



Centre for Criminology & Sociolegal Studies
UNIVERSITY OF TORONTO

Kamari Maxine Clarke, *Director*
*Distinguished Professor of
Transnational Justice & Socio-legal
Studies*

To: Office of the High Commissioner for Human Rights

From: Kamari Maxine Clarke

Date: March 14, 2025

RE: Call for inputs on CERD General Recommendation

Please find a submission for the CERD General recommendations regarding reparations for historical injustices from chattel enslavement of Africans, and the ensuing harms and crimes to people of African Descent.

Thank you,

Kamari Clarke
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Thank you,

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SUBMISSION

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A. Reparations in International Law

Applicable Questions:

- i. Share perspectives on the international and regional legal frameworks which can support reparations for people of African descent, including restitution, compensation, rehabilitation, truth and satisfaction, and guarantees of non-recurrence.
- ix. In the reparations process, what legal frameworks address the requirements for truth-seeking and truth-telling, apologies, compensation, restitution, satisfaction, and meaningful victim participation, restoring victim dignity and rehabilitation.
- x. What lessons can be usefully borrowed from the experiences with transitional justice practices, legal and institutional, regarding redressing historical injustices such as slavery and colonialism?

a. General

1. In 1927, in the case of *Chorzow Factory*, the Permanent Court of International Justice (PCIJ) affirmed the fundamental principle in customary international law that any breach of an obligation under international law gives rise to an obligation to repair the breach and make reparations in an adequate form.¹ The Court held:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation is therefore the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.

....

The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, 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. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind

¹ *Case Concerning the Factory at Chorzow (Germany v Poland)*, Jurisdiction, Judgement No. 8 (1927), PCIJ (ser A), No 17 [Chorzow].

would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.²

2. This principle has been affirmed by other international courts, including the International Court of Justice (ICJ), as well as numerous regional human rights mechanisms.³ For example, in the 2004 ICJ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, the Court relied on the principle established in *Chorzow Factory* in concluding that Israel was under an obligation to provide reparations to Palestinians for damages sustained from the illegal wall built in the Occupied Palestinian territories (OPT).⁴ The ICJ ruled that Israel's construction of the wall violated international law. It ordered Israel to cease its activities and make reparations to the Palestinians affected by the wall. In doing so, the ICJ affirmed that a state that violates international law must make reparations, including compensation for the harm caused, and reinforced the principle of state responsibility in situations of illegal occupation and ongoing violations of international human rights law.
3. Similarly, in the *Case Concerning Armed Activities on the Territory of the Congo*, the ICJ concluded that Uganda owed the DRC reparations for violations committed by Uganda, including acts of aggression, occupation, and violations of IHL, which resulted in injury to individuals. The Court held that "it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act" and confirmed that a state that has violated a rule of international law causing damage to persons has "the obligation to make reparation for the damage caused to all the natural or legal persons concerned".⁵ In doing so, the Court confirmed the responsibility of states to compensate for material and non-material damage caused by unlawful acts.
4. According to the International Commission of Jurists' *Practitioner's Guide on the Right to a Remedy and Reparations for Gross Human Rights Violations*, the

² *Chorzow*, *supra* at paras 21 and 25.

³ Claudio Grossman Guilloff, "Annex B: Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" in *Report of the International Law Commission*, UNGAOR, 70th Sess, UN Doc A/74/10 (2019) at 359.

⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004), ICJ Reports at para 152; see also Richard Falk, "Reparations, International Law, and Global Justice: A New Frontier" in Pablo de Grieff, ed, *The Handbook of Reparations* (Oxford: Oxford Academic, 2006) 478 at

⁵ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005), JICJ. Rep. 2005 (Dec. 19), at paras 258-259.

following situations may entail state responsibility for violations of human rights under international law:

- a. Where human rights violations are committed by a state body or organ;
 - b. Where human rights violations are committed by a non-state actor but under the control or with the complicity of the state to exercise government authority; and
 - c. Where a private party commits a human violation that in an of itself is not attributable to the state but where state responsibility may nonetheless be engaged.⁶
5. In the first two instances, state responsibility will always arise while in the third, the state has an obligation of due diligence to protect all persons from acts of private parties that may impair their human rights.⁷
 6. Such international law principles stemming from the law on state responsibility and reparations are codified and guided further by the International Law Commission's ("ILC") *Articles on State Responsibility for Internationally Wrongful Acts* (2001) (referred to herein as the ILC Articles), which clarify how reparations should be made following a breach of international obligations.⁸
 7. The key aspects regarding state responsibility and reparations under the ILC *Articles* include the following:
 - a. **Article 2** stipulates that a state is responsible for an internationally wrongful act if two conditions are met: (1) the act is attributable to the state; and (2) the act constitutes a breach of an international obligation. If these conditions are met, the responsible state is required to make reparations to the injured party.
 - b. **Article 31** states that a state that has committed a wrongful act must make full reparation for the injury caused by the act, which includes both material and moral damage.
 - c. **Article 34 to 37** outline the forms of reparations, which can include:

⁶ International Commission of Jurists, [The Right to a Remedy and Reparation for Gross Human Rights Violations A Practitioners' Guide](#) (2018) at 29.

⁷ *Ibid* at 30.

⁸ International Law Commission, [Responsibility of States for Internationally Wrongful Acts](#), GA Res 56/83, UNGAOR, 53rd Sess, UN Doc A/56/49(Vol. I)/Corr.4 (2001).

- i. **Restitution (Art 35)**, which requires the state to re-establishing the situation to what it was before the wrongful act was committed.
 - ii. **Compensation (Art 36)**, which requires the state to financially compensate for damages suffered by the injured party. Article 36 stipulates that compensation is appropriate where restitution is not materially possible. Accordingly, compensation is due when restitution cannot be obtained.⁹
 - iii. **Satisfaction (Art 37)**, which requires the state to give satisfaction for the injury caused insofar as it cannot be made good by restitution and compensation, including by acknowledging the breach, expressing regret, or offering a formal apology.
8. The *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of gross violations of international human rights law* (referred to herein as the UN Principles on Reparations) provide a further framework for the provision of the reparations to victims of violations of international law.¹⁰ Also based on the notion of state responsibility, these principles were adopted by the UN General Assembly in 2005 (Resolution 60/147) and establish key principles to guide states and international bodies in addressing the harm caused to victims.
9. These include the following:
 - a. **Principle 8** defines “victims” as “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law”. It also stipulates that, where appropriate, victims include the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims.
 - b. **Principle 11** outlines that remedies provided to victims under international law including the victim’s right to equal and effective access to justice; adequate, effective, and prompt reparations for harms suffered; and access to relevant information about violations and reparations mechanisms.

⁹ International Commission of Jurists, [The Right to a Remedy and Reparation for Gross Human Rights Violations A Practitioners’ Guide](#) (2018) at 156 [ICJ Practitioner’s Guide].

¹⁰ [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](#), GA Res 60/147, UNGAOR, 60th Sess, UN Doc A/RES/60/147 (2005) [UN Principles on Reparations].

- c. **Principle 15** stipulates that reparations should be “adequate, effective, and prompt” and “proportional to the gravity of the violations and the harm suffered”.
- d. **Principles 19 to 23** outline the forms of reparation as follows:
 - i. **Restitution (principle 19)** should restore the victim to the original situation before the gross violations of law occurred (e.g. restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property).
 - ii. **Compensation (principle 20)** should be provided for any economically assessable damage, such as physical or mental harm; lost opportunities; material damages; loss of earnings; moral damages; and legal or expert costs.
 - iii. **Rehabilitation (principle 21)** should include medical and psychological care as well as legal and social services.
 - iv. **Satisfaction (principle 22)** should include, where applicable, effective measures to cease continuing violations; verification of the facts and full and public disclosure of the truth; search for the disappeared, abducted, and bodies of those killed with assistance in the recovery, identification, and reburial of bodies; an official declaration or judicial decision restoring the dignity, reputation, and rights of victims; public apology; judicial and administrative sanctions; and commemorations to victims.
 - v. **Guarantees of non-repetition (principle 23)** should include, where applicable, the following measures, to contribute to prevention: effective civilian control of military and security forces; ensuring international standards for civilian and military proceedings and by public servants; independence of the judiciary; protecting persons in the legal, medical, and media professions; providing human rights education; preventing and monitoring social conflicts; and law reform.

10. The *United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (herein referred to as the UN Principles to Combat Impunity) also confirm and elaborate on the obligations of

states to provide reparations for gross violations of human rights and procedures for same.¹¹

11. Importantly, these Principles confirm that, in addition to a right to reparations, victims of gross human rights violations also have a “right to know”, which includes an inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances that led to their perpetration, as well as a duty to preserve the collective memory related to such incidents and history (see Principles 2-5).
12. Furthermore, these principles regarding state responsibility and reparations have also been codified in a number of international law treaties and regional human rights treaties, including but not limited to the following examples:

Universal Declaration of Human Rights	Article 8 Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
International Covenant on Civil and Political Rights	Article 2(3) Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

¹¹ Diane Orentlicher, [Report of the independent expert to update the Set of principles to combat impunity](#), UNESCO, 61st Sess, UN Doc E/CN.4/2005/102/Add.1 (2005).

Convention on the Elimination of Racial Discrimination	Article 6 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 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.
Rome Statute of the International Criminal Court	Article 75 1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will State the principles on which it is acting. 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79. 3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States. 4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1. 5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article. 6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law. Article 79

	1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. 2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund. 3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.
Fourth Hague Convention respecting the Laws and Customs of War on Land	Article 3 A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.
Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	Article 27 1. If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation. 2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.
European Convention on Human Rights	Article 5(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation. Article 13 Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. Article 41 If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting

	Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.
American Convention on Human Rights	Article 25 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted. Article 63(1) 1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

b. Victims Entitled to Reparations

13. Principle 8 of the UN Principles on Reparation defines 'victims' as follows:

For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct

victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

14. Accordingly, the definition of victim includes the following aspects: (1) both individuals and collective victims are included; (2) there is a requirement for the victim to have suffered harm, which can vary in nature; (3) and the definition of victim is inclusive of both direct and indirect targets of such harm.¹² That reparations may be owed in international law to collective communities and indirect victims of international rights violations are of particular relevance to an entitlement to reparations for descendants of the Transatlantic Slave Trade.
15. International and regional caselaw supports the above criteria in respect of victims' entitlement to reparations. For example, in the case before the Inter American Court of Human Rights involving the *Mayagna (Sumo) Awas Tingni Community*, an indigenous group in Nicaragua claimed recognition and protection of their ancestral lands, which were being threatened by illegal logging and land concessions granted by the government to private companies without the community's consent.¹³ The Court concluded that Nicaragua had violated the Awas Tingni Community's rights, specifically related to their right to property and cultural rights under the American Convention on Human Rights. The Court recognized that Indigenous peoples have a special relationship with their land, and their rights over their ancestral lands are not limited to formal legal titles but are rooted in their traditional and customary land tenure systems. The Court ordered Nicaragua to take specific actions to remedy the violations and provide reparations to the Awas Tingni Community, particularly related to their land rights, including for the state to: delimit, demarcate, and title the Awas Tingni Community's land in accordance with their customary law and traditions; to adopt legislative and other measures to ensure that the rights of Indigenous communities to their ancestral lands are recognized and protected; and to provide reparations for the damage caused to the Awas Tingni Community, including compensation for material and moral damages resulting from the violation of their property rights and culture.¹⁴
16. In the *Moiwana Community Case*, the Inter-American Court confirmed that the same principles apply when dealing with the communal rights of non-indigenous communities, such as the tribes who are descendant of African slaves.¹⁵ Here, the Moiwana Community, an Indigenous group in Suriname, argued violations of the right to life, the right to personal integrity, and the right to property, as well as other

¹² ICJ Practitioner's Guide, *supra* at 34.

¹³ *The Mayagna (Sumo) Awas Tingni Community Case*, I/ACtHR, Judgment of 31 August 2001, Series C No. 79.

¹⁴ *Ibid* at para 173(3), (4) and (6).

¹⁵ *The Moiwana Community Case*, I/ACtHR, Judgment of 15 June 2005, Series C No. 124 at paras 86(1) and (2).

violations stemming from unlawful military attacks against the Moiwana Community in 1986 that resulted in the killing of several community members, the destruction of property, and the forced displacement of the community. The Court found the Surinamese government responsible for the unlawful killing of community members; that the military attacks led to psychological trauma and physical injuries among the survivors, violating their right to personal integrity; that the destruction of the community homes and forced displaced amounted to a violation of the right to property; and that Suriname had failed to provide an effective remedy for the victims of the attacks. It ordered Suriname to apply “comprehensive reparation to victims”, including providing the Moiwana Community with monetary compensation for the material and moral damages suffered by the victims and for the state to carry out specific measures to restore the rights of the displaced community members, including providing the community with land, facilitating the return of members to their ancestral lands, and ensuring that the community could rebuild their lives with adequate social and economic support.¹⁶

17. According to the ICJ Practitioner’s Guide, the collective enforcement of individual rights is a substantive right of the group while collective enforcement procedures are a procedural right of standing.¹⁷ Collective enforcement allows certain individuals, groups, or organizations to bring claims on behalf of a number of individuals, which may be defined or undefined in number. International treaties are typically silent on these procedures, however they have been recognized by the Inter-American Commission and Court of Human Rights and the African Commission on Human and Peoples’ Rights, both of which have accepted complaints presented on behalf of an undefined number of persons.¹⁸ Such procedures may be relevant to claims for reparations related to slavery.
18. With respect to the notion of ‘direct’ and ‘indirect victims’, human rights jurisprudence supports an entitlement to reparations for both the direct victims of human rights violations as well as other persons who are not the direct victims but who have suffered harm as a result of the violation, be it physical, mental or economic harm, etc.¹⁹
19. The Inter-American Court of Human Rights has granted reparation to victims’ relatives, including spouses, parents, non-biological parents, siblings, half-siblings, children, victims’ unmarried partners, including in cases of enforced

¹⁶ *Ibid* at 291 and 233.

