

THE TRANS-ATLANTIC SLAVE TRADE: A LEGACY ESTABLISHING A CASE FOR INTERNATIONAL REPARATIONS

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This Article examines the legal principle of restitution (reparations) as applied to crimes against humanity that were committed as a result of the Trans-Atlantic Slave trade, as enumerated in international conventions and statutes. The Trans-Atlantic Slave trade's peculiar attractiveness to Western nation-states that implemented the institution placed a long-term social, mental, and economic hindrance upon the displaced descendants of its victims.¹ This Article also discusses possible legal theories upon which the atrocities of the Trans-Atlantic Slave Trade may be adjudicated in an international criminal tribunal, thus establishing a case for international reparations, as well as legal obstacles to such cases. The crimes committed throughout the history of the Trans-Atlantic Slave Trade warrant a legal remedy in the form of international reparations. The award of reparations serves as an introductory measure toward compensating the descendants of the victims of the slave trade, who continue to suffer under its vestiges and are still deprived of their basic civil liberties and human rights throughout the international community.

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¹ See Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 633 (1993) (“The reparationist would argue that these spiritual injuries—the pain and suffering of slavery—have had a significant and lasting impact on the African-American community.”).

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I. INTRODUCTION

In the realm of international jurisprudence, the Trans-Atlantic Slave Trade—a crime against humanity²—has been one of the most disregarded atrocities. Millions of Africans were enslaved, tortured, kidnapped, and murdered, both in the name of God and in the name of greed.³ This gruesome legal enterprise calls for international justice, as the perpetrators of these unanswered international criminal offenses have ignored the fettered cries that echo in the bleak darkness of injustice.⁴

Until the international community addresses the vestiges of disenfranchisement which remain interwoven in the garb of its societies, a new dialogue in world history will not be achieved. Thus, the

² As defined by international law. See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7218, at 40 (Nov. 26, 1968) (citing resolutions “which expressly condemned as crimes against humanity the violation of the economic and political rights of the indigenous population on the one hand and the policies of *apartheid* on the other”); World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, S. Afr., Aug. 31–Sept. 8, 2001, *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, U.N. Doc. A/CONF.189/12. See also Loi 2001-434 du 21 mai 2001 tendant à la reconnaissance des traites et des esclavages comme crime contre l’humanité (May 21, 2001), available at <http://www.senat.fr/leg/tas00-087.html> (“The French Republic recognizes both the transatlantic and Indian Ocean Negro slave trade, on the one hand, and slavery itself, on the other, that were practiced from the fifteenth century, in the Americas, the Caribbean, the Indian Ocean, and Europe against African, Amerindian, Malagasy and Indian populations, as constituting crimes against humanity.”); 570 PARL. DEB., H.L. (5th ser.) (1996) 14 (U.K.), available at http://hansard.millbanksystems.com/lords/1996/mar/14/slavery-legacy#S5LV0570P0_19960314_HOL_214 [hereinafter Lord Gifford Debate]. See generally Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT’L L. REV. 883 (2004) (discussing the history and illegality of the Trans-Atlantic Slave Trade).

³ HUGH THOMAS, *THE SLAVE TRADE: THE HISTORY OF THE ATLANTIC SLAVE TRADE* 147 (1997) (“[A] Jesuit, Frei Miguel García, who, arriving in Brazil about 1580, and being among the earliest members of the order to reach that dominion, was horrified to find that his society owned Africans, who as he thought, had been illegally enslaved. He decided to refuse to hear confession from anyone who owned African slaves.”).

From 1444 onwards Zurara’s history mentions in every chapter kidnappings of more and more Africans by Portuguese captains in ever more southern latitudes Sometimes the captures were easy but sometimes Zurara said “our men had very great toil in the capture of those who were swimming, for they dived like cormorants, so that they could not get hold of them; and the capture of the second man caused them to lose all the others. For he was so valiant that two men, strong, as they were, could not drag him into the boat until they took a boathook and caught him above the eye, and the pain of this made him abate his courage, and allow himself to be put inside the boat.”

Id. at 56–57.

The stern Puritanism of early days endeavored to carry this out literally. Consequently, around 1640 when a certain Captain Smith attacked an African village and brought some of the unoffending natives home, he was promptly arrested. Eventually, the General Court ordered the Negroes sent home at the colony’s expense, “concerning themselves bound by first opportunity to bear witness against haynos & crying sinn of manstealing as also future as may sufficiently deterr all oth’s belonging to us to have to do in such vile & odios courses, justly abhorred of all good & just men.” W.E.B. DUBOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638–1870*, at 30 (1970) (“Reverend Richard Saltonstall, who in 1645 denounced not only the murder of certain black slaves who were said to have been brought to New England from Africa, but also ‘the act of stealing negers, or of taking them by force . . . on the Sabbath Day,’ as being ‘contrary to the law of God and of this country.’”).

⁴ See ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 284 (2000) (“[S]lavery has remained the most glaring example of an unaddressed historical injustice in the United States.”).

issue of international reparations for the Trans-Atlantic Slave Trade requires a multi-dimensional legal approach. The history of common law jurisprudence, both internationally and domestically, significantly relies on two basic concepts: for every crime committed, a punishment is meted, and that for each successful civil cause of action, compensation is awarded.⁵ Based on this premise, the Trans-Atlantic Slave trade, an international criminal offense, warrants legal restitution. Additionally, this Article concentrates on the vestiges and effects of the Trans-Atlantic Slave Trade on its *displaced* descendants, as well as legal causes of action, applicable international statutes, and other legal arguments warranting international reparations.⁶ Part I of this article briefly introduces the Trans-Atlantic Slave Trade as a crime against humanity and the need for international redress.

Part II analyzes the legal concept of reparations in modern history. A few pivotal movements resulting in restitution for historical injustices are: the Civil War era and declared awards of reparations to newly freed slaves, both those who fought in battle alongside white soldiers in the Civil War, and those who were in forced bondage on the plantations of their captors; Native Americans for loss of land and deprivation of civil liberties; the Jews of the Holocaust and its survivors; Japanese Americans who survived the internment camps in America; and the Waikato people of New Zealand. Each of these movements began with human suffering and ended with individuals seeking restitution through civil suits, resulting in a heightened momentum which garnered local, national and, in some instances, international attention. As a result, some national governments began to officially acknowledge aspects of their undisputed history and create funds to provide restitution for these historic wrongs. These historic instances of restitution provide ample legal precedent supporting the idea that survivors of crimes against humanity and their descendants can petition their respective governments as well as the international community for redress.

Part II then addresses the difficulty of attaching a monetary value to human life and human suffering. Many people believe that financial compensation can never be sufficient restitution for inhumane treatment and long-term injustices. However, restitution does provide some level of relief to those segments of the population who have been affected by these historical atrocities. Restitution, whether financial, social, or related to infrastructure, can foment a societal discourse of inclusiveness and fairness.

⁵ See Dinah Shelton, *The World of Atonement Reparations for Historical Injustices*, 1 MISKOLC J. OF INT'L L. 259, 275 (2004) (“[R]eparations are owed for every breach of an international obligation due to an act or omission attributable to the state.”).

⁶ Verdun, *supra* note 1, at 639 (“Displaced descendants of the slave trade diaspora include black/Native Americans, Afro-Caribbeans in European nations, Jamaicans and other African descendants in the West Indies, Native Americans, Latinos, Chicanos, and Mexicans. The author uses this identification because many black/Native Americans historically identify solely with Africans, when it is documented that so-called “African-Americans” are of Native American, African and European bloodlines. At the end of the Civil War, many were optimistic about the future of African Americans. Perhaps the most idyllic prophecy came from a great orator in 1866: ‘My strongest conviction as to the future of the Negro therefore is, that he will not be expatriated nor annihilated, nor will he forever remain a separate and distinct race from the people around him, but that he will be absorbed, assimilated, and will only appear finally, as the Phoenicians now appear on the shores of the Shannon, in the features of a blended race.’”). A majority of the people of the West Indies are descendants of black Africans who were brought to the islands as slaves to work on sugar cane plantations. Most of the rest are of mixed black and European ancestry, or have British, Dutch, French, Portuguese or Spanish ancestry. The focus on these displaced descendants of African slaves is due to the fact that the enslaved Africans and their descendants lost nearly every aspect of their origin—from their homeland, their language, and their original culture, to their history. This loss forced the creation of new sub-cultures that became a new source of strength and identity, but also imposed a legacy of hardship and racial discrimination under which they continue to suffer. *Id.* (discussing the debate over how slavery affected the formation of modern African American culture); *id.* at 600 (noting the development of a unique African American consciousness). See also A.C. Res. 270, 212th Leg. (N.J. 2007), available at http://www.njleg.state.nj.us/2006/bills/acr/270_i1.pdf.

Part II finally provides a brief analysis of discrimination against minorities in the countries that were the primary proponents and beneficiaries of the Trans-Atlantic Slave Trade. This includes discrimination in education, employment, housing and the criminal justice system. This section supports the proposition that the Trans-Atlantic Slave Trade and its legacy profoundly impacted survivors and their progeny in nearly every facet of life.

Part III considers the valid legal theories available to potential claimants who seek redress for the offenses of the Trans-Atlantic Slave trade, as well as the legal obstacles they might face in these cases. This section discusses the notion of an International Tribunal to adjudicate the crimes against humanity—*de jure* slavery and racial discrimination—stemming from the Trans-Atlantic Slave trade. The section concludes that the proposed Tribunal is the best integrated forum for these legal issues. This is because the Trans-Atlantic Slave Trade was an intricate enterprise which involved several countries, and current civil legal systems, including the American federal courts, are insufficient to adjudicate such claims, which include issues of the jurisdiction of nation-states. This section also notes that potential litigants for restitution must overcome universal legal principles such as retroactivity and statutes of limitations in order to file viable claims. Part III also presents legal strategies that prospective claimants may use in the proposed tribunal to achieve a favorable outcome. Lastly, this section discusses arguments that individuals and governments might present to oppose reparations for the Trans-Atlantic Slave trade.

Part IV explores additional legal considerations, such as attaining jurisdiction of those nation-states that committed these crimes against humanity. This section also analyzes the difficulty of establishing the identities of the recipients of damages, the identities of those who have a legal duty to compensate the victims' descendants, and the difficulty of ascertaining an objective standard for an impartial international criminal tribunal. Part V ultimately concludes that, despite the obstacles that remain, the Trans-Atlantic Slave trade, slavery and the legacy of racial discrimination warrant restitution, and the international community has the ability to evolve and provide redress for these historical injustices.

II. LEGAL HISTORY OF REPARATIONS

The historic role of reparations in international affairs demonstrates that it has not become an obsolete legal doctrine. Lord Gifford of the House of Lords of Great Britain once stated, "The concept that reparations are payable where a crime against humanity has been committed by one people against another is well established in international law and practice."⁷ It is this principle that is the basis for descendants' of the African diaspora's legal quest for reparations for the crimes against humanity that advanced the Trans-Atlantic Slave Trade and slavery.

A. Legal Concept of Reparations & Trends in the 19TH–20TH Centuries

⁷ JOHN THORNTON, *AFRICA AND AFRICANS AND THE MAKING OF THE ATLANTIC WORLD, 1400–1800*, at 378 (1998). Historians and sociologists study the Trans-Atlantic Slave trade primarily as a sequence of past events that occurred as nation-states abolished the institution. Poets and laymen mocked those who traded in slaves for pecuniary gain, and momentum built over centuries in individual nations to abolish it, leading to an international trend. However, sociologists rarely simultaneously analyze the slave trade and reparations in a multi-dimensional manner to include social implication, financial motivations and legal redress. *See id.* at 1–13.

“Reparations” is defined as a type of compensation used to redress an injury or some other type of injustice.⁸ Based on this premise, reparations may be an award of financial damages to the aggrieved party, punishment for the perpetrator of the heinous acts, or both.

The term “restitution” is a broader concept, in which the compensation actually restores the victim to the original state in which he or she was before the injury or offense occurred.⁹ These legal terms will be used interchangeably in light of this article’s focus on compensating both the victims of egregious crimes against humanity and their descendants and the prevailing notion that no amount of money can ever replace human life or alter the years lost¹⁰ to the legal implementation of those crimes and their current effects.¹¹

1. Native Americans in the United States

In addition to Black Americans, Native Americans endured crimes against humanity committed by Western powers. The acts perpetrated by Westerners include, but are not limited to: the exploitation of Native Americans’ generosity,¹² their successful endeavors to commit genocide against the indigenous population,¹³ the enslavement of Native Americans, and the seizure of Native American land in the name of freedom from the British.¹⁴ Native Americans were also victims of the Trans-Atlantic Slave trade, of which the primary advocates were Portuguese and Spanish explorers during the initial stages of the trade’s development in the fifteenth and sixteenth centuries.¹⁵ However, the Europeans discovered

⁸ See David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1043 (2010) (“Reparations traditionally are understood as material or symbolic awards to victims of an abusive regime granted outside of a legal process.”); see also Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims’ Reparations*, 29 T. JEFFERSON L. REV. 189, 189 (2007) (“According to the ICC, reparations are aimed at ‘relieving the suffering and affording justice to victims not only through the conviction of the perpetrator by this Court, but also by attempting to redress the consequences of genocide, crimes against humanity and war crimes’”) (alteration in original).

⁹ BLACK’S LAW DICTIONARY 910 (6th ed. 1991) (“An equitable remedy under which a person is restored to his or her original position prior to loss or injury or placed in the position he or she would have been had the breach not occurred. Act of restoring anything to its rightful owner, the act of making good or giving equivalent for any loss, damage or injury; an indemnification.”).

¹⁰ See F. Michael Higginbotham, *A Dream Revived: The Rise of the Black Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 447, 454 (2003) (citing another author’s suggestion that “nothing can truly return the victim to the status quo”).

¹¹ See BARKAN, *supra* note 4, at 284 (“The moral argument is that although the past cannot be undone, and although restitution can be directed only at descendants of the victims, the effect of this historical injustice constitutes a continuing violation. Therefore, the descendants of slaves are themselves victims.”).

¹² See CARL WALDMAN, *ENCYCLOPEDIA OF NATIVE AMERICAN TRIBES* 304 (3d ed. 2006) (“The hostilities that caused their departure from North Carolina—the Tuscarora War—were especially unnecessary because the Tuscarora had been friendly to the English colonists. They not only had provided them with knowledge about wilderness survival and with food, but also had helped them in their conflicts with other tribes. Yet, settlers took their best farmlands; traders cheated them and slavers kidnapped them to ship them to the Caribbean or to Europe.”). *Id.* at 310 (“Yet the colonists abused their friendship with the Indians time and again. They wanted land for farming and tried to trick Indians into signing it away for little payment or no payment at all. One method they used was to get tribal representatives drunk before negotiating with them. Another was to bribe one Indian and make him an honorary chief, then have him sign away tribal lands.”).

¹³ See Shelton, *supra* note 5, at 272.

¹⁴ The dregs and vagabonds of primarily Great Britain society left England in pursuit of freedom, justice and equality. The Europeans ironically justified their theories of freedom and equality as solely applied to other whites and Europeans, leaving them apt to murder and conquer people of color, especially in the Western Hemisphere.

¹⁵ THOMAS, *supra* note 3, at 155 (“These English voyages greatly disturbed the Portuguese; in 1555 a special ambassador, Lope da Sousa, was dispatched by a worried and elderly King João III to remind Queen Mary of the papal

that Africans possessed greater strength and endurance than Native Americans;¹⁶ thus, the explorers turned to this new reliable stream of forced labor from Africa to quench their insatiable thirst to enslave and conquer indigenous peoples.¹⁷ In the end, the Native Americans' slaughter and enslavement, in comparison to that of Africans, was more temporary. The most apparent loss to Native Americans was their land, as they were now guests in a country that they had called home for generations.

Consequently, the United States, then known as the Union, began to "negotiate" a series of treaties with the Native Americans concerning land concessions. These treaties apparently did nothing more than solidify the taking of Native American land as well as confine Native Americans to reservations. The irony of these treaties was that they did not give any substantial restitution to the Native Americans.¹⁸ The treaties declared the Native Americans to be contained in specific segments of the United States,¹⁹ in a country that was originally their own.

grants of Portuguese monopoly in Africa . . ."). See Muhammad, *supra* note 2, at 909 (discussing treaties and contracts among slave trading nations).

¹⁶ THOMAS, *supra* note 3, at 139.

¹⁷ *Id.* at 92–93.

¹⁸ See *Treaty with the Cherokee, 1791*, in INDIAN AFFAIRS: LAWS & TREATIES, vol. II art. 4 (Charles J. Kappler ed., 1904) ("And in order to extinguish forever all claims of the Cherokee nation, or any part thereof, to any of the land lying to the right of the line above described. Beginning as aforesaid at the Currahee mountain, it is hereby agreed, that in addition to the consideration heretofore made for the said land, the United States will cause certain valuable goods, to be immediately delivered to the undersigned Chiefs and Warriors, for the use of their nation; and the said United States will also cause the sum of one thousand dollars to be paid annually to the said Cherokee nation. And the undersigned Chiefs and Warriors, do hereby for themselves and the whole Cherokee nation, their heirs and descendants, for the considerations above-mentioned, release, quit-claim, relinquish and cede, all the land to the right of the line described, and beginning as aforesaid."); *Treaty with the Cherokee, 1794*, *id.* at vol. II art. 3 ("The United States, to evince their justice by amply compensating the said Cherokee nation of Indians for all relinquishments of land made either by the treaty of Hopewell upon the Keowee river, concluded on the twenty-eighth of November one thousand seven hundred and eighty-five, or the aforesaid treaty made upon Holston river, on the second of July, one thousand seven hundred and ninety-one, do hereby stipulate, in lieu of all former sums to be paid annually to furnish the Cherokee Indians with goods suitable for their use, to the amount of five thousand dollars yearly."); *Treaty with the Potawatami, 1828*, *id.* at art. II:

In consideration of the cessions aforesaid, there shall be paid to the said tribe an additional permanent annuity of two thousand dollars; and also an additional annuity of one thousand dollars, for the term of twenty years; goods, to the value of thirty thousand dollars shall be given to the said tribe, either immediately after signing this treaty, or as soon thereafter as they can be procured; an additional sum of ten thousand dollars, in goods, and another of five thousand dollars, in specie, shall be paid to them in the year 1829. The sum of seven thousand five hundred dollars shall be expended for the said tribe, under the direction of the President of the United States, in clearing and fencing land, erecting houses, purchasing domestic animals and farming utensils, and in the support of labourers to work for them.

Two thousand pounds of tobacco, fifteen hundred weight of iron, and three hundred and fifty pounds of steel, shall be annually delivered to them.

One thousand dollars per annum shall be applied for the purposes of education, as long as Congress may think the appropriation may be useful.

One hundred dollars, in goods, shall be annually paid to To-pen-ibe-the; principal chief of the said tribe, during his natural life. The blacksmith, stipulated by the treaty of Chicago to be provided for the term of fifteen years, shall be permanently supported by the United States.

Three labourers shall be provided, during four months of the year, for ten years, to work for the band living upon the reservation South of the St. Joseph.

¹⁹ See *Treaty with the Six Nations, 1784*, *id.* at art. III; *Treaty With the Chickasaw, 1786*, *id.* at art. III; *Treaty With the Shawnee, 1786*, *id.* at art. VI; *Treaty With the Creeks, 1790*, *id.* at art. IV; *Treaty With the Cherokee, 1791*, *id.* at arts. III, IV:

The Cherokee nation shall deliver to the Governor of the territory of the United States of America, south of the river Ohio, on or before the first day of April next, at this place, all persons who are now prisoners, captured by them from any part of the United States: And the United States

During the early nineteenth century following the treaties and in an attempt to maintain amicable relations with Native American nations, the federal government instituted a uniform method of channeling additional financial compensation to the Indian tribes under the authority of the Bureau of Indian Affairs. On March 11, 1824, the federal government's Bureau of Indian Affairs established the "Indian" trust funds.²⁰ These trust funds were to aid in Indian reservation management and to support social programs that benefited Native Americans.²¹ However, it has been alleged that the U.S. government has not appropriately fulfilled its obligations concerning the funds. For example, on June 10, 1996, the Native American Rights Fund (NARF) filed a class action lawsuit against the government.²² More specifically, the complainants alleged that the United States government, as trustee of the funds, through its agents and officers, continuously mismanaged funds by abusing its access to the Individual Indian Monies and by failing to implement safeguards to curtail such breach of fiduciary duty.²³ This alleged failure included the lack of adequate record keeping of expenses associated with maintaining the funds as well as actual disbursement of funds. On December 11, 2012, the court ordered payment in the amount of \$1,000 to the Historical Accounting Class and other provisions regarding the eligibility of the Trust Administration Class to properly distribute the funds.²⁴ This is a prime example that, although the government may grant monetary restitution as a way to begin addressing historical injustices, until it

shall on or before the same day, and at the same place, restore to the Cherokees, all the prisoners now in captivity, which the citizens of the United States have captured from them.

The boundary between the citizens of the United States and the Cherokee nation, is and shall be as follows: Beginning at the top of the Currahee mountain, where the Creek line passes it; thence a direct line to Tugelo river; thence northeast to the Occunna mountain, and over the same along the South-Carolina Indian boundary to the North-Carolina boundary; thence north to a point from which a line is to be extended to the river Clinch, that shall pass the Holston at the ridge which divides the waters running into Little River from those running into the Tennessee; thence up the river Clinch to Campbell's line, and along the same to the top of Cumberland mountain; thence a direct line to the Cumberland river where the Kentucky road crosses it; thence down the Cumberland river to a point from which a south west line will strike the ridge which divides the waters of Cumberland from those of Duck river, forty miles above Nashville; thence down the said ridge to a point from whence a south west line will strike the mouth of Duck river.

And in order to preclude forever all disputes relative to the said boundary, the same shall be ascertained, and marked plainly by three persons appointed on the part of the United States, and three Cherokees on the part of their nation.

And in order to extinguish forever all claims of the Cherokee nation, or any part thereof, to any of the land lying to the right of the line above described. Beginning as aforesaid at the Currahee mountain, it is hereby agreed, that in addition to the consideration heretofore made for the said land, the United States will cause certain valuable goods, to be immediately delivered to the undersigned Chiefs and Warriors, for the use of their nation; and the said United States will also cause the sum of one thousand dollars to be paid annually to the said Cherokee nation. And the undersigned Chiefs and Warriors, do hereby for themselves and the whole Cherokee nation, their heirs and descendants, for the considerations above-mentioned, release, quit-claim, relinquish and cede, all the land to the right of the line described, and beginning as aforesaid.

See also Treaty With the Potawatami, 1828, id. at art. I.

²⁰ See National Archives and Records Administration, Letters sent, 1800–24. Letters sent by the Revenue Office, Department of the Treasury, relating to the treasury business of the War Department, 1794–96. Letters received, 1800–23. Microfilm Publications: M15, M74, M271.

²¹ See PRELIMINARY INVENTORY OF THE RECORDS OF THE BUREAU OF INDIAN AFFAIRS, Vols. I & II, PI 163 (Edward E. Hill, comp., 1965), supp., in National Archives microfiche edition of preliminary inventories.

²² Compl. to Compel Performance of Trust Obligations, *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999). For subsequent history of the case, see Shelton, *supra* note 5, at 267–68 (“In March 2003, the US Supreme Court upheld a 1999 federal court decision awarding damages to Native Americans for trust fund mismanagement by the US Department of the Interior and Treasury.”).

²³ *Id.*

²⁴ See *Cobell v. Salazar*, No. 96-cv-01285 (D.D.C. Dec. 11, 2012).

wholeheartedly addresses the underlying issues of exploitation of vulnerable populations, institutionalized discrimination, and racial inequality, financial compensation remains an insufficient legal remedy.

