



The Political Field of Reparations

John Torpey
(City Univ of New York, USA)



Abstract

This paper explores the field of reparations for historical injustices as an expression of the juridification of international affairs. Following Michael Mann, it examines the ideological, military, political, and economic reasons for the spread of reparations politics and the different meanings that the notion of reparations may have. This is explicated on the basis of the UN's Basic Guidelines on the Right to Reparation for Gross Violations of Human Rights, a crucial foundation for the pursuit of reparations in contemporary life.

Keywords

Reparations, juridification, human rights violations, Basic Guidelines



As a result not least of the reparations paid and the enormous amount of memory work done in connection with the destruction of the European Jews during World War II, the idea of “coming to terms with the past” has in recent years come to be regarded as a crucial element of progress toward more satisfactory and more democratic political and social relationships. In connection with this broader trend toward “coming to terms with the past,” there has also emerged a widespread expectation that what are called “reparations” are due to those who have been wronged by states and other entities in the past.

To anyone familiar with twentieth-century European history or with foreign affairs generally, it will immediately be clear that the use of the term “reparations” here involves a novel departure. Before the last couple of decades at most, in international affairs the term reparations referred to obligations incurred by a party to war that were to be paid to another country as compensation for the damages caused during the conflict. The contemporary usage of the term to designate efforts to repair gross violations of people’s human rights is thus quite new, and reflects important changes in the way in which we think about human social life.

In what follows, I want to consider the prevalence today of the demand for reparations for human rights violations and what that demand has come to entail. I then want to explore several causes of this development. My main claim here is that the emergence of the expectation of reparations for violations of human rights results from the post-World War II juridification of international affairs – the spreading transformation of international political questions into legal ones. The notion of juridification must be understood broadly – not merely as the use of legal venues strictly speaking, but involving as well all sorts of quasi-judicial institutions, such as truth and reconciliation commissions, historical tribunals charged with establishing contentious facts, international criminal tribunals, and the like. In analyzing the juridification of international affairs, I examine developments in the four realms of “social power” identified by Michael Mann¹ (1986;1993): the ideological, the economic, the military, and the political. I conclude by asking where we may be heading with regard to reparations claims-making and the achievement of human rights claims more broadly.

The Institutionalization of the Idea of Reparations for Gross Violations of Human Rights

The contemporary prevalence of the idea of “reparations” is reflected, among many other places, in the Chinese “Charter 08,” a document propagated in 2008 by China’s liberal community that advances many demands for a more democratic political order governed by the rule of law. In language that will sound familiar from other contexts, Charter ‘08 calls for “Truth in Reconciliation”:

We should restore the reputations of all people, including their family members, who suffered political stigma in the political campaigns of the past or who have been labeled as criminals because of their thought, speech, or faith. The state should pay reparations to these people... There should be a Truth Investigation Commission charged with finding the facts about past injustices and atrocities, determining responsibility for them, upholding justice, and, on these bases, seeking social reconciliation². (Link 2009)

Clearly, these are all very radical demands in contemporary China, as they imply a reckoning with perhaps the greatest famine in world history during the so-called Great Leap Forward, with the atrocities associated with the Cultural Revolution, and with the killings and arrests arising from the 1989 protests at Tiananmen Square. And although demands for coming to terms with the past are by no means always successful in democracies, it is only in democracies that one can reasonably expect them to be realized. In short, these demands are not likely to be fulfilled in China any time soon.

The varied elements of the demand for coming to terms with the past in the Chinese Charter ‘08 remind us that the UN definition of “reparation” – not reparations -- has a number of different dimensions. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (to which I will henceforth refer as the “Guidelines”³), adopted after years of discussion in December 2005, envision that victims of these wrongs should have a right to “reparation,” which can take the following forms:

- restitution
- compensation
- rehabilitation
- satisfaction
- guarantees of non-repetition

1. Michael Mann, *The Sources of Social Power* vol. 1: A History of Power from the Beginning to AD1760 (Cambridge U.P., 1986); do., *The Sources of Social Power* vol.2: The Rise of Classes and Nation-States (Cambridge U.P., 1993).

