



International Redress for Past Atrocities: A Theory of Redress¹

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Abstract

The International Redress Movement (IRM) developed as an area of specialty in international human rights in the years after the Holocaust—the atrocity of the twentieth century. It is a concerted effort by activists, government officials, NGOs, victims, and scholars, to establish humanity in the aftermath of an atrocity. Based on an empirical investigation of redress movements around the world, this article formulates a theory of redress; i.e., it sets forth the elements relevant to a serious discussion of redressing past atrocities and, more specifically, the elements that one normally finds in successful redress movements. The latter discussion presents a reparative framework consisting primarily of two competing redress models—the tort and atonement models—and their accompanying forms of postconflict justice—compensatory, retributive, restorative, and, in transitional states, redistributive justice. In my view, restorative justice is the highest form of reparative, or postconflict, justice, especially in nontransitional regimes, because it has a conciliatory nature that affirms our deepest sense of humanity. For that reason, I generally favor the atonement model.

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I. Overview of International Redress Movement (IRM)

In 1952, the global community was still staggering with intense fear, shock, dismal, and disgust from its discovery of the Holocaust at the end of the Second World War. Speaking for the German government and its people, Konrad Adenauer, the first chancellor of the Federal Republic of Germany, announced: "In our name, unspeakable crimes have been committed and demand compensation and restitution, both moral and material, for the persons and properties of the Jews who have been so seriously harmed."²

Adenauer's words of redress and human rights established a tone of redemption that restored our faith in human development. Those healing words, spoken on behalf of the perpetrator of one of the worst atrocities in the history of the world, reset the world's moral compass. Adenauer is considered by many to be one of the leading statesmen responsible for reshaping the community of nations in the years after World War II. There is a full-length statue of him in the Nixon Presidential Library in California along with statues of Winston Churchill, Charles de Gaulle and other world leaders of that era.

Adenauer is so honored because he gave the world a vision for responding to atrocities like the Holocaust. He taught us that as civilized nations, we must respond to atrocities not with hate, not with bloodshed, not shame, but a collective spirit of heightened morality, egalitarianism, identity, and justice.

Atrocities can happen in any country. There is a beast in all societies waiting to be unleashed by some extraordinary event—e.g., fear, greed, or anger. Redress ("both moral and material") may be our only hope of ever taming that beast. That message is Adenauer's gift to the world.

Informed by this post-Holocaust spirit, two broad strategies of redress have emerged in the decades following World War II. One strategy involves the criminal process and the other the civil process. Both seek to advance human development in the aftermath of an atrocity, but each pursues this goal through a different style of justice. Criminal redress seeks emphasizes retributive justice in the form of state prosecution of crimes under both domestic and international law. Individual perpetrators are fined, imprisoned, or executed.

Civil redress, in contrast, is an avenue for private redress. Unlike criminal redress, civil redress

operates for the benefit of the victims as opposed to the state. The state benefits from criminal redress and the victims benefit from civil redress. There are various forms of civil redress, each one emphasizing a particular style of post-conflict justice.

This article focuses on civil redress. Before delving into that topic, I would like to briefly discuss two threshold questions: what is an atrocity, and why should we care about past atrocities? These are important questions.

II. Threshold Questions

In my book, *When Sorry Isn't Enough*, I defined an atrocity, or human injustice, as "the violation or suppression of human rights or fundamental freedoms recognized by international law."³ I now believe that this definition may be too broad. I, in fact, recognized this problem in my book, where I indicated that this definition "includ[es], but [is] not limited to genocide; slavery; extrajudicial killings; torture and other cruel or degrading treatment; arbitrary detention for a period of time; rape; the denial of due process of law; forced refugee movements; the deprivation of a means of subsistence; the denial of universal suffrage; and discrimination, distinction, exclusion, or preference based on race, sex, descent, religion, or other identifying factor with the purpose or effect of impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, social, economic, cultural or any other field of public life."⁴

The problem with this definition is that it includes everyday acts of wrongdoing, such as garden variety discrimination claims, including state-sponsored or sanctioned housing discrimination or employment discrimination. I tried to correct that problem in my more recent book, *Atonement and Forgiveness*, where I offer a more limited definition. There I define atrocity as an "exceptional act[] of human degradation."⁵ This definition would certainly exclude garden variety racial discrimination, which are already covered by existing domestic law; e.g., in the U.S. racial discrimination is covered by civil rights laws. An African American who is denied employment because of his race has experienced a wrongdoing but not an atrocity.

