Reparations for Historical Wrongs: The Lessons of Durban

IT IS UNDENIABLE that the injuries to women caused by the sexism that is ubiquitous in all the world’s societies are not considered by states to be as serious as the wrongs arising from racism or colonialism. It is in the name of the latter that another type of contemporary claim based on recognition has arisen in the form of calls for the reparation of historical crimes committed because of racism, colonialism or imperialism. Does not recognition of the Other within postcolonial society involve acceptance of a shared history that sheds light on centuries of denial of the Other and the need for reparations for historically inflicted losses?

These claims were made by the Third World upon independence, including in the context of the New International Economic Order, but it cannot be denied that since the end of the Cold War they have become far more pressing. One need only look how these calls for recognition have become more numerous and more diverse in line with the historical prejudices invoked. They range from new calls for compensation for the victims of German Nazism in Eastern Europe and Japanese imperialism in Asia to claims from indigenous peoples such as the New Zealand Maoris or the Australian Aborigines, not forgetting the demands from Africans because of slavery, the slave trade and colonisation of the past. Whereas history seemed to have accepted that what was done was done with regard to these destructions and enslavements, people have organised and now want states to face up to their responsibility for historical crimes committed against them and to make reparation.

But what scope can really be attributed to these calls for reparation where the crimes of the past resurface with their sadly countless lines of victims and their descendants in search of recognition? Can one repair history, Antoine Garapon asked.¹ And is there an international law of reparation of historical losses, or even a right to reparation nowadays? To these questions, which are really decisive in that they raise the problem of the actual possibility of reparation for history and for wounded identities, the 2001 Durban Conference (and the review in Geneva in 2009) attempted to provide political and legal answers to provide an understanding of the essential issues in this type of

claim with regard to recognition and the aporias and limits to which it is open when resorting to international law. Obviously, it is just one example from among the many disputes over reparation that are underway today, but at least it can be emphasised that the purpose of the Durban talks is probably one of the most relevant for our analysis of postcolonial/post-Cold War global society and at the same time is exemplary of the more general debates about the reparation of past historical wrongs.

I Durban’s Failures, Breakthrough and Questions

A The Background

In September 2001, the UN organised an international conference against racism, racial discrimination, xenophobia and intolerance in Durban. It was to be an opportunity not just to review the contemporary manifestations of racism and the means to confront it, but also an opportunity to face the past together through the historical forms of racism and xenophobia related to slavery, the slave trade and colonialism. It is this last aspect in particular that interests us more here since the problem of reparation of historical wrongs has arisen through it.

Organised in South Africa, which had managed to achieve reconciliation and pardon for the crimes of Apartheid, Durban was to be the world conference that cleared the accounts of the colonial past of post-Cold War world society. In a common message of 21 March 2001, Mary Robinson, the then UN High Commissioner for Human Rights and Nelson Mandela, the President of South Africa, had set out the objectives of the future conference. They underscored that in addition to the discrimination of which Roms, African descendants, indigenous peoples and women were victims, it was the irrational fear of what was different and the inability to recognise and express regret for the serious injuries inflicted in the past, that were the main sources of racism in the contemporary world. They went on to assert the need to learn the lessons of the past so that humanity could put an end to the all too long and tragic history of racism.

The result was plainly not guaranteed given the passions related to this past, but when in 1996 the UN contemplated this new conference, it seemed convinced that there would be no repetition of the failures of the first two conferences against racism of 1978 and 1983 which had focused on the question of the Near East. It was a time of great optimism marked by the end of the Cold War, a Near East that was engaged in the peace process and the implementation of legal instruments with ‘conciliatory’ aims like South Africa’s Truth and Reconciliation Commission, the many declarations of repentance

made by the West, the new calls for compensation by the victims of history, but also the international criminal courts. But this optimism was short-lived. After a long preparatory process, the Conference was held from 31 August to 7 September, in the presence of thousands of non-governmental organisations (NGOs). Now, under the influence of several African and Arab NGOs, the NGO forum witnessed a wave of anti-Semitic declarations and an incredible outburst of violence against Jews, going as far as calls to murder. The United States and Israel then left the Conference which was to be dominated by intolerance and to serve in part an entirely different purpose from that for which it had been established, which resulted in a Declaration (and Programme of Action), paragraphs 32 and 68 of which insisted on inhibiting Israel by name. From this point of view it was a dismal failure, since it was a long way short of the ideal of a reconciled international community. So it was by a cruel but perfectly understandable irony that at the Review Conference in Geneva in 2009 (Durban II), the new final declaration was rushed through by the second day of the Conference out of fear that many countries might leave the Conference further to the hateful anti-Semitic diatribe by Iran’s President Mahmoud Ahmadinejad. The final declaration of 2009 which was adopted in extremis was a priori a compromise that sought to gloss over the subjects of disagreement of 2001, that is, all the anti-Israeli aspects of the first declaration and a much denounced paragraph on the defamation of religions, but it was no less equivocal in that it reaffirmed at the same time its support for the 2001 Declaration and Programme of Action which stigmatised the State of Israel alone for racism against Palestinians.

