

## Towards a framework of reparatory measures for the enslavement and colonisation of the African people

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**Summary:** *In February 2023 the African Union adopted a resolution by which it resolved to pursue reparatory justice to redress the harm that was caused against Africans through Trans-Atlantic slavery and colonialism. The adoption of the resolution has been followed by a debate on how it can best be implemented, especially considering that the quest for reparations for slavery and colonialism has been ongoing for almost a century. If the AU is to succeed in this quest, it needs to develop a strategy that addresses two critical questions, namely, (i) what would constitute reparatory justice in contemporary terms, for these historical crimes; and (ii) how the AU should pursue its claim for reparatory justice. This article discusses these two questions and suggests that the AU uses 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 as both a legal and conceptual basis for identifying measures that would constitute reparatory justice for Africans, in order to redress the harm caused through slavery and colonialism. This article identifies and discusses these measures, which include compensation for damages suffered by the African people and the African natural environment;*

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*the reform of international financing institutions; and the reform of the United Nations. In view of the constraints and biases that exist within the international legal system, the article suggests that the AU should pursue the reparatory justice agenda primarily through political engagements and the forging of global alliances, while using opportunities presented by the international justice system.*

**Key words:** *reparations; justice; slavery; colonialism; Africa*

## 1 Introduction

The discussion on reparative justice for colonialism and Trans-Atlantic enslavement of African people has been ongoing for a while among academics and policy makers. Among contributions by policy makers at the Africa regional level, of note is the June 1991 Resolution by the Council of Ministers of the Organisation of African Unity (OAU), which expressed the desire ‘to ensure that those powers responsible for the centuries of damage to Africa, take measures to make reparation[s] for the exploitation and slavery of Africa’.<sup>1</sup> As part of implementing this Resolution, in June 1992 the OAU appointed a panel of experts to assist with the development and enforcement of a claim for reparations to address the harm caused by slavery and colonialism of the African people.<sup>2</sup> In April 1993 the first Pan-African Conference on Reparations was held in Abuja, Nigeria, and it urged the international community to recognise the ‘unique and unprecedented moral debt owed to the African peoples as a result of slavery and colonialism’.<sup>3</sup> In October 2022 the African Monetary and Economic Sovereignty Initiative organised the second edition of the Conference on Economic and Monetary Sovereignty of Africa, in Dakar, Senegal, which resulted in the adoption of what is now popularly known as the Dakar Declaration.<sup>4</sup> This Declaration has been lauded as ‘an internationalist manifesto and a global action

1 Organisation of African Unity ‘Resolution on reparation for exploitation and slavery in Africa’ CM/Res.1339 (LIV), adopted by the Council of Ministers of the Organisation of African Unity, 1 June 1991 (OAU 1991 Resolution), <https://www.peaceau.org/uploads/cm-res-1339-liv-e.pdf> (accessed 16 January 2024).

2 OAU 1991 Resolution (n 1) para 1. This panel was officially referred to as the Group of Eminent Persons.

3 Organisation of African Unity ‘A declaration of the first Abuja Pan-African Conference on Reparations for African Enslavement, Colonisation and Neo-Colonisation’ (1993) 1, <https://ncobra.org/resources/pdf/TheAbujaProclamation.pdf> (accessed 16 January 2024).

4 See the Dakar Declaration on Pan-African Cooperation and Global Solidarity, <https://www.cadtm.org/The-Dakar-Declaration-Pan-African-cooperation-global-solidarity#:~:text=The%20declaration%20condemns%20the%20constraints,South%20cooperation%20and%20global%20solidarity> (accessed 15 September 2024).

plan' through which the delegates to the conference resolved to, among others, pursue reparative justice for slavery and colonialism.<sup>5</sup>

After decades of inaction on the issue, in February 2023 the African Union (AU), which succeeded the OAU in 2002, adopted a resolution calling for, among other steps, the establishment of 'an African Committee of Experts on Reparations for the purpose of developing a common African position on reparations and incorporate therein, an African reparatory programme of action'.<sup>6</sup> In November 2023 the AU held the Accra Reparations Conference, which culminated in the adoption of a declaration which affirmed as follows:<sup>7</sup>

The fulfilment of reparations is a moral as well as a legal imperative rooted in principles of justice, human rights and human dignity, and that reparations represent a concrete step towards remedying historical wrongs and fostering healing amongst people of different nations and continents.

At the global stage, policy makers have also been having conversations on this issue at least since the early 2000s. Notably, in 2001 the United Nations (UN) organised the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which culminated in the adoption of the UN Durban Declaration and Programme of Action (Durban Declaration).<sup>8</sup> To date, this remains the UN's blueprint on combating racism, racial discrimination, xenophobia and related intolerance. The Durban Declaration acknowledged that slavery and colonialism are crimes against humanity, committed against the people of Africa, and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance.<sup>9</sup> It also acknowledges that people of African descent are owed reparations for slavery and colonialism.<sup>10</sup>

5 S Ndongo and others 'Introduction: Symposium on the 2022 Dakar Declaration' (2023) 4 *Journal of Law and Political Economy* 606-609.

6 African Union 'Decision on building a united front to advance the cause of justice and the payment of reparations to Africans' Assembly/AU/Dec.847(XXXVI), adopted February 2023, <https://africanlii.org/akn/aa-au/doc/decision/2023-02-19/decision-on-building-a-united-front-to-advance-the-cause-of-justice-and-the-payment-of-reparations-to-africans-item-proposed-by-the-republic-of-ghana/eng@2023-02-19> (accessed 16 January 2024).

7 African Union Commission 'Accra proclamation on reparations' 14 November 2023, <https://au.int/en/decisions/accra-proclamation-reparations> (accessed 17 January 2024).

8 United Nations Department of Public Information 'Report on world conference against racism, racial discrimination, xenophobia and related intolerance' (2002), [https://www.ohchr.org/sites/default/files/Documents/Publications/Durban\\_text\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf) (accessed 16 January 2024).

9 United Nations Durban Declaration (n 8) para 13.

10 United Nations Durban Declaration (n 8) para 160 which, after having recognised slavery and colonialism as racist practices, 'urges states to take all necessary measures to address, as a matter of urgency, the pressing requirement for justice for the victims of racism, racial discrimination, xenophobia and related

In December 2013 the UN General Assembly proclaimed the International Decade for People of African Descent, starting on 1 January 2015 under the theme 'People of African descent: recognition, justice and development'.<sup>11</sup> During this decade the UN member states committed themselves to combating all the scourges of racism and other forms of injustices suffered by people of African descent. Among these injustices is Trans-Atlantic enslavement and colonialism, of which the enduring legacy of poverty, racism, environmental degradation and general underdevelopment of African people is self-evident.

Among public intellectuals and the academia, the call for reparatory justice in order to redress violations caused by the enslavement and colonisation of Africans can be traced back to the work of Marcus Garvey, who in the 1920s argued that '[s]lavery ... was more than theft and the loss of freedom in forced labour, it deprived a people [Africans] of their dreams and stripped them of their civilisation',<sup>12</sup> and that this damage must be repaired through reparations. Rodney in 1972 argued that the lower levels of development of Africa and other Third World regions of the world (compared to the Global North) are not a natural state, but a consequence of the process of underdevelopment caused by exploitative relations between these countries and the Western colonisers.<sup>13</sup> Rodney further argued that 'what was a slight difference [in levels of development] when the Portuguese sailed to West Africa in 1444 was a huge gap by the time that European robber statesmen sat down in Berlin, 440 years later to decide who should steal which parts of Africa'.<sup>14</sup>

This article seeks to build on these views that have already been expressed in support of the cause for reparatory justice for Africans. A review of literature on this subject reveals that a strong case for reparations to redress the violations caused by the enslavement and colonisation of the African people has been made, especially through the work of scholars who include Obeng-Odoom,<sup>15</sup> Táíwò,<sup>16</sup>

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intolerance and to ensure that victims have full access to information, support, effective protection and national, administrative and judicial remedies, including the right to seek just and adequate reparation or satisfaction for damage'. Also see United Nations Durban Declaration (n 8) paras 100-102.

