8. Negotiating the Past: Correcting or Resurrecting?

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Abstract: *Negotiating the past has its problems and is generally not recommended (Zartman & Kremenyuk 2005). Dealing with past grievances is a matter of mechanics and justice. It revives past grievances, weighing and interpreting the nature and degree of the past injustice in contemporary terms, and also does the same for the intervening period of time. It also raises the question of whether it is the past action that is being corrected or the impact of the past action, presumably cumulative, which means comparing an indicative against a conditional, i.e. what was the intervening situation and how is it to be judged against how it could have been in the absence of the grievance. Such actions tend to be one-sided, looking at the grievance only as perceived by the aggrieved, ignoring other elements in the past situation. Therefore, it raises the question of representation, which is a function of whether it is the past, the intermediate, or the present situation that is being repaired; it also raises the question of numbers and apportionment. Finally, there is the somewhat separate question of restitution: should the despoiled object be returned, what happens to the current beneficiaries, and how are current improvements to the despoiled property to be handled? Cases from Native Americans, Namibia, and Rwanda are examined along with other instances referenced.*

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'Les absents ont toujours tort' (French proverb)
'Qui ne dit mot consent' (another French proverb)

This essay seeks to analyse the issues involved in furthering the concerns of the absents from the past in negotiation. It deals with two types of absents: those who have been wronged and seek redress, and those who have rights to pursue. To do so, it must examine the topic through its significant referents: representation, time, wrongs, rights, interests, legitimacy, reconciliation and justice. Essentially, it shows that absent parties, being absent, are no longer involved in negotiation, and that their only role is to have created information for present parties who claim present representation of past parties' interests and use it for their own interests. The result can legitimately be a recognition of past rights and wrongs. Material recognition can be paid only to the pasts' descendants who continue to be materially affected and can be negotiated conclusively. Non-material (memorial?)

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recognition is more complicated and elusive; it is open to all claimants and can never be closed. The challenge then is to make the absents present.

Negotiation is a process of parties' combining their conflicting positions into a joint agreement,[1] using division (concession), exchange (compensation) or reframing (construction). It has been characterised as 'giving something to get something,' indicating that the parties give up something of their positions in order to buy movement that they accept as similar from the opponents. Mutual movement is typical; if one party makes all the concessions or movement and the other takes home all the bacon, it is an atypical negotiation or perhaps not even a negotiation at all; requitement is one of the norms of negotiation. Lastly, negotiation is carried out among parties, either directly or through their representatives.

But what if the negotiations do not involve a party, or at least a present party? Increasingly, negotiations involve parties of the future, on behalf of whom present parties negotiate. For example, heavy current expense in a government budget, such as the USD 1.9 trillion 'Covid bill' in the US, entails in fact enormous expenditure by future generations, who are in no way represented in the negotiations. Climate change negotiations continually invoke future generations, with little effort put into calculating their interests. Indeed, most negotiations are a gift – often poisoned – to future generations whether they like it or not; negotiators hope that their gift will be stable and that their agreement will provide the conflict or problem with an outcome of peace and justice, but it is for future generations unrepresented at the table to bear the burden of implementation and the realisation of its promise. Negotiated agreements are contingent promises and it is up to future parties to work out the contingency and verify the promise.

Yet these negotiations do not involve the absent futures as a party, that is, as a 'parti-cipant,' in the negotiations. At most they are carried out under the shadow of the future, much as negotiations to end a conflict are aimed at forestalling the return of the conflict in the future or, to put it otherwise, to achieve a better outcome for those who will be there in the future. The parties do give something to get something, such as giving up the expectation of victory in exchange for peace. However, it is not they that actually give and get, but the current negotiating parties on their behalf. Any action creates a future for future parties, but not by future parties.

1 I William Zartman, 'Negotiation as Joint Decision-Making' in I William Zartman (ed), *The Negotiation Process* (SAGE 1978).

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Other negotiations involve past absents, with less of a clear custom or established procedure on how to handle them. They can neither give nor get, having already given and gotten all that they could, and that may be the problem. The only event in which to be involved would be over negotiations to alter that balance sheet, but even there it is not the absents who are involved but present parties speaking for them. Past absents leave a legacy that coming parties work out. Parties can be relieved of or compensated for that legacy if the relief or the compensation comes in time to correct the situation for the parties (or their immediate children) alive at the time and in that case they are not absent; how much later raises questions, which will be discussed below. An example could be a jail sentence or exoneration that is later found to be erroneous, and a correction is negotiated with the party. But in these cases, the party is not past but present in the negotiations, which returns the discussion to the matter of the past where the absents are not parties to a negotiation. They are no more stakeholders than they are shareholders, a distinction used to bring in the first circle of absents in the present.[2] Thus, the first principle in analysing past absents is that *past absents must be made present to negotiate.*

It is perhaps relevant to make a moral disclaimer at this point, lest the following discussion be taken to imply a disregard for the situation of past absents. The fact that past wrongs cannot be righted in the past does not make them any less wrong. The Kennedy brothers cannot be revived or restored even though their murders were morally and politically heinous. The fact that Hitler and Stalin cannot be punished for the Molotov-Ribbentrop Pact that erased Poland, among other things, does not make the agreement any more despicable; that situation can be righted, and it was, but not for the people of the past.