¹⁷ ICJ Practitioner’s Guide, *supra* at 50.

¹⁸ *Ibid*.

¹⁹ *Ibid* at 35.

disappearances, unlawful killings, and other gross human rights violations where the victim did not die or disappear.²⁰

20. In the landmark case of *Velásquez Rodríguez v. Honduras*,²¹ Manuel Velásquez Rodríguez's family argued that state agents of the Honduras government were responsible for the kidnapping and disappearance of Mr. Velásquez Rodríguez in 1981, amounting to violations of the right to life, the right to personal liberty, the right to personal integrity, and the right to judicial protection. The Court concluded that the Honduran authorities were directly responsible for the disappearance due to the actions of state agents, and that Honduras had failed to carry out an effective investigation. The Court emphasized that the state's responsibility for enforced disappearances does not depend on direct evidence of government agents' involvement but on the failure of the state to investigate and prevent such violations – the duty of due diligence. The Court ordered reparations for the victim's family, including compensatory damages for the material harm, which included loss of income and other economic harm resulting from Mr. Velásquez Rodríguez's disappearance, and compensation for the moral and psychological suffering endured by Velásquez Rodríguez family, particularly the victim's mother.²²
21. According to the ICJ Practitioner's Guide, the jurisprudence from international human rights mechanisms supports the contention that the closer the family link, the higher the form of reparation, including compensation.²³ Close family members may be awarded moral damages without having to prove the actual damage on the basis that they are presumed to have a close relationship, and that damages for mental or psychological harm are typically difficult to quantify.²⁴
22. That said, in the case of *Aloeboetoe v Suriname*²⁵ suggests that in certain instances, particularly where the damages relate to assessable losses, the claimant may have to show evidence of the link between the harm suffered and the damages. Here, the Court ordered Suriname to provide reparations for victims' families for violations of the rights to life, personal integrity, and property as a result of military attacks which led to killings, forced disappearances, and the destruction of property in Suriname in the 1980s. The Court established the following

²⁰ ICJ Practitioner's Guide, *supra* at 38 citing *Velásquez Rodríguez v Honduras (Compensatory damages)*, I/ACtHR, Judgment of 21 July 1989, Series C No. 7, paras 50-52; *Garrido and Baigorria v Argentina (Reparations)*, I/ACtHR, Judgment of 27 August 1998, Series C No. 39, paras 62, 63; *Blake Case v Guatemala*, I/ACtHR, Judgment of 22 January 1999, para 37; *Bámaca Velásquez v Guatemala (Reparations)*, I/ACtHR, Judgment of 22 February 2002, Series C No. 91, paras 33-36

²¹ *Velásquez Rodríguez v Honduras (Compensatory damages)*, I/ACtHR, Judgment of 21 July 1989, Series C No. 7.

²² *Ibid* at paras 40-59.

²³ ICJ Practitioner's Guide at 191-92.

²⁴ *Ibid*.

²⁵ I/ACtHR Judgment of 10 September 1993, Series C No. 15.

conditions to be met for a claim of compensatory damages filed by a third party, such as a family member:

68. First, the payment sought must be based on payments actually made by the victim to the claimant, regardless of whether or not they constituted a legal obligation to pay support. Such payments cannot be simply a series of sporadic contributions; they must be regular, periodic payments either in cash, in kind, or in services. What is important here is the effectiveness and regularity of the contributions.

Second, the nature of the relationship between the victim and the claimant should be such that it provides some basis for the assumption that the payments would have continued had the victim not been killed.

Lastly, the claimant must have experienced a financial need that was periodically met by the contributions made by the victim. This does not necessarily mean that the person should be indigent, but only that it be somebody for whom the payment represented a benefit that, had it not been for the victim's attitude, it would not have been able to obtain on his or her own.²⁶

23. While caselaw supportive of reparations for 'indirect' victims is generally helpful for claims of reparations for descendants of slavery in that it supports the principle that individuals or groups other than the direct victim of the human rights violation may be entitled to reparations, the application of strict criteria such as those applied in *Aloeboetoe* could pose a barrier for such claimants. The entitlement to reparations appears to depend on the claimant's ability to demonstrate quantifiable damages and likely does not account for situations where the rights violations may extend over many years and intergenerationally, as is the case for descendants of the slave trade. In light of this, the precedents relating to reparations for 'collective' victims, and particularly those involving Indigenous and/or Tribal communities, as well as relevant procedures to enforce collective rights, where available, may be of greater use/relevance. This is discussed further below in the section reviewing reparations for slavery under international law.

c. Form of Reparations

i. Restitution

24. Restitution or *restituto in integrum* is the primary objective and means of reparations.²⁷ This is recognized in the *Chorzow Factory* case as well as the ILC

²⁶ *Ibid* at para 68.

²⁷ *Chorzow Factory*, *supra* at 47.

Articles on State Responsibility and the UN Principles on Reparations, the last of which defines restitution at Principle 19 as restoration of the “victim to the original situation before the gross violations of law occurred”.²⁸

25. Restitution can take multiple forms depending on the specific facts and the violations found. Examples include but are not limited to the restoration of liberty, restoration of enjoyment of human rights, restoration of identity, family life and citizenship, return to one’s place of residence, restoration of employment, return of property, restoration of legal rights, and reopening of legal proceedings, among others.²⁹

26. In *Malawi African Association and Others v. Mauritania*³⁰, the African Commission on Human and Peoples’ Rights heard five joined communications alleging the existence of slavery in Mauritania and of institutionalized racial discrimination perpetrated by the ruling Moor community against the more populous Black community. It was alleged, amongst other things, that Black Mauritians were enslaved, routinely evicted or displaced from their lands, which were then confiscated by the government along with their livestock; that Black Mauritians were denied access to employment and were subjected to tedious and unremunerated work; and that the conditions of detention of people who had been imprisoned for political cause and other reasons were insufficient. The Commission ruled in favour of the complainants, finding that Mauritania had violated several provisions of the African Charter on Human and Peoples’ Rights. Among the reparations recommended to the state party were a number of measures aimed at restitution, including that the state party take diligent measures to replace the national identity documents of the claimants, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania; that the state party undertake the restitution of belongings looted from the claimants at the time of their expulsion; that the state reinstate the rights and legal entitlements of unduly dismissed and/or forcibly retired workers.³¹ Other forms of reparations were also recommended, including that the state take appropriate measures to ensure payment of a compensatory benefit to the widows and beneficiaries of the victims and that the state party carry out an assessment of the status of such harmful practices in the country with a view to identifying the deep-rooted causes and put in place a strategy aimed at their total and definitive eradication.³²

²⁸ UN Principles on Reparation at 19.

²⁹ UN Principles on Reparation at 19; ICJ Practitioner’s Guide at 167-172.

³⁰ *Malawi African Association et al v Mauritania*, AfrComHPR Communications 54/91 et al (2000).

³¹ *Ibid* at para. 42

³² *Ibid*.

27. In *Hentrich v France*³³, the European Court of Human Rights dealt with a claim by the applicant, Mr. Hentrich, a French national who had his property expropriated by the French government under the pretext of public use. Mr. Heinrich contested the expropriation on the basis that the amount of compensation offered was not sufficient and he argued that the proceedings surrounding the expropriation and compensation were flawed and in violation of the European Convention on Human Rights. The Court held that France violated the applicant's rights to peaceful enjoyment of possessions, to a fair trial, and to an effective remedy. In considering the appropriate amount of damages, the Court stated, "the best form of redress would in principle be for the State to return the land. Failing that, the calculation of pecuniary damage must be based on the current market value of the land".³⁴ The Court unanimously concluded that State was required to pay the applicant within three months of the ruling, 56,075 French francs in respect of costs and expenses.³⁵

28. International jurisprudence also supports findings of reparations to restore one's legal rights (e.g., right to re-trial, right to commutation of sentence, etc.) and/or liberty in cases of prison sentences resulting from unfair trials³⁶ or cases where a person has been convicted pursuant to a miscarriage of justice – as forms of restitution.³⁷

29. In *Loayza Tamayo v Peru*³⁸, the Inter-American Court of Human Rights held that Claudia Loayza Tamayo, a Peruvian national and human rights activist, had been detained and subjected to judicial proceedings that violated her rights to personal liberty, a fair trial, and judicial protection, among others, under the American Convention on Human Rights. Ms. Loayza Tamayo was detained for several months without access to a fair trial and during her detention, she was subjected to torture and inhumane treatment, including solitary confinement, lack of adequate food, and deprivation of basic necessities. The Court ordered the state party to pay pecuniary damages for the losses related to her unlawful detention, such as loss of income and non-pecuniary damages for emotional suffering, physical, and psychological harm, and the impact of the violations on her dignity; that the

³³ ECtHR, Judgment of 22 September 1994, Series A No.296-A.

³⁴ *Ibid* at para 71.

³⁵ *Ibid* at para 75

³⁶ See for example, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, AfrComHPR Communications 143/95 and 150/96 (1999); *Constitutional Rights Project v Nigeria*, AfrComHPR Communication 148/96 (1999); *Loayza Tamayo Case*, I/ACtHR, Judgment of September 17, 1997, Series C No. 33; *Loayza Tamayo v Peru (Reparations)*, I/ACtHR, Judgment of 27 November 1998, Series C No. 42; and *Ilascu and others v Moldova and Russia*, ECtHR, Judgment of 8 July 2004.

³⁷ See for example, *Castillo Petruzzi et al Case*, I/ACtHR, Judgment of 30 May 1999, Series C No. 52; *Somogyi v Italy*, ECtHR, Judgment of 18 May 2004; and *Civil Liberties Organisation v Nigeria*, AfrComHPR Communication 151/96 (1999). See also ICJ Practitioner's Guide, *supra* at 159-172.

³⁸ *Loayza Tamayo Case*, I/ACtHR, Judgment of September 17, 1997, Series C No. 33; *Loayza Tamayo v Peru (Reparations)*, I/ACtHR, Judgment of 27 November 1998, Series C No. 42.

claimant be provided with the appropriate medical and psychological treatment; that Peru issue a public acknowledgment of its responsibility for the violations of Ms. Loayza Tamayo's rights; that Peru undertake reforms to its legal and judicial systems to ensure that such violations do not recur; and that Peru implement training and education programs for law enforcement, military personnel, and judicial officers to ensure they understand and respect human rights, particularly in relation to detainees' rights to fair trial, freedom from torture, and humane treatment.

30. The international human rights jurisprudence supports the view that the principle of restitution is paramount in respect of entitlements to reparation. Where the *status quo* can be returned, states have an obligation to ensure measures are undertaken to restore the situation to what it was prior to the rights violation taking place.³⁹ That said, the ICJ Practitioner's Guide states that, in practice, restitution is the least frequent type of reparations because practical realities often make it impossible to return the situation to the pre-violation state. Where full restitution is not possible, efforts should be taken to achieve as close to the original status as possible, and where that is not possible, compensation should be provided in an amount commensurate with the damage to return the situation to the status quo.⁴⁰

ii. Compensation

31. Principle 20 of the UN Principles on Reparation defines compensation as follows:

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of humanitarian law, such as:

- a) Physical or mental harm;
- b) Lost opportunities, including employment, education and social benefits;
- c) Material damages and loss of earnings, including loss of earning potential;
- d) Moral damage;

³⁹ ICJ Practitioner's Guide at 173.

⁴⁰ *Ibid.*

e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

32. In *Chorzow Factory*, the PCIJ confirmed that compensation is a substitute for restitution in kind where restitution is impossible to fulfil.⁴¹

33. International jurisprudence divides compensation into material damages, which includes compensation for loss of actual or future earnings, loss of property, legal costs, medical or psychological costs, and any other economic losses arising from the violation of human rights, immaterial or moral damages, which includes damages for physical, mental, or emotional harm.⁴² Generally, no economically assessable loss will be excluded from compensation as long as there is a causal link between the violation and the damage.⁴³ Even where evidence is insufficient to quantify awards of compensation or it is impossible to do so, for both material and immaterial damages, compensation will be awarded on the basis of equity.⁴⁴

34. The European Court of Human Rights, the Inter American Court of Human Rights, and the African Commission on Human and Peoples' Rights all award compensation for material damages such as loss of income⁴⁵, loss of property⁴⁶, loss of livestock⁴⁷, costs of alternative housing⁴⁸, and resettlement assistance⁴⁹, resulting from violations of human rights as well as moral losses such as harm to physical health, mental health⁵⁰, and lost opportunities, such as education or employment⁵¹. Where it does not have sufficiently detailed evidence on the material damages, it awards damages on an equitable basis.⁵²

⁴¹ *Chorzow Factory*, *supra* at 27.