2. Perry Link, *China’s Charter 2008*, *The New York Review of Books*, January 15th, 2009

3. It should be borne in mind that, like so many elements of the contemporary human rights paradigm, the principal drafters have been lawyers, and this is very much reflected in the language and outlook of the relevant documents and institutions. Although long advanced by the Dutch human rights lawyer Theo van Boven, what came to be the Guidelines were long known as “the Bassiouni principles,” after their proponent, law professor Cherif Bassiouni.



Note that only two of these have anything to do with economic considerations; even “restitution,” as the U.N. defines it, has relatively little to do with money. That term is defined in the Guidelines as “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.” “Rehabilitation” mainly refers to the provision of necessary medical, legal, and social services; “guarantees of non-repetition” refers to institutional changes that would militate against repeat offenses. The more elusive notion of “satisfaction” involves a range of measures including establishment and publicization of the facts behind the injustices; clearing the names of those unjustly victimized; apologies; and the commemoration of victims. Truth commissions – those much-heralded vehicles for coming to terms with the past – would thus generally fall under the rubric of “satisfaction.” Such bodies have assumed an iconic status in efforts to come to terms with the past and to make reparation for past injustices, and have spread to many parts of the world⁴ (see Hayner 2010). There has even been an attempt by religious leaders to create a truth commission in the United States to call attention to the economic harms done by the recent and (ongoing) financial crisis.

In short, the terms “reparation” and “reparations” have a variety of meanings in international law and human rights parlance, only a relatively small portion of which have to do with monetary compensation. This fact is consistent with the claim that is frequently made by those seeking reparations that “it’s not about the money.” For many such claimants, the non-economic forms of reparation would suffice. Nonetheless, the term “reparations” has come to be widely associated with monetary compensation for some past wrongdoing. This is certainly true in the US, where “reparations for slavery” are generally assumed to involve some sort of monetary reparations. Indeed, the advocates of reparations for black Americans have been chiefly focused on the economic consequences of slavery and segregation, and hence on the way in which reparations might improve the situation of the most economically disadvantaged blacks in America today. The campaign has little to do with any of the non-economic aspects of “reparation.” This is an anomaly from the standpoint of the broader field of reparations claims-making, which tends to involve persons still alive today who have suffered injury at the hands of states or other entities and are seeking amends from the state or other parties. The “reparation” to which the Guidelines refer is meant primarily for living victims of maltreatment,

not those whose descendants seek compensation for the wrongs done to their relatively long-dead ancestors. Yet this case of reparations claims-making reflects the ways in which the iniquitous past may be said to persist into the present. **The recent racist killing of nine black churchgoers in South Carolina and the wave of objections to the Confederate flag provide one more unfortunate reminder of the ways in which the slave past continues to haunt American life. In the aftermath of the tragedy, one commentator has suggested that a simple apology would go a long way toward healing the country. That couldn’t hurt, of course, but we have a long way to go before we can undo the damage that slavery has done – and continues to do – in American life.**

The Juridification of International Affairs and its Sources

Where did all this reparations talk come from? Notwithstanding the variety of contexts giving rise to demands for reparations, they all reflect a broader tendency to transform political life into legal forms. This tendency was perhaps first identified by Alexis de Tocqueville in his famous travelogue about life in America. In the first volume of his classic study *Democracy in America*, Tocqueville (2000, 257) wrote that “there is almost no political question in the United States that is not resolved sooner or later into a judicial question⁵.” While this may have been true in the United States when Tocqueville wrote it, the trend did not take serious hold in the rest of the world until the post-World War II period, in connection with the creation of the United Nations and its quasi-governmental apparatuses, and especially since the end of the Cold War. But since then it has done so with great rapidity. The legal scholar Karen Alter (2012) has observed that, in 1989, there were six permanent international courts, whereas there are now over twenty-five that have collectively issued more than 27,000 binding legal rulings⁶. For example, a special international court recently convicted former president of Liberia Charles Taylor for war crimes and crimes against humanity during his brutal campaign in Sierra Leone in the 1990s. There have been many indictments of leading war criminals, such as those responsible for the atrocities in Bosnia in the 1990s and the Sudanese leader Omar Bashir for atrocities in Darfur, but Taylor was the first head of state convicted of such crimes. These are among the diverse phenomena that comprise the juridification of international affairs; clearly, the

