INTER-TEMPORALITY AND REPARATIONS FOR COLONIAL AND OTHER HISTORIC ATROCITIES

November 2025

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In addition, the research coordinators would like to thank:

- **Professor John Armour**, Dean of the Oxford Law Faculty, for his support of this project;
- The Members of the Oxford Pro Bono Publico Executive Committee, **Professor Rachel Murray**, **Professor Başak Çali, Helen Mountfield, KC, Dr Shreya Atrey, and Dr Eliza Bechtold,** and the members of the Student Committee, **Isabella Ruiz Dos Santos Miguel, Maisy Bentley, Melanie Schneider, Mahek Bhatia, Nikhil Kothakota, Advait Tambe, Justin Winchester, Madeleine McGregor, Mashal Aamir** and **Gabriel Apolloni** for their support and assistance with the project.

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INTRODUCTION & SUMMARY

Introducing this project

1. This project was undertaken pursuant to a request for comparative legal research by the commissioning organisation.
2. The commissioning organisation seeks to identify the hurdles that principle of inter-temporality in international law (i.e., that actions must be assessed according to the law in force at the time of their commission) places on peoples and individuals (and not States) when pursuing reparations for historic atrocities; as well as the duties upon states which might be said to owe these reparations.
3. The research report from the Oxford Pro Bono Publico to address two questions:
    a. First (Question 1.1), what *are* the limitations on international or inter-state liability posed by the inter-temporal principle as applied to reparations for colonial and other past atrocities, including the application of the 'evolution of the law' element of the principle? This includes (Question 1.2) considering the legal status of these limitations, such as whether the law in this area is settled or disputed, and binding or persuasive.
    b. Secondly (Question 2), what other principles or mechanisms of international law (if any) have been contemplated and/or applied as exceptions to the principle of inter-temporal law in the context of colonial and other past atrocities?
4. As agreed upon with the commissioning organisation, in answering these questions, this project considers international law as reflected in the jurisprudence of:
    a. Two inter-state international courts:
        i. the Permanent Court of International Justice (PCIJ), and
        ii. the International Court of Justice (ICJ);
    b. Two supranational human rights systems:

i. the African Human and Peoples' Rights Charter (African Charter), and

ii. the American Convention on Human Rights (ACHR);

c. Two international human rights conventions:

i. the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), and

ii. the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)).

5. This introduction continues as follows.

a. First, the origins and obstacle of the principle of inter-temporal as relevant to this project are explained in more detail.

b. Secondly, in answer to Question 1.1, we highlight that the limitations posed by the principle of inter-temporality manifest chiefly in two ways (each of which are detailed later in this Introduction, and in Sections 1 to 6 of this report): the rules governing the temporal jurisdiction of the relevant international legal forum (courts, tribunals, and commissions) which is closely linked with the identification of the 'critical date'; and the rule against the retroactive application of international law (non-retroactivity). The status of this law, responding to Question 1.2, is that is relatively consistently applied (with variations within the jurisprudence considered in this report), though not without critique by Judge Al-Khasawneh in the ICJ. Likewise, developments are emerging in the practice of the African Human and People's Rights system, the Inter-American Human Rights system, the ICERD Committee, and the CEDAW Committee.

c. Thirdly, in respect of temporal jurisdiction and non-retroactivity, we answer Question 2 by synthesising the findings of this research which identifies ways to respond to the principle of inter-temporality as it manifests as temporal jurisdiction and the rule of non-retroactivity in the context of seeking reparations for colonial and other historic atrocities:

i. First, it includes express or implied exclusions of the principle of inter-temporality by States Parties. This is the case where it is the intention of the parties to a treaty for that treaty to have retrospective effect.

ii. Secondly, where inter-temporality would interfere with a *jus cogens* norm (irrespective of when it was identified), as arguably evidenced by the Inter-American Court.

iii. Finally, it includes exceptions: where the principle of inter-temporality is respected but its scope is treated as narrowed to still entail legal responsibility for reparations. This is the case for continuing violations, the retrospective identification of customary law, evolved interpretations of the law, and composite violations (i.e., several discrete actions or omissions which, taken in aggregate, are wrongful).

6. We turn now to the substance of the report.

The origins and obstacles of inter-temporality

7. The principle of inter-temporality was first articulated by the Permanent Court of Arbitration's (PCA) arbitration award in the *Island of Palmas* (1928). The context was the dispute between the Netherlands and the United States of America (USA) concerning sovereignty over the Island of Palmas. In answering this question, Max Huber, the arbitrator in the case, laid down the following principles.

8. First, 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.'[1] This is called the "first limb" of the principle of inter-temporality throughout this report.

9. Secondly:

> As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be

[1] *Island of Palmas (The Netherlands v United States of America)* 2 RIAA 829, 845.

> made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. [2]

This is called the "second limb" of the principle of inter-temporality throughout this report.

10. The gist of the principle of inter-temporality then is that the wrongfulness of actions taken in international law must be adjudged by the law as it stood at the time the act occurred, not some later date.

11. The problem for the purposes of this project, which organisations such as Human Rights Watch have highlighted, is that governments of former colonial powers argue that:[3]

> the legality of an act should be assessed based on the laws in effect at the time the act occurred, not the laws in effect at a later date. Relying on this legal principle [i.e., the principle of inter-temporality], current governments have dismissed any legal responsibility for colonial atrocities, claiming that these had not been recognized as international crimes when committed, or that domestic or international law treated these atrocities as lawful at the time.

12. The paradigmatic case, engaged in more detail in this report's section on the ICERD, relates to the 1904-1908 mass-killing (what is today recognised as a genocide[4]) of Ovaherero and Nama peoples by German military forces. In cases brought against the German government for reparations, the German government has relied on the inter-temporality principle to argue that their actions were not genocide *when committed* because the Nama and the Ovaherero people were not considered civilised state actors and thus refused to apply the principles of

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[2] *Island of Palmas (The Netherlands v United States of America)* 2 RIAA 829, 845.

[3] 'Q&A: Reparations for Historical and Ongoing Colonial Atrocities | Human Rights Watch' (4 September 2025) <https://www.hrw.org/news/2025/09/04/qa-reparations-for-historical-and-ongoing-colonial-atrocities> accessed 14 November 2025.

[4] Economic and Social Council, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* (1985) UN Doc E/CN.4/Sub.2/1985/6, para 24.

self-determination retrospectively.[5] The German government offered a formal apology to the Ovaherero and Nama people in 2021, accepting historical and moral responsibility for the later-named genocide, but not accepted *legal* responsibility, thereby denying the Nama and Ovaherero peoples a legal *right* at international law to full reparations.[6]

13. This example demonstrates the hurdle that the inter-temporal principle poses for claims for reparations, upon which this report was sought.

Inter-temporality and its interpretation today

14. As the research in this project shows, the principle of inter-temporality is not a rule of positive law to be followed to the letter. Inter-temporality is a secondary (or background) rule of international law subject to the operation of the primary rules of international law as expressed in treaties or through customary international law.
15. Inter-temporality does find expression in two main forms. First, in **temporal jurisdiction** where inter-temporality manifests as a *question of forum*. Here, the question is: whether a court, tribunal, commission, or other forum is empowered to consider a complaint laid before it. This is governed through forum-specific rules of jurisdiction. The challenge posed by inter-temporality is when the conduct complained of pre-dates the establishment of that forum or its entry into force.
16. Secondly, in the rule against the retroactive application of new laws (i.e., the **rule of non-retroactivity**) which is a *question of law*. Here, the question is: what is "the law" capable of being

[5] Wissenschaftlicher Dienst des Deutschen Bundestages, *Der Aufstand der Volksgruppen der Herero und Nama in Deutsch-Südwestafrika (1904–1908): Völkerrechtliche Implikationen und haftungsrechtliche Konsequenzen* [*The Uprising of the Herero and Nama Ethnic Groups in German South West Africa (1904–1908): International Law Implications and Liability Consequences*] (Research Paper No 112, 27 September 2016) 6.

[6] Wissenschaftlicher Dienst des Deutschen Bundestages, *Der Aufstand der Volksgruppen der Herero und Nama in Deutsch-Südwestafrika (1904–1908): Völkerrechtliche Implikationen und haftungsrechtliche Konsequenzen* [*The Uprising of the Herero and Nama Ethnic Groups in German South West Africa (1904–1908): International Law Implications and Liability Consequences*] (Research Paper No 112, 27 September 2016) 4.

applied to the complaint. The challenge posed by inter-temporality is that provisions declaring wrongful certain state conduct cannot be applied to conduct which pre-dates the provision.

17. This interpretation is fortified by Judge Al-Khasawneh's remarks in *Cameroon v Nigeria*, that Huber's articulation of the principle of inter-temporality caused such 'confusion' that neither the International Law Commission (ILC) nor the Vienna Conference chose to retain the principle in its original formulation.[7]

18. Instead, inter-temporality finds expression in the Vienna Convention on the Law of Treaties (1969) under the heading of 'Non-retroactivity of treaties' in Article 28,[8] expressed as such:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

19. Similarly, the ILC's Articles on the Responsibility of States under International Law (ARSIWA) state in Article 13, entitled 'International obligation in force for a State', that:

> An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

20. The ILC describes Article 13 as 'but the application in the field of State responsibility of the general principle of intertemporal law' expressed in the first limb of Huber's formulation.[9] This 'is in keeping with the idea of a guarantee against the retrospective application of international

[7] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* (Judgment) [2002] ICJ Rep 303, 503 [16] (Separate Opinion of Judge Al-Khasawneh).

[8] Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331

[9] United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (United Nations 2013) <https://www.un-ilibrary.org/international-law-and-justice/materials-on-the-responsibility-of-states-for-internationally-wrongful-acts_1b3062be-en> accessed 8 November 2025, 57.

law in matters of State responsibility';[10] that is, Article 13 states the principle of non-retroactivity.

21. Temporal jurisdiction and non-retroactivity are closely tied together by the concept of the 'critical date'. The critical date is the date on which the dispute between the parties is said to have come into existence.[11]

22. "Critical" indeed, the critical date in part determines temporal jurisdiction: if the critical date pre-dates the beginning of that forum's coming into effect, that forum cannot adjudicate that complaint (unless the alleged violation is of a continuous nature continuing into that forum's coming into effect, which is discussed below). The critical date in part determines the question posed by non-retroactivity: it is the law as it stood at that date that must be applied.

Inter-temporality as temporal jurisdiction

23. In the context of temporal jurisdiction, overcoming the principle of inter-temporality can be done through contesting the critical date.

24. First developed by the PCIJ, a dispute does not need to arise in a 'formal' manner, for example, through diplomatic negotiations; 'it should be sufficient if the two Governments have in fact shown themselves as holding opposite views'.[12] This was applied in the PCIJ's judgment in *Legal Status of Eastern Greenland*.[13] The challenge to founding a legal basis for reparations would be to prove that the dispute between the parties arose within a time period appropriate for the relevant forum to be empowered to adjudicate. Those seeking reparations for colonial and historic atrocities would want to establish the critical date for the purposes of jurisdiction as early as possible.

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[10] United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (United Nations 2013) <https://www.un-ilibrary.org/international-law-and-justice/materials-on-the-responsibility-of-states-for-internationally-wrongful-acts_1b3062be-en> accessed 8 November 2025, 57.

[11] *Phosphates in Morocco (Italy v France)*, Preliminary Objections, Judgment, (1938) PCIJ Series A/B No. 74, p. 27.

[12] *The Factory at Chorzow (Germany v. Poland)*, Merits, (1928) PCIJ Series A, No. 17, p. 10-11.

[13] *Legal Status of Eastern Greenland (Denmark v Norway)*, Judgment, (1933) PCIJ Series A/B, No. 53, p. 61.

25. One question that arose in this context in the African Court is whether temporal jurisdiction begins at the date of the ratification of the relevant rights-conferring *treaty*, or ratification of the *protocol* establishing the mechanism by which the treaty becomes justiciable. There, the relevant moment was identified as the moment when the Protocol to the African Court came into effect for the respondent state.[14]
26. Admittedly, this is not an *overcoming* of the inter-temporal principle but rather a direct application of it as it manifests as temporal jurisdiction. However, this is most relevant for instantaneous rather than continuing violations, which is explored in more detail below.

Inter-temporality as non-retroactivity

27. It will be recalled that the critical date also answers the question of at what point in time must the conduct of states be said to be judged against. There are a number of routes that influence this.

a) Intentions of the parties to a treaty

28. Article 13 of ARSIWA enshrines the rule of non-retroactivity. In the commentary to that Article, it is said that Article 13: 'is without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State.'[15]
29. Article 28 of the VCLT similarly prohibits the retroactive application of the law '[u]nless a different intention appears from the treaty or is otherwise established'. What is salient is that this focuses not on the subjective intention of the parties upon signing the treaty, but on the wording of the treaty itself.

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[14] *Beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* App No. 013/2011 (AfCHPR 39, 5 June 2015), 62, 67-68, 76-77.

[15] United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (United Nations 2013) <https://www.un-ilibrary.org/international-law-and-justice/materials-on-the-responsibility-of-states-for-internationally-wrongful-acts_1b3062be-en> accessed 8 November 2025, 58.