This new definition—an exceptional act of human degradation—would certainly include the Comfort Women and the April 3d Massacre. The question I raise for you to think about is whether this

2. This quotation is taken from a report by the U.S. Department of Justice Foreign Claims Settlement Commission, *German Compensation for National Socialist Crimes*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (Roy L. Brooks ed., 1999), p. 61 [hereinafter *WHEN SORRY ISN'T ENOUGH*].

3. *Ibid.* p. 7. See, e.g., Max du Plessis & Stephen Peté, Preface to *REPAIRING THE PAST? INTERNATIONAL PERSPECTIVES ON REPARATIONS FOR GROSS HUMAN RIGHTS ABUSES* (Max du Plessis & Stephen Pete eds., 2007), p. v.



definition—exceptional act of human degradation—excludes such atrocities as the American internment of Japanese Americans during World War II in which there were no mass killings or torture but people were taken from their homes and lived in internment camps for the duration of the war. Some of my students believe that internment does not constitute an atrocity under any definition. It is not like the Holocaust, slavery, or mass killings. Are they right? I leave it to the reader to decide for himself or herself.

The second threshold issue I should like to consider is this: why bother redressing past atrocities? Why should nations and citizens even be concerned with a wrongdoing that took place years ago, decades ago, centuries ago? Why not let the past be the past, bygones be bygones? Why dredge up dirt from the past?

My earlier discussion of Adenauer answers this question. The main reason for looking back in our history is so that we can move forward in our lives in the aftermath of an atrocity. If we allow collective amnesia about past atrocities, then we miss the opportunity to learn from our past wrongdoing and avoid future wrongdoing. Forgive but do not forget.

Seeking redress for past atrocities also gives the perpetrator an opportunity to reclaim its moral character lost in the commission of the atrocity. The very desire and effort to reclaim moral character helps to insure that the perpetrator will not commit an atrocity in the future. I will say more about this important aspect of redress later in this article.

A final reason for redressing past atrocities is to repair the broken relationship between the perpetrator and victims wrought by the atrocity. Typically, the perpetrator of an atrocity and its victims are locked into a future relationship. That relationship is poisoned when the two are party to an event that brought so much suffering to the victims and that has so tarnished the moral character of the perpetrator. There has to be some sort of reckoning of past accounts before the perpetrator and victims can move forward in a healthy relationship. In order for this reconciliation between perpetrator and victim to take place, the public will have to be educated about the atrocity, and in order for that to happen, the historical record of the atrocity has to be set straight, clarified, or corrected. Thus, educating the public about the atrocity and setting the historical straight are two additional reasons for revisiting the past.

Again, forgive but never forget.

III. A Theory of Redress.

In my book, *When Sorry Isn't Enough*, I observed conditions or elements that seemed to be present in most successful civil redress movements. Together these conditions constitute a theory of redress. This theory has five elements.⁶

The first element is the need for a legislative or executive forum. In most successful cases, redress comes from the legislature and not the judiciary. Legislatures have more legal authority to act than do courts. The first Chief Justice of the U.S. Supreme Court, John Marshall, recognized long ago in a case involving the Cherokee Indian Nation. There, the Supreme Court ruled that the judiciary has limited jurisdiction or governmental authority over claims regarding past atrocities. The highest court in most every nation that has spoken on the matter has come to the same conclusion.

The second element is a logical extension of the first: political pressure must be exerted on the legislators. The victims or their supporters must exert political pressure to get the legislature to act.

The third element extends from the second: there must be strong internal support for redress. The victims themselves must want redress. One of the reasons slave redress has failed in the U.S. is because African Americans have not exhibited strong support for redress, certainly nothing approaching the support for civil rights during the 1950s and 1960s.

Strong internal support necessarily includes the creation of strong organizations that enable the group to focus, strategize, and get things done. Perhaps the main reason the Gypsies, or Roma, have not received redress for Nazi persecution in the Second World War is because they lack the organizational structure to formulate and push their redress claim.

Having a meritorious claim is the fourth element of successful civil redress. The victims must assert a meritorious claim for redress. There are five characteristics of a meritorious redress claim. The first is that the claim must relate to a particular type of wrongdoing; i.e., an atrocity as discussed earlier. Again, the threshold question as to what constitutes an atrocity remains open. The second requirement of a meritorious redress claim is that it must be well-documented. The third requirement is that the victims must be an identifiable group; e.g., Korean and other women sexually enslaved by the Japanese Imperial Army are identified as the Comfort Women. The Fourth requirement is that the victims must continue to suffer. This requirement

4. *WHEN SORRY ISN'T ENOUGH*, p. 7.

