

PART I

Obligations of Nations and Rights of Reparation



Treaties and Transgenerational Responsibilities

Assembled Maori chiefs and a representative of the British government signed an agreement at Waitangi on the North Island of New Zealand in February 1840. Maoris ceded governance of New Zealand in return for protection from settlers and foreign invaders. The treaty guaranteed to Maoris control over their lands and traditional hunting and fishing rights. Less than a decade later the colonial government gave in to the demands of settlers and allowed them to encroach on Maori land. Armed resistance by the Maoris provided a justification for seizing more Maori land and revoking their communal rights. By the end of the century the Chief Justice of the colony had declared the treaty a ‘simple nullity’. This perception was changed during the 1980s by a campaign of Maoris and their supporters, who demanded that the government acknowledge the rights guaranteed to Maori communities by the Treaty of Waitangi and return land unjustly taken.¹

This history tells a familiar story. The Cherokee of Georgia and North Carolina were guaranteed their tribal lands by a treaty signed in 1684, but incursions by settlers resulted in losses of land which were ‘legalized’ in one treaty after another. In spite of a ruling in favour of the Indians by a federal court, the American government, urged into action by local officials, decided on a forced removal of the whole Cherokee population. The people were rounded up and marched under armed guard out of their remaining territory and forced to settle on the other side of the Mississippi. This march of the Cherokee to Oklahoma – the ‘Trail of Tears’ – resulted in the death of at least

one-quarter of the tribe.² Cherokee communities are still trying to obtain reparation for this and other wrongs.

Treaties as promises

Governments, most people agree, should keep their promises. Promises, to be sure, are obligations, all things being equal. The law and common sense allow that there can be good excuses for not keeping an agreement: it may have been made under duress or in ignorance; it may be vitiated by unforeseen circumstances or moral considerations. However, it is difficult to suppose that the British Crown, or the New Zealand and American governments that inherited its powers and responsibilities, had a legitimate excuse for what they did.³ These and many other violations of treaties made with indigenous people were injustices. They were not the only injustices done to members of indigenous communities. Aborigines of Australia and indigenous peoples of America and Canada were slaughtered and denied protection by the law; their cultures and means of life were systematically destroyed in the course of European settlement. But treaty violations provide an obvious test case for accounts of historical obligation. The basic question posed by those who demand a return to the terms of the Treaty of Waitangi is raised by all demands for the repair of past injustices: what, if anything, are people now obliged to do about repairing a historical wrong?

Defending historical obligations, as I have pointed out, requires explaining why people now living can have a responsibility for keeping promises they did not make or repairing injustices they did not commit. In the case of treaties and treaty violations this seems like an easy task. A treaty, as the Vienna Convention on the Law of Treaties makes clear, is a contract and brings with it the same moral and legal assumptions that surround promise or contract making.⁴ A treaty is a promise of state. 'A treaty is intended to be of perpetual duration and incapable of unilateral termination,' says an authority on international law.⁵ Legal conventions treat states like individuals and assign them the same responsibilities for their commitments as individual persons are supposed to have for theirs. The state is responsible for honouring its agreements and for any of the breaches that its officials commit. Since the state consists of its citizens, past, present and future, this responsibility devolves on whoever is in the position to assume it. Most citizens accept this.

Treaties made with indigenous people have not been recognized traditionally in international law, but there is no reason for doubting that they too had the moral force of promises. They too were commit-

ments made by political communities to each other, and were supposed to be valid 'so long as the grass is green and the sky is blue'. The fact that agents of government or colonial administrators were often deceitful and did not mean to keep their promises did not invalidate the agreements they made. An insincere promise is nevertheless a promise. Indigenous communities were not states, but they were independent or semi-independent societies with a political structure and governed by law – and many people refer to them as 'nations'. The British Crown made an agreement with Maori nations, and this agreement, according to conventional understanding, has been inherited by the New Zealand nation. The British Crown, and later the United States, made many treaties with Indian nations.

This way of speaking may strike some people as absurd. Maoris are New Zealand citizens, and Cherokees are Americans. If by signing the Treaty of Waitangi the Maoris became British subjects, how can they have retained their own nations? How can a community of New Zealanders or Americans make a claim on behalf of their nation against their nation? This problem is largely terminological. A nation, as I will define it, is a self-governing society or community with the power to make laws for itself (at least concerning its domestic affairs) and to make agreements with other such societies. Nations sometimes contain subordinate nations within their borders – societies that are subject in some respects to the law of the superior power, but retain some of the political entitlements of nations. Canada and the United States are nations (nation-states) that have within their borders semi-independent Indian nations with an entitlement, limited by constitutional requirements, to govern their own affairs. A nation, according to my definition, is a political society – not a cultural or religious group (though members of a nation may share a culture or a religion) – and a person can be a member of more than one nation.⁶ Leaders of nation-states and their legislatures represent on most occasions all their citizens; but in their dealings with semi-independent nations within their borders, they represent people who can be regarded as belonging to a nation distinct from their nation-state. They represent Pakeha (non-Maori) New Zealanders, or Americans or Canadians who are not Indians. To claim that New Zealand is responsible for keeping the Treaty of Waitangi is to speak of it as such a nation. Difficulties can arise about the membership of nations or about their identity through time. There can be borderline cases – communities that have lost so much of their political structure and law that it is difficult to regard them as nations. I will discuss some of these problems in later chapters. But in many cases there are no grounds for denying that the indigenous nation that was party to a historical

agreement continues to exist, or that there is a nation which can rightfully claim to be the inheritor of the political legacy of the nation that made the agreement.