30. This intention need not be express. For example, in the *Mavrommatis Palestine Concession*, the PCIJ held that retroactive effect of Protocol XII of the Treaty of Lausanne (1924) was an implied term in that treaty given that it sought to harmonise the recognition and treatment of concessions granted before that Protocol come into effect.[16]

31. Certain of the treaties considered in this report might be said to have this character. Most explicit might be the African Charter, the Preamble of which refers to the Member States' 'undertaking to eliminate colonialism, neocolonialism, apartheid, zionism, and to dismantle foreign military bases and all forms of discrimination'.[17] The reference to neocolonialism in particular signals that ongoing colonial influence or indirect control, and not formal colonisation as such, is a target to be eliminated under the African Charter.[18]

32. The ICERD suggests similarly, condemning 'colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist'.[19] This links racial discrimination to its origins in colonialism, whilst recognising that colonialism (and, hence, racial discrimination) can manifest in myriad forms while retaining its foundations in racialised exploitation, extraction, and hierarchy. This is particularly so as the ICERD sees racism as structural rather than inter-personal, which is explored below in continuing violations.

33. Notwithstanding this pathway, establishing this intention under general international law may prove difficult. As the commentary to ARSIWA states: 'cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (art. 55) is sufficient to deal with any such

[16] *The Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Objection to the Jurisdiction of the Court, Judgment, (1924) PCIJ Series A, No. 2.

[17] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Preamble.

[18] Kwame Nkrumah, *Neo-Colonialism, the Last Stage of imperialism* (Thomas Nelson & Sons Ltd., London 1965).

[19] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Preamble.

cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed'.[20]

34. The application of the *lex specialis* principle to these contexts warrants further research not undertaken here.

b) Continuing violations

35. The most common pathway for reparations for colonial and other historic atrocities came from recognising such violations as continuous. A continuous violation is contrasted with an instantaneous violation, which is once-off.

36. There are two key benefits to such framing. First, framing the violation as continuous can bring a matter within the temporal jurisdiction of the forum if the act constitutive of the violation occurred before the critical date. Where the violation is continuous *and* extends in time until after the critical date, the violation falls within the temporal jurisdiction of the forum from the critical date onwards.

37. Secondly, a continuous violation must immediately be ceased and 'full reparation' be awarded, as confirmed in the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem ('Palestine Advisory Opinion')*.[21] It therefore provides a direct route to full reparations.

38. The question becomes: what makes a violation 'continuous'? The research in this project suggests that a difference in approach between generalist international forums as compared to human rights forums, the distinction depending on whether what matters for a continuous violation is whether the violation *as such* is continuous, or if it is continuous in *its effects*.

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[20] United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (United Nations 2013) <https://www.un-ilibrary.org/international-law-and-justice/materials-on-the-responsibility-of-states-for-internationally-wrongful-acts_1b3062be-en> accessed 8 November 2025, 58.

[21] (Advisory Opinion) (International Court of Justice, General List No 186, 19 July 2024).

i) Violations continuing as such

39. Generalist international law seems to support the view that the violation must continue as such. ARSIWA's commentary is explicit in this regard:[22]

> An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of [ARSIWA]. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

40. The ICJ seems to have adopted this approach in the *Palestine Advisory Opinion*, where it reasoned that Israel's sustained annexation and assertion of permanent control over the Occupied Palestinian Territory, together with the ongoing frustration of the self-determination of the Palestinian people, were continuous violations.[23]
41. On this approach, continuing *effects* do not constitute the violative act itself. Instead, they are linked to reparations for an instantaneous (or, at least, no longer continuing) violative act.

ii) Violations continuing in effect

42. A more supple approach seems to be endorsed by human rights instruments. Here, it is not the violative act as such that must be continuous, but the effect of the violation. A classic case

[22] United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (United Nations 2013) <https://www.un-ilibrary.org/international-law-and-justice/materials-on-the-responsibility-of-states-for-internationally-wrongful-acts_1b3062be-en> accessed 8 November 2025, 60.
[23] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (International Court of Justice, General List No 186, 19 July 2024) [267].

of this kind is enforced disappearance as in the Inter-American Court, or the denial of the right to be heard as in the African Court.

43. Even seemingly instantaneous acts are treated as continuous in certain respects. ARSIWA's commentary refers to the expropriation of property and the passing of title as quintessentially instantaneous. In contrast, the African Court in *Ogiek* held that the eviction of the Ogiek community from their land was continuous. The ongoing violation was not evictions or occupation as such, but the lasting lack of access to land.[24] Similarly, the Inter-American Court in *Moiwana* held that the inability of the people of the Moiwana Village to return to their territories was a continuing violation for the reason that the initial act of violence continued to impact on the community's way of life.[25]

44. The continuous effects of the violation also need not attach to the victim of the original violation itself, but includes people similarly situated. In *Zongo*, the African Court held that Zongo's murder was instantaneous and fell outside the African Court's jurisdiction; but the failure adequately to investigate, try, and punish the suspects alleged to have assassinated Zongo — an investigate journalist — violated the right to freedom of expression because the effect was to chill the work of other investigative journalists.

45. But even murder cannot be taken for granted as instantaneous outside of its context. For example, the CEDAW Committee has held that the current, systemic discrimination faced by Indigenous women in Canada — in the form of high rates of murder and disappearance — can be traced back to the 'legacy of the colonial period'.[26] The CEDAW Committee concluded that Canada's failure to effectively address this constituted a grave violation of their rights.

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[24] *African Commission on Human and Peoples' Rights v Republic of Kenya* App No. 006/2012 (AfCHPR 2, 26 May 2017), 183.
[25] *Moiwana Community v. Suriname* Judgement of June 15, 2005 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights) 86, [101].
[26] Committee on the Elimination of Discrimination against Women, 'Report of the inquiry concerning Canada' (30 March 2015) UN Doc CEDAW/C/OP.8/CAN/1, paras 214 and 217.

46. The distinction between generalist and human rights-specialist interpretations was impliedly highlighted by Achiume, then Special Rapporteur on racism, in a critique of the ICJ's *Palestine Advisory Opinion*. Achiume argues that 'the reasoning and findings of the [ICJ] again undermined the potential of the prohibition on racial discrimination in international law to serve as a meaningful counter to the contemporary reproduction of colonial relations and structures of domination'.[27] By framing Israel's violation under ICERD as the physical and juridical separation between Palestinians and Israeli settler communities, and omitting to link this to the denial of the self-determination of Palestinians, the ICJ delinks racial discrimination from its roots in racial domination via racialisation which are constitutive of the denial of self-determination and of apartheid itself.[28]

47. For immediate purposes, Achiume's critique draws attention to the ICJ's reluctance to engage with the jurisprudence of the ICERD in respect of systemic discrimination in Article 2 of ICERD. This can also be contrasted with the ICERD Committee's wider interpretation of Article 3, on the prohibition of apartheid systems,[29] to eradicate the *consequences* of past policies of segregation, offering a crucial outlook to address continuous forms of colonialism.[30]

48. The difference is arguably, and only in part, attributed to how racial (or other) discrimination is understood. In this regard, it is easier to separate the violation as such from its effects where discrimination is taken to manifest only in inter-personal and dyadic interactions. This, however, stands in contrast to the concept of structural discrimination under international human rights law.

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[27] E Tendayi Achiume, 'Race, Reparations, and International Law' (2025) 119 *American Journal of International Law* 397, 397–422 https://doi.org/10.1017/ajil.2025.10088, 415.

[28] E Tendayi Achiume, 'Race, Reparations, and International Law' (2025) 119 *American Journal of International Law* 397, 397–422 https://doi.org/10.1017/ajil.2025.10088, 415-416.

[29] Committee on the Elimination of Racial Discrimination, *General Recommendation No 19: Racial Segregation and Apartheid (Article 3)* (18 August 1995) CERD General Recommendation No 19., para 4.

[30] Committee on the Elimination of Racial Discrimination, *Report of the Ad Hoc Conciliation Commission (State of Palestine v Israel)*, UN Doc CERD/C/113/3 and Add.1–Add.2 (22 August 2024), para 8, para 31, para 44.

49. ICERD is most explicit in this regard in their development of a conception of structural racism. Article 1(1) of ICERD defines racial discrimination as differentiating measures which have 'the purpose *or* effect' of impairing the human rights of the person. Under such a definition, the ICERD recognises the indirect *effects* of racism that do not arise from intent or through individual interactions but are systematically reproduced through seemingly neutral institutional practices which negatively and disproportionately impact racialised groups. Article 2(2) of ICERD allows positive discrimination (i.e., affirmative action) to 'overcome structural discrimination that affects people of African descent'.[31] This delinks reparations for racial discrimination from *individual* fault for racial discrimination, instead embedding reparative obligations in responsibility for addressing the injustice. Positive discrimination is one of the 'special measures to eliminate the harms of law and policy that reinforce structural racism; *de jure* racial discrimination, and the persistence of *de facto* material and social inequality, including the material and social inequalities stemming from the legacies of transatlantic chattel slavery still suffered by the descendants of enslaved persons'. The persistent denial of access to effective reparations is a separate and distinct form of racial discrimination and a violation of Article 2(2) of the ICERD.'[32]

50. Further positive measures for structural discrimination are contemplated by the Inter-American Court in *Quilombolas de Alcântara v. Brazil*, stating that 'the State incurs international responsibility when, faced with the existence of structural discrimination, it fails to adopt specific measures with regard to the particular situation of victimization that reveals the vulnerability of a universe of individualized persons.'[33]

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[31] Committee on the Elimination of Racial Discrimination, 'General Recommendation No 34: Racial Discrimination against People of African Descent' (79th session, 2011) CERD/C/GC/34, para 7.

[32] United Nations Office of the High Commissioner for Human Rights, *'Invitation for feedback: First Draft General Recommendation on Reparations for the Transatlantic Trade in Africans for Chattel Slavery and the Ensuing and Continuing Harms Inflicted on People of African Descent'* (OHCHR, 2025), para 91.

[33] *Quilombolas de Alcântara v. Brazil* Judgement of November 21, 2024 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights), 32.

c) Evolution of the law

51. A third pathway that narrows the scope of the inter-temporal principle is the requirement of the evolution of the law. Indeed, this requirement was determinative in *Island of Palmas* itself.

52. There, the PCA held that title of discovery, 'without any further display of sovereignty in the years to follow, was not sufficient under *evolved* international law to establish sovereignty over territory'.[34] It was this that resulted in the Island of Palmas forming in its entirety a part of Netherlands territory because, by the time the dispute arose between the Netherlands and the USA in 1906, the Dutch had established such a degree of authority over the islands that the importance of maintaining this prevailed over the title of discovery which the USA claimed.

53. This has been applied by the PCIJ in the *Case of the Free Zones of Upper Savoy and the District of Gex*,[35] and the ICJ in *Minquiers and Ecrehos*.[36]

54. The ICJ has also affirmed an evolutionary interpretative approach to treaties,[37] which arguably finds greater force in human rights law which are commonly referred to as living instruments.[38] One example of this is the Inter-American Court's widening concept of a 'direct victim' — a threshold for admissibility.[39] Another is the Seoul High Court (applying CEDAW) reasoning that the law on jurisdictional immunities had evolved and should be applied as evolved.[40] This shows the power of the evolution of the law to procedural norms of international law, which provide gateways to reparations for substantive wrongs.

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[34] K Häusler and J Hofbauer, *Palmas Islands Arbitration* (2011) MPEPIL.

[35] *Case of the Free Zones of Upper Savoy and the District of Gex (France v Switzerland)*, Judgment, (1932) PCIJ Series A/B, No. 46.

[36] *(France/United Kingdom)* [1953] ICJ Rep 47.

[37] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, (Advisory Opinion) [1971] ICJ Rep, [53].

[38] UN General Assembly Resolution 56/10 (2001, UN Doc A/RES/56/10) 58 [105].

[39] *La Cantuta v. Peru* Judgement of November 30, 2007 (Interpretation of the Judgment on Merits, Reparations, and Costs) (Inter-American Court of Human Rights) Separate opinion of Judge A. A. Cançado Trindade 69.

[40] *Compensation for Damage (Others)* Case No 2021Na2017165 (Seoul High Court, 33rd Civil Chamber), [27].

55. The evolution of the law point might be invoked to harmonise the meaning of discrimination in international law to the structural conception advanced in international human rights law.

d) Identifying custom retrospectively

56. Aside from evolving the interpretation of rules of customary international law, identifying customary international law to have existed at the time of the violation is itself is another possible route to reparations for colonial and other historic atrocities.

57. For example, in *Legal Consequences on the Separation of the Chagos Archipelago from Mauritius in 1965* (*Chagos Advisory Opinion*), the ICJ confronted the question of the period in which the right to self-determination had crystallised into a norm of customary international law.[41]

58. This is no neutral exercise. According to whom, or what logic, are customary norms recognised? Many argue that atrocities of slavery, extermination, and denial of peoples' sovereignty already violated customary norms at the time of their existence.[42] Indeed, Judge Al-Khasawneh in the *Land and Maritime Boundary between Cameroon and Nigeria* case criticised the Eurocentric approach to the alleged surrendering of sovereignty by African peoples under treaties of protection, especially in the light of the fact that European peoples under treaties of protection were not treated as having given up their sovereignty.[43]

59. The UN Special Rapporteur on racism has highlighted the irony of (Western) international law barring claims to reparations:[44]

> To the extent that the intertemporal principle is understood to bar reparations for colonialism and slavery, States must recognize that the very same international law that

[41] *Legal Consequences on the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep.
[42] Mavedzenge J A, 'Towards a framework of reparatory measures for the enslavement and colonisation of the African people' (2024) 24 African Human Rights Law Journal 395, 402.
[43] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* (Judgment) [2002] ICJ Rep 303, 503 [5] (Separate Opinion of Judge Al-Khasawneh).
[44] E Tendayi Achiume, Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action UNGA 74th Session, Provisional Agenda Item 70(b), UN Doc A/74/321 (2019), para 50.