⁴² ICJ Practitioner's Guide at 180-181.

⁴³ *Ibid* at 189.

⁴⁴ *Ibid* at 184 and 204.

⁴⁵ See for example, *Çakici v Turkey*, ECtHR, Judgment of 8 July 1999, reports 1999-IV; *Loayza Tamayo v Peru (Reparations)*, I/ACtHR, Judgment of November 27, 1998, Series C No. 42; *Bámaca Velásquez v Guatemala (Reparations)*, I/ACtHR, Judgment of February 22, 2002, Series C No. 91.

⁴⁶ See *Selçuk and Asker v Turkey*, ECtHR, Judgment of 24 April 1998, Reports 1998-II.

⁴⁷ *Ipek v Turkey*, ECtHR, Judgment of 17 February 2004.

⁴⁸ *Bilgin v Turkey*, ECtHR, Judgment of 16 November 2000.

⁴⁹ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, AfrComHPR Communication 155/96 (2001).

⁵⁰ *Aktas v Turkey*, ECtHR, Judgment of 24 April 2003.

⁵¹ See for example *Aloeboetoe et al v Suriname (Reparations)*, I/ACtHR, Judgment of September 10, 1993, Series C No. 15; *Loayza Tamayo v Peru (Reparations)*, I/ACtHR, Judgment of 27 November 1998, Series C No. 42; *Velásquez Rodríguez v Honduras (Compensatory damages)*, I/ACtHR, Judgment of 21 July 1989, Series C No7,

⁵² ICJ Practitioner's Guide at 185.

35. In the case of *Bámaca Velásquez v. Guatemala*⁵³, the Inter American Court of Human Rights considered the disappearance and killing of Erwin Bámaca Velásquez, a Guatemalan *guerrilla* fighter who was abducted by the Guatemalan military in 1992. The Court ruled that Guatemala was responsible for violating various provisions of the American Convention on Human Rights, including the rights to life, personal liberty, and a fair trial, as well as the right to judicial protection. In awarding reparations, the Court considered that after the peace accords in Guatemala in 1996, Mr. Bámaca Velásquez would have joined the labour force and had an income and therefore awarded lost earnings in equity based on his proposed average life expectancy after 1996.⁵⁴ The Court also awarded direct compensation to his wife for both material damages, including the loss of financial support due to Bámaca's death, and moral damages for the emotional suffering experienced by Bámaca's wife and children, particularly for the trauma caused by his forced disappearance and extrajudicial execution.⁵⁵
36. The Inter American Commission on Human Rights and the African Commission on Human and Peoples' Rights have also recognized and awarded collective forms of reparations.⁵⁶ For instance, in the case of the *Caloto Massacre*⁵⁷, members of an Indigenous community in the Cauca region of Colombia were massacred on January 29, 1991 when members of the Revolutionary Armed Forces of Colombia (FARC) ambushed a group of civilians, resulting in the deaths of several individuals and leaving many others severely injured. Among the recommended measures to be taken, the Commission recommended that the State "adopt the measures necessary to carry out the commitments regarding social reparations on behalf of the Paez indigenous community of northern Cauca", recognizing the collective nature of the reparations.⁵⁸
37. The Inter American Court of Human Rights has also ordered reparations to benefit the whole community where appropriate. In *Aloeboetoe v Suriname*, for example, the Court ordered compensation for the victims' descendants and the reopening of a school and a medical dispensary in the village where the massacre occurred. The Court held as follows:

96. The compensation fixed for the victims' heirs includes an amount that will enable the minor children to continue their education until they reach a certain age. Nevertheless, these goals will not be met merely by granting compensatory damages; it is also

⁵³ *Bámaca Velásquez v Guatemala (Reparations)*, I/ACtHR, Judgment of February 22, 2002, Series C No. 91.

⁵⁴ *Ibid* at para 51(b).

⁵⁵ *Ibid*.

⁵⁶ ICJ Practitioner's Guide at 195-198.

⁵⁷ *Caloto Massacre (Colombia)*, I/AComHR, Report No. 36/00, Case 11.10, 13 April 2000.

⁵⁸ *Ibid* at para. 66

essential that the children be offered a school where they can receive adequate education and basic medical attention. At the present time, this is not available in several of the Saramaka villages. Most of the children of the victims live in Gujaba, where the school and the medical dispensary have both been shut down. The Court believes that, as part of the compensation due, Suriname is under the obligation to reopen the school at Gujaba and staff it with teaching and administrative personnel to enable it to function on a permanent basis as of 1994. In addition, the necessary steps shall be taken for the medical dispensary already in place there to be made operational and reopen that same year.⁵⁹

38. In *Plan de Sánchez Massacre*⁶⁰ case, the Inter American Court addressed the claims of victims' families that Guatemala violated the rights to life, personal integrity, a fair trial, judicial protections, and others, as a result of an army-led massacre of 248 people in the village of Plan de Sánchez in 1982, which disproportionately targeted women, children, and elderly people from the Mayan-Achí community. The Court found that the Guatemalan state was responsible for violating the rights of the victims of the Plan de Sánchez massacre, and ordered several forms of reparations for the victims' families, including an order for the state to adopt a five-year development plan for education, health, infrastructure, and production. The Court stated:

110. Given the harm caused to the members of the Plan de Sánchez community and to the members of the communities of Chipuerta...the Court decides that the State shall implement the following programs in these communities (in addition to the public works financed by the national budget allocated to that region or municipality): a) study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organization; b) maintenance and improvement of the road systems between the said communities and the municipal capital of Rabinal; c) sewage system and potable water supply; d) supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling in these communities, and e) the establishment of a health center in the village of Plan de Sánchez with adequate personnel and conditions, as well as training for the personnel of the Rabinal Municipal Health Center so that they can provide medical and psychological care to those who have been affected and who require this kind of treatment.

⁵⁹ *Aloeboetoe et al v Suriname (Reparations)*, I/ACtHR, Judgment of 10 September 1993, Series C No. 15 at para. 96.

⁶⁰ *Case of Plan de Sánchez Massacre (Reparations)*, I/ACtHR, Judgment of 19 November 2004, Series C No. 116.

111. The State must implement these programs within five years of notification of this judgment and present the Court with a detailed implementation report every year.⁶¹

39. In the case before the Inter American Court of Human Rights involving the *Mayagna (Sumo) Awas Tingni Community*, discussed above, in which the Court concluded that Nicaragua had violated the Awas Tingni Community's property and cultural rights, the Court ordered the following collective reparations:

...[T]he State must invest, as reparation for immaterial damages, in the course of 12 months, the total sum of US\$ 50,000 (fifty thousand United States dollars) in works or services of collective interest for the benefit of the Mayagna (Sumo) Awas Tingni Community, by common agreement with the Community and under supervision by the Inter-American Commission of Human Rights...⁶²

40. Collective reparations were also ordered in the case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, a landmark decision involving economic, social, and cultural rights in the context of environmental degradation.⁶³ The complaint addressed the environmental destruction and its impact on the economic, social, and cultural rights of the Ogoni people, an ethnic minority group in the oil-rich Niger Delta region, as a result of activities oil companies, and specifically Shell, in collaboration with the Nigerian government. The communication alleged that the military government of Nigeria was guilty of, among other things, violations of the right to health, the right to dispose of wealth and natural resources, the right to a clean environment and family rights, due to its condoning and facilitating the operations of oil corporations in Ogoniland. The Commission ruled that the Ogoni had suffered violations of their right to health and right to a right to a general satisfactory environment favourable to development due to the government's failure to prevent pollution and ecological degradation. It held further that the State's failure to monitor oil activities and involve local communities in decisions violated the right of the Ogoni people to freely dispose of their wealth and natural resources. The Commission recommended the following reparations

[T]he government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

⁶¹ *Ibid* at para 110-111.

⁶² *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, I/ACtHR, Judgment of 31 August 2001, Series C No. 79 at para. 173(6).

⁶³ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, AfrComHPR Communication 155/96 (2001).

- i. Stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory;
- ii. Conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations;
- iii. Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;
- iv. Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and
- v. Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.⁶⁴

41. Finally, in *Kevin Mgwanga Gunme et al v Cameroon*⁶⁵, the African Commission on Human and Peoples' Rights addressed the complaint of Kevin Mgwanga Gunme and others, alleging violations of the right to liberty, freedom of expression, and right to a fair trial in relation to the arbitrary detention and harassment of the applicants, who were involved in political activities and were critical of the Cameroonian government. Although the Commission did not find a violation of the collective rights of the people of Southern Cameroon, it recommended a series of general measures for the benefit of the people as a whole, including to locate "national projects, equitably throughout the country, including Northwest and Southwest Cameroon, in accordance with economic viability as well as regional balance".⁶⁶

iii. Rehabilitation

42. Principle 21 of the UN Principles on Reparation defines "rehabilitation" as measures that "include medical and psychological care as well as legal and social services".⁶⁷ Rehabilitation should seek to physically and mentally help victims

⁶⁴ *Ibid* at para 69 (holding).

⁶⁵ AfrComHPR Communication 266/2003 (2009).

⁶⁶ *Ibid* at para 215.

⁶⁷ UN Principles on Reparation at 21.

overcome the damage suffered by the human rights violation, and to rehabilitate their dignity.⁶⁸

43. According to the ICJ Practitioner's Guide, rehabilitation measures are typically ordered as part of compensation measures, given the significant overlap between findings that require states to pay compensation and those that require measures related to rehabilitation.⁶⁹

44. The Inter-American Court of Human Rights has confirmed that compensation covers both past and future costs for medical care and psychological assistance. In *Suárez Rosero v. Ecuador (Reparations)*⁷⁰, the Court addressed the illegal detention and torture of Juan Suárez Rosero, an Ecuadorian national and political dissident, by agents of the Ecuadorian State. The Court held that the state of Ecuador violated multiple provisions of the American Convention on Human Rights, including the right to personal liberty, protection from torture, and the right to a fair trial. As part of the reparations, the Court ordered compensation for domestic aid as well as psychological and medical treatment, finding that the victim's ailments were linked to the actions of the state. The Court concluded as follows:

The payment of the expenses of the physical treatment of Mr. Suárez Rosero and his psychological treatment and that of Mrs. Ramón Burbano, since the Court finds that there is sufficient evidence that shows that their ailments were the consequence of the imprisonment of Mr. Suárez Rosero. This fact has not been disputed by the State, which accepted the existence of these expenses and has offered a corresponding amount. Therefore, the Court deems it equitable to award US\$ 1,500.00 (one thousand, five hundred dollars of the United States of America) for physical treatment and US\$ 4,280.00 (four thousand, two hundred eighty dollars of the United States of America) for the psychological treatment of Mr. Rafael Iván Suárez Rosero; and US\$ 2,020.00 (two thousand, twenty dollars of the United States of America) for the psychological treatment of Mrs. Margarita Ramón Burbano.⁷¹

45. Similarly, as discussed above, in the *Aloeboetoe* case, the Court ordered the reopening of a medical dispensary in a village affected by gross human rights violations⁷² and in *Plan de Sánchez Massacre* case, the Court ordered Guatemala

⁶⁸ ICJ Practitioner's Guide at 284.

⁶⁹ *Ibid* at 205.

⁷⁰ *Suárez Rosero v Ecuador (Reparations)*, I/ACtHR, Judgment of 20 January 1999, Series C No. 44.

⁷¹ *Ibid* at para 60.

⁷² *Aloeboetoe et al v Suriname (Reparations)*, I/ACtHR, Judgment of September 10, 1993, Series C No. 15 at para 96.

to provide free medical aid and medicine to the victims and to establish a program of psychological and psychiatric treatment free of cost.⁷³ The Court stated:

106. The victims who have given testimony before the Court or by affidavit have stated that they suffer from physical and psychological problems as a result of the facts of this case. Also, the expert witness, Nieves Gómez Dupuis, stated during the public hearing that the surviving victims of the massacre have mental health problems and psychosomatic ailments. The Court notes that it should order a measure designed to reduce the physical and mental sufferings of the victims in this case (*supra* para. 49(10)), resulting from the violations, if they so wish.

107. To help repair this damage, the Court decides that the State shall provide, free of charge, through its specialized health institutions, the medical treatment that the victims require, including, *inter alia*, any necessary medication. The State shall also create a specialized program of psychological and psychiatric treatment, which should also be provided free of charge. When providing the psychological and psychiatric treatment, the special circumstances and needs of each person must be taken into account, in order to provide collective, family and individual treatment. This treatment should be implemented following an assessment of each individual, and as agreed with each of them.

