

REPARATIONS FOR INDIGENOUS
PEOPLES



Reparations for Indigenous Peoples

International and Comparative Perspectives

Edited by
FEDERICO LENZERINI

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Foreword

I have some excellent memories of my childhood. One of them relates to the evenings at home, when, in our living-room, I used to sit with my father in his arm-chair to watch television. Among our favourite programmes were John Ford's and other Western movies, about the conflicting relationship between American Indians and the European pioneers who 'discovered' North America. The image of myself, a child afraid of the Indians' cavalry charge—as every time I was thinking that they would break out of the TV into the living-room—is engraved in my memory. But, apart from this, I also remember very well that there was something unconvincing for me concerning the depiction that some of those movies offered of Indians, as the evil which egoistically and savagely prevented the good white men from taking their honest piece of land in the infinite North American lands.

In the following years I have read many books about Native Americans. One of them, in particular, was very enlightening for me. It was the Italian translation of 'Cry of the Thunderbird', edited by Charles Hamilton in 1950. Although it was to some extent politically incorrect—eg when it defined Indians as 'the last primitives'—it really opened my eyes wide with regard to the exceptional value of indigenous culture; I suddenly started to perceive a feeling of guilt, which grew progressively as the years went on. I envisaged myself and my surrounding world as part of a system which had been able to develop a behaviour so criminal with respect to peoples who embodied such an extraordinary culture and whose main aspiration was to live in peace and in harmony among themselves and with all other beings making up the world. Even more important, I learned that, behind the stereotypes occasionally built by egoism and hatred, all human beings have an inherent dignity and share the same dreams and aspirations, so that nobody in the world has the right to think that—and behave as though—his/her aspirations and dreams are more worthy to be realized than those of anybody else.

With respect to the countless heinous and systematic crimes committed in the past through to the prejudice of indigenous peoples (which, unfortunately, in some cases are still continuing in the present day), the most disappointing aspect probably lies in the attempts of the contemporary dominant society to try to forget that those crimes have *actually* been perpetrated, to bury them under the tombstone of the past and to cleanse the social conscience free of them. This attitude is epitomized in one of the contributions included in this book with the paradigm of 'moral purity', representing our incapacity to accept the guilt arising from our past wrongs. Nevertheless, what indigenous peoples have suffered in the past (and that some of them continue to suffer today) has opened a deep wound in their



identity and pride that cannot be left untreated, and our attempts to keep our guilt hidden is producing additional torts and, a fortiori, additional guilt. Even more important, it is prolonging the pain and sufferings of the victims of our past behaviour. In this respect, the execution and completion of adequate reparatory processes appears as one of the crucial means to amend our past wrongs and, most importantly, to mitigate such pain and sufferings.

In light of the foregoing, this book brings together a group of renowned legal experts and activists from different parts of the world to discuss the right of indigenous peoples to reparation for injuries suffered under an international and comparative perspective, with the purpose of tackling a very problematic issue the realization of which represents an essential step in leading the way to a fairer world. In this respect, the present volume finds its historical collocation at a crucial period in the struggle of indigenous peoples to obtain effective recognition of their dignity, aspirations and rights. It in fact comes out a few weeks after the adoption by the UN General Assembly of the United Nations Declarations on the Rights of Indigenous Peoples. This is an historical moment not only for the Declaration in itself—which, although recognizing very important rights and prerogatives in favour of indigenous peoples, is a non-binding instrument—but especially for the symbolic significance of its adoption. It in fact symbolizes the definitive surrender by states to the recognition of the distinctive dignity and identity of indigenous peoples as a specific subject of law, actually owning its peculiar rights and prerogatives. In this context, the discourse of reparation is quite promising, and this volume—with its practical approach aimed at supporting legal operators and practitioners concerned in improving opportunities for indigenous peoples to be effectively redressed for the injuries suffered—has the ambitious purpose of providing a contribution to the development of this discourse; as a brick in the path which should eventually lead to the realization of justice for the communities concerned.

It is virtually impossible to give justice to all the people who have contributed to realize this book. However, among the persons who deserve my gratitude, a special thanks goes to Professor Francesco Francioni, for his economic and (priceless) moral support, as well as to all contributors to the present volume for their enthusiasm in joining the project, their inestimable cooperation and enduring patience in facing my continuous pressure and requests in the various phases of the realization of this work and, in some cases, even for the help I received from them beyond their position of contributors. My gratitude is also for the people at Oxford University Press who have worked on this project; particularly Rebecca Smith (Assistant Commissioning Editor); John Louth (Commissioning Editor) and Lucy Stevenson (Production). It is really great to work with persons who offer faultless professionalism and—at the same time—are able to let you relax even when your problems appear to you as insurmountable. Thanks also to Rory Brown for his excellent work of linguistic revision; Kirsty Gover for her precious suggestions concerning some chapters included in the book; Ellen



Lutz, of Cultural Survival, for her support to this project; and, not least, to the University of Siena for having financed the research from which this book has been produced.

All my love goes to Francesca—for her enduring love and continuing support as well as for having stood all those Sundays at home with her usual smile while I was working on this book—mamma, daddy (who will read the present volume while sitting on his cloud in the sky), my brothers, my wonderful nieces and nephews, the little Angel, all persons who love me and all the people who have supported this project.

This book is dedicated to my family, my friends, all indigenous peoples of the world and to all those who share with me the dream that justice is possible in this world.

Federico Lenzerini, October 2007



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PART I

INTERNATIONAL LAW,
REPARATIONS FOR HUMAN
RIGHTS VIOLATIONS AND
INDIGENOUS PEOPLES' RIGHTS





1

Reparations for Indigenous Peoples in International and Comparative Law: An Introduction

*Federico Lenzerini**

That a wrong done to an individual must be redressed by the offender himself or by someone else against whom the sanction of the community may be directed is one of those timeless axioms of justice without which social life is unthinkable

Justice Guha Roy, High Court of Calcutta, 1961¹

1. Introduction

In the second half of the twentieth century, the development of human rights law upset the pre-existing structure of international law. The typical configuration of international legal rules as sources of reciprocal rights and obligations that states exclusively had vis-à-vis other states was no longer the sole characterization of international law, and the extent of domestic jurisdiction of states started to be eroded by the growth of the new branch of international human rights law. This new sphere of international law progressively invaded the area (previously of exclusive pertinence to the territorial government) of the activities which exhausted their relevance and implications within the borders of the state concerned, without producing repercussions with respect to the direct interests of other governments. Also, the previously indisputable dogma that individuals

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¹ See SN Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?', 55 *AJIL* 1961, 863, p 863.



were to be considered the exclusive concern and possession of their state of citizenship, and that they could only be the object of (indirect) protection (through the law on treatments of aliens) whether and to the extent that an injury suffered by them produced the breach of the interests of their 'proprietor' state started to be challenged.

During the sixty years after the Second World War, the evolution of human rights law has ineluctably continued as a flood which permeated and, to a certain extent, transformed the whole body of international law. Today, the obligation of states to respect human rights—and to ensure their respect within their jurisdiction—presupposes not only the obligation to refrain from conduct which may directly lead to the violation of internationally recognized individual or collective rights, but also the duty to prevent and repress violations of non-state actors acting within the jurisdiction of the state concerned (ie enforcing compliance with human rights standards by private actors); the duty to investigate violations; to carry out appropriate action against the violators; to grant effective access to justice in favour of the victims; to provide them with adequate remedies and reparations.² In order to merge all these duties within a single and comprehensive concept, one can say that states have the obligation of realizing all requirements and conditions that are necessary and sufficient for ensuring effective and adequate enjoyment of internationally recognized human rights by all individuals and groups within their jurisdiction.