> provides for the intertemporal principle has a long history of service to both slavery and colonialism. As mentioned above, international law itself played an important role in consolidating the structures of racial discrimination and subordination throughout the colonial period, including through customary international law, which was co-constitutive with colonialism. Part of the problem, then, is that international law has not fully been "decolonized" and remains replete with doctrines that prevent the reparation and remediation of the inequality and injustice entrenched in the colonial era.1 When Member States and even international lawyers insist on the application of the intertemporal principle as a bar to pursuing reparation and remediation of racial injustice and inequality, they are, in effect, insisting on the application of neocolonial law. (Citations omitted.)

60. To go further, some have argued that the inter-temporal principle itself has never crystallised as a norm of customary international law outside of the criminal law context; a context distinguishable for its emphasis on individual criminal liability and focus on punishment as opposed to reparations.[45]

e) *Jus cogens*

61. *Jus cogens* norms are a distinct category of custom, the peremptory norms of international law which permit no derogation.
62. It bears highlighting then that inter-temporality, in the context of this project, is not only nor most importantly relevant to any breach of international law. As has been articulated by Dire Tladi — Judge of the International Court of Justice (ICJ) — the stakes are higher:

> The rule of intertemporal law, based mainly on the 1928 statement by sole arbitrator Max Huber in *Island of Palmas*, … has had the effect of excluding from the reach of international law some of the most egregious violations of *jus cogens* norms in human history. Violations

[45] Yarik Kryvoi and Shaun Matos, 'Non-Retroactivity as a General Principle of Law' (2021) 17(1) *Utrecht Law Review* 46. See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* (Judgment) [2002] ICJ Rep 303, 503 [16] (Separate Opinion of Judge Al-Khasawneh).

> that, to borrow and adapt a famous statement from the International Court of Justice, amount to a "denial" of the most basic rights of people, including "the right of existence of entire human groups" and the right to fully determine their political status and freely pursue their economic, social and cultural development in accordance with basic tenets of dignity and which should "shock the conscience of mankind and result in great losses to humanity, and which [are] contrary to moral law and to the spirit and aims" of an international community. (Citations omitted.)

63. Given their heightened status, norms of *jus cogens* might be said to apply retroactively. Again, a division between generalist and human rights-specific international law appear.

64. Under ARSIWA, 'when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the 1969 Vienna Convention, this does not entail any retrospective assumption of responsibility'.[46]

65. However, the Inter-American Court may have forged an alternative path in *Aloeboetoe et al. v. Suriname*. There, it held that a 1762 treaty legitimising slavery 'would today be null and void because it contradicts the norms of *jus cogens superveniens*'.[47] On one hand, this could be interpreted to mean that the treaty would have been null and void from the moment the prohibition of slavery was treated as *jus cogens*. On the other, the Inter-American Court gave the treaty no consideration *at all* suggesting that it may be appropriate to treat historical breaches of *jus cogens* norms as null and void from the beginning — having never had legal effect.

f) Composite violations

[46] United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (United Nations 2013) <https://www.un-ilibrary.org/international-law-and-justice/materials-on-the-responsibility-of-states-for-internationally-wrongful-acts_1b3062be-en> accessed 8 November 2025, 58.

[47] United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (United Nations 2013) <https://www.un-ilibrary.org/international-law-and-justice/materials-on-the-responsibility-of-states-for-internationally-wrongful-acts_1b3062be-en> accessed 8 November 2025, 57.

66. A further approach is through composite violations, described in Article 15 of ARSIWA as a 'breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act'. The commentary provides that '[e]xamples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc.'[48]

67. None of the jurisprudence surveyed in this report cites composite violations. Perhaps one articulation of this the Inter-American Court's 'specific and autonomous violations' doctrines which concern obligations to investigate acts of violence against women and ensure fair trial rights are upheld.[49] This, however, seems identical to the African Court's approach to continuing violations such as in *Zongo* (discussed above).

Concluding remarks

68. The above summarises the main findings of the report. In the main, the principle of inter-temporality has two dimensions, finding expression in international law in the rules governing temporal jurisdiction (questions of forum) and non-retroactivity (questions of law).

69. Where the parties to a treaty intend (expressly or impliedly) for a treaty to have retroactive effect, this excludes the principle of non-retroactivity. Norms of *jus cogens*, at least in the Inter-American Court, might play this role too.

70. Evolved applications of the principle of inter-temporality permit the principle to be respected while entailing reparatory obligations for historic atrocities. Violations of international law that are continuous entail reparations for acts otherwise beyond temporal reach, with international

[48] United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (United Nations 2013) <https://www.un-ilibrary.org/international-law-and-justice/materials-on-the-responsibility-of-states-for-internationally-wrongful-acts_1b3062be-en> accessed 8 November 2025, 62.

[49] E.g., *Almonacid Arellano v. Chile* Judgement of September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs) (Inter-American Court of Human Rights).

human rights law focusing on the continued effects of violations (this itself could be an evolved interpretation of the law). In addition, the retrospective identification of customs can also entail reparatory obligations.

71. The remainder of this report are each dedicated to one system: under the PCIJ, ICJ, African Human and Peoples' Rights system, the Inter-American Human Rights system, ICERD, and CEDAW.

1. PERMANENT COURT OF INTERNATIONAL JUSTICE

72. The principle of inter-temporality was first expressed explicitly, in the *Island of Palmas* arbitration award — six years after the Permanent Court of International Justice (PCIJ) was established in 1922.

73. The PCIJ's engagement with the principle of inter-temporality itself is limited and has never explicitly been cited in its jurisprudence. However, the reasoning in some PCIJ cases followed the logic of the inter-temporal principle, and may therefore assist in defining its contours and understanding how it is applied today, in particular by the International Court of Justice (ICJ). These cases are explored below.

74. The PCIJ was also instrumental in developing the principle of non-retroactivity (i.e., the principle that a law can only be applied to an act that occurs after the law was adopted) which is closely linked with the principle of inter-temporality. Some have argued that non-retroactivity is an iteration of the first limb of the inter-temporal principle.[50]

75. The first limb of the inter-temporal principle states that '[a] judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled.'[51] The principle of non-retroactivity on the other hand, enshrined in Article 28 of the Vienna Convention on the Law of Treaties (VCLT) 1969, states that laws may not be applied retroactively to situations that occurred before those laws came into force.

[50] See, e.g., R Jennings, *The Acquisition of Territory in International Law* (1963, MUP), p. 28; R Fuhrmann and M Schweizer, 'Ending the Past: International Law, Intertemporality, and Reparations for Past Wrongs' (2025) German Law Journal (forthcoming).

[51] *Island of Palmas (The Netherlands v United States of America)* 2 RIAA 829, 845.

76. Overall, the principles of inter-temporality and non-retroactivity operate distinctly. Non-retroactivity governs the idea that new laws cannot be applied to past situations, but the principle of non-retroactivity and it's expression in the VCLT is an application of the broader principle of inter-temporality.[52]

77. As a final preliminary point on reparations, the PCIJ ruled that '[t]he essential principle contained in the actual notion of an illegal act … is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[53] This laid the groundwork for the International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the standard of 'full reparation' in international law.[54] This now lays the basis for a claim for reparations in international law under customary international law.

QUESTION 1.1: What are the limitations on international or inter-state liability posed by the inter-temporal principle as applied to reparations for colonial and other past atrocities, including the application of the 'evolution of the law' element of the principle?

78. As stated above, the PCIJ has never explicitly been cited the principle of inter-temporality. However, there are four cases where the PCIJ applied reasoning that was cognisant of aspects of the principle of inter-temporality, to be dealt with in turn:

    a. *S.S. "Wimbledon"* (decided before the *Island of Palmas* decision, in 1923);[55]

    b. *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder* (1929);[56]

[52] B Juratowitch and J McArthur, 'Article 28 of the VCLT: Non-Retroactivity of Treaties' in A Kulick and M Waibel (eds.), *General International Law in International Investment Law: A Commentary* (2024, OUP), p. 84.
[53] *The Factory at Chorzow (Germany v. Poland)*, Merits, (1928) PCIJ Series A, No. 17, p. 47.
[54] International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (2001) YBILC vol. II (Part Two).
[55] *(United Kingdom, France, Italy and Japan v. Germany)*, Judgment, (1923) PCIJ Series A, No. 1.
[56] *(United Kingdom v Poland)*, Judgment, (1929) PCIJ Series A, No. 23.

c. *Case of the Free Zones of Upper Savoy and the District of Gex* (1932);[57] and

d. *Legal Status of Eastern Greenland* judgment (1933).[58]

79. In the *S.S. "Wimbledon"* judgment, the PCIJ applied the logic of *first* limb of the principle of inter-temporality strictly. Germany tried to assert its prior sovereign rights over the Kiel Canal by refusing access to the steamship "Wimbledon" on 21 March 1921. The PCIJ dismissed this argument due to Article 380 of the Versailles Peace Treaty (1919) which created a new legal regime in terms of which the Kiel Canal ceased to be an internal navigable waterway, the use of which could legitimately be controlled by Germany.[59] In essence, Germany's actions were assessed according to the legal rules in force at the time of their actions, contained in the 1919 Treaty of Versailles allowing free access to the Kiel Canal for States at peace with Germany. Applying this, the result was that Germany was under an obligation to allow the steamship to pass through the canal. The implication of this case was that Germany's actions were assessed according to the law in force at the time of its actions.

80. Similar reasoning was applied in the *Case of the Free Zones of Upper Savoy and the District of Gex* judgment. In this case, France had argued that the Treaty of Versailles abrogated previous agreements between France and Switzerland that established the free zones of Upper Savoy and Pays de Gex. This was because Article 435 of the Treaty of Versailles stated that the free zones were 'no longer consistent with present conditions'. The PCIJ found that the effect of this provision was not to abrogate the previous agreements; and that, in any case, Switzerland was not party to the Treaty of Versailles. However, it did state that if, by maintaining the previous agreements, Switzerland would obtain the economic advantages of the free zones, it 'ought in return to grant compensatory economic advantages to the people of the zones'.[60] The

[57] *(France v Switzerland)*, Judgment, (1932) PCIJ Series A/B, No. 46.
[58] *(Denmark v Norway)*, Judgment, (1933) PCIJ Series A/B, No. 53.
[59] *S.S. "Wimbledon" (United Kingdom, France, Italy and Japan v. Germany)*, Judgment, (1923) PCIJ Series A, No. 1, p. 30.
[60] *Case of the Free Zones of Upper Savoy and the District of Gex (France v Switzerland)*, Judgment, (1932) PCIJ Series A/B, No. 46, p. 169.

PCIJ found that, essentially, the historic rights that existed under those previous treaties still applied, but that their application had to be adjusted to the modern-day conditions (evolution of the law).[61] Therefore, the PCIJ balanced historic rights with present-day law (evolution of the law), but it did not provide clarity in terms of reparations.[62]

81. Limitations to liability posed by the inter-temporal principle in the PCIJ's jurisprudence also emerge from the identification of a 'critical date', defining the date on which a dispute arose, which in turn determines what law was contemporary at that date and to be applied.

82. The critical date, as developed in the PCIJ's jurisprudence, is the date on which the dispute between the parties came into existence.[63] The determination of the 'critical date' has various consequences, including whether a court or tribunal has temporal jurisdiction over a dispute, though this is distinct to the functioning of the principle of inter-temporality.[64] For the purposes of reparations for colonial and other past atrocities, however, the critical date is relevant insofar as it may determine the law that can be applied by a court or tribunal in resolving a dispute.

83. The identification of the 'critical date' is closely linked to the determination of the existence of a dispute between the parties. The PCIJ has defined a dispute as 'a disagreement on a point of law or fact, a conflict of legal views or of interests' between the parties.[65] Furthermore, the PCIJ stated that a dispute does not need to arise in a 'formal' manner, for example, through diplomatic negotiations, and that 'it should be sufficient if the two Governments have in fact

[61] *Case of the Free Zones of Upper Savoy and the District of Gex (France v Switzerland)*, Judgment, (1932) PCIJ Series A/B, No. 46, p. 169.
[62] *Case of the Free Zones of Upper Savoy and the District of Gex (France v Switzerland)*, Judgment, (1932) PCIJ Series A/B, No. 46, p. 169.
[63] *Phosphates in Morocco (Italy v France)*, Preliminary Objections, Judgment, (1938) PCIJ Series A/B No. 74, p. 27.
[64] M Shaw, 'The Temporal Factor in Jurisdiction' in *Rosenne's Law and Practice of the International Court 1920-2015* (2015, 5th edn, Brill).
[65] *The Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Objection to the Jurisdiction of the Court, Judgment, (1924) PCIJ Series A, No. 2, p. 12.

shown themselves as holding opposite views'.[66] The critical date is therefore based on when the disagreement or conflict was known to each of the parties.

84. This is how the critical date was treated in the PCIJ's judgment in *Legal Status of Eastern Greenland*, where the critical date was determined as the date of Norway's attempted occupation of the Eastern Greenland territory. Taking this as the critical date, the PCIJ then assessed Denmark and Norway's actions in the period leading up to this date and on the date itself, applying the law as it stood at that time.[67] This included bilateral and multilateral agreements between Norway and Denmark where Norway was under an obligation to not contest Denmark's sovereignty over Greenland.