The Durban and Geneva texts are without binding force and the 2001 Declaration expressly sets out that the states concerned are under a moral but not a legal obligation to take appropriate measures to terminate the detrimental consequences of past practices of colonialism and slavery. They provide an understanding of the direction given by a majority of states on these questions and the possible legal channels that may be opened up for most of the claims made at the time referred to the violation of norms of international law and so one needs to look at the state of existing international law in this domain to appraise the orientations given at Durban in the context of future dispute settlement. The matter currently before the High Court in London opposing four Kenyans to the UK is interesting in this respect. The plaintiffs allege they were tortured in 1957 at the time of the Mau-Mau rebellion and have asked the UK for an official apology and compensation fund for the victims (over 70 000 were imprisoned in camps and 12 000 allegedly died there, with only 1400 still alive today). The UK dismisses any legal liability for its colonial past but the case continues and plainly there is a fear that its outcome might inspire other former members of the Empire, whether in Cyprus, Malaysia, Nigeria or former Rhodesia.3 The same applies, of course,

3 Le Monde, 7 April 2011.
to all other former colonial powers. The fact is that the reparations granted to indigenous peoples by former settlement colonisers for the wrongs they suffered in the past (confiscation of land, natural resources, forced assimilation) are more frequent and similarly raise the question of the responsibility of the state or of private companies for the historical wrong caused. All these cases therefore confirm what is inescapable about the calls for recognition expressed in Durban, but they remain problematic for they give rise to questions that are legally unresolved and therefore to the need for renewed thinking on these matters.

B Questions on Compensation for Historical Losses

Instead of attesting to a rediscovered understanding among states, the Durban Conference demonstrated the inability of states to share a common history of colonialism and slavery and to agree on the way to remedy the faults of the past. True, at the end of the preparatory process before the 2001 Conference, everyone seemed agreed to identify slavery, the slave trade and colonialism as wrongful acts that had massively destructive effects. But the specific legal characterisation of such practices and the more specific determination of their consequences in terms of liability and compensation were to crystallise antagonism during the Conference. During the talks, opposing views were quick to arise, especially between African and European countries but also among African countries since some peoples once reduced their neighbours to slavery and some African states still practise slavery today. The concepts of ‘crime against humanity’ but also of ‘regrets’, ‘apologies’ or ‘reparations’ were the subject of intense debate and fierce opposition.

Several principles included in the Final Declaration of 2001 deserve notice, especially three principles that were stated further to the multiple compromises which attest to some advance in this domain:

(1) The principle that ‘slavery and the slave trade are a crime against humanity and should always have been so’ (point 13).

(2) The official recognition that ‘these historical injustices [slavery and colonisation] have undeniably contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, in particular in developing countries’ (Programme of Action, point 158).

(3) The principle that the ‘States concerned’ should ‘honour the memory of the victims of past tragedies’ (point 99).

In this respect the Declaration notes that ‘some States have taken the initiative to apologize and have paid reparation, where appropriate, for grave and

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massive violations committed’ (point 100) and invites ‘those who have not yet contributed to restoring the dignity of the victims to find appropriate ways to do so’ (point 101).