Nations ought to keep their agreements (all things being equal), and their liability for treaty violations seems to follow from the responsibilities they assume when they make commitments. The problem is that nations are not really individuals. Their policies and commitments depend on the actions and intentions of real individuals – as leaders, officials and citizens. A nation can be said to make a treaty because those individuals who count as the appropriate officials have entered into negotiations and reached agreement, and others have ratified this agreement according to accepted procedures. If the treaty is kept, this is because officials and citizens are prepared to perform the required actions and refrain from violations. Keeping a treaty can be burdensome. It can require citizens to forego significant advantages. It can force them to go to war to defend a treaty partner. Individuals who demand a moral justification for the burdens imposed on them are not being unreasonable. We cannot simply assume that it is morally legitimate to pass on obligations and entitlements from members of one generation to another. This is precisely what needs to be justified.

A nation, it might be insisted, just *is* a political organization that makes transgenerational agreements. Treaty making and keeping is essential to its nature, and all its members have to accept this. However, a nation is a human artefact. What it is or does is determined by the actions and interests of its members, and those who refuse to accept the burdens imposed on them by treaties from the past are not making a conceptual error. They are questioning the terms of their association – something they surely have a right to do. The response to their objections might appeal to prudence. If citizens were not prepared to keep the agreements of their predecessors (at least sometimes), then long-term commitments between nations would be impossible. But long-term agreements are often a good thing. They tend to promote trust and peaceful coexistence. So reluctant citizens might be persuaded that the burdens they are forced to assume are justified because of these good consequences. However, this reasoning is not so likely to persuade them if the benefits of violating an agreement are considerable, or if the burdens of keeping it are onerous. They will be particularly unimpressed if the injured party is not in a position to retaliate effectively or if the motivation behind the agreement was to practice deceit. But the real problem with prudential justifications for treaty keeping is not that the arguments may fail to convince. They do not explain why citizens have an obligation to keep treaties just because their predecessors made them. They do not treat treaties as promises.⁷

If prudential justifications for keeping treaties of predecessors are not satisfactory, then what other reasons can we appeal to? The problem of justifying historical obligations bears a resemblance to what has been called the ‘problem of political obligation’ – the problem of explaining why citizens should support the institutions of their nation, obey its laws, and other requirements. The problem arises because it is commonly assumed that the authority of the nation rests on the consent of its citizens. But most of us have never consented to the authority of our nation, or voluntarily accepted the burdens of citizenship. These were thrust upon us by an accident of birth.

Nevertheless, there are some notable differences between the problem of political obligation and the difficulties raised by historical obligation. One of them is that political obligation is not a real issue – at least not for most people in relatively just, democratic nations. Most of us accept the authority of our laws and national institutions without wondering whether our nation has a right to make demands of us. But whether citizens have historical obligations is a live issue. Controversies raised by demands for reparation show that many people do not think that they have a responsibility for paying the moral debts of their political predecessors. Another difference is that the way in which our national institutions exercise authority over us can, at least in a democracy, be affected by what we do. We can collectively change the law or even the constitution; we can rebuild institutions to suit our needs. The control that we can exercise over our political existence is probably one reason why most of us are willing to accept the authority of our laws and institutions. But a historical obligation to keep treaties or make reparation for past violations cannot be abrogated or altered – even by the combined will of citizens. So historical obligations are going to seem objectionable not only to those who regard forced obedience as an imposition on their lives as free beings, but also to those proponents of democracy who think that citizens should collectively be able to determine what burdens they will assume.⁸

So it is not illogical for people to accept political authority, even to have a strong sense of loyalty to their nation or fellow members, and yet reject historical obligations. They may acknowledge obligations to present and future members. They may agree that they have a duty to keep agreements of officials who represent them and to make reparation for wrongs their leaders and representatives have committed.⁹ But they can at the same time deny that they have an obligation to fulfil historical agreements or make reparations for deeds done before they were born, came of age, or arrived in the country. This means that solving the problem of political obligation, or denying that the

problem really exists, would not necessarily resolve difficulties concerning historical obligations and entitlements.