2. Black Americans and the Civil War

One of the earliest historical examples of an award of reparations has become known as the “forty acres and a mule” edict. During the Civil War, President Abraham Lincoln declared that African and Native Americans were free from slavery through the revered Emancipation Proclamation.²⁵ In January 1865, the final year of the Civil War, Union General William Tecumseh Sherman gave Special Field Order No. 15, which promised freed slaves along the coast of South Carolina, Georgia, and Florida “forty acres and a mule.”²⁶ However, President Andrew Johnson subsequently rescinded the order.²⁷ On March 11, 1867, Representative Thaddeus Stevens of Pennsylvania introduced the Reparations Bill into Congress, declaring:

And be it further enacted. That out of the lands thus seized and confiscated the slaves who have been liberated by the operations of the war and the amendment to the constitution or otherwise, who resided in said “confederate States” on the 4th day of March, A.D. 1861, or since, shall have distributed to them as follows, namely: to each male person who is the head of a family, forty acres; to each adult male, whether the head of a family or not, forty acres, to each widow who is the head of a family, forty acres—to be held by them in fee-simple, but to be inalienable for the next ten years after they become seized thereof.²⁸

This bill, though ultimately unsuccessful, may be considered one of the earliest landmark legal decisions by a Western, governmental body to initiate the grant of reparations to expiate slavery and slave trading. Thereafter, the task of Reconstruction for both the Union and the newly-liberated Black Americans began. In 1865, the federal government established the Bureau of Refugees, Freedmen, and Abandoned Lands,²⁹ later to become known as the Freedmen’s Bureau,³⁰ as a governmental institution designed to aid freed Blacks in transitioning into society. One of its many tasks was to parcel land out to former slaves. This governmental organization also served the purpose of helping impecunious White Americans, likely descendants from indentured servants, with the basics of maintaining a reasonable

²⁵ The Emancipation Proclamation was announced in January 1, 1863. However, in reality this edict did not free black/Native Americans but led to a new form of indentured slavery. Slaves were freed with no land, no culture, and no capital, resulting in renewed dependency on the jobs from which they were just freed, such as sharecropping, maid service, and chauffeuring for their former slavemasters. The Civil War did not end until 1865, and the Union did not completely eradicate municipal slavery in black letter law until the 13th Amendment was officially ratified as part of the U.S. Constitution in 1865.

²⁶ Freedmen’s Bureau Act, ch. 20, 14 Stat. 173 (1866) (“And be it further enacted, that the commissioner, under the direction of the President, shall have authority to set apart, for the use of loyal refugees and freedmen, such tracts of land within the insurrectionary states as shall have been abandoned, or to which the United States shall have acquired title by confiscation or sale, or otherwise, and to every male citizen, whether refugee or freedman, as aforesaid, there shall be assigned not more than forty acres of such land”)

²⁷ See RAYMOND A. WINBUSH, SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS 15 (2003). See also BARKAN, *supra* note 4, at 284.

²⁸ H.R. 29, 40th Cong. § 4 (1867).

²⁹ See generally Field Office Records of the Bureau of Refugees, Freedmen, and Abandoned Lands (The Freedmen’s Bureau), available at <http://www.archives.gov/atlanta/finding-aids/freedmens-bureau.pdf> [hereinafter Field Office Records].

³⁰ See Shelton, *supra* note 5, at 268.

standard of living and also transitioning into the society of the budding Union.³¹ However, this aid to the freedmen lasted only a few years; land that was previously distributed was confiscated by the federal government.³² Indeed, the national government all but abandoned the freed slaves and the United States' new budding notion of equality. As a result, the freedmen were left to fend for themselves with no economic support, little education, and no land.³³

3. Jewish People and the Holocaust

Spread across the Atlantic Ocean from the United States to Europe, the Jews of the Holocaust diaspora were also victims of racial hatred promoted by a government regime that committed crimes against humanity. Jews, many of whom were of German and Polish descent, were kidnapped from their homes, sent to concentration camps and, eventually, killed in extermination chambers.³⁴ These Jews were not only used for their labor but were also robbed of most of their personal property.³⁵ The Germans, energized by the rhetoric of Adolf Hitler, humiliated the Jews by, among other things, forcing them to wear the Star of David³⁶ and to cut grass with their teeth.³⁷ Eventually, Jewish people were simply deposited in stations and gas chambers for mass extermination.³⁸

After World War II concluded, the call for restitution steadily became a forefront issue for surviving Jews. Many of those who had escaped, were expelled, or were forced to migrate to safety from German oppression³⁹ were now without a home, property, money, or an adequate standard of living. In the years that followed, the Jews' demands for compensation increased.

After much social and political tumult,⁴⁰ companies that were implicated as being a part of or obtaining significant profits from the torture and labor of Jews agreed to set up funds or other contractual obligations to compensate Jews.⁴¹ As a result of lengthy negotiations, private corporations that had financially invested in and benefitted from the genocide of Jews paid a monetary settlement.⁴²

³¹ See Field Office Records, *supra* note 29.

³² See Shelton, *supra* note 5, at 268.

³³ See Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are in Order for African Americans*, 20 HARV. BLACKLETTER L.J. 49, 55 (2004) ("Recall that after the Civil War some congressional proposals were aimed at giving those recently freed arable land—the famous forty acres and a mule. Yet most black families never got any access to the land promised, and the inequality in wealth-generating agricultural land has been a major cause of persisting racial inequality."). See also Daisy G. Collins, *The United States Owes Reparations to Its black Citizens*, 16 HOW. L.J. 82, 92 (1970) ("The unequal economic position of the average black citizen . . . is an incident of slavery because the freedmen generally started out with no property and experienced invidious discrimination in trying to obtain it."); see also Lord Gifford Debate, *supra* note 2.

³⁴ See LAURENCE REES, *THE NAZIS: A WARNING FROM HISTORY* 203, 206 (1997) (describing the process of taking children from their homes and the establishment of the concentration and extermination camps).

³⁵ See BARKAN, *supra* note 4, at 121, 153–56.

³⁶ See REES, *supra* note 34, at 198.

³⁷ *Id.*

³⁸ *Id.* at 206 ("The men, women and children were harried down a path (the Germans called it 'The Path to Heaven') less than a hundred metres to the gas chambers where they were murdered. Once dead, their bodies were thrown into pits next to the gas chambers.").

³⁹ *Id.* at 198.

⁴⁰ *Id.* at 206.

⁴¹ BARKAN, *supra* note 4, at 24.

⁴² *Id.*

The intensity of support for these demands manifested itself through various commissions, committees, and other organizations developed by Jews.⁴³ Many private companies, headquartered or otherwise doing business in countries that either considered themselves neutral or complied with sanctions against Germany, were also involved in the historical injustice toward the Jews.⁴⁴ For instance, Switzerland, known for its purported neutrality, hosted the League of Nations, an international entity with limited military strength but which nevertheless issued sanctions against Germany after World War I. However, major Swiss banks refused to return monies that rightfully belonged to Jews, allowed funds that belonged to Jews but were confiscated by German soldiers to be deposited into Swiss bank accounts, and ultimately financed a regime and private corporations that discriminated against and mass exterminated a great number of Jews. Jewish Commissions and committees began negotiating with the representative of the Swiss banks and in 1996 entered into a Memorandum of Understanding.⁴⁵ Thereafter, in 1998 the Swiss banks and these committees entered into a global settlement to redress the atrocities of the Holocaust.⁴⁶

In addition, the German government signed the Slave Fund Deal, one of the most pivotal victories in the history of reparations.⁴⁷ In 2000, Germany established a multi-billion dollar fund to compensate survivors of Nazi-era slave labor.⁴⁸ The German government did so in response to United States pressure and in order to curtail private lawsuits filed by direct survivors and next of kin of slave laborers against the government and private sector. To determine the recipients of the reparations and to manage the fund, Germany, Poland, the Czech Republic, Ukraine and other nation-states of the former Soviet Union formed commissions and foundations.⁴⁹ Germany established a deadline for filing claims

⁴³ *Id.* (“Jewish organizations managed to formulate their claims in the language of nationalism and translate them into a legal framework.”). See also Memorandum of Understanding Between the World Jewish Restitution Organization and the World Jewish Congress Representing Also the Jewish Agency and Allied Organizations and the Swiss Bankers Association (May 2, 1996), available at http://www.swissbankclaims.com/Documents/DOC_1_memo_of.pdf (detailing the various mechanisms for reimbursement of Jewish people by Swiss banks) [hereinafter Memorandum of Understanding].

⁴⁴ BARKAN, *supra* note 4, at 21–22.

⁴⁵ Memorandum of Understanding, *supra* note 43.

⁴⁶ See CREDIT SUISSE GROUP, ANNUAL REPORT 1998/1999, at 30–31, available at https://www.credit-suisse.com/investors/doc/csg_ar98_p1_en.pdf.

⁴⁷ See *Germany Signs Historic Slave Fund Deal*, DAILY NEWS (July 18, 2000 12:00 AM), <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=germany-signs-historic-slave-fund-deal-2000-07-18> (“Germany signed a historic deal on Monday to pay 10 billion marks (\$4.8 billion) to nearly a million Nazi slaves and forced labourers in what is likely to be the last great payout for the crimes of Third Reich. Representatives from Germany, the United States, eastern Europe and Israel signed the agreement along with a battery of high-power U.S. attorneys, whose threats of lawsuits against German companies prompted the deal.”).

⁴⁸ *Id.*

⁴⁹ See FOUNDATION FOR POLISH-GERMAN RECONCILIATION, http://www.fpnpl.pl/fundacja/ofpnpl_en.php (last visited Apr. 7, 2013) [hereinafter Foundation Polish-German Reconciliation] (“Since the very beginning of our existence, we have paid financial aid of more than 4.7 billion PLN (1.3 billion Euro) to over 700.000 victims. The financial resources for these aids were obtained from various institutions from abroad—mostly from the Federal Foundation ‘Memory, Responsibility and Future,’ the Austrian Fund for ‘Reconciliation, Peace and Cooperation,’ from the fund known as the London Fund of Plundered Gold for Survivors of the Holocaust and from the Swiss Fund for the Benefit of the Victims of the Holocaust/Shoa.”); Closed Compensation Programs, *Program for Former Slave and Forced Laborers*, CLAIMS CONFERENCE: THE CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, http://www.claimscon.org/index.asp?url=compensation/closed_programs (last visited Apr. 7, 2013) [hereinafter Claims Conference] (“The Claims Conference Program for Former Slave and Forced Laborers began in 2000, after German government and industry agreed to a DM 10 billion fund to compensate surviving former laborers under the Nazis. Payments were also made from the Swiss Banks Settlement. The payments were the culmination of years of effort to compel the governments and businesses of Germany and Switzerland to acknowledge their use of slave and forced labor during World War II, and the benefits they derived from the victims’ labor.”); *Understanding and Reconciliation*, UKRAINIAN NAT’L FOUND., (May 8, 2004, 8:48 PM), <http://unf.kiev.ua/main.php?lang=de> (“Ukrainian Fund for Mutual

only a few years after the official establishment of the fund due to the various commissions working in conjunction with their respective governments and negotiating with Germany.⁵⁰ As recently as 2011, the German government also established a pension fund to recompense the survivors of the Holocaust.⁵¹ Austria has also implemented a settlement to financially compensate the victims of the Holocaust.⁵²

4. Japanese Internment in the United States

Another legal landmark in the history of reparations involved the United States, following its conflicts with Japan during World War II. After Japan bombed Pearl Harbor, the U.S. government gathered all known residents of the United States who were of Japanese descent and confined them in internment camps.⁵³ However, not all Americans of Japanese descent adhered to Executive Order 9066,⁵⁴ as was the case with Fred Korematsu, a Japanese American. In *Korematsu v. United States*, Korematsu was found guilty of disobeying a U.S. military order prohibiting those of Japanese descent in a military area located in California. Although the Supreme Court applied strict scrutiny since the exclusion order was based on race, it upheld the conviction based on the premise of national security.⁵⁵ Several decades passed before the Supreme Court overturned Korematsu's conviction at the behest of former President James Earl Carter, based on evidence discovered in the Federal Bureau of Investigation's archives. These documents revealed that Japanese Americans were not a threat to the ongoing war and that this information was never disclosed to the Supreme Court.⁵⁶ After attorneys became interested in the case, it was reopened. This resulted in the District Court for the Northern District of California vacating the conviction based on governmental malfeasance.⁵⁷

Based on Executive Order 9066, these individuals were deprived of their liberty, in the name of national security, as a result of their racial identification and purported loyalty to the United States' enemies.⁵⁸ Ironically, a majority of Japanese victims greatly opposed the concept of reparations as

Understanding and Reconciliation and Russian Fund for Mutual Understanding and Reconciliation to pay second tranche of compensation to former Nazi slave labourers before end of this year. Gunter Saathoff, the chairman of the German Fund for Memorial, Responsibility and the Future, announced this. The Ukrainian Fund for Mutual Understanding and Reconciliation has compiled a list of 800,000 people considered to be victims of Nazi."); *Financial Payments Partners*, BELARUSIAN REPUBLICAN FOUND., http://www.brfvp.com/en/?section_id=271&cat=1 (last visited Apr. 8, 2013) ("As one of the partner organizations of the Foundation 'Remembrance, Responsibility and Future,' IOM was designated to make financial compensation available to former forced labourers and other victims of the Nazi regime."); RUSSIAN FOUND. FOR UNDERSTANDING AND RECONCILIATION, <http://translate.google.com/translate?depth=1&hl=en&rurl=translate.google.com&sl=ru&tl=en&u=http://www.fondvp.ru/> (last visited Apr. 10, 2013).

⁵⁰ See Claims Conference, *supra* note 49.

⁵¹ *16,000 Holocaust Victims to Get German Pensions*, WORLD NEWS, http://worldnews.nbcnews.com/_news/2011/12/05/9235187-16000-holocaust-victims-to-get-german-pensions (last visited Apr. 7, 2013).

⁵² See Alexandra Foederl-Schmid, *Austria Signs Landmark Slave Labour Deal*, CNN (Oct. 24, 2000, 1:18 PM), <http://archives.cnn.com/2000/WORLD/europe/10/24/austria.nazi> ("The agreement includes provisions that will protect Austrian companies from future lawsuits in the slave labour case and will allow preparations for the handover of payments to begin swiftly. Compensation for the 150,000 slave labourers—mostly from central and Eastern European states—will be made from a special reconciliation fund totaling six billion schilling (\$415 million).").

⁵³ BARKAN, *supra* note 4, at 31–32 ("[T]he internment between 1942 and 1946 of 120,000 individuals, two-thirds of them American citizens, did not receive a great deal of attention.").

⁵⁴ See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

⁵⁵ *Korematsu v. United States*, 323 U.S. 214, 216, 224 (1944).

⁵⁶ *Korematsu v. United States*, 584 F. Supp. 1406, 1416–18 (N.D. Cal. 1984).

⁵⁷ *Id.* at 1419–20.

⁵⁸ *Korematsu*, 323 U.S. at 214.

compensation for their internment, likely due to the social and political implications of such requests.⁵⁹ But once the Jews of the Holocaust diaspora started the trend of restitution for past crimes against humanity and civil rights violations, it was appropriate for the Japanese to do the same.⁶⁰

In 1948, after much social pressure, the United States government enacted the Japanese American Evacuation Claims Act,⁶¹ which awarded \$38,000,000 in restitution to Japanese Americans. Four decades later, Congress passed the Civil Liberties Act.⁶² This Act included a congressional apology as well as an acknowledgment that the government's unjust confinement of Japanese Americans had been based on racism.⁶³ Not only was an apology officially made in the Act, but also years later President George H.W. Bush, Sr., and his successor President William Jefferson Clinton, Jr., made separate, formal written apologies recognizing the unfair treatment and internment of the Japanese Americans.⁶⁴ However, the paradox of jurisprudence again demonstrates that historical injustices can be retroactively addressed but cannot be fully restituted.

Yet, for some peculiar reason, in America and abroad, there is not one recorded instance in which a European country or the United States has ever offered an apology to the descendants of the slave trade.⁶⁵ Different states' legislatures today disagree on whether they should make official apologies for their participation in the trade. Some state government representatives have decided, despite societal opposition, to introduce official state-level resolutions or bills that declare their governments' regret for U.S. slavery.⁶⁶ But these limited movements are far from achieving full national support.

⁵⁹ See BARKAN, *supra* note 4, at 34 (“Most viewed it as a waste of time and energy since they believed that restitution was impossible and that the campaign would at best go nowhere or at worst turn the nation against them.”).

⁶⁰ See *generally id.* at 34–35 (discussing the debate over comparing the Japanese and Jewish experiences during World War II).

⁶¹ Japanese American Evacuation Claims Act, Pub. L. 80-886, ch. 814, 62 Stat. 1231 (codified as amended at 50 U.S.C. app. § 1981 (1948)).

⁶² BARKAN, *supra* note 4, at 30 (noting that the Civil Liberties Act was signed into law on August 10, 1988, allowing the U.S. government to compensate Japanese Americans who had been interned during World War II); *see also*

⁶³ Civil Liberties Act of 1988 Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 App. U.S.C. §§ 1989b–1989b-9).

⁶⁴ See Letter from President George H.W. Bush (Nov. 21, 1989), *available at* <http://www.learner.org/courses/amerhistory/interactives/sources/E7/e1/sources/5496.php>; letter from President William Jefferson Clinton (Oct. 1, 1993), *available at* <http://35449409.nhd.weebly.com/presidential-letters-of-apology.html>.

⁶⁵ See H.R. Res 194, 110th Cong. (2008) (enacted) (stating an official congressional apology for slavery); *see also* Blair “Sorrow” Over Slave Trade, BBC NEWS, http://news.bbc.co.uk/1/hi/uk_politics/6185176.stm (last updated Nov. 27, 2006) (discussing debate in the United Kingdom over issuing an apology for participation in the slave trade).

⁶⁶ See H.R. Res. AO1300, 2009–2010 Reg. Sess. (N.Y. 2009), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A01300&term=2009&Summary=Y&Actions=Y; H.R. Res. 1011, 2007–2008 Reg. Sess. (Ga. 2008), *available at* <http://www.legis.ga.gov/Legislation/en-US/display/20072008/HR/1011>; H.R.J. Res. 321, 2007 Leg. (Ala. 2007), *available at* http://blog.al.com/bn/2007/04/sjr54_expressing_profound_regr.html; S.J. Res. 6, 423rd Gen. Assemb. (Md. 2007), *available at* http://mgaleg.maryland.gov/2007RS/chapters_noln/Jr_1_sj0006E.pdf; H.R. Con. Res. 26, 94th Gen. Assemb., 1st Reg. Sess. (Mo. 2007), *available at* <http://www.moga.mo.gov>; H.R.J. Res. 1311, 2007 Gen. Assemb., Reg. Sess. (N.C. 2007), *available at* <http://www.ncleg.net/Sessions/2007/Bills/House/PDF/H1311v0.pdf> (but passed through the Senate, *see* S.J. Res. 1557, 2007 Gen. Assemb. (N.C. 2007), *available at* <http://www.ncleg.net/Sessions/2007/Bills/Senate/HTML/S1557v2.html>); A.C. Res. 270, 212th Leg. (N.J. 2007), *available at* http://www.njleg.state.nj.us/2006/bills/acr/270_i1.pdf; H.D.J. Res. 728, 2007 Leg., Reg. Sess. (Va. 2007), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?071+ful+HJ728H2+pdf>.

By their omissions and reluctant responses, western nations continue to reinforce the idea that those of African descent are members of the lowest caste worldwide, and that any injustice they endured is irrelevant to mainstream society.⁶⁷

5. New Zealand and Indigenous Persons

The government of New Zealand is another entity that has paid reparations for historical wrongs committed against indigenous peoples. In 1863, New Zealand initially made an agreement with the Waikato people concerning land accession. The New Zealand government then declared the Waikato people to blame for acts promoting anarchy. As a result, New Zealand officials invaded and seized Waikato lands. Nearly a century and a half later, in 1995, the Crown of New Zealand announced an official apology,⁶⁸ a restoration of lost lands⁶⁹ and financial compensation through the Waikato Raupatu Claims Settlement Act.⁷⁰

6. South African Apartheid

More recently, former South African Archbishop Desmond Tutu instituted a suit against international corporations who had conducted business with, and otherwise profited from, their association with the apartheid-era South African government.⁷¹ Desmond Tutu has cited at least 22,000 South Africans who are owed reparations; however, the case is still pending in New York federal court.⁷² As of the date of this publication, the South African government has worked with the Truth and Reconciliation Committee to grant monetary reparations to victims of Apartheid-era human rights violations,⁷³ though the Commission has appealed the current amount designated for each individual, claiming that the amounts do not reflect the true extent of their suffering. Tutu has also petitioned the government to impose a wealth tax on white South Africans who benefitted from the apartheid policies as a form of restitution for Black South Africans who were disenfranchised as a result of the policies.⁷⁴ As previously noted, the corporate proponents of unjust regimes were typically based throughout the world. In this case, those who suffered were concentrated in South Africa with their government as agent of apartheid policies and with aid to the government coming from international companies. Thus, a federal court recognized the legitimacy of petitioning the judiciary for restitution for human rights violations by corporate entities as well as public institutions.

⁶⁷ See WINBUSH, *supra* note 27, at xxi.

⁶⁸ Part 6(1) of the Waikato Raupatu Claims Settlement Act 1995 (N.Z.)

⁶⁹ *Id.* at Part 6(4).

⁷⁰ *Id.*

⁷¹ See *Tutu Backs Claims over Apartheid*, BBC NEWS (Feb. 1, 2004, 9:06 PM), <http://news.bbc.co.uk/1/hi/world/africa/3450081.stm>.

⁷² See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008). See also *ANC Welcomes TRC Proposals for Reparations*, S. AFRICAN PRESS ASS'N, Oct. 23, 1997, <http://www.justice.gov.za/trc/media/1997/9710/s971023c.htm> ("Unveiling the commission's rehabilitation and reparation policy proposals at a news conference in Cape Town on Thursday, chairman Archbishop Desmond Tutu said people judged to have suffered human rights violations under apartheid should receive a minimum reparation payment of R17000 annually for six years. He said that, if accepted, this would cost about R3 billion to implement, and a projected 22000 victims would benefit.").

⁷³ See *South Africa Offers Reparations to Apartheid Victims*, ETHICS NEWSLINE, Apr. 21, 2003, <http://www.globalethics.org/newsline/2003/04/21/south-africa-offers-reparations-to-apartheid-victims/> ("Thousands of people victimized by decades of South African apartheid will be given slightly more than \$3,800 each in a one-time reparations payment funded by the government, President Thabo Mbeki announced last week.").

⁷⁴ See *Constitutional Law Expert Backs Tutu on Apartheid Tax*, TIMES LIVE, (Aug. 15, 2011, 2:54 PM), <http://www.timeslive.co.za/local/2011/08/15/constitutional-law-expert-backs-tutu-on-apartheid-tax>.

7. Summary of Trends in Restitution for Historical Injustices

The Native Americans of the early United States, Black Americans of the African Diaspora, Jews of the European Diaspora, those of Japanese descent in the American West, the Waikato indigenous peoples of New Zealand, and the Black South Africans are all examples of historical injustices supported by governmental regimes that were provided financial benefits by private corporations. In each of these incidents either persons who directly suffered or their descendants decided to petition their government and use the existing legal infrastructure to obtain restitution for these past crimes.

With regard to the Holocaust, Jews eventually dispersed to different countries in Europe and the Americas, formed committees and petitioned European governments for restitution. Internationally, these are recurring instances which indicate restitution does not solely occur in one place and in one region. These programs of restitution provide adequate precedent for those who argue for reparations for slavery, slave trading, and its legacies.

The claim for reparations is complicated and will take years to resolve. In the past, survivors of atrocities galvanized themselves into movements which forced governments to acknowledge the validity of their claims on an international platform. For example, as the voices of survivors of the Holocaust strengthened, the international community denounced Nazi Germany's crimes against humanity. This led European nations to create a forum to prosecute these crimes at the Nuremberg International Military Tribunal.⁷⁵ Thereafter, victims and their surviving kin instituted civil lawsuits for financial compensation,⁷⁶ some individually and others as groups. Over time, the continuous quest for restitution led to ad campaigns,⁷⁷ conferences, commissions⁷⁸ and eventually the Slave Fund Deal. This Deal allowed claimants to petition the German government for acknowledgement and redress. The Fund did not prohibit claimants from also filing civil suits against private corporations whose profiteering was complicit with the Holocaust enterprise.

Yet, the *initial* undertaking to hold European governments and private corporations accountable was not achieved through a universal, cohesive plan. As momentum grew for restitution for individual suffering under the umbrella of the Holocaust, so did collective consciousness, which led to groups, conferences, then commissions.

