83 See Commentary to Art. 37, ILC Articles on State Responsibility, in Crawford, *supra* note 10 at 231.

84 See Arts. 31 and 34 and Commentary to Art. 34, ILC Articles on State Responsibility, in Crawford, *supra* note 10 at 212.

i. Restitution

As a form of reparation restitution will have limited application, particularly in the slavery context, given the scale of slavery and the extent of time over which it took place. At best then, restitution might be possible in relation to acts, which were committed generally as part of the policy of slavery perpetrated by the West. For instance, it is not inconceivable that various treasures and works of art that were taken by colonial powers in the process of enslaving African people might be capable of being restored to African States. Gifford mentions as an example the Benin Bronzes, which are to be found in the British museum. This form of reparation was recognised by the delegates at Durban who, in the final Declaration, recorded "the need to develop programmes for the social and economic development of [developing countries]" in various areas, one of which is the "[r]estitution of art objects, historical artefacts and documents to their countries of origin".[85] Another example of restitution as a relevant form of reparation in this context is the granting of assistance to persons who wish to return to Africa, even though their numbers may be small. In this regard the Durban Declaration calls for programmes aimed at the "facilitation of welcomed return and resettlement of the descendants of enslaved Africans".[86]

ii. Compensation

Compensation for slavery – or any other mass atrocity – presents arguably the most difficulties as a form of reparation, and is politically the most controversial. What appears to drive reparationists – whatever their cause – in claiming monetary payment, is the belief, as Martha Minow puts it, that the core idea behind reparation stems from the compensatory theory of justice: "[i]njuries can and must be compensated. Wrongdoers should pay victims for losses. Afterwards the slate can be wiped clean."[87] This notion of justice is commonplace in the context of bankruptcy, contracts, and personal injury law. International law rules of State responsibility endorse the same notion of justice and provide that compensation is available as legal recompense for "any financially assessable damage". However, the problem, as Minow points out, is that there is a sense of "inappropriateness of putting a value on losses from mass atrocity".[88] This is particularly true in respect of reparation for slavery where one is confronted with a variety of problems, the first of which is how to assess the damage.

Gifford argues that the damage might be classified and researched under different headings: economic damage, cultural damage, social damage and psychological damage. However, to put monetary figures on any of the elements raises questions to which Gifford himself has no answers:

> [H]ow do you assess the value of the loss to an African people of a young person, kidnapped and transported over 200 years ago?

85 Art. 158 of the Durban Declaration, *supra* note 6.

86 *Ibid.*

87 Martha Minow *Between Vengeance and Forgiveness: facing history after genocide and mass violence* (Boston: Beacon Press, 1998) at 104.

88 *Ibid.*

> What figure can be placed on the psychological damage inflicted by a system that is still deeply racist?[89] Can it be proved that the slave system destroyed old and flourishing African civilisations, and if so, how is their value to be measured? What level of restitution is appropriate for the African peoples of the Diaspora?[90]

Gifford's rhetorical questions do not pose the only problems besetting compensation awards. Even if a meaningful assessment of damage can be performed, how, for instance, will justice be done as between the claimants? Not all Africans (individuals or States) suffered equally, and some may not have suffered at all.[91] Opponents of reparation for slavery, therefore, insist that any meaningful compensation requires that the various classes of injured victims be segregated to avoid some being over-compensated and others under-compensated.[92]

One plausible solution to this problem appears to lie in the idea of the African consciousness. Reparationists, perceiving issues from a communitarian point of view, would find a uniform award consistent with group injury.[93] Such uniform awards of compensation have already been made in other contexts. For instance, reparation paid to Japanese Americans for their internment during the Second World War were uniform and did not conform to the dominant view that damages should be consistent with the relative injuries of the parties.[94] Through a reliance on the African consciousness, the idea of collective justice would be one way to overcome problems of distributive justice on an individual level.