But this was only the beginning and the compromise raised many questions that have still not been specifically answered, especially with regard to the possible liability of the state giving rise to reparation. The Conference organisers did not themselves contemplate actions in liability but the recognition of the crimes committed, official apologies and possibly the principle of voluntary reparations. In other words, it was primarily a question of seeking ‘reconciliation and healing’ (point 101) and basically of transposing to world society the process of the Truth and Reconciliation Commission that had worked so well for South Africa after Apartheid. Durban was an attempt at implementing transitional justice on a world scale to recognise the crimes of the past so as to move into a postcolonial and post-Cold War world which is both appeased and does not repeat the mistakes of the past. The ultimate challenge was to see the descendants of the former colonial society live together in the same postcolonial world society and to bring about a transition to enable such co-existence to be organised. But as Pierre Hazan has shown so well, this transposition proved impossible at an international conference of some 200 states and thousands of NGOs. Instead of creating the conditions for an appeased dialogue and a process of recognition of historical crimes, the UN inadvertently created the conditions for a generalised confrontation, caused by a series of identity-based reactions and amplified the dangers that await any process of this kind, such as victims attempting to outdo each other and the clash of memories. Extremely strong tensions arose from a policy of reconciliation transposed to world level where states squared up to one another, defending state interests. Finally, Durban leads us to question the exact role that international law can play in such cases.

The first question is whether the slavery of past centuries can be characterised as a crime or even a crime against humanity when it was perfectly consistent with the international law and national systems of law at the time; and so whether states can be held answerable on this basis. The same obviously applies to the colonial system which Euro-American international law considered lawful for centuries. This is a question of the inter-temporal application of law which gives rise to the classical answer in international law that a new law is not retroactive. Therefore there is no retroactive responsibility. A state’s behaviour only constitutes an unlawful act entailing its international


responsibility if it constitutes a failure to fulfil an international obligation that existed at the time it occurred. Hence the compromise adopted in the 2001 Declaration that ‘slavery and the slave trade are a crime against humanity and should always have been so’ (point 13). Article 13 of the latest Report on State Responsibility (2001) confirms this existing state of law and the fact that there would only be a breach of an international obligation if a state was bound by that obligation at the time the act occurred. In its commentary on Article 13, the International Law Commission (ILC) specifies that even when a new norm of *jus cogens* arises (to which the prohibition of slavery and perhaps colonialism can be likened), there cannot be any retroactive effect even so.\(^8\) Nor is this provided for by the 1948 Convention for the Prevention and Punishment of the Crime of Genocide. In truth, while the argument itself is incontrovertible from a formal point of view, it should not be forgotten that the principle of non-retroactivity, which is well established in international law, has already suffered memorable exceptions with the examples of the Nuremberg and Tokyo Tribunals and certain present-day international criminal tribunals.\(^9\)

The only possibility accepted today is that the state voluntarily consents to admit its responsibility retroactively for ‘conduct which was not at the time a breach of any international obligation in force for that State’ (Article 13 ILC Report, 2001).\(^10\) International legal acts may establish the voluntary recognition of past crimes and grant reparation, as for example a bilateral treaty between the former coloniser and the former colonised country. This was the case in the friendship treaty between Italy and Libya of 30 August 2008, which for the time being is unique at inter-state level. It is also the case in the historical dispute settlement between the Sioux and the US Government and the 70 agreements concluded by Canada’s provincial governments, the Federal Government and the representatives of the indigenous populations over the recognition of past spoliation and the assertion of a new status for those populations.

Another question is how such responsibility can be invoked and for what kind of prejudice? As presented in Durban, there were multiple acts which caused the loss: death, slavery, forced labour, plunder of natural resources, confiscation of land, destruction of cultures and ways of life, and contemporary underdevelopment. But the legal characterisation is not established even so. Following the general tendencies and the Final Declaration, a double...

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\(^10\) ILC 2001 (n 8) para 6, 58.
prejudice can be identified. A moral prejudice exists, resulting from centuries of humiliation and denial of recognition for so many populations. This moral prejudice goes along with a material loss related to the plunder of resources, the system of enslavement, the colonial system of exploitation and the spoliation of land which allegedly account for the current state of underdevelopment of formerly colonised countries but also of indigenous peoples. The Declaration states that colonisation has engendered not only past injuries but also ‘lasting social and economic inequalities in many parts of the world today’ (point 14). There results, therefore, a current prejudice that is intrinsically related to the past prejudice. However, several difficulties occur at this stage. How can one evaluate the extent to which the current prejudice may be related to past prejudice? And how can this be proved? For example, the underdevelopment of certain countries is presented as a consequence of past colonisation; but does it not also result from several factors involving the responsibility of the postcolonial countries? The difficulty increases when the past prejudice must be defined: how can it be proved, for slavery and colonisation in particular, the existence of specific acts directly attributable to the state when these were generalised systems of exploitation of great scope with multiple causes and involving many actors? True, these are still questions that pertain to strictly formalist arguments, but they are no less relevant and plainly complicate the principle of seeking liability for the crimes of history.