Similarly, the reparations movement⁷⁹ for the Trans-Atlantic Slave Trade is an arduous endeavor. It spans an extensive period of time, across several nation-states and corporations—and its vestiges still remain today. The movement has yet to reach a systematic approach. However, reparationists have

⁷⁵ See Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

⁷⁶ See *Nazi-Era Labourers Sue Two Auto Firms; 2 Groups Sue Bosch, DaimlerChrysler*, TORONTO STAR, May 10, 1999, <http://pqasb.pqarchiver.com/thestar/access/427508911.html?FMT=ABS&FMTS=ABS:FT&type=current&date=May+10%2C+1999&author=&pub=Toronto+Star&edition=&startpage=1&desc=Nazi-era+labourers+sue+two+auto+firms+%3B+2+groups+sue+Bosch%2C+DaimlerChrysler>; Howard Hobbs, *Ford Motor Co. Charged in Nazi Secret Profits on Slave Labor*, DAILY REPUBLICAN (Mar. 18, 1998), http://www.dailyrepublican.com/ford_slave_labor.html; Thomas S. Mulligan, *Lawsuit Alleges Ford Profited from Forced Labor in WWII*, L.A. TIMES, Mar. 5, 1998, <http://articles.latimes.com/1998/mar/05/business/fi-25568>.

⁷⁷ See Associated Press, *"Slave" Ads Target WWII Firms: Victims of Nazis Step Up Fight for Compensation*, TORONTO STAR, Oct. 6, 1999, at A15.

⁷⁸ See Foundation Polish-German Reconciliation, *supra* note 49.

⁷⁹ See Angelique M. Davis, *Multiracialism and Reparations: The Intersection of the Multiracial Category and Reparations Movements*, 29 T. JEFFERSON L. REV. 161, 170 (2007) ("The modern Reparations Movement began with the publication of Randall Robinson's book *The Debt: What America Owes to blacks and Representative John Conyers' (D.-Mich.)* introduction of H.R. 40, a bill to redress slavery. Robinson's compelling indictment of America's failure to recognize the consequences of slavery reenergized reparations activism and discourse." (footnotes omitted)).

recently filed lawsuits,⁸⁰ and grassroot organizations in the United States,⁸¹ the West Indies,⁸² and Central America⁸³ have mustered public attention through international conferences⁸⁴ and increasing media coverage.⁸⁵ As a result, at least in the U.S., individual states and municipalities have enacted measures

⁸⁰ See, e.g., Compl. and Jury Trial Demand, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. 02-CV-1862 (E.D.N.Y. filed Mar. 26, 2002); *Farmer-Paellmann v. Brown & Williamson Tobacco Corp.*, 552 U.S. 941, 941 (2007) (denying petition for certiorari); *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995); see also Peter Viles, *Suit Seeks Billions in Slave Reparations*, CNN (Mar. 27, 2002, 11:29 AM), <http://archives.cnn.com/2002/LAW/03/26/slavery.reparations/index.html>; *Second Slave Reparations Suit Filed*, FOX NEWS, May 2, 2002, <http://www.foxnews.com/story/0%2C2933%2C51723%2C00.html>; Michael Winter, *House OKs \$4.55B Settlement for American Indians, black Farmers*, USA TODAY (Nov. 30, 2010, 7:48 PM), <http://content.usatoday.com/communities/ondeadline/post/2010/11/house-oks-455b-settlement-for-american-indians-black-farmers/1>; see also Ben Evans, *USDA Offers \$1.3-Billion Settlement to Female, Latino Farmers Who Claim Discrimination*, CNS NEWS, May 26, 2010, <http://cnsnews.com/node/66673>.

⁸¹ See RESTITUTION STUDY GRP., <http://rsgincorp.com/> (last visited Apr. 8, 2013); CURE (CAUCASIANS UNITED FOR REPARATIONS & EMANCIPATION): REPARATIONS, EDUC. & ADVOC., <http://reparationsthecure.org/> (last visited Apr. 8, 2013); *Millions for Reparations*, SOCIAL JUSTICE MOVEMENTS (July 12, 2005, 11:03 AM), http://socialjustice.ccnmtl.columbia.edu/index.php/Millions_for_Reparations; NAT'L COAL. OF BLACKS FOR REPARATIONS IN AM., <http://www.ncobra.org/> (last visited Apr. 8, 2013); *Dr. Raymond Windebush, Director*, INST. FOR URBAN RESEARCH AT MORGAN STATE UNIV., <http://iur.morgan.edu/RW.htm> (last visited Apr. 8, 2013).

⁸² See *Background*, NAT'L COMM'N ON REPARATIONS, http://www.jis.gov.jm/special_sections/reparations/background.html ("The establishment of a Reparations Commission and the Terms of Reference by which it should operate covers Jamaican descendants of slaves, wherever they reside, whether in Jamaica or in the diaspora in order to consider the interests of the large external Jamaican population. This is highlighted to clearly delineate the work of the Commission and the Jamaican Government's power to demand compensation.") (last visited Aug. 10, 2013).

⁸³ See Columbia's Comité para la Eliminación de la Discriminación Racial (CERD); see also Movimiento Panafricanista de España y ponente PNL reconocimiento de la Comunidad Negra.

⁸⁴ See Congreso Internacional de Víctimas Del Racismo: Acciones afirmativas, reparaciones, memoria historica negra en Democracia, Barcelona Spain (Mar. 21, 2012), <http://www.reparacionafricana.blogspot.com/>; *Durban Review Conference, Geneva, Switz., Apr. 20–24, 2009*, UNITED NATIONS, <http://www.un.org/durbanreview2009/> (last visited Apr. 7, 2013); United Nations Econ. & Soc. Council, Comm'n on Human Rights, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Prevention of Discrimination: Prevention of Discrimination and Protection of Minorities*, May 12–16, 2003, ¶ 19, U.N. Doc. E/CN.4/Sub.2/2003/19 (July 10, 2003), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/80aaa6b2133aa5e9c1256d8a00291c18/\\$FILE/G0315163.doc](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/80aaa6b2133aa5e9c1256d8a00291c18/$FILE/G0315163.doc) ("Afro-descendant representatives called for integration measures to encourage the development of multicultural organizations and raise awareness of minority issues. The Government of Brazil was also requested to empower the reparations movement for Afro-descendants, indigenous peoples and Roma people."); see also World Conference Against Racism, *supra* note 2.

⁸⁵ See, e.g., Baldwin Spencer, *Demanding Reparations for Slavery*, NATION NEWS (Sept. 25, 2011, 1:35 PM), <http://www.nationnews.com/articles/view/demanding-reparations-for-slavery/> ("The Antiguan and Vincentian prime ministers, in separate speeches to the United Nations yesterday, demanded reparations for injustices suffered by African slaves and their descendants, whose legacy has slowed their advancement as people and nations."); George Alleyne, *Call for Reparations*, TRINIDAD AND TOBAGO NEWSDAY (Oct. 5, 2011), <http://www.newsday.co.tt/commentary/0,148391.html>; Shelley Moorhead, *A Return To Denmark For Reparations*, CRUCIANS IN FOCUS (June 29, 2010), <http://cruciainsinfocus.com/2010/06/29/a-return-to-denmark-for-reparations/>; *Slavery and Debt*, (Feb. 13, 2005, 10:24 PM), http://www.workers.org/2005/editorials/reparations_0217/; *California Considering Slave Reparations*, FOX NEWS (May 6, 2002), <http://www.foxnews.com/story/0,2933,52062,00.html>; *Suit Seeks Billions in Slave Reparations*, CNN (Mar. 27, 2002), <http://www.cnn.com/2002/LAW/03/26/slavery.reparations/index.html>; *Second Slave Reparations Suit Filed*, FOX NEWS (May 2, 2002), <http://www.foxnews.com/story/0,2933,51723,00.html>; Brandt Williams, *The Case for Slavery Reparations*, MINN. PUB. RADIO (Nov. 13, 2000), http://news.mpr.org/features/200011/13_williamsb_reparations/; Paul Shepard, *Lawyers Plan Slave Reparations Suit*, WASH. POST (Nov. 4, 2000, 11:14 PM), http://www.washingtonpost.com/wp-srv/aponline/20001104/aponline231414_000.htm.

requiring banks and companies to disclose their roles in municipal slavery,⁸⁶ and in some instances these ordinances prevent such corporations from participating in government contracts or accessing state funds to conduct business until they comply with such statutes. These states include Iowa,⁸⁷ New York,⁸⁸ North Carolina,⁸⁹ and Illinois.⁹⁰ Some municipalities throughout the United States have followed state examples by replicating the disclosure requirement at the city level. These municipalities include Chicago, Illinois,⁹¹ Wayne County, Michigan,⁹² and Philadelphia, Pennsylvania.⁹³ California⁹⁴ catapulted this legislative trend by being the first state to propose and pass such laws. Several of its major cities are proposing local ordinances reiterating the same principles.⁹⁵ Currently the state of Massachusetts has also proposed “An Act Relative to the History of Slavery in the Commonwealth.”⁹⁶ It appears that the state legislatures and grass roots organizations within the United States have led the fight for reparations. As of the date of this writing, nations of the West Indies and South America have no known lawsuits or legislation addressing slavery and the Trans-Atlantic Slave trade.

While scholar-activists continue to advocate for restitution,⁹⁷ state-level lawmakers have begun to chisel a gateway for restitution by establishing their own commissions to permit monetary claims for

⁸⁶ See Chris Baker, *NAACP to Target Private Business*, THE WASH. TIMES, July 12, 2005, <http://www.washingtontimes.com/news/2005/jul/12/20050712-120944-7745r/> (“The group’s strategy will include a lobbying effort to encourage cities to enact laws requiring businesses to complete an extensive slavery study and submit it to the city before they can get a city contract.”).

⁸⁷ See H.R. 29, 80th Gen. Assemb., Reg. Sess. (Iowa 2003), available at <http://coolice.legis.state.ia.us/CoolICE/default.asp?Category=BillInfo&Service=Billbook&ga=80&hbill=HR29>; IOWA INS. DIV., *Report on Slavery Era Insurance*, Iowa.gov, <http://www.iid.state.ia.us/slavery> (last visited Apr. 7, 2013).

⁸⁸ S. S01383, 2005–2006 Gen. Assemb., Reg. Sess. (2005), available at http://assembly.state.ny.us/leg/?default_fld=&bn=S01383&term=2005&Summary=Y&Actions=Y&Votes=Y

⁸⁹ H.R. 1006, 2005 Gen. Assemb., Reg. Sess. (2005), available at <http://www.ncga.state.nc.us/sessions/2005/bills/house/pdf/h1006v1.pdf>, codified at N.C. GEN. STATE., ch. 143, art. 3., § 143-59.4.

⁹⁰ H.R. 2379, 93rd Gen. Assemb., Reg. Sess. (Ill. 2003), available at <http://www.ilga.gov/legislation/93/HB/09300HB2379eng.htm>, codified at 215 ILL. COMP. STAT. 5/155.39 (2003).

⁹¹ See CHI., ILL., MUNICIPAL CODE § 292-585 (2002); see also Sabrina L. Miller & Gary Washburn, *New Chicago Law Requires Firms to Tell Slavery Links*, CHICAGO TRIBUNE (Oct. 03, 2002), http://articles.chicagotribune.com/2002-10-03/news/0210030033_1_chicago-ordinance-city-contracts-dorothy-tillman.

⁹² See WAYNE CNTY., MICH., CODE OF ORDINANCES, tit. VI, ch. 120, art. XI, §120-192(f), available at <http://library.municode.com/index.aspx?clientId=13032>.

⁹³ PHILA., PA. CODE § 17-104 (2005), available at <http://legislation.phila.gov/attachments/1420.pdf>.

⁹⁴ S. 2199, 2000 Leg., Reg. Sess. (Cal. 2000), available at <http://www.insurance.ca.gov/0100-consumers/0300-public-programs/0200-slavery-era-insur/sb-2199.cfm>; CAL. CODE OF REGS. tit. 10, §§ 2393-2398, available at <http://www.insurance.ca.gov/0100-consumers/0300-public-programs/0200-slavery-era-insur/insur-slavery-regs.cfm>.

⁹⁵ See, e.g., L.A., CAL., ADMIN. CODE, ch. 1, art. 15 (2003), available at http://clkrep.lacity.org/onlinedocs/2003/03-0232_ORD_175346_08-16-2003.pdf (affidavit available at <http://bca.lacity.org/site/pdf/sdo/Affidavit.pdf>); S.F., CAL., ADMIN. CODE, CH. 12Y (2006), available at [http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca](http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca;);

BERKELEY, CAL., MUNICIPAL CODE, tit. 13, ch. 13.96 (2005), available at <http://www.ci.berkeley.ca.us/citycouncil/2005citycouncil/packet/052405/2005-05-24%20Item%2015.pdf>; RICHMOND, CAL., CODE OF ORDINANCES, art. II, ch. 2.29, available at <http://library.municode.com/index.aspx?clientId=16579&stateId=5&stateName=California>. See also Jason B. Johnson, *Firms that Profited from Slavery Reviewed: Richmond, Oakland Consider Early Step to Seeking Reparations*, S.F. CHRONICLE (Mar. 12, 2005, 4:00 AM), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/03/12/BAG00BNTTS1.DTL>.

⁹⁶ H.R. 3148, 186th Gen. Ct., Reg. Sess. (Mass. 2009), available at <http://www.mass.gov/legis/bills/house/186/ht03pdf/ht03148.pdf>.

⁹⁷ See, e.g., Feagin, *supra* note 33; Eric J. Miller, *Representing the Race: Standing To Sue in Reparations Lawsuits*, 20 HARV. BLACKLETTER L.J. 91 (2004); Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051 (2003) [hereinafter *The Current Reparations Debate*]; Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31 (2004); Charles J. Ogletree, Jr., *Reparations for the Children of Slaves: Litigating the Issues*, 33 U. MEM. L.

badges and incidents of slavery.⁹⁸ At least one member of the United States Congress is a long-time supporter of reparations and advocates the establishment of a national commission to study the effects of slavery. Representative John Conyer's H.R. 40 bill⁹⁹ is a pivotal next step in petitioning the United States government for reparations. Once a national commission is established, descendants of the African Diaspora may use it as a prototype and replicate it in their respective countries, similar to the different commissions which sprang forth for Holocaust survivors and slave laborers in the Czech Republic, Hungary, Poland, and the other former states of the Soviet Union.¹⁰⁰ It will be that moment in the reparations movement that will generate sufficient international fervor for a proposed International Tribunal for the Trans-Atlantic Slave Trade and municipal slavery finally to be established.

B. Difficulty In Attaching a Monetary Value for Crimes Against Humanity

Any human life that has been annihilated as a result of those who have committed crimes against humanity is legally entitled to compensation.¹⁰¹ The question that remains is how does one assign a monetary value to human life because the reasonably prudent person knows that wealth cannot revive the dead. This and relevant legal questions are based on the judicial system of the United Nations and those nation-states who are (at minimum) signatories to the basic UN Protocols and Conventions-Declaration on Human Rights, Slavery Convention of 1926 and Supplement Slavery Convention.

Nevertheless, restitution is an acknowledgment of a wrong, regardless of how inadequate the monetary award is in light of the actual loss.

At the time when European Jews began to develop momentum for the cause of reparations for the atrocities of the Holocaust, not all Jews agreed that assigning a monetary value to human life was impossible. There were some who deplored the notion of financial compensation for the horrors of the concentration and extermination camps.¹⁰² These members of the Jewish community believed that accepting money from Germany devalued the memory of the Holocaust that they and their forefathers

REV. 245 (2003) [hereinafter Children of Slaves]; Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003) [hereinafter New Efforts]; Adrienne D. Davis, *The Case for United States Reparations to African Americans*, 7 HUM. RTS. BR. 3 (2000); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for black Reparations?*, 40 B.C. L. REV. 429 (1998); Verdun, *supra* note 1.

⁹⁸ See 2012 Va. Acts 527, available at <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=121&typ=bil&val=HB527> (establishing "the Virginia Slave Commission . . . in the legislative branch of state government for the purpose of addressing contemporary political, economic, educational, and societal issues and public policies whose roots lie in the transatlantic slave trade." The Commission, among other things, must identify the vestiges and assess the effects of the transatlantic slave trade on African Americans, the Commonwealth, and modern societal problems and public policies.); S. A07312, 2005–2006 Gen. Assemb., Reg. Sess. (N.Y. 2005), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A07312&term=2005&Summary=Y&Actions=Y; H.J.R. 0014, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011), available at <http://legiscan.com/TN/text/HJR0014/2011> (creating special committee to study "the impact of slavery and segregation on African-Americans in Tennessee"); H.J.R. 0086, 93rd Gen. Assemb., Reg. Sess. (Ill. 2004), available at <http://www.ilga.gov/legislation/93/HJR/09300HJ0086.htm> ("Resolved, by the House of Representatives of the Ninety-Third General Assembly of the State of Illinois, the Senate Concurring Herein, that there is established the Commission to Study the Transatlantic Slave Trade and its Past and Present Effects on African-Americans").

⁹⁹ H.R. 3745, 101st Cong. (1989).

¹⁰⁰ See, e.g., Foundation Polish-German Reconciliation, *supra* note 49.

¹⁰¹ The concept that reparations are payable where a crime against humanity has been committed by one people against another is well-established in international law and practice. See Lord Gifford Debate, *supra* note 2.

¹⁰² BARKAN, *supra* note 4, at 25. They insisted that it was inexcusable to betray the memory of the six million Jews who had perished in the Holocaust by negotiating the forgiveness of their blood.

had endured.¹⁰³ Nevertheless, the cause for reparations increasingly gained support, creating a greater unification amongst Jews who would demand recompense for the Holocaust.¹⁰⁴

Although Jews knew that money could not restore them to their original state nor alter the status of their tortured predecessors, they did accept the notion, that the *smallest* act of atonement that the German government could perform was to pay reparations.¹⁰⁵ Germany's act of restitution became part of a recognized legacy in which the progeny of European Jews would later promote a legacy of remembrance, and thus adopted the phrase "Never Again." Similarly, advocates argue that reparations are the smallest necessary act of atonement for generations and nations involved in the slave trade.¹⁰⁶

Thus, the increased advocacy for reparations on behalf of Jews evolved into a two-fold moral obligation. European Jews advocated not only for their own injuries, but also on behalf of their forebears. They created a new legacy of strength rather than victimization.¹⁰⁷ On the other side, the German government paid reparations to apologize for the perpetrators of these crimes against humanity many of whom held positions in the government in years past. Germany's act of reparation began to transform its reputation among its citizens as well as in the international community.¹⁰⁸ Thus, Jews began to forge a new paradigm regarding restitution and historical injustices that subsequent survivors of crimes against humanity could use as a standard, while making a social, economic and legal impact that would benefit their prosperity.

C. The Trans-Atlantic Slave Trade's Legalized Legacy of Discrimination

Although the Trans-Atlantic Slave Trade was a complex financial enterprise, its proponents shed continuous streams of African blood, eradicating precious human life throughout the Eastern and Western Hemispheres. Black/Native Americans, as well as some Latinos and their African ancestors, were socially and culturally dismantled by those who engaged in slave expeditions, kidnapping, and slave trading.¹⁰⁹

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 27. Reparation was viewed as a moral, legal, and political commitment, yet the enormity of the ethical and moral crimes made a comprehensive restitution impossible.

¹⁰⁶ See Verdun, *supra* note 1, at 612–28.

¹⁰⁷ BARKAN, *supra* note 4, at 26.

¹⁰⁸ *Id.* at 27.

¹⁰⁹ African slaves were forced to speak the language of their captors throughout the Trans-Atlantic Slave trade and subsequent international municipal slavery, while losing their own. They were also forced to nurse their captors and mistresses' children, while their owns either starved, were neglected, or were forced to consume the remnants of eaten or rotten food in the shacks on the plantation like animals or work in the gleaming sun while tending the fields. They lived in shacks, while their masters and mistresses resided in luxurious, clean mansions or homes that slaves built and maintained. The slaves were the seamstresses for the madams, while they themselves wore little clothing or rags. They were also forced into illiteracy so that they would naturally sound unlearned, thus creating another justification for Europeans to enslave the "ignorant" Africans, while the slave-masters' children attended institutions of learning and the slave-children labored in the plantation fields. Slave-masters and slavers aboard ships raped slave women, and forced them to breed in order to generate valuable chattel to be sold. The slave-traders and overseers tortured and murdered slaves when they attempted to escape the dreadful reality of servitude labor; while Europeans enslaved Africans and journeyed to the New World in the name of freedom from tyranny or oppression of European monarchs. See SLAVE TESTIMONY: TWO CENTURIES OF LETTERS, SPEECHES, INTERVIEWS, AND AUTOBIOGRAPHIES (John W. Blassingame ed., 1977); see also THOMAS, *supra* note 3 at 117.

The Slavery Convention of 1926,¹¹⁰ as amended, and the Slavery Convention of 1956¹¹¹ outline acts that constitute slave trading and slavery. The Rome Statute, ratified in 2002,¹¹² includes slavery in its detailed explanation of crimes against humanity. European and African monarchs who held and traded slaves have committed these crimes against humanity. The Slavery Conventions define slavery and slave trading as follows:

- (1) Slavery is the status or condition of a person over whom any or all of the powers attaching the right of ownership are exercised.
- (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade transport of slaves

The entire slave trade institution became the foundation for which the Slavery Conventions were enacted, and decades after the ratification of the Slavery Conventions the Rome Statute was ratified, providing additional credence to the Slavery Conventions.

In 1948, the General Assembly of the United Nations announced the adoption of the Universal Declaration of Human Rights.¹¹³ The crafters of the Declaration recognized that all human beings are inherently free,¹¹⁴ and provided additional denouncement of slavery and slave-trading.¹¹⁵ Although this Declaration is advisory and not statutorily binding on member nation-states, under international custom it is binding on the international community.

Despite the international condemnation of crimes against humanity and slavery in general, the issue of reparations for the Trans-Atlantic Slave Trade itself has not been addressed. Thus, remains the awesome task of assessing the immediate and long-term social, cultural, and economic damage that the Trans-Atlantic Slave Trade has had (primarily) on Black/Native Americans, but also on Native Americans and those of Hispanic descent.

The victims of the Trans-Atlantic Slave Trade and Western municipal slavery were systematically dehumanized by being branded, kidnapped, and lynched simply because of their race. During the era of Reconstruction, beneath the guise of the Freedmen's Bureau, the laws of Jim Crow, and Black Codes, the system of slavery and its legacy still existed, regardless of the passage of the 13th Amendment.¹¹⁶ It is

¹¹⁰ See The Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253, *amended by* Protocol Amending the Slavery Convention, Dec. 7, 1953, 182 U.N.T.S. 51.

¹¹¹ See Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3.

¹¹² See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Final Act*, U.N. Doc. A/CONF.183/10 (1998) [hereinafter Rome Treaty Statute].

¹¹³ See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).

¹¹⁴ *Id.* at Art. I (“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”).

¹¹⁵ *Id.* at Art. 4 (“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”).

¹¹⁶ See The Current Reparations Debate, *supra* note 97, at 1068, 1069 (“But perhaps my favorite was the letter stating that blacks should compensate the Southern whites dispossessed by means of the Freedman's Bureau. This correspondent had a shaky grasp of history. The land the Bureau gave to blacks was taken back and redistributed to whites to compensate them for their loss of slaves.”).

unreasonable to expect that after all of these acts, centuries later, descendants of freed slaves could equitably compete economically, socially, and culturally with their white counterparts in a system whose foundation is corrupted with racial bias.¹¹⁷ Members of the dominant society possessed a four-century-old, well-established advantage in a system that their ancestors created,¹¹⁸ an institution stymied with institutionalized racial discrimination.