Obligation and historical title

The problem of explaining why we have a historical obligation to keep agreements made by our predecessors might be avoided altogether if Nozick is right about historical title. If the Maoris have a persisting entitlement to their land, then those who now occupy it have an obligation to give it back (or provide appropriate compensation). A treaty, it could be argued, is merely a political means of protecting basic rights, and thus not philosophically all that interesting. The right to land would remain even if the treaty had never existed.¹⁰

One problem with this argument is that treaties are made for many purposes: for protection against attack, to ensure co-operation, to coordinate activities, etc. So the existence of morally basic titles to land would not relieve us of the task of explaining why we ought to keep the agreements of our predecessors. It could be said that, by putting us into a special relation with members of another nation, *every* treaty generates obligations that are likely to have implications for the way in which we discharge our responsibilities or how we should behave if we fail. Treaties are not morally superfluous. But the more serious difficulty with appeals to historical titles is that they may not be so morally basic as their supporters suppose. Nozick assumes that we should argue from entitlements to obligations: since he believes that individuals and groups have a persisting title to their possessions, he insists that we have an obligation to ensure that this right is not violated, or if violated to rectify the situation. But the direction of the argument might be reversed: 'Because we do not have an obligation to rectify the wrongs of our predecessors, persisting historical titles (like that claimed by the Maori) do not exist.' Those who refuse to think that they have such an obligation will be predisposed to argue in this way. Barring a convincing and strong reason for the existence and persistence of the entitlement, what is to prevent them from doing so?¹¹

Collective responsibility and the past

Since keeping treaties and making reparations for past violations are supposed to be the collective responsibility of individuals as citizens,

or citizens of a certain kind, it is natural to look to theories about collective responsibility to explain why historical obligations exist. But most accounts of why members have moral responsibilities for activities of their group reinforce the idea that there is no obligation without participation. These theories have the objective of determining whether, and to what extent, individuals are responsible for the deeds of their leaders or other members of their group – whether, for example, ordinary citizens bear some responsibility for the involvement of their country in an unjust war. Almost all of them agree that it would be unjust to hold individuals liable for actions which they had no possibility of influencing. Joel Feinberg, for example, lists ‘opportunity for control’ as one of the necessary conditions for liability for an action or practice of a group.¹² A citizen of a democracy – even one who doesn’t vote or pay attention to politics – may bear some responsibility for the wrongs done by officials of her nation. She could have been more informed and politically active, she could have spoken out against injustice. But she had no way of influencing the actions of members of past generations – no way of objecting to agreements they made or injustices they did.

If moral responsibility depends on liability, and liability on control or ability to participate, then historical obligations do not exist. However, defenders of historical obligation often have in mind a different idea of how members of collectives acquire responsibilities. The wealth of nations has been built on past injustices. Non-indigenous Americans, Australians, New Zealanders, South Africans and Canadians are now benefiting from injustices done to indigenous communities – from the consequences of broken treaties, from land that was seized and settled.

If the Aborigines had not lost their land, and had maintained their traditional relationship with the land on which their well-being depended, then white Australian society could not have developed in the way it has, whites would not enjoy the high levels of well-being they enjoy, Aborigines would not have suffered significant losses in self-esteem, and nor would they have been so culturally devastated.¹³

The beneficiaries of this injustice, Bigelow, Pargetter and Young go on to say, have a duty to repair the injuries suffered by the victims.

There are two ways of understanding this claim. According to the first, beneficiaries of historical injustices are the receivers of stolen goods. They have been unjustly enriched. Justice demands the return of these goods to their rightful owners, or at least compensation in some form. The second says that those who have gained through

interactions should share their benefits with those who have suffered loss. The fact that the losses suffered by indigenous people are the result of wrongs done by a nation plays no essential role in the argument so understood. Beneficiaries would have just as strong a reason for sharing if their gains, and the losses of others, had been the result of economic or natural contingencies for which no one could have been blamed. If, for example, the normal economic interactions of people of a nation result in the collapse of a large business and unemployment for its workers, then many of us believe that those who have benefited from these interactions should provide compensation in the form of unemployment benefits and other subsidies for those who have suffered the harm. Graduated income tax is supposed to ensure that those who benefit the most bear the greatest burden. But there is no question of blaming them for the harm, and no reason to think of their payments as reparation. What this second interpretation of the argument calls for, in other words, is compensation for unfair disadvantage – not reparation for wrong done. Compensation for losses incurred as the result of social interactions is required by many theories of equity, so the common belief that beneficiaries of past injustices owe something to people who have been harmed is probably best interpreted in this way.¹⁴