While the Kennedys cannot be restored to life or to politics, Poland can be – and has been – restored. Some individual citizens who last property have doubtless seen it returned or been compensated for it, some monuments and plaques have been erected, but life picks up with the restoration of Poland on the basis of the situation at the time of restoration. The same occurred in 1919 when Poland reappeared after 125 years' absence. Poles existed during these periods of absence, but the political entity and economy of Poland was absorbed by neighbors. Resuscitation was accomplished by

2 Maria Bonnafous-Boucher and Yvon Pesqueux, *Décider avec les parties prenantes* (Découverte 2006); Maria Bonnafous-Boucher and Jacob Dahl Rendtorff, *Stakeholder Theory* (Springer 2016).

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descendants (shareholders) and 'stakeholders' (interested second parties) on both occasions. Essentially, the new (or renewed) corporate entity started out again where it was, the result of the balance sheet incurred in its absence.

1. Making the Absents Present in the United States

There seem to be only two ways to remove the status of absents: either to bring them back alive in the present or to meet them in the past. The first means carrying their line to one or more living descendants, converting their absence into presence and allowing for agreed closure by the present parties. The second means performing acts of material or memorial recognition open to a larger or unlimited audience, with acknowledgement or write-off only on behalf of but not from the absents. A few examples will illustrate these notions, realities being sharper but never as comprehensive as concepts.

A situation relevant to this discussion concerns the land of *Native Americans* which have been sequestered by the US federal government.[3] By the doctrine of discovery, based on the European feudally-derived doctrine of conquest, Britain (and other European 'discovering' countries) had legal title to the land it 'discovered' and this power of sovereignty passed on to the United States upon independence and then, under the Constitution (art 1, §8, cl 3, the Interstate and Indian Commerce Clause) to the federal government.[4] Justice John Marshall defined the relationship with:

> domestic dependent nations…(who) occupy a territory to which we assert a title independent of their will. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power, …[5]

Many of the 'dependent nations' or tribes negotiated their landholdings with the federal government.

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3 I am grateful to Katherine Nelson and David Smith for an understanding of this case. Katharine F Nelson, 'Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power' (1994) 39(3) Villanova Law Review 525.

4 *Worcester v Georgia*, 31 US 515 (1832); *Johnson & Graham's Lessee v McIntosh*, 21 US 543 (1823); *Oneida Indian Nation v County of Oneida*, 414 US 661 (1974).

5 *Cherokee Nation v Georgia*, 30 US 1, 17 (1831).

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But in 1887 Congress passed the Dawes Act that authorised the president 'to allot the lands in said reservations…to any Indian located thereon in quantities as follows: 160 acres to a head of family, 80 acres to adult single persons, and 40 acres to children', 'for agricultural and grazing purposes' to encourage them to become farmers subject to state laws, 'and, if they lived separate and apart from any tribe...and have adopted the habits of civilized life…to [become] a citizen of the United States'.[6] The federal government held in trust all grazing, oil, gas, and recreational leases or administered them through 'individual Indian money (IIM) accounts'. But over time the landowners received no or inadequate payments for the leases, and whatever payment was held for them in trust; the plots were too small and arid for farming or cattle raising, and gradually the owners sold them at low rates for an immediate return. The 155 million Indian-owned acres in 1881 dropped in half by 1900 and to a quarter in 1934. In 1996, Elouise Cobell, a Blackfeet Nation banker, launched a class action suit on behalf of over 300 000 landholders – the largest class action suit ever – against the Secretary of Interior to recover the sums held in trust by the federal government's Bureau of Indian Affairs (BIA) but withheld by 122 years of negligence or design (eventually *Cobell v. Salazar*[7]).

The suit, settled in 2009, raised innumerable and typical problems, which – politics aside, of course – may have helped delay its resolution for thirteen years of litigation including 10 trials, two judges, seven appeals, and 22 published decisions. Six generations of absent landowners had passed, and their inheritance had been fractionated by probate 'so that some parcels now have many hundreds – or even thousands – of owners,' which had made it difficult to reach agreement to develop, improve or lease the land.[8] At the time of the suit, 10 million acres contained 4.1 million fractionated interests in 99 000 land parcels.[9] A lawyer for the plaintiffs later claimed, 'I spent 7 or 8 years of my life trying to track down claimants and descendants.' The land itself was estimated at between 47 million and 54 million acres, and the lawsuit was designed to force the government

6 US Statutes at Large, XXIV, 386.

7 *Cobell v Salazar*, 573 US F.3d *808* (DC Cir. 2009) (Cobell XXII).

8 [8] Chris Edwards, 'Indian Lands, Indian Subsidies, and the Bureau of Indian Affairs' (*Downsizing the Federal Government*, 1 February 2012) <https://perma.cc/4S4G-TZPD>. In the US, 3-descendents fractionation yield 163 heirs in the sixth generation; 'Government Settles Indian Trust Fund Suit' (*Cultural Survival*, 14 December 2009) <https://perma.cc/B6R9-FZGG>.

9 Edwards (n 8).

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either to fully account for the profits of the leases or to distribute them to the owners, a full accounting being impossible since the Department of Interior had either lost or destroyed many of the records (three previous cabinet secretaries for Interior and Treasury were held in contempt of court for failing to protect and provide adequate documentation.)[10] In sum, once the federal responsibility through the Bureau of Indian Affairs' (largely willful) mishandling was established, both the number of representatives of the absent landholders, the amount of their losses, the means of calculation of its value, and the allocation of any award, which lacked any firm basis, were open to negotiation.