Such a collective perspective would, in any event, need to be adopted to overcome problems of distributing blame as between wrongdoers. Opponents of reparation insist that only those who were to blame for slavery ought to pay compensation, and then only such an amount as is commensurate with their blame. Those advocating reparation have examined the possibility of forcing payments from companies and individuals that benefited from slavery, but Gifford concedes, "such an approach would create more problems than it solved":

> Enormous research would be needed to identify the companies and the families, to determine how much money was made by their ancestors, and to calculate how much should be forfeited by the

89 As Chisolm notes: "It is simply unrealistic to think that relief from the effects of deep-rooted iniquities and discrimination can be resolved by a lump sum payment." (Chisolm, *supra* note 6 at 723). Jay Parker, Founder and President of the Lincoln Institute for Research and Education expresses similar sentiments, arguing that no amount of restitution can make up for slavery or somehow cure imperfect race relations in America. (See Julie Foster "Slavery reparations lawsuit brewing" *WorldNetDaily* (23 January 2001)).

90 Gifford "Legal Basis", *supra* note 8 at 5.

91 South Africa is a prime example. While South Africa may feasibly have a legitimate call for reparation for colonisation, it is difficult to see how it could make a similar claim in respect of slavery. Few, if any, of its people were exploited during the Atlantic slave trade.

92 Verdun, *supra* note 32 at 658.

93 Verdun, *ibid.*

94 A uniform amount of $20,000 was paid to individuals of Japanese ancestry who were interned.

> present shareholders or family members. The process would inevitably be somewhat arbitrary, and potentially oppressive, and it would be rejected both by the targets themselves and their governments.[95]

A collective approach again presents itself as the only viable alternative. Gifford suggests quite reasonably that it is more appropriate to concentrate on the governments of the countries, which fostered and supported the slave trade, which legitimised the institution of slavery, and which profited as a result.

However, even if the African consciousness method makes uniform compensation by a collective of States a viable option, there are more significant problems to be faced. One of the most difficult to deal with is this: in assessing compensation claims, how far back should one go? As Human Rights Watch has pointed out in this regard, "[b]ecause human history is filled with wrongs, many of which amount to severe human rights abuse, significant practical problems arise once a certain time has elapsed in building a theory of reparations on claims of descendancy alone."[96] By going back too far, "most everyone could make a case of some sort for reparations, trivializing the concept", and of course, "the older a wrong, the less the residents of countries called on to provide reparations will feel an obligation to make amends".[97]

A focus on past wrongs and attempts to make amends by payments to living victims means that the total amount of any monetary award (be it to specific States or groups or individuals within those States) would quickly approach excessive sums which would serve only to scare Western governments away from the bargaining table.[98] The number of claimants it is meant to serve (States directly, and their citizens indirectly) renders compensation, already riddled with the internal difficulties I have identified, unworkable.

Is compensation, therefore, to be cast aside as a form of reparation for slavery? I believe not. So long as calls by reparationists for compensation for slavery are pragmatic there is no reason why they cannot be aligned with existing calls by developing States for assistance under the rubric of the emerging right to development in international law.[99] The call for compensation ought thus to shift away from attempts to compensate for racial injustices against victims of

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95 Gifford "Legal Basis", *supra* note 8 at 5.

96 Human Rights Watch Report, *supra* note 66 at 1.

97 *Ibid.*

98 See, for example, the excessive and arbitrary amount called for by a group describing themselves as 'The African World Reparations and Repatriation Truth Commission' recently demanded $777 thousand billion to be paid within 5 years by Western governments as compensation for slavery. The figure was reportedly arrived at on the basis of the number of lives lost to Africa during the slave trade, as well as an assessment of the worth of the gold, diamonds and other minerals taken from the continent during colonial rule. (See "Trillions demanded in slavery reparations" *BBC News, World: Africa* (20 August 1999), on line: <http://news.bbc.co.uk/hi/English/world/Africa/newsid_424000/424984.stm>).

It is quite clear that such risible claims do the reparation movement far more damage than good, and simply fuel an unfortunate but understandable reticence on the part of governments to address the issue of compensatory reparation.