These were only some of the atrocities that slaves and their descendants systematically endured for centuries. Unfortunately, due to the inevitable passage of time and the legacy of international sanction, participating nation-states have provided limited reconciliatory actions towards slavery survivors and their descendants for these crimes against humanity. While the immediate perpetrators have vanished, there are still authorities who sit in the same seats of international power in nations that were intricately involved in the Trans-Atlantic Slave trade,¹¹⁹ and who continue to benefit financially from its legacy.¹²⁰ Many of the nation-states who participated in and encouraged the degrading and demoralizing enterprise of the Slave trade within its borders and abroad remain in existence or evolved itself into an autonomous country and arguably continue to prosper based on centuries of forced free labor. There remain Caucasian laymen who benefit from slavery's established privilege of wealth by enjoying greater access to education and employment, while the descendants of slaves continue to be oppressed by the great disadvantages that are linked to such an historical atrocity.¹²¹

¹¹⁷ See also International Labor Conference, May 30–June 15, 2007 *Equality at Work: Tackling the Challenges* 24 (May 10, 2007), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082607.pdf [hereinafter *Equality at Work*]. Racial discrimination affects millions of different workers around the world, ranging from black people and ethnic minorities to indigenous peoples, nationals of foreign origin and migrant workers. Very often those who suffer racial or ethnic discrimination are very poor. Centuries of unequal treatment in all spheres of life, combined with persistent and deep ethnic socio-economic inequalities, explain their low educational and occupational attainments. Lower achievements, in turn, make them vulnerable to ethnic stereotyping, while social and geographic segregation perpetuates ethnic inequalities, reinforcing perceptions of “inferiority” or “distastefulness” by majority groups.

¹¹⁸ See Verdun, *supra* note 1, at 612–13. Ignoring or even downplaying the significance of race in a system that discriminated against a group of people based on its race for hundreds of years—a system that left that group in a politically, economically, and socially disadvantaged state—threatens affirmative action plans and efforts.

¹¹⁹ See WINBUSH, *supra* note 27, at 57.

¹²⁰ See Verdun, *supra* note 1, at 636.

¹²¹ See Feagin, *supra* note 33, at 50. There is a similar connection between the relative poverty of African Americans and the enrichment and prosperity of most European Americans. Over several centuries, most whites, as individuals and families, have benefited handsomely from anti-black oppression and the transmission of ill-gotten wealth and privilege from one generation to the next. Today, the relative prosperity, long life expectancies, and high standard of living of white Americans are significantly rooted in centuries of exploitation and impoverishment of African Americans and other Americans of color; see also H.R. 40, 108th Cong. (2004). Quoting Michigan Representative Conyers, sponsor of the bill: “Just as white Americans have benefited from education, life experiences, and wealth that was handed down to them by their ancestor, so too have African Americans been harmed by the institution of slavery.” See U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2011 Current Population Reports*, Carmen DeNavas-Walt, Bernadette D. Proctor, Jessica C. Smith, pp. 14, 18 (2012). See also United States Bureau of Labor Statistics, Economic News Release November 2, 2012. <http://www.bls.gov/news.release/empsit.a.htm> (last visited December 4, 2012). See also News One, *black Unemployment Jumps In Jobs Report Released On Eve Of Election*, Lynette Holloway. <http://newsone.com/2072628/black-unemployment-october-jobs-report-2012-presidential-election/>. (last visited December 4, 2012). See also CNN Money, *African-American jobless rate surges*, Emily Jane Fox, July 6, 2012. <http://money.cnn.com/2012/07/06/news/economy/black-unemployment-rate/index.htm>. (last visited December 4, 2012). See also City Limits, *Group Wants UN Scrutiny Of U.S. black Unemployment: As the United Nation's Human Rights Council embarks on a review of the United States, some advocates say high black joblessness is a mark against America*, Jarrett Murphy, April 26, 2010, <http://www.citylimits.org/news/articles/3956/group-wants-un-scrutiny-of-u-s-black-unemployment>. (last visited December 4, 2012). See also The Washington Post, *U.S. unemployment rate for blacks projected to hit 25-year high*, V. Dion Haynes, January 15, 2010. <http://www.washingtonpost.com/wp>

Thereafter, the effects of this gruesome legal history have consistently manifested themselves throughout the lives of its progeny. These badges and incidents of slavery attest to the international community's failure to enforce existing legislation which prohibit discrimination and protect civil rights, and its failure to enact appropriate UN resolutions and conventions addressing the issue of reparations.

In recent decades, invidious discrimination has occurred internationally against people of color, especially Black/Native Americans, regarding the right to vote, equitable access to education, employment, housing,¹²² and racial profiling.¹²³

Black, Native, and Latino Americans continue to have unequal access to education. The Universal Declaration of Human Rights states that each person has the *right* to equal access to education based on merit.¹²⁴ Thus, the Declaration argues for *equitable*, and not necessarily equal, access to education. It cannot be emphasized enough that because the descendants of slavery were involuntarily integrated into an unfamiliar, Caucasian-owned and managed system of government, these citizens deserve the same opportunity to education as their white contemporaries. When Africans were separated from Africa they lost much of their native language. Africans were often beaten or tortured if they uttered a word of their native tongue, thus they lost their original oral tradition and remained illiterate in the dominant, written language. Illiteracy dismantled basic freedoms to advance economically in mainstream society, associate, assemble in a peacefully, express ideologies, travel, and shop.

During the early 1900s, most schools for Blacks in the rural South had no books, and those that they did have were antiquated or few in number. Schools were overcrowded, with a high student to teacher ratio. In addition to inadequate schoolhouses and supplies due to lack of funding,¹²⁵ the

dyn/content/article/2010/01/14/AR2010011404085.html. (last visited December 4, 2012). *See also*, Asher Hawkins, *Minority Unemployment Skyrocketing, Report Says*, Forbes Magazine, January 15, 2010, <http://www.forbes.com/sites/moneybuilder/2010/01/15/minority-unemployment-skyrocketing-report-says/>. (last visited December 4, 2012). *See also* Equality at Work, *supra* note 117. *See also* Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All forms of Discrimination (2007). Nonetheless, significant challenges still exist. Subtle, and in some cases overt, forms of discrimination against minority individuals and groups continue to plague American society, reflecting attitudes that persist from a legacy of segregation, ignorant stereotyping, and disparities in opportunity and achievement. Such problems are compounded by factors such as inadequate understanding by the public of the problem of racial discrimination, lack of awareness of the government-funded programs and activities designed to address it, lack of resources for enforcement, and other factors. *See also* Hylton, *supra* note 97, at 35.

¹²² *See* Verdun, *supra* note 1, at 598, 640. Pervasive discrimination and segregation in employment, education, and housing, which have resulted in the continuing exclusion of great numbers of Negroes from the benefits of economic progress.

¹²³ William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 18, 22 (2004) (racial profiling occurs when law enforcement authorities use race as a factor in predicting criminal conduct).

¹²⁴ *See* Universal Declaration of Human Rights, *supra* note 113 (“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. (3) Parents have a prior right to choose the kind of education that shall be given to their children.”).

¹²⁵ *See* Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of black Life Under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L. J. 207, 236 (2006) (“Following the Civil War, legally mandated segregation in education blossomed in the South while it gradually declined in the North. In the South, segregation became the norm for public education. Through legislative action, state officials consistently provided unequal funding to African American schools as compared with their white counterparts. Discrimination by legislatures in funding segregated schools also included substantial discrepancies in the

psychological, racial status quo was approved under the “separate but equal” legal doctrine.¹²⁶ Supporters of this notion asserted that “Negroes” now had an “opportunity” to advance in mainstream society because of the new educational and transportation facilities separated by racial distinctions. Additionally, the education Black/Native Americans received in such segregated institutions was antiquated, Eurocentric, and perpetuated the loss of a connection to their historical and cultural roots.

Descendants of slavery did not endure the separate but equal doctrine in the field of education alone. Government also applied this policy in transportation and commerce. A pivotal civil rights case emerged challenging American racial politics entitled *Plessy v. Ferguson*. *Plessy* was a landmark case in which the “separate but equal” doctrine was upheld. The appellant Plessy was a mulatto passenger¹²⁷ in a railroad coach whose departure and destination was within the borders of the state of Louisiana.¹²⁸ Plessy attempted to sit in a section of the train reserved for whites when the conductor of the train attempted to eject him from the section.¹²⁹ Plessy’s primary argument against the constitutionality of the Louisiana law¹³⁰ was that because he was of mixed race, and upon first glance it was not readily ascertainable that he had a trace of Negro blood in him, he was entitled to the same privileges and immunities as whites.¹³¹ The policy of the private owners of the train was to provide “separate but equal” accommodations to whites and “coloreds,” and was supported by Louisiana’s legislation.¹³² The Supreme Court declared the law constitutional.

The Court, in delivering its convoluted opinion, asserted that federal law was only a corrective measure to be used *after* a citizen’s right is violated due to enforcement of state law.¹³³ The Court cautioned that Congress did not have the legislative power to dictate to state legislatures how or what type of laws should be passed regarding the private rights of their citizens.¹³⁴ Thus, the Court, in construing the ideal of federalism,¹³⁵ emphasized the necessity of enacted state legislation to cause an injury before adjudicating the constitutionality of municipal or state law.¹³⁶

The Court further elaborated the issue of federal jurisdiction by noting that the Louisiana statute only regulated railroad cars that traveled within its borders. The Constitution vests regulation of interstate commerce solely in Congress.¹³⁷ The Court, quoting another federal case, stated that the

salaries of black and white teachers with comparable qualifications. In many instances, schools for blacks only came about through the funding of black parents and white philanthropists. In some cases, post-Reconstruction governments of the South refused to fund black education and, in other cases, officials opposed the establishment of schools regardless of funding.”) (citations omitted).

¹²⁶ In its 1896 *Plessy v. Ferguson*, 163 U.S. 537 (1896), decision, the Supreme Court upheld de jure segregation by the states. The precedent established in *Plessy* continued as the law of the land until the 1954 Supreme Court decision in *Brown v. the Board of Education*.

¹²⁷ See *id.* (“That petitioner was a citizen of the United States and a resident of the state of Louisiana, of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood . . .”)

¹²⁸ See *id.* (“[H]e engaged and paid for a first-class passage on the East Louisiana Railway, from New Orleans to Covington, in the same state . . .”).

¹²⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹³⁰ See 1890 La. Acts 152. This act sanctions separate railway carriages for whites and blacks.

¹³¹ *Plessy*, 163 U.S. at 537 (“ . . . [T]hat the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege, and immunity secured to the citizens of the United States of the white race by its constitution and laws . . .”).

¹³² See generally 1890 La. Acts 152, *supra* note 130.

¹³³ See *Plessy*, 163 U.S. at 537.

¹³⁴ *Id.*

¹³⁵ See BARRON’S LAW DICTIONARY 186 (3rd Ed. 1991); see also *Marbury v. Madison*, 5 U.S. 137 (1803).

¹³⁶ *Marbury*, 5 U.S. at 137.

¹³⁷ U.S. CONST. art. I, § 8, cl. 3 (“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

Louisiana statute had no bearing on interstate commerce, and thus eliminated Congress' standing to interfere with the issue of the statute's constitutionality.¹³⁸ The Court then addressed Plessy's argument that the regulation of segregation by race deprived him of property in violation of the Privileges and Immunities clause of the U.S. Constitution.¹³⁹ The Court's simplified response was that only if Plessy were white and seated in a "colored" compartment would he then be deprived of property, because white men had certain privileges that non-whites did not possess. However, since the railroad company determined that Plessy was not white and thus not in possession of these privileges, and seated him in the "colored" car, Plessy was not deprived of any privileges.¹⁴⁰

At this point in of U.S. Constitutional history, The Supreme Court did not consider race a "suspect" class and therefore not held to today's standard of strict scrutiny.¹⁴¹ As a result, the Supreme Court ruled applied the rational basis review standard¹⁴² to hold that Louisiana's statute was reasonable and therefore constitutional. The *prima facie* psychological effect of this ruling was that, once again, whites deemed themselves to be somehow superior to their non-white counterparts.¹⁴³ The Supreme Court would argue that such a construction was the mental burden of Black/Native Americans¹⁴⁴ while at the same time conceding that the reality of social inequality between Blacks and Whites was a result of slavery.

As a result of government-codified stereotypes, it became unlawful for Blacks to visit, shop, and attend the same institutions of learning, visit the same businesses, museums, other public facilities, reside in homes of a quality comparable to those of Whites, and to ride the same public transportation as whites, because the dominant culture used the psychological branding of inferiority on Blacks.¹⁴⁵ This branding was the same as that imposed was in the time of the Trans-Atlantic Slave trade, and in today's continuation of municipal slavery, white supremacy remains the inherited reality in American and European societies.¹⁴⁶ Black/Native Americans, however, did not necessarily harbor the notion that in order for their self-worth to be sufficient they had to be in the constant presence or societal engagement of whites. In fact, during slavery, Blacks and Native Americans were ecstatic to be in their own company and celebrating the remnants of their African heritage and new Black/Native American culture without

¹³⁸ Plessy v. Ferguson, 163 U.S. 537 (1896).

¹³⁹ *See id.* at 549 ("It is claimed by the plaintiff in error that, in an [sic] mixed community, the reputation of belonging to the dominant race, in this instance the white race, is 'property,' in the same sense that a right of action or of inheritance or property.")

¹⁴⁰ *Id.* ("If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called 'property.' Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.")

¹⁴¹ *Id.* at 549 ("If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called 'property.' Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.")

¹⁴² *Id.* at 550 ("In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and preservation of the public peace and good order.")

¹⁴³ Plessy v. Ferguson, 163 U.S. 537, 552 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.")

¹⁴⁴ *Id.*

¹⁴⁵ *See Verdun, supra* note 1, at 634 (although most whites and African-Americans would consciously disclaim any notion that African-Americans are inferior to whites, subconsciously many decisions, heavily camouflaged in the cloak of meritocracy, are made based on such beliefs. This heritage of inferiority looms in eerie, ghostlike form over African Americans in the workforce, classrooms, markets, and social circles throughout the nation).

¹⁴⁶ *Id.*

the annoying interference of their white oppressors. In South America this was evident in slave runaway communities, one of the most famous, Palmares, referred to as *quilombos*,¹⁴⁷ in which former slaves and Africans not only help other slaves gain freedom but created new communities which merged a new solidarity of freedom with aspects of African culture with newly imposed Christianity.

Africans knew that in order to survive in this land as well as in other European countries they would need to eventually be accepted by their former slavemasters. The most successful way to achieve this was to destroy Europeans' mentality of white supremacy.

Still, the federal United States government and governments of Europe blamed the victims, who experienced inadequate access to goods, education, and accommodations under the doctrine of "separate but equal." The federal government possessed a predatory ideology, according to which it could prey legally upon the perceived undesirables and then fault the victim for having caused the discriminatory cause of the act. The Court manipulated the psychological effect of its opinion by asserting that Black Americans, Black/Native Americans, or other people of color developed a mentality of inferiority due to some anonymous source, yet acknowledged the privileges whites enjoyed as a result of white supremacy and de jure segregation.

In another landmark case centuries later, *Brown v. Board of Education*,¹⁴⁸ the federal government abolished the "separate but equal" status quo in institutions of learning. Blacks and Native Americans attended schools that had minuscule school supplies, inadequate seating, and poor or no lighting.

Although many initial proponents of this doctrine did not in fact mind the separate educational facilities, as long as there was equal access to learning materials, teachers,¹⁴⁹ and opportunities following graduation, a distinct reality emerged. The schools were separate but not equal.¹⁵⁰ History has a peculiar manner of repeating itself. In the twenty-first century, the same racial disparity in education exists, albeit less obviously, that existed during Reconstruction. Many inadequately equipped public schools today are in poor neighborhoods occupied by Latinos and Black Americans, as well as Black/Native Americans. From the nineteenth through the twenty-first centuries, in the southside of Chicago, Baltimore, New York City, Detroit, and South Central Los Angeles, schools continue to be overcrowded, inadequately funded, and polluted by asbestos and lead.¹⁵¹ For a substantial period of time, Baltimore had one of the highest illiteracy rates in the United States. Cities in the United States and Europe still suffer from unacceptable conditions that were not adequately addressed after the eradication of physical slavery.

White privilege in the realm of education in the United States is also manifest in the inequitable access to respected colleges and universities in the twenty-first century. The parents of students in one high school refused to allow the school to be renamed after Martin Luther King, Jr. The parents'

¹⁴⁷ Palmares was the largest and most famous community established by runaway slaves in Brazil during the 1600s. Through the years, it has become an important symbol of the black struggle for freedom in Brazil and other parts of the Americas. Palmares was formed about 1605 and grew through the union of several mocambos—settlements of runaway slaves.

¹⁴⁸ 344 U.S. 1 (1952).

¹⁴⁹ JERALD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* 56–57 (2002).

¹⁵⁰ See *Briggs v. Elliott*, 342 U.S. 350, 351 (1952). A Federal District Court admitted "that the educational facilities afforded by appellees for Negro pupils are not equal to those provided for white children."

¹⁵¹ See Diane Rado et al., *Still separate, unequal*, CHI. TRIB., May 9, 2004, at 1. See also *Report: Nearly Half Of Detroiters Can't Read*, CBS News Detroit, (May 4, 2011, 2:20pm), <http://detroit.cbslocal.com/2011/05/04/report-nearly-half-of-detroiters-cant-read>; see also Simone Wilson, *Los Angeles Ranks In Bottom Fourth Of 'America's Most Literate Cities'* (January 10, 2011, 10:45 am), http://blogs.laweekly.com/informer/2011/01/literacy_ranking_los_angeles.php; see also Paul W. Valentine, *Baltimore Targets its High Rate of Illiteracy; Schmoke Pushing Programs to Make 'City That Reads' More Than Just an Idle Slogan*, *The Washington Post*, August 27, 1990.

reasoning was that the school was in a majority white school district and the parents did not want their privileged white children to attend a high school associated with a Black American.¹⁵² They theorized that college admission offices would likely discriminate against their children.¹⁵³ They unwittingly asserted what most Americans are reluctant to admit—that racism exists, and that not only are Blacks discriminated against, but the mere association with Black Americans or Black/Native Americans could affect one's educational and economic future. It is actually the Blacks and Native Americans who have the least access to education, resulting in meager wages that in turn limit the extent to which they are able to economically provide for their families.¹⁵⁴

According to statistics calculated in 2010, of the Black Americans and Black/Native Americans surveyed twenty-five years of age or older, only 13.2% had obtained a Bachelor's degree compared to 20% of white Americans and 14.4% of Americans of Hispanic Origin.¹⁵⁵ 80% of these Black Americans and Black/Native Americans had less than a Bachelor's Degree, compared to 67% of white Americans and 86% of those of Hispanic origin.¹⁵⁶

The disparate impact of the lack of access to education may not, at first glance, appear to be staggering. However, the total number of citizens within this age group was as follows: 22,202 Black Americans and Black/Native Americans, 138,482 white Americans, and 26,375 Hispanic Americans.¹⁵⁷ Although Black Americans and Black/Native Americans comprised the smallest population in this age group, they also had the lowest percentage of education, compared to White Americans who had the highest percentage of educational attainment. Overall, white and Latino had more people within their respective ethnic group to obtain a higher education than Blacks. Descendants of slavery did not endure the separate but equal doctrine in the field of education alone. Government also applied this policy in transportation and commerce.

The Universal Declaration of Human Rights prohibits discrimination in employment, and names employment as a right belonging to all citizens of the international community.¹⁵⁸ In the United States, the Civil Rights Act of 1964¹⁵⁹ was enacted to eliminate employment discrimination; it prohibits discrimination based on race, religion, national origin, gender, ethnicity, or disability. However, the disparity in hiring among whites and people of color is staggering.¹⁶⁰ It is not solely a question of

¹⁵² See THE WASHINGTON POST, *Debate on Naming School for M.L. King*, January 5, 1998, at A.07 (“Some white parents are fighting a plan to name a new high school after the Rev. Martin Luther King Jr., claiming it would be branded as a black school, hurting graduates’ college chances. The school in the city about 60 miles east of Los Angeles is scheduled to open in September 1999.”).

¹⁵³ *Id.*

¹⁵⁴ See also RAYMOND A. WINBUSH, *SHOULD AMERICA PAY: SLAVERY AND THE RAGING DEBATE ON REPARATIONS* 61 (2003).

¹⁵⁵ See U.S. Census Bureau, *Current Population Survey: Educational Attainment—People 25 Years Old and Over, by Total Money Earnings in 2010, Work Experience in 2010, Age, Race, Hispanic Origin, and Sex*, http://www.census.gov/hhes/www/cpstables/032011/perinc/new03_001.htm (last visited Aug. 10, 2013).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See Universal Declaration of Human Rights, *supra* note 113. The Charter states, “(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work.”

¹⁵⁹ See Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2 (2006).

¹⁶⁰ For Americans over the age of 16 in March 2013, white Americans had an unemployment rate of 6.7 percent while the rate for African Americans was 13.3. BUREAU OF LABOR STATISTICS, DEPT OF LABOR, *Economic News Release* (April 5, 2013), available at <http://www.bls.gov/news.release/empstat.a.htm> (last visited Apr. 6, 2013); See also INTERNATIONAL LABOUR ORGANIZATION, 91st Session 2003, *REPORT OF THE DIRECTOR-GENERAL TIME FOR EQUALITY AT WORK* 67, Report I (B), Table 6 (2003), available at <http://www.ilo.org/ilc/ILCSessions/91stSession/lang--en/index.htm> (Last visited Dec. 4, 2012); see also Lynette

whether a Black American and a White American are equally qualified, but rather if the potential employer under such circumstances *actually* hires the Black American, perhaps based on affirmative action.¹⁶¹

Even if they obtain employment, Black/Native Americans receive unfair treatment, their opinions are disregarded, and often a supervisor will favor an idea for improvement presented by a white employee simply because of the employee's race, not because that employee's idea served the best interests of the company or organization. Conversely, a Black/Native American employee who provides initiatives for a company that improve that organization's growth may be terminated based on racial discrimination.¹⁶² Additionally, Black/Native Americans who remain loyal to a company and advance in their position are usually denied advancement in favor of younger white replacements, who are less qualified.¹⁶³ Regardless of the strides that Black/Native Americans make in their education and life experiences, their inner consciousnesses¹⁶⁴ remain aware that they must toil twice as hard, restrain their emotions twice as much, and rely on a system that continuously deprives them of equal protection under the law;¹⁶⁵ the pervasive reality is that justice is bound by those who administer it. Unfortunately, the beholder inherits the position of dominant society, and true justice remains quite distant. The reality is racial inequality.

Additionally, there remains government action endorsing racial discrimination in access to housing. Black/Native Americans and others graduated from living in plantation shacks or being a "house Negro;" to attempting to develop their own neighborhoods without collateral, education, land, or job training; to progressing in their economic lives in the twentieth century in order to obtain a piece of

Holloway, *black Unemployment Jumps in Jobs Report Released on Eve of Election*, NEWS ONE, <http://newsone.com/2072628/black-unemployment-october-jobs-report-2012-presidential-election/> (black unemployment rose from 13.4 percent in September 2012 to 14.3 percent in October); *see also* Emily Jane Fox, *African-American Jobless Rate Surges*, CNN MONEY, July 6, 2012, <http://money.cnn.com/2012/07/06/news/economy/black-unemployment-rate/index.htm> (while the national unemployment figures remained constant during the May 2012, black unemployment rose by 0.8 percent); *See also* Jarrett Murphy, *Group Wants UN Scrutiny Of U.S. black Unemployment*, CITY LIMITS, Apr. 26, 2010, <http://www.citylimits.org/news/articles/3956/group-wants-un-scrutiny-of-u-s-black-unemployment> (a coalition of advocacy groups filed a petition with the Human Rights Council seeking review of black unemployment in America); *See also* V. Dion Haynes, *U.S. Unemployment Rate for blacks Projected to Hit 25-Year High*, WASH. POST, Jan. 15, 2010, at A20 (black unemployment reached a twenty-five year high in 2010); *See also* Asher Hawkins, *Minority Unemployment Skyrocketing, Report Says*, FORBES.COM (Jan. 15, 2010, 1:19 pm), <http://www.forbes.com/sites/moneybuilder/2010/01/15/minority-unemployment-skyrocketing-report-says> (similar).

¹⁶¹ The legal framework of affirmative action is set forth in statutes and executive orders. *See generally* 29 C.F.R. § 1608 (1979) (statute authorizing the Equal Employment Opportunity Commission); Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965) (creating the Equal Employment Opportunity program); Exec. Order No. 11478, 34 Fed. Reg. 12,985 (Aug. 8, 1969) (same for federal government hiring).

¹⁶² *See* Lauren FitzPatrick, *Fired Teacher Sues CPS, Alleging Racial Discrimination*, CHICAGO SUN TIMES, Dec. 12, 2012, at A12.