It is reported that Judge Robertson brought the parties to his chambers in the summer of 2009 and said: 'You can litigate this for another 10 years or you can resolve it now. I want you to resolve it now'.[11] The value of the claims varied widely according to plaintiffs and scholars, from USD 47 billion demanded by the plaintiffs to USD 176 billion mentioned in press statements. Since tribal trust lands (three-quarters of the reservations' total acreage) are 80 percent less productive than fee-simple lands (5 % of the total) and individual trust lands (a fifth of the total) are 30–40 % less productive, the basis for an estimate of lost value is complex and uncertain.[12] In 2005, the US government proposed paying USD 7 billion as partial settlement; the plaintiffs requested USD 27.487 billion;[13] two years later, the government proposed USD 7 billion which the plaintiffs said was 'pennies on the dollar' and mentioned liability of over USD 100 billion.[14] After three months of negotiation in 2009 that followed a curious bargaining process of lowering totals to reach an agreement, the outcome was a USD 3.4 billion settlement, the largest such settlement ever for the US government. After legal and administrative fees, USD 1.4 billion was set aside for the plaintiffs, individuals who had an account open in the BIA as of 1994, who were

10 Cultural Survival (n 8).

11 Ari Shapiro, 'US in $3B Settlement with American Indians' (*NPR*, 8 December 2009) <https://perma.cc/ZSM9-MQ43>.

12 Terry L Anderson and Dean Lueck, 'Land Tenure and Productivity on Indian Reservations' (1992) 35(2) Journal of Law and Economics 427.

13 James Cason, 'Statement of James Cason, associate deputy secretary and Ross Swimmer, Special Trustee for American Indians on the Cobell Lawsuit' (*Department of the Interior – Office of Congressional and Legislative Affairs*, 26 July 2005) <https://perma.cc/V8KY-BKJH>.

14 Mary Clare Jalonik, 'Interior Proposes Settlement in Cobell Case' (*Bismarck Tribune,* 6 March 2007) <https://bismarcktribune.com/news/state-and-regional/article_e2586773-2cd9-5415-bdd3-a7d28ff5d455.html> accessed 7 July 2023.

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expected to receive USD 1000 each; USD 1.9 billion went to individuals who wanted to sell their fractionated interests to the federal government to be turned over to the tribes as community lands, and USD 900 million was set aside for higher education scholarships, a common practice with Indian settlements. The settlement was the negotiation of a bad debt, paid on 10 cents or less to the dollar.

2. Making Absents Present in Africa

A case of absents for comparative relief concerning *German non-reparations to Namibians* killed and despoiled in 1904–1908, following a Herero and Nama resistance against the German colonisation of South West Africa, now Namibia. Germany launched an extirpation campaign against the two tribes, chasing them into the desert, poisoning and imprisoning those who remained, and killing 65 000 of the 80 000 Hereros and 10 000 of the 20 000 Namas. There are four questions involved.[15] The first is the matter of representation. Under internal pressure, Germany looked into negotiations in 2004 with the two tribes, who in 2007 petitioned inclusion; Germany found them locked into maximalist positions.[16] The Namibian government, composed of the national liberation movement turned single party, the South West Africa People's Orgnisation (SWAPO), which is primarily Ovambo, rejected the tribal associations, the Ovaherero Traditional Authority and the Nama Traditional Leaders Association, as non-representative. They then turned to the US court in a class action suit in 2007 but were rejected for non-jurisdiction, and then considered approaching the International Court. Instead, under pressure the government included a Ovaherero/Ovambanderu and Nama Council for Dialogue on the 1904–1908 Genocide (ONCD 1904–1908) that was willing to accept a role as a consultant body to the process. The Agreement finally reached between the two states was rejected by tribal representatives for agency as well as content.

15 Reinhart Kössler, *Namibia and Germany: Negotiating the Past* (University of Namibia Press 2016).

16 Rudolf Schüssler, 'Self-Centered Reconciliation: The German-Namibian Case' (2021) 50 PINPoints 31. Henning Melber, 'Germany and Namibia: Negotiating Genocide' (2020) 22(4) International Journal of Genocide Research 502.

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The second issue, in time and in the negotiation process, is the game of the name. In part because of the past shadow of the word, it took until May 2021 for Germany to agree to the official use of the term 'genocide,' but it still refuses to refer to 'reparations' because 'the prevention and punishment of genocide [by the 1848 convention] does not apply retrospectively and cannot be the basis of [individual] financial claim,' whereas reparations open up endless possibilities of litigation and precedents for other cases involving Germany and other neighboring and colonial countries.[17]

The third issue is the 'Quantum' question. In 2005 Germany offered EUR 20 million in compensation over 10 years but the deal fell through in November; in 2015 it again offered EUR 10 million, presumably on different terms, but the negotiations on the issue stalled. The two states finally made an agreement in May 2021 for a EUR 1.1billion payment of EUR 36 million annually over 30 years, still rejecting the notion of reparations.[18] The payments are to be used for social and economic development including vocational training with a focus on Herero and Nama people but not specifically to them or to victims' descendants.[19] For these reasons, the agreement has been castigated by the tribal spokesmen, who claim the sum is inadequate, the representative inappropriate, the focus on training demeaning, and the reparations question still open. Analysts say that rising youth consciousness in Germany may yet make a return to the issue possible.

The fourth issue has not been addressed at all. Under colonisation, German settlers took over the land abandoned by their former Herero and Nama owners. Government policy has favored land recovery benefitting farming Ovambo people in the heavily populated north and little for the pastoral Herrero people in the northeast. As in former settler colonies in southern Africa and elsewhere, land redistribution is a highly political issue relating both to economics and historic identity. There is no accountability for the absent perpetrators, either of the genocide or – still present and visible – of the land usurpers.