99 A right to development has been identified in international law as a controversial, but important example of a claimed "solidarity" human right. Crawford suggests that the following assessment of the right to development by Umozurike appears to be the most balanced:

the past (whereby States and their descendants hope to benefit in some way or another), and focus instead on correcting contemporary effects of past wrongs as they continue to present themselves in the here and now. Put differently, reparationists should focus less on demands for money to *redress* the historical wrongs of slavery and concentrate instead on demands for compensation to *address* the current effects of slavery which manifest themselves in the continuing racial inequality that pervades our world, in the form of social and economic discrimination.[100]

The drive for compensation for slavery therefore needs to be more carefully focused and more purposively applied for it to draw any support from the developed world. In this regard the call for compensation should be informed by the eventual goals for which reparationists strive. To my mind such goals would best be achieved not through an impossible attempt to compensate the descendants of the victims of slavery in the past – which Western States will consistently balk at – but by empowering the people and States of Africa in relation to their situation in the present. This empowerment ought surely to be the purpose behind Africa's call for reparation? As Mazrui points out, "[e]mpowering the African people in relation to [their] ... states is the challenge of democratization. Empowering the ... African states in relation to the world system is the challenge of international centering."[101] The details of how compensation can be used to democratise and internationally centre need to be worked out, but some tentative suggestions are advanced here.[102]

> "The right to development ... appears not to have attained the definitive status of rule of law despite its powerful advocates. Its inclusion in the African Charter will be as effective as the Charter itself. The negative duty not to impede the development of States may go down well; the positive duty to aid such development, in the absence of specific accords, is a higher level of commitment that still rests on non legal considerations". (Umozurike, (1983) 77AJIL 902 at 907 quoted in Crawford (ed.) *The Rights of Peoples* (Cambridge, UK: Claredon Press, 1988) at 65–66).

See also Bedjaoui "Some Unorthodox Reflections on the Right to Development" in F. Snyder and P. Slinn (eds.) *International Law of Development: Comparative Perspectives* (US: Lexis Publishing, 1987) at 87.

100 It is of course not impossible to imagine that compensation which is paid with the aim of correcting a past injustice committed against someone's ancestor, at the same time achieves economic justice for that person because she continues to suffer the effects of the slavery perpetrated against her ancestor, perhaps through lack of means or poor schooling etc. However, this overlap of achievements is not guaranteed. A focus exclusively on righting past wrongs could all too easily "deliver what might look like windfalls to people who assert vicarious claims to reparations but have suffered no harm themselves". (Human Rights Watch Report, *supra* note 66 at 2). It is for this reason that I propose an approach that focuses on contemporary effects of slavery as manifested in inequality between States.

101 Mazrui, *supra* note 5 at 5.

102 The Senegalese President Abdoulaye Wade has articulated the ideas I mention here by reference to what he considers to be a "Marshall Plan" for Africa, or what President Mbeki sees as "The New Africa Initiative". Such a plan is intended to mitigate the scourge of slavery and its devastating and lingering effect on the continent. (See Qfeibea Quist-Arcton, "Slavery Issue Struggles to Get a Hearing in Durban" *AllAfrica.Com* (4 September 2001), on line:<http://allafrica.com/stories/200109040564.html>; See also the views of A. Ajayi "Unfinished Business: Confronting the Legacies of Slavery and Colonialism in Africa", on line: <www.african-century.com/acphp/ac_list_articles.php>).

As regards democratisation, the West can continue to increase material support to democratic trends in Africa. International lawyers have since the early 1990's been arguing that the empowerment of the people within States is best advanced through the creation of democratic governments that represent them. As President Thabo Mbeki has said, "[t]he new wave of democracy sweeping the African continent is a ... sign that the conditions are emerging for the African people to realise a life of prosperity and to achieve the rebirth of our continent."[103]

As regards international centering, programmes of development are essential for the reconstruction of Africa and many such programmes are already underway, giving credence to the idea of a right to development in international law. The advantage of such development programmes would be a discussion of reparation claims in terms of the impact of past slavery practices on contemporary respect for economic and social rights in the world order.[104] This focus would make it more likely for a Western public to accept the need to end a contemporary wrong connected to a historical injustice than to provide compensation for past wrongs *per se*. An approach thus based on economic and social rights would allow for an alignment of compensation schemes with the world's most acute development challenges – instead of doling out money on the principle that past victims deserve justice, the compensation becomes a vehicle for rectifying the social and economic problems that underpin today's victims' continuing marginalisation.[105] Accordingly, compensation payments would be used for investment in education, housing, health care, job training, and skills transfer – portfolios that would assist African states to centre themselves internationally through an improvement of the infrastructure of Africa as a whole. International scholarships and exchange programmes for Africans would be a small part of this effort.[106] As a last point, it is trite that another development initiative by the West would be a continuation of measures to cancel the intolerable burden of debt, which has become an impediment to sustainable development in many African countries.[107]

