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Elimination of racism, racial discrimination, xenophobia and related intolerance: comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action

Contemporary forms of racism, racial discrimination, xenophobia and racial intolerance

Note by the Secretary-General**

The Secretariat has the honour to transmit to the General Assembly the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Tendayi Achiume, prepared pursuant to General Assembly resolution 73/262.

* A/74/150.

** The present report was submitted after the deadline owing to the proximity of the deadline to earlier deadlines for the submission of the reports of the Special Rapporteur to the Human Rights Council, as well as the greater number of reports that the Special Rapporteur is required to submit relative to other special procedures mandate holders.

Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance

Summary

In the present report, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance addresses the human rights obligations of Member States in relation to reparations for racial discrimination rooted in slavery and colonialism.

I. Activities of the Special Rapporteur

1. The present report is submitted pursuant to General Assembly resolution 73/262 on a global call for concrete action for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action.

A. Country visits

2. The Special Rapporteur made an official visit to the United Kingdom of Great Britain and Northern Ireland from 30 April to 11 May 2018[1] and to Morocco from 13 to 21 December 2018.[2] She presented her first country visit reports to the Human Rights Council at its forty-first session, on 8 July 2019.

3. The Special Rapporteur would like to thank the Governments of the Netherlands and Qatar for inviting her to conduct country visits from 30 September to 7 October 2019, and from 24 November to 1 December 2019, respectively. She also wishes to thank the Governments of Brazil, Malaysia and Poland for accepting her country visit requests and looks forward to their cooperation in scheduling dates for those visits in 2020–2021.

B. Other activities

4. The activities of the Special Rapporteur from July 2018 to April 2019 are listed in her report on global extractivism and racial equality presented to the Human Rights Council at its forty-first session.[3] In the report, the Special Rapporteur highlighted racial discrimination in the global economy and natural resource extraction industries. Her subsequent activities included the convening of an expert group meeting on reparations, racial justice and racial equality on 29 May 2019 at the New York University Gallatin School of Individualized Study. In July 2019, the Special Rapporteur convened a civil society consultation in Geneva, in the margins of the forty-first session of the Human Rights Council, on the topic “Strengthening an international human rights anti-racism agenda, amplifying the knowledge of civil society organizations”. She also participated in an expert round table on the theme “Stand up for migrants: confronting hate in our societies and reshaping narratives on migration”, as well as a side event entitled “Intersectionality as politics and practice”.

5. In response to her call for submissions, the Special Rapporteur received 22 submissions that helped to inform the present report. She expresses her gratitude for those submissions and thanks in particular the participants of the expert group meeting for their invaluable contributions.

II. Introduction

6. In the present report, the Special Rapporteur addresses the obligations of Member States in relation to reparations for slavery and colonialism, which requires the following factors to be taken into consideration:

[1] A/HRC/41/54/Add.2.
[2] A/HRC/41/54/Add.1.
[3] A/HRC/41/54.

(a) The historic racial injustices of slavery and colonialism that remain largely unaccounted for today, but which nevertheless require restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition;

(b) The contemporary racially discriminatory effects of structures of inequality and subordination resulting from failures to redress the racism of slavery and colonialism.

7. In that context, reparations for slavery and colonialism include not only justice and accountability for historic wrongs, but also the eradication of persisting structures of racial inequality, subordination and discrimination that were built under slavery and colonialism to deprive non-whites of their fundamental human rights. Slavery and colonialism denied persons equal protection before the law on the basis of their race. One of the persisting legacies of slavery and colonialism remains the unequal application of the law to descendants of historically enslaved and colonized peoples.

8. Reparations concern both our past and our present; the Durban Declaration clearly states that transatlantic slavery and colonialism remain among the root causes of racism, racial discrimination, xenophobia and related intolerance against Africans and people of African descent, people of Asian descent and indigenous peoples.[4] States in the Americas have also recognized the existence of "a mestizo population of different ethnic and racial origins, to a large extent as the result of the history of colonization and slavery in the American continent, in which unequal relations of race and gender were joined".[5] In addition to implicating individual wrongful acts, reparations for slavery and colonialism implicate entire legal, economic, social and political structures that enabled slavery and colonialism, and which continue to sustain racial discrimination and inequality today. That means that the urgent project of providing reparations for slavery and colonialism requires States not only to fulfil remedial obligations resulting from specific historical wrongful acts, but also to transform contemporary structures of racial injustice, inequality, discrimination and subordination that are the product of the centuries of racial machinery built through slavery and colonialism.

9. Reparations for slavery and colonialism entail moral, economic, political and legal responsibilities.[6] The present report outlines a structural approach to providing reparations for slavery and colonialism under public international law and international human rights law, according to which States must pursue a just and equitable international order as an urgent dimension of reparations for slavery and colonialism. Full implementation of the International Convention on the Elimination of All Forms of Racial Discrimination must also be understood as a central pillar to achieving reparations for slavery and colonialism. The present report also provides detailed information on the duties of States in providing reparations for racial discrimination and injustice under public international law and international human rights law.

10. In the present report, the Special Rapporteur discusses legal hurdles to providing full reparations, while also highlighting legal obligations related to the provision of reparations for which States are fully liable today. In addition, the Special Rapporteur emphasizes that the pursuit and achievement of reparations for slavery and colonialism require a genuine "decolonization" of the doctrines of international law that remain barriers to reparations. In the face of the grave historic injustices of slavery and colonialism, as well as their continuing legacies, the use of legal doctrine by Member States to impede redress is distressing. The Special Rapporteur stresses that international legal doctrine has a longer history of justifying and enabling

[4] A/CONF.189/12, chap. I, paras. 13–14.
[5] A/CONF.189/PC.2/7, para. 41.
[6] A/CONF.189/PC.2/8, para. 20.

colonial domination than it does of guaranteeing equal rights to all human beings. Law that perpetuates neocolonial dynamics – including the failure to eradicate the legacies of slavery and colonialism – must itself be recognized and condemned as neocolonial law. The impetus should be on developing legal doctrines that can ensure justice and equality for all, irrespective of race. Colonialism and slavery were legal once, but both were abolished. This then raises the question as to why defenders of liberal justice are not preoccupied with achieving the legal reform that would make comprehensive reparations compatible with international law.

11. In cases where States have pursued reparations for slavery and colonialism, they have often done so in a racially discriminatory fashion. Notable historical examples exist where whites who profited and benefited the most from chattel slavery and colonialism received monetary compensation, while non-whites and their nations were partially or wholly left without redress or were forced to make payment to former colonizers or enslavers. For example, after slavery was abolished in the colonies of the United Kingdom in 1833, about 3,000 families received £20 million, valued at over £16 billion today, for their loss of "property", in other words, enslaved Africans.[7] At the time, those payments accounted for 40 per cent of the annual expenditure budget of the United Kingdom Treasury.[8] In 1862, the President of the United States of America, Abraham Lincoln, signed the District of Columbia Compensated Emancipation Act, requiring the immediate emancipation of enslaved people in exchange for US$ 300 for each freed person payable to former slave owners.[9] In less than a year, 930 petitions for compensation were wholly or partially approved, resulting in the freedom of nearly 3,000 enslaved people.[10] The Compensated Emancipation Act also authorized the payment of US$ 100 to formerly enslaved people but only if they were willing to repatriate to Africa.[11] In 1825, newly independent Haiti was forced into an agreement to pay 150 million gold francs to France in order to compensate French planters for "lost property" (land and enslaved people), an amount that was well in excess of the planters' actual financial losses.[12] In short, racial discrimination has historically pervaded the consideration and implementation of reparative justice; the discriminatory pursuit of reparations is itself a product of the cemented and continuing legacy of colonialism and slavery.