Today, in this context, particular attention is devoted by the international community to the so-called *gross violations* of human rights, although a generally agreed opinion on the exact meaning of this expression does not exist at present. According to the traditional approach the term 'gross violations' only includes the conduct translating into the perpetration of particularly serious violations of human rights on a wide and systematic scale, thus requiring that two conditions are met, ie that the conduct concerned is committed on a wide and systematic scale (excluding isolated cases of violations of human rights, irrespective of the importance of the value(s) infringed) *and* that the value protected by the norm that is breached is particularly significant. This interpretation seems to be confirmed by the recent report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, where it appears that the term 'gross' is conceived as a synonymous with the word 'widespread' or 'massive'.³ However, as noted by the Special Rapporteur, Theo van Boven, in the final version of his *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* ('van Boven principles'), no agreed definition exists of the expression under examination, and the word 'gross' may be related both to the term 'violations'

² See 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, UN G.A. Res. 60/147 of 16 December 2005, para 2.

³ See UN doc. E/CN.4/2005/102 of 18 February 2005, para 20.

(indicating ‘the serious character of the violations’) and ‘to the type of human right that is being violated’.⁴ Interpreted in this second sense (also considering that the Special Rapporteur regards the word ‘gross’ as conceptually distinct from the term ‘systematic’),⁵ the only necessary requirement for qualifying a breach of human rights as a gross violation of international human rights law would be that the breach is related to a particularly important right (eg the right to life or to freedom from torture or slavery), without requiring that the violation concerned is also ‘systematic’ or committed on a wide scale (thus also embracing individual violations).⁶ In the end, the Special Rapporteur concluded that the scope of his study ‘would be unduly circumscribed if the notion of “gross violations of human rights and fundamental freedoms” would be understood in a fixed and exhaustive sense’, thus opting for ‘an indicative or illustrative formula’, according to which:

while under international law the violation of any human right gives rise to a right to reparation for the victim, particular attention is paid to gross violations of human rights and fundamental freedoms which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.⁷

As for the UN General Assembly, in adopting its Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines),⁸ it has left the question open, providing no definition of the expression in point.

However, gross violations or not, the most serious breaches of international human rights law, as unacceptable offences to human dignity, are repudiated by the entire international community as the most intolerable crimes against humankind. When they meet the requirements for being included within the area of *crimina juris gentium* (crimes under international law) they exceptionally produce the individual criminal responsibility of their perpetrators *pursuant to international law* (entailing the application of peculiar principles like the principle

⁴ See UN doc. E/CN.4/Sub.2/1993/8 of 2 July 1993, para 8.

⁵ See, in particular, fn 1.

⁶ This interpretation is also supported by Principle 26 of the 2005 *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (UN doc. E/CN.4/2005/102/Add.1 of 8 February 2005), which states that extradition of persons who have committed serious crimes of international law should ‘be denied where there are substantial grounds for believing that the suspect would be in danger of being subjected to gross violations of human rights such as torture; enforced disappearance; or extra-legal, arbitrary or summary execution’. Since this provision refers to specific individual persons, it is clear that the character of gross violation of a breach of their rights is only linked to the particular gravity of the breach(es), and not to its systematic or widespread character, being as such breach(es) are generally of individual nature.

⁷ See UN doc. E/CN.4/Sub.2/1993/8, para 13.

⁸ See n 2 above.

of universality of jurisdiction). In addition, some of the norms prohibiting such breaches (including the prohibition of slave-trade or torture) are today part of *jus cogens*, as principles placed at the very top of the hierarchy of international law sources, prevailing over all the others and being non-derogable even in cases of emergency. Furthermore, state obligations related to human rights have an *erga omnes* character, that is to say that their perpetration qualifies a special form of state responsibility which is owed toward the international community as a whole, ie toward all other states, which may thus act against the responsible government for obtaining reparation.⁹ This characterization of human rights law bypasses the traditional connotation of international responsibility as necessarily requiring a directly injured state, allowing the repression of the violations of human rights committed by a state against its own citizens.

As previously noted, the obligation to provide reparation for human rights breaches is part of the duties on states pursuant to international human rights law.¹⁰ It probably entails the subsidiary responsibility of governments to provide reparations in favour of victims of conduct attributable to non-state actors within their jurisdiction in the event that the necessary and adequate machinery allowing victims to obtain reparation directly from the perpetrator is not available; in any event, it emerges from para 15 of the Basic Principles and Guidelines that the right of the victim to receive reparation is independent of any requirement to establish responsibility of the state agent.¹¹ In cases where the government under

⁹ See, consistently, the separate opinion released by Judge Bruno Simma to the International Court of Justice's judgment on the case *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 December 2005, available at <<http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>> (last visited on 5 March 2007), para 39 ff.

¹⁰ In this respect see, eg (with regard to the 1966 International Covenant on Civil and Political Rights (ICCPR), 999 *UNTS* 171) Human Rights Committee, General Comment No 31[80], 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004, para 16 ('[a]rticle 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations'). The principle expressed in the text is also confirmed, *inter alia*, by the Basic principles and guidelines (n 2 above; see, in particular, para 18, affirming the right of victims to full and effective reparation), although their scope is limited to gross violations of international human rights law and serious violations of international humanitarian law. See, finally, Principle 1 of the van Boven principles (n 4 above), according to which '[u]nder international law, the violation of any human right gives rise to a right of reparation for the victim'; UN doc. E/CN.4/2005/102, para 58; UN doc. E/CN.4/2005/102/Add.1, Principle 31 (stating that '[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator').

¹¹ See 'The right to a remedy and reparation for victims of violations of international human rights and humanitarian law', Note by the High Commissioner for Human Rights, UN doc. E/CN.4/2003/63 of 27 December 2002, para 49.

whose authority the violation occurred is no longer in existence, the successor state has the (moral) duty to provide reparation to the victim(s).¹²

The right to a remedy for violations of basic human rights is an essential element for ensuring the concrete effectiveness of such rights. It in fact represents the primary and indispensable tool for treating the 'pathological' phase of human rights law, ie its violation, which jeopardizes their effective realization. The existence of efficient remedies is thus strictly intertwined with the effectiveness of 'primary' rights. The international community is perfectly aware of this, as demonstrated by the approach adopted by the Human Rights Committee (HRC). In its General Comment on Art 4 of the ICCPR¹³ the Committee considered the obligation of state parties to provide remedies for any violation of the Covenant (contemplated by Art 2) as non-derogable in state of emergency, even if not explicitly mentioned by Art 4 para 2, when it is related to any right expressly considered as non-derogable by this latter provision. In particular, the Committee noted that the obligation established by Art 2 is 'inherent in the Covenant as a whole',¹⁴ and

[i]t is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.¹⁵

Transmuted in the context of customary international law, this reasoning could possibly lead to the assertion that the right to a remedy, when is related to a peremptory norm, is part of *jus cogens* itself.

The one just depicted is the bright side of the coin. But there is also a dark side, which rests in the scarce effectiveness of the protection of human rights in the real world, on account of the enormous figure of breaches of fundamental rights committed every day which translate into unacceptable offences to the sanctity of human dignity. These breaches are often characterized by the impunity of their perpetrators and the unavailability, in the real world, of effective remedies for the victims. As stressed in the van Boven principles, 'only scarce or marginal attention is given to the

¹² See 'The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report of the Special Rapporteur, Mr M Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33', UN doc. E/CN.4/2000/62 of 18 January 2000, Annex para 20.