85. The critical date concept has been further developed by the ICJ.

QUESTION 1.2: What is the status of this law?

86. As the ICJ's predecessor, the PCIJ's jurisprudence is often relied upon as authority in the ICJ.[68] This is by virtue of Article 38(1)(d) of Statute of the ICJ, which states that judicial decisions shall be used as subsidiary means for the determination of rules of international law. As the PCIJ is no longer in existence, the status of the principle of inter-temporality can rather be found by reference to the ICJ's jurisprudence (next section), for which the PCIJ laid the groundwork.

QUESTION 2: What other principles or mechanisms of international law (if any) have been contemplated and/or applied as exceptions to the principle of inter-temporal law in the context of colonial and other past atrocities?

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[66] *The Factory at Chorzow (Germany v. Poland)*, Merits, (1928) PCIJ Series A, No. 17, p. 10-11.

[67] *Legal Status of Eastern Greenland (Denmark v Norway)*, Judgment, (1933) PCIJ Series A/B, No. 53, p. 61.

[68] M Fitzmaurice and C Tams, 'Introduction' in *Legacies of the Permanent Court of International Justice* (2013, Brill), p. 3.

87. Due to the short period within which the PCIJ operated (1922—1945), there is limited contemplation or application of other principles or mechanisms as exceptions to the principle of inter-temporality, especially within the context of colonial and other past atrocities.

88. There are, however, two potential exceptions that may be drawn from the PCIJ's jurisprudence and which have found further application in the ICJ: first, by considering the *intention* behind a legal obligation; and, secondly, in the case of *continuing acts*. Both of these are contained in the *Mavrommatis Palestine Concession* judgment, where the PCIJ considered whether the Treaty of Lausanne (1924) could be applied retroactively.[69]

89. The Treaty of Lausanne delimited the borders of Greece, Turkey, and Bulgaria following the end of the Ottoman Empire in 1922, and as part of this transferred property to Palestine that had belonged to Greece. The Treaty also required that the United Kingdom, as the sovereign power in Palestine, recognise certain concessions that had been previously granted by the Ottoman authorities to Mavrommatis (a Greek national).

90. In argument, Greece claimed that the United Kingdom had failed to recognise such concessions. The United Kingdom, for their part, argued that the PCIJ did not have jurisdiction to hear the case as the 'critical date' on which the alleged breach occurred, and from when the dispute arose, was three years before the entry into force of the relevant legal obligations under the Treaty of Lausanne (under Protocol XII).

91. The PCIJ found that this obligation did have retroactive effect, as one of its essential characteristics was 'that its effects extend to legal situations dating from a time previous to its own existence'.[70] This is because Protocol XII was drawn up to fix the conditions governing and recognition and treatment of the concessions which had been granted before the conclusion of the Protocol itself.

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[69] *The Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Objection to the Jurisdiction of the Court, Judgment, (1924) PCIJ Series A, No. 2, p. 34.

[70] *The Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Objection to the Jurisdiction of the Court, Judgment, (1924) PCIJ Series A, No. 2, p. 34.

92. The key mechanism applied here as a potential exception to the principle of inter-temporality is where the intention behind a legal obligation is for it to apply retroactively. This is expressed in Article 28 Vienna Convention on the Law of Treaties,[71] which begins with '[u]nless a different intention appears from the treaty or is otherwise established …'. This intention can either be expressed within the treaty itself, or can be implied from the terms of the treaty, as was done by the PCIJ in *Mavrommatis*.

93. A second potential exception is in relation to continuing acts. In the *Mavrommatis Palestine Concession* judgment, the PCIJ stated that even if the Treaty of Lausanne's terms could not be applied retroactively, the United Kingdom's alleged breach, which was the ongoing denial to recognise certain concessions, 'no matter what date it was first committed, still subsists', thereby granting the Court jurisdiction over the dispute.[72]

94. The concept of a continuing violation was also raised by the PCIJ in the *Phosphates in Morocco* case.[73] There, the dispute arose concerning Italian-held phosphate mining rights in a French-protected area of Morocco. On 27 January 1920, a *dahir* (royal decree) was promulgated reserving to the Maghzen (Moroccan State) the right to prospect for phosphates. On 7 August 1920, another *dahir* established a State monopoly (the Shereefian Phosphates Office) responsible for prospecting and for working phosphates in Morocco. Prior to this, some French citizens had been issued prospecting licenses later ceded to an Italian citizen, but the Moroccan Mines Department rejected recognising those rights. The Italian government, acting on behalf of its nationals, proposed to the French government referring the matter to arbitration. The French government refused, instigating Italy's application in the PCIJ.

95. Italy argued that the monopolisation instituted by the *dahirs* established a monopoly inconsistent with the international obligations of Morocco and of France under Article 112 of

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[71] 1155 UNTS 331 (23 May 1969).

[72] *The Mavrommatis Palestine Concessions (Greece v United Kingdom)*, Objection to the Jurisdiction of the Court, Judgment, (1924) PCIJ Series A, No. 2, p. 35.

[73] *(Italy v France)*, Preliminary Objections, Judgment, (1938) PCIJ Series A/B No. 74.

the General Act signed at Algeciras, on April 7th, 1906, and the Franco-German Convention of November 4th, 1911. France argued that the PCIJ lacked temporal jurisdiction because the dispute originated from facts that occurred before it ratified the compulsory jurisdiction clause of the PCIJ's statute in 1931. The PCIJ held that the real dispute arose from the *dahirs* of 1920 establishing the monopoly. But, having been issued before 1931, these fall outside the PCIJ's jurisdiction.

96. Italy further argued that this monopolistic regime, still in force, and the failure to recognise the rights under the licenses ceded to the Italian national constituted a situation subsequent to the crucial date, extending into the PCIJ's temporal jurisdiction. The PCIJ rejected this argument because the acts subsequent to the crucial date could not be regarded as factors *giving rise* to the present dispute.

2. INTERNATIONAL COURT OF JUSTICE

97. The International Court of Justice (ICJ) has jurisdiction only in relation to inter-*State* disputes, and questions of law referred to it by the United Nations for an advisory opinion. Thus, the ICJ's guidance on the inter-temporal principle is relevant mainly by analogy, since it does not directly deal with reparations for *communities* affected by colonial or other historic atrocities.

QUESTION 1.1: What are the limitations on international or inter-state liability posed by the inter-temporal principle as applied to reparations for colonial and other past atrocities, including the application of the 'evolution of the law' element of the principle?

98. The inter-temporal principle will limit the possibility for reparations for colonial and other past atrocities as it restricts the retroactive application of legal principles. As stated by the ICJ in *LaGrand*,[74] reparation, and other remedies in international law, may only be ordered for internationally wrongful acts. The ICJ has applied this principle, enunciated in Article 13 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),[75] that an act of a State is not a breach of an international obligation (i.e., an internationally wrongful act) if the relevant obligation did not bind that State at the time that the act occurred. This is the principle of non-retroactivity.
99. The primary context in which the inter-temporal principle has arisen in the ICJ has been in relation to territorial disputes. An orthodox application of the second limb of the inter-temporal principle – the evolution of the law – may be seen in *Minquiers and Ecrehos*.[76] There,

[74] *(Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, 485 [48], adopting the statements of the Permanent Court of International Justice in *Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17
[75] UNGA Res 56/83 (UN Doc A/RES/56/83, 12 December 2001).
[76] *(France/United Kingdom)* [1953] ICJ Rep 47.

France and the United Kingdom submitted a *compromis* (agreement to international arbitration) to the ICJ seeking resolution of a territorial dispute regarding islands in the English Channel. France sought to found its claim of sovereignty by virtue of the lineage of the Dukes of Normandy dating back to the eleventh century. The Dukes of Normandy (which were vassals of the Kings of France) had conquered the islands, and France claimed that this act required the ICJ to recognise French sovereignty over the islands.

100. In rejecting this claim, and applying the inter-temporal principle, the ICJ stated, 'such an alleged original feudal title of the Kings of France in respect of the Channel Islands could today produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement'.[77] The inter-temporal principle therefore restricted the legal effects of France's previous conquest of the islands. The continued manifestation of the rights said to have been manifested through the conquer of England by the Dukes of Normandy could not justify the continuing existence of the purported rights where that fact could no longer support a claim of sovereignty under contemporary international law. As put in *Island of Palmas*, the continued manifestation of the rights must 'follow the conditions required by the evolution of law'.[78]

101. The *Land and Maritime Boundary between Cameroon and Nigeria* dispute took place in a similar context, relating to maritime boundaries. Following the colonial partition of, and Scramble for, Africa triggered by the Berlin West Africa Conference (1884-85), Germany succeeded in concluding 'treaties of protection' with local chiefs in the Cameroons. Great Britain at the time had the pre-existing colony of Lagos (Nigeria) which neighboured the Cameroons. Following World War I, the Treaty of Versailles (1919) deprived Germany of its colonial possessions including the Cameroons. Cameroon, now a mandate of the League of Nations, was administered by France and Great Britain, the latter administering the border with Nigeria.

[77] *Minquiers and Ecrehos (France/United Kingdom)* [1953] ICJ Rep 47, 56.
[78] (*Netherlands v USA*) (1928) 2 RIAA 829, 846.

Both Nigeria and Cameroon gained independence in the 1960's and their boundary was drawn. The dispute arose because Nigerian authorities invaded areas which Cameroon claimed sovereignty over.

102. In a Separate Opinion, Judge Al-Khasawneh reviewed the operation of the inter-temporal principle in relation to the transfer of sovereignty of colonial possessions through 'treaties of protection' in the early twentieth century, and stated: 'I see no reason why a behaviour that is incompatible with modern rules of international law and morally unacceptable by modern values underlying those rules should be shielded by reference to inter-temporal law, all the more so when the reprobation of later times manifests itself not in criminalization but merely in invalidation'.[79] This highlights the flexible nature of the inter-temporal principle, and stresses that it is a secondary rule of international law, subject to the primary rules of international law.

103. The most directly relevant application of the principle may be seen in the ICJ's Advisory Opinion in *Legal Consequences on the Separation of the Chagos Archipelago from Mauritius in 1965* (*Chagos Advisory Opinion*).[80] There, the Court had cause to revisit the question of the period in which the right to self-determination arose. The ICJ did not hold that it was bound to apply the law as it was perceived at the time by States; rather, that it would undertake an inquiry to determine when the right to self-determination crystallised as a norm of customary international law. In order to do so, the ICJ identified and relied upon subsequent practice which confirmed its interpretation that this norm had crystallised upon the passage of UN General Assembly resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples on 14 December 1960.[81] The subsequent practice referred to by the ICJ when making this decision included the passage of the Friendly Relations

[79] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* (Judgment) [2002] ICJ Rep 303, 503 [16] (Separate Opinion of Judge Al-Khasawneh).
[80] *Legal Consequences on the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep.
[81] *Legal Consequences on the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep, [152].

Declaration in 1970, which post-dated the act of severing the Chagos Archipelago from Mauritius, which was determined to be a wrongful act from the moment it occurred that continued until remedied.[82]

104. Notably, the *Chagos Advisory Opinion* stands in stark contrast to the decision in *South West Africa Cases (Second Phase)*[83] where an evenly divided court (decided by the casting vote of the President Sir Percy Spender) did not even consider the principle of self-determination when assessing the wrongfulness of South Africa's conduct. However, the Dissenting Opinion of Judge Tanaka contains observations on the application of the inter-temporal principle in relation to newly developed norms of international law:[84]

> The reason why we recognize the retroactive application of a new customary law to a matter which started more than 40 years ago is as follows.
>
> The matter in question is in reality not that of an old law and a new law, that is to say, it is not a question which arises out of an amendment of a law and which should be decided on the basis of the principle of the protection of *droit acquis* and therefore of non-retroactivity. In the present case, the protection of the acquired rights of the Respondent is not the issue, but its obligations, because the main purpose of the mandate system are ethical and humanitarian. The Respondent has no right to behave in an inhuman way today as well as during those 40 years. Therefore, the recognition of the generation of a new customary international law on the matter of non-discrimination is not to be regarded as detrimental to the Mandatory, but as an authentic interpretation of the already existing provisions of Article 2, paragraph 2, of the Mandate and the Covenant. It is nothing other than a simple clarification of what was not so clear 40 years ago. What ought to have been clear 40 years

[82] *Legal Consequences on the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep, [177].
[83] *(Ethiopia v. South Africa; Liberia v. South Africa)* (Judgment) [1966] ICJ Rep 6.
[84] *South West Africa Cases (Second Phase) (Ethiopia v. South Africa; Liberia v. South Africa)*, (Judgment) [1966] ICJ Rep 6, 293–4.

ago has been revealed by the creation of a new customary law which plays the role of authentic interpretation the effect of which is retroactive.