12. In the present report, the Special Rapporteur also considers the interplay between political and legal resistance to reparations. For example, in the early 1900s in Namibia, Germany committed genocide against the Ovaherero and Nama peoples.[13] As recounted by the Working Group of Experts on People of African Descent, German authorities killed over 65,000 Ovaherero and 10,000 Nama,[14] including

> thousands who died of starvation and thirst after being driven into the desert without food or water. Many Ovaherero and Nama who survived the initial slaughter of their people died in the notorious concentration camps; they were decapitated and their skulls were then sent to Germany at the request of medical

[7] Sanchez Manning, "Britain's colonial shame: slave-owners given huge payouts after abolition", *Independent*, 24 February 2013; Ahmed N. Reid, "Data for reparation", paper presented at the twenty-fourth session of the Working Group of Experts on People of African Descent, Geneva, March 2019, p. 9.

[8] Reid, "Data for reparation".

[9] United States of America, District of Columbia Compensated Emancipation Act, 16 April 1862.

[10] Ibid.

[11] Ibid.

[12] Reid, "Data for reparation", p. 8.

[13] A/HRC/36/60/Add.2, paras. 7–8 and 53.

[14] Ibid., para. 7.

researchers to help prove the racial superiority of white people over black people.[15]

Germany has acknowledged that it has a moral and historical responsibility to Namibia[16] and has conducted "targeted development projects".[17] Although Germany now refers to the Ovaherero massacre as a genocide, it reportedly does so in a non-legal sense and refuses to acknowledge a legal obligation for the massacre.[18] Furthermore, the Working Group, in its report on its mission to Germany of 2017, noted that Germany had thus far not consulted seriously with the lawful representatives of the minority and indigenous victims of that genocide to discuss reparations.[19]

13. The Ovaherero and Nama are owed full reparations for the German genocide and, although development aid can be part of a comprehensive approach to reparations, it cannot be a substitute for a full accounting of the historic and ongoing racially discriminatory human rights violations resulting from the genocide. The Ovaherero and Nama must themselves be permitted to shape the process of repairing the harm their communities have endured. The extensive measures that Germany has taken to provide reparations for the atrocities of the Holocaust are acknowledged and commended in chapter V below. A similar commitment to reparations is necessary in the case of the Ovaherero and Nama genocide, which occurred in the same half-century as the Holocaust.

14. Reparations alone cannot achieve the eradication of racial discrimination. Nevertheless, they are a vital aspect of a global order genuinely committed to the inherent dignity of all, irrespective of race, ethnicity or national origin. An important first step towards achieving reparations is raising awareness as to the full extent of the racially discriminatory evils of slavery and colonialism, which are an unavoidable reality of global history,[20] but which are regularly erased from the history books and the national consciousness of the nations that bear the greatest guilt for perpetrating such evils.

15. Ultimately, the difficult truth is that the greatest barrier to reparations for colonialism and slavery is that the biggest beneficiaries of both lack the political will and moral courage to pursue such reparations.

III. Slavery, colonialism and racial discrimination

16. The transatlantic slave trade has been described as the first system of globalization.[21] At the core of transatlantic slavery and the slave trade was the dehumanization of persons on the basis of "race"; a social construct that to this day shapes access to fundamental human rights.[22] Slavery and the slave trade embodied and entrenched extreme forms of racial discrimination, relying on domestic and international legal frameworks to institute and protect racial hierarchy in the various parts of the world affected by transatlantic slavery. For example, by the mid-seventeenth century, black people were recognized as chattel slaves in law – as

[15] Ibid.
[16] Germany, Federal Parliament, Official Record No. 17/6813, 18 August 2011.
[17] A/HRC/36/60/Add.2, para. 53.
[18] Daniel Pelz, "Berlin unruffled by US lawsuit on colonial-era genocide", *Deutsche Welle*, 6 January 2017; Kate Brady, "Germany officially refers to Herero massacre as genocide", *Deutsche Welle*, 13 July 2016.
[19] A/HRC/36/60/Add.2, para. 53.
[20] A/69/272, para. 83.
[21] See www.unesco.org/new/en/social-and-human-sciences/themes/slave-route/transatlantic-slave-trade/.
[22] A/HRC/41/54, para. 12.

property, rather as than humans – in the American colonies. "'Black' racial identity marked who was subject to enslavement; 'white' racial identity marked who was 'free' or, at minimum, not a slave."[23] As a legal institution, slavery used race to determine which humans would face treatment as property to be bought, sold, inherited and even used as collateral.[24]

17. In the Durban Declaration and Programme of Action, adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, in 2001, and endorsed by the General Assembly in its resolution 56/266 in 2002, Member States denounced "slavery and the slave trade, including the transatlantic slave trade, [as] appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims".[25] They further declared that "slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade".[26] The international prohibition of slavery is also articulated in the Universal Declaration of Human Rights,[27] the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,[28] and the International Covenant on Civil and Political Rights.[29]

18. Racial discrimination was also at the core of European colonialism. As the Special Rapporteur has previously noted,[30] European colonial domination, first in the Americas and then in Asia and Africa, eventually constructed race as "a supposedly different biological structure that placed some in a natural situation of inferiority to the others".[31] Colonialism consolidated "race and racial identity" as "instruments of basic social classification"[32] and made the former "the fundamental criterion for the distribution of the world population into ranks, places, and roles in the new [colonial] society's structure of power".[33] For centuries, colonialism justified and relied upon brutal regimes of slavery and indentured servitude to establish and sustain transnational extractivist processes in exploitation and settler colonies.[34] Colonialism, including through its use of national and international law, also allocated human rights on a racial basis; colonial powers used the now-discredited "scientific" theories of biological races to justify laws prohibiting non-whites from enjoying the most fundamental of human rights. Under colonialism, law, including international law, played a central role in consolidating and furthering global structures of racial domination and discrimination.[35]

19. At the World Conference against Racism in Durban, Member States denounced the brutality of colonialism, calling for its condemnation and for the prevention of its reoccurrence.[36] Member States have also rejected colonialism as incompatible with

[23] Cheryl I. Harris, "Whiteness as property", *Harvard Law Review*, vol. 106, No. 8 (June 1993), p. 1,718.
[24] Ibid., p. 1,720.
[25] A/CONF.189/12, chap. I, para. 13.
[26] Ibid.
[27] Resolution 217 (III).
[28] United Nations, *Treaty Series*, vol. 266, No. 3822.
[29] Resolution 2200 A (XXI), annex, art. 8.
[30] A/HRC/41/54, para. 25.
[31] Anibal Quijano and Michael Ennis, "Coloniality of power, Eurocentrism and Latin America", *Nepantla: Views from South*, vol. 1, No. 3 (2000), p. 533.
[32] Ibid., p. 534.
[33] Ibid., p. 535.
[34] A/HRC/41/54.
[35] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press, 2005).
[36] A/CONF.189/12, chap. I, para. 14.

fundamental human rights, self-determination, and development.[37] The United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples states that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation".[38] At the core of decolonization was the fundamental affirmation, including in the Declaration, that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[39] The General Assembly has since enshrined that condemnation of colonialism in its human rights system, including in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination,[40] the International Convention on the Elimination of All Forms of Racial Discrimination,[41] and the Declaration on the Right to Development.[42]

Contemporary racially discriminatory legacies of transatlantic slavery and colonialism