108. To this end, the State must set up a committee to evaluate the physical and mental condition of the victims, and also the treatment that each one requires. The non-governmental organization, Community Studies and Psychosocial Action Team, must play an active part in this committee and, should this organization not agree or be unable to assume the task, the State must identify another non-governmental organization, with experience in treating victims, to replace it. Guatemala must inform the Court about the constitution of this committee within six months. With regard to the medical and psychological treatment, this should be started immediately after the constitution of the committee for a period of five years.⁷⁴

iv. Satisfaction

46. Principle 22 of the UN Principles on Reparation states that satisfaction includes any or all of the following aspects:

⁷³ *Case of Plan de Sánchez Massacre (Reparations)*, I/ActHR, Judgment of 19 November 2004, Series C No. 116 at paras 106-108.

⁷⁴ *Ibid.*

- a. Effective measures aimed at the cessation of continuing violations;
 - b. Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
 - c. The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
 - d. An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
 - e. Public apology, including acknowledgement of the facts and acceptance of responsibility;
 - f. Judicial and administrative sanctions against persons liable for the violations;
 - g. Commemorations and tributes to the victims;
 - h. Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.
47. The UN Updated Principles to Combat Impunity also provide for the "right to know", which encompasses the right to know the truth about past events, the duty to preserve memory, and the right for victims and their families to know the truth about which human rights violations took place.⁷⁵ It also elaborates on the role, establishment, and composition of truth commissions or other commissions of inquiry in giving effect to the right to know.⁷⁶
48. Some international courts and tribunals, including the ICJ, have held that a condemnatory judgement constitutes satisfaction in itself.⁷⁷ For example, in the *Corfu Channel Case*⁷⁸, the ICJ addressed a dispute between the United Kingdom

⁷⁵ UN Updated Principles on Impunity at Principles 2-5.

⁷⁶ *Ibid* at Principles 5-18.

⁷⁷ ICJ Practitioner's Guide at 207.

⁷⁸ (1948) ICJ Reports 1.

and Albania concerning incidents in the Corfu Channel, a strategic waterway in the Mediterranean, which arose when British warships struck mines in Albanian waters on October 22, 1946, resulting in damage and loss of life. The Court concluded that Albania was responsible for failing to warn about the mines and was ordered to pay compensation to the UK. In its judgement, the ICJ addressed satisfaction as a form of reparations, concluding that the “judgment itself served as moral and legal satisfaction” for the violation of Albania’s international obligations.⁷⁹

49. The Inter American Court, in contrast, has concluded that a judgement alone does not constitute adequate satisfaction or reparation in cases involving gross violations of human rights – in such cases, compensation is required.⁸⁰

50. The Inter American Court has also ordered public announcements⁸¹ and public commemorations⁸² (e.g., naming of streets and buildings, dedication of a public monument) as forms of satisfaction. For instance, in the *Plan de Sanchez Massacre* case, the Court ordered that the judgment be published in the local newspaper and translated into the Maya language as the majority of the victims were part of the Maya community in Guatemala.⁸³

B. National Reparations Efforts

51. Although legal cases specifically focussed on reparations, including for the Transatlantic Slave Trade (“TST”), have not yet resulted in significant decisions or settlements, certain political movements, lawsuits, and calls for reparations from affected countries are playing a key role in advancing the conversation about reparations for the transatlantic slave trade. Select regional examples are outlined in brief below. Please let me know if you would like me to expand further on any particular examples.

a. Africa

⁷⁹ *Ibid* at 35. See also ICJ Practitioner’s Guide at 207-208.

⁸⁰ See for example, *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, I/ACtHR, Judgment of 31 August 2001, Series C No. 79 at 166; *Bámaca Velásquez v Guatemala (Reparations)*, I/ACtHR, Judgment of 22 February 2002, Series C No. 91 at 84; *Cantoral Benavides v Peru (Reparations)*, I/ACtHR, Judgment of 3 December 2001, Series C No. 88, para 79. See also ICJ Practitioner’s Guide at 207-208.

⁸¹ See for example, *Cantoral Benavides v Peru (Reparations)*, I/ACtHR, Judgment of 3 December 2001, Series C No. 88, para 79; *Bámaca Velásquez v Guatemala (Reparations)*, I/ACtHR, Judgment of 22 February 2002, Series C No. 91, para 84.

⁸² See for example, *Villagrán Morales et al v Guatemala, Street Children Case (Reparations)*, I/ACtHR, Judgment of 26 May 2001, Series C No. 77, para 103 and *Barrios Altos Case v Peru (Reparations)*, I/ACtHR, Judgment of 30 November 2001, Series C No. 87, para 44(f) and operative para 5(f).

⁸³ *Case of Plan de Sánchez Massacre (Reparations)*, I/ACtHR, Judgment of 19 November 2004, Series C No. 116, para 102.

i. Truth and Reconciliation Commission (TRC) of South Africa

52. The Truth and Reconciliation Commission (TRC) of South Africa, which operated from 1995 to 2002, had the mandate of investigating the nature, cause, and extent of the gross violations of human rights that occurred during apartheid between 1960 and 1994.⁸⁴ In 1998, the TRC released an extensive five-volume report which included testimony from over 22,000 victims and witnesses, more than 2,000 of whom testified at public hearings.⁸⁵ The TRC law allowed for a controversial “amnesty for truth” for those perpetrators who were willing to confess to human rights violations.⁸⁶ The TRC recommended the following reparations: (1) individual financial compensation, including payments to victims or their families for suffering caused by gross human rights violations; (2) symbolic reparations, including official apologies, renaming streets and buildings, and national memorials; (3) community reparations, including development projects in communities heavily affected by apartheid violence; (4) institutional reform, including legal and policy changes to prevent future human rights abuses; and (5) rehabilitative support, including medical, psychological, and educational assistance for victims.⁸⁷
53. According to the International Centre for Transitional Justice (“ICTJ”), most of the reparations recommendations made by the TRC have not since been implemented by the state. For example, the TRC recommended that payments be made to survivors in the amount of R210,000 annually for a period of six years and also that the state party collect a wealth tax from industries that benefitted from the system of apartheid in order to fund the reparations scheme.⁸⁸ Instead, the government established a reparations fund from which it paid out lump sums of R30,000 to 23,000 persons, and only those who registered with the TRC as ‘victims’. It has also provided approximately R800,000 in funding for reburial expenses to 47 families.⁸⁹

ii. Mau Mau Case, Kenya and United Kingdom

54. In *Mutua and Others v. The Foreign and Commonwealth Office*⁹⁰, a group of five Kenyans who were imprisoned and tortured by British colonial authorities during the Mau Mau rebellion from 1952-1960 brought a claim for damages against the British government, and in particular the UK Foreign and Commonwealth Office,

⁸⁴ See [South African Truth and Reconciliation Commission \(TRC\)](#), Department of Justice of South Africa; [“South Africa”](#), *International Centre for Transitional Justice (ICTJ)*.

⁸⁵ [“South Africa”](#), *International Centre for Transitional Justice (ICTJ)*.

⁸⁶ *Ibid.*

⁸⁷ See Truth and Reconciliation Commission of South Africa Report, Vol V and Report of the Reparation and Rehabilitation Committee, Vol 6, Sect 2.

⁸⁸ [South Africa](#), *International Centre for Transitional Justice (ICTJ)*.

⁸⁹ *Ibid.*

⁹⁰ [2012] EWHC 2678 (QB).

seeking compensation for the treatment they sustained in British-controlled detention camps. The case established a number of procedural precedents for seeking reparations for colonial violence, including that: (1) the UK Court rejected the state's argument that liability rested with the independent Kenyan government after Kenya's independence in 1963, finding that the British government had a direct role in the administration of colonial detention camps and could still be held accountable; (2) that the seriousness of the allegations and the availability of documentary evidence justified the waiving of the limitations period to allow the claim to proceed; and (3) that there was strong documentary and testimonial evidence to support allegations of torture.⁹¹

55. Following the decision, the parties agreed to a settlement which provided £19.9 million in compensation to over 5,000 Mau Mau victims along with the issuance of a formal statement of regret, acknowledging the colonial abuses but stopping short of a full apology.⁹²

iii. Herero and Nama Case, Namibia and Germany

56. In 2017, representatives of the Herero and Nama communities of Namibia filed a class action lawsuit against the German government in U.S. courts seeking reparations for the genocide that took place between 1904 and 1908, in which approximately 100,000 Herero and Nama people were killed by German colonial leaders in South West Africa (now known as Namibia).⁹³ The plaintiffs invoked the *Alien Tort Statute*, a U.S. law that allows foreign nationals to seek redress in U.S. courts for serious violations of international law, and demanded financial reparations and inclusion in negotiations between Germany and Namibia regarding official recognition and compensation. The Court ultimately ruled in Germany's favour, dismissing the case, and agreeing with its argument that Germany was protected from lawsuits in U.S. courts under the *Foreign Sovereign Immunities Act*, which generally prevents lawsuits against foreign states unless a specific exception applies. The plaintiffs appealed the decision, but the U.S. Court of Appeals for the Second Circuit upheld the dismissal in September 2020, reaffirming Germany's sovereign immunity.

57. In 2021, Germany and Namibia reached an agreement in which Germany acknowledged its role in the genocide, issued an apology which Namibia

⁹¹ *Ibid.* See also [“Decision in Mau Mau Case Strengthens the Right to Reparations of All Victims of Torture”](#), *International Centre for Transitional Justice (ICTJ)* (10 May 2012); [“The Mau Mau Claims”](#), Leigh Day.

⁹² [“The Mau Mau Claims”](#), Leigh Day; [“Mau Mau torture victims to receive compensation – Hague”](#), BBC (6 June 2013).

⁹³ *Rukoro et al. v. Federal Republic of Germany*, No. 1:17-cv-00062 (S.D.N.Y. 2019). See also, [“Namibia tribes lodge case against Germany over genocide”](#), *Al Jazeera* (16 March 2017). Christopher Clark, [“Genocide negotiations reopen colonial wounds in Namibia”](#), *Al Jazeera* (4 July 2016).

accepted⁹⁴, and committed to paying Namibia €1.1 billion, in the form of development aid to the affected communities in Namibia to be made over 30 years. Accordingly, the descendants of the victims did not receive any direct compensation nor did Germany acknowledge that the payment amounted to reparations.⁹⁵

58. Subsequently, in 2023, the descendants brought a legal claim against the Namibian government, rejecting the 2021 apology, and arguing that the settlement was agreed to by the state parties without their input or involvement and that they are entitled to direct reparations from Germany.⁹⁶

iv. Metis Children, Congo and Belgium

59. On December 12, 2024, the Brussels Court of Appeal issued a landmark decision relating to reparations claims which held the Belgian state accountable for crimes against humanity committed during its colonial rule in Congo (now known as the Democratic Republic of Congo).⁹⁷ The case was brought by five women who were forcibly removed from their Congolese mothers as small children between 1948 and 1953, and who now live in Belgium and France. During the colonial era, approximately 20,000 mixed-race children, known as *metis*, were systematically removed from their mothers as small children by the state and sent to Catholic institutions because of their mixed-race origins, which was seen as threat to the racial order. Following colonization, the children were abandoned by the Belgian state.

60. The appeal decision overturned a 2021 lower court decision which found in favour of Belgium on the basis that forced removal and segregation was not a crime during the colonial era. The Court awarded compensation of €50,000 to each claimant in damages.⁹⁸ In 2019, the then Belgium Prime Minister Charles Michel issued an official apology but stopped short of providing reparations.⁹⁹

⁹⁴ [See Joint Declaration by the Federal Republic of Germany and the Republic of Namibia – United in Remembrance of our Colonial Past, United in our will to Reconcile, United in our Vision of the Future](#) (May 2021) at paras 13-14.

⁹⁵ Philip Oltermann, "Germany agrees to pay Namibia €1.1bn over historical Herero-Nama genocide", *The Guardian* (28 May 2021).

⁹⁶ Kaamil Ahmed, "Descendants of Namibia's genocide victims call on Germany to 'stop hiding'", *The Guardian* (3 February 2023).

⁹⁷ Almaz Teffera, "Belgian Ruling a Landmark Win for Reparations Movement", *Human Rights Watch* (3 December 2024); Jennifer Rankin, "Court ruling on Belgium's conduct in colonial Africa hailed as turning point", *The Guardian* (12 January 2025).