¹³ See General Comment No 29—States of Emergency (Art 4), UN doc. CCPR/C/21/Rev.1/Add.11 of 31 August 2001. Article 4 para 1 ICCPR states that '[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.

¹⁴ See General Comment No 29, n 13 above, para 14.

¹⁵ Ibid, para 15.

issue of redress and reparation to the victims¹⁶—which on the contrary is essential in view of ensuring the effectiveness of human rights—'[i]n spite of the existence of relevant international standards to that effect'.¹⁷ '[T]he perspective of the victim is often overlooked. It appears that many authorities consider this perspective a complication, an inconvenience and a marginal phenomenon'.¹⁸ This is particularly true for indigenous peoples, who have suffered for centuries the cruelest violations of their basic individual and collective rights as well as humiliation and mortification of their communal dignity and pride.

Starting from this point, the major purpose of the present volume is to investigate, through an in-depth assessment of the relevant practice at the international, regional and national level, the existing chances for indigenous peoples to have actual access to effective remedies, placing particular emphasis on the specific aspect of substantive redress. In the following chapters the authors will also try to assess how such possibilities may be enhanced and maximized through examining the best practices and the possible strategies which may lead to a speedy and effective realization of justice by redressing indigenous peoples for the wrongs suffered. Last but not least, the present volume has the ambitious purpose of increasing awareness, among practitioners as well as individuals and peoples concerned, that the chance of having access to effective forms of redress for the torts suffered actually exists, although to a different extent in the diverse areas of the world, and that the fight for justice has only just begun.

2. Choice of Terminology

The specific terminology chosen for the title of the present volume (and, consequently, as common inspirational and starting point of all contributions included herein) is motivated by two basic reasons:

a) The moment in which reparations (ie 'substantive redress') are materially granted is the moment in which the idea of justice crystallizes, and only at that precise moment justice is effectively realized

The particular focus of the present book is the specific aspect of 'substantive redress', which represents one specific meaning of the term 'remedies'. This latter term is in itself more comprehensive than 'reparations', in that it also entails different and wider meanings (including 'access to justice'). The Basic Principles and Guidelines define the victim's right to a remedy as including his/her right to: a) equal and

¹⁶ See UN doc. E/CN.4/Sub.2/1993/8, para 132.

¹⁷ Ibid, para 133.

¹⁸ Ibid, para 133.

effective access to justice; b) adequate, effective, and prompt reparation for harm suffered; c) access to relevant information concerning violations and reparation mechanisms.¹⁹

The term ‘remedies’ has thus a very broad scope, which goes beyond the primary purpose of the present volume, ie to explore the nature of calls for justice of indigenous peoples that have been in the past, and are being presently, translated into concrete forms of redress, what strategies are to be adopted for increasing the chances to obtain such redress, and whether and to what extent these forms of redress, when granted, actually meet the expectations of the communities concerned.

The term ‘reparation’ (according to the meaning indicated in the following section), as a specific ‘part’ of the meaning of ‘remedy’, calls to mind the element of substance rather than ‘procedural’ aspects, while the word ‘remedy’ includes both elements as two different ‘applications’ of its scope equally matching its meaning. As a consequence, the term ‘reparation’ seems to typify the specific aspect of substantive redress more directly and precisely than ‘remedy’.

This does not mean that no reference to, eg, the right of access to justice of indigenous peoples, will be made in the next chapters, but simply that particular emphasis is placed on the ‘reparatory phase’, that is the moment in which the entire remedial procedure comes to fruition and justice is done, ie the moment in which ‘substantive redress’ is granted in favour of the peoples concerned for the wrongs suffered. This may be in fact considered the very heart of the idea of reintegration of justice.

Of course, the moment of ‘substantive redress’ is not the only juncture in the complex process spanning the long distance between the instant of the perpetration of the wrong and the final moment of the granting of effective redress in favour of the victim(s). Other phases exist which generally represent essential prerequisites for creating the conditions in view of making the phase of redress actually possible, and are thus in themselves indispensable for translating the idea of restoration of justice into real and concrete results. The first of these phases consists in acknowledgement, by the competent authorities (as well as by the civil society), that an action performed to the prejudice of a person or a community (‘victim’) is a potential tort. The second phase lies in the recognition and concrete realization of the victim’s access to justice, a right of procedural nature consisting

¹⁹ See n 2 above, Annex, para 11. See also ‘The Administration of Justice and the Human Rights of Detainees. Question of the impunity of perpetrators of human rights violations (civil and political)’, revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, UN doc. E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997, para 26; UN doc. E/CN.4/2000/62, Annex, para 11. It is to be noted that the approach of the UN documents concerning the notion of reparations is not always univocal and coherent. In fact, while as noted in the text reparations are generally envisaged as a specific component of the concept of ‘remedies’ (ie the component of substantive redress), in certain provisions it seems that the term ‘reparation’ is instead used as a synonymous of ‘remedy’; in this sense see, eg, UN doc. E/CN.4/Sub.2/1997/20/Rev.1, Principle 34, according to which ‘[e]xercise of the right to reparation includes access to the applicable international procedures’ (see also, with an almost identical text, UN doc. E/CN.4/2005/102/Add.1, Principle 32).

in the possibility for the victim to utilize appropriate machinery for : a) investigating whether a tort has been committed to the prejudice of the victim; b) evaluating the claim of the victim comprehensively and impartially; and, c) if so, recognizing the right of the victim to be redressed for the prejudice suffered. The third phase consists in granting to the victim the actual chance of enjoying all procedural rights that are indispensable for ensuring the impartiality of the process aimed at evaluating whether or not the conduct committed to the prejudice of the victim is to be considered as a 'wrong'. The fourth phase is represented by the making of an enforceable decision addressed to the authorities concerned (as well as, depending on the facts, to other persons and institutions) recognizing the wrongful nature of the act suffered by the victim and allowing his/her/its (in the case of a community) actual access to adequate measures of redress. All these phases are generally necessary for 'justice', but justice is not concretely realized until adequate and substantive redress is materially granted to the victim(s). All other phases, without the actual granting of substantive redress, usually remain inconsequential and ineffective *in concreto*. On the contrary, when adequate redress is granted in favour of the victim(s), the realization of justice is generally achieved in any case, paradoxically even in the event (in those cases when it may be concretely possible) that one of even all the other phases have been bypassed (this provided that, in certain circumstances, even the judicial or political recognition that a tort has been made may in itself constitute reparation).

Etymologically speaking, the term 'reparations' is best suited to illustrating the idea just explained by means of the use of a single word, although presenting the problem that, in classical international law, it *prima facie* recalls a different area which is not directly related to the subject of remedies for human rights violations, ie the complex of means through which states may repair the consequences of the breaches of international obligations of which they are responsible.²⁰ It is thus a term which classically and primarily belongs to the dialectics of responsibility of states in their reciprocal relations, or to the topic of reparations for war damages,²¹ which is also a typical aspect of state-to-state dialectics in

²⁰ See D Shelton, *Remedies in International Human Rights Law*, 2nd edn (Oxford, 2005), p 7; R Wolfrum, 'Reparation for Internationally Wrongful Acts', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (North Holland, 2000), vol 4, p 177 ff. See also art 31 para 1 of the International Law Commission's Articles on Responsibility of States for internationally wrongful acts, 2001, available at <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf>, according to which '[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act' (this principle is then developed at art 34 ff.). In the Commentary to art 31 (available at <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>), relying on the judgment of the Permanent Court of International Justice in the *Factory at Chorzów* case (Merits, 1928, *PCIJ*, Series A, No 17, p 47), the Commission explains the nature of the obligation to grant full reparation as the duty of 'wip[ing] out[, as far as possible] all the consequences of the illegal act and re-establish[ing] the situation which would, in all probability, have existed if that act had not been committed' that the responsible State must endeavour to respect (see para 3).