4. See, Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of the Challenge of Truth Commissions* (2nd ed.)(Routledge, 2011)

5. Alexis de Tocqueville, *Democracy in America*, edited and translated by Harvey Mansfield and Delba Winthrop (U. Chicago P., 2000) 257.

6. Karen Alter, “The New Terrain of International Law: Courts, Politics, Rights”, Lecture, American Academy in Berlin, May 12th, 2012. <http://www.americanacademy.de/home/media/videos/new-terrain-international-law-courts-politics-rights>



list could be multiplied many times over by invoking the names of international courts, criminal tribunals, international administrative courts, and the like.

How did this process of juridification happen? I want to consider several factors: ideological, economic, military, and political.

Ideological factors

In 1898, the sociologist Emile Durkheim argued, in the context of the Dreyfus affair, that a “cult of the individual” had emerged in modern society. Yet he was not referring to the “individualism” which his compatriot Tocqueville feared might undermine the common good in America; instead, the cult of the individual referred to the exaltation of the human person *qua* person. “Whoever makes an attempt on a man’s life, on a man’s liberty, on a man’s honor,” Durkheim(1973, 46) wrote, “inspires in us a feeling of horror analogous in every way to that which the believer experiences when he sees his idol profaned⁷.” Indeed, despite Tocqueville’s concerns about the problem of individualism in America, he, too, had seen that the breakthrough of a more autonomous individual from traditional forms of social organization would lead to new forms of human solidarity. That is, there would be less loyalty to individual persons, as in feudalism, and more to humanity as a whole⁸ (Tocqueville 2000, 535-539). One might see this vision of a new, more general kind of solidarity among humans as the secularization of the Christian idea of universal human salvation; there is surely some of that involved. In all events, that idea entailed the notion of the sanctity of the person and the right to be secure in one’s person. In other words, it entailed the idea of human rights.

The idea of human rights was at the heart of the French Revolution and its Declaration of the Rights of Man and Citizen, which suggested that the rights of Frenchmen and the rights of human beings as such could be enunciated in the same document. On the basis of European experience during World War II, however, Hannah Arendt(1958) insisted that human rights were nothing unless enforced by a state (even if it is also true that human rights violations and crimes against humanity frequently occur with impunity as long as they remain within the borders of a given state)⁹. Some states do endorse those values within their own borders, and promote them at least rhetorically outside those borders. But states always have their own parochial interests.

What came into existence to transcend the particular interests of states was an intergovernmental quasi-

state – the United Nations – and, in due course, a panoply of quasi-judicial institutions that promoted what is typically known as “soft law.” Soft law involves largely unenforceable statements and principles of desired states of affairs with regard to individual treatment and well-being in the world. The Guidelines on Reparation for Gross Violations of Human Rights are such a statement. They can do relatively little to bring about these desired states of affairs, but constitute a standard for shaming those reprobates who fail to live up to them. But these statements and principles comprise an important part of the climate of international opinion today. As leader of a country with a seat at the United Nations, one normally wishes to be seen as a member in good standing of the international community, which presupposes adherence to the norms of democracy, the rule of law, and respect for human rights. And while some may regard the present and the future as the only relevant time-periods for achieving human rights, many have looked to the past as the source of contemporary inequalities and injustices, and sought to fix the present by way of the wrongs of the more or less distant past. The fact, of course, is that these apparently distinct periods meld into one another in ways that make them and their consequences difficult to disentangle, opening the door to claims-making about what may seem to some to be long-forgotten events.