¹⁶³ Several examples have been reported in the news recently. *See* Shan Li, *Race bias found in firing by Wet Seal*, L.A. TIMES, Dec. 4, 2012, at B1 ("Hersey was turned down each time that the position became available from 2009 to early 2010, not because she was unqualified but because she's black, according to a lawsuit filed on her behalf by the Equal Employment Opportunity Commission."); *see also* David Schepp, *Dollar General Accused of Denying Promotion to black Worker in Favor of whites*, AOL JOBS, Oct. 3, 2012, <http://jobs.aol.com/articles/2012/10/03/lawsuits-charge-dollar-general-with-race-discrimination-sex-har/> (Dollar General promoted less-qualified white applicants instead of black applicants into that position, the federal agency claims, noting that Hersey was the only black employee of the store, located in the Gulf Coast community of Long Beach."); *See also* *Wet Seal Discriminated against Former Black Manager, EEOC says*, L.A. TIMES, Dec. 4, 2012, <http://articles.latimes.com/2012/dec/04/business/la-fi-wet-seal-eeoc-bias-20121204> ("Filed in July, the lawsuit accuses the clothier of adopting a policy of firing black employees and denying them promotions and pay raises in favor of hiring white workers who better fit the company's "brand image.").

¹⁶⁴ Verdun, *supra* note 1, at 600.

¹⁶⁵ *See* Carter, *supra* note 123, at 26; *see also* Verdun, *supra* note 1, at 627.

the American dream of owning a home; only to be once again stripped of this dream by government and private actors¹⁶⁶ primarily because of the color of their skin. These minorities are herded into inadequate living conditions in the ghettos of the modern West due to the inherent racial dynamics of its social and legal systems, providing more support for the legal argument that racial discrimination in access to housing is yet another vestige of the Trans-Atlantic Slave Trade and municipal slavery.¹⁶⁷ Finally, the vestiges of the slave-trading institution are not only apparent in education, employment, and housing. They have also disparately impacted the criminal justice system¹⁶⁸ in the form of racial profiling by law enforcement officials.¹⁶⁹

Beyond the particular acts that comprised the Trans-Atlantic slave trade, it is also peculiar that four centuries thereafter, descendants of its victims have been maligned and coerced into a systematic, menial social status that still affects nearly every aspect of their lives.¹⁷⁰ As discussed, the victims and their progeny were and still are stripped of voting rights, education, employment, and housing, features that form the bases of acceptable standards of living and the foundations of any democratic community or civilization.

The exact costs of the Trans-Atlantic Slave Trade have not, and will likely never be, fully ascertained. The pending H.R. 40 bill¹⁷¹ would form a commission to examine the institution of slavery and its effects on descendants of the African diaspora in North America. Representative Tony P. Hall of Ohio sponsored a separate bill, H. Con. Res. 356,¹⁷² declaring that the history of slavery continues to deprive Black Americans of their civil rights as natural citizens of the United States.¹⁷³ The resolution also calls on Congress to apologize for slavery and the slavery-like conditions that existed in America,¹⁷⁴ just as Congress did in the Civil Liberties Act of 1965, and just as Presidents George Bush, Sr. and William Jefferson Clinton apologized on behalf of the government for the unfair and racist treatment of the Japanese.¹⁷⁵ Like H.R. 40,¹⁷⁶ H. Con. Res. 356 calls on Congress to establish a commission to analyze

¹⁶⁶ See WINBUSH, *supra* note 27, at 114.

¹⁶⁷ See *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 443 (1968). The Court interpreted the 1866 Civil Rights Act as prohibiting both private and governmental discrimination in housing. “Whatever else they may have encompassed, the badges and incidents of slavery that the Thirteenth Amendment empowered Congress to eliminate included restraints upon “those fundamental rights which are the essence of civil freedom, namely, the same right...to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.” This is in contrast to the prior Civil Rights Cases, in which Congress rejected the idea that the 14th Amendment granted federal powers to prohibit or enforce the prohibition of discrimination against blacks in housing if the actor is a private citizen. See *The Civil Rights Cases*, 109 U.S. 3, 22 (1883).

¹⁶⁸ See Shelton, *supra* note 5, at 286.

¹⁶⁹ See Carter, *supra* note 123, at 21 (“Rather this Article contends that the widespread stigmatization of African Americans as predisposed toward criminality is a lingering vestige of the slave system and is therefore outlawed by the Thirteenth Amendment.”).

¹⁷⁰ See WINBUSH, *supra* note 27, at 116; see also Race Relations Act, (1976), c. 74 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1976/74> (2000 amendments).

¹⁷¹ See H.R. 40, 112th Cong. (2011).

¹⁷² See H.R. Con. Res. 356, 106th Cong. (2000) (“Whereas slavery was a grave injustice that caused and continues to cause African Americans to suffered enormous damages and losses, both material and intangible, including the loss of human dignity and liberty, the frustration of careers and professional lives, and the long-term loss of income and opportunity . . .”).

¹⁷³ *Id.*

¹⁷⁴ *Id.* (“Resolved by the House of Representatives (the Senate concurring), That—(1) Congress . . . (B) apologizes to African-Americans on behalf of the people of the United States for the wrongs committed against their ancestors who suffered as slaves . . .”).

¹⁷⁵ See Civil Liberties Act, *supra* note 63. See also Letter from President George Bush, Sr., October 9, 1991 (containing apology on behalf of the country to Japanese interned during World War II), available at <http://www.learner.org/courses/amerhistory/interactives/sources/E7/e1/sources/5496.php>; Letter from President

the impacts of slavery and subsequent racial discrimination against Black Americans.¹⁷⁷ Some advocates for restitution argue that the minimum amount of reparations is the current value of “forty acres and a mule,”¹⁷⁸ based on the original field order of General Sherman. However, this minimal award ignores years of loss of families, culture, and homeland that Africans and their descendants experienced,¹⁷⁹ as well as the involvement of other nations¹⁸⁰ whose wealth was directly cultivated and nourished by the toil of Africans, Black/Native Americans, and Native Americans. Thus, the threshold issue is what standard to use to calculate restitution and how that standard would be applied.

III. LEGAL ISSUES FOR ENFORCING APPLICABILITY OF INTERNATIONAL REPARATIONS

A. Ascertaining Jurisdiction/Sovereignty Standards for International Criminal Tribunal

Jurisdiction over a sovereign was legally impossible from the seventeenth through the nineteenth century, based on the European notion that “the King can do no wrong.”¹⁸¹ This idea became the basis of the legal doctrine of sovereign immunity. Due to the belief that because a king or other governmental leader is in charge of his citizens, he would do only that which is beneficial for the sovereign.¹⁸² However, international legal history evidences the right of citizens to seek redress from offending governments.¹⁸³ It has been conceded on record that the Trans-Atlantic Slave Trade was a crime against humanity.¹⁸⁴

Traditionally, the state brings criminal charges against individuals who have violated the rights of others. Although individual slave traders have perished, the governments and private companies who financed, licensed, promoted, and otherwise aided those involved in the enterprise, and who continue to

William Jefferson Clinton, October 1, 1993 (same), *available at* http://hillaryhistory.net/uploads/President_Bill_Clinton_-_Internment_Apology_Letter_text_Oct_1_1993_.pdf.

¹⁷⁶ See H.R. 40, 112th Cong. (2011).

¹⁷⁷ See H.R. Con. Res. 356, 106th Cong. § 2 (2000).

¹⁷⁸ See H.R. 29, 40th Cong. (1867).

¹⁷⁹ See Lord Gifford Debate, *supra* note 2 (Lord Gifford discusses the profound legacy of “one of the most massive and terrible criminal enterprises in recorded human history,” i.e., slavery).

¹⁸⁰ See Muhammad, *supra* note 2, at 912. See THOMAS, *supra* note 3, at 292 (identifying companies created and sponsored by Portugal, Holland, Great Britain, Spain and France “to carry slaves from Africa to the New World”). Specifically, the Portuguese established the Cacheu Company and the Maranhão and Pernambuco companies in the seventeenth and eighteenth centuries, respectively. *Id.* Holland owned the West India Company, and Britain established the Royal Adventurers, the Royal African Company, and the South Sea Company. *Id.* In the eighteenth century, Spain possessed “many companies with a privileged status.” *Id.* France founded a number of Guinea companies after the 1670s, when Colbert established the first one. See also Muhammad, *supra* note 2, at 931–32.

¹⁸¹ “[T]he king, as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects.” Greg Weeks, *Private Law Litigation Against the Government: Are Public Authorities and Private Actors Really ‘the Same’?*, 68 UN. S. WALES RES. SERIES 1, 4 (2010). Indeed, it is argued by scholars based on what seems to be adequate evidence that the expression “the King can do no wrong” originally meant precisely the contrary to what it later came to mean. *Id.* “[I]t meant that the king must not, was not allowed, not entitled, to do wrong” *Id.* It was on this basis that the King, though not suable in his court (since it seemed an anomaly to issue a writ against oneself), nevertheless endorsed on petitions “let justice be done”, thus empowering his courts to proceed. *Id.* See also Alexis Blane, Note, *Sovereign Immunity as a Bar to the Execution of International Arbitral Awards*, 41 N.Y.U. J. INT’L L. & POL. 453, 460 (2009).

¹⁸² Weeks, *supra* note 181, at 3.

¹⁸³ See Shelton, *supra* note 5, at 267–68.

¹⁸⁴ See *United States v. Le Jeune Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822).

benefit financially from their historic association with them, survive today.¹⁸⁵ Thus, there is a foundation for the exercise of jurisdiction over nation-states or other legal entities complicit in the Trans-Atlantic Slave Trade.

The historic Nuremberg International Military Tribunal,¹⁸⁶ the International Criminal Tribunal of the Former Yugoslavia,¹⁸⁷ the International Criminal Tribunal of Rwanda,¹⁸⁸ and the newly-established International Criminal Court¹⁸⁹ permit charges against and punishment of individuals for crimes against humanity, thereby creating a form of subject matter jurisdiction.¹⁹⁰ Because subject matter jurisdiction determines the types of cases a court can hear, these criminal tribunals limited their authority to crimes against humanity. Although none of these tribunals exempts individual actors who commit these crimes in their governmental capacity,¹⁹¹ there is no precedent under customary international law that allows complainants to charge sovereigns with criminal offenses.¹⁹²

1. Territorial Jurisdiction

The legal nature of the Trans-Atlantic Slave Trade is unique in several ways. First, the international community's commission of crimes against humanity spanned four centuries. Second, the governments involved in the trade possessed a peculiar racial justification for their systematic degradation of dark-skinned people in general, and Blacks and Africans in particular.¹⁹³ Finally, the international community and lack of action to address the vestiges of the Trans-Atlantic Slave Trade are unmatched. Such unprecedented crimes against humanity and unparalleled moral and social degradation require an extraordinary response by the governments involved, through admission, apology, and reparations.¹⁹⁴ Jurisdiction over nation-states accused of crimes against humanity, as enumerated in the Charter for the Nuremberg Military Tribunal,¹⁹⁵ the International Criminal Tribunal for the Former

¹⁸⁵ See Verdun, *supra* note 1, at 639.

¹⁸⁶ See Charter of the International Military Tribunal, *supra* note 75.

¹⁸⁷ "The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute." Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 6 (1991), available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." *Id.* at Art. 7(1).

¹⁸⁸ "The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute." S.C. Res. 955, art. 5, U.N. Doc. S/RES/955 (Nov. 8, 1994). "A person who planned instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime." *Id.* at art. 6(1).

¹⁸⁹ See Rome Treaty Statute, *supra* note 112.

¹⁹⁰ See Statute of the International Criminal Tribunal for the former Yugoslavia, *supra* note 187, at art. 5. See also Statute of the International Criminal Tribunal for Rwanda, *supra* note 188, at art. 3. See also Charter of the International Military Tribunal, *supra* note 75, at art. 6. See also Rome Treaty Statute, *supra* note 112, at art. 5.

¹⁹¹ See Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 187, at Art. 7 (2)–(4). See also Statute of the International Criminal Tribunal for Rwanda, *supra* note 188, at Art. 6 (2)–(4). See also Charter of the International Military Tribunal, *supra* note 75, at art. 7, 8. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, should not be a factor to free them from responsibility or mitigate their punishment. *Id.* at Art. 8.

¹⁹² There are precedents where governments waived sovereign immunity in order to address an historical injustice in primarily civil matters. However, there is no international precedent, custom or U.N. Convention that applies this doctrine against nation-states and their participation in crimes against humanity. See generally Weeks, *supra* note 181.

¹⁹³ PACKARD, *supra* note 149, at 17–18.

¹⁹⁴ Shelton, *supra* note 5, at 266. In some instances, particularly where indigenous groups are concerned, negotiated reparations include restitution of lands and resources.

¹⁹⁵ See Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 187, at Art. 5.

Yugoslavia,¹⁹⁶ the International Criminal Tribunal for Rwanda,¹⁹⁷ Rome Statute,¹⁹⁸ and Slavery Conventions¹⁹⁹ is determined by territorial jurisdiction.

European governments and some African monarchs financed and promoted the lucrative infrastructure of the Trans-Atlantic Slave Trade. The slavers began trading from the shores of Africa primarily to the ports of Portugal,²⁰⁰ and ended their voyages in other European nations or in the New World.²⁰¹ The governments imposed taxes and licensing fees²⁰² on the trade and incorporated slaving companies²⁰³ that transformed individual, sporadic kidnappings²⁰⁴ from the African shores into an organized, legal enterprise. Precedent demonstrates that courts have the ability to exercise jurisdiction over persons/entities within a specific geographic region. Thus, should the court or tribunal be unable to exercise personal jurisdiction, it would still be able to exercise territorial jurisdiction over a corporation with an office, headquarters, or direct subsidiary within a specific locale as well as governments complicit in the trade. Claimants would be able to pursue a cause of action in a court of their homeland or in the proposed tribunal.

Territorial jurisdiction over governments that benefitted from the slave trade allows descendants who are scattered throughout the world to establish jurisdiction over the North African, European, and North and South American countries who participated in the slave trade.

2. Personal Jurisdiction

Complainants may also assert in rem jurisdiction, personal jurisdiction attaching to property,²⁰⁵ against foreign nations and private companies that have real property or other assets in any of the participating nation-states. These associated assets will be relevant not only for complainants who charge crimes against humanity, but also for those who assert civil claims for financial reparations. Although it is possible for the nation-states of the victims to attain jurisdiction over other offending Western nations and to adjudicate the charges of crimes against humanity, such jurisdiction presents an arduous legal complication due to these states' reciprocal guilt or liability. Therefore, each national government that participated in the Trans-Atlantic Slave Trade would be liable not only to those descendants who are citizens or residents of their country but also to descendants who are citizens/residents of other countries, because shipment of slaves, licenses, and stopovers at different ports were part of most transactions spanning the Atlantic Ocean.

Exercising jurisdiction over a nation-state that was not fully developed as a legal entity at the time of the slave trade poses another legal problem. Two nation-states, Portugal and the United States, were not in existence as independent sovereignties throughout most of the history of the international

¹⁹⁶ *Id.*

¹⁹⁷ See Statute of the International Criminal Tribunal for Rwanda, *supra* note 188.

¹⁹⁸ See Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 187, at Art. 5.

¹⁹⁹ Slavery Convention, *supra* note 110.

²⁰⁰ THOMAS, *supra* note 3, at 78.

²⁰¹ *Id.*

²⁰² Muhammad, *supra* note 2, at 905–06.

²⁰³ THOMAS, *supra* note 3, at 160, 242–43.

²⁰⁴ Muhammad, *supra* note 2, at 892.

²⁰⁵ See Jennifer S. Martinez, *International Courts and the U.S. Constitution: Reexamining the History*, 159 U. PA. L. REV. 1069, (2011) (“Second, contrary to Kontrovich’s assertions, the international slave trade tribunals did not exercise criminal jurisdiction, but rather a type of civil in rem jurisdiction that American admiralty law in the early nineteenth century recognized and that U.S. courts used extensively in cases involving the forfeiture of ships under domestic laws prohibiting the slave trade.”).

slave trade. Portugal was a region annexed to Spain until the nineteenth century,²⁰⁶ and the United States was a scattered mass of lands captured by European powers in the North American continent, before evolving into a confederacy and then the Union. However, this idiosyncrasy is not an insurmountable hurdle because slavery clearly occurred in these geographical regions under the auspices of governmental authority. Despite their historical legal forms, the modern versions of these countries are legally recognized by the international community.²⁰⁷ Thus, subject matter jurisdiction of European countries remains a viable option to establish a cause of action for harms incurred as a result of the Trans-Atlantic Slave Trade and its legacy. The fact that the slavers kidnapped, shackled, and enslaved Africans in slave fortresses²⁰⁸ throughout Sub-Saharan Africa and near the African coasts also makes jurisdiction possible in Africa.

3. Maritime Jurisdiction

Maritime law, or the law of the high seas, provides another possible basis for jurisdiction. The international community developed maritime law based on the growth of fishing, exploration, and of the Trans-Atlantic Slave Trade, which included the trading of goods for slaves and the transportation of slaves. The nearest coastal location of a ship and crewmen is the simplest legal standard for determining maritime jurisdiction. Maritime jurisdiction may also be extended to the destinations of the ships' return voyages to Europe or the New World, where they unloaded and further profited from their tortured cargo.

The international legal community also considers other factors in determining maritime jurisdiction. These include the nationality of the seamen, the country under whose flag a ship sailed, the nationality of the individual or the country who financed the construction of the ship or the expedition, and any contractual obligations between individuals or countries who have a vested interest in the ship in question.²⁰⁹ Complainants who bring civil actions asserting maritime jurisdiction must consider such factors.

The crewmembers of slave ships originated in European countries. Generally, a ship sailing through the Atlantic Ocean would hoist the flag of the nation that chartered the ship or of the ship's private owner. This maritime norm introduced new problems due to the increase in piracy as well as to the differing periods during which each nation abolished slave trading. However, flags are still a factor used to determine the applicability of maritime jurisdiction. A few European nations either financed the ships and related costs of slave voyages through the creation of government-owned, for-profit

²⁰⁶ The Portuguese, on the other hand, became independent under the rule of the Braganza kings. These events brought an end to the imperial Spanish Crown's collaboration with the Portuguese merchants in the slave trade to their empire. THOMAS, *supra* note 3, at 182.

²⁰⁷ See Shelton, *supra* note 5, at 272.

²⁰⁸ *Id.* at 331 ("Ten years later, the Portuguese Crown built a polygonal fortress above a 200-foot cliff and in the 1560s it was still profitable to Portugal. [T]he Brandenburgers seized Arguin and established a garrison of twenty to serve as an intermediate trading post on the way to headquarters at Prince Town, on the Gold Coast."). Several ports on the river, such as Podar, one hundred miles inland, had from the early eighteenth century belonged to French privileged companies, such as Law's Compagnie des Indes. *Id.*

²⁰⁹ See generally United Nations Convention on the Law of the Sea arts. 22, 92, 94, 110, Dec. 10, 1982, 1833 U.N.T.S. 3; United Nations Convention on the Law of the High Seas, Final Act, U.N. Doc. A/CONF.13/L.58, UNCLOS, 2 U.N.T.S. 146 (1958); Acts of the Conference for the Codification of International Law, League of Nations Doc. C.351M.145 (1930); Report of the Second Commission, League of Nations Doc. C.230M.117 (1930); Yearbook of the Int'l Law Comm'n, 1st Sess., U.N. Doc. A/CN.4/13, ch. II, p. 281 (1949); see also Yearbook of the Int'l Law Comm'n, 8th Sess., U.N. Doc. A/3159, vol. II (1956); United Nations Conference on the Law of the Sea, Geneva, Switz., 24 Feb. –27 Apr., 1958, U.N. Doc. A/CONF.13/L.58 (Vol. II), p. 146 (1958); Second United Nations Conference on the Law of the Sea, Geneva, Switz., 17 Mar.–26 Apr. 1960, U.N. Doc. A/CONF.19/L.15, Annex (1960).

corporations or supported individual undertakings of which the sovereign would become a substantial beneficiary. Such companies included the Royal African Company and South Sea Company of Great Britain, the Portuguese Cacheu Company, Holland's West India Company, the Dutch East India Company of the Netherlands, and the Mississippi Company of France.²¹⁰

European insurance companies also insured ships against damage to the vessel, perishable cargo used for trading, and African slaves. These companies created financial and contractual obligations within the international community, increasing the use of the high seas. Multi-national treaties, including the treaties of Utrecht²¹¹ Aix-la-Chapelle, and the *Asiento*, created additional obligations between European countries concerning navigable waters and slave bartering. These treaties imposed specific territorial boundaries and permissible time spans for the capture of slaves and reciprocal permission to use territorial waters. The slave trade satisfies all factors used to determine traditional maritime law jurisdiction. Therefore, the governments and slavers who outfitted and financed slave ships, slave kidnappings, and slave bartering are subject to maritime law.

4. Feasibility of an International Tribunal for The Trans-Atlantic Slave Trade and Legacies

Use of the above-mentioned methods of personal jurisdiction should take place within the context of a single international criminal tribunal to address the legacy of the slave trade. The legal format of an international criminal tribunal would be amenable to those nations who desire to forego the proliferation²¹² of ordinary civil lawsuits for the same series of transactions with varying victims, circumstances, and geographical regions. An international criminal tribunal would have subject matter jurisdiction over crimes against humanity and genocide similar to that of the International Criminal Tribunals of the Former Yugoslavia²¹³ and Rwanda.²¹⁴ This tribunal could also serve as a forum for each participatory nation-state to officially render reparations to the heirs in the memory of the slave trade's historic victims.

The International Criminal Tribunal of the Former Yugoslavia and the International Criminal Tribunal of Rwanda permit charges of crimes against humanity against *individuals* and not nation-states.²¹⁵ These tribunals do not provide an amenable standard to obtain jurisdiction over deceased slavers, overseers, or officials in their governmental capacity who advanced the slave trade and increased the number of its victims. However, the model of the International Criminal Tribunals does not pose a

²¹⁰ By 1600, many Dutch captains were sailing annually on their own *Carreira da Mina*, often financed by the same men who were founding their great Dutch East India Company. THOMAS, *supra* note 3, at 160, 242–43.

²¹¹ Muhammad, *supra* note 2 at 883, n.133. See Utrecht Treaty of Peace and Friendship, Gr. Brit.-Spain, July 13, 1719, 28 Consol. T.S. 295, 325 (granting Britain the “*asiento*” or contract to import slaves). A few decades later, Great Britain, France, Spain and Sardinia, Hungary, Modena, the Republic of Genoa, and the United Provinces signed the Aix-La-Chapelle treaty concerning the conquests of the New World, primarily the West and East Indies. *Id.* at 911–12. The Aix-La-Chapelle treaty reestablished Britain's monopoly in the international African slave trade by referencing the infamous *asiento* agreement. *Id.* at 883, n.116 (explaining that an *asiento* is a Spanish term used to define a privilege or contract that the Spanish monarch grants in connection with the slave trade). By 1700, it should have been evident, that no chartered company had a future. THOMAS, *supra* note 3, at 227.

²¹² See Shelton, *supra* note 5, at 260. While the barriers to reparations are significant, historical events are the subject of a growing number of legal and/or political claims by groups seeking redress. The proliferation of such demands may represent a global tribute to the strength of human rights doctrine and its moral claim on the international community or the fact that success induces emulation.

²¹³ *Id.* at 286.