5. ROY L. BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS* (2004), p. 142 [hereinafter *BROOKS, ATONEMENT AND FORGIVENESS*].

6. See *WHEN SORRY ISN'T ENOUGH*, pp. 6-9



warrants further comment.

Some victims may recover financially from an atrocity but carry emotional scars. Emotional suffering counts. In passing the Apology Resolution in 1993, in which the U.S. government apologized for overthrowing the sovereign nation of Hawaii one hundred years earlier, Congress and the president acknowledged the continuing economic and social suffering of the people of Hawaii.⁷ One of the issues I have raised in civil redress discourse is whether this requirement is even needed under one form of redress call the atonement model. Certainly, it is needed under the tort model. I shall discuss both the atonement model and tort model in a greater detailed later this article.

The fifth feature of a meritorious claim is that the victims must have suffered because of the perpetrator's wrongdoing. There must be a causal relationship between the atrocity and the suffering. In other words, the victim must establish damages caused by the atrocity.

These are the five requirements of a meritorious claim that one tends to see in successful redress movements. A meritorious claim is the fourth element of my theory of redress. The last element of my theory of redress is that the redress claim must have an articulated normative stance. It must promote one or more forms of post-conflict justice: compensatory, retributive, restorative or redistributive justice. The question is this: What is the post-conflict theory of justice being pursued by the redress movement? The answer to that question can be found in the form of redress the victims demand.

IV. Forms of Redress

Like criminal redress, civil redress seeks ultimately to vindicate human dignity. Unlike criminal redress, civil redress works to the material benefit of the victims. It is, in essence, private redress that takes place in a public forum.

There are several forms of civil redress. Each one promotes one or more models of justice, postconflict justice—retributive, compensatory, restorative, or redistributive justice.

A. Truth Commissions and Truth Trials

The first two forms of civil redress are truth commissions and truth trials. Truth commissions and truth trials are relatively straightforward civil redress models. They are typically used in conjunction with the atonement model. South Africa and Sierra Leone employed truth commissions in their approaches to redress, while Argentina used

both truth commissions and truth trials. Truth commissions and truth trials primarily seek to get at the truth, and provide a predicate for restorative justice.

In many ways, the South African Truth and Reconciliation Commission set the standard for the use of the truth commission. After Apartheid ended, the government created the Truth and Reconciliation Commission (TRC) to conduct hearings for the purpose of uncovering the truth about Apartheid: who did what to whom and what were the consequences to the victims?⁸

To encourage individual perpetrators to come forward and speak the truth, the TRC was given a controversial additional power—the power to grant amnesty from criminal and civil prosecution for truth-tellers. Headed by the world-renowned Archbishop of South Africa Desmond Tutu, the TRC uncovered untold acts of violence and torture that proved useful for two purposes—it set straight the historical record regarding the atrocity, and it established a factual predicate for the creation of meaningful reparations.

The TRC made the difficult and controversial judgment that it was better to pursue restorative and redistributive justice through a regime of civil redress than to pursue retributive justice in the form of criminal prosecutions. They deemed redistributive justice a necessary vehicle for transitioning the country toward democratic government and racial reconciliation. The success of this calculation is still very much an open question; for although there has been a meaningful redistribution of political power in South Africa, there has not been a meaningful redistribution of educational and economic opportunities.

Not unlike South Africa's TRC, Sierra Leone's TRC (SLTRC) was created to get at the truth. It was established as part of the Lome Peace Accord, which marked the end of the civil war in 1999, with the help of Reverend Jesse Jackson. The SLTRC's findings provided an unbiased historical record of the violations of international human rights committed during the conflict. These findings proved to be a vital step in furthering the process of reconciliation. The SLTRC also presented recommendations, including a recommendation that the government should issue a general apology and implement a series of reparations. Although the government issued apologies on a number of occasions, it failed to implement most of the recommended reparations due to a lack of economic resources.⁹

Like all truth commissions, Argentina's truth commission, the Argentine National Commission on the Disappeared, sought to clarify the facts

7. Apology Resolution of 1993, S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993).

8. See generally Brooks, What Price Reconciliation? in *WHEN SORRY ISN'T ENOUGH*, pp.443-445.

9. See Laura R. Hall, Recent Development: Prospects for Justice and Reconciliation in Sierra Leone, 44 *HARV. INT'L L.J.* 287 (2003); Jesse Jackson in *Sierra Leone Talks*, BBC NEWS (May 18, 2000, 2:28 PM), <http://news.bbc.co.uk/2/hi/africa/753728.stm>.



of its atrocity, the so-called “Dirty War.” During this atrocity (1976–1983), Argentina’s military government killed, tortured, and arrested thousands of suspected leftist dissidents. Many innocent people, called “the disappeared,” simply disappeared, never to be found. In addition to creating a historical record, which could aid in the prosecution of war criminals, the commission also recommended specific reparations.¹⁰

The commission recommended compensatory reparations in the form of economic assistance, educational grants, and employment to the families and relatives of the “disappeared.” Rehabilitative reparations included new laws to combat forced abduction and other measures to strengthen human rights.