²¹ See I Seidl-Hohenveldern, 'Reparations', in R Bernhardt (ed.), *Encyclopedia of Public International Law* (North Holland, 2000) vol 4, p 178 ff (stating that '[i]n ancient times it was the

international law. At the same time, however, the term ‘reparation’ is not totally extraneous to the discourse of international human rights, and it is currently used in the context of the United Nations as a concept usually referred to the rights of the victims of violations of international human rights law.²² For this reason, its use for the title of the present volume represents a choice which is in any case consistent with the pertinent contemporary international practice.

b) The term ‘reparations’ (as currently used for state-to-state relations) better recalls the status of indigenous peoples as original sovereign entities over their ancestral lands that never totally lost their sovereignty

As pointed out in the previous paragraph, the term ‘reparations’ is traditionally used within the context of the dialectics of state responsibility, and is thus related to the area of interstate relations. Its use is thus particularly suitable for recalling one important element of the philosophical and inspirational background that led to the publishing of the present volume, ie the consideration of indigenous peoples as the original sovereign entities over their ancestral lands, whose sovereignty, although hindered for centuries, has never completely expired. Like a once-dormant volcano, the principle of indigenous sovereignty has finally returned to life, formally recognized by the authorities of the same states that for centuries tried to eradicate such sovereignty for ever. National courts, in particular, have (partially) amended the past wrongs of their governments by denying the lawfulness of the legal principles (occupation, conquest, *terra nullius*) that were originally used for justifying the appropriation of indigenous ancestral lands by European invaders, and recognizing that indigenous peoples have retained a certain degree of sovereignty on their original lands, although this sovereignty is generally subordinated to the supreme sovereign powers of the territorial state.²³

From this perspective, the discourse of reparations for indigenous peoples has a double connotation, in that it is the result of the application of human rights law, and, at the same time (although this second argument is to be used very carefully), of the analogical application of the doctrine of state responsibility in the context of a type of relationship similar to that arising between states as the result of the commission of an internationally wrongful act (although, with respect to the subject matter of the present volume, the wrongful nature of such acts derives in any case from breaches of international human rights law). It would be, in short,

lot of vanquished peoples to pay tribute to the victors. The duty to pay war indemnities derives from this custom’); idem, ‘Reparations After World War II’, *ibid*, p 180 ff.

²² See, inter alia, the various documents cited in this chapter.

²³ See, on this subject, F Lenzerini, ‘Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples’, in 42 *Texas International Law Journal*, 2006, p 155 ff.

an analogous application, *mutatis mutandis*,²⁴ of the law on state responsibility with respect to the relations between states and indigenous peoples. Providing that this argument may be validly maintained, the obligation of responsible states to repair indigenous peoples (*as collective entities*) for the wrongs suffered would arise not only (although primarily) from human rights law, but also from the analogical application of the law on state responsibility.²⁵

3. The Concept of 'Reparations'

According to the *Oxford English Dictionary*, the concept of 'reparation' includes any 'measure aimed at restoring a person and/or a community of a loss, harm or damage suffered consequent to an action or omission'.²⁶ The term in point also indicates the 'action of restoring something to a proper state', or the 'action of making amend for a wrong done'. The *Oxford Dictionary* uses the terms 'amends' and 'compensation' as tantamount to 'reparation', while indicating this latter term (as well as 'redress' and 'relief') as being synonymous with 'remedy'. At the same time, however, it also defines 'remedy' as 'a means of counteracting or removing an outward evil of any kind', that is a concept which is somehow broader than 'reparation' (although including this latter concept). The reparatory aspect is indeed indicated by the word 'removing' (meaning 'to relieve or free one from some feeling, quality, condition, etc, esp. one of a bad or detrimental kind'),²⁷ while the 'additional' term 'counteracting' (ie acting 'against, in opposition to, or contrary to')²⁸ entails a distinct meaning, mainly relating to the 'procedural' phases in which one acts for obtaining the recognition of his/her right to gain reparation (ie 'redress') for the harm suffered.

For the purposes of the present volume the term 'reparation' will thus not be intended as a precise synonym of 'remedy', for the reason that (as previously

²⁴ Of course, the possible application of the language of state responsibility to the relationship between states and indigenous peoples is to be adapted to the realities of that relationship, particularly to the circumstances that a) the relationship is in any case characterized by disparity; b) the sovereign prerogatives of indigenous peoples are to be exercised *within* the context of the supreme sovereignty of the territorial state, and are thus subordinated to such sovereignty. In light of this, certain elements which characterize the relations among states pursuant to the law of state responsibility are in any event inherently inapplicable to the relationship between States and indigenous peoples, even supporting the applicability by analogy of such law to the relationship in point. So, for example, it would be very hard to maintain that indigenous peoples may have recourse to countermeasures for reacting to a tort produced by a state to their prejudice.

²⁵ In applying this double characterization of the right of indigenous peoples to reparations vis-à-vis the states concerned, special attention is to be devoted to the 'structural' differences existing between the two areas of international human rights law and state responsibility; on this point see Shelton, *op cit*, n 20, p 97 ff.

²⁶ See online version, available at <<http://dictionary.oed.com>> (last visited on 10 July 2006).

²⁷ *Ibid.*

²⁸ *Ibid.*

explained) this latter term is to be conceived as more comprehensive than 'reparation', which represents only a specific aspect (or a specific meaning) of the concept of 'remedy'. However, this 'limitedness' of the notion of 'reparation' is to be only intended in a 'horizontal' sense, in that it does not cover all the meanings and aspects in which the concept of 'remedy' may be translated. On the contrary, it is to be conceived as comprehensively as possible in a 'vertical' sense, including whatever measure abstractly suitable to being taken to redress a wrong, irrespective of the fact that such wrong could be qualified as a human rights violation or criminal offence at the time of its perpetration or of the circumstance that the measure taken is specifically listed among the forms of reparation as provided for by the relevant instruments of international law.

a) Notion of 'reparation'

As noted in the previous section, in the legal discourse concerning indigenous peoples the notion of reparation used in the framework of state responsibility may be adapted to the subject of remedial justice for human rights violations. All measures aimed at *restoring justice* through *wiping out all the consequences* of the harm suffered by the individuals and/or peoples concerned as the result of a wrong, and at *re-establishing the situation which would have existed if the wrong had not been produced* are thus suitable of being considered as reparations.²⁹ In the terminology of human rights, the aim of reparations is to 'render justice by removing or redressing the consequences' of a tort in favour of the victim(s) of such tort,³⁰ or 'to rectify the wrong done to a victim, that is, to correct injustice'.³¹

As for the requirements of reparation, it must first of all be *adequate*. This term is to be understood as tantamount to 'full', in the sense that, as just emphasized, reparation should wipe out *all* the consequences deriving from a tort (ie *all* injuries suffered by the victims), through the use of all appropriate measures to this end, including, inter alia, recognition of the tort, restitution, compensation, rehabilitation, and satisfaction.³²

Reparation must also be *effective*: this means that it must be efficient in restoring the tort suffered (in all its components, including spiritual, social, moral, and economic) and re-establishing the pre-existing situation.

²⁹ See the famous statement of the Permanent Court of International Justice in the the *Factory at Chorzów* case, n 20 above.

³⁰ See 'Question of the human rights of all persons subjected to any form of detention or imprisonment', Note by the Secretary-General, UN doc. E/CN.4/1997/104 of 16 January 1997, Appendix, para 7.