To conclude, it is fitting to observe the eventual agreement of the delegates at the Durban Conference on this controversial form of reparation. The Durban Declaration shows an abandonment, no doubt due to sustained pressure from Western governments that remained at the Conference, of the original position put forward by African ministers in their preparatory meeting in Dakar in January 2001. There the ministers had committed themselves to a position in anticipation of the Durban Conference, which would focus on the provision of compensation to a group unsatisfactorily described as the "victims of the slave

103 In an address at the National Summit of Unity and Reconciliation, Rwanda, 18 October 2000, on line: <www.sapa.org.za>.

104 See the Report of Human Rights Watch, *supra* note 66 at 4. As the report points out, a focus on economic and social rights provides greater urgency than traditional reparation claims because it asks us to "rectify today's injustices rather than yesterday's." (*Ibid*).

105 Human Rights Watch Report, *ibid.*

106 Mazrui, *supra* note 5 at 7.

107 *Ibid.*

trade".[108] Besides the difficulty of identification of such victims, it is clear that the inclination of African States was to focus on righting the historical injustices of the past. In happy contradistinction to that position, the Durban Declaration has adopted a development-based vision of compensatory justice, a vision that while not providing a guaranteed buy-in from Western States will at least avoid their overt opposition. Article 158 of the Declaration provides as follows:

> [T]hat these historical injustices have undeniably contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, in particular in developing countries. The Conference recognizes the need to develop programmes for the social and economic development of these societies and the Diaspora, within the framework of a new partnership based on the spirit of solidarity and mutual respect, in the ... areas [of, *inter alia*] debt relief; poverty eradication; building or strengthening democratic institutions; transfer of technology; infrastructure development; education ....

iii. Satisfaction

I come now to a consideration of *satisfaction* as a form of reparation for slavery. There is little doubt that the logical starting point for repair by the West would be a formal apology for the acts of slavery perpetrated in the past. Bill Clinton and the Pope have set an example in this regard by apologising informally to distinct African communities for slavery. On a visit to various sub-Saharan nations, Clinton made an informal apology in Uganda for America's part in the slave trade.[109] The Pope set a similar example on a visit to the slave dungeons of Goree in Senegal in February 1992, asking forgiveness for slavery.[110]

A formal apology would be a measure of satisfaction, a recognised form of reparation in international law. In anticipation of the Durban Conference, African ministers called for such an apology in their Draft Declaration in the following terms:

> [T]he first logical and credible step to be taken at this juncture of our collective struggle is for the World Conference against racism to declare solemnly that the international community as a whole fully recognises the historical injustices of slave trade and colonialism as the most massive human rights violations in the history of mankind;
> ...

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108 See the Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Regional Conference for Africa (Dakar, 22-24 January 2001), on line: <http://www.un.org/WCAR/>. Art. 2 of the Declaration provided that: "An International Compensation Scheme should be set up for victims of the slave trade, as well as victims of any other transnational racist policies and acts, in addition to the national funds or any equivalent national mechanisms aimed at fulfilling the right to compensation".

109 Nancy Mathis "President Acknowledges U.S. 'Sins' Against Africa" *Houston Chronicle* (25 March 1998) cited in Chisolm, *supra* note 6 at 704.

110 Gifford "House of Lords", *supra* note 57.

> [T]his recognition would be meaningless without the explicit apology by ex-colonial powers or their successors for those violations, and ... this apology should be duly reflected in the final Declaration of the World conference against racism, racial discrimination, xenophobia and related intolerance.[111]