- 11 Resolution 68/237, adopted by the 68th session of the United Nations General Assembly, 23 December 2013. This Resolution was adopted as a follow-up to the United Nations Durban Declaration (n 8).
- 12 R Eyerman *Cultural trauma: Slavery and the formation of African American identity* (2001) 91.
- 13 W Rodney *How Europe underdeveloped Africa* (1972) 149.
- 14 Rodney (n 13) 149.
- 15 F Obeng-Odoom 'Reparations' (2024) 51 *Review of Black Political Economy* 458-478.
- 16 O Táíwò *Reconsidering reparations* (2022).

Beckles<sup>17</sup> and Curto.<sup>18</sup> Therefore, in this article I do not intend to (substantially) address the question of whether there is a justified case for Africans to demand reparations for the enslavement of their ancestors and colonialism. The questions I seek to address are what reparations entail for the African people, and what strategic actions the AU can undertake to pursue the claim for reparations.

However, even as I proceed from the assumption that the case for reparations has been made in literature, it is necessary (as a way of setting context for this article) to summarise the arguments that have been advanced to demonstrate that the reparations claim is a justifiable one. The claim for reparations for slavery and colonialism is grounded on three key legal and political arguments, namely, that slavery and colonialism underdeveloped Africa; slavery and colonialism were gross violations of international human rights that must be remedied; and slavery and colonialism created racial and global inequalities that must be rectified. In the next part I explain these arguments.

## 2 The case for reparations

Three key arguments have been advanced in support of the claim for reparations. First is the 'underdevelopment school of thought'. According to Rodney:<sup>19</sup>

Underdevelopment is not absence of development, because every people have developed in one way or another and to a greater or lesser extent. Underdevelopment [is] comparing levels of development. It is very much tied to the fact that human social development has been uneven and from a strictly economic viewpoint some human groups have advanced further by producing more and becoming wealthier. The moment that one group appears to be wealthier than others, some enquiry is bound to take place as to the reason for the difference.

Rodney argues that the underdevelopment of Africa, compared to Europe, is a direct result of the exploitation of Africa by Europe. He argues that slavery and colonialism resulted in the underdevelopment of Africa while enriching the Global North, through the abduction of manpower and grand looting of natural resources from Africa by the slave traders and colonisers.<sup>20</sup> The 'underdevelopment school of thought' expounded on the earlier work of Williams, whose seminal

17 H Beckles 'The case for reparations' in D Dabydeen and others (eds) *The Oxford companion to black British history* (2007) 408-410.

18 J Curto 'A quantitative reassessment of the legal Portuguese slave trade from Luanda, Angola 1710-1830' (1992) 20 *African Economic History* 1-25.

19 Rodney (n 13) 25.

20 Rodney (n 13) 149.

research in 1944<sup>21</sup> demonstrated that the enslavement of Africans was central to the rise and sustenance of capitalist economies and societies of the Global North. Ample evidence<sup>22</sup> has been advanced to demonstrate that natural resources, including minerals, were stolen from Africa to sponsor the development of colonial powers, including Britain, Belgium and France.

A good example is the invention of the Victorian bicycles in Britain in the early 1800s. This invention had a massive impact on the development of infrastructure, technology and social relations in Britain. It is reported that the number of bicycles in use spiked as production rose from an estimated 200 000 bicycles in 1889 to one million in 1899.<sup>23</sup> This led to the widening and smoothing of roadways, paving the way for the introduction of the automobile later on. Inner parts of the cities were decongested as workers moved further out because they could now commute using the Victorian bicycles.<sup>24</sup> The introduction of this bicycle is also regarded as a catalyst for the emancipation of British women. British women, who were not permitted to move around without a male companion in the past for 'safety reasons', were now allowed to do so on the bicycle. The Victorian bicycle revolution was enabled by Congolese rubber collected by slave labourers under the coercive supervision of Belgian security forces.<sup>25</sup> In ways that demonstrate Rodney's underdevelopment theory, the invention and mass production of the Victorian bicycle propelled the development of Britain while promoting the underdevelopment of the Congo, through the exploitation of human and natural resources of the Congo. While the mass production of the Victorian bicycle catalysed the emancipation of British women, such emancipation came at the cost of the liberty of African women who were enslaved by the Belgians as rubber collectors in the fields of the Congo.

A recent study published by the John Hopkins University<sup>26</sup> also vindicates the underdevelopment school of thought, as originally argued by Williams and perfected by Rodney. The John Hopkins study demonstrates that slave trade contributed to the booming of the

21 E Williams *Capitalism and slavery* (1944).

22 Rodney (n 13) 1-15; Williams (n 21) 13-21.

23 <https://www.lovetoknow.com/home/antiques-collectibles/victorian-bicycles> (accessed 16 January 2024).

24 <https://www.lovetoknow.com/home/antiques-collectibles/victorian-bicycles> (accessed 16 January 2024).

25 BBC News 'DR Congo: Cursed by its natural wealth' *BBC News* (London) 9 October 2013, <https://www.bbc.com/news/magazine-24396390> (accessed 16 January 2024); A Hochschild *King Leopold's ghost: A story of greed, terror, and heroism in colonial Africa* (1998) 161.

26 John Hopkins University 'Underwriting souls' 2020, <https://underwritingsouls.org/> (accessed 16 January 2024).

insurance sector in Britain. It shows that several insurance companies, including Lloyd's of London, made huge profits from extending insurance cover to voyages transporting slaves and insuring slaves as cargo.<sup>27</sup> The booming of the insurance services brought about the accumulation of capital in the British financial services sector, which was used to finance other development initiatives, including the building of infrastructure. Such infrastructure and a rich capital base in the financial services sector remain the mainstay of the economy of contemporary British society. This came at the cost of the exploitation of the African people, who (today) remain poor as a result of their exploitation.<sup>28</sup>

Indigenous African communities were disposed of their agricultural land by the colonisers and were turned into poor peasants.<sup>29</sup> The natural environment in Africa was destroyed as a result of the reckless extractive industry operated by the colonial forces,<sup>30</sup> while some Africans were forcibly removed and resettled in regions of the world (including the Caribbean islands) that are more prone to the devastating effects of the ongoing climate change crisis.<sup>31</sup> These actions against Africans and the African natural environment have impoverished Africa while enriching Europe, and there lies the justification for the claim for reparations.

The second argument in support of the claim for reparations has been advanced from a political economy perspective.<sup>32</sup> By virtue of underdeveloping Africa while enriching the Global North, slavery and colonialism created what Obeng-Odoom has described as 'rising and resistant inequalities, and social stratification'.<sup>33</sup> These inequalities manifest in several ways, including the unjustifiable wealth gap between Africa and the Global North. As has been demonstrated above,<sup>34</sup> colonialism created a particular type of economic stratification in which Africa relates to the Global North as a supplier of cheap labour, cheap raw materials, and is a consumer of finished products from the Global North. This has led to the

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27 As above.

28 Rodney (n 13) 149.

29 J Laband *The land wars: The dispossession of the Khoisan and AmaXhosa in the Cape colony* (2020). Also see Rodney (n 13) 149.

30 Taiwò (n 16) 63.

31 By virtue of their proximity to the oceans that are experiencing a rapid rising of sea levels. See KK Perry 'Realising climate reparations: Towards a global climate stabilisation fund and resilience fund programme for loss and damage in marginalised and former colonised societies' (2020) *Social Science Research Network* 5-13.

32 Eg, see A Darity & K Mullen *From here to equality: Reparations for black Americans in the twenty-first century* (2020).

33 Obeng-Odoom (n 15) 459.

34 Also see Williams (n 21).

exploitation of Africa's resources and has created poverty among Africans, while enriching the Global North. These inequalities and socio-economic stratification, created through the exploitation of Africa by the Global North as a result of slavery and colonialism, can only be redressed through reparations.