105. Judge Tanaka's interpretation has not been taken up in subsequent cases, nor was it determinative in the *South West Africa Cases*. However, a version of this argument may be seen as part of the reasoning of the ICJ in its later Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*.[85] There, the ICJ made clear that it 'may not ignore' developments in general international law following the conclusion of a treaty imposing legal obligations, which in that case was a treaty establishing a protectorate in South West Africa.[86] An international instrument 'has to be interpreted and applied within the framework of the *entire legal system prevailing at the time of the interpretation*'.[87]

106. In *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear*,[88] Judge Cançado Trindade stated, without further explanation, that 'the passage of time' was relevant to the evolution of rules in international law.[89] That statement should be viewed as consistent with the approach of the ICJ to evolutionary interpretation of treaties.[90]

107. A further relevant decision is the ICJ's 2012 decision in *Jurisdictional Immunities of the State*.[91] There, Italian courts had rendered decisions that Germany did not have immunity from jurisdiction in relation to claims arising out of unlawful conduct by the German armed forces in Italy during the Second World War (including war crimes and crimes against humanity). The

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[85] (Advisory Opinion) [1971] ICJ Rep.

[86] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, (Advisory Opinion) [1971] ICJ Rep, [31]-[32].

[87] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, (Advisory Opinion) [1971] ICJ Rep, [31]-[32] (emphasis added).

[88] [2011] ICJ Rep 537.

[89] [2011] ICJ Rep 566, [12] (Separate Opinion of Judge Cançado Trindade).

[90] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, (Advisory Opinion) [1971] ICJ Rep, [53].

[91] *(Germany v Italy)*, (Judgment) [2012] ICJ Rep 99.

ICJ found that the doctrine of sovereign immunities was not subject to such an exception, and therefore Italy had committed an internationally wrongful act by removing Germany's immunity in those lawsuits.[92] Importantly, the ICJ noted that 'the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred'.[93] Therefore, while Germany's actions from 1943–5 were to be governed by the law in force at the time they occurred, Italy's actions (i.e. the court decision that had the effect of disregarding Germany's right to invoke its immunity from suit) would be governed by the applicable law at the time that it had occurred.[94]

108. Another aspect of the law of State responsibility that was emphasised by the ICJ in *Jurisdictional Immunities of the State*,[95] as well as in the *Namibia Advisory Opinion*,[96] is that all States are obliged to cease a continuing violation of international law.[97] A continuing violation is one which extends over time, such as the maintenance of an illegal situation or the refusal to carry out an obligation of a continuing character.[98]

109. This has been applied in the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*.[99] There, the ICJ considered that:[100]

> … the violations by Israel of the prohibition of the acquisition of territory by force and of the Palestinian people's right to self-determination have a direct impact on the legality of the *continued* presence of Israel, as an occupying Power, in the Occupied Palestinian

[92] *Jurisdictional Immunities of the State (Germany v Italy)* (Judgment) [2012] ICJ Rep 99, [27]–[36].
[93] *Jurisdictional Immunities of the State (Germany v Italy)* (Judgment) [2012] ICJ Rep 99, [58].
[94] *Jurisdictional Immunities of the State (Germany v Italy)* (Judgment) [2012] ICJ Rep 99, [58].
[95] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, (Advisory Opinion) [1971] ICJ Rep, [137]
[96] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, (Advisory Opinion) [1971] ICJ Rep.
[97] ARSIWA UNGA Res 56/83 (UN Doc A/RES/56/83, 12 December 2001), Article 30(a).
[98] Jean Salmon, 'Duration of the Breach' in James Crawford et al (eds) *The Law of International Responsibility* (Oxford University Press, 2010) 386; Joost Pauwelyn, 'The Concept of a "Continuing Violation" of an International Obligation: Selected Problems' (1996) 66(1) *British Yearbook of International Law* 415.
[99] (Advisory Opinion) (International Court of Justice, General List No 186, 19 July 2024).
[100] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (International Court of Justice, General List No 186, 19 July 2024) [261] (emphasis supplied).

> Territory. The sustained abuse by Israel of its position as an occupying Power, through annexation and an assertion of permanent control over the Occupied Palestinian Territory and *continued* frustration of the right of the Palestinian people to self-determination, violates fundamental principles of international law and renders Israel's presence in the Occupied Palestinian Territory unlawful.'

110. The ICJ specifically stipulated that Israel's continued presence in the Occupied Palestinian Territory 'is a wrongful act of a continuing character which has been brought about by Israel's violations, through its policies and practices, of the prohibition on the acquisition of territory by force and the right to self-determination of the Palestinian people. Consequently, Israel has an obligation to bring an end to its presence in the Occupied Palestinian Territory as rapidly as possible.'[101]

111. Finally, on the question of reparation, the ICJ held that Israel was obliged to 'provide full reparation for the damage caused by its internationally wrongful acts to all natural or legal persons concerned'.[102] The ICJ went into further detail on what reparations could look like, as including restitution, compensation and/or satisfaction.

112. Compensation was contemplated '[i]n the event that such restitution should prove to be materially impossible'.[103] Restitution was framed in terms of:[104]

> Israel's obligation to return the land and other immovable property, as well as all assets seized from any natural or legal person since its occupation started in 1967, and all cultural property and assets taken from Palestinians and Palestinian institutions, including archives and documents. It also requires the evacuation of all settlers from existing settlements and

[101] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (International Court of Justice, General List No 186, 19 July 2024) [267].
[102] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (International Court of Justice, General List No 186, 19 July 2024) [269].
[103] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (International Court of Justice, General List No 186, 19 July 2024) [271].
[104] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (International Court of Justice, General List No 186, 19 July 2024) [270].

the dismantling of the parts of the wall constructed by Israel that are situated in the Occupied Palestinian Territory, as well as allowing all Palestinians displaced during the occupation to return to their original place of residence.

QUESTION 1.2: What is the status of this law?

113. The inter-temporal principle prohibits the retroactive application of legal norms, and that is consistent with the cases identified above. In order to justify a finding of an internationally wrongful act, the act must have been wrongful when it was committed.[105]

114. That said, the Separate Opinion of Judge Al-Khasawneh in the *Land and Maritime Boundary between Cameroon and Nigeria* case provides insights that are relevant for reparations and destabilising modern manifestations of past colonial rule. Judge Al-Khasawneh reasoned that the treaties of protection did not have the effect of surrendering sovereignty. The treaties established *protectorates* and not colonies which, under the 1884 Treaty of Protection, does not confer *ownership* over the territory to the protecting power. Therefore, that power could not dispose of any part of the territory. To do so, Judge Al-Khasawneh reasoned, undermined the core principle underlying treaties: that agreements must be kept (*pacta sunt servanda*).[106] If any change occurred, it would have to be explicit in the 1913 Anglo-German Agreement. Indeed, there is a presumption against incidental loss of sovereignty (*volenti non fit iniuria*).[107]

115. Judge Al-Khasawneh took particular issue with the *Island of Palmas* on three levels. First, Huber's suggestion that the protecting power's suzerainty (dominance) over the native state

[105] ARSIWA UNGA Res 56/83 (UN Doc A/RES/56/83, 12 December 2001), Article 13.
[106] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* (Judgment) [2002] ICJ Rep 303, 503 [3] (Separate Opinion of Judge Al-Khasawneh).
[107] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* (Judgment) [2002] ICJ Rep 303, 503 [21] (Separate Opinion of Judge Al-Khasawneh).

became the basis for its territorial sovereignty toward other states, was 'clearly wrong'.[108] This confuses inequality of *power* with inequality of *legal status*: a weak ruler can still have the legal capacity to make treaties, and entering a protection treaty does not erase that sovereignty.[109]

116. Secondly, Judge Al-Khasawneh criticises Huber's approach as Eurocentric and over-general. Huber's move assumes that, once a protection treaty exists, the local polity becomes a quasi-colony regardless of its institutions, history, or the text of the protection treaty. Judge Al-Khasawneh probes that Europe had protected principalities which were not treated as owned by a sovereign, so to treat non-European protectorates differently was problematic.[110]

117. Finally, Judge Al-Khasawneh reasoned that Huber's approach depends on an extreme form of constitutive inter-State recognition not supported by State practice.[111]

QUESTION 2: What other principles or mechanisms of international law (if any) have been contemplated and/or applied as exceptions to the principle of inter-temporal law in the context of colonial and other past atrocities?

118. The ICJ has not applied an exception to the inter-temporal principle in the context of colonial or past atrocities. However, there are two important limits on the scope of the inter-temporal principle that may permit orders for reparation for colonial and other past atrocities.

119. At present, the only mechanisms that may allow an applicant to circumvent the application of the inter-temporal principle is through characterising a violation as a continuing violation, to which a norm of international law applies. Alternatively, a primary norm (whether in a treaty

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[108] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* (Judgment) [2002] ICJ Rep 303, 503 [5] (Separate Opinion of Judge Al-Khasawneh).
[109] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* (Judgment) [2002] ICJ Rep 303, 503 [5] (Separate Opinion of Judge Al-Khasawneh).
[110] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* (Judgment) [2002] ICJ Rep 303, 503 [5] (Separate Opinion of Judge Al-Khasawneh).
[111] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* (Judgment) [2002] ICJ Rep 303, 503 [5] (Separate Opinion of Judge Al-Khasawneh).

or as custom) could be characterised as providing for a retrospective application and displacing the general operation of the inter-temporal principle.

120. First, the ICJ's jurisprudence makes clear that it may apply a hindsight perspective to identify and apply *customary international law*. This means that even if at the time of the commission or perpetuation of a past wrong there was a divergent perspective on the nature of a customary norm, this is not a barrier to the application of that norm to the conduct.

121. That was the approach adopted in the *Chagos Advisory Opinion*.[112] The ICJ did not turn to what States' perspectives on the principle of self-determination would have been at the time of the separation of the Chagos Archipelago from Mauritius, but instead examined both contemporary and subsequent practice to determine the date that the customary norm crystallised. This means that even if there is uncertainty as to the status of a customary norm at the time that an atrocity or colonial injustice was carried out, an applicant may still be able to prove customary norm governed the conduct. The point at which a norm of customary international law crystallises is often unclear, and there is scope for using 'hindsight' analysis to identify the moment that this norm bound States. However, as explained above, even if the norm crystallises after the violative act occurred, if that act is a continuing act which continued past the crystallisation of the norm, it will be a breach of international law from the date the norm crystallised.

122. Second, in the context of *treaties*, consideration must be given to the concept of 'evolutionary interpretation'. The inter-temporal principle is a secondary rule of international law and is not absolute. The operation of the principle is subject to the development of the primary rules of law as contained in treaties and customary international law. Article 28 of the Vienna Convention on the Law of Treaties[113] countenances the retroactive application of treaty

[112] Manuel Gruber, 'Time for a Reappraisal? The Intertemporal Principle of International Law Examined' (2019) Australian Journal of International Law 91, 95.
[113] 1155 UNTS 331 (23 May 1969).

provisions '[u]nless a different intention appears from the treaty or is otherwise established'. Similarly, the commentary to ARSIWA Article 13 makes clear that a customary norm may crystallise in a manner that requires a retroactive application.[114] In order to do so, the rule would be *lex specialis*, and so an intention to displace the general rules of State responsibility would have to be manifest.[115]

123. The jurisprudence of the ICJ relating to the evolutionary interpretation of treaties, and particularly human rights treaties, means that there is some prospect for developments in modern international law to affect the interpretation of treaties that governed conduct in the past. As identified by former ICJ President Roslyn Higgins, writing in an extra-curial context, the justification for an evolutionary interpretation is the 'presumed intention of the parties'.[116] That is particularly so where the treaty was framed as pursuing a humanitarian goal.[117] Therefore, there is some scope to identify treaties with this purpose and to identify whether they provide for the possibility of establishing an internationally wrongful act and therefore for an award of reparations.

[114] UN General Assembly Resolution 56/10 (2001, UN Doc A/RES/56/10) 58 [6].
[115] ARSIWA UNGA Res 56/83 (UN Doc A/RES/56/83, 12 December 2001), Article 55.
[116] Roslyn Higgins, *Themes and Theories* (Oxford University Press, 2009) 872–3.
[117] UN General Assembly Resolution 56/10 (2001, UN Doc A/RES/56/10) 58 [105].

3. AFRICAN HUMAN AND PEOPLES' RIGHTS SYSTEM

Introduction: The anti-colonial foundations of the African human rights system

3. The origins of the African human rights system lie in the ongoing struggle of African society against the remnants and consequences of colonialism.

4. The Charter of the Organization of African Unity (OAU), an intergovernmental organisation established to promote solidarity and cooperation among African nations back in the 1960s and transformed into the African Union (AU) in the early 2000s, listed eradicating 'all forms of colonialism from Africa' as one of its purposes.[118]

5. The African Union (AU) has also reframed reparations around historical continuity and structural harm in its soft law instruments. The AU Transitional Justice Policy (AUTJP) 2019 provided member states with guidance on how to address past human rights violations and conflicts comprehensively, including by explaining the types of reparations[119] and the correct approach to their provision based on the UN recommendations.[120] The Accra Declaration on Reparations and Racial Healing (2022),[121] and the Dakar Declaration (2022) regarding the socio-ecological crisis,[122] both pushed by civil society activists, stressed the need for a reparations agenda in Africa.

[118] Organization of African Unity (OAU), Charter of the Organization of African Unity (adopted 25 May 1963, entered into force 13 September 1963), UN Treaty Series, vol. 479, p. 39, Art 2.
[119] AU, Transitional Justice Policy (adopted 1 February 2019) EX.CL/1145(XXXIV), 65.
[120] UN 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 GA Res 60/147; AU, Transitional Justice Policy (adopted 1 February 2019) EX.CL/1145 (XXXIV), 66.
[121] Accra Declaration on Reparations and Racial Healing (August 2022), 2.
[122] African Economic and Monetary Sovereignty Initiative, The Dakar Declaration: Facing the Socio-Ecological Crisis: Delinking and the Question of Global Reparations (2022), 9.