³¹ See Shelton, op cit n 20 above, p 10.

³² See UN doc. E/CN.4/2005/102/Add.1, Principle 34.

b) 'Adequacy' and 'effectiveness'

The basic criteria to be taken into a particular account for assessing whether a measure of reparation may be actually considered as *adequate* and *effective* are the following:

1. the measure of reparation taken must be *proportionate* to the gravity of the breach and the harm suffered taking into account the peculiar circumstances of the specific case (objective criterion);³³
2. the measure of reparation taken must be considered as adequate and effective (irrespective of whether it is included among the 'canonical' forms of redress contemplated by the relevant international legal instruments) *by the persons, groups or communities to which it is addressed*, provided that they act in good faith (subjective criterion).³⁴

Not all potential measures of reparation may grant the same degree of adequacy and effectiveness; *restitutio in integrum* ('restoration *in natura*'),³⁵ consisting in the complete re-establishment of the original situation which existed before the wrong was committed, is inherently the most adequate and effective measure of reparation, as it is demonstrated by the fact that its notion effectively corresponds to the concept of reparation itself. Although generally treated as a synonymous with the term *restitutio in integrum*, the related term 'restitution' is to be considered as more comprehensive, in that it also includes the cases in which, being objectively impossible to *exactly* restore the situation prior to the wrong, reparation is realized through the return to a state that is *as close as possible* to the original one. In such cases *restitutio* is *not in integrum*, but is only partial, being thus less adequate and effective than *restitutio in integrum* itself.³⁶ *Restitutio in integrum* or restitution will take the appropriate form in the light of the specific values (as self-perceived by the victims) that have been infringed by the wrong. In the case of indigenous peoples, as it will be illustrated in various

³³ See Basic Principles and Guidelines, n 2 above, para 15 and para 18; UN doc. E/CN.4/Sub.2/1993/8, Principle 4; UN doc. E/CN.4/1997/104, Appendix, para 7; UN doc. E/CN.4/2000/62, Annex para 15.

³⁴ See Principle 4 of the van Boven principles (n 4 above), according to which '[r]eparation should respond to the needs and wishes of the victims'; see also Shelton, op cit n 20 above, p 11 ('[a] morally adequate response addresses itself in the first instance to restoring precisely what was lost or something equivalent in value... rectification and compensation in the framework of basic rights serve to restore the individuals to the extent possible their capacity to achieve the ends that they personally value').

³⁵ See Shelton, op cit n 20 above, p 65. According to the Inter-American Court of Human Rights, *restitutio in integrum* 'includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm' (see *Velásquez Rodríguez* case, compensation Judgement, Series C. No 7 (1989), para 26).

³⁶ See Principle 8 of van Boven principles (n 4, above), according to which '[r]estitution shall be provided to re-establish, *to the extent possible*, the situation that existed for the victim prior to the violations of human rights' (emphasis added).

contributions included in this volume, they frequently take the form of return or restoration of ancestral lands, sacred or culturally significant objects or essential belongings.

The degree of adequateness and effectiveness of any other measure of reparation is to be measured not on the basis of solely material and/or objective criteria (consisting in ascertaining whether such measures are proportionate to the gravity of the breach and the consequent harm), but also and especially through evaluating the extent to which they are considered as adequate and effective by the individuals and/or peoples concerned (subjective criterion). As a consequence, the typical forms of reparation other than restitution (including rehabilitation, satisfaction, disclosure of truth, guarantees of non-repetition and measures of assistance of various kinds) may be more or less adequate and effective depending on the nature of the wrong and of the resulting offence as it is perceived by the victim(s). With respect to indigenous peoples, the typical form of restitution per equivalent, ie compensation, is generally inadequate and ineffective to redress the tort suffered, on account of the limited value that economic assets usually have for these peoples.³⁷ The choice of the forms of reparation should be made on a case-by-case basis, selecting those measures that, in the light of the specific circumstances of the concrete situation, are the most adequate and effective for the instant case, irrespective of the fact that they are 'typical' or 'atypical' (ie different from those contemplated by relevant international instruments and more frequently used in practice).

c) 'Wrong', 'tort', 'prejudice', 'loss', 'harm', 'damage'

In considering the 'pathological' moment that leads to the production of the situation from which the right to reparation arises, as well as the effects produced to the prejudice of the victim(s), the nature and content of the terms 'wrong', 'tort', 'prejudice', 'loss', 'harm', 'damage' or other similar expressions are to be evaluated primarily through the subjective lens of the perception of the persons and/or groups concerned, and not under stereotyped criteria. In other words, the terms in point are not to be interpreted as necessarily requiring the production of an economic loss, physical damage or any other kind of predetermined effect, especially with respect to indigenous peoples, whose holistic philosophy of existence is drastically different from the materialistic vision of life of the Western world. As a consequence, for the purposes of the present volume, any modification of the pre-existing conditions affecting the life of indigenous peoples is potentially

³⁷ It is a fact that, even when persons and/or groups different from indigenous ones are concerned, compensation is often insufficient adequately and effectively to restore the harm suffered by the victim(s). See, on this point, Shelton, *op cit*, n 20 above, p 43, quoting a nineteenth-century Russian legal scholar, who said that 'only one seized by a profound disrespect for the human personality would attempt to persuade another human being that money makes good moral afflictions of every sort'.

suitable for consideration as a 'wrong', 'tort', 'prejudice', etc, when it is perceived as such by the persons and/or communities concerned, provided that it may be reasonably qualified as a breach of a right belonging to the community concerned or to any of its members. In this respect, the term 'right' is to be intended broadly, so as to include cultural rights (seen through the lens of the interested individuals and/or groups).

d) 'Action' or 'omission'

Any situation producing a right to reparation for human rights breaches (whether claimed by indigenous peoples or not) necessarily arises from an event which is the result of an 'action' or an 'omission'. For the purposes of the present volume, the meaning of these terms is to be evaluated taking into primary account the 'effects' of such conduct, ie whether it results or not in a breach of internationally protected human rights. As a consequence, the words 'action' and 'omission' do not only and do not necessarily include unlawful, illegitimate or improper 'actions' or 'omissions'. The scope of the present volume will thus not cover only malicious or voluntary (active or passive) conduct prejudicial to indigenous peoples, but also the conduct actually producing such effects that is not characterized by the existence of the actual intention of creating them. This is provided that such conduct is suitable for inclusion within the scope of applicability of the scheme of international liability for lawful acts according to the ordinary rules governing this kind of responsibility.³⁸

e) Collective reparations

As stressed by the van Boven principles,

[i]n addition to providing reparation to individuals, States shall make adequate provision for groups of victims to bring collective claims and to obtain collective reparation. Special measures should be taken for the purpose of affording opportunities for self-development and advancement to groups who, as a result of human rights violations, were denied such opportunities.³⁹

³⁸ On international liability for lawful acts see, inter alia, G Lysen, *State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles* (Lustu Forlag, Uppsala, 1997); B Conforti, *Diritto Internazionale* (Naples, 2006), p 364 ff. See also the International Law Commission's web page on 'International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law', at <<http://untreaty.un.org/ilc/summaries/9.htm>> (last visited on 5 March 2007).

³⁹ See n 4 above, Principle 7. See also UN doc. E/CN.4/Sub.2/1997/20/Rev.1, para 40 (according to which '[t]he right to reparation entails both individual measures and general, collective measures'); this principle is also indirectly confirmed by the Basic Principles and Guidelines, n 2 above, whose para 8 states that '[f]or purposes of the present document, victims are persons who individually or collectively suffered harm [...]'].