20. Although slavery and colonialism are the object of international condemnation, they still occur and require urgent action from Member States.[43] Furthermore, the formal abolition of slavery and colonialism has not addressed the ongoing racially discriminatory structures built by those practices. In other words, many contemporary manifestations of racial discrimination must be understood as a continuation of insufficiently remediated historical forms and structures of racial injustice and inequality.[44] Accordingly, United Nations Member States and organs have rightly emphasized that colonialism and the transatlantic slave trade are a cause of numerous contemporary harms and human rights violations. The Durban Declaration identifies both colonialism and transatlantic slavery as evils that remain contemporary sources of racial discrimination and persistent inequality.[45] The Sub-Commission on the Promotion and Protection of Human Rights also emphasized that the harmful effects of those practices continue into the twenty-first century.[46]

21. Preceding the conclusions dating from the early twenty-first century are numerous United Nations documents that express a similar conclusion, including the Declaration on the Establishment of a New International Economic Order[47] and the United Nations Educational, Scientific and Cultural Organization Declaration on Race and Racial Prejudice.[48] The preamble to the Abuja Proclamation of the Organization of African Unity, adopted at the first Pan-African Conference on Reparations for African Enslavement, Colonization and Neo-colonization in 1993, also emphasizes the ongoing nature of those "historical" violations.[49] Over the past few decades, United Nations special procedure mandate holders have also concluded

[37] A/CN.4/SER.A/1976/Add.1 (Part II), pp. 106–108; A/31/10.
[38] Resolution 1514 (XV).
[39] Ibid.
[40] Resolution 1904 (XVIII), preamble.
[41] Resolution 2106 A (XX), annex.
[42] Resolution 41/128, annex, preamble and art. 5.
[43] Human Rights Council resolutions 33/1 and 40/22.
[44] A/CONF.189/PC.2/7.
[45] A/CONF.189/12, chap. I, preamble and paras. 13–20.
[46] Sub-Commission on the Promotion and Protection of Human Rights, resolutions 2001/1 and 2002/5.
[47] Resolution 3201 (S-VI).
[48] United Nations Educational, Scientific and Cultural Organization, Declaration on Race and Racial Prejudice, 27 November 1978.
[49] Organization of African Unity, Abuja Proclamation, adopted at the first Pan-African Conference on Reparations for African Enslavement, Colonization and Neo-colonization, held in Abuja, 27–29 April 1993.

that colonialism and the slave trade have entrenched racial discrimination and continue to be a root cause of contemporary manifestations of racism and racially discriminatory violations of human rights.[50]

22. Examples from the United States illustrate the long legacy of chattel slavery, notwithstanding its abolition. After emancipation, southern states implemented segregationist laws and practices and whites were effectively granted a licence to terrorize black communities.[51] Approximately 5,000 black people were lynched by white mobs[52] and many others were beaten or sexually assaulted.[53] The judicial system did not protect black people from violence; instead, white people found refuge in the complicity of the legal system.[54] Even today, black people are killed and brutalized at alarming rates by law enforcement authorities and vigilantes, who have little to no accountability.[55] Currently, 2.2 million people are incarcerated in jails and prisons in the United States,[56] which extract free or low-wage labour from those behind bars.[57] Black adults are 5.9 times more likely to be incarcerated than white adults.[58] Such racial disparities do not occur by accident: mass incarceration is a vestige of slavery and the "Jim Crow" era of racial segregation that followed.[59]

23. Even after freedom from enslavement, black people continued to face economic exploitation and were forced into debt peonage through sharecropping.[60] After emancipation, many worked on the same plantations on which they had previously been enslaved, and were crippled by debts to former slave masters. In addition, black people were prevented from obtaining wealth through property ownership. Those fleeing the southern United States in search of better opportunities in the north were forced into segregated communities by way of racially restrictive covenants, which were agreements written into property deeds prohibiting sale to black people.[61] Predatory lending practices also robbed black people of the benefits of home ownership.[62] Black communities that thrived in spite of economic discrimination faced violence that devastated their opportunities for economic uplift and stability. The Tulsa race massacre of 1921 is a prime example: white mobs descended upon the Greenwood District in Tulsa, Oklahoma, which was one of the wealthiest black communities in the United States at the time and known as "Black Wall Street".[63] Over 800 people were injured, and as many as 300 people were killed, while 35 square blocks of commercial and residential property were destroyed.[64] The racial

[50] E/CN.4/1995/78/Add.1, paras. 21–36; A/HRC/33/61/Add.2, paras. 68 and 91.
[51] E/CN.4/1995/78/Add.1, paras. 26–29.
[52] Ibid., para. 29.
[53] See https://eji.org/history-racial-injustice-sexual-exploitation-black-women; Jasmine Sankofa, "Mapping the blank: centering black women's vulnerability to police sexual violence to upend mainstream police reform", *Howard Law Journal*, vol. 59, no. 3 (Spring 2016), pp. 673–678.
[54] Jasmine Sankofa, "Mapping the blank".
[55] See https://eji.org/history-racial-injustice-sexual-exploitation-black-women.
[56] The Sentencing Project, "Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance: regarding racial disparities in the United States criminal justice system", March 2018, p. 1
[57] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York, The New Press, 2010).
[58] The Sentencing Project, "Report of The Sentencing Project to the United Nations Special Rapporteur", p. 1.
[59] Michelle Alexander, *The New Jim Crow*.
[60] N. Gordon Carper, "Slavery revisited: peonage in the south", *Phylon*, vol. 37, No. 1 (1976).
[61] Nancy H. Welsh, "Racially restrictive covenants in the United States: a call to action", *Agora Journal of Urban Planning and Design*, vol. 12 (2018), p. 131.
[62] Ta-Nehisi Coates, "The case for reparations", *The Atlantic*, June 2014.
[63] See www.tulsahistory.org/exhibit/1921-tulsa-race-massacre/.
[64] Ibid.

subordination of black people, consolidated during the peak of chattel slavery, persisted for generations, and remains in effect today. Around 21 per cent of black people live in poverty in the United States, which is more than double the rate for white people (8.8 per cent).[65] Given the current pace of growth in wealth among black families, it is estimated that it will take nearly 230 years for black families to obtain the same amount of wealth that white families currently have.[66] As researchers have noted, "these wealth disparities are rooted in historic injustices and carried forward by practices and policies that fail to reverse inequitable trends".[67]

24. Brazil offers another example of the contemporary racially discriminatory legacies of colonialism and slavery. It is not possible to determine the exact number of enslaved Africans that were transported to the Americas. Contemporary research places the estimate at about 12 million, 46 per cent of whom were taken to Brazil[68] and experienced the grossest forms of human rights violations. After the abolition of slavery, racial segregation, "whitening" policies and other forms of institutionalized discrimination against Brazilians of African descent preserved the racial hierarchies created by slavery.[69] Although the Government of Brazil has attempted to address the issue of structural racism against Brazilians of African descent, the lingering unremedied effects of slavery and colonialization still permeate Brazilian society. Although Brazilians of African descent constitute a demographic majority, their inherited subordinate social status has deprived them of political power.[70] Brazilians of African descent face ongoing racial discrimination and institutional exclusion, and remain at the bottom of the socioeconomic ladder.[71] Compared with Brazilians of European descent, Brazilians of African descent endure poorer social and economic conditions, including lower average income, lower life expectancy, inadequate education and housing, higher rates of unemployment and greater food insecurity.[72] Furthermore, as a result of entrenched and State-sponsored discrimination, the State continues to criminalize and disproportionately subject Brazilians of African descent to imprisonment and brutal violence, including extrajudicial executions.[73]

25. In sum, contemporary structures of racial discrimination, inequality and subordination are among the most salient legacies of slavery and colonialism. Those structures require urgent attention in the context of reparations.

[65] Kayla Fontenot, Jessica Semega and Melissa Kollar, *Income and Poverty in the United States: 2017*, U.S. Census Bureau, Current Population Reports, P60-263 (Washington, D.C., U.S. Government Printing Office, 2018), p. 12.