⁹⁸ *Ibid.*

⁹⁹ Almaz Teffera, "Belgian Ruling a Landmark Win for Reparations Movement", *Human Rights Watch* (3 December 2024); "Belgium apology for mixed-race kidnappings in colonial era", *BBC* (4 April 2019).

a. Americas

i. United States

61. H.R. 40, introduced annually since 1989 and known as the "Commission to Study and Develop Reparation Proposals for African Americans Act," is a bill in the U.S. Congress that proposes the creation of a federal commission to study the impact of slavery and racial discrimination and make recommendations for reparations. On January 3, 2025, the bill was reintroduced in congress by Representatives Ayanna Pressley and Corey Booker, with 72 co-sponsors.¹⁰⁰ The bill is currently under consideration. While it has never passed over the years, it has renewed conversations about reparations for African Americans in recent years.
62. Some U.S. cities and states have initiated local reparations programs or committees. In 2021, Evanston, Illinois, became the first U.S. city to implement a government-funded reparations program for Black residents affected by the historical impacts of slavery and systemic racism.¹⁰¹ The Reparations Fund uses cannabis sales tax revenue to fund housing grants, which could be used for mortgage assistance, repairs, down payments, etc. In June 2024, a non-profit conservative group called Judicial Watch filed a lawsuit against Evanston's reparations program, stating that the program was unconstitutional and violates the 14th Amendment on the basis that it is only available to Black residents. To date, the fund is continuing despite the ongoing lawsuit.¹⁰²
63. In 2020, California formed a Reparations Task Force to study and develop recommendations for reparations for African Americans, particularly descendants of enslaved individuals. After extensive research and public hearings, the task force released its final report in June 2023, which provided comprehensive recommendations on proposed reparations.¹⁰³
64. In September 2024, California Governor, Gavin Newsom, signed a package of 16 reparations bills, 7 of which were signed into law. Among those passed was the issuance of a formal apology from California for its role in slavery and the continuing effects on Black Americans.¹⁰⁴ The legislative package also included

¹⁰⁰ ["Amid Onslaught on DEI, Pressley, Booker, Colleagues Reintroduce Historic Reparations Bill During Black History Month"](#), Congresswoman Ayana Pressley (12 February 2025).

¹⁰¹ Rachel Treisman, ["In Likely First, Chicago Suburb Of Evanston Approves Reparations For Black Residents"](#), NPR (23 March 2021); Richard Requana, "Evanston has paid out just over \$5 million in reparations so far", *The Chicago Tribune* (14 September 2024).

¹⁰² *Ibid.*

¹⁰³ [California Task Force to Study and Develop Reparation Proposals for African Americans Final Report](#), Office of the Attorney General of California (June 2023); Michela Moscufo, ["California brings new state reparations bills amid Trump onslaught on DEI: 'The fight for justice'"](#), *The Guardian* (6 March 2025).

¹⁰⁴ Sophie Austin, ["California to apologize for state's legacy of racism against Black Americans under new law"](#), *Associate Press* (26 September 2024).

measures to protect against hair discrimination and enhanced oversight of book bans in state prisons. In March 2025, Newsom introduced a second set of reparations bills, based on recommendations from the California reparations taskforce's landmark 2023 report, which includes measures that could, among other things, have the state prioritize public university admission for descendants of enslaved people; have public elementary and high-school curriculum include the impacts of segregation and slavery; and require that government agencies conduct racial equity analyses.¹⁰⁵

65. The National African American Reparations Commission (NAARC) is an organization established in 2015 by the Institute of the Black World 21st Century (IBW) that is dedicated to advancing reparations for African Americans in the United States. It is comprised of scholars, activists, and community leaders who advocate for policies addressing the long-term effects of slavery and racial discrimination.¹⁰⁶ The NAARC has established a 10-Point Reparations Plan, based on that of the CARICOM Reparations Commission (discussed below), includes the following policy initiatives aimed at addressing the historical and current injustices faced by African Americans as a result of slavery:

- 1) **Apology & Maafa Institute** - A formal apology issued and establishment of an African Holocaust (Maafa) Institute to provide public education.
- 2) **Repatriation** - African Americans should have the right of return to Africa, with support for relocation and reintegration.
- 3) **Land** – Land grants or subsidies should be provided to African Americans to support economic independence and community building.
- 4) **Funds** – Funds should be allocated to support Black-owned businesses and cooperatives and economic infrastructure.
- 5) **Health** - Investment in health, wellness, and healing of Black families, including culturally competent mental health services and trauma recovery programs, and resources for.
- 6) **Education** - Free or subsidized higher education for descendants of enslaved Africans, including for HBCUs. Curriculum reforms to include accurate Black history education in schools.

¹⁰⁵ Moscufo, *supra*.

¹⁰⁶ “[About NAARC](#)”, *National African American Reparations Commission (NAARC)*.

- 7) **Housing and Wealth Generation** - Initiatives to address housing discrimination and provide financial assistance for Black homeownership. Policies to combat gentrification and displacement.
- 8) **Information and Communication** - Investment in Black media, including newspapers, radio stations, and digital platforms. Ensuring fair representation of Black voices in mainstream media.
- 9) **Sacred Sites** - Protection and restoration of historic Black sites and cultural landmarks, including museums, memorials, and institutions dedicated to the history of African Americans.
- 10) **Criminal Justice System** – Substantial resources to establish a Black controlled Agency for Returning Citizens, restoration of voting rights for all formerly incarcerated persons, exoneration and/or release of Black leaders and political prisoners, and amendments to the 13th Amendment of the Constitution.¹⁰⁷

ii. Canada

66. The Truth and Reconciliation Commission of Canada (“TRC”), which operated from 2008 to 2015, was established investigate the history and lasting impacts of the Indian Residential School System on Indigenous peoples in Canada. The TRC’s final report made a number of findings, including that the residential school system was a form of “cultural genocide”, and outlined 94 Calls to Action, which identified specific steps for achieving reconciliation between Indigenous and non-Indigenous peoples in Canada.¹⁰⁸ Among the calls to action were that Canada fulfil its compensation commitments in relations to the 2006 Residential Schools Settlement Agreement (2006); it reform of the child welfare system to address the overrepresentation of Indigenous children in foster care; it reject the Doctrine of Discovery and *terra nullius*, legal principles that justified the theft of Indigenous lands; it provide adequate funding for Indigenous language and culture programs to help preserve and revitalize Indigenous languages; it eliminate the discrepancy in federal education funding for First Nations children being educated on reserves and those First Nations children being educated off reserves; and it take measures to eliminate the over-incarceration of Indigenous people, among many others aimed at long term reconciliation and healing. Unfortunately, to date, many of the Calls to Action have not yet been implemented or fully addressed.

¹⁰⁷ “[Reparations Plan](#)”, *National African American Reparations Commission* (NAARC).

¹⁰⁸ “[Truth and Reconciliation Commission of Canada: Calls to Action](#)”, Truth and Reconciliation Commission of Canada (2015).

67. In 2023, following a length litigation process before the Canadian Human Rights Tribunal, the Federal Court of Canada the *First Nations Child and Family Services, Jordan's Principle and Trout Class Settlement Agreement*, providing \$23.3 billion for: (1) children who were removed from their homes under the First Nations Child and Family Services Program between April 1, 1991 and March 31, 2022; (2) First Nations children who were impacted by the government's narrow definition of Jordan's Principle between December 12, 2007 and November 2, 2017; (3) First Nations children who did not receive or were delayed in receiving an essential public service, product or support between April 1, 1991 and December 11, 2007; and (4) First Nations individuals living on-reserve or in the Yukon, while under the age of majority, who were, based on the involvement of a child welfare agency, sent off-reserve by a caregiving parent or caregiving grandparent to stay with a non-family member in a placement not funded by ISC, between April 1, 1991, and March 31, 2022.¹⁰⁹

b. Caribbean and Latin America

68. The Caribbean Community ("CARICOM") Reparations Commission ("CRC") was established in 2013 by the Caribbean Heads of Governments with a mandate to propose reparations for the region's Indigenous and African descendant communities who are the victims of crimes against humanity in the forms of genocide, slavery, slave trading, and racial apartheid.¹¹⁰ The Commission issued a 10-Point Plan for reparations, which includes:

- a. **Full Formal Apology** – Governments of former colonial powers must issue official apologies (not just expressions of regret).
- b. **Indigenous Peoples Development** – Investment in Indigenous communities who were decimated by European colonization.
- c. **Repatriation to Africa** – Programs to help descendants of enslaved Africans return to Africa if they choose.
- d. **Cultural Institutions** – Funding for museums, research centres, and educational programs on Caribbean history and the effects of slavery.
- e. **Public Health Initiatives** – Addressing high rates of chronic disease in the Caribbean, which are linked to colonial-era malnutrition and poor healthcare.

¹⁰⁹ ["Final settlement agreement on Compensation and Agreement-in-Principle for long-term reform of First Nations Child and Family Services and Jordan's Principle"](#), Government of Canada.

¹¹⁰ ["10-Point Reparation Plan"](#), CARICOM Reparations Commission.

- f. **Education** – Funding for education and literacy programs, as colonial education policies left many Caribbean nations with weak education systems.
- g. **African Knowledge Programs** – Incorporating African history and cultural studies into Caribbean school curricula.
- h. **Psychological Rehabilitation** – Programs to heal intergenerational trauma caused by slavery and colonial oppression.
- i. **Technology Transfer** – European nations should help Caribbean countries develop modern industries and economies, as colonialism left them economically dependent.
- j. **Debt Cancellation** – The cancellation of unjust colonial-era debts, which have trapped Caribbean nations in economic hardship. A full formal apology.

C. Transatlantic Slave Trade and Contemporary Forms of Racial Hierarchy

Applicable Questions:

- ii. To what extent can we conclude that the system of chattel slavery, which was unique at the time it was developed in the Americas, constitute a system which violated “general principles of law recognized by civilized nations” in the meaning of Article 38 (1) of the Statute of the International Court of Justice.
- iv. To what extent was anti-Black racism developed as a necessary component of the institution of transatlantic chattel enslavement, and then continued after *de jure* chattel enslavement was ended. What support is there for the conclusion that the contemporary systems of racial hierarchy are the progeny of the system of chattel enslavement.

69. The Transatlantic Slave Trade was carried between 1547 and 1860. Over that period, approximately 12.5 million slaves were brought by ship from Africa, with approximately 10.7 million eventually arriving in the Americas where they experienced extreme brutality, indentured labour, and multiple forms for systemic inequality.¹¹¹

David Eltis, “A Brief Overview of the Trans-Atlantic Slave Trade”, *Slave Voyages* (2007).

70. There is increasing recognition and evidence of the widespread impacts and intergenerational harms associated with gross violations of human rights, including the slave trade.¹¹² At the Durban World Conference on Racism held in 2001, it was recognized that “slavery and the slave trade are a crime against humanity, and should have always been so” and further agreed that “slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity, especially in their negation of the essence of the victims”.¹¹³
71. The Conference also recognized that “colonialism had led to racism and caused suffering and that its consequences persist to this day” and that such “historical injustices have undeniably contributed to poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, particularly in developing countries”.¹¹⁴
72. Examples of ongoing forms of racial inequality, and particularly anti-Black racism, which are rooted in the history of violence and oppression that occurred during the slave trade, include but are not limited to the following instances. These examples are focussed on the U.S. context related to African Americans, however similar social phenomena appear in other countries, such as Canada, which also have a legacy of slavery and colonialism:

a. Discriminatory Laws such as Black Codes and Jim Crow

73. Following the legal the enactment of the Thirteenth Amendment in the United States, which put an end to *de jure* slavery in the U.S., Black Codes were introduced that criminalized actions such as vagrancy, absence from work, breach of job contracts, the possession of firearms, and insulting gestures or acts, when the person charged was Black.¹¹⁵ Mississippi and South Carolina enacted the first Black Codes in 1865. In some states, Black Codes forbade Blacks from owning property and renting land and in others, they imposed exceptional taxes on former

¹¹² See for example, Patricia M. Muhammad, "The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations" (2013) 3:2 Colum J Race & L 147; Stephen Pete & Max du Plessis, "International Law and Reparations for the Atlantic Slave Trade: A Case Study in Legal Obfuscation" (2006) 31 S Afr YB Int'l L 243; 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" (2003) 22 Windsor YB Access Just 41; and Luke Moffett & Katarina Schwarz, "Reparations for the Transatlantic Slave Trade and Historical Enslavement: Linking Past Atrocities with Contemporary Victim Populations" [2018] 36:4 Neth Q Hum Rts 247.

¹¹³ ["Declaration and Programme of Action"](#), World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Violence, United Nations (2001) at 1.

¹¹⁴ *Ibid* at para. 158.

¹¹⁵ Louis H Pollak, "Race, Law & History: The Supreme Court from "Dred Scott" to "Grutter V. Bollinger" (2005) 134:1 Daedalus 29 at 32.

slaves pursuing any occupation other than farmer or servant.¹¹⁶ Former slaves could be legally sentenced to penal servitude as a result of a conviction under the Codes.¹¹⁷ The Codes also forced black women and children to work outside of the home through harsh apprenticeship laws and prohibited collective bargaining.¹¹⁸

74. With their roots in the Black Codes, the Jim Crow laws were a collection of local and state statutes that legalized segregation between whites and Blacks in various forms, and codified other types of anti-Black racism.¹¹⁹ Jim Crow states passed laws that required Blacks and whites to be separated in public transport, schools, churches, libraries, restaurants, cemeteries, hospitals, prisons, elevators, building entrances, phone booths, and at water fountains.¹²⁰ Blacks were also forbidden from attending public parks, amusement parks, roller skating rinks, bowling alleys, swimming pools, and tennis courts, and from living in white neighbourhoods.¹²¹
75. In 1896, the US Supreme Court issued its decision in *Plessy v. Ferguson*,¹²² which determined the validity of Louisiana's Jim Crow statute. In an 8-1 decision, the Court endorsed the system of racial segregation and concluded that segregation rendered the races "separate but equal".

a. Violence Against Black People, including Gender-Based Violence

76. Violence against Black people remains a pervasive form of racial inequity, with deep roots in the legacy of slavery and colonialism. Black communities face disproportionate levels of state violence and gender-based violence, with Black women and 2SLGBTQIA+ individuals facing heightened risks of sexual violence while also receiving less media attention and institutional support.
77. Such violence is a continuation of historical practices like lynching, a form of racial terrorism that enforced white supremacy through public executions, often targeting Black men accused of crimes without evidence and Black women who defied social norms. The Equal Justice Initiative (EJI) documented more than 6,400 Black

¹¹⁶ Ashraf HA Rushdy, *American Lynching* (New Haven: Yale University Press, 2012) at 60.