This is so because '[m]ost of the gross violations [of human rights] inherently affect rights of individuals and rights of collectivities.... This coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples'.⁴⁰ As a consequence of this, to the extent that the right infringed by a violation of internationally recognized human rights is of collective character, also the measures adopted in order to redress the prejudice suffered by the victim(s) must be of collective nature. The possibility of making collective claims for redress and granting collective reparation is thus an indispensable prerequisite of justice. This, as stated by the UN Special Rapporteur, is particularly important with respect to indigenous peoples, whose daily exercise of their rights is collective. Broadly speaking, they give realization to their peculiar identity mainly at the communal level.

The same principle has been expressed in 2004—with respect to the ICCPR—by the HRC, according to which:

[t]he beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.⁴¹

The right of indigenous peoples to collective reparation—in the event that they are deprived of their right to 'own, develop, control and use their communal lands, territories and resources'—has also been recognized, *inter alia*, by the UN Committee on the Elimination of Racial Discrimination (CERD); this form of reparation must comprise:

[The] return [of] those lands and territories [traditionally owned or otherwise inhabited or used by them of which they have been deprived without their free and informed consent]. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁴²

⁴⁰ *Ibid*, para 14.

⁴¹ See General Comment No 31[80], 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004, para 9.

⁴² See 'General Recommendation No 23: Indigenous Peoples', 18 August 1997, available at <<http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument>> (last visited on 28 February 2007), para 5.

4. The Notion of ‘Indigenous Peoples’

The definition of the term ‘indigenous peoples’ will be the object of a specific section of another chapter included in this volume.⁴³ For this reason, the present section will only include a few introductory remarks, referring to the main elements of the definition in point, which will be analyzed more comprehensively later.

For the purposes of the present volume, the basic elements of objective character classifying an ethnic or cultural community as indigenous are the following:

- historical continuity of the community concerned with pre-invasion and pre-colonial societies that developed on their traditional territories;
- occupation by the community concerned of its traditional territories (or at least part of them) since a time preceding the invasion of colonial societies;
- common ancestry of the community concerned with the original occupants of such territories;
- historical continuity by the community concerned in the occupation of such territories, or continuity in claiming the said territories in the case that the community in point has been forcibly removed from them by the dominant sectors of the territorial state’s society;
- preservation by the community concerned of a specific culture, religion and/or language;
- preservation by the community concerned of a peculiar system of government based on customary law;
- consideration, by the community concerned, of itself as distinct from the cultural groups prevailing on the territorial state where it lives and will to preserve, develop and transmit to future generations its ancestral lands and cultural identity as a distinct people, in accordance with its own cultural archetype, social institutions and legal system.

As for the subjective requisites which are necessary for considering an individual as ‘indigenous’ (in that he/she is part of an indigenous community), they mainly include the following:

- self-identification by the person concerned as indigenous in that he/she is a member of an indigenous community;
- acceptance of such person as a member by the indigenous community (qualified as such on the basis of the objective criteria enumerated *supra*) of which he/she claims of being part.

⁴³ See ch 4, by this author.

5. Philosophy and Contents of the Present Volume

Today, the discourse regarding indigenous peoples is well-developed in the international society. The pride of indigenous communities in rediscovering their identity and self-consciousness crosses with an assorted and confused mix of feelings developed in their respect by the dominant society—on which they continue to depend as a result of the historical developments of the last 5 centuries—including solidarity, respect and true support, but also paternalism, ‘folklorization’ of their culture, deceitful amity and open hostility. Today the struggle by indigenous peoples to recover their right to decide their own destiny by themselves is still far from reaching its final goal, but has nevertheless produced quite promising outcomes. It is not to be overlooked, for example, that in a span of only 3 decades—after nearly 5 centuries of prevarication—⁴⁴ the attitude of international law with respect to indigenous peoples has been reversed, from the ‘assimilationist’ approach epitomized by ILO Convention No 107⁴⁵ to the ‘solidaristic’ one symbolized by Convention No 169.⁴⁶ Also, the number of states which continue to oppose the recognition of effective rights of self-determination, autonomy and self-government in favour of indigenous peoples (through, inter alia, opposing the definitive adoption by the UN General Assembly of the *Declaration on the Rights of Indigenous Peoples*⁴⁷) is constantly and inexorably reducing, as in an odd and out-of-time representation of the scene of the Western *Fort Apache*, in which most of its defenders have crossed over to the side of the attackers, having implicitly recognized the wrongfulness of their former behaviour toward indigenous communities.

It is against this background that the discourse of reparation finds its place. Of course, as it is noted by Professor Torres in his chapter,⁴⁸ reparation may not be sufficient, alone, for fully realizing the rights and aspirations of indigenous peoples in a future ‘perennial’ perspective. But it nevertheless represents a crucial and indispensable ingredient for construing a solid basis from which the movement for the effective realization of these rights and aspirations may spread its wings. Apart from its retributive function for the victims of injustices—which is by itself a value amply justifying the development of ad hoc legal studies and

⁴⁴ See, in this respect, ch 4, by this author, section 3.

⁴⁵ Convention No 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957, available at <<http://www.ilo.org/ilolex/english/convdisp1.htm>> (last visited on 26 April 2007).

⁴⁶ Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989, available at <<http://www.ilo.org/ilolex/english/convdisp1.htm>> (last visited on 26 April 2007).

⁴⁷ See United Nations Draft Declaration on the Rights of Indigenous Peoples, approved by the Human Rights Council on 29 June 2006, Resolution No 2006/2; UN doc. A/HRC/1/L.10 of 30 June 2006, p 58 ff.

⁴⁸ See ch 5.

social movements on the matter—the role of reparation in the realization of indigenous peoples' rights goes even further. Contextualized in the anti-materialistic, holistic vision of life of indigenous peoples, reparation is not only suitable for improving the living conditions of the injured persons, but it also provides—in a more 'metaphysical' sense—the basis for reconstructing the link between present and past times, restoring the continuity of the present generations with their ancestors as well as the integrity and 'eternity' of the cultural and spiritual identity of the communities concerned. It is like when a person—or a personified community—who has been deprived of an essential part of his/her own identity and cannot continue his/her walk of life without recovering that element of his/her personality, is restored with this vital segment of his/her personal make-up. Or, alternatively, it is as if a missing letter in a sequence of mutually interdependent DNA is replaced. In sum, reparations may play a decisive role in filling the gap opened in the bridge connecting an indigenous community with its traditions as an essential part of its identity,⁴⁹ in reintegrating the missing letter of the communal DNA of indigenous groups, as well as in restoring indigenous peoples with an essential feature of their presence in this world and securing the transmission of their cultural identity to future generations.

It is to be noted that the international legal background is not immune from difficulties in translating into practice the theoretical argument of reparations for indigenous peoples. As the ideological and moral foundations of this argument are undeniable, their transformation into practical outcomes may prove quite difficult depending on the socio-geographic context. But, at the same time, the lessons from a given country or region may positively influence the evolution of the matter in the rest of the world. On the basis of this assumption, the present volume will explore the 'living practice' of reparations for indigenous peoples in the different parts of the world, with the final purpose of singling out the best practices and strategies for maximizing the effectiveness of reparatory actions taking as the main parameter the needs and expectations of the communities concerned. At the beginning of the relay run by the authors of the different chapters of the present volume in order to bring the idea inspiring this book to its finishing-line, Professor Francioni investigates the general issue of the fertility of the contemporary international legal order for the discourse relating to reparations for indigenous peoples. Examining this issue from the twofold perspective of the rules on state responsibility and of reparations for breaches of fundamental human rights, Professor Francioni comes to conclusions which, albeit not unconditionally positive, are quite promising and encouraging, relying on the fact that the recent developments of international law show 'positive signs of a progressive development... toward the recognition of a customary right to reparation' for the

⁴⁹ The construction made in the text is coherent with the importance of the element of continuity with the ancestors, which, as seen in Section 4 above, is an essential element for defining a community as 'indigenous'.

victims of breaches of the rules of human rights and international humanitarian law. Of course, important barriers remain that make the realization of this right pretty difficult in many instances, but they may be overcome through adopting an eclectic approach which 'combines traditional interstate remedies with more modern techniques of direct access by individuals and peoples to international justice, and, on the other hand, brings together judicial remedies and political and diplomatic process'.