The argument from unjust enrichment *does* insist that beneficiaries of injustice have a historical obligation of reparation, and would have this obligation even if they had not prospered from their ill-got gains (and even if the victims or their descendants were relatively prosperous). But the idea that such an obligation exists seems to depend on the existence and persistence of historical titles. If the land of their ancestors still belongs to the Maori, then, according to the argument, the present inhabitants are benefiting from something that does not belong to them. The problem is not merely that the argument from unjust enrichment makes an assumption about the persistence of title that many people are inclined to question. It also ignores claims that present inhabitants might make on their own behalf. The existence of Maori title does not exclude the possibility that present possessors may also have an entitlement. It is notable that the law puts limitations on what can be claimed in restitution, and for how long.¹⁵ If many years have passed since the theft occurred, the claim of the original owner is likely to lapse, and that of the present possessor will take precedence. There is in fact a good reason for imposing limitations on entitlement to restitution. We generally assume that those who obey the law and act justly have the right to pursue their projects, engage in commercial activities and enjoy the fruits of their labour without the fear that they will be stripped of their possessions because

of an injustice committed by others a long time ago.¹⁶ Those who react with indignation to reparation claims, who regard them as 'unfair', may do so for this reason.

Guilt, shame, and identity

The ideas of collective responsibility so far examined seem to ignore an important psychological fact. People sometimes do feel guilt or shame for injustices committed by members of their group, or are made uncomfortable by the knowledge that they are benefiting from past injustice. Many citizens are sorry for the wrongdoing of their predecessors and are prepared to take responsibility for keeping their agreements. An account of collective responsibility that takes these responses seriously is likely to be in a much better position to justify historical obligations.

Alasdair MacIntyre thinks that the explanation for such responses comes from the fact that we are bearers of a particular social identity.

I am someone's son or daughter, someone else's cousin or uncle... I belong to this clan, that tribe, this nation. Hence what is good for me has to be the good for one who inhabits these roles. As such I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of my life, my moral starting point.

The self, he says, has a history that stretches back before birth. And he contrasts this 'narrative view of the self' with the viewpoint of modern individualism which detaches the self from all social relationships and denies that a person can be held responsible for 'what his father did or for what his country does or has done'.¹⁷ The modern individualist is likely to deny historical obligations, but those with a narrative view of themselves cannot.

MacIntyre's presents a 'strong' account of collective responsibilities in the sense that he makes them follow from an identity with, or commitment to, a community. It claims that we have a relation to our community that entails special responsibilities, including historical obligations. The 'weak' position of Feinberg, on the other hand, does not presuppose the existence of special community obligations. It makes our collective responsibilities follow from a general human duty to promote justice and prevent unjust actions of the groups to which we happen to belong. It is not a theory about political or communal obligation. A strong theory seems attractive, because it solves several problems at once. It purports to explain why we have

special duties to our community or nation, and also why we should assume responsibility for communal deeds that we had no possibility of influencing.

MacIntyre makes a person's special obligations depend on the nature of his or her self. But not all selves are narrative selves, and those that are will tell many different stories. MacIntyre himself thinks that individualist selves are becoming more common in the modern (or post-modern) world, but these are the people most likely to deny that they have communal or historical obligations. Even those who do regard themselves as attached in an essential way to others are likely to have different ideas about which relationships form their identity. Some people regard their family as central to their lives, but have little interest in their nation. The immigrant may continue to derive his self-identity from the land of his ancestors and have no feeling of responsibility for the inheritance of his new nation. Nor does acceptance of responsibility necessarily follow from identification. A person can locate herself within a history or identify with a group without thinking that she is obliged to do anything about the commitments or injustices of past people. And there is no necessary connection between feeling shame or regret for the sins of predecessors and taking responsibility for reparation. MacIntyre's narrative view of the self can account for why some people are prepared to take responsibility for the past of their community, but it is not able to establish that all members of nations should accept historical obligations.

Perhaps these obligations arise simply from the fact that we are members of certain kinds of community. If so, they are basic duties, ones that people are supposed to accept without asking for reasons.¹⁸ Most people do take for granted that they have family obligations – responsibilities to brothers and sisters, parents and children, even to uncles and aunts. They accept such duties even though family membership is not a matter of choice, and even when they do not have positive feelings about all their relatives. Many people are also prepared to accept national responsibilities as a matter of course. But if people are supposed to accept these obligations without asking for reasons, then it is difficult to see what arguments can be given to someone who has different ideas about duty or different loyalties. Accusations of immorality are likely to be perceived by non-conformists as moral bullying. Nor does acceptance of communal obligations necessarily require taking responsibility for the past. We can accept obligations to members of our own family – those with whom we live or interact – without supposing that we have an obligation to pay the debts of our parents, let alone more distant ancestors. We can ac-

knowledge special obligations to members of our nation without supposing that we have historical obligations for its past.

The possibility remains that we acquire commitments and obligations, including obligations with respect to the past, through participation in communal activities. Margaret Gilbert thinks that a joint commitment comes into existence when people participate in joint activities or signal their readiness to participate. Having shown through their actions that they have entered a commitment, they constitute with others a plural subject and acquire responsibilities for fulfilling its intentions.¹⁹ Most of Gilbert's examples of joint commitment focus on personal relations. By using conventional gestures or words to signal that I accept an invitation to dance, I thereby commit myself to forming a dance-floor couple. But she thinks that we also acquire joint commitments as members of more enduring plural subjects like nations. We signal our readiness by participating in public events, voting in elections, or even by our use of language – by the use of 'we', as in 'We are engaged in a war against terrorism'.