The third argument in support of the reparations claim has been advanced from a human rights and criminal justice perspective. It has been argued that slavery and colonialism were crimes against humanity and, in some cases,<sup>35</sup> Africans suffered genocide as punishment for resisting colonial occupation. Although some<sup>36</sup> have counter-argued that slavery and colonialism were not unlawful at the time of their commission, it has sufficiently been demonstrated, including by Wittmann,<sup>37</sup> that the abduction of human beings and the sale of them to perform forced and unpaid labour (slavery) were contrary to customary international law, which already was in existence at the time. Equally, colonialism, which involved (among other violations) the invasion of other people's homes, the forced removal of families from their land, the extra-judicial killing, torture and rape of those who resisted colonial occupation, was a serious violation of customary international law existing at the time.<sup>38</sup> Although some of the slave-trading states observed domestic legal rules that recognised slaves as a form of property,<sup>39</sup> these rules applied only within those states and could not apply internationally. Customary international law, which was binding in the conduct of states internationally at the time of slavery and colonialism, prohibited subjecting human beings to degrading and inhuman treatment. Slavery and colonialism involved subjecting human beings (Africans) to inhuman and degrading treatment and, thus, were in violation of customary international law.<sup>40</sup> Therefore, although slavery may have been legalised within the slave-trading states, it remained illegal in so far as those states were engaging in it in international territories where they were abducting human beings and selling them as slaves.

35 Including the Nama and Herero people of Namibia. See M Häussler *The Herero genocide: War, emotion and extreme violence in colonial Namibia* (2021) 115-199; R Paulose & R Rogo 'Addressing colonial crimes through reparations: The Mau Mau, Herero and Nama' (2018) 7 *State Crime Journal* 369-388.

36 For a detailed discussion, see I McDougale 'The legal status of slavery' (1918) 3 *Journal of Negro History* 240-280.

37 N Wittmann *Slavery reparations time is now: Exposing lies, claiming justice for global survival: An international legal assessment* (2013). Also see Häussler (n 35) 115-199 and Paulose & Rogo (n 35) 369-388.

38 J Allain 'The international legal regime of slavery and human exploitation and its obfuscation by the term of art: Slavery-like practice' (2012) 10 *Esclavage et travail force* 35-40.

39 L Brophy 'Some conceptual and legal problems in reparations for slavery' (2001) 58 *New York University Annual Survey of American Law* 497.

40 Wittmann (n 37).



Scholars, who include Wittmann<sup>41</sup> and Obeng-Odoom,<sup>42</sup> have argued that the doctrine of state responsibility can be relied upon to found a legal claim for reparations for slavery and colonialism. I take a different view on this. As I will explain in detail later, the doctrine of state responsibility is applicable only in situations where it can be proven that the wrongful act was committed against a state. While I agree with Wittmann's argument that slavery and colonialism were violations of customary international law,<sup>43</sup> these violations were committed against a people who were not necessarily recognised as being part of a state under international law that existed at the time, which presents a challenge for existing international fora such as the International Court of Justice (ICJ) to determine these disputes.

However, the fact that the contemporary international legal system does not offer a judicial forum for Africans to pursue a legal claim for reparations does not detract from the fact that slavery and colonialism were wrongful and illegal acts even at the time that these atrocities were committed. As I will demonstrate later in this article, the absence of a judicial forum within the international legal system, with jurisdiction to determine reparations claims by African to redress slavery and colonialism, is a result of the engineering of international law by former colonisers in an effort to evade accountability for these crimes and human rights violations.

Some have argued that it cannot be proven that current generations of Africans have been disadvantaged by slavery and colonialism. For instance, Howard-Hassmann argues as follows:<sup>44</sup>

While in retrospect, the direct harms of slavery endured by those enslaved are easy to identify, the direct harm visited upon their descendants is far less clear. It is, therefore, difficult to persuade those Western states (and their citizens) who might be expected to pay compensation that the often-tragic situation of Africans and members of the African Diaspora alive today is a consequence in part of the actions of the West's own forebears.

There is ample evidence to demonstrate that current generations of Africans have been disadvantaged by slavery and colonialism and that they continue to suffer the harm caused by these heinous criminal acts. For example, several post-independence African governments inherited huge financial debts accrued by colonial governments and

41 Wittmann (n 37) 15-21.

42 F Obeng-Odoom 'Capitalism and the legal foundations of global reparations' (2023) 4 *Journal of Law and Political Economy* 610-614.

43 See Wittmann (n 37) 15-21.

44 R Howard-Hassmann 'Reparations to Africa and the Group of Eminent Persons' (2004) *Cahiers d'études africaines* 92-93.

they continue to struggle with a debt crisis that is partly as a result of inheriting these debts;<sup>45</sup> colonialism resulted in the damage of the natural environment in Africa and this has made Africans more prone to the contemporary devastating effects of climate change crisis; slave trade removed African families from their homelands and resettled them in regions that are more vulnerable to climate change (including the Caribbean island region) where their descendants are currently suffering the loss and damage caused by the ongoing climate change crisis; descendants of families who were sold off during slave trade continue to suffer from trauma that is caused by being disconnected from their cultural life; and there are several descendants of indigenous African communities who currently are landless and live in poverty because their ancestors were disposed of their land during colonialism. I will engage with these claims substantially in the parts below as part of suggesting a framework of reparatory measures that Africans must demand.

Howard-Hassmann has observed that the challenge facing proponents of the reparations claim 'is the problem of how to frame the question'.<sup>46</sup> She argues that historical efforts to pursue the reparations claim have become stuck because of the failure to define what would constitute the package of reparations in this case.<sup>47</sup> This is what I seek to address through this article by suggesting an approach that can be considered by the AU to identify a package of reparatory measures which the AU must claim and strategic actions that can be taken to pursue these reparations. This discussion is particularly important because the AU has called on the academia to assist with ideation in order to empower the continental body to implement its 2023 Resolution on reparatory justice.<sup>48</sup>

Indeed, it must be acknowledged that the Caribbean Community (CARICOM) has developed its own set of demands of reparatory measures,<sup>49</sup> and I make reference to those in my proposals in this article. Although both the Africans in the diaspora and those in Africa suffered harm as a result of slavery and colonialism, the nature of the damage not necessarily is the same. Each continental block of

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45 L Umubyeyi 'Reparations for Europe's colonial crimes in Africa and slavery: A critical step in tackling Africa's contemporary challenges' (2023) *African Futures Lab*, <https://africanfutures.mit.edu/research/publications/reparations-for-europes-colonial-crimes-in-africa-and-slavery-a-critical-step-in-tackling-africas-contemporary-challenges-1/> (accessed 17 January 2024).

46 Howard-Hassmann (n 44) 91.

47 As above.

48 African Union (n 6).

49 CARICOM Reparations Commission 'Ten point plan for reparatory justice' 2014, <https://caricom.org/caricom-ten-point-plan-for-reparatory-justice/> (accessed 17 January 2024).

African people must develop its own set of measures that constitute its reparations claim. However, as proposed later in this article, they must consider developing and adopting a joint programme of action to pursue their claims.

### 3 Conceptual framework for reparations against slavery and colonialism

Early discussions on reparations were confined to financial compensation for the wrongs suffered by Africans as a result of slavery and colonialism.<sup>50</sup> Contemporary conversations on this subject have also emphasised financial compensation. For example, esteemed scholars Beckles<sup>51</sup> and Obeng-Odoom<sup>52</sup> have proposed methods of quantifying the damages suffered by Africans that should be claimed as part of the reparations claim against specific states. While I agree with these proposals, it needs to be noted that reparations, as a concept of remedying human rights violations, is broader than financial compensation. Scholar Táiwò<sup>53</sup> has made some innovative proposals on why reparative justice should be factored into the climate justice agenda by suggesting specific measures that must be implemented by the Global North as part of discharging their reparations debt to Africa. While I associate with these suggestions, and I believe that they should be seriously considered by the AU, I contend that discussions on the scope of reparations should be based on a much more comprehensive theoretical or legal framework that allows the AU to identify reparatory measures that adequately address the harm caused by slavery and colonialism.