6. The AU has been active in the face of civil society activism. Its Accra Proclamation 2023 called for establishing an AU Committee of Experts on Reparations, an Office of AU Special Envoy on Reparations for Africans, and a Global Reparations Fund in Africa.[123] Moreover, the AU adopted 'Justice for Africans and People of African Descent Through Reparations' as its theme for 2025, providing a comprehensive 2025 agenda for combating racism, racial discrimination, xenophobia, and related intolerance created by the neocolonial international economic and political systems.[124]

7. The African Commission on Human and Peoples' Rights (African Commission) has also expressed its view on reparations, not only in its decisions on individual cases but more generally in its soft law instruments, such as general comments and resolutions. The Commission's Resolution on the Protection of Indigenous Peoples' Rights in the Context of Natural Resource Exploitation (2011),[125] the General Comment No. 4 on Article 5 of the African Charter (right to respect for dignity) (2017)[126] and the Resolution on Africa's Reparations Agenda and the Human Rights of Africans and People of African Descent

1. [123]The most recent summit adopted resolutions focused on strengthening cooperation with the UN and addressing issues like clean energy, sustainable transport, and climate security. The AU's 2025 theme, "Justice for Africans and People of African Descent Through Reparations," was launched at the 38th AU Summit, with a specific resolution calling for continued consultation on reparations and the 6th region of the AU. The Accra Proclamation on Reparations (adopted February 2024) AU Dec 884 (XXXVII), preamble, 1 and 2.

[124] AU Theme 2025 'Justice for Africans and People of African Descent Through Reparations', AU 37th Ordinary Session, Assembly/AU/Dec.884 (XXXVII), 11.

[125] African Commission on Human and Peoples' Rights (ACHPR), Resolution on the Protection of Indigenous Peoples' Rights in the Context of Natural Resource Exploitation (ACHPR/Res.197, 2011).

[126] ACHPR, General Comment No. 4 (2017), 33-56.

Worldwide (2022)[127] confirm that reparations form a crucial part of Africa's evolving human and peoples' rights project.[128]

8. The African Charter on Human and Peoples' Rights (African Charter), as one of the key outcomes of the OAU's efforts, has a strong anti-colonial focus. Its Preamble expressly refers to the OAU's member states' 'undertaking to eliminate colonialism, neocolonialism, apartheid, zionism, and to dismantle foreign military bases and all forms of discrimination'.[129] The African Charter's unique features in comparison to other human rights conventions – such as the possibility of *actio popularis* applications (defending public interest);[130] the absence of quantitative limitations on jurisdiction; and the recognition of collective rights; including the rights to development,[131] a healthy environment,[132] and socio-economic rights[133] – clearly indicate that this instrument aims to address historical and communal issues as well as upholding individual rights.

9. The key treaties and soft law instruments of the African human rights system thus recognise that colonial injustices persist through land dispossession, economic marginalisation, and cultural erasure.

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[127] African Commission on Human and People's Rights, Resolution on Africa's Reparations Agenda and the Human Rights of Africans and People of African Descent Worldwide (ACHPR/Res.543 (LXXIII) 2022).

[128] See African Commission on Human and Peoples' Rights (ACHPR), Resolution 616 (LXXXI) 2024: Resolution in preparation for the AU Theme for 2025 "Justice for Africans and People of African Descent Through Reparations" through consultations on Afro-descendants, Indigenous/ethnic ancestry, reparations & the 6th Region. Adopted at the 81st Ordinary Session (17 October – 6 November 2024).

[129] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Preamble.

[130] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Art 56(1); Mpunga-Biayi P, 'The Assertion of a Regional Specificity of the Right of Peoples to Self-determination by the African Court on Human and Peoples' Rights' (2025) 17 Journal of Human Rights Practice, 1, 4.

[131] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Art 22.

[132] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Art 24.

[133] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Art 15, 16 and 17.

10. On the basis of the above, it is pertinent to note two distinct understandings of reparations in the African context: the pan-African claim for reparations such as debt relief, financial flows management, and cultural heritage returns, as per the Accra Proclamation, made on behalf of the people of Africa to the ex-metropolitan colonial powers; and human rights claims against African states based on atrocities of the distant or not-so-distant past. While the first claim occupies an important part of the AU agenda, it is the second claim that receives specific attention from the African Commission and the African Court on Human and Peoples' Rights (African Court) when exercising their protective mandate.

QUESTION 1.1: What are the limitations on international or inter-state liability posed by the inter-temporal principle as applied to reparations for colonial and other past atrocities, including the application of the 'evolution of the law' element of the principle?

g) Inter-temporality, temporal jurisdiction, and non-retroactivity

11. It is appropriate to suggest that temporal jurisdiction and the related issue of non-retroactivity of human rights treaties present a specific lens through which the issue of timing of the alleged violations is considered in the African regional human rights system. It can be inferred from both the academic literature and case analysis that neither the African Commission nor African Court have considered the issue of timing of the alleged violation separately from the process of establishing their own jurisdiction with reference to non-retroactivity, including in cases concerning reparations for past atrocities.[134]

12. However, it is also important to note the differences between the inter-temporality and non-retroactivity concepts. While a human rights court or commission considers whether

[134] Murray, Rachel, "The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights" (2019) *in* R Murray et al (eds), *The African Court of Justice and Human and Peoples' Rights in Context* (Cambridge University Press) pp 965-988 and Sanchez M A, 'Admitting (to) the past: transitional justice in the European and Inter-American courts of human rights' (2023) 27 The International Journal of Human Rights 1244.

it can take on a case based on the relevant convention's applicability (non-retroactivity), the principle of inter-temporality refers to a different process: identifying the law applicable to a particular case that is already confirmed to be within the jurisdiction of a specific body.

13. In addition, the decisions of the African Court regarding timing issues pertain only to jurisdiction – not to the types or scope of reparations as such.[135] Had the principle of inter-temporality been applied by the Court in its purest form, it would likely have influenced the substantive reasoning on reparations, as it would have affected the choice of applicable substantive law.

14. Even when a body having a protective mandate occasionally refers to the timing issue in the substantive part of the decision, the discussion still evolves around jurisdictional issues, as was done by the Commission in *Gunme v Cameroon*.[136] In this case, the Commission found Cameroon violated the African Charter by adopting practices and laws discriminating against its English-speaking population in various areas of social and public life, from business transitions to judicial proceedings. The applicant also asked the African Commission to determine whether the 1961 plebiscite violated the right to self-determination of Southern Cameroonians, as it did not offer an option for separation of Southern Cameroon as an independent state, and also to assess further adoption of legislation enabling and leading to annexation/colonial occupation of Southern Cameroon. The Commission carefully considered this request but rejected it on the basis of the temporal jurisdiction limitation. Interestingly, this reasoning was presented in the substantive part of the decision.[137]

[135] See African Commission on Human and Peoples' Rights v Libya (Application No 002/2013) [2016] AfCHPR 37 (3 June 2016) and Mkandawire v Republic of Malawi (Application No 003/2011) [2013] AfCHPR 38 (21 June 2013)

[136] *Mgwanga Gunme v Cameroon*, Comm 266 of 2003 (ACHPR 99, 27 May 2009).

[137] *Mgwanga Gunme v Cameroon*, Comm 266 of 2003 (ACHPR 99, 27 May 2009), 154-157.

h) Two understandings of temporal jurisdiction in the African human rights system

15. Temporal jurisdiction — the span of time in which the alleged violation must have occurred for it to be considered by the relevant court — can be understood in two ways.

16. Firstly, it is the period of time following the alleged violative act during which the applicant can *apply* to the court. While there are specific time limitations for the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (Inter-American Court), at four and six months respectively,[138] a quantitative limitation on temporal jurisdiction is absent from the African Charter and the Protocol for establishing the African Court (Protocol).[139]

17. Instead, the African Charter and the Protocol pose a *qualitative* standard requiring the application or communication to be submitted within a 'reasonable term'.[140] The assessment of reasonableness is left to the Commission's or Court's discretion on a case-by-case basis and can include consideration of multiple factors, including when the applicant became aware of the alleged violation, the nature of the harm, the conduct of domestic authorities, and any ongoing effects.[141] It has been suggested that, 'lacking formalised boundaries on temporal jurisdiction, the African Court could theoretically hold

[138] Protocol 15 to European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS 5; American Convention on Human Rights (adopted on 22 November 1969, entered into force on 18 July 1978) 1144 UNTS 123, Art 46(b).

[139] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) (1999) 20 HRLJ 269.

[140] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Art 56(6); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) (1999) 20 HRLJ 269 Art 6(2); African Court, Rules of Procedure (2021), Rule 50(2)(f).

[141] Nkhata M J, 'What counts as a 'reasonable period'? An analytical survey of the jurisprudence of the African Court on Human and Peoples' Rights on reasonable time for filing applications' (2023) 6 African Human Rights Yearbook, 129, 135.

governments accountable for rights violations that occurred long before those governments came to power'.[142]

18. Secondly, temporal jurisdiction can be understood through the principle of non-retroactivity as established by the Vienna Convention on the Law of Treaties (VCLT),[143] and of the African Charter in particular. While not mentioned in the African Charter or Protocol directly, the application of the VCLT is implied.[144]

19. Article 28 of the VCLT provides an exception to the strict application of non-retroactivity if 'a different intention appears from the treaty or is otherwise established'.[145] The African Charter preamble, making explicitly reference to the elimination of colonialism and neocolonialism, arguably supports such an intention. However, neither the African Commission nor the African Court have applied this logic to date.

20. Based on the above, it can be tentatively suggested that – notwithstanding that inter-temporality and non-retroactivity differ — the first limb of the inter-temporal principle has been integrated into the Court's practice through the general non-retroactivity rule, which holds that cases based on alleged human rights violations occurring and ending before the state's obligation came into existence shall be deemed inadmissible. Thus, the main limitation to state liability related to temporality within the African human rights system is the absence of the Commission's or the Court's power in cases where there is no temporal jurisdiction.

i) The second limb of the inter-temporal test under the African system of human rights

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[142] Sanchez, M A 'The African Court on Human and Peoples' Rights: forging a jurisdictional frontier in post-colonial human rights' (2023) 19 International Journal of Law in Context, 352, 364.

[143] VCLT, Article 28.

[144] *Beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* App No. 013/2011 (AfCHPR 39, 5 June 2015); *Ingabire Victoire Umuhoza v Republic of Rwanda* App 003/2014 (AfCHPR 70, 18 March 2016), 53.

[145] VCLT, Article 28.

21. The above analysis can be seen as primarily concerning the first limb of the inter-temporal principle: that a fact is governed by the law in force at the time it occurs. The second limb of the inter-temporal principle, which prescribes considering the evolution of the law, can also be interpreted as reflected in the practice of the African Commission and Court: it is applied by considering whether the alleged violation is continuous.

22. The rule adopted in the African system can be summarised as follows: if the violation constituted a once-off, instantaneous act occurring before the African Charter (in case of the Commission) or Protocol (in case of the Court) was ratified, then temporal jurisdiction is absent (first limb); however, if the violation has a continuous effect lasting after the instrument was ratified, the Commission or Court has jurisdiction over such matter (second limb).[146] This also stems from Article 28 of the VCLT which stipulates that a treaty applies only to situations 'which ceased to exist before the date of the entry into force of the treaty'.[147]

23. Technically, relying on the continuous nature of the violation to bypass the limitations to state liability can be seen as either the second limb of the inter-temporality test or as an exception to it altogether. In the context of the African system, the former interpretation is apposite: as demonstrated below, the African Court consistently considers the issue of temporal jurisdiction by directly referencing both the general rule of non-retroactivity and the continuous nature of the act as two inextricably interwoven and necessary parts of the test.

[146] *John K. Modise v. Botswana* Comm 97 of 1993 (ACHPR 25, 6 November 2000), 23; *Beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* App No. 013/2011 (AfCHPR 39, 5 June 2015), 65-82.
[147] VCLT, Article 28.

24. In addition, the continuous nature of the act is an unlikely candidate for an exception to the non-retroactivity rule, as it does not negate the rule itself but rather conforms to it. Non-retroactivity continues to apply even when the act is considered continuous.

j) Inter-temporality and reparations in the African system jurisprudence

i) Timing of the alleged violation as a jurisdictional issue

25. The most notable African human rights cases that considered the timing issue in detail and found that the continuity of previously alleged violations led to the jurisdiction being upheld include the following.