¹¹⁷ Pollack, *supra* at 29.

¹¹⁸ Rushdy, *supra* at 60.

¹¹⁹ See Lynching in America: Confronting the Legacy of Racial Terror", 3rd ed, *Equal Justice Initiative* (2017) at 25; *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2006; David Pilgrim, "What was Jim Crow?", (2012) Ferris State University Jim Crow Museum; Douglas S Massey, "The Past & Future of American Civil Rights" (2011) 140:2 *Daedalus* 37 at 40; "Segregation in America", *Equal Justice Initiative*, (2018).

¹²⁰ "Segregation in America", *Equal Justice Initiative*, (2018) at 10.

¹²¹ Leon F Litwack, "Jim Crow Blues" (2004) 18:2 *OAH Magazine of History* 7; "Chapter 1: The Plessy Era" in Michael J Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2006 at 8.

¹²² 163 U.S. 537 (1896)

victims of terror lynchings between 1865 and 1950¹²³ Scholars agree that the actual number of lynchings in the United States may be impossible to determine given the thousands of additional victims who may be excluded from the historical record.¹²⁴

78. During the Reconstruction period between 1865 and 1877, thousands of Black people were killed, attacked, sexually assaulted, and terrorized by white mobs and individuals who were shielded from arrest and prosecution. White perpetrators were almost never held accountable and were frequently celebrated.¹²⁵ Many Black people killed during the Reconstruction era were lynched after being accused of a crime and before receiving any trial or fair investigation.¹²⁶
79. EJI documented 4084 racial terror lynchings in twelve Southern states between the end of Reconstruction in 1877 and 1950, and approximately 300 in other states during this time period.¹²⁷ Hundreds of African Americans were lynched for a myriad of activities, including speaking ‘disrespectfully’, refusing to step off the sidewalk, using ‘profane’ language, using an ‘improper’ title for a white person, suing a white man, arguing with a white man, bumping into a white woman, ‘insulting’ a white person, and other social grievances.¹²⁸
80. Tolnay and Beck observe that, after peaking in the 1890s, the annual number of lynchings began to decline, interrupted by intermittent spikes that occurred after World War I and during the resurgence of the Ku Klux Klan in the 1920s.¹²⁹ By the early 1930s, lynching were relatively rare, however they still do occur. In June 2020, a group of UN experts condemned the modern-day racial terror lynchings in US, including the killings of Ahmaud Arbery, Breonna Taylor, and George Floyd, and called on the United States Government to take action to address systemic racism and racial bias in the country’s criminal justice system by launching independent investigations and ensuring accountability in all cases of excessive use of force by police.¹³⁰
81. Furthermore, the legacy of slavery, racism, sexism, and economic oppression continues to influence the lives of contemporary Black women and gender-diverse

¹²³ See “Reconstruction in America: Racial Violence after the Civil War, 1865-1876”, Equal Justice Initiative (2020) at 44; “Lynching in America: Confronting the Legacy of Racial Terror”, 3rd ed, *Equal Justice Initiative* (2017) at 4.

¹²⁴ *Ibid.*

¹²⁵ Lynchings and Racial Violence during Reconstruction 1865-1876, *Equal Justice Initiative*, Video (1:07).

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ EJI, *Lynching in America*, *supra* at 31.

¹²⁹ Stewart E Tolnay and EM Beck, ““Racialized Terrorism” in the American South: Do Completed Lynchings Tell an Accurate Story?” (2018) 42 *Social Science History* 677 at 677-678.

¹³⁰ [“UN experts condemn modern-day racial terror lynchings in US and call for systemic reform and justice”](#), *United Nations Human Rights Office of the High Commissioner* (5 June 2020).

people.¹³¹ While Black and white American women often report similar rates of rape in national high school, college, and community samples, Black women experience sexual violence in a way which is unique to their racial experiences.¹³² West highlights poverty and multiple victimization as two risk factors specific to African American women, noting that that researchers have found disturbingly high rates of rape among impoverished Black women.¹³³ African American girls are also at higher risk of childhood sexual abuse, according to West and Johnson.¹³⁴ They state that 1 in 4 Black girls will be sexually abused before the age of 18 in the United States, which includes extrafamilial childhood sexual abuse perpetrated by strangers, neighbours, and clergy members, and intrafamilial childhood sexual abuse committed by fathers, grandfathers, uncles, and brothers.¹³⁵ West and Johnson note that a history of childhood sexual abuse is also a risk factor for adult sexual revictimization.¹³⁶

82. Finoh and Sankofa observe that when abuse of Black girls, women, and non-binary people occurs, they are less likely to be believed.¹³⁷ A report published by Georgetown Law Center found that “adults view Black girls as less innocent and more adult-like than their white peers.”¹³⁸ Black girls are perceived to be more independent, more knowledgeable about sex, and in less need of protection.¹³⁹

83. Studies also reveal that while African American women are at greater risk of being sexually assaulted, they are less likely to seek out help or press charges against their assailants.¹⁴⁰ Sommerville notes that Black women perceive a lack of community and societal support for Black victims of rape, and, to a large extent, the trends in prosecutions and the comparatively less severe sentences handed down validate that perception.¹⁴¹

b. Criminal Justice Disparities

¹³¹ Carolyn M West, “Sexual Violence in the Lives of African American Women: Risk, Response, and Resilience” (2006) VAWnet: The National Online Resource Center on Violence Against Women 1 at 1.

¹³² West, *supra*, at 3.

¹³³ *Ibid* at 3.

¹³⁴ *Ibid* at 4.

¹³⁵ *Ibid* citing Stone, R. D. (2004). *No secrets, no lies: How Black families can heal from sexual abuse*. New York: Broadway Books.

¹³⁶ *Ibid* at 4.

¹³⁷ Maya Finoh and Jasmine Sankofa, [“The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence”](#) (28 January 2019), *American Civil Liberties Union* (blog).

¹³⁸ Rebecca Epstein, Jamilia J Blake, and Thalia Gonzalez, [“Girlhood Interrupted: The Erasure of Black Girls’ Childhood”](#), *Center on Poverty and Inequality, Georgetown Law* (2017).

¹³⁹ *Ibid*.

¹⁴⁰ Diane Miller Sommerville, “Rape” in Darlene Clark Hine, *Black Women in America*, 2nd ed (Oxford: Oxford University Press, 2005) at 6-7.

¹⁴¹ *Ibid*.

84. The over-policing, mass incarceration, and harsher sentencing of Black people reflects a historical continuum of systems of exploitation. Michelle Alexander has argued that mass incarceration in the United States has emerged as a comprehensive and well-disguised system of racialized social control that functions in a manner similar to the old system of Jim Crow. She states:

Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against criminals in nearly all the ways it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination-employment discrimination, housing discrimination, denial of the right to vote, and exclusion from jury service-are suddenly legal. As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.¹⁴²

85. The United States ranks among the highest worldwide in its dependence on incarceration.¹⁴³ The correctional population rate in the US peaked in 2007 when 7,339,600 men and women were under correctional supervision, including 70% (about 5.1 million) who were supervised in the community on probation or parole and 30% (about 2.3 million) who were held in the custody of prisons or jails.¹⁴⁴ Since 1980, there has been a 500% increase in the nation's prison and jail populations.¹⁴⁵ Between 1972 and 2009, there was a 700% increase in the prison population of the United States.¹⁴⁶

86. Over 5 million people in total are currently under supervision by the criminal legal system, including in prisons, jails, and under community supervision, with people of colour and especially Black men overrepresented in prisons, accounting for nearly 7 in 10 people in prison.¹⁴⁷ Recent estimates find that one in 81 Black adults in the United States is serving time in state prison.¹⁴⁸ As of 2019, more than 1% of Black adults were serving a sentence in state or federal prisons and Black males

¹⁴² Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010) at 2.

¹⁴³ "Mass Incarceration Trends", *The Sentencing Project* (21 May 2024)..

¹⁴⁴ Laura M Maruschak and Todd D Minton, Correctional Populations in the United States, 2017-2018, *Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice* (August 2020) at 1; Bureau of Justice Statistics, News Release, "Growth in the Total Correctional Population during 2008 was the Slowest in Eight Years" (8 December 2009).

¹⁴⁵ "Fact Sheet: Trends in U.S. Corrections", *The Sentencing Project* (August 2020); "Criminal Justice Facts", *The Sentencing Project* (2020)..

¹⁴⁶ Nazgol Ghandnoosh, "U.S. Prison Decline: Insufficient to Undo Mass Incarceration", *The Sentencing Project* (2020) at 1.

¹⁴⁷ "Mass Incarceration Trends", *The Sentencing Project* (21 May 2024)..

¹⁴⁸ Ibid.

ages 18 to 19 were 12 times as likely to be imprisoned as white males of the same ages.¹⁴⁹ Systemic causes range from a history of racial and ethnic subordination to ongoing police tactics that unfairly bring people of colour into the system, including charging and sentencing practices that create stiffer punishments for people of colour.¹⁵⁰

87. Modern day incidents of police brutality in the U.S. are also rooted in legacies of racist police violence, such as the slave patrols that were the original police forces in the American south, and the culture of race and gender-based violence that exists within the structures of policing in America.¹⁵¹ Black and Hispanic people are more likely to have multiple contacts with police than white people, especially in the contexts of traffic and street stops, and Black people are disproportionately subjected to harsh treatment and use of force by police.¹⁵²
88. According to Mapping Police Violence, police kill approximately 1,200 people each year, with 96% of people killed by police in 2024 being killed by police shootings.¹⁵³ The data shows that police disproportionately kill Black people, year after year, and Black people make up the majority of those killed who are unarmed¹⁵⁴
89. Black people make up the majority of those killed who are unarmed. Between 2013 and 2019, 8 of the 100 largest city police departments kill Black males at higher rates than the U.S. murder rate.¹⁵⁵ Police also injure and kill people with disabilities at extremely high rates, including a disproportionate number of disabled Black and Indigenous people.¹⁵⁶
90. Black women and Black trans women are also disproportionately and uniquely targeted by police violence, including sexual violence perpetrated by the police¹⁵⁷

¹⁴⁹ *Ibid* at 16.

¹⁵⁰ *Ibid*.

¹⁵¹ Geoff Ward, *Living Histories of White Supremacist Policing: Towards Transformative Justice* (2018) 15:1 Du Bois Review 167.

¹⁵² USA: The World is Watching – Mass Violations by U.S. Police of Black Lives Matter Protesters' Rights", *Amnesty International* (4 August 2020); "Deadly Force: Police Use of Lethal Force in the United States", *Amnesty International USA* (2015).

¹⁵³ "[Mapping Police Violence](#)" *MappingPoliceViolence.org*.

¹⁵⁴ "[Mapping Police Violence](#)" *MappingPoliceViolence.org*; A Roadmap for Re-Imagining Public Safety in the United State: 14 Recommendations on Policing, Community Investment, and Accountability", *Human Rights Watch* (2020)

¹⁵⁵ "A Roadmap for Re-Imagining Public Safety in the United State: 14 Recommendations on Policing, Community Investment, and Accountability", *Human Rights Watch* (2020), at 7.

¹⁵⁶ "A Roadmap for Re-Imagining Public Safety in the United State: 14 Recommendations on Policing, Community Investment, and Accountability", *Human Rights Watch* (2020), at 7; Dominic Bradley and Sarah Katz, "Sandra Bland, Eric Garner, Freddie Gray: the toll of police violence on disabled Americans", *Guardian* (9 June 2020)

¹⁵⁷ Kimberlé Williams Crenshaw and Andrea J Ritchie, "Say Her Name: Resisting Police Brutality Against Black Women", *African American Policy Forum* (2015); Andrea J Ritchie and Delores Jones-Brown,

According to Crenshaw and Ritchie, Black women, including Black trans women are targets of police brutality similarly to Black men, although their experiences are informed by the intersections of race, gender, gender identity, and sexual orientation.¹⁵⁸ Research shows that Black trans women and gender-nonconforming women are also routinely subjected to transphobic verbal harassment and abuse, unlawful and degrading searches, and dangerous placement in police custody.¹⁵⁹

91. Following the police killing of Michael Brown in 2014, examination of a DOJ study revealed that 88% of all cases in which a Ferguson Police Department officer reported using force between 2010 and August 2014 involved African Americans, even though they comprised only 67% of Ferguson's population.¹⁶⁰ The study further concluded that: "at each point in the enforcement process there is a higher likelihood that an African American will be subjected to harsher treatment" and that "statistical analysis shows that African Americans are...more likely to have force used against them".¹⁶¹
92. A report issued in April 2016 by the Police Accountability Task Force in Chicago concluded that racism was one of the main factors that could explain the pattern of arrests without justification, detentions without legal counsel, and physical and verbal abuse, including deaths and injuries, against African Americans committed by members of the Chicago Police Department.¹⁶²
93. The UN Working Group of Experts on People of African Descent has held that racial profiling is a rampant practice and seriously damages the trust between African Americans and law enforcement officials in the U.S.¹⁶³ It concluded that the media routinely portray African Americans as criminals and this negatively

"Policing Race, Gender, and Sex: A Review of Law Enforcement Policies" (2017) 27 *Women & Criminal Justice* 21; Maya Finoh and Jasmine Sankofa, "The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence" (28 January 2019), American Civil Liberties Union (blog); Sandy E James, Carter Brown, and Isaiah Wilson, "2015 U.S. Transgender Survey: Report on the Experiences of Black Respondents", *National Center for Transgender Equality, Black Trans Advocacy, & National Black Justice Coalition* (September 2017); The Cato Institute's National Police Misconduct Reporting Project, 2010 Annual Report; Matt Sedensky, "AP: Hundreds of officers lose licenses over sex misconduct", *Associated Press* (1 November 2015).