In this sense, I propose that 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 (UN Basic Principles)<sup>54</sup> offer a more comprehensive framework for developing and determining the scope of reparatory measures that the AU should demand from perpetrator states and non-state actors. These were adopted by the UN in December 2005, as part of the international

50 Howard-Hassmann (n 44) 90.

51 H Beckles *Britain's black debt: Reparations for Caribbean slavery and native genocide* (2013) 170-171.

52 Obeng-Odoom (n 15) 459.

53 Táiwò (n 16).

54 United Nations General Assembly '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', December 2005, <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation> (accessed 17 January 2024).

body's affirmation of the principle of international human rights law that victims of human rights violations have a right to remedies that adequately and timeously repair the harm suffered as a result of the violations of their human rights.<sup>55</sup>

Although these principles were adopted in order to give effect to the right to remedies under the International Covenant on Civil and Political Rights (ICCPR), which was adopted way after the formal abolition of slavery, it is appropriate to use these principles in developing a framework of reparatory measures for slavery and colonialism. This is because, although ICCPR came into effect in 1976, some of the rights recognised therein are codifications of rights that existed prior to ICCPR, under customary international law, and which is binding upon states liable for colonialism and slavery. The right to remedies, which the UN Basic Principles seek to implement, is one of those rights that existed under customary international human rights law.<sup>56</sup>

In the process of conducting this research, it has been argued by some<sup>57</sup> that the UN Basic Principles were not originally drafted to address historic crimes, but were rather introduced to ensure reparations to victims of contemporary crimes such as enforced disappearances in Argentina and Chile in the 1970s and 1980s. On this basis, some scholars, including Howard-Hassmann,<sup>58</sup> have argued that these principles are inapplicable when seeking to address historical human rights violations arising from the enslavement and colonialism of the African people. This view represents a gross misinterpretation of the background of the UN Basic Principles and their legal application. While the drafting of these principles may have been inspired by enforced disappearances in Latin America in the 1970s, their origins and purpose are not confined to these events. As indicated under the Preamble<sup>59</sup> to the UN Basic Principles, they were drafted and adopted in order to interpret and provide further legal guidance on the implementation of the right to remedies, which is a customary international human rights principle that was codified under ICCPR in 1976. Therefore, these principles can be applied when interpreting the UN member states' legal obligations

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55 UN Basic Principles (n 54) Preamble.

56 UN Basic Principles (n 54) para 1(b).

57 I am grateful to the comments made by one of the reviewers of this article.

58 R Howard-Hassmann *Reparations to Africa* (2008) 4-5.

59 Which states that the purpose of the Basic Principles is 'affirming the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law'.

on reparatory justice to address historical injustices, including the enslavement and colonisation of the African people.

According to the UN Basic Principles,<sup>60</sup> the term ‘reparation’ encapsulates measures aimed at redressing violations of human rights by undertaking a range of material and symbolic measures in favour of the victims or their families as well as affected communities. The measures must be adequate.<sup>61</sup> In order to be considered adequate, the scope of reparatory measures must include measures for restitution; compensation; rehabilitation; repatriation; satisfaction and cessation of continuing violations; truth seeking; search for the disappeared persons or their remains; reburial of remains; and public apologies.<sup>62</sup> Using this framework, I suggest the measures below to be part of the package of reparations due to the African people, in order to repair the harm that was caused to them and their environment through slavery and colonialism. The measures suggested below are not exhaustive but are an illustration of the approach that could be applied to identify reparatory measures for Africans, using the UN Basic Principles as a conceptual and legal framework for such an exercise.

### 3.1 Measures of satisfaction

At the core of the harm inflicted by systematic human rights violations and crimes such as slavery and colonialism is the degradation of the human dignity of the victims and their descendants. In addition to creating enduring economic inequalities and poverty among Africans, slavery and colonialism have created a sense as well as a perception that Africans are an inferior race, and these perceptions are among the major causes of contemporary racism and discrimination against Africans.<sup>63</sup> As part of repairing the dignity of victims and their families, the UN Basic Principles make provision for measures of satisfaction as part of the reparations.<sup>64</sup> Such measures must include

public apology, including acknowledgment of the facts and acceptance of responsibility; judicial and administrative sanctions against persons liable for the violations; commemorations and tributes to the victims; inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.<sup>65</sup>

60 UN Basic Principles (n 54) para 15.

61 As above.

62 UN Basic Principles (n 54) paras 15-23.

63 United Nations Durban Declaration (n 8) 3.

64 UN Basic Principles (n 54) para 22.

65 UN Basic Principles (n 54) paras 22(e) to (h).

Perhaps the first set of reparatory measures that must be undertaken by states and non-state actors<sup>66</sup> who perpetrated and were complicit in slavery and colonialism must include the tendering of official apologies in which they unequivocally acknowledge and take responsibility for their role in committing and perpetuating these injustices.<sup>67</sup> There is ample evidence<sup>68</sup> demonstrating that the United States of America (USA), certain European states and their citizens, monarchs and private corporates were beneficiaries, perpetrators and/or accomplices in the process of committing the injustices of slavery and colonialism against Africans. For example, the British royal family and the British state presided over at least 14<sup>69</sup> colonies in Africa. Portugal had six<sup>70</sup> African colonies, while Germany had seven colonial territories,<sup>71</sup> and France boasted of eight colonies.<sup>72</sup> Belgium annexed the Congo (now the Democratic Republic of the Congo (DRC)) in 1908, although it must be noted that King Leopold II had long colonised the Congo and conducted slavery with support from Belgian security forces.<sup>73</sup> The USA alone received an estimated 470 000 African men, women and children who were abducted from Africa and sold as slaves to North American owners.<sup>74</sup>

As highlighted earlier in this article and discussed (more comprehensively) elsewhere in literature,<sup>75</sup> Europe's and the USA's industrialisation benefited from slave labour and the looting of African resources during colonialism. These states, their royal figures and some of their private corporates must tender apologies to the people they enslaved and colonised, and those apologies must be sufficiently unequivocal and comprehensive to reflect full acceptance of responsibility for their roles. This would be an important symbolic sign of remorsefulness and an acknowledgment of the injustices that Africans suffered and continue to suffer today, and will go a long way towards laying a firm foundation for world peace and normalisation

66 Including private companies that are still in existence today.

67 Also see CARICOM (n 49).

68 Beckles (n 51) 170; Rodney (n 13).

69 Namely Egypt, Sudan, Kenya, Uganda, South Africa, The Gambia, Sierra Leone, Northwestern Somalia, Zimbabwe, Zambia, Botswana, Nigeria, Ghana and Malawi.

70 Namely Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe and Equatorial Guinea.

71 In Tanzania, Burundi, Rwanda, Namibia, Cameroon, Togo and Ghana.

72 Namely Mauritania, Senegal, French Sudan (now Mali), French Guinea (now Guinea), Côte d'Ivoire, Upper Volta (now Burkina Faso), Dahomey (now Benin) and Niger.

73 Hochschild (n 25) 161.

74 M Battle 'African passages' (1990) *Lowcountry Digital History Initiative*, [https://ldhi.library.cofc.edu/exhibits/show/africanpassageslowcountryadapt/section\\_ii\\_introduction/north\\_american\\_context#:~:text=Of%20the%20over%20twelve%20million,were%20sent%20to%20North%20America](https://ldhi.library.cofc.edu/exhibits/show/africanpassageslowcountryadapt/section_ii_introduction/north_american_context#:~:text=Of%20the%20over%20twelve%20million,were%20sent%20to%20North%20America.). (accessed 17 January 2024).

75 Beckles (n 17) 408-410; Rodney (n 13).

of race relations. Some of the members of the European royal families and members of government have made statements in which they expressed regret for their role in slavery and colonialism.<sup>76</sup> However, these statements do not meet the standards of the UN Basic Principles as they do not include an acknowledgment of the facts and acceptance of responsibility. For example, in 2013 the British government expressed its 'sincere regrets' for abuses that took place during the detention of some of the Kenyans during the period of the state of emergency during the Mau Mau rebellion against colonial occupation.<sup>77</sup> However, the British government made it very clear that it did not accept that it is legally liable for the actions of the colonial administration in Kenya.<sup>78</sup> In a rare development in 2020, Lloyd's of London issued an apology for its role in supporting slave trade, through extending insurance cover to voyages transporting slaves and insuring slaves as cargo.<sup>79</sup>

In addition to tendering apologies, the perpetrators and accomplices of slavery and colonialism must undertake and participate in activities to commemorate and pay tributes to the victims.<sup>80</sup> This should include designating a UN International Day of Remembrance of the enslavement and colonial subjugation of African people. Accounts of slavery and colonialism against Africans must be included in the education curriculum of states that were victims, beneficiaries, perpetrators, or accomplices of these injustices. In developing these curricula, it is important that the victims and their families be consulted to ensure accuracy of the accounts. In this sense, Europe and the USA ought to consult the AU and governments of their former colonies when developing these curricula. Undertaking these measures will help create public consciousness on these injustices and may lead to genuine reconciliation and foster international peace, as citizens across the globe take individual and collective action to remedy the harm that was caused.