Argentina’s truth commission failed, however, to respond to a crucial need of the victims—finding out what happened to their disappeared family members. Groups like the Madres de Plaza de Mayo called for the judiciary to initiate truth trials. In these trials, perpetrators already under the protection of the amnesty laws would be forced into court to testify about what they knew about the disappeared.

B. Apologies

It is no small matter when the perpetrator of an atrocity tenders an apology. At its highest level, the perpetrator expresses remorse and seeks to reclaim its moral character in the aftermath of a grave human injustice. Over the years, apologies have come from all corners of the world, including Britain’s Queen Elizabeth apologizing to the Maori people, Australia apologizing to the stolen Aboriginal children, Japanese Prime Ministers apologizing to the Comfort Women, who have rejected such apologies as insufficient, and South Korean’s president for the Jeju atrocity.

I do not believe that an apology by itself is sufficient to elevate the level of humanity in the aftermath of an atrocity. In other words, saying “I’m sorry” is not enough to redress an atrocity. The citizens of Hawaii have said as much to the U.S. apology for the overthrow of the Hawaiian Kingdom. The details surrounding the apology are as follows.¹¹ About 120 years ago, the U.S. government participated in the overthrow of the Kingdom of Hawaii. With the use of military force and intimidation, the United States effectively dethroned the Kingdom’s Queen, Lili’uokalani. The provisional government that replaced the Kingdom took away the native people’s lands, destroyed their culture, and limited

their freedom, leaving the indigenous people with a diminished sense of self-worth and belonging—i.e., cultural genocide.

In 1993, the hundredth anniversary of the overthrow, the United States issued a formal apology. Congress passed the “Apology Resolution.” The resolution’s purpose was to “(1) educate the American public and the Congress on the history of U.S. involvement in the overthrow and its aftermath; and (2) set the record straight regarding the 1983 Native Hawaiians Study Commission’s (NHSC) majority report, which concluded that the U.S. government was not liable for the loss of sovereignty of lands of the Hawaiian people in the 1893 overthrow.”¹² Specifically, the resolution acknowledged that the Hawaiian Kingdom was self-sufficient, that the United States played a major role in its overthrow, including the cession of lands from the Native Hawaiian people to the U.S. government, and that, as a result, the “long-range economic and social changes in Hawaii . . . have been devastating to the population and to the health and well-being of the Hawaiian people.”¹³

Having passed the Senate by a vote of sixty-five to thirty-four and the House by a voice vote, President Clinton signed the resolution into law on November 23, 1993.

Senator Daniel Inouye of Hawaii, one of the primary sponsors of the legislation, argued that an apology was necessary to mend the country’s broken past and to “cleanse one of our pages, to make it a bit brighter. We are not here to change history. But we can acknowledge responsibility.”¹⁴

Some activists have criticized the Apology Resolution because it effectuated no concrete changes. It did not provide reparations. This indeed was the intent of the resolution, as it clearly stated, “[n]othing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.” As Hannah Reeves, a full-blooded Native Hawaiian, stated, “‘Apology is not enough You must help our people.’”¹⁵

Apologies can, however, be useful when reparations accompany them. Reparations need not always be joined with an apology; in fact, they usually are not. When issued without an apology, reparations constitute a form of redress called the tort model. In contrast, an apology used in conjunction with reparations creates a form of redress called the atonement model. The primary social and political objective of the atonement model is restorative justice (a forward-looking process), while the tort model mainly seeks to achieve compensatory

10. See COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS [COMMISSION ON THE DISAPPEARED], NUNCA MÁS [NEVER AGAIN], translated in: NUNCA MÁS (NEVER AGAIN): THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 446 (Faber & Faber, Ltd., 1986).

11. See Apology Resolution of 1993, S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993).

12. *Ibid.*

13. *Ibid.*

14. 139 CONG. REC. S14481 (daily ed. Oct. 27, 1993) (statement of Sen. Inouye).