[66] Dedrick Asante-Muhammed and others, "The ever-growing gap", Institute for Policy Studies and CFED, 21 June 2016, p. 5.

[67] Laura Sullivan and others, "The racial wealth gap: why policy matters", Demos and Institute for Assets and Social Policy, 2016, p. 5.

[68] Myrian Sepulveda Santos, "The legacy of slavery in contemporary Brazil", in *African Heritage and Memory of Slavery in Brazil and the South Atlantic World*, Ana Lucia Araujo, ed. (New York, Cambria Press, 2015).

[69] A/HRC/27/68/Add.1, para. 5.

[70] A/HRC/31/56/Add.1, para. 17.

[71] Ibid., para. 89; Inter-American Commission on Human Rights, "Preliminary observations of IACHR's in loco visit to Brazil", visit from 5–12 November 2018.

[72] Ibid.

[73] Ibid.

IV. Duties of States to provide reparations for racial discrimination under international human rights law

A. Structural approach to reparations for slavery and colonialism under public international law and international human rights law

26. In 1974, the General Assembly recognized that the establishment of a new international economic order, based on equity, sovereign equality, interdependence, common interest and cooperation among all States, was essential to correcting inequalities and redressing injustices rooted in colonialism.[74] It stated that "the remaining vestiges of alien and colonial domination, foreign occupation, racial discrimination, apartheid and neo-colonialism in all its forms continue to be among the greatest obstacles to the full emancipation and progress of the developing countries and all the peoples involved".[75] The Declaration on the Establishment of a New International Economic Order provided a blueprint for the structural reform of the international system (and international law) that remains vital to repairing the structures of inequality and discrimination that were built predominantly from the legacies of colonialism and slavery. In the Declaration and other instruments, the United Nations has recognized that the right to self-determination, and to social progress more generally, requires States to eliminate colonialism, slavery and all its consequences.[76] Recognizing that the yoke of those historical violations continues to impede the enjoyment of human rights, States must treat the pursuit of a just and equitable international order as an urgent dimension of reparations for slavery and colonialism.

27. In a similar vein, the Expert Mechanism on the Rights of Indigenous Peoples has stated that:

> indigenous people view recognition, reparation and reconciliation as a means of addressing colonization and its long-term effects and of overcoming challenges with deep historical roots. In this regard, recognition of the right of indigenous peoples to self-determination (including free, prior and informed consent), their rights to autonomy and political participation, their claims to their lands and the recognition of indigenous juridical systems and customary laws should be considered an essential part of recognition, reparation and reconciliation.[77]

28. Full implementation of the International Convention on the Elimination of All Forms of Racial Discrimination must also be understood as an essential means of achieving reparations for slavery and colonialism. In a direct repudiation of colonial-era biological theories of race, States parties to the Convention affirmed their belief that "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere".[78] Furthermore, with the adoption of the Convention, States parties explicitly recalled the racial discrimination endemic in colonialism.[79] The Convention provides a solid blueprint for dismantling racially discriminatory structures, including those rooted in historical racial injustices. The effective protection of individuals from forms of racial discrimination requires access to justice, pursuit of accountability, reparations, guarantees of

[74] Resolution 3201 (S-VI).
[75] Ibid.
[76] Resolutions 1514 (XV) and 41/128, annex, art. 5.
[77] A/HRC/EMRIP/2019/3, para. 73.
[78] Resolution 2106 A (XX), annex, preamble.
[79] Ibid.

non-recurrence, and the elimination of impunity.[80] Furthermore, the Convention requires States parties "to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms"[81] and anticipates the necessity of special measures or affirmative action "taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms".[82] The Special Rapporteur has emphasized the obligation of States to undertake special measures to correct historical violations and harms.[83]

B. Duty to provide reparations (including for racial discrimination) under public international law and international human rights law

29. International practices, tribunal decisions and other sources of international law have long held that State breaches of legal obligations entail a responsibility on the part of States to provide full reparations.[84] As the Permanent Court of International Justice concluded in 1927, "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a [breach]".[85]

30. Traditionally, reparations in international law involved restitution or compensation from one State to another State.[86] Notwithstanding the long history of gross racially discriminatory human rights violations by European colonial powers (including genocide), it was the unconscionable acts of Germany during the Holocaust that gave momentum to an important shift in international reparations. Although the dominant conception of international reparations had been almost exclusively inter-State, by the early 1950s the emergent concept of international reparations included direct State-to-individual and State-to-society reparations.[87]

31. The draft articles on responsibility of States for internationally wrongful acts, with commentaries, adopted by the General Assembly in 2001, [88] outline a contemporary understanding of the obligation of States to make reparations. Drawing on existing international law, article 31 of the draft articles codifies the basic reparative obligation of States: "to make full reparation for the injury caused by the internationally wrongful act" where "injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".[89] In the commentary to the draft articles, it is noted that two of the elements of article 31 correspond to principles enshrined in international law.[90] It is also noted in the commentary that

[80] Ibid., art. 6; E/CN.4/Sub.2/2005/7, summary and para. 31; A/55/18, annex V, sect. C, para. 12; Committee on the Elimination of Racial Discrimination, general recommendation No. 34 (2011), paras. 27–28 and 58; Human Rights Committee, general comment No. 31 (2004), paras. 8 and 15–19.

[81] Resolution 2106 A (XX), art. 2.

[82] Ibid., art 1 (4); Committee on the Elimination of Racial Discrimination, general recommendation No. 32 (2009).

[83] A/68/333.

[84] *Case Concerning the Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47.

[85] Ibid., Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21.

[86] Dinah Shelton, "Righting wrongs: reparations in the articles on State responsibility", *American Journal of International Law*, vol. 96, No. 4 (October 2002), p. 839.

[87] Richard M. Buxbaum, "A legal history of international reparations", *Berkeley Journal of International Law*, vol. 23, No. 2 (2005), p. 314.

[88] A/56/10.

[89] Ibid., pp. 223–231.

[90] Ibid., pp. 223–231.

article 31 requires a responsible State to endeavour to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[91] through the provision of one or more of the forms of reparation.

32. In accordance with the draft articles on responsibility of States for internationally wrongful acts, States owe obligations to make reparations for a wide range of violations of international law, including violations of treaty law, as well as crimes against humanity, human rights violations and violations *erga omnes*.[92] However, the draft articles codify a fairly strict standard regarding a State's international responsibility and the associated obligation to make reparations.[93] The draft articles decline to discuss the obligations of States to repair harms caused by legal acts,[94] concluding instead that States only incur international responsibility for acts that are both internationally wrongful and attributable to the State.[95] Similarly, the widely recognized intertemporal principle limits State responsibility for reparations to those acts that were internationally wrongful at the time the State committed them.[96] However, the intertemporal principle is not an absolute bar. Extensions in time for international responsibility apply when: (a) an act is ongoing and continues to a time when international law considered the act to be a violation;[97] or (b) the direct ongoing consequences of the wrongful act extend to a time when the act and its consequences are considered internationally wrongful.[98] Both of those exceptions are vital to the context of reparations related to transatlantic slavery and colonialism, given the continuing legacies of racial discrimination discussed above.