The third case is again quite different. The absents are the 800 000 victims of the 1994 *Rwandan genocide*, primarily Tutsi. France did not commit the genocide but by its support, political and material, for the Hutu-domi-

17 Morimitsu Onishi and Melissa Eddy, 'A Forgotten Genocide' *The New York Times* (New York, 8 May 2021).

18 Philip Obermann, 'Germany Rules out financial reparations' (*The Guardian,* 21 May 2021) <https://perma.cc/Y24H-UELB>.

19 Alfred L Brody, *Reparations: Pro and Con* (OUP 2021).

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nated regime in Rwanda associated with the Rwandan National Movement (MNR) and the ensuing *génocidaires* or *nguzu*, it made the killing possible. After the fact, genocide has been widely admitted and perpetrators have been pursued by the International Criminal Tribunal for Rwanda. The Rwanda regime has revived a traditional reconciliation institution of *gacaca* designed to air and meet the griefs of the survivors of the victims, although there have been charges that a frank and open exchange is absent and the institution is in Tutsi hands. French President Emmanuel Macron publicly acknowledged 'France's overwhelming responsibility' in the affair, standing next to the Rwandan President Paul Kagame, the Tutsi leader who ousted the MNR regime. The French government had commissioned a private Duclert report that established the record of responsibility.[20] The admission was greeted positively by Rwandan groups. However, some commentators have questioned the extent of the admission. French involvement was part of a policy of backing authoritarian regimes as a means of assuring good relations and French responsibility for stability in French-speaking Africa. The Kagame regime is a leading example of the same relationship with a repressive regime.[21] African critics stated that an appropriate recognition of the absents would be a future correction of the type of policy that underlay the support of the type of regime that engaged in genocide.

In the Native Indian case, the absents were brought to life, in some cases from 15 to 122 years (since 1887 or 1994) but they never were really absent, just ignored, having remained on the out-of-date BIA records. How the sums to be paid were negotiated down in a reverse bargaining process is not clear. The suit was not over the injustice of the law vis-à-vis the absents but over the neglect of its application. Payments were not updated to take the effects of economic conditions, back interest, inflation or opportunity costs into account.

In the Namibian case, none of the issues under negotiation has brought the absents back in any way. They celebrate an event, like a wake, and made (or sought to make) money out of it. Had they addressed the land issue, the

20 Mehdi Ba, 'Rwandan genocide was "a French political, institutional and moral failure" says Duclert Commission' (*The Africa Reports,* 29 March 2021) <https://perma.cc/66RB-NK8R>.

21 Achille Mbembe mentions 'France's "apparent blindness to tyranny"' in Barbara Wojazer and Melissa Bell, 'Macron Seeks Forgiveness for France's Role in Rwanda Genocide, But Stops Short of Apology' (*CNN World,* 2021) <https://perma.cc/Q9ME-6NP3>.

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absents would appear and their confrontation with the presents would be more real. That may yet happen.

The Rwanda case shows the greatest distance between the absents and the presents, or really the futures. On the levels of legal naming and judicial retribution, the situation has been fully handled, if not settled. It is only on broader implications of policy and relations, twice removed, that the implications of the absents' situation is brought to the future.

3. Referent Principles

None of the component seven principles itemized below deal uniquely with the situation of the absents *per se*, but they frame such consideration. When discussing past absents, one is not considering their role in negotiations since they are absent, an unresurrectable situation. At most, one can consider their rights and wrongs as carried by a representative in the present. Thus, the past cannot be remedied or advanced in the past but only in the present, through the present situation of present parties with claims based on absents' losses and claims. In dealing with the value of such claims and negotiations, referents are crucial elements in framing the issue (Kaneman & Tversky). Such referents are involved in breaking down (analysing) the current issue, including rights (interests), wrongs, representation (standing), time, legitimacy, reconciliation, and justice, perhaps among others.

Rights including interests are a defining referent, concerning notably the issue of participation and the extent to which it can be restored. Presumably, the past absents had or would have or should have had the right to participate had they been present. That right is then reactivated by their representatives, discussed in the following section. However, if that right was absent along with them or not recognised, the first task is to establish it, again presumably by the claimant's representatives. The claim is made in the same terms as it would have been if the absents were present, in terms of damages and interests. The Poles can claim that they had the right to be present in the Molotov-Ribbentrop discussions since their existence was at stake, and in their absence, the negotiations were illegitimate. Denial of that right was one of the causes of World War II. Hereros and Namas can claim that a right to life and land existed for all time and that genocide now was extermination then, in concept even if not in legal language. Apartheid Blacks, American natives and American slaves can claim their rights as humans were not recognised and that by the same reasoning, apartheid,

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pupilage and slavery compacts were illegitimate. As a result the wronged groups had past rights that can be pursued by their representatives.