The arrangements for reparation raise associated difficulties. What kind of reparation should be awarded? How can one identify the current successors in title down the course of generations? In Durban the problem was simplified as it was the responsibility of one state towards another that was called into question, so the beneficiary was simply the formerly colonised state and the debtor the former colonising state. In the case of indigenous peoples, it is also usually the people that are considered the beneficiaries of reparation and the state as being bound to make reparation. However, the question may prove far more intricate if the author of the prejudice was a private company, say, and if the plaintiffs are simple individuals who claim to be the descendants of despoiled and discriminated generations. Moreover, with regard to the form of reparation, the international law of responsibility provides several possibilities: restitution in kind, financial compensation and satisfaction. All have been invoked, whether within the Durban framework or in the context of specific actions. For restitution in kind, one thinks notably of actions for the return of stolen cultural property, sometimes mummified human remains, which have occurred in some instances. Under a special statute of 6 March 2002, France thus returned to the Khoi Khoi people of South Africa the remains of Saartje Baartman, known as the Hottentot Venus, and

Such reparation in the form of restitution is expressly set out in Article 11(2) of the UN Declaration on the Rights of Indigenous Peoples; www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. The discussion focused essentially on the return of cultural property, with the creation of an intergovernmental committee within UNESCO for that purpose.
she was finally buried in May 2002 in accordance with the traditional rites of her people. The multiplication of this type of claim for human remains kept in Western museums is an additional indication, were any needed, of the spectacular rise in demand for recognition of identities wounded by history, based both on equal respect for every human being and the acceptance of their differences.

However, it is usually other forms of reparation that are invoked. Compensation is the most common form. It must correspond to the economic loss resulting from the wrongful act but also, possibly, the moral harm for the injuries done to persons. The Abuja Declaration on colonialism, adopted by many African heads of state in 1993, includes for example a requirement for ‘full monetary payment of repayments through capital transfer and debt cancellation’. 12 Sao Paolo University’s Centre for Black Consciousness is demanding payment from the United States of US $100 000 for each of the 60 million descendants of slaves. In 2003, President Jean-Bertrand Aristide considered that France ought to repay Haiti the celebrated debt of independence paid by Haiti to France between 1825 and 1887, the equivalent of 90 million gold francs. As these examples show, the question remains of the amount of compensation that should be attributed, which varies with the valuation of the loss. But how can adequate financial reparation be evaluated when the wrong results from several centuries of economic exploitation and denial? How can it be evaluated when the wrong is considered to persist over time because of underdevelopment? The difficulties are enormous and the most realistic idea is probably to reach a negotiated settlement on greater development aid. This was achieved by the 2008 treaty mentioned earlier between Italy and Libya, in which Italy apologised for 30 years of colonisation and undertook to pay $5 billion in damages in the form of investments over the following 25 years. In this case the financial measures are considered to be reparation for the historical prejudice incurred, which is wholly different from a symbolic (and legal) point of view from the aid that former colonising states now grant through unilateral or multilateral commitments. This means agreeing to include financial aid in a perspective of recognition of responsibility for historical wrongs committed with the result that such aid counts symbolically as a form of reparation for the injured identities that may thus find their place in the repaired fabric of history. 13

Besides, financial compensation may be seen as insufficient or wholly inadequate with regard to the type of historical prejudice invoked and some states and victims refuse any form of financial compensation. Some African

13 This is why the first compensation process established by the King of Morocco, Mohammed VI, in 1999, for the victims of torture and ‘disappearance’ did not really work. It provided for ‘straight’ compensation for the crimes of the regime but without recognising them as crimes. A second more satisfactory process had to be established. See Garapon, Peut-on réparer l’histoire? (n 1) 214–17.
states have vilified the idea of receiving monetary payment as reparation for the slave trade and colonialism and this is also true of the case of the Lakotas Indians who refused the compensation proposed in 1980 by the US Government for the unlawful possession of the Black Hills, since to accept, they argued, would be to accept the theft of their sacred land. In fact, if it is wanted, financial compensation may help to close and repair the historical wrong done to identities but provided that, as said, it is accompanied by a discourse that makes the compensation meaningful by tying it in with a ‘dis-course of justice’ and the recognition of the massive denial of identity. It is evident that satisfaction as a form of reparation may appear to be the most suitable when dealing with immaterial losses of such seriousness and such a nature because satisfaction is aimed directly at symbolic reparation of the wrong. It may take on extremely varied forms including, say, the recognition of responsibility, the expression of regret, formal apologies, or asking forgiveness. In a memorable case, Virginia was the first American state to publicly apologise and express its ‘profound regret’ for the enslavement of blacks and the exploitation of Indians, as well as the violation of their most fundamental rights. Similarly, Germany officially apologised in Durban for its colonial policy. Much like what the Inter-American Court ordered in several cases involving the indigenous peoples of Latin America, less ordinary but probably more effective measures can be adopted such as the organisation of cultural events, the creation of foundations, commemorative stones, memorial days or memorial museums or the establishment of aid associations for indigenous populations.