Once individuals have committed themselves to being part of such a plural subject, they acquire responsibility for its deeds. Having this responsibility does not depend on participation, and lack of culpability is no reason for denying obligation. Since a nation is an ongoing, intergenerational, plural subject, joint commitment means sharing responsibility for its past. Gilbert wants to explain why people sometimes feel guilty for what their nation has done, even when they bear no responsibility as individuals. But her position also implies that people who don't feel guilt may nevertheless have obligations, including historical obligations, as citizens.

There is a large gap, however, between personal relations that give rise to legitimate expectations and the relations of individuals in a large, impersonal society.²⁰ In face-to-face interactions people can make their intentions clear, especially if they are able to rely on mutually understood conventions. The mere fact that people participate in public events or use 'we' when speaking of the nation is not enough to establish that they are participants in a joint commitment. Even if these activities did indicate commitment, they would not tell us what responsibilities people have accepted, or exactly whom they are committed to. They may be signalling a commitment to the people of their nation, but not a readiness to fulfil the intentions of its leaders, still less to take responsibility for what leaders or officials did in the past.

Are there actions that do signal such a commitment? Expressing pride in the past deeds of the nation may be one. 'Can one accept the

benediction and reject the curse? Can one accept the legacy and avoid the duty of paying its debts?²¹ But this point, though it may be correct, does not get us very far. We have returned to the problems associated with MacIntyre's conception of the narrative self. Having responsibility is made to depend on a response that many people belonging to a nation – recent immigrants, for example – may not share. And worse, it is not a response that requires any particular action.

This brief discussion of views about collective responsibility is not exhaustive. Nor am I likely to have proved to everyone's satisfaction that the views of MacIntyre, Gilbert and others are not able to do the job of explaining why we have historical obligations. However, the problems encountered by common, and not so common, views about collective responsibility for historical injustices are reason enough to search for an alternative.

Presuppositions of promising

The first step is to explain why presently existing citizens or members of nations are obliged to keep the treaties of their predecessors. Understanding why this historical obligation exists will put us in a better position to understand why citizens have an obligation to make reparations for historical violations of agreements and for wrongs other than treaty violations.

All arguments begin with assumptions. I will take it for granted that the Vienna Convention on the Law of Treaties rightly regards a treaty as having the legal and moral force of a promise or contract. A promise is supposed to *entitle* those to whom it is made to trust that it will be kept. Violation of a treaty, like violation of a promise, is the breaking of a trust – which counts as an injustice even if the recipient of the promise does not suffer loss. The obligation to keep a promise is a duty, all things being equal, and a complete account of promise or treaty making would have to define the circumstances that would make commitments void or inapplicable (as the Vienna Convention does in its codification of international conventions concerning treaties). But in the absence of such circumstances it is assumed that nations ought to honour their agreements.

Treaty violations are common occurrences in the affairs of nations. But this does not detract from their moral force. Indeed, the very existence of a treaty system depends on the prevalence, at least as a guiding idea, of what the convention calls 'good faith'. 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'²²

I will also assume that citizens of democratic nations, or nations that provide their members with some means of influencing the behaviour of leaders or governments, are collectively responsible for the policies and political actions of their representatives and officials. This includes a collective responsibility for keeping the agreements that their representatives make. The issue is how these citizens can have an obligation to honour agreements that were made not by their representatives, but by leaders and officials of the past. I do not assume any particular account of why citizens have collective responsibilities. They might be thought of as arising from the influence that citizens can exercise over their leaders – the view of collective responsibility promoted by orthodox theories. Or they may be regarded as a consequence of social identity or the commitment of citizens to each other or to the nation itself. Strong accounts of collective responsibility, as we have seen, do not relieve us of the task of justifying historical obligations. But a weaker account will suffice.

What makes treaties possible?

By their nature treaties are ‘posterity-binding’: they are meant to impose obligations on our political successors as well as ourselves. To be perpetually valid, or even valid for a reasonable period of time, a treaty has to bind citizens of the future. Those with whom it is made are being given an entitlement to trust that this will be so. This means that if we endorse such an agreement, then we must suppose that our successors have an obligation to keep it – at least so long as it can be regarded as applicable and fair. But how is it possible to impose obligations on our successors? The problem is not merely that our control over what future people will do is limited – that we will not be in a position to force them to do what we want. The primary issue is moral. What gives us the moral entitlement to perform an act that imposes obligations on future people? What gives those with whom we have made an agreement the entitlement to trust that our commitment binds our successors? And why should these future people regard themselves as bound by our agreements? Only by answering these questions, can we understand what makes treaties as promises possible. Let us tackle each of them in turn.