However, when such fundamental rights as existence as human beings or as a state are concerned, it should not only be the job of representatives but of all inheritors of the system to pursue them. Hence World War II was pursued by all the Allies, not just the Poles, and the end of apartheid and slavery is the challenge to all South Africans and Americans. These are clear cases: but what about the right of nations that are not yet states, such as Palestinians, Kurds,the Armenians in Nagorno Karabakh or Uighurs in China? The right of national (or state) self-determination has been firmly recognised but is obtainable only by intense violence. By the same token, another special group of absents with rights as human beings are the yet unborn, most of whom will not be absents in the future but some of whom are threatened with absence in their past. Not parties now themselves, they depend on their representative to insure the recognition of their right to life.[22]

Wrongs are defining elements in the consideration of absent parties. Most discussion of the past absents is triggered by a desire to right the wrongs of the past. It is not simply a question of suspended inheritance, as the discussion and the case to this point has indicated, but of a wrong condition of the estate at the very time of reckoning. Thus, it is not just a matter of updating the inheritance but of correcting the inheritance itself at the time of accounting. But should the books of the time be accepted at face value, without accrued interest and opportunity costs? However, there is no question of righting the wrong for the benefit of the wronged, since they are past, but of doing it for the benefit of present survivors. Beneficiaries are usually representatives of past absents but they also can include a larger group of present parties, when class action is possible, which is not the case in many legal systems.

Past wrongs cannot be used as an excuse to claim benefits for present parties other than immediate descendants. The notion is based on the fundamental idea that one is responsible for one's acts and that an individual can be held accountable only for them. Responsibility cannot be inherited or represented (and it is a good thing). There can be such a thing as collective responsibility in cases where the institutional or social collectivity is the agent; institutions and societies have longer lives than individuals and

22 Alveda King, 'Dr Mildred Jefferson: A Hero in the Pro-life Movement' (*The Washington Times*, 23 March 2021) <https://perma.cc/37MU-X423>.

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so their responsibility is longer lasting, but then they are not absent parties. Without an official representative, there is no one to act for the wronged. Israel and the World Jewish Council were specifically designated as the representative of the holocaust victims for receiving German reparations, but the state of Namibia, rather than the tribal houses, arrogated for themselves the right of representation. There is not yet a representative for Sephardic Jews or Uighurs (Kurds on the other hand have at least three). The basic nature of individual responsibility is important in discussing rights and wrongs.

Representation is necessary for the past absents to be present again, to re-present their interests and grievances. It comes into play in regard to gaining a hearing so as to advance claims of the absent party, but also in regard to enjoyment of the results when the claims are heard. The most direct representatives are the direct descendants of the original absent party, however much fractioned and regardless of the intervening additions, as required, for example by the DAR for membership or the BIA for (belated) trust benefits. If the absents are a group, not simply direct descendants, a certain percentage (or number of qualifying ancestors) from the group might be required, leading to such categorisations as coloreds and octoroons; even in the presence of strict anti-miscegenation laws, leaks are frequent and have to be considered in some way. Unless the group is exclusively inbred, the extent of endogeneity requires specification. Thus, rights – and so, wrongs – can be inherited, as long as the line is not broken, but there is no statute of limitations, in law or in custom and no established rationale for extension. Any limitations or extension must be legislated for. This is an important conceptual and practical question and will keep on coming up in the discussion.

In the absence of direct descent, another type of representation would be through class action, as the Herero and Nama tried. In class action cases, the class is generally considered to be the group directly affected in the present, as the American Indian tribes, but the class could also be a human rights organisation interested in simply making the loss known rather than recouping any tangible benefits. The International League of human Rights (LIDH), the Catholic Church, the World Council of Churches, and their various national groups and members have been active and occasionally powerful in bringing to light the perpetrators and victims, by name, of atrocities in Brazil, Uruguay, Argentina, and Haiti; here the absents have been represented not to gain compensation but to pursue the perpetrators, who in turn have generally been represented by the military organisations

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as protectors. The most distant representation would be friends in court, without any direct link to the absents except support for their cause; unlike the others, this group would not have to worry about the degree to which it is related to the original absents, but would gain no benefits. Given this array of possibilities of representation, a specific criterion would have to be established with appropriate justification before the process can move ahead; the Namibian case illustrates the controversy.

Representation also concerns the calculation and allocation of benefits when the claims are awarded. Redress for past losses by absent parties are generally referred to as reparations, usually considered as tangible financial restorations. The basis of calculation is as complicated as the matter of apportionment. Would it be the victims' deficiency from a general standard at the time, or the victims' past condition updated by some growth factor to a present level, or the victims' level equalised to the average level at the time or at the present? The US government answered these questions by sticking to the recognised debt figures and awarded BIA trust money to each descendant. The calculation of the payment made to Israel for the victims of the holocaust on the basis of USD 3000 for each of the 500 000 holocaust survivors over 14 years, lowered in the 1962 agreement to USD 1 billion from West Germany (East Germany never paid its share);[23] another USD 2400 for 240 000 of the poorest survivors was added for Covid-19 (not expressly related to reparations). Apportionment of the reparation once made has its own logic which goes back to the above discussions of criteria for representation: fragmentated direct descent, group descent, or group membership.

In the case of the holocaust reparations, the state of Israel was the major representative of the victims (the World Jewish Council also for a small part) and used the funds for their collective welfare, whether they were descents or not. This role for the state of Namibia was rejected by the tribes affected, but it is not clear how the figures were arrived at. Yet the further question was also determinantal: if someone is to get rich as a result, who is to get poor? Who pays and why should they? In Germany, responsibility was generally accepted by the public and the (West) German state was the representative of the wrongdoers; the Namibian state, the US

23 Shoah Resource Center, The International School for Holocaust Studies, 'Reparations and Restitutions' (*Yad vashem*) <https://www.yadvashem.org/odot_pdf/microsoft%20word%20-%206419.pdf> accessed 7 July 2023; PG 'German Reparations to Israel: The 1952 Treaty and Its Effects' (1954) 10(6) The World Today 258.