II The Paradigm of Recognition and the Limits of Resort to Law

As can be seen, the thing which casts light on the mechanisms behind such claims and which may illuminate the most appropriate response to them is the fact that those claims are part of the contemporary paradigm of recognition. This paradigm explains why all the history-related claims are so pressing today whereas at one time they were usually settled by silence and the passage of time. In a now famous speech made in 1992, the Australian Prime Minister expressed this new attitude towards the Aborigines:

And, as I say, the starting point might be to recognise that the problem starts with us non-Aboriginal Australians. It begins, I think with that act of recognition.

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15 This is also recommended by Resolution 2002/5 of the Sub-Commission for the Protection and Promotion of Human Rights (point 6): Recognition of responsibility for massive and flagrant violations of human rights which constitute crimes against humanity and which took place during the period of slavery, colonialism and wars of conquest; www.unhchr.ch/Huridoca/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2002.5.En?OpenDocument.
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Recognition that it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion. It was our ignorance and our prejudice. Admittedly, the demand for recognition of historical crimes is not entirely new; there are examples of this from the past. There are obviously other explanations for the current enthusiasm for this type of action, in particular the extension of the human rights discourse and the will to punish crimes that are in the category of what is unjustifiable and for which there is no statute of limitations. But the demand for recognition of historical crimes has been substantially intensified by the new perception of the identities of peoples, groups and individuals and by the new way in which they perceive themselves nowadays through history and the passing of time. They define themselves not just through their present status and culture, but also through the history and memories of their group, state or community. For Ricœur, these are individual identities that are forged collectively in a temporal dimension that includes what may be centuries-old discriminations against these groups. The temporal dimensions of the identity of individuals and groups means that not only are they their own history but that history is not limited to the narrative account of their existence, it is also woven from the histories inherited from the past and the common memory that has been handed down from one generation to the next. And so individuals, groups and peoples experience the present effects of the crimes of the past, based on the denial of individuals, by internalising an image of themselves that is depreciatory or demeaning and so suffering a deep-seated denial of recognition which is handed down the generations and is not repaired in any way. Now, the awareness of this denial that still weighs on the victims or their descendants is transformed today into a demand for justice, that is, into an implication of the state’s responsibility and a call for reparation of the crimes committed, which then serves as a process of recognition of the Other. The recognition of responsibility and reparation should put an end to the general feeling of devaluation and stigma that has lasted over time by designating the guilty party, by exposing the scale of the crimes committed, by honouring the


21 ibid 332.
memory of the victims and by rehabilitating people both in terms of their equal dignity and of respect for their ethnical or cultural difference.

The Durban Conference was part of this new context. It was aimed not so much at the violence directed against individuals and peoples through slavery and colonialism but the total disregard for individuals which meant they could be treated as things, as chattels or that their property could be seized as if it did not belong to anyone. In particular, the 2001 Declaration emphasised the ‘negation of the essence of the victims’ by their enslavement and the racism that went with it. It is this denial, along with the economic exploitation which is still the kernel of actions for reparation and that shows the connection with the paradigm of recognition. The very deep wound inflicted on identities, being passed on over several generations until the present day, gives rise to expectations about the recognition of the crimes committed and their reparation, with recognition not only being perceived as a final rehabilitation of the dignity of the victims and of all those who were stigmatised, but also of the entire history of a people or community.