Economic factors

The major shift that has taken place economically that has promoted the ideas of human rights and reparations has been the transition from a predominantly industrial to a post-industrial society. Industrial society, particularly in its “Fordist” variant, involved the creation of large factories into which substantial numbers of more or less interchangeable personnel were inserted. Industrial conflict thus typically took the form of unions grouping together massive numbers of workers who were arrayed against the employers of their labor power contesting wages, working conditions, and the like. Notwithstanding their elimination of labor markets, Soviet-type societies largely followed this basic framework of organization, and indeed were typified by huge industrial combines that also served a variety of their workers’ needs, from child care to burial arrangements. By 1989, this “Fordist” model was buried as it came under challenge from a service economy in which tiny bits of gadgetry would soon transform the way people lived their everyday lives.

7. Emile Durkheim, “Individualism and the Intellectuals”, in: Emile Durkheim on Morality and Society, edited by Robert Bellah (U. Chicago P., 1973) 46.

8. Tocqueville, *supra* note 5, at 535-539.

9. Hanna Arendt, *The Human Condition* (U. Chicago P., 1958(1998)).



The electronic/micro-chip revolution overwhelmed the mass-production economy, at least mentally speaking, and turned everyone into his or her own center of communications. Computerization strengthened the drive toward individualization that has been widely observed to have accompanied the decline of factory employment in the more developed world. The shift to computers and the Internet thus facilitated a significant hollowing out of earlier ideas about working-class solidarity and economic justice. Now, it seemed, everyone was (or was expected to be) a consultant, a freelancer, an entrepreneur. The middle-class “golden age”¹⁰ (Hobsbawm 1994) that had attended postwar Fordist and Keynesian socio-economic arrangements came under assault by employer organizations and conservative think-tanks in the United States and elsewhere, leading to the global predominance of the so-called “Washington Consensus” concerning the desirability of free-market principles and practices. Instead of enjoying the well-being once made possible by collective bargaining agreements, workers were increasingly thrown back on themselves. Increasingly it was the new idea, the new device, the new app that generated wealth. Having intellectual capital and making it pay became the order of the day. All of this rendered individuals more exposed to markets and dependent on their services, even for some of their most intimate needs¹¹ (Hochschild 2012).

Against this background, human rights and the idea of reparations as compensation for past wrongs resonated with a broader neo-liberal and individualistic mindset that has dominated the sensibilities of educated elites for the past three decades and more. Insofar as monetary reparations are the aim, the idea of reparations for historical injustices fits in with a broader legalistic outlook that assigns values on the basis of individual “desserts” rather than on the basis of membership in a community as such. It also harmonizes with the general trend in policing toward “victim’s rights,” which reflect a broader shift away from public notions of justice and toward more private ones¹² (see Garland 2001, 11-12). This is emphatically not to say that the idea of reparations for past injustices is a bad thing, but simply that it is part of a wider trend toward a thinner conception of national citizenship **and away from a more holistic conception of the nation.**

Many reparations claims-makers are of course defined as members of groups – indigenous peoples, victims of overseas colonialism, the descendants of slaves – and may seek non-monetary objectives from their former tormentors

rather than money. Yet money is often the medium through which amends are made, simply because there may not be any other way to set things right if lands have been taken, people killed, or cultures disrupted. The interned (incarcerated) Japanese-Americans wanted (and got) an apology from the U.S. government for their mistreatment during World War II, but they also got \$20,000 per person as a way of demonstrating that the United States was serious about righting this wrong.

Military factors

With regard to military developments, the decisive transition has been that from mass conscription to a combination of rarely used nuclear weapons and highly professionalized commandos combined with unmanned or abstract forms of conflict (e.g., drones and cyberwarfare). The French Revolution introduced the *levée en masse*, the idea that it was the obligation of every French citizen to defend the revolution against its antagonists. The idea of a militia recruited from the citizenry thus came to be the norm for modern nation-states. Yet the Second World War, the last military conflict involving huge numbers of soldiers fighting interstate wars of conquest, ended in one theater in a defeat of conventional forces and in the other with the use of atomic weapons of unprecedented exterminatory power. Ever since, the world has been preoccupied with the problem of “nuclear proliferation,” on one hand, and with civil and “guerrilla” wars, on the other. From Vietnam to Yugoslavia, Rwanda and the larger Middle East **and North Africa**, interstate warfare has declined notably in favor of the spread of various kinds of “internal” wars.