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- 76 L Umubyeyi 'Europe's hollow apologies for colonial crimes stand in the way of true reparation' *Guardian* (London) 27 November, 2023 <https://www.theguardian.com/commentisfree/2023/nov/27/europe-apologies-colonial-crimes-reparation-belgium-germany-britain> (accessed 17 January 2024); H Williams 'Why Britain's royals won't apologise for profiting off slavery, and why Prince Harry's admission matters' *CBS News* (Toronto) 16 January 2023, <https://www.cbsnews.com/news/prince-harry-spare-book-uk-royals-slavery-colonialism-slave-trade-reparations/> (accessed 17 January 2024).
- 77 BBC News 'Mau Mau torture victims to receive compensation – Hague' *BBC News* (London), <https://www.bbc.com/news/uk-22790037> (accessed 17 January 2024).
- 78 As above.
- 79 BBC News 'Lloyd's of London deeply sorry over slavery links' *BBC News* (London) 8 November 2023, [https://www.bbc.com/news/business-67354167?utm\\_source=ground.news&utm\\_medium=referral](https://www.bbc.com/news/business-67354167?utm_source=ground.news&utm_medium=referral) (accessed 17 January 2024).
- 80 UN Basic Principles (n 54) para 22(g).

### 3.2 Guarantees of non-repetition

It may be argued that measures to guarantee non-repetition of the enslavement and colonisation of Africans are irrelevant because former slave trading and colonial countries are most unlikely to reinstate slave trading and colonialism in the twenty-first century.<sup>81</sup> As has been demonstrated above, and as has been adequately addressed by other scholars,<sup>82</sup> African people are still enduring (and remain vulnerable to) various forms of exploitation akin to or even worse than the Trans-Atlantic enslavement and colonialism. This includes the continued unlawful interferences in the domestic affairs of African states;<sup>83</sup> the ongoing plundering of Africa's natural resources by multinational corporations with the backing of former slave trading and colonial powers in the Global North; the continued enslavement of Africans<sup>84</sup> in mines that are owned by these Global North-based multinational corporations; and the continued exploitation of Africans by international financial lending institutions.<sup>85</sup> In order to address Africa's vulnerability to further exploitation through these neo-colonial practices, a discussion on reparatory measures that guarantee a non-repetition of similar forms of enslavement and colonialism is not only justified but is urgently imperative.

In terms of the UN Basic Principles, such measures must include establishing

mechanisms for preventing and monitoring social conflicts and their resolution; [and] reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.<sup>86</sup>

81 I am grateful for the comments made by one of the reviewers of this article. For similar views, also see G Kane 'Why the reparations movement should fail' (2003) 3 *University of Maryland Law Journal of Race, Religion, Gender and Class* 194.

82 Including Rodney (n 13), Obeng-Odoom (n 15) and Táiwò (n 16).

83 See S Ndlovu-Gatsheni *Epistemic freedom in Africa: Deprovincialisation and decolonisation* (2018) 34-40; N Hodges 'Neo-colonialism: The new rape of Africa' (1972) 3 *The Black Scholar* 12-23.

84 J McQuilken, Z Shirgholami & D McFarlane 'Understanding and addressing modern slavery in DRC-UK cobalt supply chains' in N Yakovleva & E Nickless (eds) *Routledge handbook of the extractive industries and sustainable development* (2022) 514.

85 See discussion below on marginalisation of Africa in the governance of these institutions.

86 UN Basic Principles (n 54) paras 23(g) & (h). Also see United Nations Durban Declaration (n 8) para 13 where the United Nations also emphasises the need to prevent a re-occurrence of slavery and colonialism by noting that '[w]e recognise that apartheid and genocide in terms of international law constitute crimes against humanity and are major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and acknowledge the untold evil and suffering caused by these acts and affirm that wherever and whenever they occurred, they must be condemned and their recurrence prevented'.



The establishment of the UN in 1945 is one of the mechanisms (at a global level) that is aimed at monitoring conflicts and ensuring their amicable resolution. The development of international law under the UN framework must also be seen as part of the global efforts to prevent the re-occurrence of injustices such as slavery and colonialism. However, as indicated above, states that perpetrated and were complicit in the enslavement and colonisation of Africans have all but rendered the UN ineffective as a mechanism that could be utilised to redress the harm caused by these heinous injustices. Similarly, the same states have used their unjustifiable dominance in the UN to ensure that the development of international law is skewed against promoting accountability for the crimes of enslavement and colonisation of Africans.

Therefore, as is acknowledged under the UN Basic Principles,<sup>87</sup> part of the reparatory measures must be aimed at strengthening the UN in order for it to be an effective mechanism for protecting and promoting human rights, peace and justice. This requires the UN to be reformed in several ways, as has been suggested by other scholars.<sup>88</sup> However, in so far as guaranteeing Africans with the non-reoccurrence of injustices similar to slavery and colonialism, Africans must be given a permanent seat in the UN Security Council. This will put Africa on the same pedestal with other regions, and ensure that the perspective of Africans is taken on board in decision making, especially on global fundamental issues that concern human rights, peace and justice.

Africa's representation and decision-making powers within the international finance institutions must also be reviewed and strengthened as part of the reparatory measures aimed at preventing the re-occurrence of similar injustices. As indicated above, the enslavement and colonisation of Africans was sorely meant to facilitate the stealing and exploitation of Africa's resources in order to promote industrialisation and subsequent development of Europe and the USA. Decision making and access to finances from the international financial institutions, including the Bretton Woods institutions,<sup>89</sup> are biased against Africans and other developing countries. For example, since their establishment in 1944, the distribution of voting quotas and process of electing the leadership of the Bretton Woods Institutions have remained biased in favour of

87 UN Basic Principles (n 54) Preamble.

88 Who include O Afoaku & O Ukaga 'United Nations Security Council reform: A critical analysis of enlargement options' (2001) 18 *Journal of Third World Studies* 149-169.

89 Including the International Monetary Fund and World Bank. For a full list, see <https://www.un.org/esa/africa/brettonwoods.htm> (accessed 17 January 2024).

the USA and Europe, and discriminatory against Africans and other regions. A recent analysis by Mohseni-Cheraghloou reveals that

[t]he United States continues to have the largest voting power in the WBG and IMF, holding greater than 15% of the voting power. Keeping a minimum of 15.01% voting power is critical for U.S influence in these institutions. The majority of the WBG and IMF decisions require a 50% majority vote, while some critical matters require a 70% or 85% rate of affirmative votes. Holding a larger than 15% voting power grants the United States veto power in most cases. Hence, no funding and quota increase, amendments, or other major actions can go into effect without US consent. Moreover, the United States, Japan, Germany, France, United Kingdom, as well as other European countries and US allies in various constituencies, hold more than 70% of all voting power in both institutions.<sup>90</sup>

Thus, these institutions are controlled and unfairly dominated by the same states that perpetrated and were complicit in the economic exploitation of Africans through their enslavement and colonisation. The justification for dominance by Europe and the USA, and the marginalisation of Africa in these institutions, was based on the size of the economies.<sup>91</sup> Yet, Europe and the USA grew their economies on the back of the exploitation of Africa through slavery and colonialism. Therefore, the dominance of Europe and the USA in the Bretton Woods Institutions was never justifiable even at the time these institutions were established. The UN Secretary-General, António Guterres, has called for a new 'Bretton Woods moment to radically transform the global financial architecture'.<sup>92</sup> Such a moment must come as part of reparatory measures to protect Africans against the re-occurrence of economic exploitation similar to what they suffered as a result of slavery and colonialism. Debates on neo-colonialism<sup>93</sup> suggest that the enslavement and colonisation of Africans by Europeans and the USA never ceased, partly due to the current power imbalances and marginalisation of Africans in the international governance system, particularly Africa's underrepresentation in the UN Security Council and international financial institutions.