¹⁵⁸ Crenshaw and Ritchie, *supra*, at 1.

¹⁵⁹ Crenshaw and Ritchie, *supra*, at 24.

¹⁶⁰ "Deadly Force: Police Use of Lethal Force in the United States", *Amnesty International USA* (2015) citing US Department of Justice, Civil Rights Division, Investigation of the Ferguson Police Department, 4 March 2015 at p. 5.

¹⁶¹ US Department of Justice, Civil Rights Division, Investigation of the Ferguson Police Department, 4 March 2015, p. 63 and 71.

¹⁶² UN Working Group, *supra*, at 8 citing Police Accountability Task Force, "Recommendations for reform: restoring trust between the Chicago police and the communities they serve", April 2016, p. 8.

¹⁶³ UN Working Group, *supra*, at para 77.

impacts the perception that society in general has of African Americans, eroding trust and leading to fatal consequences.¹⁶⁴

d. Voting Disenfranchisement

94. Voting disenfranchisement of Black Americans remains a persistent barrier to racial equity, rooted in the long history of slavery and segregation. Since shortly after slavery ended, African Americans have been systematically denied their rights in the U.S, including due to Jim Crow laws, poll taxes, literacy tests, and violent intimidation.¹⁶⁵ In the 1890s, Mississippi, South Carolina, and Louisiana all adopted new state constitutions that denied Black people the vote. In 1901, Alabama followed suit and held a constitutional convention “to establish white supremacy in this state.”¹⁶⁶
95. Numerous early Supreme Court decisions also contributed to the denial of voting rights for Black Americans. In 1898, in *Williams v. Mississippi*¹⁶⁷, the Supreme Court upheld Mississippi’s poll tax and other voting qualifications even though the Court acknowledged that such measure were adopted explicitly to disenfranchise African Americans. It held that the provisions on their face were “not limited by their language or effect to one race”.¹⁶⁸ In 1903, in *Giles v. Harris*¹⁶⁹, the Court upheld Alabama’s voting legislation as constitutional even though the scheme refused voter registration to Black men who met all qualifications. The Court concluded there was nothing it could do if Alabama was truly determined to prevent African Americans from voting.¹⁷⁰ Similarly, in 1915, in the case of *Guinn v. United States*,¹⁷¹ the Court upheld the use of literacy tests and poll taxes and prerequisites for voting, even though such tactics were known to effectively deny voting rights to African Americans.¹⁷²
96. Felony disenfranchisement, which is the practice of stripping voting rights from people with criminal convictions, is another aspect of racial exclusion that disproportionately impacts Black Americans, and especially Black men.¹⁷³ Recent data suggests that four million Americans were unable to vote in the 2024 election

¹⁶⁴ *Ibid.*

¹⁶⁵ See for example “The Impact of Voter Suppression on Communities of Color”, *Brennan Centre for Justice* 10 January 2022).

¹⁶⁶ EJI, Segregation, *supra*, at 10.

¹⁶⁷ 170 U.S. 213, 225 (1898).

¹⁶⁸ EJI, Segregation, *supra*, at 17-18 citing 170 U.S. 213 (1898) at 225.

¹⁶⁹ 189 U.S. 475 (1903).

¹⁷⁰ *Ibid* at 487-488.

¹⁷¹ 238 U.S. 347 (1915).

¹⁷² *Ibid.*

¹⁷³ Christopher Uggen et al., “Locked Out 2024: Estimates of People Denied Voting Rights Due to a Felony Conviction”, *The Sentencing Project* (30 October 2024).

due to felony disenfranchisement laws.¹⁷⁴ The research concluded that one in 22 African Americans of voting age is disenfranchised, a rate more than three times that of non-African Americans, and that more than 10% of African American citizens are barred from voting in Arizona, Florida, Kentucky, South Dakota, and Tennessee.¹⁷⁵ In another 15 states, 5% or more of the African American adult population is banned from voting due to a felony conviction.¹⁷⁶

e. Racial Wealth Gap

97. Poverty and access to wealth intersects profoundly with race in the U.S and the racial wealth gap is a reflection of centuries of systemic racism against African Americans. More than 20% of Black Americans live in poverty, which is twice the rate of white people, and the median Black household wealth is just one-tenth that of white households.¹⁷⁷ Data from the 2019 Survey of Consumer Finances show the typical White family has eight times the wealth of the typical Black family.¹⁷⁸ Wealth was defined as the difference between families' gross assets and their liabilities and they observed patterns at the median (the typical household within each group) and at the mean (the average among households in each group).¹⁷⁹ The median young Black family has almost no wealth (\$600) compared to the median young white family, which has a wealth of \$25,400.¹⁸⁰ The gaps in median wealth between white and non-white families widen considerably at older ages.¹⁸¹
98. While there are numerous factors that contribute to the racial wealth gap, inheritances, family transfers, and gifts of money accounts for more of the racial wealth gap than any other indicator.¹⁸² Dhutta et al. observe that among young

¹⁷⁴ Christopher Uggen et al., "Locked Out 2024: Estimates of People Denied Voting Rights Due to a Felony Conviction", *The Sentencing Project* (30 October 2024); "New Sentencing Project Report Reveals 4 Million Americans Denied Voting Rights Due to Felony Convictions", *The Sentencing Project* (10 October 2024).

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ "Revoked: How Probation and Parole Feed Mass Incarceration in the United States", *Human Rights Watch and the American Civil Liberties Union* (2020) ; "Not in it for Justice: How California's Pretrial Detention and Bail System Unfairly Punishes Poor People", *Human Rights Watch* (April 2017).

¹⁷⁸ Neil Bhutta et al, "Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances", *FEDS Notes, Board of Governors of the Federal Reserve System* (28 September 2020).

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² See William Darity Jr., "What We Got Wrong About Closing the Racial Wealth Gap", *Samuel DuBois Cook Center on Social Equity and Insight Center for Community Economic Development* (April 2018); Neil Bhutta et al, "Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances", *FEDS Notes, Board of Governors of the Federal Reserve System* (28 September 2020); Kriston McIntosh et al, "Examining the Black-white wealth gap", *Brookings Institute* (27 February 2020); Nikole Hannah-Jones, "What Is Owed: It's Time for Reparations", *New York Times Magazine* (30 June 2020); Nick Noel et al, "The Economic Impact of Closing the Racial Wealth Gap", *McKinsey & Company* (August 2019).

families, about 46% of white families own their home, compared to just 17% of Black families. They note that this gap may partially reflect differences in parental wealth, as previous research has found that Black families are far less likely to receive down payment assistance from their parents, delaying transitions into homeownership.¹⁸³

99. The wealth gap also contributes to poverty in older age. In all age groups, Black and Hispanic families are far less likely to have pensions and retirement accounts.¹⁸⁴ Dhutta et al observe that among middle-aged families, which are those with the highest rates of account ownership, 65% of white families have at least one retirement account compared to 44% of Black families and 28% of Hispanic families.¹⁸⁵

f. Housing Discrimination

100. African Americans have long faced systemic discrimination in housing through practices like redlining, restrictive covenants, and unequal access to mortgages, resulting in lasting racial disparities in homeownership and wealth. Redlining, a practice institutionalized in the 1930s by the U.S. government's Home Owners' Loan Corporation (HOLC), systematically denied mortgages and insurance to Black families and other people of colour by marking their neighbourhoods as "high-risk" on colour-coded maps.¹⁸⁶ This forced Black Americans into overcrowded and poorly maintained areas while white families accessed government-backed loans to buy homes in more desirable, segregated suburbs.¹⁸⁷
101. Banks, real estate agents, and landlords reinforced this discrimination through restrictive covenants, which were lists of obligations that purchasers of property had to assume which were then included in individual home deeds as well as pacts among neighbours that prohibited future resales to African Americans.¹⁸⁸ These covenants served to deny Black families the chance to build equity and generational wealth.

¹⁸³ Dhutta, *supra*.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Amy E. Hillier, "Redlining and the Home Owners' Loan Corporation" (2003) 29:4 J of Urban History 394 at 395; Daniel Aronson, Daniel Hartley, and Bhashkar Maumder, "The Effects of the 1930s HOLC "Redlining" Maps" (August 2020) Federal Reserve Bank of Chicago Working Paper WP 2017-12 at 5.

¹⁸⁷ *Ibid.*

¹⁸⁸ Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright Publishing Corporation, 2017) at 77.

102. Even after the *Fair Housing Act* of 1968 outlawed explicit housing discrimination, the lasting effects of redlining persisted.¹⁸⁹ Black neighbourhoods often face lower property values, underfunded schools, and limited access to essential services, while discriminatory lending practices, unequal appraisals, and gentrification continue to disadvantage Black homebuyers and renters today, a legacy which also contributes to the racial wealth gap.¹⁹⁰ Numerous reports have confirmed that African Americans and Latinos continue to be routinely denied conventional mortgage loans at rates far higher than their white counterparts.¹⁹¹
103. The National Community Reinvestment Coalition (NCRC) conducted a study to examine how redlined neighbourhoods compared in terms of recent social and economic conditions with city-level measures of segregation and economic inequality.¹⁹² The results revealed persistent pattern of both economic and racial residential exclusion.¹⁹³ The authors concluded that redlining buttressed the segregated structure of American cities; that most of the HOLC-graded “hazardous” areas are now minority neighbourhoods associated with “hyper-segregation and are low-to-moderate income today; and that there is significantly greater economic inequality in cities where more areas were graded high-risk or “Hazardous”.¹⁹⁴
104. Rothstein and others have also observed that Black communities have been disproportionately built near commercial waste treatment facilities and uncontrolled hazardous waste sites.¹⁹⁵ For example, a 2017 report from the N.A.A.C.P. and the Clean Air Task Force showed that African Americans are 75% more likely than other Americans to live in so-called fence-line communities, defined as areas situated near facilities that produce hazardous waste.¹⁹⁶ A 2018

¹⁸⁹ Bruce Mitchell and Juan Franco, “HOLC “Redlining” Maps: The persistent structure of segregation and economic inequality”, *National Community Reinvestment Coalition* (20 March 2018).

¹⁹⁰ *Ibid.*

¹⁹¹ See Charles M Lamb et al, “HMDA, Housing Segregation, and Racial Disparities in Mortgage Lending” (2016) 12:2 *Stanford J of Civil Rights & Civil Liberties* 249; Aaron Glantz and Emmanuel Martinez, “Keep Out: For people of color, banks are shutting the door to home ownership”, *Reveal News* (15 February 2018).

¹⁹² Bruce Mitchell and Juan Franco, “HOLC “Redlining” Maps: The persistent structure of segregation and economic inequality”, *National Community Reinvestment Coalition* (20 March 2018).

¹⁹³ *Ibid* at 5.

¹⁹⁴ Mitchell and Franco, *supra*, at 4.

¹⁹⁵ Rothstein, *supra*, at 54.

