

SYMPOSIUM ON WHAT CAN INTERNATIONAL LAW REPAIR?

INTRODUCTION TO SYMPOSIUM

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Our exploration of *Reparations in International Law*, spanning both the print edition and *AJIL Unbound*, continues with this second *Unbound* symposium. The first symposium began by asking the difficult threshold question of how international law might approach demands for reparations. The five essays in that symposium asked who can seek reparations, what reparations should look like, and finally, how the process of reparations might be operationalized. This second symposium takes a different approach: each of the six essays included here provides probing case studies of reparation demands met or unmet. Surveying responses to the cholera epidemic in Haiti, resource exploitation in Africa, atrocities committed against Mau Mau veterans, demands for repatriation of Native American cultural objects, the Indian Residential Schools policy in Canada, and chattel slavery, each of the authors provides insights into successful and unsuccessful reparations projects. With colonialism lurking behind each story, the authors also implicitly or explicitly raise questions whether an international law so implicated in both these harms and in past impunity can now provide effective reparations. The answers are hopeful but sobering.

Across the essays, a number of themes emerge. One key finding by the authors is that effective reparations must be based on meaningful consultation and partnership with harmed communities. Writing about the Canadian government's efforts to make amends for the harms inflicted on Indigenous people and Indigenous communities, Tamara Thermitus, of McGill Law, details how initial efforts at redress failed. Drawing on her experience as negotiator of Canada's Truth and Reconciliation Commission's mandate, she explains how the initial focus on case-by-case monetary compensation ignored Indigenous voices, demands, knowledge, and culture. It was only after the institution of a truly consultative process, one that sought the views of survivors, elders, and community members, that real progress in repairing the harms caused by the Indian Residential School policy became possible.

Elena Baylis, of University of Pittsburgh Law, writing about repatriation of cultural artifacts, makes similar observations. Looking at the U.S. Native American Graves Protection and Repatriation Act, she notes that its success hinges in part on its embedded consultative process. "Museums are required to consult with communities, defer to their knowledge, and return regulated heritage upon request." By contrast, museums' retention of some final decision-making authority remains a point of conflict with Indigenous communities.

Focused on Indigenous efforts to repair environments long exploited by others, Marie-Louise Fehun Aren, of Schulich Law, also sees a potential model in U.S. reforms. Comparing legal responses in the United States, Nigeria, and Namibia, she sees progress where communities are given meaningful roles in planning and budgets.

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International legal principles of free, prior, and informed consent require a concomitant commitment to self-determination. When that commitment is present, as it has been at times in the United States and Namibia, progress in resource management has been possible. When that commitment has been lacking, as in Nigeria, efforts at reparation have been frustrated.

The fieldwork undertaken in Haiti by Rosa Freedman, of Reading Law School, and Nicolas Lemay-Hébert, of University of Manchester, reveals the ways UN efforts to respond to the cholera spread by peacekeepers failed to appreciate what Haitians actually want. And Elvis Mogesa Ongiri, of Kabarak Law Review, condemns efforts to redress atrocities committed during the Mau Mau uprising in Kenya for failing to consult the victims of those harms or their communities.

Listening to harmed individuals and communities also reveals the importance for reparations projects of thinking beyond individualized damages. In some cases, as Rosa Freedman and Nicolas Lemay-Hébert document, that sort of compensation may be essential, but many of the authors emphasize the limits of such reparations. The loss of cultural artifacts to looting and theft, Elena Baylis explains, is not just a loss of property but a loss of culture and identity. Effective reparation requires not just compensation or the return of objects, but efforts at repairing those communal and spiritual harms. Tamara Thermitus describes harms caused by Indian Residential Schools in similar ways. For Marie-Louise Fehun Aren, forms of community self-determination may be the type of reparation necessary to repair Indigenous peoples' relationship to their environment. And Elvis Mogesa Ongiri describes the harms of colonial violence in Kenya as "social and psychic scars" that cannot be healed through individualized compensation alone.

But perhaps most notable in these stories is the role of international law, more often portrayed as an obstacle than as a solution. While semi-successful reparations efforts often draw on international law principles like free, prior, and informed consent, they are usually implemented at more local levels and through domestic legal processes. Lurking within these essays are explanations why. Even as international law has sought to become more inclusive, its rules continue to protect those with the power to shape them. International law's complicity in past harms lurks within international law doctrine, frustrating efforts at genuine reparation.

Rosa Freedman and Nicolas Lemay-Hébert explain how the United Nations has stood behind international law doctrines of immunity to shield itself from meaningful responsibility for its mistakes in spreading cholera to Haiti. Detailing the progress of cases brought by victims of atrocities in Kenya, Elvis Mogesa Ongiri powerfully indicts the "legal sophistry" of international law rules of states succession that successfully shield colonial states from responsibility for past harm.

But for Christopher Gevers, of University of the Witwatersrand, it is not just international law rules that stand in the way of a more just system, but international law's role as an agent and abettor of power. Gevers's provocative and important essay turns the notion of reparations on its head, explaining how in prohibiting slavery and the slave trade, international law compensated slaveholders by elevating "whiteness." It was not just that former slaveholders received compensation for their lost slaves, nor even that those funds were invested in colonial enterprises that further subjugated peoples around the world. The prohibition of slavery was refigured within international law as proof of the advancement of European civilization, a justification for a standard of civilization in international law that legalized white dominance over the nonwhite world and embedded racism within international law doctrine itself. Describing "Whiteness as Reparation," Gevers effectively unmasks international law to reveal the smirking face of power beneath. All the obstacles described by the other authors become not just stumbling blocks to remove but symptoms of international law's twisting pact with power. Whether international law can free itself from it remains a sobering question haunting all efforts to achieve a more just world. To provide effective reparations, international law itself will need to be repaired.