²¹⁴ *Id.*

²¹⁵ “The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.” Statute of the International Criminal Tribunal for Rwanda, *supra* note 188, at Art. 5.

serious barrier to potential complainants of the Trans-Atlantic Slave Trade because there are methods by which sovereign states may be held legally accountable. Over the course of the twentieth century, the United States enacted laws that specifically address inhumane governmental acts. For instance, although the United States government interned Japanese persons within its borders under the guise of national security during World War II, over forty years later it enacted legislation enabling the federal government to pay compensation for such acts to Japanese claimants.²¹⁶ Further, the federal government has waived its sovereign immunity, allowing it to be sued in a number of instances.²¹⁷

5. Potential Legal Claims

The United States and other Western nations are the primary leaders in promoting democracy and have continued to increase their economic influence throughout the world. These nations also have a steady democratic and financial infrastructure which is conducive to enacting legislation that deems their governments accountable for the atrocities of the Trans-Atlantic Slave Trade and its legacy. The United States has already set out to rid itself of the legacy of slavery through the Thirteenth and Fourteenth Amendments, the Voting Rights Act, the 1965 Civil Rights Act, and other measures. Descendants of slaves who are not American may nevertheless have charges of crimes against humanity and claims against the United States and may also use the Alien Tort Act.²¹⁸ The Act is interpreted as granting aliens the right to sue American corporations complicit in human rights abuses in United States district courts,²¹⁹ thus obtaining jurisdiction over American private companies complicit in the Trans-Atlantic Slave Trade. The United States Court of Appeals for the Second Circuit permitted South African victims of apartheid-era injustices, through the Truth and Reconciliation Committee, to sue U.S. corporations who materially benefitted from apartheid.²²⁰ The Alien Tort Act may also be used by victims and descendants of victims of the Trans-Atlantic Slave Trade and its institutionalized legacy.

²¹⁶ See generally BARKAN, *supra* note 4.

²¹⁷ See, e.g., Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

²¹⁸ “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Id.*

²¹⁹ Currently the Supreme Court is split on the scope of the Alien Torts Act with regard to jurisdiction, human rights violations and private corporations. For a recent example, see *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738, (March 5, 2012) (granting reargument and requesting supplemental briefing on the question of “[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”); see also Marcia Coyle, *Supreme Court Orders Reargument in Alien Tort Statute Case*, LEGAL TIMES BLOG, Mar. 5, 2012, <http://legaltimes.typepad.com/blt/2012/03/supreme-court-orders-reargument-in-alien-tort-statute-case.html> (the U.S. Supreme Court on Monday ordered reargument in a major challenge involving lawsuits against corporations for human rights violations under the Alien Tort Statute); see also Nina Totenberg, *High Court To Reconsider Major Human Rights Ruling*, NATIONAL PUBLIC RADIO BLOG, Mar. 5, 2012, <http://www.npr.org/blogs/thetwo-way/2012/03/05/147996648/high-court-to-reconsider-major-human-rights-case-ruling> (the U.S. Supreme Court said Monday that it will hear reargument next term in a major human rights case, raising the specter that the justices might reverse a 2004 ruling that allowed some lawsuits in U.S. courts for human rights atrocities committed abroad).

²²⁰ See *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (on appeal from district court’s grant of summary judgment to defendants, the Second Circuit reversed in part, allowing plaintiffs to argue an “aiding and abetting theory” of liability under the Alien Tort Claims Act); *In re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. 2004) (decision below granting summary judgment to defendants). See also *ANC Welcomes TRC Proposals for Reparations*, SOUTH AFRICAN PRESS ASSOCIATION, Oct. 23, 1997, <http://www.justice.gov.za/trc/media/1997/9710/s971023c.htm> (“Unveiling the commission’s rehabilitation and reparation policy proposals at a news conference in Cape Town on Thursday, Chairman Archbishop Desmond Tutu said people judged to have suffered human rights violations under apartheid should receive a minimum reparation payment of R17000 annually for six years. He said that, if accepted, this would cost about R3 billion to implement, and a projected 22000 victims would benefit.”); See *US Court Considers Appeal Against Apartheid Lawsuit*, MAIL & GUARDIAN

The descendants of the slave trade's victims may petition the proposed tribunal to legally charge Western nation-states who actively participated in the enslavement and kidnapping of their ancestors with crimes against humanity, guided by the standards of the Rome Statute and the Slavery Conventions. On behalf of these descendants, the governing authority may charge the governments of states of which they are now citizens for the continuation of the slave trade institution, whose legacy has been transformed into institutionalized racism.²²¹

One example of a potential claim is that of a Latino American who is the descendant of slaves. The Latino American may petition the tribunal to indict Portugal and Spain for their involvement in the slave trade, which led his ancestors to be captives on the shores of the New World during the seventeenth century.²²² Latino Americans could also have the proposed tribunal issue criminal charges against the United States for continuing the slave trade in its territory, and against Spain for its expansion of slavery into Cuba, Antigua, Panama, and other lands of Central and South America.²²³ Latinos, specifically, may also have the tribunal issue charges of crimes against humanity for acts of branding, kidnapping, selling, and buying of slaves. Black/Native Americans, West Indians, and Afro-Caribbeans could have the proposed tribunal exercise jurisdiction over various governments by asserting similar charges of crimes against humanity. These three ethnic groups have standing for the tribunal to legally indict Great Britain, France, and Spain for enslaving of their ancestors on the continent of Africa and forcing them to the lands of the West Indies, the Caribbean, and the eastern coast of North America.²²⁴

6. Issue of Standing

Another legal consideration regarding jurisdiction is whether a potential complainant has proper standing to bring a claim. Any individual who has an actual injury or an injury with a reasonable nexus to the offense has legal standing.²²⁵ The historic victims are no longer living and are therefore legally incapacitated and incapable of exercising their rights to institute civil actions against the governments and private companies who financed the slave trade.²²⁶ However, under the doctrine of “next friend,” a living relative or guardian who has the best interest of the victim and acts in good faith, may allow the filing of a civil suit or issuance of criminal charges on behalf of the injured complainant.²²⁷

Standing also exists for slave descendants that are subject to the current form of institutionalized racism that permeates the international community and governs housing, education, employment, and

JOHANNESBURG, Jan. 12, 2010, <http://mg.co.za/article/2010-01-12-us-court-considers-appeal-against-apartheid-lawsuit> (reporting on the *In re South African Apartheid Litigation* case).

²²¹ When slavery ended, it was replaced by a caste system designed to maintain the status quo of the previous two hundred and fifty years—white supremacy. Verdun, *supra* note 1, at 640–41. The caste system was supported by state and local laws, the courts, the Constitution as interpreted by the Supreme Court in *Plessy v. Ferguson*, and the American people. *Id.* This wrongful activity, the acts driven by racism to perpetuate white supremacy, is what is being referred to when the term “systematic discrimination” is used in Verdun’s Article. *Id.*

²²² See Muhammad, *supra* note 2, at 892.

²²³ *Id.* at 904–06.

²²⁴ See Muhammad, *supra* note 2, at 909–12.

²²⁵ Standing and privity are concepts core to state contract and tort law, and generally limit obligations and claims of benefit to those who directly incurred a duty, entitlement, or loss, or those who have a sufficiently close relationship with an original claimant or obligor. David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1058 (2010) (citation omitted).

²²⁶ See *supra* notes 162–65.

²²⁷ See, e.g., *In re African-American Slave Descendants Litigation*, 471 F.3d 754 (7th Cir. 2006) (“And again, if there were a legal wrong, it would not be a wrong to any living persons unless they were somehow the authorized representatives to bring suits on behalf of their enslaved ancestors.”).

racial profiling. However, one U.S. federal court disagrees with this legal argument²²⁸ and supports the dominant society's historical perspective of individual injury for individual damages,²²⁹ without considering centuries of deprived rights, the uniqueness of the crimes against humanity, and indoctrination, which birthed the current form of racial discrimination. Yet, the same case that appears to deny plaintiffs standing in recent reparations cases does permit a slim usage of the next friend concept for actual ancestors enslaved.²³⁰ This legal opinion is not persuasive due to the same judiciary's acknowledgment of the wrongs of slavery and the systemic pattern of institutionalized, racial discrimination as a badge or incident of slavery.²³¹ When a pattern of behavior, legislation, and other governmental acts is institutionalized, it is difficult to ascertain individual harm, especially when the acts are repetitive and interwoven within the duties and character of the dominant society.

Governments tied to the Trans-Atlantic Slave Trade may be the best entities to determine standing of initial complainants. The proposed international tribunal would possess a civil and criminal role in adjudicating the atrocities of slavery. Although the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda are proposed as prototypes, they both address only the criminal nature of crimes against humanity. Though they may award damages resulting from criminal acts, they do not hear civil cases at all. Standing for these tribunals is similar to standing in the U.S. in criminal cases: an aggrieved complainant or the legal guardian of a party suffering harm goes to law enforcement, law enforcement helps with gathering evidence, and then a state's attorney brings charges against the accused. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda both have a prosecutorial authority which gathers evidence through the Office of the Prosecutor and seeks an indictment against the accused. The victim may petition the Office and be part of gathering evidence against the accused. In both American criminal cases and international criminal tribunals, a victim has a right to petition the court/tribunal for charges.²³² Because traditional legal procedures are inadequate to properly address civil actions, it is in the interest of justice for the United States and the rest of the international community to establish an international tribunal with power to adjudicate both criminal and civil claims arising from the atrocities of the Trans-Atlantic Slave Trade.

²²⁸ The Ninth Circuit in *Cato* denied standing, writing:

First, *Cato* proceeds on a generalized, class-based grievance; she neither alleges, nor suggests that she might claim, any conduct on the part of any specific official or as a result of any specific program that has run afoul of a constitutional or statutory right and caused her a discrete injury. Without a concrete, personal injury that is not abstract and that is fairly traceable to the government conduct that she challenges as unconstitutional, *Cato* lacks standing. *Allen v. Wright*, 468 U.S. 737 (1984).

Cato v. United States, 70 F.3d 1103, 1109 (9th Cir. 1995).

²²⁹ See Verdun, *supra* note 1, at 621–22.

²³⁰ The Seventh Circuit wrote:

But the district judge accepted that the purported representatives had a right to sue on behalf of their ancestors, and the defendants offer only a perfunctory rebuttal. We shall assume without deciding that some of the plaintiffs are legal representatives of their slave ancestors. These plaintiffs not only escape the objection to standing that the suits seek damages for injuries actually suffered by third parties (the ancestors are no longer third parties, but the real parties in interest, merely represented by the plaintiffs), but have less to prove. They have to prove injury to the ancestors; the trickle-down question is elided.

In re African-American Slave Descendants Litigation, 471 F.3d at 762.

²³¹ *Cato*, 70 F.3d 1103.

²³² See *About the ICTY*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/97#sourcesofevidence> (last visited Aug. 8, 2013) (describing sources of evidence for the ICTY); see also *Office of the Prosecution*, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unict.org/AboutICTR/ICTRStructure/OfficeoftheProsecution/tabid/104/Default.aspx> (last visited Aug. 8, 2013).

B. Legal Difficulty of Retroactivity

English common law and United States statutory laws generally prohibit the retroactive application of criminal penalties to acts that were not punishable prior to the enactment or recognition of a law, known as *ex post facto* laws.²³³ There is also the issue of countries who, during certain periods of time, outlawed slave trading on the high seas but allowed slavery to continue within their borders. This time frame also becomes more complicated because some nations prohibited slave trading earlier than did others.

As most descendants of the African/aboriginal diaspora live and to some degree are integrated into Western nation-states, it is more practical to use modern, compatible standards of law as the basis for the international tribunal. Countries such as the United States, England, France, Spain, and Portugal share similarities in domestic civil and criminal laws. In addition, these countries also have amicable trade agreements and multi-lateral treaties. Thus, it is not solely the United States' legal system that is proposed to be the paradigm for the tribunal, nor will it necessarily be the primary guideline; it will be a blend of similar standards of other Western nation-states as well as international human rights law. As a result, international human rights law provides myriad opportunities to charge crimes against humanity regardless of a nation-state's law.

The Rome Statute specifically prohibits retroactive application of jurisdiction and charges of crimes against humanity.²³⁴ This statute is diametrically opposed to the intent and precedent established by the Nuremberg International Military Criminal Tribunal.²³⁵ The Nuremberg International Military Criminal Tribunal was created in response to Germany's grave human rights violations against European Jews. The Nuremberg Charter reads in part:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: . . . (c) Crimes Against Humanity: namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.²³⁶

The Tribunal maintained the legal authority to prosecute German war criminals who committed past crimes against humanity, even though those crimes had been considered lawful by the German government during that period.²³⁷ This aspect of the Nuremberg Charter, which is directly antonymous to the current Rome Statute of the International Criminal Court, thus establishes another legal basis for a separate international tribunal for the atrocities of the Trans-Atlantic Slave Trade. The Nuremberg

²³³ See U.S. CONST. art. I, § 9, cl. 3, §10.

²³⁴ See Rome Treaty Statute, *supra* note 189, at Art. 1.

²³⁵ See Charter of the International Military Tribunal, *supra* note 75.

²³⁶ *Id.* at art. 6.

²³⁷ See BARKAN, *supra* note 4, at 14, 284. Denazification ended by 1950, and a year later the Bundestag restored benefits and rights to government workers who, following the defeat, had been implicated in National Socialist crimes. *Id.* Those who had served the Nazi regime were now viewed merely as employees of the previous government. *Id.* Indeed this view of normal government employment meant that forty years later, when Eastern Europe emerged from communism, "employers" in the Third Reich—those who had participated in the extermination—would receive state benefits while the Nazis' victims would again struggle to receive recognition. *Id.* For a short period immediately after the defeat, the official view of the Nazi regime was of a criminal and an abnormal period. *Id.* Denazification had taken place under American supervision, but by 1950 West Germany had normalized its past and included the Third Reich as simply a phase in German history. It would take a generation to question this normalization. *Id.*

precedent is the preferable standard as it was established to adjudicate crimes against humanity and atrocities specific to the Jews of the Holocaust. As the suffering of African slaves under the Trans-Atlantic Slave Trade, domestic slavery, Jim Crow laws, and institutionalized racial discrimination are unique to those of the African diaspora, a tribunal catered to these specific historical atrocities is appropriate and consistent with the purpose for establishing the Nuremberg Tribunal.

Advocates for reparations for crimes against humanity committed by European governments and some African monarchs maintain that slave trading was not universally considered lawful, and was perhaps illegal under the custom of international law.²³⁸ Although the international custom of those nation-states who participated in the slave trade was to recognize the legality of trade, the declaration of the World Conference on Racism asserts that the Trans-Atlantic Slave Trade was in fact a crime against humanity and should always have been considered as such.²³⁹ Consequently, the Slavery Conventions that were later created merely codified this international custom, and did not create a new standard for the illegality of slavery and slave trading.

Under practical legal standards, retroactivity should not apply to the Trans-Atlantic Slave Trade and various nation-states' municipal slavery. The standard for the Tribunal combines UN conventions regarding retroactivity and the principle that statute of limitations do not apply to crimes against humanity, a use of both UN conventions and evolving international custom. The evolving national laws of different nations which the Tribunal obtains jurisdiction demonstrates that slavery was inhumane, marginalized specific populations, and created a legacy of great loss to those targeted and an unfair advantage to the dominant society. So regardless of when slavery was abolished on record, there were eras of: the international trade, crossing over with slavery within the borders of individual countries, period of abolishment, new wave of *de jure* slavery, and institutionalized discrimination. These actions are a continuous stream of harm that arguably is not attenuated so much so that retroactivity would still not apply.

The slave trade continued for a significant time following treaties among nation-states, and other efforts to abolish slavery, through illegal slave trading or piracy. Additionally, a few sovereigns continued to barter in slaves within their borders well after their own governments abolished the municipal trade.

The Emancipation Proclamation of 1863 historically documented the freeing of slaves in the United States.²⁴⁰ However, Black/Native Americans were held in what amounts to chattel slavery for well over a century after its abolition, and institutionalized racism was legally sanctioned throughout the United States, France, Great Britain, and other European nations both during and following the abolition of the slave trade.

The Rome Statute only allows jurisdiction over individuals not sovereigns or nation-states. Thus the Rome Statute as applied to the slave trade would only have jurisdiction over *deceased* slaves,

²³⁸ See Muhammad, *supra* note 2 at 916–21.

²³⁹ We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences.

Report of the World Conference against Racial Discrimination, Xenophobia and Related Intolerance, *supra* note 2.

²⁴⁰ See *supra* note 25.

overseers, owners, transporters, merchants, and perhaps individuals in government. Thus, one cannot appropriately use the legal standard of the Rome Statute regarding retroactivity to address slavery that is directly related to the Trans-Atlantic Slave trade, or the systematic racial discrimination that is its offspring.²⁴¹

C. Applicability of Statute of Limitations

Generally, statutes of limitations do not apply to crimes against humanity. Laws of many nation-states do not impose statutes of limitations on heinous domestic criminal offenses such as murder and mayhem, which are similar in nature to international crimes against humanity.²⁴² Much of the international community views the prosecution of these offenses as necessary to promote and maintain peace and security. Similarly, the United Nations enacted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to internationally codify the same notion.²⁴³ However, this Convention is only enforceable against state parties who ratified it, subject to any reservations.²⁴⁴ The Convention prohibits the application of any statute of limitations to crimes against humanity that are enumerated in the Charter of the Nuremberg International Military Tribunal.²⁴⁵ Since this Tribunal included acts of enslavement and torture, it could therefore apply to the barter and enslavement of Africans and Native Americans in furtherance of the Trans-Atlantic Slave Trade. Thus, no statute of limitations apply to crimes against humanity that were committed by slavers, overseers, seamen, or government officials who owned, sold, or otherwise transferred ownership of slaves and financed slavery expeditions by issuing licenses, or by nation-states who encouraged, financed, or otherwise acted in their proprietary capacity to benefit from the Trans-Atlantic Slave Trade. Although the Rome Statute of the International Criminal Court prohibits retroactive punishment for crimes against humanity,²⁴⁶ it does not apply the statute of limitations to such charges.²⁴⁷

²⁴¹ Verdun, *supra* note 1, at 640.

²⁴² See 18 U.S.C. § 3281 (capital offenses may be found at any time without limitation); 18 U.S.C. § 1091(e) (genocide has no statute of limitations under subsection (a)(1)); see also CODE PÉNAL [C. PÉN] art. 221-1, 221-2, 221-3 (Fr.), *available at* <http://legislationline.org/download/action/download/id/1674/file/848f4569851e2ea7eabfb2ffcd70.htm/preview>. Murder is the intentional killing of another person, punished by a maximum of thirty years' criminal imprisonment. *Id.* at art. 362.

²⁴³ See United Nations Convention on the Non Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 11, 1970, 754 U.N.T.S. 73, *available at* <http://www1.umn.edu/humanrts/instree/x4cnaslw.htm>. (“The States Parties to the present Convention . . . Considering that war crimes and crimes against humanity are among the gravest crimes in international law, Convinced that the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security . . .”).

²⁴⁴ *Id.* According to United Nations archives a limited number of countries actually ratified this Convention for the prepared adoption date.

²⁴⁵ See *id.*, at art. I (“No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: . . . (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid and the crimes of genocide as defined in the 1948 Convention on the Prevention and punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they are committed.”).

²⁴⁶ See Muhammad, *supra* note 2, at 943. In contrast with the Slavery Conventions, the inherent anomaly of the Rome Statute is that it specifically cannot be applied retroactively, although it provides an excellent standard, thus far, for defining crimes against humanity. Therefore, the Rome Statute of 1998 apparently would not apply to the Trans-Atlantic slave trade, as a crime against humanity, which occurred over several centuries.

Traditionally, the statute of limitations for civil causes of action runs from the time the claimant knew or should have known of the injury.²⁴⁸ The victims of the Trans-Atlantic Slave Trade were tortured and murdered upon any showing of insurrection; these Africans had no chance to assert legal claims for the crimes committed against them.²⁴⁹ Slaves had no civil rights to exercise in a land of their captors, who defined and treated them under statutory law as chattel.²⁵⁰ It would be generations before Europe's general population and governments would even marginally accept the descendants of slaves into mainstream society. Thus, the slaves had no opportunity to exercise any legal basic rights, especially the right to redress.²⁵¹

In the 1960s, U.S. officials and citizens refused to recognize or enforce the rights of the African-American descendants of slaves.²⁵² Succeeding generations made legal strides for education, employment and housing during the Civil Rights Movement in America and availed themselves of the new reality to exercise their rights, despite the possibility of maiming, lynching, or murder. Yet, human rights advocacy's legal and practical effect would not begin to manifest itself until following generations. Under the long term and historic circumstances, equitable tolling of the statute of limitations reasonably applies for slavery reparations.²⁵³

Maritime law presents a narrower standard for civil causes of actions by commencing the statute of limitations at the time the *actus reus* occurred, regardless of whether the complainant knew of the harm.²⁵⁴ Maritime law's general standard inhibits descendants of the Trans-Atlantic Slave Trade from instituting civil suits against the perpetrators of the crimes committed against them. However, just as the Convention on the Non-Applicability of the Statute of Limitations to War Crimes and Crimes Against Humanity refers to criminal offenses, this standard may also be applied to any civil causes of actions that arise from these types of crimes.²⁵⁵ As the causes of actions are a result and sequentially secondary to the

²⁴⁷ See Rome Treaty Statute, *supra* note 112. The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

²⁴⁸ See Hylton, *supra* note 97, at 42.

²⁴⁹ Muhammad, *supra* note 2, at 996–97.

²⁵⁰ Shelton, *supra* note 5, at 272. Those claiming reparations present several reasons why reparations should be afforded for historical injustices. First, some acts were illegal under national or international law at the time they were committed. The victims have been unable to secure redress for political reasons, because evidence was concealed, or because procedural barriers have prevented them from presenting claims. In such circumstances, they argue that lapse of time should not prevent reparation for harm caused by illegal conduct.

²⁵¹ *Id.*

²⁵² See BARKAN, *supra* note 4, at 16. In the United States, while slavery was defeated, racism remained, and even grew. See also WINBUSH, *supra* note 27, at 83.

²⁵³ See New Efforts, *supra* note 97, at 301. (“The reasons for tolling the statute in such circumstances are reasonably clear. In general, those who attempt to engage in genocidal attacks should not be able to preclude their victims from recovery by threats of violence and active concealment. Equitable estoppel and equitable tolling are both available to reparations plaintiffs where the defendant has acted to prevent the filing of a lawsuit, and the plaintiffs have been unable to file through no fault of their own.”) (citations omitted).

²⁵⁴ See Uniform Statute of Limitations for Maritime Torts, 46 U.S.C. § 30106, Pub. L. 109-304, 120 Stat. 1511; (Established time limit on bringing maritime action for personal injury or death: “Except as otherwise provided by law, a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose.”); see also 46 U.S.C. § 30508 (d).

²⁵⁵ See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 243 (“Considering that war crimes and crimes against humanity are among the gravest crimes in international law, Convinced that the effective punishment of war crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security, Noting that the application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes.”).

actual criminal offense committed, it follows that the Convention permitted an interminable time span to prosecute such crimes that the Convention would also not limit the time one has to claim restitution for such offenses.

For example, the United States did not assert a statutory limitations defense regarding the internment of the Japanese.²⁵⁶ The federal government even enacted special legislation years later to address the past wrongs committed against the Japanese Americans, which included an apology and reparations. It is this precedent that the court cites in *Cato v. U.S.*,²⁵⁷ one of the most recent cases for slavery reparations, which lends credence to the notion that appropriate, municipal remedies are found in the legislature, and not in the judiciary.²⁵⁸ Thus, the judiciary is unable to adjudicate slavery and reparation claims against the United States.²⁵⁹ The Thirteenth Amendment grants Congress the constitutional authority to enact legislation to address the slave trade, slavery, and badges and incidents of slavery.²⁶⁰ Congressional action is necessary.²⁶¹

D. Legal Strategies

It is clear that the extensive temporal and geographical span of the Trans-Atlantic Slave Trade and the copious entanglement of the international community in the trade impose a moral requirement on the historically injured and their descendants.

Legal considerations to separate all individual acts of brutality related to the slave trade, from institutionalized racism to racial profiling, do not change the fact of the extensive, legal time frame of a continuous violation of human rights and basic civil liberties that is forever the vestige of the slave trade.²⁶²

The United Nations' Office of the High Commissioner for Human Rights adopted a resolution titled "The Right to Restitution, compensation, and rehabilitation for victims of grave violations of human rights and fundamental freedoms."²⁶³ This resolution recognizes the right of those injured by human rights violations to receive restitution, as well as the need to award reparations to those whose

²⁵⁶ See Verdun, *supra* note 1, at 645. The decision to intern and relocate Japanese Americans was largely based on a military report known as the "Final Report." An archival researcher discovered the original version of the Final Report. This original version had been surreptitiously replaced by a revised and less incriminating version that contained fewer obvious references to race as the basis for the issuance of the civilian exclusion orders and curfew proclamations; the original version came from John L. DeWitt, Commanding General of the Western Defense Command responsible for issuing the orders. The surreptitiously reviewed Final Report had been submitted into evidence at the trials to establish that the evacuation and curfews were impelled by military necessity. This new evidence, the original Final Report, provided proof that the wartime restrictions were based on racial prejudice. (citations omitted).