15. Native Hawaiians Seek Redress for U.S. Role in Ousting Queen, N.Y. TIMES (Dec. 11, 1999), <http://www.nytimes.com/1999/12/11/us/native-hawaiians-seek-redress-for-us-role-in-ousting-queen.html> (quoting Hannah Reeves).



and sometimes punitive, or retributive, justice (a backward-looking style of redress).

C. Reparations

There are two basic forms of reparations: victim-directed reparations, or compensatory reparations, and community-directed reparations, or rehabilitative reparations. Victim-directed (compensatory) reparations “are directed toward the individual victim or the victim’s family.” They are compensatory, but only in a symbolic way, as “nothing can undo the past or truly return the victim to the status quo ante.” Rather than directed toward the victim or the victim’s family, community-directed (rehabilitative) reparations seek to redress the harm the atrocity has visited upon a large portion of the victim’s group or community, whether or not a particular beneficiary of the redress was a direct victim of the atrocity. These are community-building reparations. Not unlike voluntary affirmative action programs, rehabilitative reparations respond to the lingering effects the atrocity has on the victims’ social group as a whole. Ultimately, rehabilitative reparations seek “to nurture the group’s self-empowerment, and thus aid in the nation’s social and cultural transformation.”¹⁶

Both forms of reparations can be divided into monetary and nonmonetary (or in-kind) reparations. When cash is given to the victims or their families on an individual (sometimes needs-only) basis, that constitutes a monetary victim-directed (compensatory) reparation. When cash is given to members of the victims’ community, that is a monetary community-directed (rehabilitative) reparation. When medical or psychological assistance, job training or job placement, or a special educational program is provided to the victims or their families on an individual basis, that is a nonmonetary (or in-kind) victim-directed (compensatory) reparation. When such services are provided to the victims’ community, that is a nonmonetary community-directed (rehabilitative) reparation.¹⁷

Victim-directed (compensatory) reparations are typically pursued through the tort model. In contrast, community-directed (rehabilitative) reparations are more suited for the atonement model. Each model brings its own brand of justice to the table.

D. Tort Model

Reparations of any kind that are not preceded by an apology operate as a form of postconflict redress for tort liability. The victim or the victim’s family typically seeks compensation for personal injury sustained as a result of the perpetrator’s intentional acts of

wrongdoing. Victims can also seek retributive, or punitive, justice in conjunction with compensatory justice.

Although victim-directed (compensatory) reparations are most commonly pursued under the tort model through civil litigation in which the victim sues the perpetrator in court, they can also be pursued through legislation. The Rosewood Compensation Act is one example. In 1994, the Florida legislature enacted the act to compensate blacks who lost property after a race riot that demolished the all-black town of Rosewood in 1921. The Act issued no apology in connection with such compensation, but merely sought to compensate the victims and hence settle the matter once and for all.¹⁸

Forced labor litigation is a prime example of victim-directed (compensatory) reparations pursued through litigation. Filed in U.S. courts, these cases consist of dozens of class action lawsuits brought by private citizens and World War II veterans of both the U.S. and Allied armed forces. These lawsuits named the governments and several corporations of Japan and Germany as defendants. The plaintiffs asked for damages for unpaid wages and injuries arising from the labor they were forced to perform under inhumane conditions while held captive or as POWs during World War II. The Comfort Women have sued Japan in U.S. federal court as well. All these plaintiffs asserted claims under U.S. constitutional and statutory law, state constitutional and statutory law, as well as international common law (or customary international law). Like most civil redress litigation, these lawsuits have been unsuccessful. They were dismissed on numerous grounds: the primary ones being lack of subject-matter jurisdiction, violation of sovereign immunity, and expiration of the statute of limitations.¹⁹

These cases demonstrate that legislation may be a more practical path to reparations than litigation. Even assuming a country’s system of laws allows for reparative litigation, adjudication is expensive, time-consuming, cumbersome, and indeterminate. There are too many hurdles to scale and too many hoops to jump through. Finally, judges have far less power than legislators to effectuate compensatory, retributive, restorative, or redistributive justice.