90 A Mohseni-Cheraghloou 'Democratic challenges at Bretton Woods institutions' Atlantic Council (Web blog) 11 April 2022, <https://www.atlanticcouncil.org/blogs/econographics/inequality-at-the-top-democratic-challenges-at-bretton-woods-institutions/> (accessed 17 January 2024).

91 As above.

92 Full address is available at <https://press.un.org/en/2023/sgsm21691.doc.htm> (accessed 17 January 2024).

93 Ndlovu-Gatsheni (n 83); Hodges (n 83).

### 3.3 Restitutory measures

Restitutory measures entail measures that, to the extent possible, seek to restore the victims of human rights violations to the original situation in which they were before the violations took place.<sup>94</sup> Such measures include returning the victims and their families to their place of residence and returning their property. Slave trade resulted in the forced removal of Africans from their homelands and their relocation to other world regions, including the USA, Europe, the Caribbean islands and Latin America, where they were sold off and subjected to unpaid forced labour.<sup>95</sup> Families were forcibly separated as a result of the slave trade. This resulted in a traumatic disconnection from their culture and loss of family identity. The descendants of those who were enslaved in this way continue to suffer the trauma of being disconnected from their culture, home and family identity.<sup>96</sup> Therefore, as part of restitutory measures, the descendants of Africans who were removed from their homeland as part of slave trade must be assisted to return to their homelands if they so wish. The perpetrators of slavery and those who were enriched by slavery must bear the costs associated with the repatriation and relocation of Africans who wish to return to their homelands from where their ancestors were removed through slave trade. Some of the descendants may not wish to return to their ancestral homelands, but they have a right to retrace and reconnect with their ancestral family roots. The perpetrators of slavery and those who were enriched by slavery must bear the costs associated with such efforts to retrace the original family roots and identity of Africans whose ancestors were forcibly removed from their homeland by slave trade.

During colonialism, several forms of property (including cultural artefacts) were looted and removed from Africa. Some of these are currently stored in museums located in Europe and owned by Europeans.<sup>97</sup> As part of restitutory measures, these artefacts and other properties must be returned to Africans, particularly to communities where they were stolen and removed from. The revenue that has been generated through the display of these artefacts in the museums must also be quantified and paid to Africa as part of restitution.

94 UN Basic Principles (n 54) para 19.

95 R Lewis 'How Britain underdeveloped the Caribbean: A reparation response to Europe's legacy of plunder and poverty' (2020) 68 *Caribbean Quarterly* 295-300; Beckles (n 17) 408-410; Rodney (n 13).

96 Rodney (n 13).

97 F Moradi 'Catastrophic art' (2022) 24 *Public Culture* 243-264.

Several post-independence governments inherited huge sums of debts incurred by the colonial authorities. For example, King Leopold II and, later, the Belgian state, ran up vast debts in the course of their exploitation of the Congo.<sup>98</sup> These debts included a \$120 million loan from the World Bank, which was primarily used to buy products exported from Belgium.<sup>99</sup> The Congo gained independence in 1960 as Zaire and was forced to take on the debt accrued by Belgium, thereby paying for the costs of its own past exploitation. Currently it is one of the African countries struggling with a debt crisis. Although the situation of debt crisis is also attributable to government corruption in the post-independence era, the contribution of King Leopold II and Belgium to the DRC's debt crisis must be quantified and all the monies which the DRC has spent in repaying the debt accrued by the colonial powers must be returned to the DRC as part of restitutionary measures. Essentially, the DRC must be returned back to the state in which it was in as far as debt is concerned, prior to its colonisation by King Leopold II and Belgium. Similar restitutionary measures are due to several other African states that inherited colonial debts.<sup>100</sup>

### 3.4 Compensation

Slave trade and colonialism involved the exploitation of Africans and their resources for the benefit of the colonial powers and colonial elites.<sup>101</sup> For example, during colonialism huge quantities of minerals were siphoned from Africa to Europe. This includes gold, copper, diamonds, cobalt, uranium, coltan, rubber and iron, which were used to propel and sustain Europe's industrialisation. For example, historical studies<sup>102</sup> have shown that the manufacturing of bicycles, automobile tyres and electrical insulation in Europe was enabled by rubber from the Congo which was under the colonial occupation of King Leopold II with backing from the Belgian state. The development of Europe's military industrial complex was also enabled by the siphoning of uranium and other minerals from African colonies. For example, it has been reported that the brass casings of allied shells fired during the battle of Passchendaele (in Belgium) and the battle of Somme (in France) during World War I by Allied forces against the Germany Empire were 75 per cent Congolese copper, while the

98 Hochschild (n 25) 161-170.

99 BBC News (n 25).

100 Umubyeyi (n 45).

101 C Mavhunga 'Africa's move from raw material exports toward mineral value addition: Historical background and implications' (2023) 48 *MRS Bulletin* 395-406.

102 BBC News (n 25); Hochschild (n 25) 161-170.

uranium used to make the nuclear bombs dropped on Hiroshima and Nagasaki was taken from a mine in South-East Congo.<sup>103</sup>

In addition, Africans were disposed of their land by colonial governments. Their land was allocated to colonial European farmers who – using cheap labour provided by Africans – produced cash crops such as wheat, cotton and tobacco that were exported to Europe for use as raw materials for the development of finished goods in Europe, supporting the industrial revolution in the Global North.<sup>104</sup> Inevitably, Africa suffered severe economic losses as a result of the siphoning of its natural resources by colonial European powers. Europe’s unjustified enrichment on the basis of slave labour and exploitation of African natural resources needs to be quantified, and so is the economic loss that was suffered by Africa as a result of slave trade and colonialism. Based on these quantifications, an agreed sum of funds must be paid to African former colonies by the colonisers. In this regard, the AU should consider the quantification formulas proposed by scholars who include Beckles<sup>105</sup> and Obeng-Odoom.<sup>106</sup>

Due to slave trade, some Africans were forcibly relocated to areas such as the Caribbean islands, which are more vulnerable to the effects of the climate change crisis, including drought and floods as a result of rising sea levels. These descendants of African slaves must be compensated for the loss and damage they have suffered thus far as a result of climate change crisis. In this regard, the AU should seriously consider incorporating the proposals made by scholar Táíwò<sup>107</sup> on specific measures that must be implemented by the Global North as part of discharging their reparations debt to Africa in the context of climate justice.

#### **4 How the African Union can pursue the reparative justice agenda**

Having proposed the nature of reparatory measures that the AU should consider pursuing, the next important question for discussion is how the AU should pursue its campaign for reparative justice. In its February 2023 Resolution<sup>108</sup> the AU invited the academia to suggest ideas that can feed into the development of a programme of action by

103 BBC News (n 25).

104 Mavhunga (n 101) 395-406; Rodney (n 13) 150.

105 Beckles (n 51) 170-171.

106 Obeng-Odoom (n 15) 459.

107 Táíwò (n 16).

108 African Union (n 6).

the continental body. Several suggestions have been proffered thus far.<sup>109</sup> Some have suggested that the AU should pursue reparative justice as a legal claim.<sup>110</sup> This approach would entail petitioning domestic and or international tribunals for adjudication of Africa's claims for reparations as redress for the injustices of enslavement and colonialism. Some have argued that the cause for reparative justice should be pursued through political action. In the parts below I examine these suggestions and offer my own views on the way forward.

#### 4.1 Litigation

To some extent, this approach (of litigation) has been applied (with very limited success in the United States of America) and in Britain, and there are lessons to be drawn by the AU and the broader Africa reparations movement. In the USA there have been attempts to bring class action civil law suits against corporations that have profited from the enslavement of African-Americans. Notably, in 2004 a suit was filed in the federal court in Manhattan claiming reparations from Lloyd's of London, FleetBoston and RJ Reynolds for aiding and abetting the commission of genocide by (allegedly) financing and insuring the ships that delivered slaves to tobacco plantations in the USA.<sup>111</sup> No judicial remedy was obtained through these petitions. However, some of the companies have now apologised for their role in supporting slave trade. For example, Lloyd's of London apologised and in 2023 pledged \$50 million for its role in the slave trade, which included extending insurance to voyages carrying slaves and even insuring slaves as cargo.<sup>112</sup> Though far from being enough, the apology and the pledge could have been a result of the pressure exerted through litigation as well as the emergence of further damning evidence<sup>113</sup> that demonstrated the role of the company in supporting slave trade.