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federal government and the French state (at least for the moment) were the representatives in their cases. The American state has the responsibility toward the native Americans and paid USD 1.3 billion between 1945 and 1978 for seizing natives' land and another USD 3.4 billion for withheld payments on land that the BIA did not seize; there is no such representative for Black Americans nor is there any specific account of payment denied or assets withheld. Africans sold to European slavers about 90 % of those enslaved and shipped to the New World; about a quarter of US Southern white families bought and owned these slaves.

One relevant question is the motivation and expectation of the representative for representing the absent party. Representation of an absent party should be independent of the representative's own interests, lest the two become entangled and the one diluted.[24] However, since the absent party cannot benefit from the outcome of representation since it is absent, and the representative represents only interests derived from the absent party's losses and gains, it might even be expected to be motivated to represent in expectation of any such benefits. The only other reason for representing – and one that is prevalent and powerful in many cases – is altruistic, for the common good and the maintenance of a principle, including non-impunity or simply the right to life and property.

Time is also a referent for analysing the issue of past absents. In negotiations over the inheritance of a deceased party, the only absent party is the deceased, who has already indicated his/her position in the negotiations; present parties to an inheritance negotiate the estate left to them at the time of the deceased and may include generations as parties but only those who are present, the living survivors of the deceased. But the estate of earlier deceased or absent parties is beyond recall. If the condition (estate) of an absent party several generations previous were to be considered, the same questions on the value of the estate would arise. Would claims be based on the value of the condition of the absent at the time of decease, by current or original values? Or the value of the estate at present, including any growth or loss, in current values, and how is the investment or depreciation rate determine? As noted, these questions were avoided as unsolvable by the Native American Indian settlement The Biblical story of the servants who received either 3 talents, 2 talents, and 1 talent is apposite, although it does not establish a single growth rate (it suggests that the greater the

24 John Rawls, *A Theory of Justice* (Harvard University Press, Belknap Press 1971) 63; Cecilia Albin, *Justice and Fairness in International Negotiation* (CUP 2001) 28.

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original sum, the higher the growth rate, but then the story is for illustrative and religious purposes only). No proposed answer to these questions is authoritative and there is no established rule of justice to authorise any particular answer.

But if apartheid and slavery, extermination and genocide, unremitted land claims and state dismemberment are over, what about their shadow? Shadows fade but can be revived; wounds become scars but can be re-opened. But wherever it happens, it is for the benefit of the representatives, not of the absents or even of their memory. To avoid the recidivist memory, it is important to erase traces. The nostalgic representatives may have no interest in shelving the past, but the general public has a great interest in acknowledging the catastrophe and passing it on. Keeping the shadow under control depends much on positive actions in the meantime, between the event and the present. If little has changed, it is not the absents who are being recompensed but rather the presents representatives of themselves. But to the extent the absents' descendants have made progress since the event and overcome the wronging conditions – which clearly may take some time – the representatives have less and less of a claim on indemnification. There is no rule in law or logic by which to judge how long the shadow is as a justifiable argument for compensation, but it would likely involve the standard calculation: cost vs gain, loss at the time minus progress made to the general standard since then. But that does not settle the argument, it only gives a basis for debate and calculations. What is – or should be – clear is, again, that the beneficiaries are the representatives here present, and that the calculation of the formula refers to now, the present rather than the past or the future.

It is striking – but never considered – that the past is not made up solely of wrongs and losses.[25] Even wrongs have multiple consequences that need to be included when a balance sheet is drawn up and compensation calculated. Not to do so gives rise to feelings of victimization, that sees oneself as only a target of wrong and makes improvement impossible. Thus, it would be just, and important in quantitative terms, to consider opportunity gains as well as costs. Comparison with prior or alternative or full future situations can evaluate gains as well as losses to be included in the calculations. Repeated or gradual recovery of absents' interest opens the question of whether done is ever done. The BIA settlement was indicated

25 Robin Gregory and others, 'Methods for assessing social and cultural losses' (2023) 381(6657) Science 478.

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as final, although challenging finality is only human, even if not legal (can the Namibian state indicate the case is closed when the tribes do not think so?). The German-Israeli agreement has a full-satisfaction clause, exempting specific personal claims; otherwise the demand could forever be repeated by future generations, since the issue is fully in the hands of present representatives. Milosevich has shown that without such a limit, the rerun of the claims can be eternal. If the US, *Brown v Board of Education* in 1954 was to have evened the scale, then Lyndon Johnson's New Society in the 1960s would have been definitive. Yet the issue of reparation still appears in the 2020s. The absents remain absent; it is the presents that raise the claims for their own benefit.

One curious and perhaps psychological characteristic of moving toward achievement of reparations for the absent past's condition is the final-push or approach-intensity effect (reverse of the approach-avoidance effect in negotiation).[26] As present parties move closer to the goal of eliminating the conditions of the past absent party after already making significant progress in that direction, representative present parties greatly intensify their efforts, magnify the past evils, and downplay past progress. The prospect theory finding that achieved gain is valued less than unrecovered loss registers a strong effect.[27] It may be an attempt not to slacken efforts and to overcome relaxation after past progress, or a benefit of the strengthened position made possible by the past progress, or an improved realisation that the full or oversubscribed goal is finally actually attainable, or a sharpened view of details as the end comes closer, or a heightened effort to overcome last-chance resistance that the heightened effort actually spurs (an approach-avoidance reaction), or all of these, that produce the effect and prolongs and intensifies the drive to realise the past absents' inheritance.