This stance was echoed, albeit in weakened form, by the South African Foreign Minister, Nkosozana Dlamini Zuma who opined that one of the methods of dealing with slavery "would be to acknowledge and recognise there was a historic injustice".[112] Martha Minow considers that official apologies can correct a public record, afford public acknowledgement of a violation, assign responsibility, but that they "are less good at warranting any promise about the future, given the shifts in officeholders".[113] As a result, unless the apology is "accompanied by direct and immediate actions...that manifest responsibility for the violation, the official apology may seem superficial, insincere, or meaningless".[114] It is with this point in mind that other measures of satisfaction become increasingly important – for instance, measures aimed at raising public awareness of slavery. These measures would focus on "legitimising" the victims' side of history, and would be consistent with providing the moral global economy that reparationists strive for. The Durban Declaration reflects such thinking in urging the United Nations, other appropriate international and regional organisations and States to "redress the marginalization of Africa's contribution to world history and civilization by developing and implementing a specific and comprehensive programme of research, education and mass communication to disseminate widely a balanced and objective presentation of Africa's seminal and valuable contribution to humanity."[115] In this regard, one thinks of public education funds to facilitate public awareness of slavery and systemic discrimination. Chinweizu speaks, for instance, of the creation of a "Black Heritage Education Curriculum", to teach Africans their true history and to restore their

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111 Draft Declaration of the African preparatory meeting for the World Conference Against Racism, Racial Discrimination, Xenophobia and related Intolerance, as adopted by the Ambassadorial meeting on 8th December 2000, Arts. 21 and 22.

112 "Countries should be ready to discuss compensation for slavery – Dlamini-Zuma" *Reuters* (23 March 2001). The Durban Declaration however equivocates on the "apology" which the States' delegates offer.

113 Minow, *supra* note 87 at 116.

114 Minow, *ibid.*

115 Art. 118 of the Durban Declaration. See too Art. 119 which

> "Invites States and relevant international organizations and non-governmental organizations to build upon the efforts of the Slave Route Project of the United Nations Educational Scientific and Cultural Organization and its theme of "Breaking the silence" by developing texts and testimony, slavery multi-media centres and/or programmes that will collect, record, organize, exhibit and publish the existing data relevant to the history of slavery and the trans-Atlantic, Mediterranean and Indian Ocean slave trades, paying particular attention to the thoughts and actions of the victims of slavery and the slave trade, in their quest for freedom and justice."

sense of self-worth.[116] Similar measures include the institution of monuments and memorial days. In so doing, Africans as a group will eventually benefit as fallacies of inferiority are replaced by a true understanding of how integral the African presence has been to the success of Western economies.[117]

III. CONCLUSION

Reparation for slavery – or any other form of mass-atrocity – is a multifaceted issue that requires realistic political debate. In the context of slavery, the seemingly intractable legal problems associated with a claim for reparation, means that other, more overtly political strategies, may have to be turned to for success.

However, within the political realm the success of any strategy will be weakened by unrealistic demands for unworkable forms of reparation. In respect of slavery, return of stolen artefacts, expressions of regret for the slave trade, and programmes to raise public awareness of slavery are examples of legitimate and feasible forms of reparation, which African States, either corporately or singly, are entitled to on any moral account. But if Africans are to secure a moral global economy through the device of an African consciousness, African States have to adopt a purposive approach to their calls for compensatory justice, which will draw the support of Western States. An approach which focuses on contemporary development problems has the advantage of being aligned with existing international human rights struggles under the banner of socio-economic advancement and the right to development. By translating the duty to make compensatory reparation for past racist practices into a duty to speed up development of third world States, reparationists "provide another reason for doing the right thing".[118]

As a whole, each of the forms of reparation discussed in this article present their own promises and problems as responses to the history of slavery, and will no doubt hold different promises and problems as responses to other mass atrocities. This much is clear, whatever the reparation context, be it slavery, colonialism, genocide, or any other mass atrocity. While many Western States are understandably concerned about the implications of reparation claims, it is only through reasoned and appropriately goal-directed argument that reparationists will be able to convince them of an alternative that is worse. That alternative, in the words of Geraldine Van Bueren, is "that the passage of time has made Western states cosy with injustice".[119]

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116 Chinweizu, "Reparations and A New Global Order: A Comparative Overview", paper read at the second Plenary Session of the First Pan-African Conference on Reparations, Abuja, Nigeria (27April 1993), on line: <www.arm.arc.co.uk>.

117 Chisolm makes a similar point with regard to the African Americans and their presence as a driving force behind the success of the capitalist foundation of the United States (Chisolm, *supra* note 6 at 723).

118 See Human Rights Watch Report, *supra* note 66 at 5.

119 Geraldine Van Bueren.