Even if successful, reparations through the tort model have many deficiencies as a civil redress model. For example, using the tort model can result in an insufficient development of the historical record of the atrocity. Knowing what happened is crucial to any attempt to redress a past atrocity. With many lawsuits filed, it is quite probable that one

16. BROOKS, ATONEMENT AND FORGIVENESS, p. 156.

17. *Ibid.*

18. See Kenneth B. Nunn, Rosewood, in *WHEN SORRY ISN'T ENOUGH*, pp. 435-436.

19. See, *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160, 1162-64 (N.D. Cal. 2001); *Hwang v. Japan*, 413 F.3d 45 (2005). See also, Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 *Berkeley Women's L.J.* 174 (2001).



judge may see the facts of the atrocity differently from another judge. Thus, several different versions of the same set of facts can emerge in litigation. Perhaps the larger concern is that there may not be any development of the historical record at all. Some judges may feel institutionally constrained to develop the record of an event that took place long ago. If the case is tried before a jury, there will be no formal finding of facts except a verdict for or against the parties. And, finally, the parties may simply agree to a quick settlement without paying any attention to the historical record, except the usual settlement refrain that the defendant does not admit to a violation of any law.

The tort model is also deficient in that it is essentially a backward-looking redress model. As such, it offers a narrow view of the redress movement. For example, the Black Redress Movement in the United States is traditionally focused on paying descendants of slaves for their slave labor. This redress approach “implies that proposals for reparations focus on the injustices of the distant past.”²⁰ It completely sweeps under the rug the fact that slavery has lasting effects that are felt in society today. Professor Boris Bittker made this argument many years ago:

[T]his preoccupation with slavery ... has stultified the discussion of black reparations by implying that the only issue is the correction of an ancient injustice, thus inviting the reply that the wrongs were committed by persons long since dead, whose profits may well have been dissipated during their own lifetimes or their descendants' and whose moral responsibility should not be visited upon succeeding generations, let alone upon wholly unrelated persons.²¹

Concentrating on the past, Professor Bittker argues, “understate[s] the case for compensation,” let alone other forms of reparations, “so much so that one might almost suspect that the distant past is serving to suppress the ugly facts of the recent past and of contemporary life.” Indeed, “slavery was only a necessary, not sufficient, condition for today’s compensatory proposals.” Hence, when arguments made for and against black redress are based on the assumption that the goal of redress is to compensate for some past event, such as lost wages, they miss the fact that slavery cost African Americans far more than a few dollars a day. These arguments, both for and against redress, fail to acknowledge that African Americans are still

suffering from the atrocity of human bondage that ended more than a century and a half ago.²²

Given the deficiencies of the tort model, it behooves us to consider the atonement model. The latter is more complex, and is typically a product of legislation.

E. Atonement Model

If redress under the tort model is victim focused, backward looking, and compensatory or retributive, then redress under the atonement model is perpetrator focused, forward looking, and restorative, or, in transitional states like South Africa, redistributive. Under the atonement model, redress is mainly about reconciliation between victims and perpetrator. It seeks to move society forward in the aftermath of an atrocity. For this to happen, both the perpetrator and the victims must assume reciprocal responsibilities. The perpetrator has a moral obligation to apologize and to make that apology believable by doing something tangible called a “reparation.” The victims, in response, have a civic (not moral) obligation to forgive, so that society as a whole, including the victims themselves, can move forward.

Thus, reconciliation begins with a perpetrator-issued apology, backed by reparations to solidify the rhetoric of remorse. Forgiveness then arrives on the victim’s desk like a subpoena—a response must be given. Forgive but never forget.

Unlike the tort model, the atonement model never advocates punishment of the perpetrator. However, the atonement model can be joined with redress models that effectuate retributive justice so long as the latter do not conflict with the goal of reconciliation. For example, In Northern Uganda, many victims of the Lord’s Resistance Army (LRA) did not support the Ugandan government’s referral of redress to the ICC for prosecution of five LRA leaders. Indeed, many Ugandans viewed the government’s referral as “a threat to a peaceful resolution of the conflict.” Ugandan activists argued that the “ICC has committed a terrible blunder” by initiating “war crimes investigations for the sake of [retributive] justice at a time when Northern Uganda sees the most promising signs for a negotiated settlement.” Many in Uganda pleaded with the ICC to delay investigations, arguing that atonement and peaceful reconciliation must come first. Hence, in an effort to achieve restorative justice, sometimes it is better not to prosecute perpetrators. Sometimes retributive justice must yield to restorative justice.²³

20. BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* 8 (rev. ed. 2003).

21. *Ibid.*, p. 9.

22. *Ibid.*, pp. 9–12.