There has also been some discussion that reparations are not a restitution for a past condition but an initiation of an ongoing policy for the future, correcting condition of the past victims projected into the future, as in the criticism of the French position in regard to an African state like Rwanda.[28] This has been introduced as a meaning of reparations for XVIII-

26 Dean G Pruitt, 'When Is "Enough" Enough? Approach–Avoidance' in I William Zartman (ed), *How Negotiations End: Negotiating Behavior in the Endgame* (CUP 2019).

27 Amos Tversky and Daniel Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185(4157) Sciences New Series 1124.

28 Conor Friedersdorf, 'What do 2020 Candidates Mean When they Say "Reparations"?' (*The Atlantic*, 5 June 2019) <https://www.theatlantic.com/ideas/archive/2019/06/reparations-definition-2020-candidates/590863/> accessed 7 July 2023.

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XIX century slavery and its aftermath in America but also as a consequence of the disclosure campaigns in authoritarian states such as South Africa and the Latin American republics where the identification of a repressive regime has been less disputed. In this understanding, the absent party is represented through a demand or promise for improvement of conditions as a consequence of its past deprivation. The demand is, in fact, independent of the past condition but is enhanced by it, a rather forward-looking projection of past deficiencies that aims at improving conditions for both descendants of the wronged party and for the rest of society, a kind of 'never again' response. This is perhaps the most diluted but most broadly beneficial notion of repayment for past wrongs, facing problems neither of calculation nor of apportionment. It is of course open to enormous battles over the degree of reform necessary for its accomplishment, as present parties dispute whether the past wrongs have already been sufficiently compensated and eliminated, and it returns the issue to the usual course of popular protest movements, which eventually die out in fatigue after a while after having achieved some but not all of its original promises.[29]

Legitimacy is one of the two underlying values of this inquiry. Can a party be held responsible by a value that was not in place at the time of the act? Such judgments are termed bills of attainder or ex post facto condemnations in the US Constitution (art 1 §9c) and are banned. If the representation of the absents is concerned with a general issue – slavery, apartheid, torture and disappearance – evaluation is a general moral judgment; if actual damage is the cause for remuneration, then more specific issues of quantitative evaluation are involved. In the latter case, the same questions of accounting apply: what is the basis of evaluating the failings of the absents' estate at that point? And then, how has it been evaluated. A major element in the answer depends on the source of values – by notions of legitimacy at the time or by current notions. The implied German contention that genocide was not recognised as genocide back then or the Guatemalan contention that subversion then should be recognised as subversion now should not cover the fact that herding victims into the desert and dropping them from airplanes is an inhuman action at any time, whereas death by duel cannot be considered murder a century later.

29 David Meyer, 'Civil Disobedience and Protest Cycles' in Jo Freeman and Victoria Johnson (eds), *Waves of Protest Social Movements Since the 1960s* (Rowman & Littlefield 1999). Doug McAdams, 'The Decline of the Civil Rights Movement' in Jo Freeman and Victoria Johnson (eds), *Waves of Protest Social Movements Since the 1960s* (Rowman & Littlefield 1999).

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A contentious question in the matter of legitimacy, however, raises the reasons for which the past wrong was committed. The wrong may have been accepted by the norms of dominant society at the time (including the wronged parties at the time such as the South African or American Blacks or Native American Indians), judged wrong later on, or more narrowly imposed by the interests of an authoritarian regime, as in the case of military regimes in Latin America; in the latter case, the justifying norms were for the benefit of a repressive regime over much of society, the difference being in the degree of popular acquiescence to the system. Guilt maybe adjudged by revised standards later on, but it does not affect the fact that elements of the absent past were wronged, taking the discussion to the referent of representation.

When it is the whole system of governance or the social system that is responsible for condoning an action that is held reprehensible by later laws and mores, the legitimate criterion for responsibility may appear less clear, but it is nonetheless clear that a person cannot be held guilty for an act that was legal and legitimate at the time committed, even if that notion of legitimacy can itself be criticised later on. However, if the actor cannot be punished, the past actor's representative can be urged to seek acknowledgement, pardon and reconciliation at a later time.

There is no indication that a party wronged by current standards can be compensated for an action that was legal or legitimate at the time committed, and by what criteria? The change of standards does not involve any guilt in regard to the committing actor, merely a moral or legal evolution. Similarly, absent parties condemned at the time are exonerated because the standard of condemnation no longer holds. Women condemned of witchcraft in Salem Massachusetts in the XVII century were exonerated in 1711; women condemned between the XIV and the XIX centuries in Scotland were rehabilitated in 2021.[30] Disgusting though the condemnations were, there is no way the persecutors can be held accountable for their actions, nor can descendants of the condemned women sue for redress; statutory limitations have expired and, even if not statuted, accountability has to be fixed on a living person, and the rehabilitation of the "witches" brought no indemnification for their mistreatment.

30 Valentina Pop, 'Justice for the Victims of Witch Hunts, Old and New' (*Wall Street Journal*, 4 March 2021) <https://perma.cc/Z3RG-N4PD>.

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Justice receives little attention in agreements on the issue of absent parties, probably because they are over-occupied by the plight of present parties. Although we are still searching for a commonly accepted meaning of the term applicable to all situations – and some have asserted rather strongly that such search is pointless and that justice in negotiation is situationally defined from among many meanings.[31]) – current attempts tend to land on such meanings as fairness[32] or envy-free[33] or some other twist on equality. This serves as good a starting point as any.