Suppose that through our elected representatives we want to make a posterity-binding treaty with another community. Let us assume that everyone concerned is sincere and morally responsible. We intend to keep the agreement, and have the capacity to do so. But our sincerity and our situation are not sufficient to give us the right to undertake

something on behalf of our successors. A moral entitlement to make such a posterity-binding commitment, I suggest, depends on this act taking place within the framework of a moral practice that requires us to take responsibility for fulfilling posterity-binding commitments of our political predecessors.

That this is so follows from a basic assumption about morality, at least in those cases where we are reasoning about public affairs – that ‘like cases ought to be treated alike’. If you assign duties or obligations to others, then you have to be prepared to accept the same (or relevantly similar) duties yourself. If you insist that others should refrain from throwing their litter on the street, then you have to believe that you and your friends are under the same obligation. If you deny that this duty is also yours, then you do not have the moral authority to tell others what they ought to do. In other words, making a legitimate moral demand means conforming to a practice requiring (among other things) that you accept that the same judgement would apply to anyone who was in a relevantly similar situation, including yourself. Moral prescriptions associated with treaty making are different in one respect from more familiar judgements about what people in a particular position ought to do. The people on whom we are imposing duties are our national successors, not just our contemporaries. This means that ‘treating like cases alike’ commits us to accepting similar obligations in cases where *we* are the successors.²³

Being willing to accept as an obligation a demand made by our predecessors is not, to be sure, sufficient to ground a posterity-binding obligation. Suppose people demand that their successors take revenge on the people of those nations that have done them an injury. They are prepared to conform to the ‘treat like cases alike’ rule and take revenge on the people who injured *their* predecessors. But their demand gives rise to no obligation. Their successors can ignore their wishes, and so they should. Revenge is not a good idea from a moral point of view, particularly when it is being visited on people who were not themselves responsible for an injury. This means that we, as responsible moral agents, do not regard it as legitimate to demand of our successors that they take revenge on our enemies, and thus we have no obligation to heed calls for revenge made by our predecessors. What we demand of our successors must be something we can regard as morally legitimate. This is a presupposition for the application of the rule. For the same reason we are not entitled to insist that our successors keep unfair promises, and have no obligation to honour the unfair promises of our predecessors. But if a promise is fair (and satisfies the other conditions associated with promising), then no moral considerations stand in the way of us binding our

successors. (Indeed, I will argue in the next chapter that we cannot reasonably avoid making posterity-binding commitments.)

Why not say that the possibility of making a posterity-binding commitment requires only that we take steps to ensure that our successors will carry it out? We could make a law designed to force them to do this, or even enshrine the treaty in the constitution of our political society. Making treaties into law is in fact a standard practice in many countries. We could indoctrinate our children to honour our commitments. The problem with these measures however, is not merely that they might fail. The issue is not the effectiveness of the means we might use to induce our successors to do what we want. What needs to be explained is how we can presume an entitlement to impose a *moral* obligation on our successors. What gives us the authority to say that they *ought* to honour our agreements? The answer is that our moral authority comes from accepting the obligation to honour the morally acceptable agreements of our predecessors.

We reach the same conclusion when we look at the matter from the point of view of those with whom we make an agreement. We want them to be able to trust that it will be fulfilled. But our sincerity, our own ability to keep the agreement, and the moral reasonableness of the agreement itself do not give them a sufficient reason for trust. It is not only our own willingness to fulfil the undertaking that is in question, but its acceptance as an obligation by our successors. Those with whom the agreement is made are entitled to trust us only if they also have good reason to believe that they are dealing with a people who accept the moral practice of honouring the agreements of their predecessors.

Let us assume that we are entitled to make our posterity-binding commitment. Why should our political successors think that they are obliged to keep it? They may, of course, think that the agreement suits their purposes and abide by its terms for this reason. But in this case they aren't really *honouring* our agreement. They are merely doing what they see to be in their interests. They would not keep it if it were not so convenient. Their *obligation* to keep our agreements arises from their belief that the agreements they make ought to be honoured by *their* successors. By committing their successors to honour their agreements, they take on the responsibility of honouring ours. They are obliged to accept the consequences of their practice.

This explanation of why we have a historical obligation to honour treaties made by our predecessors may seem like an unnecessarily complicated way of defending what almost everyone concedes: that nations ought to keep their promises. The complexity is justified by

special problems raised by historical obligations and the fact that other ways of dealing with these problems do not seem adequate. My account does not depend on the identification of citizens with people of the past. Nevertheless, it obliges them to see themselves as participants in a transgenerational relationship in which each generation inherits obligations from its predecessors and passes on obligations to its successors. The implications and advantages of this approach will be explored in later chapters, when my account of historical obligation takes on difficult cases. But first it has to answer some obvious objections.