26. In the African Commission, *Modise v Botswana* (former opposition party leader declared an 'undesirable immigrant' by the government, faced continuous abuse)[148] and *Gunme v Cameroon* (violation of the rights of anglophone citizens, including rights to equality and a fair trial).[149]

27. In the African Court cases, *Mtikila & Others v Tanzania* (independent candidates not allowed to stand in elections),[150] *Ogiek* (continuing evictions as consequences of the past violations),[151] *Mornah v Benin* (continuing aspects of the right to self-determination),[152] and *Centre for Human Rights v Tanzania* (discrimination against people with albinism).[153]

28. The cases above provide guidance on what makes acts ongoing or continuous. In particular, in case of singular events with continued consequences such as evictions (as in *Ogiek*), the ongoing violation was not evictions or occupation as such, but the lasting lack

[148] *John K. Modise v. Botswana* Comm 97 of 1993 (ACHPR 25, 6 November 2000), 2 and 23.
[149] *Mgwanga Gunme v Cameroon* Comm 266 of 2003 (ACHPR 99, 27 May 2009), 92-97.
[150] *Tanganyika Law Society and Others v United Republic of Tanzania; Mtikila v United Republic of Tanzania* App No. 009/2011, App No. 011/2011(AfCHPR 8, 14 June 2013), 84; Windridge O, 'A watershed moment for African human rights: Mtikila & Others v Tanzania at the African Court on Human and Peoples' Rights' (2015) 15 African Human Rights Law Journal 299, 304.
[151] *African Commission on Human and Peoples' Rights v Republic of Kenya* App No. 006/2012 (AfCHPR 2, 26 May 2017), 63 and 65.
[152] *Bernard Anbataayela Mornah v Republic of Benin & Others* App No. 028/2018 (AfCHPR 22, 22 September 2022), 130.
[153] *LIDHO and Others v Republic of Cote d'Ivoire* App 041/201 (AfCHPR 21, 5 September 2023), 39-42.

of access to land.[154] Similarly, in *Mornan*, what matters is that 'the alleged breach of (…) obligation under the Charter renews itself every day' after occurrence of those singular events,[155] as the failure to safeguard the independence of a particular disputed territory was.[156]

29. The African Court can choose to consider its temporal jurisdiction even when it is not challenged by the respondent. Thus, the Court analysed and confirmed the alleged violation's continuous nature on its own initiative in a number of cases: *Abubakari v Tanzania*,[157] *Mallya v Tanzania*,[158] *Guehi v Tanzania,*[159] and *Vedastus v Tanzania*[160] (all challenges to convictions and continuous sentences), as well as in *Rashidi v Tanzania* (challenging continuous immigration detention)[161] and *Kambole v Tanzania* (challenging constitutional provision barring courts from inquiring into the presidential election). [162]

30. A more complex picture emerges from *Zongo v Burkina Faso*,[163] *Fory v Côte d'Ivoire*,[164] and *Paul and Faustin v Côte d'Ivoire*[165] where the African Court differentiated between the facts forming the basis of the applications, finding a lack of jurisdiction regarding some while upholding jurisdiction regarding others.

31. In *Zongo*, an investigative journalist and three others who were found assassinated in 1998, burned in a car after investigating the torture and murder of a presidential aide's employee.

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[154] *African Commission on Human and Peoples' Rights v Republic of Kenya* App No. 006/2012 (AfCHPR 2, 26 May 2017), 183.
[155] *Bernard Anbataayela Mornah v Republic of Benin & Others* App No. 028/2018 (AfCHPR 22, 22 September 2022), 220.
[156] *Bernard Anbataayela Mornah v Republic of Benin & Others* App No. 028/2018 (AfCHPR 22, 22 September 2022), 220.
[157] *Mohamed Abubakari v United Republic of Tanzania* App No. 007/2013 (AfCHPR 23, 3 June 2016), 36.
[158] *Benedicto Daniel Mallya vs United Republic of Tanzania* App 018/2015 (AfCHPR 23, 25 September 2020), 20(ii).
[159] *Armand Guehi v United Republic of Republic of Tanzania* App 001/2015 (AfCHPR 72, 18 March 2016), 39(ii).
[160] *Majid Goa Alias Vedastus v Republic of Tanzania* App No. 025/2015 (AfCHPR 40, 26 September 2019), 23(ii).
[161] *Lucien Ikili Rashidi v United Republic of Tanzania* App No. 009/2015 (AfCHPR 10, 28 March 2019), 33(iii).
[162] *Jebra Kambole vs United Republic of Tanzania* App No. 018/2018 (AfCHPR 1, 15 July 2020), 24.
[163] *Beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* App No. 013/2011 (AfCHPR 39, 5 June 2015).
[164] *Kouadio Kobena Fory v Republic of Cote D'Ivoire* App No. 034/2017, (AfCHPR 8, 2 December 2021).
[165] *Baedan Dogbo Paul and Another v Republic of Cote d'Ivoire* App 019/2020 (AfCHPR 27, 5 September 2023).

The African Court held that it lacked temporal jurisdiction in relation to the right to life claim (the murder itself). The murder took place before the entry into force of the Protocol establishing the African Court. Murder was an instantaneous, not continuing, violation.[166]

32. In contrast, the African Court concluded that it had jurisdiction over the other — continuous — acts. For example, it had jurisdiction over the claim alleging a violation of the right to be heard by competent national courts, as the state had not done all in its power to find, arrest, try, and punish the perpetrators of the assassination.[167] The African Court held that it had jurisdiction over the related continuous aspects, such as the obligation to adopt legislative and other measures to ensure respect for the rights guaranteed under the Charter and the right to equality.[168]

33. In *Fory v Republic of Côte d'Ivoire*, the African Court considered the issue of temporal jurisdiction in detail on its own initiative.[169] The applicant alleged a series of violations related to two instances of his detention. He was detained and sentenced, served ten years in prison as per the sentence, and several days after his release he was re-arrested and held in prison without trial for another six years. The African Court found it had jurisdiction regarding the latter episode of detention, as it was a continuing matter. However, it did not have jurisdiction over the initial sentence and detention, which had concluded before the Protocol was ratified.[170] The African Court also found that it had jurisdiction over other types of continuous violations, such as suspension from his public office and deprivation of property rights.[171]

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[166] *Beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* App No. 013/2011 (AfCHPR 39, 5 June 2015), 65-70.
[167] *Beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* App No. 013/2011 (AfCHPR 39, 5 June 2015), 71-77.
[168] *Beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* App No. 013/2011 (AfCHPR 39, 5 June 2015),78-82.
[169] *Kouadio Kobena Fory v Republic of Cote D'Ivoire* App No. 034/2017, (AfCHPR 8, 2 December 2021), 25.
[170] *Kouadio Kobena Fory v Republic of Cote D'Ivoire* App No. 034/2017, (AfCHPR 8, 2 December 2021), 33.
[171] *Kouadio Kobena Fory v Republic of Cote D'Ivoire* App No. 034/2017, (AfCHPR 8, 2 December 2021), 34-35.

34. *Paul and Faustin v Côte d'Ivoire* concerned land arbitrarily expropriated for public works. The African Court considered that it did not have temporal jurisdiction in relation to the right of ownership over the parcel of land expropriated back in 1980, as expropriation was an instantaneous act occurring before entry into force of the Protocol.[172] The other part of the claim related to the sold plots of land and legal proceedings stemming from the fact of sale. Although the Respondent State was not yet a party to the Protocol when the land was *sold*, it was subject to ongoing legal proceedings that concluded after the State ratified the Protocol and, on that basis, jurisdiction was upheld.[173] In addition, the Court found that the right to compensation and the right to the execution of judgement, even if they occurred before the ratification of the Protocol, were of a continuous nature; thus, the court also had jurisdiction over these instances.[174]

35. However, the African Court has applied the non-retroactivity rule strictly to reject the whole application for lack of temporal jurisdiction at times. In *Boateng & Others v Ghana (Twifo Hemang Community)*, the African Court found that it lacked temporal jurisdiction because the promulgation of the laws regarding the compulsory acquisition of the lands in dispute constituted instantaneous acts which had occurred before the impugned State had become a Party to the African Charter and Protocol.[175]

36. As concerns the African Court's temporal jurisdiction to cases of a state's withdrawal from the Protocol, *Umuhoza v Rwanda* is instructive. There, a few days before the scheduled hearing in, the government of Rwanda withdrew its acceptance of direct individual access to the African Court under the Protocol. The African Court ruled that this withdrawal had

[172] *Baedan Dogbo Paul and Another v Republic of Cote d'Ivoire* App 019/2020 (AfCHPR 27, 5 September 2023), 29-32.
[173] *Baedan Dogbo Paul and Another v Republic of Cote d'Ivoire* App 019/2020 (AfCHPR 27, 5 September 2023), 33.
[174] *Baedan Dogbo Paul and Another v Republic of Cote d'Ivoire* App 019/2020 (AfCHPR 27, 5 September 2023), 34-36.
[175] *Akwasi Boateng and 351 Others v Republic of Ghana* App 059/2016 (AfCHPR 10, 27 March 2020), 49-64.

no retroactive effect and thus could not affect proceedings with regard to cases that had already been accepted for consideration.[176]

ii) Reparations regarding communal issues and violations of the past

37. Many ongoing and systemic human rights violations stemming from historic injustices, including colonialism, affect communities in general and indigenous communities in particular, where identifying an individual victim may be challenging or where too many people have suffered. The African human rights system countenances this by being flexible in terms of standing and victim status, allowing *actio popularis* (public interest) applications.[177]

38. There is no specific mention of *actio popularis* in the African Charter or the African Court Protocol. There used to be a direct allowance in the Commission Rules of Procedure, which stated that non-victims could submit communications if the victims were unable to do so themselves or in cases of serious or massive violations. These provisions in the Rules of Procedure were removed at the 18th ordinary session of the Commission in 1995.[178] This approach, however, continues to be implemented and constitutes a helpful tool in the fight for communities' rights and against their historic oppression,[179] as was the case in *Ogiek*.

[176] *Ingabire Victoire Umuhoza v Republic of Rwanda* App 003/2014 (AfCHPR 70, 18 March 2016), 68-69.

[177] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Art 56(1); Mpunga-Biayi P, 'The Assertion of a Regional Specificity of the Right of Peoples to Self-determination by the African Court on Human and Peoples' Rights' (2025) 17 Journal of Human Rights Practice ,1, 4.

[178] Pedersen M P, Standing and the African Commission on Human and Peoples' Rights (2006) 2 *AHRLJ* 407, 410.

[179] Mpunga-Biayi P, 'The Assertion of a Regional Specificity of the Right of Peoples to Self-determination by the African Court on Human and Peoples' Rights' (2025) 17 Journal of Human Rights Practice, 1, 4.

39. *Ogiek* concerned a systemic violation of indigenous community rights to property, natural resources, culture, religion, and development, infringed through the lasting consequences of the forced evictions of the community and denial of access to the ancestral territories.[180]

40. The indigenous rights cases are also noteworthy in terms of the types of awarded reparations. As opposed to traditional awards of pecuniary damages, including for confiscation of belongings[181] and moral harm,[182] sometimes combined with the order to make legislative changes.[183] International courts might refuse measures against non-repetition in case of non-systemic or clearly ended violations.[184] The cases concerned with indigenous communities' rights expand this traditional understanding of reparations.[185]

41. In *Ogiek*, the African Court ordered a lump sum compensation but also determined that the land must be legally owned by the community and clearly demarcated as such in order to adequately protect them from further violations.[186] The *Ogiek* judgment also reinforced state obligations to consult indigenous persons and communities and obtain their free and informed consent before engaging on a project affecting their ancestral lands – measures

[180] *African Commission on Human and Peoples' Rights v Republic of Kenya* App No. 006/2012 (AfCHPR 2, 26 May 2017), 75.
[181] *Lucien Ikili Rashidi v United Republic of Tanzania* App No. 009/2015 (AfCHPR 10, 28 March 2019), 128.
[182] *Mohamed Abubakari v United Republic of Tanzania* App No. 007/2013 (AfCHPR 23, 4 July 2019), 94(v); Umuhoza 90; Zongo 67; Fory 105, 110.
[183] *Tanganyika Law Society and Others v United Republic of Tanzania; Mtikila v United Republic of Tanzania* App No. 009/2011, App No. 011/2011(AfCHPR 8, 14 June 2013), 126(3); *Jebra Kambole vs United Republic of Tanzania* App No. 018/2018 (AfCHPR 1, 15 July 2020), 118.
[184] *Armand Guehi v United Republic of Republic of Tanzania* App 001/2015 (AfCHPR 72, 18 March 2016), 192; *Lucien Ikili Rashidi v United Republic of Tanzania* App No. 009/2015 (AfCHPR 10, 28 March 2019), 147.
[185] See also *Minority Rights Group International and Environnement Ressources Naturelles et Développement (on behalf of the Batwa of Kahuzi-Biega National Park, DRC) v Democratic Republic of Congo* (Communication 588/15) African Commission on Human and Peoples' Rights, 73rd Ordinary Session, November 2022 https://achpr.au.int/en/communication/588-15
[186] *African Commission on Human and Peoples' Rights v Republic of Kenya* App No. 006/2012 (AfCHPR 2, 23 June 2022), 160 (ii-iv).

that will allow the safeguarding of the *Ogiek's* cultural rights for future generations.[187] The African Court also ordered a public apology and the erection of a monument.[188]

42. In an earlier case, *Endorois*, the African Commission found the Kenyan government violated the rights of the Endorois community by forcibly evicting them from their ancestral land in the 1970s to create a game reserve on that territory and by further obstructing community access to the lake and places of worship.[189] The community lost the high court legal proceedings regarding the issue in 2002.

43. Unlike in *Ogiek*, the temporal jurisdiction was not contested in this case. However, even if this issue was raised, the Commission would likely have found it had jurisdiction: even though the original eviction took place before the Charter's existence, the violations of the community's rights triggered by this eviction continued to the day of bringing the application in 2003.[190])

44. Though the eviction happened after formal colonial rule, this case had a close link to the colonial era as the applicant's argued that 'even under colonial rule, when the British Crown claimed formal possession of Endorois land, the colonial authorities recognised the Endorois' right to occupy and use the land and its resources'.[191] It was also specifically stressed by both the applicant and Commission that many indigenous issues with rights to land rights stem from colonial times.[192]

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[187] *African Commission on Human and Peoples' Rights v Republic of Kenya* App No. 006/2012 (AfCHPR 2, 23 June 2022), 160 (v).