In 2011 Mau Mau victims of British colonialism in Kenya petitioned a British High Court for an order of 'compensation for the harms they had suffered in British detention camps'.<sup>114</sup> The petition was opposed by the British government, arguing that the applicants did not have

<sup>109</sup> African Union Commission (n 7).

<sup>110</sup> As above.

<sup>111</sup> For a list of these cases and their progression, see <https://www.business-humanrights.org/en/latest-news/slave-descendants-file-1b-lawsuit/> (accessed 17 January 2024).

<sup>112</sup> BBC News (n 79).

<sup>113</sup> Lloyd's made its pledge just before the publication of a ground-breaking research by John Hopkins University (n 26).

<sup>114</sup> Paulose & Rogo (n 35) '369.

the right to pursue such a claim in British courts. The Court ruled that the Mau Mau victims had the right to sue in British courts for compensation.<sup>115</sup> Partly as a result of the pressure exerted through litigation, the British government negotiated and reached an out-of-court settlement with the applicants, agreeing to pay £19,9 million to the 5 228 victims.<sup>116</sup> The AU and the Africa reparations movement should study these legal cases more closely and identify opportunities for mounting and supporting similar litigation efforts in the domestic courts of the relevant states, targeting governments, royal families and private corporations.

Litigation using the international legal system is heavily constrained. The ICJ, established in 1945 under the auspices of the UN, would have been the most appropriate forum to pursue a legal claim for reparations to redress the enslavement and colonisation of Africans. The ICJ's mandate includes the adjudication of and the making of binding decisions to settle disputes between member states of the UN, in accordance with international law.<sup>117</sup> As a general rule, any state party to the ICJ Statute can bring cases before the ICJ against another state that is also party to the Statute.<sup>118</sup> All the 193 members of the UN are *ipso facto* parties to the Statute of the ICJ.<sup>119</sup> However, member states are permitted to deposit declarations (to the UN Secretary-General) through which they prescribe conditions under which they recognise the jurisdiction of the Court.<sup>120</sup> Several member states, who are beneficiaries, perpetrators and or accomplices in the enslavement and colonisation of Africans, have deposited declarations stipulating that they only recognise the jurisdiction of the ICJ to settle legal disputes arising from facts that took place after a certain period. For example, the United Kingdom (Britain) has stipulated that it accepts the jurisdiction of the ICJ only over disputes of which the facts arose after 1 January 1987.<sup>121</sup> Similarly, the government of Spain has excluded from its recognition of the ICJ's jurisdiction all disputes of which the facts arose prior to 29 October 1990<sup>122</sup> or relating to events or situations that occurred prior to that date, even if such events or situations may continue to occur or to have effects

115 As above.

116 BBC News (n 77).

117 Arts 36 & 38 of the Statute International Court of Justice, 1945.

118 Statute (n 117) arts 34(1) & 35(1).

119 Statute (n 117) art 35(1) read together with art 93(1). See full list on <https://www.icj-cij.org/states-entitled-to-appear> (accessed 17 January 2024).

120 Statute (n 117) art 36(2).

121 See para 1 of the Declaration, <https://www.icj-cij.org/declarations/gb> (accessed 17 January 2024).

122 The date on which it deposited its declaration with the Secretary-General of the United Nations, in terms of art 36 of the Statute.

thereafter.<sup>123</sup> Germany has deposited a declaration stipulating that it recognises the jurisdiction of the ICJ in legal disputes of which the facts arose after 30 April 2008 and other than legal disputes that 'relate to, arise from or are connected with the deployment of armed forces abroad, involvement in such deployments or decisions thereon'.<sup>124</sup> Portugal deposited its initial declaration recognising the jurisdiction of the ICJ in December 1955. However, in February 2005 it amended this declaration to, among other requirements, stipulate that it recognises the jurisdiction of the ICJ only in legal disputes of which the facts arose after 26 April 1974.<sup>125</sup>

These sinister exceptions have effectively enabled states that are guilty of the injustices of slavery and colonialism against Africans to circumvent liability under the ICJ Statute. However, the ICJ can still be approached to issue an advisory opinion<sup>126</sup> on certain legal questions regarding the interpretation of international law in the context of the right to reparative justice for Africans. For example, the AU and others should consider seeking an advisory opinion from the ICJ on whether UN member states have an obligation to establish a special tribunal to adjudicate legal claims for reparations to redress slavery and colonialism suffered by Africans, given the absence of a competent judicial forum within the international legal system to adjudicate over these claims. Such a petition for an advisory opinion should be founded on the claim that the right to remedies was a recognised principle of customary international law at the time the ICJ was established and at the time of the enslavement and colonisation of the African people. Further, as demonstrated above, enslavement and colonialism of Africans are a continuing crime given that Africans continue to experience and suffer the harm long after the formal declaration of the end these historical crimes. On this basis, the ICJ can found jurisdiction to adjudicate the petition for an advisory opinion of this nature. An advisory opinion could also be sought on whether the refusal by certain states to pay reparations for their role in slavery and colonialism, yet they paid reparations to redress violations of the rights of other oppressed people (including the Jews),<sup>127</sup> does not constitute unfair discrimination against Africans.

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123 See para 1(d) of the Declaration, <https://www.icj-cij.org/declarations/es> (accessed 17 January 2024).

124 See para 1(ii)(a) of the Declaration, <https://www.icj-cij.org/declarations/de> (accessed 17 January 2024).

125 See para 1(iii) of the Declaration, <https://www.icj-cij.org/declarations/pt> (accessed 17 January 2024).

126 Statute (n 117) arts 65-68.

127 Eg, the Jewish survivors of the holocaust have been receiving compensation from Germany for the holocaust. See 'Germany marks 70 years of compensating holocaust survivors with payment for home care' *NBC News* (New York) 15 September 2022.



Though not legally binding by themselves,<sup>128</sup> advisory opinions on these questions would clarify certain legal questions, including on the nature of obligations that are due from states and non-state actors with regard to reparatory justice, and such clarifications may strengthen litigation efforts in domestic tribunals as well as strengthen other advocacy efforts within the international relations arena.

## 4.2 Political action

Litigation efforts must be supported with strong political action. Such political action could include making the acceptance of liability for reparations by Europe and the USA to be a mandatory condition for diplomatic, trade and other forms of engagements and cooperation with the AU and its members states. In this sense, Africa's trade policy with the European Union (EU) and the USA must be linked to Africa's quest for reparatory justice. Africa is endowed with vast mineral resources that are critical for Europe and the USA's economic survival and growth. According to the latest EU critical mineral list,<sup>129</sup> these resources include lithium, cobalt, platinum, phosphate rock and light rare earth elements. African states account for the largest reserves of some of these minerals. For instance, Zimbabwe is ranked the sixth largest producer of lithium, accounting for 1,4 per cent of the world's reserves.<sup>130</sup> Several recent surveys<sup>131</sup> show that the DRC has the largest cobalt reserves in the world, accounting for nearly half of the world's reserves of the metal. Madagascar has the world's seventh largest reserves of cobalt.<sup>132</sup> South Africa and Zimbabwe are among the top five world producers of platinum.<sup>133</sup> A recent European Commission report<sup>134</sup> indicates that South Africa provides

128 Statute (n 117) arts 65-68.

129 Critical materials are raw materials for which there are no viable substitutes with current technologies, which most consumer countries are dependent on importing, and whose supply is dominated by one or a few producers. For a full list, see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0474> (accessed 17 January 2024).

130 C Pavlovic 'Zimbabwe: A new focus for lithium mining' *Mining Weekly* (Harare) 18 April 2023, <https://www.miningweekly.com/article/zimbabwe-a-new-focus-for-lithium-mining-2023-04-18> (accessed 17 January 2024).

131 See Statista 'Reserves of cobalt worldwide in 2022, by country' (2022) <https://www.statista.com/statistics/264930/global-cobalt-reserves/> (accessed 17 January 2024).

132 As above.

133 WorldAtlas 'The top platinum producing countries in the world' (2023), <https://www.worldatlas.com/articles/the-top-platinum-producing-countries-in-the-world.html> (accessed 17 January 2024).

134 European Commission 'Critical raw materials resilience: Charting a path towards greater security and sustainability' (2022) 2, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0474> (accessed 17 January 2024).