This conclusion is corroborated by the work of Professor Shelton, who, in chapter 3, after describing the several rationales that support—in legal terms—reparatory claims of indigenous peoples for past and present wrongs, provides a comprehensive critical review of the relevant practice, examining accurately the specific forms of concrete, practicable reparations—particularly apology, restitution and compensation. Professor Shelton then deals with the barriers which sometimes make the way to reparations hardly practicable in the real world; the negative role played by these barriers, however, must not be overvalued since, as Professor Shelton notes, '[t]he fact that lawsuits do not produce a judgment favorable to reparations does not mean that they lack value in bringing attention to the legitimacy or moral dimensions of the claims at issue. In fact, many lawsuits have been the precursor to negotiated or legislative settlements'. Professor Shelton also carefully examines the main vehicles in which reparations may be pursued—i.e. the rules on state responsibility, international human rights law and national law—concluding her essay by explaining the factors making actions for reparations more likely to succeed and emphasizing the potential of reparations to contribute to the realization of the 'idea of restorative justice as a potentially transformative social action'.

In chapter 4, the present writer tries to define the current status of international law on indigenous peoples, in order to establish what the rights are that, when infringed, may entitle the communities concerned to claim reparations. After having examined the relevant international instruments and state practice, Chapter 4 concludes that the right of indigenous peoples to enjoy, preserve and transmit to future generations their distinctive identity is today recognized by customary international law 'as a value perceived by the international community as a whole as worthy of protecting in itself', translating into a correspondent state obligation 'to ensure that the right in point is adequately preserved and safeguarded'. This right may feasibly translate into a number of prerogatives which—if infringed—may give title to reparation.

The successive contribution is by Professor Torres, who provides a deep and comprehensive vision of reparations by comparing, mainly on the basis of US and Latin American experience, the realities of indigenous peoples and of 'indigenized' Afro-descendants. After having examined the idea of reparations itself, Professor Torres concentrates his work on the colonial projects in Anglo and Latin America, as well as on the resulting structure of the relations between indigenous peoples and the state. Then Professor Torres examines the ways in which

contemporary conceptions of race and culture influence the arguments for reparations within the context of human rights, concluding that it is the current system of human rights which dominates the discourse on reparations.

In chapter 6, Nieves Gómez offers the reader much more than a glimpse of the significance of psychosocial reparation as an essential component to be realized in order to achieve a decent restoration of the dignity of indigenous victims of abuses and human rights breaches. Her experience with Latin American (particularly Guatemalan) indigenous communities epitomizes a reality that is characterized by certain core 'spiritual' elements which are shared by most indigenous communities around the world. Serious breaches of individual and collective rights generally lead to the rupture of, or grave damage to, the whole collectivity and social structure of indigenous communities, breaking the harmony and continuity of indigenous existence. When this happens, adequate redress for such sufferings may not take place without reconstructing such harmony and continuity. This is the reason why symbolic 'spiritual' and psychosocial reparation is not less important than material redress in order to make justice which is conceived as such by the persons concerned.

The Second Part of the volume—having the purpose of examining the practice of reparations for indigenous peoples at the international, regional and domestic levels—is opened by the contribution in chapter 7 of Claire Charters, who examines the existing international instruments and institutions at the global level for the protection of indigenous peoples and their potential for being reparation-supportive. The rights of indigenous peoples to reparation arising from the most important treaties and *soft law* instruments in existence, as well as international jurisprudence and 'para-jurisprudential' practice, are carefully and empirically examined, highlighting the different standards imposed by the various instruments with respect to the remedies made available for the peoples concerned in order to obtain redress for their injured rights.

Ana Vrdoljak then deals with the key topic of reparations for indigenous peoples for cultural loss, based on 'a holistic conceptualization of culture which covers land, immovable and movable heritage, tangible and intangible elements'. The element of land rights is thus specially emphasized, seen in its central significance together with 'collective and intergenerational custodianship; and the importance of customary law'. In her essay, Ana offers the legal bases of claims for cultural loss, including genocide and the removal of children, ethnocide and cultural genocide, human rights and self-determination. She then examines the ways of redressing indigenous peoples for cultural loss, ie restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. However, she rightly notes that indigenous peoples' 'reparations claims must be appreciated within the broader campaign...for recognition and enjoyment of their collective and individual human rights, especially the right to self-determination'.

In chapter 9 Professor Williams explains why—despite the fact that 'most Americans are theoretically committed to remedial justice and also aware of the

abuses inflicted on the Indians by non-Indian governments, associations, and individuals’—the United States has no programme of reparation for indigenous peoples and there are no concrete prospects of adopting one in the near future. The reason for this—as noted by Professor Williams—is that ‘American law-makers, judges, and lawyers have certain deep psychological needs that prevent them from recognizing the importance of a reparation programme’. In other words, according to Professor Williams, ‘the reluctance to grant reparations is connected to some fundamental elements of American legal culture’. It is the idea of ‘moral purity’, leading to an intrinsic difficulty of accepting that ‘guilt’ is an inevitable part of human life, which prevents Americans from developing a systematic programme of reparations for indigenous peoples. In this respect, Professor Williams suggests that this situation could be only reversed through accepting that ‘guilt is an inevitable feature of human life [and] that moral purity is not possible for us’.

Of course, when Professor Williams speaks about the lack of a programme of reparations for Native Americans in the United States, he refers to programmes of *general* character. This does not mean that in the country in issue there is no practice of reparation for indigenous peoples. This practice is examined in the following chapter by Professors Krakoff and Carpenter, who look at the matter from the eyes of the people concerned, showing the ‘complexity of imposing a reparations framework on injustices that the United States has inflicted on American Indians’. However, the authors examine the US model of reparations based on American Indian Law as well as the particular context of American Indian self-help reparations, concluding that the most hopeful forms of reparations are those that are available to indigenous communities ‘through the prism of tribal sovereignty’.

The struggle of Canadian indigenous peoples to achieve ‘true reparations’ is examined by Professor Morse in the following chapter. After having analysed Canada’s experience of reparations for non-Aboriginal Canadians, Professor Morse goes straight to the heart of his subject, carefully evaluating the national practice of reparations for injustices to indigenous peoples, and concentrating in particular on the key issue of restoration of lands (including land claims currently under negotiation). He then examines ‘[a]nother crucial sector in which First Nations, Inuit and Métis peoples have actively pressed for action for many years’, ie self-government or, in broader terms, ‘full control over their lives’, providing a comprehensive assessment of the relevant self-government agreements. Professor Morse concludes that ‘[t]he reality of Canada is that it remains a land that was colonized illegally and has never been decolonized’, claiming the need of allowing Canadian Aboriginal peoples to fulfil their wish ‘to regain control of their lives and their lands so as to refurbish their spiritual link and to resume their responsibilities as stewards of this space’.