33. Over the past several years, the International Law Commission has worked on draft articles defining crimes against humanity and discussing State obligations to refrain from, prevent and redress such crimes.[99] Similar to the obligations under international human rights law, the current draft of article 12 (3) envisions State obligations to ensure that individuals enjoy "the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition".[100]

34. The emergence of international human rights systems in the 1940s and the post-Second World War conceptual shift in international reparations are synergistic. The international human rights system operates on the fundamental premise that violations of international human rights law incur an obligation on violators to provide adequate and effective reparations to victims of those violations.[101] Victims of human rights violations, including racially discriminatory violations, hold a corresponding right to full reparations. Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination is clear in that regard:

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his

[91] Ibid., pp. 223–231.
[92] Ibid., pp. 63–67.
[93] Ibid., arts. 12–15.
[94] Ibid., p. 62.
[95] Ibid., art. 2.
[96] Ibid., art. 13.
[97] Ibid., art. 14.
[98] Ibid., art. 15.
[99] International Law Commission, Analytical Guide to the Work of the International Law Commission – Crimes Against Humanity. Available at http://legal.un.org/ilc/guide/7_7.shtml.
[100] A/CN.4/L.935, art. 12 (3).
[101] Resolutions 2200 A (XXI), annex, art. 2, and 2106 A (XX), annex, art. 6.

human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

35. That requirement arises because, for rights to have meaning, effective remedies must be available to redress violations,[102] and reparations form a central element of full remediation. Members of the United Nations human rights system also note that effective remedies, reparations and redress are necessary for ensuring rights to access justice[103] and to protection against possible violations,[104] as well as for ensuring the cessation and non-recurrence of violations[105] and for combating impunity.[106] Similar to the United Nations human rights system, the European, inter-American and African human rights systems seek to ensure remedies for violations of human rights and associated wrongful acts.[107]

C. Comprehensive approach to understanding forms of reparations under international law

36. Public international law, as articulated by the draft articles on responsibility of States for internationally wrongful acts, provides for a fairly broad conception of reparations for internationally wrongful acts.[108] Full reparations entail restitution, compensation and satisfaction, as appropriate. States are required, if possible, to pursue restitution, that is, restoration to the status quo before the internationally wrongful act was committed.[109] If full restitution is not materially possible or is out of proportion to the harm suffered,[110] States should supplement their restitution efforts with compensation.[111] Should restitution and compensation fail to result in full reparations, States have an obligation to implement forms of satisfaction.[112] Forms of satisfaction may include an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality,[113] such as a prevention of non-repetition.[114]

37. The United Nations human rights system follows a more detailed and expansive approach to types of remedies and reparations than the three-pronged approach set out in the draft articles on responsibility of States for internationally wrongful acts. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[115] (“the Basic Principles and Guidelines”), adopted by the General Assembly in 2005, aim to consolidate rights and

[102] Committee on the Rights of the Child, general comment No. 5 (2003), paras. 6 and 24; Human Rights Committee, general comment No. 31 (2004), paras. 15–19; A/69/518, para. 15.
[103] A/60/18, para. 217; Human Rights Committee, general comment No. 31 (2004), para. 15.
[104] Resolution 2106 A (XX), art. 6; A/60/18, para. 460; Human Rights Committee, general comment No. 31 (2004), para. 16.
[105] Human Rights Committee, general comment No. 31 (2004), paras. 15–19.
[106] A/55/18, annex V, sect. C., para. 12; Human Rights Committee, general comment No. 31 (2004), para. 18.
[107] American Convention on Human Rights, art. 25; European Convention on Human Rights, art. 13; African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, sect. C.
[108] A/56/10, pp. 223–231.
[109] Ibid., art. 35.
[110] Ibid., art. 35.
[111] Ibid., art. 36.
[112] Ibid., art. 37.
[113] Ibid., art. 37 (2).
[114] Ibid., p. 221, para. 11.
[115] Resolution 60/147.

best practices for remedies and reparations recognized within the United Nations human rights system.[116] The Basic Principles and Guidelines set out five forms of remedy and reparations for violations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[117] Each of those forms plays a different role in ensuring a holistic and effective remedy, one closely related to the notion of transitional justice.[118] Restitution aims to "restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred".[119] Compensation entails payment for economically assessable damage, including physical and mental harm, lost social benefits, material damages, moral damage and costs incurred.[120] Rehabilitation includes the provision of "medical and psychological care as well as legal and social services".[121] Satisfaction is a wide-ranging element of reparations and remedies. Where appropriate, satisfaction may encompass measures to stop violations, disclose the truth, restore dignity, accept responsibility, commemorate or pay tribute to victims, and ensure sanctions against responsible parties.[122] Lastly, guarantees of non-repetition involve measures that contribute to non-recurrence and are most closely associated with the structural reform and strengthening of State institutions, as well as ensuring sufficient civilian oversight and proper respect for human rights.[123]

38. In addition to outlining those five forms of remedy and reparations, the Basic Principles and Guidelines address several other topics, including the role of reparations in the promotion of justice, the proper treatment of victims, and ensuring widespread access to information on reparations mechanisms. The Basic Principles and Guidelines now constitute an important element of the United Nations human rights system.[124] At the same time, the Basic Principles and Guidelines do not capture the full range of views on reparations and remedies in the United Nations human rights system. Even during the drafting of a background report that would inform those principles, some actors within the United Nations human rights system expressed concern over insufficient incorporation of other views of the United Nations, especially on reparations for historical violations and on definitions of victims.[125] The Basic Principles and Guidelines should therefore be understood as non-exhaustive, and as leaving room for relevant bodies, including United Nations treaty bodies, to suggest appropriate, effective and victim-specific reparations.

39. The work of the Special Rapporteurs on the promotion of truth, justice, reparation and guarantees of non-recurrence has been critical to understanding implementation by States of their human rights obligations to provide reparations. In a report from 2014, the Special Rapporteur discussed widespread failures by States to ensure reparations for gross violations of human rights and humanitarian law.[126] Among several other topics, the Special Rapporteur: (a) stressed the obligation to ensure that the magnitude of reparation programmes is commensurate with the gravity of the violations;[127] (b) explained why complex reparation programmes (those providing both individual and collective forms of material reparation and symbolic

[116] A/69/518, para. 18.
[117] Resolution 60/147, annex, para. 18.
[118] A/69/518, para. 20.
[119] Resolution 60/147, annex, para. 19.
[120] Ibid., para. 20.
[121] Ibid., para. 21.
[122] Ibid., para. 22.
[123] Ibid., para. 23.
[124] CRC/C/MOZ/CO/2, para. 78; A/HRC/34/73, para. 93.
[125] E/CN.4/Sub.2/1992/SR.27, para. 46; E/CN.4/Sub.2/1992/SR.31, paras. 1–3; E/CN.4/Sub.2/1993/8, para. 24.
[126] A/69/518.
[127] Ibid., para. 47.

measures) may better suit the needs of victims;[128] (c) articulated that the positive consequences of well-designed reparation programmes may have important spillover effects for non-victims;[129] (d) discussed how providing reparations for certain violations and not others harms marginalized groups and ensures that States will face ongoing calls to make reparations;[130] (e) explained the reason why development and reparation programmes should be viewed as distinct;[131] (f) critiqued State reluctance to acknowledge violations;[132] (g) challenged State claims that reparation programmes are unaffordable, noting that political constraints often hinder reparation efforts to a greater degree than socioeconomic development;[133] and (h) called on the international community to play a larger role and be more responsive in supporting reparation initiatives.[134]

40. The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, in his report of 2016, made important observations on victim participation in reparations and transitional justice processes. He explained several ways in which victim participation strengthens efforts to achieve transitional justice.[135] On the topic of reparations, the Special Rapporteur observed that victim participation can help to improve the fit between the benefits available to, and the expectations of, victims.[136] In addition, the Special Rapporteur observed that,

> given that large-scale programmes fall short of full compensation, the adequacy of the benefits they offer depends on complicated judgments concerning the appropriateness of the whole complex of benefits, the process of distribution and the relationship between the reparation benefits and other redress measures, including criminal justice, truth and guarantees of non-recurrence, judgments that are also for the victims to make.[137]