From the point of view of fairness or equality, the first cut at justice for absent parties is simple: all parties, present or absent, should have an equal chance of being heard, that is, absence should be mitigated. For the absents, if absence is not immediately correctable, this means representation at an effective level, interested in regard to the absent parties' interests, disinterested on the part of the representatives' own interests. Wrongs need redressing, rights need pursuing; but in neither case is the outcome automatically guaranteed, only the opportunity for equal presence before an appropriate decision-making agency- judicial or executive, voting, or negotiation.[34]

The simplicity disappears, however, when the absent party is more than a generation distant in time. The absence of the absent party can no longer be overcome, and its interests represented in current transaction. There is no justice for the distant absents, only for the shadow of their memory, and here the field is crowded. How many past memories should be corrected – Muslims and Jews in Spain (1492), Slavs at Kosovo (1381), Muslims in Algeria at many places including Setif (1948), Korean Pleasure Women in World War II, African Americans since 1619 and notably in Tulsa in 1921, and native Americans in 1815. Indeed, arguably every country has a time or incident in which the now-absents suffered a notable wrong, and in which their rights at the time remain unaddressed. Most of these events, and thousands others, have been relegated to history books, optimally duly acknowledged. It is interesting how many historical studies of awful doings

31 Lloyd Jensen and others, 'Negotiation as a Search for Justice' (1996) 1(1) International Negotiation 79.

32 Rawls (n 24).

33 Steven J Brams and Alan D Taylor, *Fair Division: From Cake-Cutting to Dispute Resolution* (CUP 1996).

34 Robert Dahl, 'Hierarchy, Democracy and Bargaining in Economics and Politics' in Robert Dahl and others (eds), *Research Frontiers in Politics and Government* (Brookings 1955); Zartman (n 1).

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in the past appear in the Review section of any good Sunday papers without triggering a national protest to right the wrong (except Tulsa).

However, some have become roaring political causes. As such, they can never be fully satisfied and can forever be revived, even after long periods of somnolence. In an appropriate political context, they call for reparations, redress and revenge, ignited by eloquent appeals, from *Flanders Field* (1919) to Milosevic (1989) to al-Suri (2010) and ben Laden (2005); nothing can prevent such mad revivals. To many, there is no reconciliation possible, because reconciliation would be infidelity to the victims' (often relatives' or earlier ancestors'), grievances and unjust treatments and because those who committed the wrongs are no more present than the wronged and so apologies in their name by self-appointed representatives are fictitious and second-hand. Reconciliation is a reciprocal action, even though it involves separate individual decisions. Therefore, reconciliation with absent parties is not possible, whether they be the wronged or the wronging absent. Reconciliation can only be in the present.

This situation, finally, brings in an additional dimension not found in the previous type, a negative attachment or opprobrium. The previous elements were discussed and are handled in a business-like atmosphere; legal values are attached when appropriate, and rights and wrong claim a moral attachment, to which the representatives may or may not agree. Such is the atmosphere of any negotiation, and it colors the debate surrounding recent absents and their representatives. However, in cases of distant absents, who are in no way directly involved or benefit from the negotiations carried out in their name, there is an emotional element of shame that gives somber tones to the issue. What was done some time ago was not a single act in such cases, but a condition assented by all society (often with a few exceptional voices). Perhaps one should turn the description around and talk of situations that reflect social involvement, rather than emphasise the distant past as part of the definition. In any case, the situation is that of the holocaust as well as slavery, Armenians as well as Native Americans, apartheid victims and other colonised peoples, among others (in the case of the Hutu or the Korean women, it is the element of time and hence assignable guilt that differentiates). In each case of the type, the incident brings shame on the society which allowed – and indeed legitimised – the occurrence, a stain on history.

Shame belongs to the past, guilt is its present manifestation. It is here that the issue comes to its most extreme point. Shame is attached to a society that is now absent; guilt calls for justice and punishment. But who

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now is guilty? Just as the absents are no longer present, so it is with the perpetrators. Just as the wronged, being (long) absent cannot benefit from rectifications, so can the presents not pay for them or bear their guilt, an injustice in the present that would not rectify the injustice of the past. The inappropriate assignment of guilt has its costs, beyond any monetary burden on the non-guilty presents, resurrects not the damaged from the past but the damages to the present, where they are not being inflicted. Rather than healing the past it wounds the present, transposing the wounds of the past onto the present, ignoring any healing and restoration that has been accomplished in between. The only alternative to this juxtaposition of times is to operate in the present; the only thing those present can do is to make sure 'Never Again'.

4. Never Again

There is no easy way to square this circle. For absolutists who look back, history must be rewritten, evils reemphasised, statues torn down, and Once Before and Never Again written on everyone's forehead. For the relativists who look ahead, aware that Never Again was followed by Rwanda, the challenge is in prevention for the future, turning backs to the contentious past left among the absents and removing its causes for the future.[35] That is the more difficult of the two courses. But it can be done, not by erasing the past nor by memorialising it, but by making common projects that remove the separate identity of the wronged and wronging absents' heirs to make an indistinguishable just future.

35 Rudolf Schüssler, 'Reconciliation, Morality and Moral Compromise' in Valérie Rosoux and Mark Anstey (eds), *Negotiating Reconciliation in Peacemaking Quandaries of Relationship Building* (Springer 2017) 48–49; Valérie Rosoux, '*Time and Reconciliation: Dealing with Festering Wounds*' in Rosoux and Anstey (n 35) ; I William Zartman and Victor Kremenyuk (eds), *Peace vs Justice* (Rowman & Littlefield 2005).

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