23. Hema Chatlani, *Uganda: A Nation in Crisis*, 37 *CAL. W. INT’L L.J.* 277, 291–292 (2007); Payam Akhavan, *The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court*, 99 *AM. J. INT’L L.* 403, 410, 416–18 (2005); Josefine Volqvartz, *ICC Under Fire Over Uganda Probe*, CNN (Feb. 23, 2005, 11:46 AM), <http://www.cnn.com/2005/WORLD/africa/02/23/uganda.volqvartz/index.html>. See BROOKS, *ATONEMENT AND FORGIVENESS*, p. 147 (“Sometimes it is wise to forgo retribution in the interest of urgent social, political, or moral considerations.”).



Restorative justice is the primary form of postconflict justice under the atonement model. Restorative justice provides the perpetrator of the atrocity with an opportunity to restore its moral worth, and it creates an opportunity for the perpetrator and victims to restore their broken relationship in the aftermath of an atrocity.

The atonement model, then, has three distinct elements—apology, reparations, and forgiveness. Apology and reparations have special meaning under the atonement model. Forgiveness introduces a new set of considerations. I will explain each element in greater detail.²⁴

1. Atonement Apology

A perpetrator-issued apology begins the atonement process. When the perpetrator apologizes under the atonement model, it does four things: (1) confesses the deed; (2) admits the deed was an injustice; (3) repents, shows remorse; and (3) with deep humility asks for forgiveness. Without a public statement of remorse recognizing guilt, the redress is nothing more than a settlement. Without a request for forgiveness, the victims' forgiveness, and, ultimately reconciliation, is unlikely to be placed on the table for consideration.

The passage of time does not eliminate the need for an apology. There is no statute of limitations on the moral obligation to apologize. Even if there are no living victims of the atrocity, an apology should still be tendered if the perpetrator is still alive. It is for this reason that the Fourth Element of my Theory of Redress—the victims must continue to suffer—may not be necessary insofar as the atonement model is concerned.²⁵

Under the atonement model, it is paramount, particularly after the passage of time, to clarify the historical record of the atrocity. Clarifying the historical record provides the factual foundation for apology and resolves antagonistic histories so that we have a single story to which both sides can subscribe. Clarification of the historical record creates an understanding for the necessity of reparations and the moral obligation to apologize.

An example of an almost flawless atonement apology is the U.S. government's formal apology for its overthrow of the Kingdom of Hawaii. As mentioned earlier, the apology was issued through a 1993 congressional resolution, called the "Apology Resolution," on the hundredth anniversary of the atrocity. No reparations were issued, and that was a mistake as I indicated earlier. The Apology

Resolution reflects all the conditions constitutive of an atonement apology in one way or another. It recognizes the deed and that the deed was an injustice. The congressional resolution sought to clarify these aspects of the historical record by stating, through a series of "whereas" statements, the facts leading to the Hawaiian overthrow and the aftermath of the overthrow. In addition, the resolution conceded the illegal nature of the overthrow, the U.S. interference with Native Hawaiians' right to self-governance, and the overthrow's dramatic deleterious impact on the economic and social status of Native Hawaiians. The apology also specifically repents, stating that the United States "express[es] its deep regret to the Native Hawaiian people." Although the apology does not specifically ask for forgiveness, the apology does state that the U.S. Congress "support[s] the reconciliation efforts," implying its hope for healing and forgiveness.²⁶

A more direct and hence better statement of the forgiveness element of an atonement apology can be found in the 2004 apology issued by Argentine President Néstor Kirchner.

President Kirchner apologized on behalf of the Argentine state (government and people) for atrocities committed in the name of the Argentine state during the 1976–1983 military dictatorship (or Dirty War). The apology came well after the atrocities had ended—better late than never. President Kirchner stated: "As president of the nation I come to beg forgiveness of the state for the shame of having stayed silent about so many atrocities during 20 years of democracy."²⁷

2. Atonement Reparations

Under the atonement model, reparations serve a very specific purpose: "they make apologies believable." Atonement reparations, unlike reparations outside the atonement model, transform an apology into a meaningful statement of remorse. They "turn the rhetoric of an apology into a meaningful, material reality and thus help to repair the damage caused by the atrocity and [help to] ensure that the atrocity will not be repeated." Hence, atonement reparations can be defined as "the revelation and realization of apology."²⁸

Atonement reparations can take many forms, but, as I mentioned earlier, they are usually rehabilitative. A rehabilitative reparation might include a special educational or employment program directed toward the victims' community (specifically, a nonmonetary rehabilitative reparation). If these reparations are directed toward the victims or their

24. This discussion is taken from BROOKS, ATONEMENT AND FORGIVENESS, ch. 5

25. See discussion in Part III of this article.

26. Apology Resolution of 1993, S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993).

27. N. Am. Cong. on Latin Am., Argentina: Human Rights Commemoration, 37 NACLA REP. AMERICAS 44, 44–45 (2004).

29. BROOKS, ATONEMENT AND FORGIVENESS, pp. 142–143, 147, 155.



families, they are victim-directed (compensatory) reparations (specifically, nonmonetary compensatory reparations).³⁰

Ultimately, it is the perpetrator's responsibility to generate appropriate reparations. The perpetrator, however, has to be mindful of the victims' needs, desires, and opinions. Otherwise, the reparation might not be sufficient to induce the victims' forgiveness and ultimately lead to reconciliation, which is the goal of atonement reparations.