Intentions and obligations

Treaty keeping is a backward-looking obligation, but the justification I have offered is forward-looking in the sense that it depends on the concern of morally responsible citizens that their commitments be honoured by their successors. For this reason it might be accused of the same inadequacy as the prudential view that I criticized earlier in this chapter – that it does not provide a plausible account of why people are obligated to honour promises and contracts. Suppose we don't make any posterity-binding promises at all. Does this mean that we are relieved of the responsibility of honouring the promises of our predecessors?

The answer is 'No'. Our moral commitments do not depend on what we actually do or refrain from doing. They depend on our judgements about what ought to be done in cases real or merely possible. Much of our moral reasoning is hypothetical. We make judgements about what we would be morally obliged to do if a particular situation *were* to occur. The point of such an exercise is to identify those moral practices to which we are committed. The moral practice we think we ought to adopt in relation to the promises of our predecessors is determined not by whether we actually make posterity-binding promises, but by what we think our successors ought to do were we to make them.

I have been assuming in this discussion that we are morally responsible citizens, that we intend to adhere to the morally acceptable agreements that our representatives have made, and think that our successors should do so too. But suppose we are not so conscientious. Suppose that our motivations are less sincere, and our intentions more devious. We do not intend to keep our agreement, or perhaps we intend to keep it only so long as it serves our interests. We certainly have no desire to bind our successors. Does this mean that we avoid

incurring an obligation to honour the commitments of our predecessors? Does it mean that our successors have no obligation to honour the agreement? The issue raised by this last question is particularly relevant to our actual situation. For we have good reason to believe that in many cases our predecessors had no intention of honouring the treaties they made with indigenous people and had no desire that we do so. The many treaties made with the Cherokee were devices for 'legalizing' invasions of their territory, and no one could have believed that the American government intended to prevent further incursions. Some of the British officials who promulgated the Treaty of Waitangi may have been sincere, but others probably thought of it as a device for placating savages until Her Majesty's forces arrived in greater strength. In many cases the motivations of our predecessors are unknown, and now unknowable.

Do people who do not intend that their posterity-binding agreements be kept have a duty to honour the posterity-binding treaties of their predecessors? The answer is, obviously, 'Yes'. People do not avoid having duties by being immoral. If I make a promise with no intention of keeping it, I am not relieved of obligations. I open myself up to accusations of insincerity and abusing the trust of others. People who make a posterity-binding agreement without intending that it be kept are equally immoral. They are pretending to conform to a practice that requires that they and their successors honour a promise. They incur the obligations that this practice entails, whether or not they intend to fulfil them. Reasoning from the perspective of a morally responsible person is not merely a way of determining what rules or practices a morally responsible person should follow. It provides a standard for criticizing the behaviour of those who are less responsible – and for making judgements about what they ought to have done.

Do we have an obligation to fulfil promises that our predecessors did not intend us to keep? The answer depends on how we interpret the 'treat like cases alike' requirement: whether it requires us to fulfil the *intentions* of our predecessors or to keep their *promises*. How we interpret this rule depends in turn on what we, as morally responsible citizens, think that our successors should do. The answer seems clear. We want them to honour our agreements not because this is what we intend them to do – not out of regard for our desires or other psychological states – but because we think our agreements should be honoured. The trust of those who have made an agreement with us should not be violated. In other words, we are assigning our successors an obligation to honour our commitments, not a duty to fulfil our intentions. So the appropriate and relevant description of

our obligation in respect to the agreements of our predecessors is to fulfil their promises. Their intentions, good or bad, are not relevant – at least not to the determination of what it means to treat like cases alike. What is morally important is not the state of mind of those who made a commitment, but the fact that it was made.

The same conclusions follow if we reason about the matter from the point of view of those with whom an agreement is made – if we put ourselves in their position, as the ‘treat like cases alike’ rule demands that we do. If we were those to whom a commitment was made, we would believe ourselves to be entitled to trust that it would be kept. We would believe ourselves entitled to engage in undertakings or make plans for the future with the understanding that the agreement would be upheld, not only by those who made it but also by their successors. We would be prepared to accept some excuses for not keeping the agreement; but we would not regard it as acceptable if these successors refused to honour it on the grounds that their predecessors were insincere and did not intend it to be kept.

This way of reasoning about our historical obligations has the obvious advantage of relieving us of problems associated with the intentions of past people. It does not require us to respect or fulfil their intentions. It does not require that we know what their intentions were. Moreover, it puts us in a good position to deal with another problem concerning intentions. A question that often arises when dealing with agreements from the past is how we should interpret their terms or determine their validity. Should we interpret and apply them according to the intentions of those who made them (so far as we know what they were)? To do so may require us to act in ways we think to be unjust – either because the terms of the agreement were meant to favour the interests of the powerful, or because circumstances have changed, or because our predecessors’ conception of justice was different from ours. Should we interpret and apply the agreement, so far as we can, according to contemporary ideas of justice? But if so, then surely we are simply doing what we happen to regard as just and not keeping the promises of our predecessors.