41. The report of the Expert Mechanism on the Rights of Indigenous Peoples on recognition, reparation and reconciliation[138] submitted in 2019 is an important contribution to the United Nations human rights system's understanding of the obligation to provide reparations and effective, victim-centred remedies. In the report, the Expert Mechanism provided details on numerous efforts by indigenous peoples around the world to achieve recognition, reparation and reconciliation. The Expert Mechanism also helpfully discussed the important but potentially challenging overlap of reparation and reconciliation.[139]

V. Reparations for slavery and colonialism: overcoming barriers

42. Reparations for racial injustice, although elusive for many, are possible and have been achieved in some cases. For example, beginning in the late 1940s, the Federal Republic of Germany (known informally as "West Germany" at the time) commenced restitution for Nazi-era crimes.[140] Soon thereafter, Germany supplemented its

[128] Ibid., para. 32.
[129] Ibid., paras. 11, 72 and 82.
[130] Ibid., para. 27.
[131] Ibid., paras. 40–42.
[132] Ibid., paras. 62–63.
[133] Ibid., paras. 51–61.
[134] Ibid., para. 58.
[135] A/HRC/34/62, para. 53.
[136] Ibid., para. 57.
[137] Ibid.
[138] A/HRC/EMRIP/2019/3.
[139] Ibid., paras. 39–47.
[140] Germany, Federal Ministry of Finance, Compensation for National Socialist Injustice: Indemnification Provisions, 21 May 2019.

restitution programmes with compensation for individual suffering, loss of life, health and liberty inflicted by the Nazi regime.[141] By the early 1950s, Germany had concluded the "Luxembourg Agreement", in which the country agreed to pay DM 3 billion to the State of Israel and DM 450 million to the Conference on Jewish Material Claims against Germany.[142] The overall compensation by Germany for victims of the Nazi regime has been wide-ranging. Among other programmes, Germany also implemented several comprehensive agreements with European States whose nationals suffered National Socialist persecution.[143] Germany has also provided compensation for the Nazi regime's use of slave labour.[144] Current total compensation paid by Germany to the victims of the Nazi regime exceeds €76.659 million.[145]

43. With regard to colonialism, in April 2011 veterans of the Mau Mau movement filed suit in the United Kingdom, requesting compensation for assault, battery and negligence. The claimants were tortured, castrated and sexually abused while held in detention camps by the Government of the United Kingdom in the 1950s.[146] Some 1.5 million Kenyans were held in detention camps and confined to villages and subjected to systematic torture and abuse during the repression of the Mau Mau independence movement by the British colonial Government.[147] The High Court of Justice granted the Mau Mau the right to sue, permitting the case to move forward.[148] The Government ultimately settled the suit and agreed to pay £19.9 million in damages to 5,228 survivors of abuse. The Government also issued an apology, admitting that:

> Kenyans were subject to torture and other forms of ill treatment at the hands of the colonial administration. The British government sincerely regrets that these abuses took place, and that they marred Kenya's progress towards independence. Torture and ill treatment are abhorrent violations of human dignity which we unreservedly condemn.[149]

44. There are numerous examples of detailed proposals for reparations for slavery and colonial injustices, and only a few are highlighted here as illustrations.[150] Among the most significant is the Ten-Point Plan for Reparatory Justice adopted in 2014 by the Caribbean Community (CARICOM), which aims to "achieve reparatory justice for the victims of genocide, slavery, slave trading and racial apartheid".[151] The Ten-Point Plan is informed by the previous discussions between African and CARICOM

[141] Ibid., pp. 6, 28.
[142] Ibid., pp. 6–7.
[143] Ibid., pp. 10–12 and 31.
[144] Ibid., pp. 12–13.
[145] Ibid., p. 25.
[146] High Court of Justice, *Ndiki Mutua, Paulo Nzili, Wambugu Wa Nyingi, Jane Muthoni Mara, Susan Ngondi v. The Foreign and Commonwealth Office*, Case No. HQ09X02666, Approved Judgment, 21 May 2011.
[147] Colin Prescod, "Archives, race, class and rage", *Race & Class*, vol. 58, No. 4 (April–June 2017), p. 76.
[148] High Court of Justice, *Ndiki Mutua, Paulo Nzili, Wambugu Wa Nyingi, Jane Muthoni Mara, Susan Ngondi v. The Foreign and Commonwealth Office*, Case No. HQ09X02666, Approved Judgment, 10 October 2012.
[149] Press Association, "UK to compensate Kenya's Mau Mau torture victims", *Guardian*, 6 June 2013.
[150] Thomas Craemer, "International reparations for slavery and the slave trade", *Journal of Black Studies*, vol. 49, No. 7 (October 2018), p. 694; William Darity, Jr., "Forty acres and a mule in the 21st century", *Social Science Quarterly*, vol. 89, No. 3 (February 2008), p. 656; William Darity, Jr. and Dania Frank, "The economics of reparations", *American Economic Review*, vol. 93, No. 2 (May 2003); Kitty B. Dumont and Sven Waldzus, "Reparation demands and collective guilt assignment of Black South Africans", *Journal of Black Psychology*, vol. 43, No. 1 (2017), p. 27.
[151] Leigh Day, "CARICOM nations unanimously approve 10 point plan for slavery reparations", 11 March 2014.

States on reparations that began in Abuja at the first Pan-African Conference on Reparations in 1993 and continued at the World Conference against Racism held in Durban in 2001.[152] The Ten-Point Plan forms part of a broader CARICOM Reparatory Justice Programme, in which CARICOM nations have worked to engage former colonial European nations. The CARICOM Reparations Commission provides important context for understanding contemporary movements for reparations, noting that the issue is not only historic racial injustice, but also the need to address the contemporary human rights violations and socioeconomic deprivation for which slavery and colonialism are among the root causes.[153]

Political and legal resistance to reparations

45. Serious political opposition to reparations for colonialism and slavery remains among the countries that benefited the most from both. For example, during both the lead-up to and at the World Conference against Racism held in Durban in 2001, certain former colonial powers remained staunchly resistant to formal apologies for slavery and colonialism, and to any acknowledgment of the pressing need for reparations. At the Regional Conference of the Americas in preparation for the World Conference against Racism, participating States adopted the following strong statement acknowledging that:

> the enslavement and other forms of servitude of Africans and their descendants and of the indigenous peoples of the Americas, as well as the slave trade, were morally reprehensible, in some cases constituted crimes under domestic law and, if they occurred today, would constitute crimes under international law. [And that] these practices have resulted in substantial and lasting economic, political and cultural damage to these peoples and that justice now requires that substantial national and international efforts be made to repair such damage. Such reparation should be in the form of policies, programmes and measures to be adopted by the States which benefited materially from these practices, and designed to rectify the economic, cultural and political damage which has been inflicted on the affected communities and peoples.[154]

46. Canada and the United States opposed the inclusion of this important paragraph in the report of the Regional Conference.[155] The European Conference against Racism failed to sufficiently underscore the persisting discriminatory legacies of slavery and colonialism, and the urgency of reparations for those historical injustices.[156] The report of the European Conference did not even mention peoples of African or Asian descent.