In chapter 12 Gabriella Citroni and Karla Quintana Osuna examine the practice of the Inter-American Court of Human Rights, devoting special attention to its uniquely advanced approach in evaluating the features of any specific reparatory

process in order to ensure its effectiveness in the light of the self-perception of the damage suffered by the indigenous communities concerned. The authors thus emphasize the capacity of the Inter-American Court to translate—with respect to indigenous peoples—the inherent individual connotation of the rights proclaimed by the 1969 American Convention of Human Rights into a *collective* perspective, taking '[t]he specific and unique cultural identity of each indigenous group [as] the guideline for both the interpretation of the provisions of the [Convention] and, consequently, for the determination of the measures of reparation needed to remedy the violations suffered by indigenous communities'. This approach has led the Court to develop 'a sound set of principles concerning reparations in cases of violations of human rights of indigenous communities' which have proven particularly adequate in terms of *effectiveness* of the action for the restoration of such rights.

The part on Latin America is completed by a contribution, offered by Professor Rosti, dealing with the relevant domestic practice of 2 selected countries, namely Argentina and Chile. The picture resulting from this chapter shows that, while in Argentina, since 1994, 'certain steps have been taken in terms of reparations for the indigenous peoples' (including, in some instances, restitution of lands), the situation in Chile has up to now been less encouraging, although 'signs of a counter tendency have recently come from some local courts'.

In Chapter 14, Stefania Errico and Professor Hocking examine the practice of reparations for indigenous peoples in Europe, devoting special attention to the case of the Sámi people (living in the Northern countries of the European continent). At the beginning of their contribution, they note that, '[w]hen compared to the American continent, Europe, on its whole, appears to have been less concerned about indigenous issues and accordingly slower in dealing with them'. In Europe the discourse of indigenous peoples has in fact traditionally been approached within the broader context of minority rights. However, a positive trend has recently been inaugurated in some Northern countries with respect to the Sámi people, through the recognition of their right of ownership of ancestral lands at the judicial level as well as of the Sámi Parliaments as 'a means of cultural autonomy' (although lacking territorial jurisdiction).

The African case is assessed in chapter 15 by Professor Udombana, who starts out from the assumption that 'international human rights are relevant only to the extent that the secondary (power-conferring) rules are regularly applied to remedy breaches of the primary (duty-imposing) obligations'. Thus, after dealing with the problems related to classification of Africa's indigenous peoples, he first examines the 'various primary obligations' that have been infringed to the prejudice of these peoples and, second, the degree of fulfilment of the secondary obligation to grant reparation for these injuries within the context of the African continent. Professor Udombana concludes that, beyond the encouraging signs shown by the relevant practice toward the actual implementation of such secondary obligation, there is a need that the global community helps indigenous peoples to 'realize their aspirations in controlling their own institutions, ways of life, and

economic development, and in maintaining and developing their identities, languages and religions’.

In the following chapter, Phutoli Chingmak examines the complex reality of reparations for indigenous peoples in Asia, showing a very heterogeneous situation characterized by the deeply diverse approaches adopted by the various countries dealt with in her contribution with respect to the matter at issue. While some Asian countries (eg, to a different extent, Bangladesh, Cambodia, Malaysia and Japan) have developed a more or less sophisticated practice—at the judicial and even normative level—of reparations for the wrongs suffered by indigenous peoples, others (eg China or Myanmar) continue to pursue a policy characterized by clear ostracism—to use an euphemism—toward the recognition of the basic rights of such communities as well as of their distinctiveness from the dominant sectors of the national society. However, it is a positive sign that the attitude of a number of Asian countries, with respect to reparations for indigenous peoples, is today moving toward the effective implementation of international standards on human rights.

The panorama on the Asian continent is completed by the case-study concerning Indonesian indigenous peoples offered by Professor Soares in Chapter 17. Professor Soares notes that the struggle of the *masyarakat adat* in order to obtain justice for the horrific violations suffered in the past has so far clashed with a totally unfavourable surrounding environment characterized by the general inadequateness of Indonesia’s justice system to address human rights claims ‘because of corruption, interventions by other state apparatus and lack of professionalism’. For this reason, a vital role is today played by the efforts undertaken by NGOs and *masyarakat adat* at the national and international level, to be considered, particularly because of their symbolic value, as ‘small steps for *masyarakat adat* to achieve the justice that has been denied to them for decades’.

This is followed by the chapter on Australia, written by Professors Hocking and Stephenson. In their very comprehensive essay, the authors illustrate how in the last years the Australian society has tried to compensate Aboriginal peoples for the past governmental policy aimed at speeding up their extinction, which was seen as a natural consequence of the human evolutionary process. In doing this, they devote special attention to the shameful practice of the ‘Stolen Generation’, for which the State of Tasmania has very recently announced a compensation package. The authors then concentrate on the practice of compensation for indigenous property rights in Australia, representing ‘a key issue to emerge from the Australian High Court’s decision in *Mabo v State of Queensland (No 2)*’ of 1992. They conclude that, ‘despite the incremental ‘pockets’ of compensation’ recently emerged for Aboriginal peoples in the areas of property, constitutional, labour and tort law, [the] inadequacies of the contemporary Australian legal system in this context’ are a consequence of ‘the absence of a federal Bill of Rights in Australia’.

In the final chapter of Part II of this volume, Professor Iorns Magallanes examines the topic of reparations for Maori grievances in New Zealand. After

an inclusive and useful assessment of the historical evolution of the situation of indigenous peoples in the country, since the first approaches with the British Crown and the Treaty of Waitangi up to present times, the author concentrates her essay on modern reparations mechanisms available to the Maori people, ie the Waitangi Tribunal, national courts and negotiation with the Crown. Professor Iorns Magallanes concludes that 'New Zealand has embarked upon a significant modern effort to effect reparations for Maori grievances arising out of colonization', suggesting that 'the New Zealand experience has shown that it is possible for indigenous peoples to obtain concrete and meaningful reparations for past injustices.' A very promising conclusion for the whole book—having the ambitious aspiration of representing a doctrinal contribution to a struggle which in most recent years has been producing its first encouraging outcomes—is offered by the author at the very end of her contribution: '[r]eparations for indigenous grievances look expensive but are well worth it. They need to be seen, not as a cost to be borne, but as an investment for the future of the whole country.'

In chapter 20, which introduces Part III of the present volume, Professor Anaya provides the reader with a superb example of how a claim for reparations is to be submitted before a court. It is based on two separate claims, which were actually filed by representatives and members of the indigenous Maya villages of Conejo and Santa Cruz to the Supreme Court of Belize on 3 April 2007. The skeleton argument prepared by Professor Anaya for the claimants, who alleged that the government of Belize violated their constitutionally recognized customary land rights, is also reproduced in the chapter. It is a 'living' example of how historical evidence, cultural arguments, international law and domestic law may be combined in order to build a solid argument which may prove strong enough to convince a court that the communities concerned are to be granted actual redress for the torts suffered. The reader is thus made aware of how the legal principles analysed in the preceding chapters are to be translated into concrete action in order to give realization to the right of indigenous peoples to reparation in the real world.

Finally, chapter 21, written by this author, has the purpose of leading the idea inspiring this book to reach its destination. It thus tries to bring the different lessons illustrated in the second part of the volume together, including the best practices and strategies to be adopted in order to maximize the concrete opportunities of indigenous peoples to obtain effective redress for injustices suffered (of course taking into account the differences existing in the diverse legal contexts and geographic areas of the world). Thus, the final chapter tries to recapitulate the experiences of the different parts of the world described by the authors contributing to the volume as well as to identify the criteria to be taken into account and the strategic moves to be adopted in order to enable indigenous peoples—to the maximum extent possible—to obtain effective reparation for their grievances.