In the more developed parts of the world, therefore, conscription has increasingly been abandoned with the result that the more comfortable members of these societies can scarcely imagine participation in military life. Meanwhile, the inhabitants of the world’s poorer precincts are often exposed to the depredations of warlords and forced impressment into military service, or rented out as policemen for the international community. The general result is that war as we have traditionally known it has become an activity conducted by the world’s poor and less-educated, fighting it out over better grazing lands, profitable minerals, control of smuggling routes, or the old-fashioned spoils of government. War and the atrocities that frequently accompany it increasingly appear bizarre and incomprehensible to those located in the world’s more prosperous and democratic countries. In this context, the notion that one ought to be

10. Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914-1991* (Vintage, 1994).

11. Ariele Hochschild, *The Outsourced Self: Intimate Life in Market Times* (Metropolitan Books, 2012).

12. See, David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (U. Chicago P., 2001) 11-12.



compensated for pointless suffering may seem to go without saying to those who think such things far-off and barbaric. The fact that reparations for victims of human rights violations are often hard to come by in those places where war and atrocities are endemic doesn't necessarily enter the discussion. One hopes that they might be made more accessible to victims, but it is not always clear how this is going to happen if the wherewithal or the political will is lacking to fund the various programs associated with reparations claims.

Political factors

One major political factor overwhelms all others with regard to the spread of the idea of human rights norms and of the idea of reparations as compensation for past wrongdoing – namely, the geopolitical dominance of the United States in post-World War II global affairs. Unlike the British and French, the postwar U.S. was not burdened with extensive colonial empires with many grievances against their soon-to-be former colonial masters. The U.S. could thus support decolonization, not least on the basis of its own heritage as the first revolutionary, post-colonial state. The United States was also crucial to the creation of the United Nations and, in a reflection of the emerging Cold War rivalry, helped persuade the United Nations to reject Soviet efforts to tie the definition of genocide more closely to Nazi atrocities¹³ (Novick 1999, 100). The idea of genocide as outlined by Raphael Lemkin thus received much greater attention than it might have had the Soviets had greater influence in early postwar world affairs. Still, the Soviet challenge led the United States to behave better with regard to racial inequality than it would otherwise have done, although the granting of civil and political rights was not accompanied by reparations in the sense usually intended (i.e., leaving aside “affirmative action” measures)¹⁴ (Dudziak 2002). The post-Soviet era of even more untrammelled American dominance led to the opening of archives that made possible further inquiry into World War II and other pasts, which in turn stimulated a variety of demands for coming to terms with unsavory pasts, especially in the former Communist world.

Another aspect of the importance of American dominance to the spread of human rights and reparations claims-making has been that international campaigners for reparations have taken advantage of the receptivity of American courts to lawsuits arising from actions taking place elsewhere. For example, the Alien Tort Statute,

which allows U.S. courts to hear suits for heinous crimes that may have taken place anywhere in the world, has been a crucial tool in this regard. Nigerian activists persecuted for their opposition to Shell Oil's activities took advantage of the statute to promote a settlement when their leader, Ken Saro-Wiwa, was killed in the 1990s¹⁵ (see Mouawad 2009; Weiss 2012). None of this is to say that the United States has been by any means perfect in terms of its record on human rights, and it has often had to be forced to live up to commitments it expected rhetorically of other countries but failed to meet itself.

American influence in the world is waning, however, and the United States now confronts a world with many different regional centers of power and attraction¹⁶ (Kupchan 2012). With growing pressure for a re-balancing of the Security Council to reflect this changing reality, there is every reason to think that there will in coming years be greater parity in international decision-making, with countries such as the BRICS acquiring increasing sway in global councils. But, as we have seen in the case of the Syrian rebellion, a possible global order dominated by Russia or China is not likely to be one in which human rights or reparations for past injustices receive much attention. The widespread support for human rights among European countries certainly helps sustain the human rights revolution, and with it the pressure for reparations in particular cases. But European influence remains limited as compared to American and is likely to do so for the foreseeable future – with the exception of human rights standouts such as Norway and Denmark.