71 per cent of the EU's needs for platinum and an even higher share of the platinum group metals, iridium, rhodium and ruthenium.<sup>135</sup>

Other minerals that are critical to Europe and the USA include gold, diamonds and oil, and Africa accounts for some of the largest reserves of these minerals. For example, Nigeria, Angola, Algeria, Egypt and Libya are among the top 30 producers of oil in the world.<sup>136</sup> Of the ten world's largest producers of diamonds, eight are African states, and these are Botswana (second largest producer), the DRC, South Africa, Namibia, Angola, Zimbabwe, Lesotho and Sierra Leone.<sup>137</sup> South Africa, the DRC and Botswana are among the world's top five producers of gold,<sup>138</sup> while Zambia and the DRC are among the world largest producers of copper.<sup>139</sup>

Africa must leverage on its resources endowment in order to sustain its campaign for reparatory justice by making its trade with Europe and the USA conditional to their acceptance of liability for reparations, as part of addressing the harm they caused to Africans through enslavement and colonialism. In undertaking this policy, Africa must forge alliances with other regions, crucially Latin America, China and Russia. Latin America holds a significant share of minerals that are critical to Europe. For example, Brazil is among the largest producers of oil<sup>140</sup> and lithium.<sup>141</sup> China provides 98 per cent of the EU's needs of rare earth elements,<sup>142</sup> while Russia is the world's largest producer of diamonds.<sup>143</sup> Therefore, Africa must consider forging alliances with China, Brazil and Russia so that these countries can also impose trade conditions on Europe and the USA, which seek to reinforce Africa's quest for Europe and the USA to accept liability for

135 M Pistilli 'Top 10 phosphate countries by production' *Investing News Network* (Toronto) 6 June 2023, <https://investingnews.com/daily/resource-investing/agriculture-investing/phosphate-investing/top-phosphate-countries-by-production/> (accessed 17 January 2024).

136 Worldometers 'Oil production by country' (2023), <https://www.worldometers.info/oil/oil-production-by-country/> (accessed 17 January 2024).

137 S Parker & P Rao 'Ranked: The world's top diamond mining countries, by carats and value' (2023) *Visual Capitalist*, <https://www.visualcapitalist.com/cp/world-diamond-mining-by-country/> (accessed 17 January 2024).

138 Diamond Registry 'World's top diamond-producing countries' (2023), <https://www.diamondregistry.com/education-guides/worlds-top-diamond-producing-countries/> (accessed 17 January 2024); WorldAtlas 'World's top 5 diamond-producing countries' (2023), <https://www.worldatlas.com/industries/world-s-top-5-diamond-producing-countries.html> (accessed 17 January 2024).

139 World Economic Forum 'Which countries produce the most copper?' (2022) <https://www.weforum.org/agenda/2022/12/which-countries-produce-the-most-copper/> (accessed 17 January 2024).

140 Worldometers (n 136).

141 Statista 'Mine production of lithium in Brazil from 2011 to 2022' (2022), <https://www.statista.com/statistics/717596/brazil-lithium-production/> (accessed 17 January 2024).

142 European Commission (n 134).

143 Parker & Rao (n 137).

reparations to redress the enslavement and colonisation of Africans. In addition to other global forums, BRICS<sup>144</sup> and the Non-Aligned Movement could offer an opportunity for the forging of such an alliance on reparations. Brazil is home to millions of descendants of African slaves,<sup>145</sup> has suffered colonialism, while China and Russia have historically supported Africa's anti-colonial struggles and, thus, would consider supporting Africa's quest for reparatory justice against enslavement and colonialism.

Africa's pursuit to promote intra-trade under the Africa's Continental Free Trade Area (ACFTA) agreement should also be utilised to advance the reparative justice agenda. If fully implemented, the ACFTA could see Africa establishing the world's largest single market.<sup>146</sup> Africa can leverage on this to pursue its reparative justice agenda by adopting a policy that makes access to its market by Europe and the USA conditional on their acceptance of liability for reparations to address the harm caused by their enslavement and colonisation of Africa.

However, in order for this policy to be effective, African states would have to be united in their pursuit for reparatory justice. The 2023 Resolution of the AU, in which they adopted a common position on this issue, is a step in the right direction and offers an opportunity for the development of a legal and political programme around which Africa can unite, as well as forge the necessary global alliances.

## 5 Conclusion

There is ample evidence presented in existing literature that makes a clear case for Africa's claim for reparations to address the harm caused by their enslavement and colonisation by the USA, Europe and private corporates. There is a range of evidence demonstrating that Africans are still reeling from the harm caused by the enslavement of their ancestors and colonisation. Though a clear case for reparations has been made, Africa is yet to develop (in substantive terms) the package of reparatory measures it seeks to pursue, and a programme

144 An intergovernmental organisation comprising Brazil, Russia, India, China and South Africa.

145 M Battle 'African passages' (1990) *Lowcountry Digital History Initiative*, [https://ldhi.library.cofc.edu/exhibits/show/africanpassageslowcountryadapt/section\\_ii\\_introduction/north\\_american\\_context#:~:text=Of%20the%20over%20twelve%20million,were%20sent%20to%20North%20America](https://ldhi.library.cofc.edu/exhibits/show/africanpassageslowcountryadapt/section_ii_introduction/north_american_context#:~:text=Of%20the%20over%20twelve%20million,were%20sent%20to%20North%20America) (accessed 17 January 2024).

146 V Mlambo & M Masuku 'Africa trade with yourself: Challenges in facilitating the African Continental Free Trade Agreement' (2022) 21 *African Studies Quarterly* 59.

of action through which it seeks to secure the acceptance by Europe, the USA and other entities of their liability for reparations. In this article I have proposed that since the enslavement and colonisation of Africans were crimes against humanity and serious human rights violations, the UN Basic Principles should be used as both the conceptual and legal framework for identifying reparatory measures that are due to Africa. According to the UN Basic Principles,<sup>147</sup> reparations are measures aimed at redressing violations of human rights suffered by victims or their families as well as affected communities. The measures must be adequate.<sup>148</sup> In order to meet the standard of adequacy, reparations must include measures for restitution, compensation, rehabilitation, repatriation, satisfaction and cessation of continuing violations.<sup>149</sup>

In pursuit of the reparative agenda, the AU must explore opportunities for litigating its claim using the ICJ as a forum. However, the ICJ lacks jurisdiction to settle, through binding decisions, any disputes relating to Africa's reparations claim. The ICJ can only provide non-binding advisory opinions on certain important legal questions regarding the interpretation of international law in the context of the right to reparative justice for Africans. For example, the AU and others should consider seeking an advisory opinion on whether the international community has an obligation to establish a special tribunal to adjudicate legal claims for reparations for slavery and colonialism suffered by Africans, given the absence of a competent judicial forum within the international legal system to adjudicate over these claims. An advisory opinion could also be sought on whether the refusal by certain states to pay reparations for their role in slavery and colonialism, yet they paid reparations to redress violations of the rights of other oppressed people, does not constitute unfair discrimination against Africans. Though not legally binding, advisory opinions on these questions would strengthen litigation efforts in domestic tribunals as well as strengthen other advocacy efforts within the international relations arena.

Legal action should be supported through diplomatic pressure. Crucially, Africa must consider designing its trade policy towards the EU and the USA in ways that make access to African resources and markets conditional to Europe being acceptable to repair the damage they caused through the enslavement and colonisation of Africans. African states have the leverage to adopt such a policy because Africa is the source of most of the mineral resources that are critical for

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147 UN Basic Principles (n 54) para 15.

148 As above.

149 UN Basic Principles (n 54) paras 15-23.

Europe's and the USA's economic survival and growth, which include cobalt, gold, diamonds, lithium and platinum. The establishment of a single market under the ACFTA agreement should be accelerated. If fully implemented, the ACFTA will see Africa establishing the world's largest single market. Africa can leverage on this to pursue its reparative justice agenda by adopting a policy that makes access to its market by Europe and the USA conditional on their acceptance of liability for reparations to address the harm caused by their enslavement and colonisation of Africa. In undertaking these policies, the AU must forge the necessary global alliances, particularly with Latin America, CARICOM, China and Russia.