This explains the big difference between a dispute over reparations further to an ordinary armed conflict, however destructive it may be, and a dispute over acts of denial of the other affecting identities. In this situation, the treaties or the various legal instruments by which the culpable states have sought to shirk their responsibility and the issues of reparation are simply intolerable for the individuals or communities that suffered such acts. For example, Japan shelters behind a 1965 treaty on the normalisation of diplomatic relations between Japan and South Korea to escape any subsequent implication for crimes relating to its policy of imperialistic conquest. The treaty provides for South Korea’s waiving of the right to claims from the Korean people against Japan in exchange for new economic cooperation and the recognition of the Korean Government in office as the only legitimate one. But since the 1980s, Korean women, who were subjected to sexual enslavement by the Japanese military, have been challenging the validity of this treaty by which one state is exempted from its responsibility for violating fundamental rights, accusing the Korean state of having abandoned actions in (domestic and international) responsibility against the Japanese state and fighting to obtain reparation both for the suffering they were subjected to and the stigma of being seen as ‘soiled women’.

Finally, this is why Africans and indigenous peoples are taking the lead with these claims internationally. Some observers have pointed out that neither

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22 The case of the peace treaty between Japan and the United States ending the Second World War waiving any action related to the destruction of Hiroshima and Nagasaki is an interesting limiting case since, through its massive and indiscriminate force, nuclear power is another fundamental denial of individuals.

23 The validity of this type of treaty is highly debatable. See Luigi Condorelli, ‘Conclusions générales’ in Boisson de Chazournes, Quéguinier and Villalpando (eds), Crimes de l’histoire et réparations (n 6) 300–01.
India, nor Indonesia, nor former Indo-China (Vietnam, Laos, Cambodia) have claimed reparations, and that the Africans are in a marginal position. But this would be to pretend not to see that, like indigenous peoples who were sometimes decimated, Africans are the ones who have suffered most from contempt, racism, humiliation and de-humanisation both through the slave trade and colonisation, which are two systems of massive exploitation that wrought their effects over several centuries. Taking up one of the major themes of the 1993 Abuja Conference, the Independent Commission on Africa published a Report in 2002 entitled ‘Winning the War against Humiliation’. The Report explains how the main task of contemporary Africa is to win that war because of a global system of negation of Africans that dates back to the slave trade and is perpetuated with the latest episode of globalisation. According to the Report, centuries of domination and humiliation are an extremely burdensome legacy for present-day populations as they have led to a generalised lack of self-esteem and a feeling of devaluation that is still deeply ingrained. It is in this that, in addition to underdevelopment, the historical crimes associated with slavery and colonialism are incontrovertibly considered to have effects that are still felt by individuals, peoples and communities.

There is no possible way of going back on these issues. The entry of our era into the recognition paradigm means that we can no longer be rid of the question of historical wrongs related to mass crimes based on the denial of the identities of individuals that still affects the present. Can France, for example, long continue to deny its responsibility and not recognise the great wrong it did to Algeria and to its former colonised territories? How can successive governments fail to see, beyond the ethical act, the interest they have in acknowledging the faults of the past so as to be able to really move forward today; how can they fail to see how their discourse, by being oblivious to the past, is what prevents people from forgetting and how it unfailingly postpones the time when people will want to move forward together? Likewise, Algeria, too, should recognise the crimes of the time of the national liberation, for this absence of mutual and reciprocal recognition prevents people from honouring the memory of the victims and from learning the lessons of

25 ibid. Albert Memmi and Frantz Fanon were among the first to highlight this phenomenon, that is, the way the coloniser imposed a negative self-image on the colonised. They showed that the colonised would not be freed until they could get rid of this debasing self-representation. See Albert Memmi, The Colonizer and the Colonized (Boston, Beacon Press, 1965) and Fanon, The Wretched of the Earth (New York, Grove Press, 1963).
the past. This would result in a state of ‘positive mutual debt’ as Jacques Godbout terms it, which would at last make a new start possible. Some states and governments still fail to see that this requirement for historical recognition has become unavoidable because of the new paradigmatic values of our age and the circumstances of post-Cold War justice. Even though, it can be readily admitted, there is no easy solution. Durban is indeed an example of this. Can one contemplate, as the conference organisers hoped, a transitional justice at world level that would allow a transition to a postcolonial world society that is at peace with the past and the shift from a racist and colonised society to a truly decolonised, multicultural international society that is reconciled with its history? Transitional justice corresponds to a mixed set of legal institutions that aim to bring about a transition from non-democratic to democratic societies and from societies at war to societies at peace, by responding to the acts committed by the former oppressor regime so as to move towards a new society having righted the injustice of the past. But is this feasible on a world scale?