3. Forgiveness

Forgiveness is the last element of the atonement model. Forgiveness is the victims' remission of an attitude of resentment evoked by injury. It is the victims' willingness to re-establish a broken relationship with the perpetrator. None of the other major redress models, criminal or civil, contemplate forgiveness. None view the victims as having a redress duty of any sort.

Forgiveness is, however, essential to the forward-looking, reconciliation-focus of the atonement model. Atonement (meaning apology plus reparations) and forgiveness are the key elements of this unique redress model.

Yet atonement and forgiveness are not morally equivalent under the atonement model. The perpetrator's duty to atone for a past atrocity is a moral imperative. But the victim's duty to forgive can be no more than a civic responsibility. The victim of an atrocity, unlike the perpetrator, has no moral debt to pay.

Some might disagree with the atonement model's characterization of forgiveness as a civic duty. In literature, religion, philosophy, and culture, forgiveness is viewed in different ways. Sometimes, it is seen as a moral imperative based on our unity with God. Other times, it is formulated only as a moral prerogative. Then there is Nietzsche, who believed that one who forgives manifests a "slave morality." Similarly, S.J. Perelman once quipped: "To err is human, to forgive supine."³¹ I would argue in response that the victims of an atrocity are innocent and have incurred no moral obligation to forgive. As a strong advocate of the atonement model, I believe that forgiveness is conditional, and that the civic duty to forgive is predicated upon the quality of the atonement tendered.

Under the atonement model, then, there has to be a tender of atonement by the perpetrator, including a specific request for forgiveness, as a precondition for forgiveness. Unconditional forgiveness is unacceptable in my opinion. Absent atonement, forgiveness is morally objectionable because the

indiscriminate forgiver disrespects herself. She preserves an unhealthy relationship with her perpetrator by accepting the perpetrator in his identity as her tormentor.

Can an atrocity be too great or its lingering effects be too devastating or horrific to warrant forgiveness? William Styron's novel, *Sophie's Choice*, raises the issue in dramatic fashion. In the incident from which the book has its name, Sophie and her two children arrive at Auschwitz, prisoners of the latest German round-up of Polish resistance members. Upon disembarking from the train which had brought them to this death camp, Sophie encounters the infamous selection process by which SS doctors determined those who were strong enough to work, and thus to live, and those who were to die. Sophie is allowed to live, but the doctor before whom Sophie is brought makes her the victim of a perverse plot to commit an unforgivable crime. He gives Sophie a choice: one of her children may live, but she must decide who lives or both shall be killed. So Sophie is forced to make a deadly choice. Even if, miraculously, Sophie's little girl survived after she was taken away, we would still, I think, say that no amount of restitution, and no change of heart on the part of the doctor, could make forgiveness a requirement in such a case. Indeed, it was precisely the doctor's belief that such a crime was unforgivable that led him to commit it. As Styron portrays it, the doctor, having been pressed into the wretched service of the selection process, and despairing of the godlessness of his existence, plans an offence which he believed only God could forgive: his need for divine forgiveness, he hoped, would restore his faith.³²

Even where forgiveness is possible, the atonement model does not envision forgiveness to be an immediate response to atonement. Forgiveness is a process, a long dance between the perpetrator and victims. It is a negotiation over the victims' needs against the backdrop of the perpetrator's apology and reparations. The victims will be motivated in large part by the sincerity of the apology, and they will surely calculate the sincerity of the apology by the weight of the reparations.

In short, atonement and forgiveness are necessary for reconciliation. With reconciliation, we have reached the highest form of human development in the aftermath of an atrocity. Perhaps then we can put an end to atrocities forever.

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30. See section on Reparations above.

31. BROOKS, ATONEMENT AND FORGIVENESS, p. 166.

32. WILLIAM STYRON, *SOPHIE'S CHOICE* (Random House 1998) (1976), pp. 164-166, 553-566.