¹⁹⁶ Lesley Fleischman and Marcus Franklin, “Fumes Across the Fence-Line”, *Clean Air Task Force (CATF) & National Association for the Advancement of Colored People (NAACP)* (November 2017), online: <https://www.naacp.org/climate-justice-resources/fumes-across-fence-line/>; See also Linda Villarosa, “Pollution is Killing Black Americans. This Community Fought Back”, *The New York Times Magazine* (28 June 2020), online: <https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html>.

study by the Environmental Protection Agency (EPA) found that people of colour are much more likely to live near polluters and breathe polluted air.¹⁹⁷

105. A 2020 study by Hoffman et al explored the relationship between historic redlining practices and present-day summertime intra-urban land surface temperature anomalies.¹⁹⁸ The results revealed that 94% of the studied areas displayed patterns of elevated land surface temperatures in formerly redlined areas relative to non-redlined areas, and by as much as 7 degrees Celsius.¹⁹⁹ It found that nationally, land surface temperatures in redlined areas are ~2.6 degrees Celsius warmer than in non-redlined areas.²⁰⁰

106. A 2020 study by the NCRC also found that redlined areas are linked to significant health disparities, including increased vulnerability to COVID-19.²⁰¹ The study revealed that historically redlined neighbourhoods are associated with worse health outcomes, including poorer rates of mental health, lower life expectancy at birth, and higher prevalence of chronic health conditions like asthma, COPD, diabetes, hypertension, high cholesterol, kidney disease, obesity, and stroke — all of which increase the risk of severe illness from COVID-19.²⁰² On average, life expectancy in redlined neighborhoods is 3.6 years lower than in neighbourhoods that were graded as “best” by the HOLC, highlighting the lasting public health consequences of discriminatory housing policies.²⁰³

D. Reparations for the Transatlantic Slave Trade in International Law

107. While the Transatlantic Slave Trade is widely recognized as a great moral wrong with wide ranging lasting impacts, the wealth of research I have reviewed

¹⁹⁷ Ihab Mikati et al, “Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status” (2018) 108:4 American J of Public Health 480. See also Vann R. Newkirk II, “Trump’s EPA Concludes Environmental Racism Is Real”, *The Atlantic* (28 February 2018), online: <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/>.

¹⁹⁸ Jeremy Hoffman, Vivek Shandas, and Nicholas Pendleton, “The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas” (2020) 8:12 Climate 1. See also, Brad Plumer and Nadja Popovich, “How Decades of Racist Housing Policy Left Neighborhoods Sweltering”, *The New York Times* (24 August 2020), online: <https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html> and Brad Plumer, Nadja Popovich, and Marion Renault, “How Racist Urban Planning Left Some Neighborhoods to Swelter”, *The New York Times* (26 August 2020), online: <https://www.nytimes.com/2020/08/26/climate/racist-urban-planning.html>.

¹⁹⁹ Jeremy Hoffman, Vivek Shandas, and Nicholas Pendleton, *supra* at 1.

²⁰⁰ *Ibid.*

²⁰¹ Jason Richardson et al, “The Lasting Impact of Historic “Redlining” on Neighborhood Health: Higher Prevalence of COVID-19 Risk Factors”, *National Community Reinvestment Coalition* (2020).

²⁰² *Ibid.*

²⁰³ *Ibid.*

suggests there are significant barriers to proving a legal claim for reparations stemming from slavery under international law. Because judicial mechanisms deal primarily with individual reparations and have barriers in relation to retroactivity, attribution of responsibility, and causation, such legal claims are unlikely to be successful.²⁰⁴ The research suggests that, instead, a collective approach to reparations, established through political negotiations and emphasizing 'satisfaction' as the key form of reparations, is likely to be a more realistic and appropriate avenue for seeking reparations related to the slave trade.²⁰⁵

108. As discussed above, the law of state responsibility is concerned with breaches of illegal acts in international law and a state's obligation to make reparations for such acts in adequate form.²⁰⁶ The law on state responsibility is clear that lawfulness of an act in international law must be established on the basis of obligations in force at the time when the act was performed.²⁰⁷
109. Article 13 of the ILC Articles on State Responsibility states that "an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs".²⁰⁸ Accordingly, international law enshrines as a fundamental principle the doctrine of inter-temporal law, which holds that the legality of an act must be assessed based on the laws in place when it occurred.²⁰⁹
110. Claimants for reparations would have to show that the conduct complained of was unlawful at the time it was committed, which will be a difficult bar to meet as slavery was not universally prohibited under international law during the slave trade.²¹⁰ Current conceptions of the prohibition of slavery suggest that international laws banning slavery did not come into existence until 1926, with the introduction of the Slavery Convention which defined slavery as "the status or condition of a person over whom any or all of the powers attaching the right of ownership are exercised".²¹¹ The Universal Declaration of Human Rights of 1948, although not

²⁰⁴ See for example, 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" (2003) 22 Windsor YB Access Just 41 and Luke Moffett and Katarina Schwarz, "Reparations for the Transatlantic Slave Trade and Historical Enslavement: Linking Past Atrocities with Contemporary Victim Populations" [2018] 36:4 Neth Q Hum Rts 247.

²⁰⁵ *Ibid.*

²⁰⁶ Chorzow, *supra*.

²⁰⁷ du Plessis, *supra* at 47.

²⁰⁸ ILC Articles, *supra* at Art 13.

²⁰⁹ Moffet and Schwarz, *supra* at 253.

²¹⁰ du Plessis, *supra* at 45-46.

²¹¹ *Slavery Convention* (1926), League of Nations Treaty Series, vol. 60, 253; Moffet and Schwarz, *supra* at 253.

legally binding, also stated at Art. 4 that “no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms”.²¹²

111. Du Plessis observes that while by today’s standards, the transatlantic slave trade would undoubtedly amount to a crime against humanity and a clear moral injustice, that the “principles of morality are not by themselves a sufficient condition for the emergence of an international law rule - there must be evidence of a wide State practice before a rule crystallises”.²¹³ Accordingly, he rejects the possible argument that the prohibition against slavery has attained the force of a *jus cogens* norm in contemporary international law such that there is some form of retrospective responsibility for the states who perpetrated slavery in the past.²¹⁴
112. Any legal claim for reparations would require the attribution of responsibility for wrongful acts to a legal entity or person.²¹⁵ According to du Plessis, this presents an additional hurdle, as it would require proving in relation to the doctrine of state responsibility that present-day Western States are responsible for slavery that was practised many years ago, and require overcoming difficulties related to state succession, continuity, and identity.²¹⁶
113. Beyond this, there remain serious challenges in finding sufficient evidence of a causal nexus between contemporary harms and suffering and historical wrongs to satisfy judicial requirements.²¹⁷ The nature of causation relies on the foundational principle in private, criminal, and international law that for a victim to receive redress through judicial mechanisms, the harm must stem from a wrongful act or crime committed by the party being held accountable.²¹⁸ That is, causation requires a direct connection between the wrongs in question and the damages suffered as a result of the wrong in question.
114. It also requires an assessment of remoteness, with the consequences of the act being sufficiently foreseeable and proximate in order to attract legal liability.²¹⁹ Only where the consequences are sufficiently causally connected and proximate to the illegal acts in question will it arise to the standard of a compensable harm.²²⁰

²¹² Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) at Art 4.

²¹³ du Plessis, *supra* at 48

²¹⁴ *Ibid* at 49. See also Moffet and Schwarz, *supra* at 254.

²¹⁵ Moffet and Schwarz, *supra* at 257.

²¹⁶ du Plessis, *supra* at 48.

²¹⁷ *Ibid* at 255.

²¹⁸ *Ibid*.

²¹⁹ *Ibid* at 256.

²²⁰ *Ibid*.

115. According to Moffet and Schwarz, the intergenerational nature of claims tied to historical injustices such as slavey weakens the foundation for a legal claim for reparations as it is increasingly difficult over time to establish a clear, direct link between the suffering of present-day descendants and the original wrongdoing.²²¹ Courts often limit reparations to direct victims or their immediate descendants, which complicates claims based on centuries-old harms. Furthermore, with the passage of time and intervening acts such as apartheid, colonialism, Black Codes, segregation, and other discriminatory systems, it may be more difficult to establish a direct causal connection given the break in the chain of causation between the perpetrator's wrongdoing and the victims' harm.²²²
116. Judicial systems typically prioritize the claims of direct victims and their immediate family members but rarely extend recognition beyond this.²²³ Moffet and Schwarz observe that this focus on the individual rights can undermine the gravity of harms that target groups, communities, or populations and in doing so, legal proceedings that individualize victims may ignore or exclude collective suffering and atrocities committed on a large scale.
117. Muhammad and du Plessis both observe that there are also significant barriers in bringing legal claims for reparations for the slave trade in domestic courts, including but not limited to rules on standing, time limits, and separation of powers.²²⁴ In the United States, for example, African Americans' legal attempts to claim compensation from the present-day US government for the acts of slavery have been denied. In *Cato v United States*²²⁵, the plaintiffs sued the United States for damages for past and present injustices related to ancestral slavery and racial discrimination. The claims sought both monetary damages and official recognition of the harm inflicted on African Americans. The Court dismissed the claim for lack of an arguable basis in law, lack of causation, and lack of standing. It found that the U.S. government, as a sovereign entity, is immune from lawsuits unless it explicitly consents to be sued.
118. One possible approach to overcome this barrier is through a domestic claim for unjust enrichment, arguing that the unpaid labour of enslaved individuals forms the basis for the action. Moffet and Schwarz observe that in civil cases, personal claims can typically only be brought against an individual, and therefore bar claims

²²¹ *Ibid* at 251.

²²² *Ibid* at 257.

²²³ *Ibid*.

²²⁴ Patricia M. Muhammad, "The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations" (2013) 3:2 Colum J Race & L 147 at 166 and 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" (2003) 22 Windsor YB Access Just 41. See also Moffet and Schwarz, *supra* at 253.

²²⁵ 70 F.3d 1103 (9th Cir. 1995).

based on individual wrongdoing in relation to slavery, as no living perpetrators remain.²²⁶ Actions against property or assets can be transferred to others beyond the original wrongdoer, however they note that these claims also face significant challenges when applied to enslavement because the core rights being pursued stem from harms committed against people, not property.²²⁷ This strategy involves creating a constructive trust, treating the value of the unpaid labour as an identifiable asset, and extending the associated obligations to the heirs or successors who inherited wealth derived from that exploitation.²²⁸

119. Klimchuk assesses the possibility of unjust enrichment and reparations for slavery, and states that while there are procedural and substantive hurdles, two possible avenues for such claims are labour claims, which would seek to recover the market value of enslaved people's unpaid labour, and profit claims, which would seek to recover the profits made by companies from that labour.²²⁹ Klimchuk argues that unjust enrichment claims focus not on the slaveholders' wrongdoing, but on the fact that wealth generated from enslaved labour was transferred without consent and remains unjustly retained today, which may overcome some of the hurdles identified above related to state responsibility claims. He further argues that unjust enrichment claims are uniquely suited to address intergenerational harms because, unlike tort claims that focus on past wrongdoing, unjust enrichment focuses on the present, including whether the wealth derived from slavery is still unjustly held. This potentially can help descendants of enslaved people establish standing, not based on their ancestors' victimization, but on the ongoing, unjust retention of benefits derived from that oppression.²³⁰

That said, Moffet and Schwarz observe that holding companies that facilitated the transportation of individuals into slavery accountable presents significant legal challenges because many of the companies have ceased to exist, changed ownership, or merged with other corporations over time, complicating efforts to establish direct responsibility.²³¹

120. In light of the above challenges, du Plessis and Moffet and Schwarz identify political settlements as the most appropriate avenue for remedial relief to recognize the harm caused and make symbolic reparations. They note that political reparations processes focussed on transformative justice (such as the CARICOM reparations commission) can foster meaningful change for victims within their

²²⁶ Moffet and Schwarz, *supra* at 257.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ Dennis Klimchuk, "Unjust Enrichment and Reparations for Slavery" (2004) 84:5 BU L Rev 1257.

²³⁰ *Ibid.*

²³¹ *Ibid* at 258.

specific social and political contexts, and often in ways that legal reparations are less equipped to accomplish.²³²

121. Such processes would likely be limited in the types and scale of reparations it would provide.²³³ For instance, restitution as a form of reparation would have limited application in the slavery context as it would be impossible to return victims to the positions that they would have been in but for the wrongdoing.²³⁴ Further, as Moffet and Schwarz observe, restoring an individual's personal and property rights to the state they were in before the violation would overlook the deeper structural causes of victimization, marginalization, and discrimination.²³⁵
122. Similarly, compensation presents the most difficulties as a form of reparation is likely the most politically controversial as it would likely be extremely difficult to quantify the economic, cultural, social, and psychological damages owing to an individual subject to the slave trade, and their descendants.²³⁶
123. Political settlements drawing on transitional justice experiences and various forms of reparation, including those associated with satisfaction, are therefore likely to be more appropriate in providing redress.²³⁷ Moffet and Schwarz argue that acknowledgement of wrongdoing is vital to the success of a reparations program, and meaningful apologies are an integral aspect of such recognition.²³⁸ In their view, collective reparations, such as the model of reparations proposed by CARICOM (discussed above), are designed to address the harm experienced by a group, community, or people and they target various modalities of reparations to respond to the contemporary consequences of transatlantic enslavement.²³⁹
124. As structural measures premised upon the legacies of enslavement rather than individual connections to enslaved persons, the CARICOM claim is collective in nature. Collective reparations are remedial measures aimed at responding to the harm suffered by a group, community or people and providing 'shared benefits' to the victim population that reflect the collective harm shared by the group.

²³² Moffet and Schwarz, *supra* at 261.

²³³ Moffet and Schwarz, *supra* at 253.

²³⁴ *Ibid* at 250.

²³⁵ *Ibid*.

²³⁶ du Plessis, *supra* at 62.

²³⁷ Moffet and Schwarz, *supra* at 249.

²³⁸ *Ibid*. See also du Plessis, *supra* at 67.

²³⁹ *Ibid* at 249.