The Future of Reparations

The foregoing discussion demonstrates that there are some very deep sources of the new expectation of reparations for victims of gross violations of human rights. The notion is now institutionalized, at least at the level of UN “soft law.” The term has become widely familiar – if not always a matter of enthusiasm – among scholars, NGO activists, and politicians. Yet the juridification of politics is not necessarily solidly entrenched or irreversible. There is little doubt, for example, that the campaign for reparations for slavery in the United States suffered a grievous blow with the attacks of 9/11/2001. While that campaign had begun to garner significant national attention, Americans' concerns quickly shifted to Al Qaeda and the greater Middle East and away from matters of domestic historical injustices. Relatively little has been heard from the

13. Peter Novick, *The Holocaust in American Life* (Houghton Mifflin, 1999) 100.

14. Mary Douziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton U.P., 2002).

15. See, Jad Mouawad, “Shell to Pay 15.5 Million to Settle Nigerian Case”, *The New York Times*, June 8th, 2009; Peter Weiss, “Should Corporations Have More Leeway to Kill Than People Do?”, *The New York Times*, February 24th, 2012.

16. Charles Kupchan, *No One's World: The West, the Rising Rest, and the Coming Global Turn* (Oxford U.P., 2012).



movement since. Yet that is a matter of American domestic politics; 9/11 hardly derailed the spread of reparations claims—making globally, as reflected in the 2005 adoption of the UN Guidelines on Reparation for Gross Violations of Human Rights.

Still, this example suggests the problem with the juridification of politics: it has the vice of its virtues. That is, juridification shifts political questions to courts or court-like venues, and while courts may help pacify otherwise violent conflict, courtrooms and UN hearing rooms are intrinsically the province of elites who may or may not represent a broader constituency. The point is often made with regard to reparations for black Americans that the courts have been a crucial venue in which blacks' interests have been promoted; activists seeking monetary reparations have argued that a court decision in their favor could help spark a broader legislative push. Yet so far there has been relatively little popular political support for the idea of reparations for blacks, no doubt in part because of the complexities inevitably associated with the distribution of compensation. One may doubt that the new National Museum of African American History and Culture on the Mall in Washington, D.C. will mollify those concerned primarily with fixing racial inequality of a predominantly economic kind.

In cases of mass atrocities, the problem is often one of establishing mechanisms for reparation in places that are rebuilding war-torn economies or attempting to create a functioning political or judicial system of their own. Some have argued in the aftermath of the Charles Taylor decision that it would have been better to try Taylor in Africa than far off in the Hague, where the “demonstration effects” in Africa would be more limited. They also point to the enormous cost -- \$250 million over many years - that might better have been spent on rebuilding Sierra Leone. Most problematically, the decision has prompted renewed criticism of the “international community” for selective prosecution of miscreants. Notwithstanding its historical role in helping to establish some of these mechanisms, critics noted that prosecutions of other leaders involved in the conflict that might be antagonistic to American interests would have resulted in the cut-off of American funding for the special court.

While elections are sometimes stolen, to be sure, there is always the danger that justice, too, may be tainted by the preferences of the powerful. The juridification of international politics has helped establish the notion that victims of gross violations of human rights deserve reparations of various kinds. But it cannot necessarily enforce that notion very effectively, and claims for reparations that may appear to be straightforwardly deserved are in fact always a matter of political contestation at the domestic and or the international levels. The spread

of legal mechanisms for handling international conflict and past wrongdoing constitutes an advance in human affairs. But we shouldn't imagine that they are something other than a continuation of politics by other means.

Finally, there is a way in which past wrongs can never be undone. As one writer once put it, “The slain are truly slain.” There is no bringing them back. Money may help. But as creatures who seek meaning in life, explanations may matter more. Only the victims themselves can decide which is more important to them, and they will often be unsatisfied with efforts to make whole what has been smashed.

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