47. Political opposition to the subject of reparations in some countries is so deep that even attempts to study the issue have been consistently blocked at the legislative level. For example, between 1989 and 2017, United States Congressman John Conyers repeatedly introduced bill H.R. 40, entitled “Commission to Study and Develop Reparation Proposals for African-Americans Act”, to the House of Representatives.[157] During that period Congress blocked the progress of the initiative – which sought only to advance understanding of the issue of reparations, and did not even authorize any actual measures for reparations. That sort of political

[152] CARICOM, “CARICOM ten point plan for reparatory justice”.
[153] Ibid.
[154] A/CONF.189/PC.2/7.
[155] Ibid., annex IV.
[156] A/CONF.189/PC.2/6.
[157] United States, “Commission to Study and Develop Reparation Proposals for African-Americans Act”, H.R. 40, 115th Congress (2017–2018).

resistance to the very production of knowledge on reparations is incompatible with the international human rights principles and standards canvassed above.

48. Conventional analysis of international law, including by former colonial nations, identifies a number of legal hurdles to the pursuit of claims for reparations for slavery and colonialism. Among the most salient legal hurdles identified is the intertemporal principle in international law, codified in article 13 of the articles on responsibility of States for internationally wrongful acts. The intertemporal principle stresses that a State is responsible for violations of international law only if, at the time of the violation or its continuing effects, the State was bound by the legal provisions it transgressed. Numerous States have appealed to the non-retroactive application of international law to deny that they have a legal obligation to provide reparations. For example, with regard to its genocide of the Ovaherero and Nama peoples of Namibia, Germany has stressed the intertemporal principle as a barrier to its international responsibility for both the genocide and reparations.[158] Rather than accepting that it has a legal obligation to provide reparations, Germany has argued that its obligations are "historical" and "moral".[159]

49. First, the intertemporal principle is subject to exception, including when (a) an act is ongoing and continues into a time when international law considered the act a violation,[160] or (b) the wrongful act's direct ongoing consequences extend into a time when the act and its consequences are considered internationally wrongful.[161] That means that racial discrimination rooted in or caused by colonialism and slavery that occurred after each had been outlawed cannot be subject to the intertemporal bar. Second, the intertemporal principle does not apply to present-day racially discriminatory effects of slavery and colonialism, which States are obligated to remediate, including through reparations. The intertemporal principle cannot be said, per se, to bar all claims for reparations for racial discrimination rooted in the events and structures of slavery and colonialism. Member States, and international lawyers involved in the interpretation and articulation of international law, must do more to explore the application of the intertemporal principle's exceptions, especially as a mechanism for overcoming overstated legal hurdles to the pursuit of racial justice.

50. To the extent that the intertemporal principle is understood to bar reparations for colonialism and slavery, States must recognize that the very same international law that provides for the intertemporal principle has a long history of service to both slavery and colonialism. As mentioned above, international law itself played an important role in consolidating the structures of racial discrimination and subordination throughout the colonial period, including through customary international law, which was co-constitutive with colonialism.[162] Part of the problem, then, is that international law has not fully been "decolonized" and remains replete with doctrines that prevent the reparation and remediation of the inequality and injustice entrenched in the colonial era.[163] When Member States and even international lawyers insist on the application of the intertemporal principle as a bar to pursuing reparation and remediation of racial injustice and inequality, they are, in effect, insisting on the application of neocolonial law. Legal efforts are more appropriately directed at developing international doctrine that can ensure the equal

[158] Germany, Federal Parliament, Official Record No. 17/6813.
[159] Ibid.
[160] A/56/10, art. 14.
[161] Ibid., art. 15.
[162] B. S. Chimni, "Customary international law: a third world perspective", *American Journal of International Law*, vol. 12, No. 1 (2018).
[163] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 196–244.

treatment and recognition of all human beings irrespective of race, and that is, in part, what is at stake in debates on reparations for slavery and colonialism.

51. Other legal concerns involve the difficulties in potential matters of responsibility and causality, especially with regard to the time that has passed since the transatlantic slave trade and colonialism. The concern is that determining the individuals responsible for horrific acts, the identities of the victims, the descendants of the victims and how much is owed poses insurmountable legal difficulties.[164] The legal complexity that would be and is involved in pursuit of individually and even class-based legal claims for reparations are genuine. However, such difficulties cannot be the basis for nullifying the existence of underlying legal obligations. Even if judicial bodies are constrained under applicable law, nothing prevents legislative and executive bodies from reforming the law and taking the sort of measures that ensured that slave owners and colonizing powers received reparations, as discussed in chapter II of the present report. The intention of the Special Rapporteur is not to trivialize the practical hurdles to the legal determination of reparations; her intention is instead to insist that, with the requisite political will and moral courage, much more could be done through legal and political channels to pursue meaningful reparations for colonialism and slavery.

52. An example of reparations for colonial harm that persisted well into the twentieth century offers an example of what can be achieved when the requisite political will, mobilization and creativity is present. From the late 1800s to 1996, the Government of Canada operated the Indian Residential School System with the goal of assimilating indigenous children by stripping them of their traditions, customs, values and languages. As part of the System, "deliberate and often brutal strategies were used to destroy family and community bonds".[165] Approximately one in three children were subjected to physical, sexual and emotional abuse.[166] In the early 1990s, former students sought redress for the abuses they suffered while in the System by launching class-action lawsuits against the Government and the churches involved. The persistent efforts of the Assembly of First Nations, among others, resulted in the Indian Residential Schools Settlement Agreement of 2006, which was an out-of-court settlement of a lawsuit involving almost 15,000 former students. It was signed by more than 70 parties, including the Government of Canada, most major churches, as well as indigenous organizations and legal counsel. With an estimated worth of about Can$ 5 billion, it was the largest class action settlement in Canada.[167] Reparations in that context included acknowledgment of past wrongs, compensation, rehabilitative measures including physical and psychological health services, legal services, educational support and the establishment of the Truth and Reconciliation

[164] Max du Plessis, "Reparations and international law: how are reparations to be determined (past wrong or current effects), against whom, and what form should they take", *Windsor Yearbook of Access to Justice*, vol. 22, No. 41 (2003); Luke Moffett and Katarina Schwarz, "Reparations for the transatlantic slave trade and historical enslavement: linking past atrocities with contemporary victim populations", *Netherlands Quarterly of Human Rights*, vol. 36, No. 4 (2018), p. 247; Robert Westley, "The accursed share: genealogy, temporality, and the problem of value in black reparations discourse", *Representations*, vol. 92, No. 1 (2005), p. 98; United States Court of Appeals for the Seventh Circuit, *In re African-American Slave Descendants Litigation*, Case No. 471 F.3d 754 (7th Cir. 2006), 13 December 2006.

[165] Kathleen Mahoney, "The untold story: how indigenous legal principles informed the largest settlement in Canadian legal history", *University of New Brunswick Law Journal*, vol. 69 (January 2018), p. 199.

[166] Ibid.; Konstantin Petoukhov, "Recognition, redistribution, and representation: assessing the transformative potential of reparations for the Indian Residential Schools experience", *McGill Sociological Review*, vol. 3 (2013), p. 73.

[167] Mayo Moran, "The role of reparative justice in responding to the legacy of Indian Residential Schools", *University of Toronto Law Journal*, vol. 64, No. 4 (2014), pp. 529–565.