Today, it is easy to understand that setting excessive objectives of this type for a single international conference was probably a mistake and that it is better to opt for other arrangements at national bilateral and regional level. It all depends on the context and the scale of the wrongs caused; and also on the way in which the infringement of identity and the reparation of immaterial wrongs are handled through the responses given. One can also and foremost see the limits of what international law can offer when recognition pertains not just to the order of justice and law but to the order of love, social esteem, education and morals. This is a decisive aspect to identify after this review of the various domains where the right of recognition has manifested itself. The concept of recognition is aimed at an expectation that law and justice can never fully meet because it involves acceptance of the Other for what he or she is and cannot be calculated by nor measured by law alone. This is compounded by the fact that, for the major historical crimes at issue here, they are of such political, moral and historical importance that the law alone cannot from this point of view be the only appropriate response to expectations as to recognition. For historical crimes, the solution is not only legal but also social, political, educational and cultural. Apart from justice for a specific case relating to a specific historical crime or apart from what law can contribute through a formal instrument on the general recognition of responsibility, both of which inevitably remain limited, only education, or the

27 Notably with regard to the crimes against the Harkis, troops of Algerian origin supporting France’s presence in Algeria, tens of thousands of whom were massacred by the National Liberation Front (and abandoned by France, which eventually acknowledge its wrongdoing to them).
29 Both Honneth and Ricoeur show, through a threefold arrangement of order of intersubjective recognition, that there are structures of recognition that anticipate or go beyond legal matters. See, for example, Ricoeur, Parcours de la reconnaissance (n 20) 295.
creation of new institutions can enable the next generations of ex-colonised and ex-colonisers to learn the lessons of the mistakes and crimes of the past by helping to deconstruct the political and moral structures, and the underlying cultural representations that enabled those crimes and to pinpoint any continuation of stigmatising rules, practices and institutions. At this stage, a distinction must be made between the discourse of international law containing official recognition, relating to a decision of justice or an act of repentance or responsibility, and the historical, educational and cultural work of deconstruction/rehabilitation that cannot take the form of a legal text or judicial decision.  

More generally, it is the goal of a global postcolonial reconciliation among all states and peoples that should be definitively deconstructed because of the illusions and therefore the frustrations that such an objective may engender, since dreaming of a world that has completely settled the accounts of the past and balanced off its historical legacy is just as dangerous an illusion as not wanting to face up to that past or to try to repair wounded identities. The idea of making a fresh start and returning to some state of original innocence, which never existed anyway, must give way to the idea of a world that confronts its past but accepts the fact that all crimes are not reparable and all visions of history must have their place. And if the return to history is essential in this domain, since it is at the heart of the approach involving recognition of the historical wrong committed, such a return cannot consist of serving up a single historical version – whichever it may be – of past international history, a sort of great re-founding myth that would supersede classical official history, which had justified colonisation, and that would be enacted in a new international instrument ratifying the reconciliation of postcolonial society. One cannot legally enact a new official world history which would count as definitive global recognition of what has happened, through a common declaration in international law, as the Secretary-General of the Durban Conference wished in advocating the writing of such a history. Nor can one settle for producing a Western counter-narrative as a substitute to the former narrative. In its 2001 Report, the Independent Commission on Africa called for some ‘mechanism’ to ‘re-establish the truth’ about the slave trade and colonisation. The 2001 Durban Declaration emphasised ‘the importance and necessity of teaching about the facts and truth of the history of humankind from antiquity to the recent past’ (Point 98). But all these formulations are troublesome as they seem to suggest that there is

31 Garapon, Peut-on réparer l’histoire? (n 1) 247 ff.
33 2001 Cotonou Report cited in Winning the War against Humiliation (n 24).
only one ‘truth of the history of humankind’ and so inadvertently highlight the difficulty of the exercise. However necessary it might be, resorting to history cannot reveal any universal truth about historical crimes, a truth which would ideally be shared by all and would settle the accounts of the past, as this would be a deeply mistaken conception of history that has been sufficiently deconstructed by postmodern scholars and would only prompt new claims, expectations or denials of recognition. To resort to history in this way would be to claim to be able to reconstruct the past afresh. This is intellectually impossible and, in addition, always and inevitably leads to bias, as it is done principally in line with present concerns and usually, as its purpose, lends legitimacy to the powers-that-be and more specifically here to officially institute a new vision of world society and its international institutions for the postcolonial and post-Cold War world.