²⁵⁷ *Cato v. United States*, 70 F.3d 1103, 1109 (9th Cir. 1995).

²⁵⁸ See Shelton, *supra* note 5, at 269.

²⁵⁹ *Id.*

²⁶⁰ See U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

²⁶¹ See BARKAN, *supra* note 4, at 286. In 1989 the situation changed. The U.S. government's compensation to the Japanese Americans who were interned during World War II reawakened African Americans' sense of deprivation and unfairness.

²⁶² See Shelton, *supra* note 5, at 285. Given the long period of slavery and the slave trade, the numbers and the abuses involved, it is not surprising that its legacy has been a subsequent century of racism, segregation and denials of civil rights. These are ongoing harms that cannot be separated from the early slave status, which commodified a race of human beings and denied their humanity.

²⁶³ Commission on Human Rights Res. 127, Report of the Commission on Human Rights on the 60th Sess., March 15–Apr. 23, 2004, U.N. Doc. E/CN.4/2004/127.

fundamental rights are *systematically* violated.²⁶⁴ The crimes against humanity from the Trans-Atlantic Slave Trade are clearly in line with the violations contemplated by the resolution.

Descendants of the historically injured cannot only institute civil actions as “next friend,” but may bring these suits as survival actions on their ancestors’ behalf. Any nation that mechanically and unlawfully changes the biological, ethnic, and cultural heritage of a people and implements the extermination of them, is guilty of genocide²⁶⁵ and liable for any reasonable damages.

As a result of the slave trade the biological makeup, cultural identity of descendants of the slave trade has evolved (although arguably it birthed a new strength within dominant society), it was nevertheless initially lost by force—there is no way to go back in time or provide restitution to remedy the intangible harm. Those who supported, and were benefitted by, the slave trade fuel the opposition to the reward of reparations. The facts that these harms are theoretically unascertainable and are interwoven in dominant society’s culture form the root of society’s opposition to reparations. True reparations would alter the status quo in mainstream society.²⁶⁶

The historically injured also have tangible, ascertainable claims regarding actual profits gained and labor rendered as a consequence of their enslavement. In the eighteenth century, European nation-states incorporated slaving companies²⁶⁷ specifically designed to further streamline and increase financial prosperity from the slave trade. Such government-sponsored companies imposed licenses, taxes and other fees on slavers and other participants in slave trading. These licenses and import and export taxes served to maintain a budget to render salaries to agents of the company, but they primarily benefited European economies.

Historic victims also have civil causes of actions against the insurance companies that insured ships that supported and were crucial to the slave trade. The insurance companies were an essential element to successful slave bartering in the New World. Slaves’ lives were further insured for successful transport to New England during the period of the municipal slavery in the United States.²⁶⁸

Descendants of slaves also have a civil claim against the railroad companies²⁶⁹ that transported their ancestors during the eighteenth and nineteenth centuries in Western lands. These companies received tangible profits, including the fees that slavers, overseers, or other businessmen purchased to ensure the slaves’ transport, as well as any insurance they required for protection of their chattel-slaves.

²⁶⁴ Theo Van Boven, *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 and Serious Violations of International Humanitarian Law*, Dec. 16, 2005, available at http://untreaty.un.org/cod/avl/ha/ga_60-147/ga_60-147.html.

²⁶⁵ See Rome Treaty Statute, *supra* note 112, at art. 6.

²⁶⁶ WINBUSH, *supra* note 27, at 47.

²⁶⁷ See Muhammad, *supra* note 2, at 912; THOMAS, *supra* note 3, at 292 (identifying companies created and sponsored by Portugal, Holland, Great Britain, Spain and France “to carry slaves from Africa to the New World.” Specifically, the Portuguese established the Cacheu Company and the Maranhão and Pernambuco companies in the seventeenth and eighteenth centuries, respectively. Holland owned the West India Company, and Britain established the Royal Adventurers, the Royal African Company, and the South Sea Company. In the eighteenth century, Spain possessed “many companies with a privileged status.” France founded a number of Guinea companies after the 1670s, when Colbert established the first one).

²⁶⁸ See THOMAS, *supra* note 3, at 159, 241, 245, 294, 312, 726, 741, 974.

²⁶⁹ See Compl. and Jury Trial Demand, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. 02-CV-1862 (E.D.N.Y. filed Mar. 26, 2002) (Count I-Conspiracy, No. 51: “The shipping and railroad industry benefited and profited from the transportation of the slaves. The railroad industry utilized slave labor in the construction of railroad lines. These transportation industries were dependent upon the manufacturing and raw materials industry to utilize the slaves they shipped.”).

Banks, too, increased their profits, as they were repositories for the funds, agents of loans, and maintained interest rates that generated additional funds to continue supporting slaving expeditions. They promoted and benefited from the institution, sacrificing innocent human life in the process.

One infamous potential claim is based on the forty acres and a mule edict initially decreed to aid slaves' transition into their newfound freedom. The award of forty acres and a mule is not an adequate remedy in light of the horrific nature of crimes against humanity, nor is it in light of the increase in today's standard of living, inflation, and the continued racial discrimination that prevent people of color from successfully obtaining real property. Still, it is evidence from generations ago of the U.S. government's admission of guilt and liability to slaves and their descendants, even though the edict was never fulfilled.²⁷⁰ These legal arguments for reparations are valid under international law and within the confines of the U.S. Constitution's Thirteenth Amendment. The promise of forty acres and a mule would enable historic victims to sue under quasi estoppel.²⁷¹ The U.S. government promised to issue forty acres and a mule to slaves following emancipation. For the U.S. government to subsequently rescind the offer after slaves' reasonable reliance on it, violates all notions of fairness, and quasi estoppel would apply to this claim. Additionally, the fact that so many slaves worked innumerable hours in harsh physical and psychological conditions validly warrants a legal claim for uncompensated wages.²⁷²

However, regardless of the availability of valid claims and arguments, no lawyer, reparationist, or human rights advocate can force the international community to fulfill its legal obligation; they can only remind it to adhere to its moral duty.

Descendants of the Trans-Atlantic Slave Trade also have tangible and intangible civil claims they may institute against the international community. Most Black/Native Americans are of mixed descent,²⁷³ especially with African and Native American blood. However, they were categorized as African or Negro in order to deprive them of the benefits of their entire heritage. The treaties and land accessions between the United States and other Western powers and the natives omitted land distribution to Black/Native Americans. As a result, Black/Native Americans were not compensated for the colonial governments' takings, and therefore also have a claim for land under Native American-U.S.

²⁷⁰ See Verdun, *supra* note 1, at 608.

²⁷¹ See James H. Stillwell, *When Actions Speak Louder Than Words: The Case for a Quasi-Estoppel Exception to the Statute of Frauds*, 22 REV. LITIG. 69 (2003).

²⁷² See Verdun, *supra* note 1, at 608. The moral basis for reparations is simply stated: 1) slaves were not paid for their labor for more than two hundred and sixty-five years, thereby depriving the descendants of slaves of their inheritance; the descendants of the slavemasters inherited the benefit derived from slave labor, which properly belonged to the descendants of slaves; 2) the United States Government promised ex-slaves forty acres and a mule and did not make good on that promise. See also Shelton, *supra* note 5, at 287. A related trust theory argues that descendants of slaves were deprived of inheritance because slaves were not paid for the work they did.

²⁷³ See Verdun, *supra* note 1, at 640 (At the end of the Civil War, many were optimistic about the future of African Americans. Perhaps the most idyllic prophecy came from a great orator in 1866: "My strongest conviction as to the future of the Negro therefore is, that he will not be expatriated nor annihilated, nor will he forever remain a separate and distinct race from the people around him, but that he will be absorbed, assimilated, and will only appear finally as the Phoenicians now appear on the shores of the Shannon, in the features of a blended race.") (citing 4 Philip S. Foner, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 195 (1955) (quoting Frederick Douglass, *The Future of the Colored Race*, N.A.M. Rev., May 1866, at 437-40)). See also Warren Fiske, *The black & white World of Walter Plecker: The obsessions of a state bureaucrat have Virginia's Native Americans struggling for their identity*, STYLE WEEKLY, Sept. 22, 2004, <http://www.styleweekly.com/richmond/the-black-and-white-world-of-walter-plecker/Content?oid=1381080> ("From the grave, Plecker is frustrating the efforts of Virginia tribes to win federal recognition and a trove of accompanying grants for housing, health care and education. One of the requirements is that the tribes prove their continuous existence since 1900. Plecker, by purging Indians as a race, has made that nearly impossible. Six Virginia tribes are seeking the permission of Congress to bypass the requirement.").

treaties.²⁷⁴ Although potential claimants may seek damages in civil court, the proposed tribunal has the advantage of adjudicating civil claims as well as rendering legally binding decisions regarding nationstates complicit with crimes against humanity such as the Trans-Atlantic Slave Trade.

Lending institutions, government-insured mortgage companies,²⁷⁵ and private land owners²⁷⁶ continue to operate under the vestiges of slavery, which manifest themselves today in a new form of racial discrimination. The legacy of slavery includes the continuous deprivation of purchasing, inheriting, or otherwise devising real property, in violation of the Equal Protection Clause,²⁷⁷ the Civil Rights Act of 1964,²⁷⁸ and Universal Declaration of Human Rights.²⁷⁹

Descendants of the slave trade diaspora also have claims for the American and European governments' systematic racial discrimination in education and employment. In the United States, such claims for Black/Native Americans and Latino Americans are supported by the Civil Rights Act of 1964.²⁸⁰ In European nations, claims for deprivation of employment and education are supported by Great Britain's Race Relations Act of 1976,²⁸¹ France's New Criminal Code,²⁸² and a myriad of municipal laws in various European nations, depending on slave descendants' ancestry. Internationally, they would be supported by the Universal Declaration of Human Rights and the U.N. Convention against Discrimination in Education.²⁸³

Black/Native Americans, Latinos, and Afro-Caribbeans also have civil causes of actions for racial profiling. This cause of action, however, is more individualized than other civil claims, due to the direct future impact of the offense, such as the death penalty or incarceration. Firstly, these classes have a group cause of action since they fall within a "suspect classification." Individually they have claims as well and are more readily available to adjudicate. Arguably, government actors who are likely to continue racial profiling result in a higher probability of harm, thus both group and individual claimants have causes of actions. As with any class action, individuals may opt out and pursue individual remedies should they believe their harm is greater or damages would be diluted by group award of damages. The latter would still be able to pursue claims under the jurisdiction of the proposed tribunal.

For a class action suit or a suit before the international criminal tribunal, the issue would not be considered ripe, since individual harm is more ascertainable. Yet the United States does recognize that constitutional claims exist if the occurrence of profiling is egregious and has the likelihood of repeating itself, thus consistently depriving citizens of their constitutional rights. Most Western nations guilty of

²⁷⁵ See James H. Carr and Isaac F. Megbolugbue, *The Federal Reserve Bank of Boston Study on Mortgage Lending Revisited*, 4 J. OF HOUSING RES. 277 (1993) ("In each of the Boston Fed empirical specifications, African Americans and Hispanics were denied credit more often than otherwise identical whites. The most general specification implies that minorities in the Boston area are rejected 56 percent more often than equally creditworthy whites. This result provides the most powerful evidence to date of disparate treatment in application processing."). See also Alicia H. Munnell et al., *Mortgage Lending in Boston: Interpreting HMDA Data* (Federal Reserve Bank of Boston, Working Paper WP-92-7, Oct. 1992) [hereafter referred to as Munnell et al.].

²⁷⁶ See 42 U.S.C. §1982 (1978).

²⁷⁷ See U.S. CONST. amend XIV.

²⁷⁸ See VII Civil Rights Act of 1964 *supra* note 159.

²⁷⁹ See Universal Declaration of Human Rights, *supra* note 113, at Art. 17 ("(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.").

²⁸⁰ See Civil Rights Act, *supra* note 159.

²⁸¹ See Race Relations Act, *supra* note 170.

²⁸² France Penal Code, *supra* note 242, at art. 225-1, 225-2, 3.

²⁸³ See Convention Against Discrimination in Education, May 22, 1962, 429 U.N.T.S. 93, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20429/volume-429-I-6193-English.pdf>.

racial profiling do not prohibit the practice, and most of the individuals impacted are descendants of the Trans-Atlantic Slave Trade diaspora.²⁸⁴

Historic victims and descendants' legal claims are based not only on moral obligation and international convention or custom but also on the concept of equitable relief. Monetary reparations will never truly compensate the injured, nor return them to their original state. Equitable relief is used to enforce restitution to rectify, to a balanced degree, the harm incurred. Therefore, claimants can also institute civil suits based on equitable estoppel.

Throughout the slave trade and in some municipal cases, judiciaries of the international community admitted that the slave trade was a crime and violated the sense of morality. However, international governments including legislatures and state courts, who were in a legal superior position, enacted and upheld laws which deemed those with African and other descent slaves and determined their progeny to be the same. The U.S. federal government declared them to be 3/5 of a human and not entitled to basic human and civil rights. This deprived slaves and their descendants of their inherent right of redress and access to the civil courts. This legacy of discrimination lasted for centuries and various forms of institutional discrimination continued to deprive these descendants of their rights. Thus, the international community, and federal and state governments are estopped from asserting certain legal defenses, such as the failure to state a claim or invoking the statute of limitations.²⁸⁵ This legal admission is a clear basis for estoppel. The international community is estopped to deny its participation, profiteering, and its own admission that this institution was a crime against humanity.

Another argument for reparations sounds in trusts and estates law, and provides a cause of action that would be sustainable against the estate inheritors of private companies and real property purchased or received as a result of slavery. An inherited estate is subject to any outstanding debts or liabilities. Individuals who inherit majority shares or other controlling interest in a corporation historically linked to slavery would be accountable for providing a fund or separate trust designated to pay potential claimants. Some American states have required banks, railroads and similar companies to disclose their historic affiliation with the slave trade industry whether under the guise of insurance underwriting, sales, advertisement and profits. The latter is distinct from a claimant's civil cause of action against an estate of an individual slaver's estate, which is likely insolvent or nonexistent. However, many members of society have continued to benefit from historical inequities based on historical injustices against the descendants of slaves at the behest of government and the willingness of private actors. However, the Uniform Probate Code provides few exceptions to the statute of limitations regarding estates based on the discovery of assets.²⁸⁶

E. Legal Arguments Opposing Reparations

The primary argument of opponents of reparations is that whites today are not slavemasters, as their forefathers were. Although many of their ancestors were slaveholders, overseers, or traders, the descendants did not engage in such activities and the international community cannot validly order them to pay reparations.²⁸⁷

²⁸⁴ See Amnesty International, *Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States*, at 1 (Oct. 2004), available at http://www.amnestyusa.org/pdfs/rp_report.pdf.

²⁸⁵ Muhammad, *supra* note 2, at 917–22.

²⁸⁶ See Uniform Probate Code (1969) §§ 3-802, 3-803, available at <http://www.uniformlaws.org/shared/docs/probate%20code/upc%202010.pdf> (last updated February 11, 2013).

²⁸⁷ See Richard A. Epstein, *The Case Against black Reparations*, 84 B.U.L. REV. 1177, 1188 (2004) (Over 300,000 northerners, many of whom were black, were killed during the Civil War in the successful effort to end slavery. Their

However, just as Black/Native Americans and others have inherited the burdens of a legacy of institutionalized racism and discrimination that still permeate nearly every aspect of life's activities, whites have inherited the privileges. Because the members of dominant society claimed the benefits of the slave trade and its legacy for themselves and their children in estates and wills while they deprived slaves and their descendants of basic liberties and the right to self-determination, they owe a debt of reparations.²⁸⁸

Nevertheless, the taxpayers are not bearing the burden of the current civil lawsuits. Plaintiffs are filing current civil actions against specific corporations for direct historical wrongs to their ancestors. Proposed funds monitored by nation-states government have not been established and may become an issue at that point in time. However, whites are not the only hard-working Americans, South Americans or Europeans. Black/Native Americans, Native Americans, and other descendants of the African Diaspora who have steady employment currently pay taxes on their income and property. Thus future funding for established claims would not be placed only on whites should the government fail to earmark sufficient funds to pay for reparations.

Detractors of the reparations movement contend not only that current whites did not enslave the ancestors of the descendants of the African Diaspora, but that some ancestral whites actually helped free slaves. Some even state that whites gave Black American and Latino American slaves' freedom.

History has demonstrated repeatedly that freedom is not given. People have died, fought in wars, strategized, and negotiated freedom. The same dissenters do not acknowledge that Black/Native Americans fought and were slaughtered in the battlefield by members of the Confederate South for a freedom not realized.²⁸⁹ History records disclose that others passive-aggressively fought their slavemasters by poisoning, grinding up broken glass into fine powder and integrating it in the slavemasters' families' meals. Still many slaves did what they could and stole away into the night, staving off slave-hunters, former slavemasters, local law enforcement, treading for days at a time, hiding in the swamps of the undeveloped South and fighting off animals which desired to feed from their weary flesh. With lack of literacy many slaves escaped to the North. At times, a few whites would help along the way providing a place to sleep in a barn or shed, or even helping to look out to capturers. But North America and South America never *gave* Black/Native Americans, Native Americans, and Latino Americans freedom. Many slaves searched for embodiment of liberty, even if it was with their last breath.

Strikingly what they found in the North, with the exception of primarily white Quakers, was that slavery existed there too. Even with the Emancipation Proclamation, the President and the U.S.

descendants could think that they have paid reparations in blood and do not wish to go further. Next to them stand vast numbers of individuals who regard themselves as wholly unrelated to the wrongs in question and are asked to foot some fraction of the bill, while their own grievances remain largely unredressed.). See Feagin, *supra* note 33, at 51 ("Since there are close historical connections between past and present white privileges and black disabilities, it is not surprising that most whites wish to deny the historical linkages with such phrases as "my family and I never owned slaves" or "slavery happened hundreds of years ago—get over it."). See Verdun, *supra* note 1, at 628 (Opponents of reparations to African Americans argue that living whites have not injured living African Americans; the wrongs of slavery were committed by individuals who have been dead for years.).

²⁸⁸ See Verdun, *supra* note 1, at 637–38.

²⁸⁹ See New Efforts, *supra* note 97, at 315 ("Another claim alleges that whites expiated the sin of slavery by fighting the Civil War. Quite apart from ignoring that Southern whites fought the Civil War to perpetuate slavery, this argument ignores President Lincoln's quite categorical statement that the Union side did *not* fight the Civil War only to abolish slavery.") (emphasis in original).

government did not give freedom. A new form of debt slavery emerged in the form of working for former slavemasters through sharecropping,²⁹⁰ Black Codes and Jim Crow.

Slave revolts were frequent in the West Indies and portions of South America, namely Brazil and Argentina. One of the most popular slave revolts was led by Toussaint L'Overture in Haiti. These revolts alarmed the white colonists to the reality that slavery became impractical to maintain fiscally, not that slavery was morally wrong. In Brazil, former slaves and free-born Africans created communities for their own protection and to help runaway slaves to freedom.

Those who make arguments that whites at some point helped slaves, speak merely of a minority and do so with the assumption that potential claimants are suing individual White Americans. It cannot be over-emphasized that the past and potential *civil* lawsuits are aimed at corporations, funds, government and insurance companies. These are financial entities who have a documented, long-standing establishment and promotion of the Trans-Atlantic Slave Trade and its vestiges.²⁹¹

Another legal argument of reparation's opponents is that since historic victims were considered chattel they had no rights to legal redress.²⁹² Survival actions by slave descendants as next friend on behalf of historic victims would not be viable legal claims for reparations because chattel cannot possess inalienable rights.²⁹³

Opponents also argue that a civil claim for reparations would be void for over-inclusiveness. Descendants who have not been directly discriminated against or who are in the upper middle class or wealthy would reap the financial benefits of restitution.²⁹⁴ However, the goal of restitution is to compensate for an entire institution of slave trading and a governmental system based on discrimination against people of color, and, if achieved, restitution would inevitably benefit the few members of the plaintiff class who might appear not to be directly harmed. Over-inclusiveness would not detrimentally interfere with the ultimate goal of redressing the lack of equality that equilibrium, which directly resulted from the slave trade and its legacy.

Another legal argument against the award of reparations is that some Blacks owned slaves. Often times, these Black purchasers acquired slaves, such as members of their family who may not have been freed upon the death of their slavemaster, in order to free them.²⁹⁵ These instances were rare and did not substantially contribute to slavery, nor were they related to the inception of the Trans-Atlantic Slave Trade. Such an argument does not detract from the overwhelming legal support for appropriate restitution.

Reparations' opponents are quick to argue, too, that African monarchs participated in the Trans-Atlantic Slave Trade.²⁹⁶ This is a fact that historians and human rights advocates cannot avoid.²⁹⁷ North

²⁹⁰ Waterhouse, *supra* note 125, at 218.

²⁹¹ See New Efforts, *supra* note 97, at 310 ("As historian John Hope Franklin noted in an open-letter reply to Horowitz, this is an odd claim. Most people would not dispute that Western powers, most notably Spain, Great Britain, France, and the United States, began and promulgated the slave trade. Slavery was made possible through a practice of colonization in which the European powers subjugated indigenous Africans and engaged in a policy of underdevelopment.").

²⁹² See Shelton, *supra* note 5, at 281.

²⁹³ See Shelton, *supra* note 5, at 27.

²⁹⁴ See Gray, *supra* note 8, at 1062.

²⁹⁵ See Verdun, *supra* note 1, at 633.

²⁹⁶ See Henry Louis Gates, Jr., *Ending the Slavery Blame-Game*, N. Y. TIMES, Apr. 22, 2010, <http://www.nytimes.com/2010/04/23/opinion/23gates.html?ref=opinion> ("While we are all familiar with the role played by the United States and the European colonial powers like Britain, France, Holland, Portugal and Spain, there is

African nations' complicity in tribal raids and kidnappings does subject them to suit by their own descendants.²⁹⁸ However, African nations' liability for their participation does not lessen the evidence of Europeans' development of and financial profiteering from the slave trade, or hamper the formulation of a case for international reparations.

Some descendants of historic victims from the Trans-Atlantic Slave Trade oppose the award of reparations due to its inadequacy, and consider it an insult to the incomparable atrocities of the slave trade.²⁹⁹ This view is also fueled by the notion that the acceptance of redress would strengthen the stigma of victimhood.³⁰⁰ Although this argument requires consideration, it is more feasible for an injured party to receive compensation for a wrong than to reject compensation out of *pride* in victimhood. Although the sentiments fueling these descendants' opposition to reparations are natural, they do not diminish those of the great number of descendants who would appreciate some form of restitution for centuries of slavery and racial discrimination.

Further, for those descendants of the historically injured who do not desire reparations, the answer, as it was for the Japanese and those of Japanese descent who were resistant to the award of restitution for internment, is simple and clear: one is not required to accept it.³⁰¹ One does not possess the legal justification to interfere with those who desire justice. As with a class action lawsuit or a human rights tribunal, one has the option of waiving the benefit of the outcome, even as a party to the suit.

Another legal argument against reparations is that, due to the length of the slave trade, no sufficient amount of funds is readily available for distribution to the descendants of historic victims.³⁰² As a result, the advocate of this argument concludes award of reparations is simply an impractical legal remedy.

Finally, opponents of reparations contend that restitution, at least in the United States, was made at least a century ago to Black/Native Americans, through the establishment of the Freedman's Bureau in 1865, the promise of forty acres and a mule, civil rights legislation, and affirmative action programs.³⁰³ However, these programs and laws cannot truly be considered reparations because they were not universally or effectively enforced, and thus produced the opposite effect of their purpose: a disparate

very little discussion of the role Africans themselves played. And that role, it turns out, was a considerable one, especially for the slave-trading kingdoms of western and central Africa. These included the Akan of the kingdom of Asante in what is now Ghana, the Fon of Dahomey (now Benin), the Mbundu of Ndongo in modern Angola and the Kongo of today's Congo, among several othersThe sad truth is that without complex business partnerships between African elites and European traders and commercial agents, the slave trade to the New World would have been impossible, at least on the scale it occurred.”).