In order to be said to be keeping an agreement, we have to refer to its provisions and provide an interpretation of what they were supposed to protect or guarantee. But my account of why we have an obligation to keep the agreements of our predecessors favours the idea that the interpretation and application of these provisions should depend on what we now think is fair. We think our successors ought to keep our commitments not simply because these commitments were made, but because we regard the terms as just. But we know that circumstances change and that our ideas about justice are not

above criticism. The duty we assign to our successors is thus to interpret and apply our agreements in a just way according to the circumstances. We have the same obligation with respect to the agreements of our predecessors. Suppose, for example, a treaty our predecessors made with an indigenous nation gave them fishing rights in a particular area. Because of ecological changes for which no one is directly responsible, the fish have moved away to an area beyond that designated by the treaty. The indigenous people are still dependent on fishing for their livelihood. We might under these circumstances interpret the treaty as guaranteeing a source of livelihood for indigenous people, and thus apply it by ceding them the new fishing ground. Controversies about what is just are bound to arise in this and other cases. But the issues can be settled only by appealing to present circumstances and the ideas of justice that people now have.

We are entitled to interpret the agreements of our predecessors according to our ideas of justice, even though we know that our predecessors had somewhat different ideas. Our conception of justice is for us what justice is, and we are entitled to judge according to our moral convictions. We are entitled, for example, to insist that slavery was unjust, even though we know that some of our predecessors saw nothing wrong with it. So the historical obligation to justly interpret and apply the agreements of our predecessors entitles – indeed obliges – us to do what we and those we deal with think is just.

This view of interpretation is reinforced by reflection on the moral purpose which a treaty, as a promise, is supposed to serve. A treaty is supposed to be based on mutual respect, and aims to establish and maintain relations of trust and terms of co-operation acceptable to all parties. In the real world, to be sure, nations have often been forced to sign treaties and accept terms that they regard as unfair. Indigenous people have often had to negotiate from a position of weakness and accept whatever terms that they could get. But when we criticize these treaties, we have in mind an idea of what it means to make a morally acceptable agreement. The Vienna Convention regards as illegitimate treaties that are concluded by coercion or fraud.²⁴ It is the moral idea of what constitutes a fair agreement that should guide our thinking about what our successors ought to do. Above all, we should want our successors to maintain arrangements that all parties can continue to respect and regard as acceptable. They ought to interpret and apply treaties, change or re-negotiate them, in a way that will maintain respect, trust and mutually accepted terms of co-operation. By making this demand, we commit ourselves to taking the same approach to the agreements made by our predecessors. It is an approach that allows that an agreement is something that evolves,

changes its meaning, comes to an end, or is reborn, as the relations between communities develop, and conditions and ideas of acceptability change.

This approach enables us to overcome, at least in principle, a common difficulty that affects the interpretation of many treaties made with indigenous people. The Treaty of Waitangi existed in two main versions, one signed by the representative of the British Crown and one translated into the Maori language and signed by Maori chiefs. The two versions are significantly different. Those responsible for translating the treaty had only a rudimentary understanding of Maori culture and the meanings of key Maori words, and Maoris undoubtedly had only an imperfect understanding of British ideas of sovereignty or what it meant to be a British subject.²⁵ If a treaty must be interpreted according to the intentions or understandings of its signatories, then there can be no agreed interpretation of the Treaty of Waitangi. But lack of agreement about its original meaning does not prevent Maori and Pakeha from trying to reach an understanding about how it should now be interpreted in the light of present circumstances and views about justice.

Historical injustice

This chapter explains how we acquire obligations that are historical. However, my defence of historical obligations is far from complete. The British Crown made a treaty with Maori chiefs at Waitangi, but the government appointed by the Crown soon broke it. The critical issue for Pakeha New Zealanders, and for the people of nations with similar histories, is not why they should continue to honour a treaty that was made long ago, but what, if anything, they owe to indigenous communities in reparation for violations of historical agreements.

Treaty violations were not the only injustices committed in the past. Across the Tasman Sea from New Zealand, in the Crown Colonies of Australia, governments persistently refused to make agreements of any kind with Aboriginal communities. Appealing to the fiction of 'terra nullius' – the idea that the country was empty of people and available for settlement – governments appropriated the land and opened it to pastoralists, farmers and prospectors. Aborigines were pushed out of the land that their people had occupied for thousands of years, and when they resisted, they were punished. None of these actions violated a treaty, but they clearly count as injustices. The fact that no treaties were made seems itself an injustice. In the United States, Canada, Australia and many other countries, past govern-

ments have undermined the culture of indigenous people and destroyed their communities. They have taken away their children and forced them to sell their communal land. A theory of historical obligations has to be able to encompass the demands that these injustices give rise to, not just demands for reparation for broken treaties.