Commission of Canada.[168] The chief negotiator involved in the settlement has explained that it was only made possible by setting aside conventional liberal legal frameworks of tort and civil law in favour of indigenous law and legal traditions.[169]

53. Several States have refused to issue a formal apology for their roles in slavery and colonialism, instead issuing expressions of remorse or regret.[170] States appear to be driven by concern that formal apologies could be construed as an admission of legal responsibility, generating lengthy legal claims and financial compensation.[171] Such concerns not only put the adoption by the General Assembly of the basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law on hold,[172] but also drove the dilution of the strong calls for apologies and reparations articulated in the reports of the Regional Conference for Africa and the Asian Preparatory Meeting held in 2001 during the lead-up to the World Conference on Racism.[173] The then Director General of the European Commission noted that States of the European Union pursued statements of condemnation and regret in an effort to ensure that they remained free of concrete commitments.[174] In negotiating the Durban Declaration, the United States also resisted calls for an apology.[175] Instead, it said that it was ready to express regret for historic injustices and then focus on the present, including through development aid and national reforms.[176] That position was similar to the reported position of the United Kingdom on reparations.[177]

54. Development aid and national reform can certainly form part of the suite of reparatory measures for slavery and colonialism. However, if pursued in a manner that completely denies the connection between contemporary problems and their historical origins, such initiatives cannot do the necessary work of repairing structures of racial inequality and discrimination rooted in historic injustice. Such ahistorical and uncontextualized development aid similarly fails to fulfil specific international human rights obligations relating to the contemporary manifestations of historic racial discrimination and injustice. The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has criticized expressions of remorse or regret that lack acknowledgement of responsibility for violations.[178] The current Chair of the Working Group of Experts on People of African Descent has documented the importance of a historicized account of the genuine pursuit of the Sustainable Development Goals in the Caribbean. His insights are applicable to other regions whose destinies were fundamentally shaped by slavery and colonialism. He

[168] Luke Moffett and Katarina Schwarz, “Reparations for the transatlantic slave trade and historical enslavement”.

[169] Kathleen Mahoney, “The untold story”.

[170] Anthony J. Sebok, “Slavery, reparations, and potential legal liability: the hidden legal issue behind the U.N. Racism Conference,” *FindLaw*, 10 September 2001; BBC News, “Mixed emotions as Durban winds up”, 8 September 2001.

[171] M. Cherif Bassiouni, “International recognition of victims’ rights”, *Human Rights Law Review*, vol. 6, No. 2 (2006), p. 249.

[172] Ibid.

[173] Compare adopted language in the Durban Declaration with the reports of the Regional Conference for Africa (A/CONF.189/PC.2/8) and the Asian Preparatory Meeting (A/CONF.189/PC.2/9).

[174] Chris McGreal, “Britain blocks EU apology for slave trade”, *Guardian*, 3 September 2001.

[175] Michelle E. Lyons, “World conference against racism: new avenues for slavery reparations?”, *Vanderbilt Journal of Transnational Law*, vol. 35, No. 4 (October 2002), pp. 1,235–1,268.

[176] William B. Wood, Acting Assistant Secretary for International Organization Affairs, statement to the House International Relations Committee, Subcommittee on International Operations and Human Rights, Washington, D.C., 31 July 2001.

[177] Owen Bowcott and Ian Cobain, “UK sternly resists paying reparations for slave trade atrocities and injustice”, *Guardian*, 24 February 2014.

[178] A/69/518, paras. 62–63.

points out that, in much development discourse regarding the Caribbean, "there is no acknowledgment that the lack of social and economic growth that confront the Caribbean, and which are so visible in the [Human Development Index], are structurally linked to the region's colonial past".[179]

VI. Recommendations for reparations for colonialism and slavery

55. **Ensure the momentum of the commitments made in the Durban Declaration and Programme of Action: The Durban Declaration and Programme of Action remain a profound milestone in articulating the harms of colonialism and slavery, both historically and in the present, with an important emphasis on the structural forms of racism and racial discrimination that to this day require urgent attention. Member States must ensure momentum in the implementation of the commitments made in Durban.**

56. **Fully implement international human rights legal obligations to provide reparations for racially discriminatory violations of human rights: Member States should fully implement international human rights legal obligations to provide reparations for racially discriminatory violations of human rights. States should also ensure the ratification and full implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.**

57. **Adopt a structural and comprehensive approach to reparations: Member States should adopt an approach to reparations that accounts for not only historical individual and group wrongs, but also the persisting structures of racial inequality, discrimination and subordination that have slavery and colonialism as their root causes. Reparations entail accountability, including the transformation and rehabilitation of those structures and relations fundamentally distorted by slavery and colonialism, and that sustain contemporary racial inequality, discrimination and subordination. States should also adopt a comprehensive approach to reparations, pursuing the range of forms identified in the present report according to the respective context. A comprehensive approach entails an intersectional approach to understanding and fighting racial discrimination by accounting for gender, class, disability status and other social categories. It also entails reparations for violations of socioeconomic rights as well as civil and political rights.**

58. **Decolonize international and national approaches to reparations: Member States should decolonize the very laws applicable to reparations for slavery and colonialism. In other words, States should reform existing laws where necessary to make them fit for the purposes of undoing the legacies of historical racial discrimination and injustice, including by looking to indigenous and other value and legal systems to inform the process. International lawyers and judges must play their parts to ensure the decolonization of the applicable legal doctrines.**

59. **Adopt a survivor- and victim-centred approach to reparations: Member States must place victims and survivors (including descendants where appropriate) of the historic and contemporary racial injustice associated with colonialism and slavery at the centre of processes designed to achieve reparations. Reparations cannot be achieved unless those groups have a meaningful seat at the decision-making table.**

[179] Reid, "Data for reparations".

60. **Pursue educational measures to ensure national and international consciousness of the scale, scope and contemporary legacies of racial discrimination, rooted slavery and colonialism: A serious barrier to reparations is ignorance and the lack of awareness among the public and even among national leaders regarding the persisting racially discriminatory legacies of slavery and colonialism. In many countries, educational curricula include partial histories that erase the fundamental role that enslavement and colonial domination played in securing the past and present prosperity of enslaving and colonial powers. Those histories may sometimes refer to the past brutalities of colonialism and slavery, but very rarely do they make explicit the public and private beneficiaries of slavery and colonialism. Member States must take urgent steps to ensure representative and accurate accounts of slavery, colonialism and their contemporary legacies, including in their education systems. Ensuring historical and political consciousness, especially among contemporary beneficiaries of slavery and colonialism, is an important step towards building the requisite political will to make reparations a reality. Ahistorical understandings of the present operate as a barrier to achieving reparations.**

61. **Create a well-funded global platform for the sustained study of paths forward for international action to achieve reparations: Slavery and colonialism were global projects, and reparations for both require global intervention. Member States should create a platform devoted to the serious consideration of reparations for slavery and colonialism and provide the requisite resources to ensure the success of that platform.**

62. **Initiatives by non-State actors: Reparations require the participation and initiative of non-State actors, especially, for example, churches, universities, financial institutions and other corporations that benefited directly or indirectly from slavery and colonialism. For example, in 2016, the University of Glasgow, which was founded in 1451, commissioned a study to investigate the financial benefits it received from historical slavery.[180] The University itself never owned slaves and indeed supported abolition, but received sizeable donations and contributions derived from the profits of enslavement.[181] The reparative justice programme associated with the report the University eventually published focuses on increasing the racial diversity of the student body and the staff at the University, reducing educational attainment gaps in Scottish society and building educational partnerships with the University of the West Indies.[182] The United Church of Canada and the United Church of Christ have taken steps to provide reparations for its role in racial subordination rooted in historic injustice, and the Episcopal Church has worked to confront its complicity in the same.**

63. **International Decade for People of African Descent: Member States should work within the framework of the International Decade for People of African Descent to pursue the cause of reparations for colonialism and slavery for peoples of African descent.**

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[180] Stephen Mullen and Simon Newman, “Slavery, abolition, and the University of Glasgow”, report and recommendations of the University of Glasgow History of Slavery Steering Committee, September 2018.

[181] Submission, Sir Geoff Palmer, Professor Emeritus, Heriot-Watt University in Edinburgh, United Kingdom.

[182] “Glasgow University funds £20m programme of ‘reparative justice’ over historical links to slave trade”, *Independent*, 2 August 2019.