²⁹⁷ *Id.* (“Advocates of reparations for the descendants of those slaves generally ignore this untidy problem of the significant role that Africans played in the trade, choosing to believe the romanticized version that our ancestors were all kidnapped unawares by evil white men, like Kunta Kinte was in *Roots*.”); *see also* Shelton, *supra* note 5, at 285.

²⁹⁸ Muhammad, *supra* note 2, at 893. Raids on neighboring tribes or villages supplied a constant flow of slaves.

²⁹⁹ *See* Higginbotham, *supra* note 10, at 454.

³⁰⁰ Shelton, *supra* note 5, at 274 (“Some view reparations for historical injustices as the triumph of a victim psychology that blames everyone else for today’s problems, saying that ‘[w]hat is alarming is the extent to which so many minorities have come to define themselves above all as historical victims.’”).

³⁰¹ *See* Chad W. Byran, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations Might Fit*, ALA. L. REV. 599, 602–03 (2003).

³⁰² *See* Shelton, *supra* note 5, at 288. An argument frequently made is that the costs of implementing redress would be excessively high.

³⁰³ *Id.* Those who oppose slave reparations assert that the violations occurred too long ago, and were remedied through emancipation, civil rights legislation and affirmative action.

impact in education, economics, and politics.³⁰⁴ In any society, no single variable is the determinant of cultural and economic oppression, yet the law does not require evidence of substantial harm or causal linkage to the harm by an act to be the sole relevant contributing factor. The acts of the Trans-Atlantic Slave Trade and its vestiges are significant causes of the present condition of a majority of Black/Native Americans and Latinos.

IV. ADDITIONAL LEGAL CONSIDERATIONS

A. Identifying Descendants of the Trans-Atlantic Slave Massacre

The United States of America, several European countries, and African monarchs³⁰⁵ all participated in the Trans-Atlantic Slave Trade, resulting in new cultural and racial identifications among various African descendants. A typical “Black” American or “African” American is simply not just “Black” or “African.” Black/Native Americans are historically composed of two to three ethnic groupings: African, Native American, and European, which likely includes British or French heritage.³⁰⁶ West Indians have similar ethnic backgrounds of African, Native American, and French citizens. Thus the legal question arises of who exactly comprises the racial class of persons that should receive reparations. The class is narrowed to the descendants of slaves, but the process of identification is difficult. During earlier colonial periods, anyone with a drop of African or Native American blood would be deemed “Black”, “Negroid,” or “Native American,”³⁰⁷ but there were also people of color who were extremely light-skinned and, despite the derogatory references to the higher yellow skin tones of Black/Native Americans during slavery through the early twentieth century, who could “pass” for white. These descendants of the slave trade suffered the psychological damage of racism,³⁰⁸ but they necessarily did not suffer blatant Jim Crow or Black Codes discrimination because it was difficult to discern that they were people of color.³⁰⁹

One simplistic manner to ascertain the identities of the descendants of slaves, although not absolute, is to study the genealogical charts or undergo DNA testing. The former may not be possible

³⁰⁴ *Id.* at 286. Despite these on-going effects of slavery, governments have shown hostility toward affirmative action as a means of rehabilitation or remediation for past and present discrimination. As a result, many slave descendants lack adequate education, safe and decent housing, full participation in the political process, and equal economic opportunity.

³⁰⁵ These countries include the United Kingdom of Great Britain, the United Kingdom of Denmark, the Kingdom of Spain, the Portuguese Republic, the Kingdom of Sweden, and the Federal Republic of Germany. *See* Muhammad, *supra* note 2, at 887, 903, 904.

³⁰⁶ Verdun, *supra* note 1, at 639 (A majority of the people of the West Indies are descendants of black Africans who were brought to the islands as slaves to work on sugar cane plantations. Most of the rest are of mixed black and European ancestry, or have British, Dutch, French, Portuguese or Spanish ancestry).

³⁰⁷ Virginia’s Racial Integrity Act of 1924 led to many states following suit with their own anti-miscegenation laws; *see generally* J.R. Browning, *Anti-Miscegenation Laws*, 1 DUKE L.J. 26 (1951).

³⁰⁸ PACKARD, *supra* note 149, at 97. Principally it meant cutting oneself off from family and community and the security those resources brought. Furthermore, such people—meaning those aware of the African ancestry but deliberately passing to escape the social penalties black classification brought in America—were constantly at risk of their legal classification being discovered.

³⁰⁹ *Id.* When laws defining racial status were written in the colonies of the Deep South, any black genes—no matter how few—meant you were black. Caucasian appearance was irrelevant if public knowledge existed of one’s black ancestry. If such a person’s appearance was Caucasian, and assuming the black heritage was successfully hidden that person could “pass” as white if he or she chose to do so. But such passing generally involved colossal sacrifices for the person affected. Principally it meant cutting oneself off from family and community and the security those resources brought. Furthermore, such people—meaning those aware of the African ancestry but deliberately passing to escape the social penalties black classification brought in America—were constantly at risk of their legal classification being discovered.

for many descendants of slaves, since slaveholders often did not maintain accurate, or any, records of the slaves they owned. The latter, however, is feasible, especially in light of the open argument that the slave trade deprived the slave descendants of ancestral memory and that there is a great yearning for many to know their historical heritage. By satisfying African descendants' requests for DNA identification, the National Human Genome Center at Howard University³¹⁰ provides them with an aspect of non-monetary compensation—the descendants' knowledge of their genetic ancestry.

So the issue is not only of harm, but linking the harm to racial identity remains. This factor is intertwined with the legal notion of standing as prominently highlighted by those who oppose reparations. Problems with regard to racial and ethnic identity occur due to ancestral mixing, though often only one aspect of their lineage is highlighted in government categorization—"African American." Though Native Americans initially did not mix with different racial and ethnic groups, as time passed, the comingled with African slaves as the former would sometimes protect the latter from European slavers.³¹¹

The other groups to consider are Africans, South Americans, and Central Americans who have migrated to the West during the twentieth and twenty-first centuries, likely from impoverished lands affected by colonialism.³¹² They trekked to the West voluntarily under student or work visas. Those who remain an extended period of time consequently gain citizenship status and are ushered into the government-sanctioned African American and Hispanic groupings.

In order to make this distinction of those Black/Native Americans and Latino Americans of the African Diaspora from recent migrants, both groups may have to disclose their family history, identity, and DNA.

Not only will Black/Native Americans, West Indians, and Latino Americans likely purge personal family information, one must consider who is a descendant of slaves. Presuming that claimants for reparations pursue a viable cause of action for slavery, the burden remains whether their particular ancestors were slaves. Since colonists and early America deemed Africans and Black/Native Americans as slave chattel, accurate records were not kept. The marriage and genealogy of slave property were not slave-owners' and slave traders' priority in the agricultural south.

Even so, during American slavery some Black/Native Americans were free men. Some Blacks are progeny of those from the coasts of North and West Africa who traveled and explored freely to the Americas, yet at different points of U.S. history, both freemen and freedmen were likely captured and recaptured into slavery. Nevertheless, some rich free Blacks existed simultaneously as their slave counterparts in America.

Historically, many Black/Native Americans in America are of mixed descent with white ancestry, some more than others. Depending on the level of intermixing, those deemed Black American by the "one drop" rule would "pass" for white. Many of these Black/Native Americans used this racial ambiguity to their advantage and staved off potential discriminatory harms that their darker counterparts were unable to avoid. One may argue that they did not suffer harm during these racially turbulent

³¹⁰ See HOW. U. NAT'L HUMAN GENOME CENTER, <http://www.genomecenter.howard.edu/intro.htm> (last visited April 8, 2013).

³¹¹ See ENCYCLOPEDIA OF NATIVE AMERICAN TRIBES 257 (3d ed. 2006). In the early 1800s the Seminole were friends of other runaways-escaped African American slaves. They hid the slaves and welcomed them into their families.

³¹² See Epstein, *supra* note 287, at 1189 (The second problem arises on the plaintiff side of the equation: Who should get the dollars in question? Any state-wide program is haunted by the problem of migration, which makes it likely that much of the cash would go to the wrong people.).

decades. Thus, even though they are categorically Black American and descendants of slaves, their claim to restitution is arguably weaker and possibly void.

Yet, it is valid to argue that those Black/Native Americans who passed for white suffered a different historical harm. These individuals had to deny their identity to avoid random lynchings, rapes, and degrading racial laws that subjugated them to inhumane treatment by white society.

Black Americans of the United States must address this social and legal issue from the vantage point of the nineteenth and twentieth centuries, a time period that presents a festoon of considerations. The U.S. Census recorded mixed Black Americans who were not first generation bi-racial, but had multiple ethnic backgrounds, as mulatto, a separate ethnic designation³¹³ from older terms of Negro and Black American. The federal government altered the latter racial designation in succeeding decades beyond the "one drop rule."³¹⁴ Different, non-white ethnic groupings at different times of American history were categorized as Black American. For instance at one point in history Virginia's legislature categorized Chinese Americans as Black Americans. In the alternative, varying "races" were categorized as whites at different points of U.S. history.³¹⁵

In identifying descendants of the African Diaspora, issues of allocating the burden of proof between individual, state and federal government must be assessed. Primarily is the administrative effort in determining costs, privacy issues and fraud prevention are all factors which undergird identifying descendants of the Trans-Atlantic Slave Trade. These findings will then be used to formulate the criteria of who has standing on an international level and in the proposed International Tribunal.

Once state and national governments reconcile who is to receive reparations, opponents argue additional administrative issues remain.³¹⁶ For instance, a fund must be created to administer the compensation. One must determine whether corporate entities establish their own funds for individual losses or to provide accounting to their local and national government and transfer the monies to the government for distribution. As for the federal and state government, their primary liability is furthering the slave trade and receiving pecuniary benefits through taxes, imports and licenses.³¹⁷ Afterwards, these governments maintained de jure segregation and deprivation of human rights. Thus the governments must establish a separate fund for their role in slavery.

Using the proposed International Tribunal, various countries would create a fund in a designated depository. Each country involved may adopt an agreed upon application to its citizens and have the Secretary of the Commission establish in their homeland register the paperwork. Additional issues of applications of descendants to countries and corporations who sponsored the Trans-Atlantic Slave Trade

³¹³ ELIZABETH MARTIN ET AL., U. S. BUREAU OF THE CENSUS, CTR FOR SURVEY METHODS RESEARCH, CONTEXT EFFECTS FOR CENSUS MEASURES OF RACE AND HISPANIC ORIGIN 3 (1990), *available at* <http://www.census.gov/srd/papers/pdf/sm9001.pdf> ("Race was first measured as a separate item in the 1850 census, using the categories, 'white,' 'black,' and 'Mulatto,' which were also used in 1860. In the 1870 and 1880 censuses, categories for 'Chinese' and 'Indian' were added, and in 1890, 'Japanese' was added. The interpretation of race as a biological (yet observable) characteristic in these early censuses is clear.")

³¹⁴ *Id.*

³¹⁵ *Id.* (In 1940, this rule was changed, and Mexicans and other persons of "Latin descent" were to be classified as "white" unless they were definitely of some race other than white. The rule was changed again in 1980, and Hispanic entries, such as Puerto Rican and Mexican, were left in the "Other race" category).

³¹⁶ See Muhammad, *supra* note 2, at 906. If the recipient is to be some corporate entity, as Robinson and others suggest, how can its representativeness and accountability be determined? If the body is a development fund, who would control it and how would the decision be made? Robinson has suggested that philanthropic agencies be the grantees, but which ones and to whom would they be accountable?

³¹⁷ *Id.*

would pay those of the African Diaspora who live in other countries. Recipients would then receive multiple payments should nexus of country, corporation, slavery and harm proven.

This will likely take years to achieve, and once established the question remains who supervises the government fund. In the past the federal government mismanaged funds that were earmarked for Native Americans for past harms.³¹⁸ Therefore, it is reasonable to have concerns that such fiscal corruption is likely to occur again. However, the federal government, depending on how the fund is established may create a committee comprised of budget analysts and fund managers and then reserve a set number of appointees to be selected by persons who are scheduled to receive payment.³¹⁹

In poorer countries in the West Indies, and Central and South America, such suggestions are difficult to implement where government corruption may be rampant and democratic governance is not upheld.³²⁰ To minimize financial corruption, the most fiscally sound manner to distribute the funds is to provide application forms for those who believe they are due reparations and once confirmed the government may distribute the funds directly to those individuals. This minimizes funds earmarked for reparations from taking an extraordinary amount of time to be disbursed and unnecessarily spent on excessive overhead.

B. Forms of Legal Reparations

The proposed remedies to address the Trans-Atlantic Slave Trade and its legacy vary from tangible and intangible, just like the injuries they are designed to redress. Each proposed remedy is an introductory measure aimed at remedying the harm of the slave trade and its residual effects. Tangible remedies include, but are not limited to, financial compensation from corporations and insurance companies in Western nation-states, awards of the current equivalent value of forty acres and a mule, a trust fund for slave descendants of the slave trade diaspora, mortgage loan forgiveness, student loan forgiveness, land accession, and comprehensive health care.

Private corporations, including insurance companies, were significant participants in the slave trade. Some of these companies have evolved into mortgage insurers and vehicle insurers, and some remain in their traditional capacity of insuring the railroad companies, equipment, and facilities historically used to promote municipal slavery in North America.

Neighborhoods that experienced demographic growth comprised of persons of color, especially Black, continue to exist despite generations of urban deterioration compounded by the lack of investment from benefactors of the overall economy as well as municipal neglect. They have historically been and still are considered the ghettos, whether in the inner cities or parts of the impoverished Deep South, in states like Louisiana, Mississippi, and Alabama. Impoverished areas of England and France are primarily populated by Afro-Caribbeans due to racial discrimination.³²¹

³¹⁸ See National Archives and Records Administration, Letters sent, 1800–24. Letters sent by the Revenue Office, Department of the Treasury, relating to the treasury business of the War Department, 1794–96. Letters received, 1800–23. Microfilm Publications: M15, M74, M271.

³¹⁹ New Efforts, *supra* note 97, at 298 (if reparations were not to be paid to individuals but to groups, it would create the problem of determining who would “represent” African Americans and the legitimacy of such a group).

³²⁰ See TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT, 77–79, 115–16, 138–46, 253 (2007), available at http://issuu.com/transparencyinternational/docs/global_corruption_report_2007_english/1?mode=a_p.

³²¹ See Steve Garner & Gargi Bhattacharyya, *Poverty, Ethnicity and Place*, JOSEPH ROWNTREE FOUND. 9, 10, 16 (2011), available at <http://www.jrf.org.uk/sites/files/jrf/poverty-ethnicity-place-full.pdf>; See also Equality at Work, *supra*

Today, those who live in geographical regions linked to historical discrimination also suffer from insurance companies' impositions of higher premiums and other inflated rates based on the race of the insured or on the race of residents within a particular geographical region.

As discussed, the U.S. government officially promised former slaves in the nineteenth century forty acres and a mule, which it failed to fulfill. The United States therefore deprived historic victims of lawful property as well as any succeeding generations who likely would have inherited such estates.

A proposed trust fund is also a feasible form of restitution, aimed at creating financial security for current and foreseeable future generations and thus increasing slave descendants' opportunities to advance in society and to build more stable communities. In the plainest sense, trust funds are used as economic foundations for beneficiaries who, in their current state, are unable to fully manage or distribute tangible or intangible wealth.

An example of this method of restitution is the NARF³²² fund for Native Americans, although in this instance the U.S. government is the trustee, instead of a committee or commission chosen by Native Americans to represent their interests and goals before the federal government. The most reasonable way to create and build a proposed fund for slavery's descendants is for members of the international community to contribute an initial monetary amount followed by subsequent annual deposits for an indefinite period of time. However, the international community has neglected to make universal amends, a failure that presumably creates a general mistrust between the proposed beneficiaries and governmental contributors. Thus, a pattern of trusts should be set up under international regulation, but organized and supervised by commissions especially created to distribute funds. This organization of the trusts would be similar to the set of committees and commissions who maintained trust funds for Holocaust victims and their descendants who negotiated settlements with Swiss Banks and the German government.³²³

Another reconciliatory measure would be for nation-states whose sovereigns fund mortgages to forgive mortgage loans. This type of restitution is a direct form of compensation from which buyers from the early twentieth century and twenty-first century would benefit. Mortgage lenders who refused to offer financing to potential buyers during the twentieth century and those who have practiced racially discriminatory lending to mortgage applicants in violation of the Civil Rights Act of 1964 would be liable.³²⁴

Student loan forgiveness by United States government and other Western nation-states that sponsor similar funding would serve to reconcile generations of systematic discrimination in education. Although Black/Native Americans and other descendants of the slave trade diaspora originally lacked access to education based on the lack of facilities or general prohibitions, succeeding generations during

note 117; *see also* International Labor Conference, June 3–19, 2003 *Report of the Director-General Time for Equality at Work* 18, 90 (2003).

³²² *See* Memorandum of Understanding, *supra* note 43.

³²³ BARKAN, *supra* note 4, at 62–64.

³²⁴ *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, 88TH ANNUAL REPORT (2001), *available at* <http://www.federalreserve.gov/boarddocs/rptcongress/annual01/ar01.pdf> (Overall, the denial rate for conventional, that is, non-government-backed home purchase loans, was 27 percent in 2000. The rate rose steadily from 1993 through 1998 but has now fallen slightly (about 1 percentage point) for the second consecutive year. Denial rates for conventional home purchase loans in 2000 were 45 percent for black applicants, 42 percent for Native American applicants, 31 percent for Hispanic applicants, 22 percent for white applicants, and 12 percent for Asian applicants.), <http://www.federalreserve.gov/boarddocs/rptcongress/annual01/ar01.pdf> (last visited December 10, 2012). *See also* MONIQUE W. MORRIS, NAACP REPORT, DISCRIMINATION AND MORTGAGE LENDING (2009), *available at* <http://www.naacplv.org/lending.pdf>.

the nineteenth through twentieth centuries have been prevented from obtaining the economic means to pay for such higher learning once qualified. This is especially apparent in America, where most qualified students have no alternative but to indebted themselves to an exorbitant amount of student loans from the same government that created the economic, employment, and educational disparity that led to the need for such economic assistance in the first place.

Historic victims and their descendants also have a valid claim for land accessions. Slaves were considered personal property and not a part of society. They and their descendants were deprived of land before, during, and after slave trading and municipal slavery. Many were, and many continue to be, forced to reside in the unkempt, poor neighborhoods of most Western nation-states.

The possession of real property is universally accepted as the foundation of any sovereignty or community.³²⁵ Although descendants of the slave trade diaspora are somewhat assimilated in mainstream Western societies, discriminatory practices continue to prevent them from enjoying social and economic equality. Some have argued that the U.S. government did not give descendants of slaves in America the option of returning to their homeland through a form of financial settlement or allow them to settle themselves on land acquired from colonial territories, especially during the eighteenth through twentieth centuries, during which much of the Western international community committed crimes against humanity against Black/Native Americans, Native Americans, and Africans. Instead, descendants were “declared” free by the Emancipation Proclamation and citizens by the Fourteenth Amendment in the United States. Currently, there remain slave descendants who still desire land accession in order to form a true identity and foundation for economic equality in relation to mainstream society.

Comprehensive health care is designed to reconcile the period from the slave trade through the twentieth century during which slaves and their descendants had no health care. During Reconstruction, Black/Native Americans were forced to visit segregated hospitals that had inadequate facilities and equipment, resulting in a high mortality rate.³²⁶

In the United States, many women of color were sterilized through government-sponsored programs that surgically injected young woman of color with Norplant and provided no federal assistance for its removal, resulting in involuntary sterilization.³²⁷ This form of genocide violates the Rome Statute’s provisions against the systematic elimination or murder of specific populations.

Forms of intangible restitution aimed at restructuring the societal and cultural damage of the Trans-Atlantic Slave Trade in the international community include an apology, a rewritten history of the Trans-Atlantic Slave Trade and slavery, genealogical analysis of slave descendants’ DNA, and official recognition of Native American heritage, dual or trilateral citizenship, and an ancestral continent.

An apology from members of the international community for their participation in the Trans-Atlantic Slave Trade, municipal slavery, and continued racial discrimination would serve as an official acknowledgement of inherently evil crimes against humanity.³²⁸ The United States issuing apologies for the Japanese internment during World War II³²⁹ set a humane precedent for this reconciliation between

³²⁵ Waterhouse, *supra* note 125, at 218.

³²⁶ PACKARD, *supra* note 149, at 90.

³²⁷ See Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 AM. U. J. GENDER & L. 15, 20–21, 32 (1994); see also Pat Wingert and Barbara Kantowitz, *The Norplant Debate*, NEWSWEEK, Feb. 14, 1993, <http://www.thedailybeast.com/newsweek/1993/02/14/the-norplant-debate.html> (this controversy occurred in the 1990s).

³²⁸ See Shelton, *supra* note 5, at 273.

³²⁹ See Civil Liberties Act of 1988 Pub. L. No. 100-383, 102 Stat. 903.

Western nation-states and victims of these crimes. Although an apology for the slave trade and its legacy is not a legal remedy per se, it would set the tone for positive, reasonable negotiations designed to work towards tangible restitution.

Another form of intangible restitution is an accurate rewritten account of the historical events that led to the enslavement of indigenous peoples throughout the sixteenth and nineteenth centuries. This intangible form of restitution would benefit future generations of descendants both descendants of former slaves as well as of slave masters. History has the effect of influencing the perception of the current reality of society. Descendants of historic victims still possess an inferiority complex about their skin color and ancestry that has been cultivated by generations of indoctrination. The international community's proposed rewriting of slavery, slave trading, and sources of racial discrimination in history could build a stronger identity for Black/Native Americans, Latinos, and other descendants of the slave trade diaspora.

The United States currently does not recognize Latino Americans, Black/Native Americans, and some West Indians' Native American heritage. The United States has deemed that anyone who identifies themselves with Native American ethnicity must be a "card-carrying" member of a specific tribe.³³⁰ This segmented designation deprives many descendants of their cultural recognition and incorrectly categorizes them as Hispanic or "African American." As a result, many cross-cultural ties have been disconnected from one another by dominant society's oppressive categorization of these populations.

Genealogical analysis for slave descendants would bridge the gap between their current cultural status and ancestral homeland. As descendants of historic victims are minimally integrated into Western mainstream society, genealogical analysis could create a greater understanding that although they are a part of current Western culture, they have a heritage that transcends and extends back in time long before the Trans-Atlantic Slave Trade.

Finally, dual or trilateral citizenship among Native American tribes, America, other Western nations, and the ancestral continent could produce similar psychological and cultural benefits as genealogical analysis, and a greater sense of cultural identity in all aspects of descendants' heritage.

V. CONCLUSION

International law does not traditionally promote a simple legal resolution for crimes against humanity. No monetary amount can return freedom usurped, revive lives lost, assemble cultures dismantled, restore family traditions broken, nor ease the pain of torture endured as a consequence of the international community's participation in the Trans-Atlantic Slave Trade.

As with any tragedy in human existence, the acknowledgement of any wrong, whether considered lawful under international norms or municipal law at the time committed or not, is the basis for transforming traditional legal custom to prevent the commission of future similar acts. However, it has gradually acknowledged victims' right to effective remedies.

However, just as the international community has addressed other human rights violations committed in the past, it has the ability to make substantial restitution that will socially, economically,

³³⁰ Any American who is not already identified as Native American or part of a reservation cannot claim Native American ancestry unless they 1) identify as Native American 2) also maintain a documented affiliation with a specific tribe/band within the Native American population. *See* OFFICE OF THE BUREAU OF INDIAN AFFAIRS, A GUIDE TO TRACING AMERICAN INDIAN & ALASKA NATIVE ANCESTRY, *available at* <http://www.bia.gov/cs/groups/public/documents/text/idc-002619.pdf> (last visited April 20, 2013).

politically, and culturally repair some of the damage produced by the slave trade and its vestiges. Nation-states that participated in the Trans-Atlantic Slave Trade are obligated to do so, not solely based on current standards of international custom, but also on the universal recognition of every human being's rights to live, to assemble, and to attain education, employment, shelter, and respect. The international community has the capacity to contribute to the evolution of legal precedent regarding human rights violations. All that is needed is for one nation-state to take that courageous step to make amends.