[188] *African Commission on Human and Peoples' Rights v Republic of Kenya* App No. 006/2012 (AfCHPR 2, 23 June 2022), 160 (vii-viii).

[189] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (Communication 276/2003) African Commission on Human and Peoples' Rights, 4 February 2010.

[190] Cerone J, 'Introductory Note to Endorois Welfare Council v. Kenya' (2010) 49 International Legal Materials 858, 859.

[191] *Centre For Minority Rights Development and Another v Kenya* Comm 276 of 2003 (ACHPR 102, 25 November 2009), 74 and 88.

[192] *Centre For Minority Rights Development and Another v Kenya* Comm 276 of 2003 (ACHPR 102, 25 November 2009), 94 and 187.

45. The *Endorois* case presented the first legal recognition of an African indigenous peoples' rights over traditionally owned land. The African Commission prescribed Kenya to return the ancestral land to the indigenous community, provide it unrestricted access to the lake, and pay adequate compensation for the loss of property and livelihood.[193] The ruling included provisions for the community to benefit from economic activities within the reserve in the form of royalties, and for a dialogue with the government to implement the recommendations.[194]

46. Of further consideration is *Ogoniland*. Though there was no dispute over temporal jurisdiction nor was this case an example of *actio popularis*, *Ogoniland* holds significance in terms of its treatment of colonialism. In its decision, the Commission directly mentions that the roots of the violations in question lay in colonialism, as 'the aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation'.[195]

47. The military government of Nigeria was found responsible for violations of the right to health, the right to dispose of wealth and natural resources, the right to a clean environment, and the right to shelter, due to its condoning and facilitating the operations of oil corporations in the Ogoni's territory.[196] The Commission also confirmed that governments have a duty to protect their citizens from damaging acts that may be

[193] *Centre For Minority Rights Development and Another v Kenya* Comm 276 of 2003 (ACHPR 102, 25 November 2009), recommendations (a)-(c).
[194] *Centre For Minority Rights Development and Another v Kenya* Comm 276 of 2003 (ACHPR 102, 25 November 2009), recommendations (d) and (f).
[195] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* Comm No. 155/96, Comm 155 of 1996 (ACHPR 35, 27 October 2001), 56.
[196] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* Comm No. 155/96, Comm 155 of 1996 (ACHPR 35, 27 October 2001), holding.

perpetrated by private parties and that this duty calls for positive action on the part of governments.[197]

48. The Commission prescribed Nigeria to cease attacks on the Ogoni people, to investigate and prosecute those responsible for attacks, to provide compensation to victims, to prepare environmental and social impact assessments in the future, and to provide information on health and environmental risks.[198]

49. Finally, *LIDHO* and *Centre for Human Rights v Tanzania* bear mention. Temporal jurisdiction was upheld in both, through only *Centre for Human Rights* employed the concept of continuous violation.[199] Their significance lies in the innovative reparations ordered by the Courts in the form of compensation funds.

50. In *LIDHO*, the African Court ordered the state to reopen the investigation into the toxic waste dumping incident. More throughgoing, the African Court also ordered the establishment of a compensation fund in consultation with victims or the victims' associations, and the deposit of the amount received from the private company who owned the ship that had toxic waste on board, as well as to ensure that the victims receive adequate and appropriate medical and psychological assistance.[200]

51. Similarly, in *Centre for Human Rights v Tanzania*, 'given the fact that the violations affect a particular group of the population', the Court ordered to establish a compensation fund in

[197] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* Comm No. 155/96, Comm 155 of 1996 (ACHPR 35, 27 October 2001), 47 and 60.
[198] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* Comm No. 155/96, Comm 155 of 1996 (ACHPR 35, 27 October 2001), holding.
[199] *Centre for Human Rights and Others v United Republic of Tanzania* App No. 019/2018 (AfCHPR 4, 5 February 2025), 39-42.
[200] *LIDHO and Others v Republic of Cote d'Ivoire* App 041/2016 (AfCHPR 21, 5 September 2023), X.

consultation with the applicants and community representatives to identify victims of attacks and compensate them according to the extent of the prejudice suffered.[201]

52. These orders present a new and progressive approach to community reparations understood holistically. 'Reimagining justice through an African lens', such decisions ensure 'reparatory justice transcends mere restitution' and 'becomes a vehicle for reclaiming autonomy, restoring cultural memory, and redressing systemic injustices rooted in colonial and imperial histories'.[202]

QUESTION 1.2: What is the status of this law?

53. Raised by the African Court in *Mtikila*,[203] is whether temporal jurisdiction determined from when the African *Charter* was ratified by a particular state, or when the Protocol establishing the African *Court* was ratified.

54. In *Zongo,* the African Court identified three relevant dates: the ratification of the Charter, the ratification of the Protocol, and the making of the optional declaration accepting the direct jurisdiction of the Court (if any). For temporal jurisdiction, the relevant moment was identified as the moment when the *Protocol* came into effect for the respondent state.[204] As confirmed in *Mtikila* two years later, the continuous violation fell under the Court's jurisdiction because (a) it began after the Charter was ratified and the state obligation

[201] *Centre for Human Rights and Others v United Republic of Tanzania* App No. 019/2018 (AfCHPR 4, 5 February 2025), 379.
[202] Mudeyi M O and Mbaye P L, 'Advancing Reparatory Justice in Africa: The Role of Regional Human Rights Bodies in Addressing Historical Injustices, Colonial Exploitation, and Systemic Violations' (2025) SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5488970> accessed 15 October 2025.
[203] Separate Opinion of Fatsah Ouguergouz in *Tanganyika Law Society and Others v United Republic of Tanzania; Mtikila v United Republic of Tanzania* App No. 009/2011, App No. 011/2011(AfCHPR 8, 14 June 2013), 20.
[204] *Beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Burkina Faso* App No. 013/2011 (AfCHPR 39, 5 June 2015), 62, 67-68, 76-77.

emerged, and (b) it continued after the Protocol was ratified.[205] This approach could, for example, 'open the door for applications relating to Cameroon going back to 1989, the date of its ratification of the African Charter, rather than from August 2015 when it ratified the African Court Protocol'.[206]

55. Later cases — including *Ogiek*,[207] *Kambole*,[208] *Boateng and Others v Ghana*,[209] and *Paul and Faustin v Côte D'ivoire*[210] — have confirmed that the dates of enactment of both the Charter and the Protocol continued to be considered as significant, following similar logic.

56. In summary, the date of ratification of the Protocol currently serves as the point of no return for *instantaneous* violations, while both the dates of the Charter and the Protocol ratification hold significance for *continuous* violations. To fall under the Court's jurisdiction, a continuous violation should start after the enactment of the Charter and continue beyond the enactment of the Protocol.

57. Temporal jurisdiction is certainly open to interpretation, as the African Court addresses this issue from scratch in each case, and we may see further development and evolution of the approach over time. Theoretically, it is possible to imagine a situation where a continuous violation that initially emerged long before a state ratified the African Charter (including during colonial times) actively continues beyond both the moment of its ratification and the moment of accession to the African Court, and thus may fall within the African Court's jurisdiction. However, no such cases have appeared before the African Court in practice to date. This logic could potentially be applied to *Endorois*, discussed

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[205] *Tanganyika Law Society and Others v United Republic of Tanzania; Mtikila v United Republic of Tanzania* App No. 009/2011, App No. 011/2011(AfCHPR 8, 14 June 2013), 84.

[206] Windridge O, 'A watershed moment for African human rights: Mtikila & Others v Tanzania at the African Court on Human and Peoples' Rights' (2015) 15 African Human Rights Law Journal 299, 304.

[207] *African Commission on Human and Peoples' Rights v Republic of Kenya* App No. 006/2012 (AfCHPR 2, 26 May 2017), 64-65.

[208] *Jebra Kambole vs United Republic of Tanzania* App No. 018/2018 (AfCHPR 1, 15 July 2020), 22.

[209] *Akwasi Boateng and 351 Others v Republic of Ghana* App 059/2016 (AfCHPR 10, 27 March 2020), 22.

[210] *Baedan Dogbo Paul and Another v Republic of Cote d'Ivoire* App 019/2020 (AfCHPR 27, 5 September 2023), 30.

above, but no issue of timing was raised in this case by the respondent nor the Commission.

58. Another noteworthy issue in this regard is the problematic enforcement of the African human rights system's decisions. The implementation of *Ogiek*, *Ogoniland,* and *Endorois* has been slow and inconsistent, with the governments facing criticisms for failing to meet their obligations.[211] This, however, does not change the status of the legal principles themselves.

QUESTION 2: What other principles or mechanisms of international law (if any) have been contemplated and/or applied as exceptions to the principle of inter-temporal law in the context of colonial and other past atrocities?

59. The African system's current approach to the issue of temporal jurisdiction, being limited by the timing of the Charter and Protocol ratification, excludes usage of pre-existing international customary law at the time of the atrocity.

60. While custom is specifically named as one of the law sources that the Commission and Court can and should 'take into consideration',[212] no reference have been found to human rights violations being upheld on the basis of them being seen as prohibited by customary law before the African Charter and Protocol entered into force.

61. As suggested above, continuous human rights violations are better appreciated as applying the second limb of the principle of inter-temporality, rather than an exception to it.

62. However, while the African Court does not explicitly deal with the inter-temporal principle and instead works with the issue of non-retroactivity of the Charter and Protocol, there

[211] ESCR-Net articles <https://www.escr-net.org/caselaw/2006/social-and-economic-rights-action-center-center-economic-and-social-rights-v-nigeria/> and <https://www.escr-net.org/resources/the-endorois-case/> assessed 20 October 2025.

[212] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Art 61.

are cases on the African continent beyond the African Court that get closer to the application of the inter-temporal principle and, thus, may provide clearer exceptions to it.

63. In *Hissène Habré v Senegal*, the Court of Justice of the Economic Community of West African States (ECOWAS Court) was faced with a case of individual criminal liability (rather than state liability) for past atrocities. Thus, the case did not involve reparations.[213] However, it concerned a clear exception to the inter-temporality in the form of an appeal to customary law.

64. The ECOWAS Court concluded that Senegalese domestic laws did not criminalise the atrocities that Habré committed.[214] Yet, his acts amounted to conduct criminalised by 'general principles of law recognised by the community of nations' at the moment of their commission, as per Article 15(2) of the International Covenant on Civil and Political Rights (ICCPR).[215] The ECOWAS Court specifically noted that the rationale behind this principle was 'to avoid letting those who commit the most heinous atrocities go unpunished when no domestic legal rule prohibited the acts at the time of their commission'.[216]

65. As a result, the ECOWAS Court concluded that the mandate to prosecute Habré assigned by the AU to Senegal should be carried out in accordance with the international custom of establishment of *ad hoc* jurisdictions.[217] The ECOWAS Court thus considered the principle of inter-temporality and referred to international custom as an exception to it, which would allow prosecution.

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[213] Hissène Habré v. Republic of Senegal, ECW/CCJ/JUD/06/10.

[214] Hissène Habré v. Republic of Senegal, ECW/CCJ/JUD/06/10, 58.

[215] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 15(2).

[216] Hissène Habré v. Republic of Senegal, ECW/CCJ/JUD/06/10, 58; Spiga V, 'Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga'(2011) 9 Journal of International Criminal Justice 5, 10.

[217] Hissène Habré v. Republic of Senegal, ECW/CCJ/JUD/06/10, 58; Spiga V, 'Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga'(2011) 9 Journal of International Criminal Justice 5, 10.

4. INTER-AMERICAN HUMAN RIGHTS SYSTEM

66. Cases pursued by the Inter-American Commission on Human Rights (IACHR) and rulings by the Inter-American Court of Human Rights (Inter-American Court) in relation to the treatment of past atrocities have been developed primarily when dealing with transitional justice from repressive regimes, with colonial-era references serving as contextual background.[218]

67. In the Inter-American context, a distinction must be drawn between: inter-temporality, which refers to the principle that the legality of an act must be *assessed* according to the law in force at the time it occurred;[219] non-retroactivity, which prevents the *application* of legal norms to events that took place before those norms were enacted;[220] and temporal jurisdiction, which defines the timeframe within which the Commission and the Court can *examine* alleged violations.[221]

QUESTION 1.1: What are the limitations on international or inter-state liability posed by the inter-temporal principle as applied to reparations for colonial and other past atrocities, including the application of the 'evolution of the law' element of the principle?

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[218] Dinah Sheldon, *Remedies in International Human Rights Law* (Oxford University Press 2016) 476-494; *Moiwana Community v. Suriname* Judgement of June 15, 2005 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights) 86; *Xákmok Kásek Indigenous Community v. Paraguay* Judgement of August 24, 2010 (Merits, reparations and costs) (Inter-American Court of Human Rights) 56-63; *Saramaka People v. Suriname* Judgement of November 28, 2007 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights) 80; *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* Judgement of February 6, 2020 (Merits, reparations and costs) (Inter-American Court of Human Rights) 47-52; *Sales Pimenta v. Brazil* Judgement of June 30, 2022 (Preliminary objection, merits, reparations and costs) (Inter-American Court of Human Rights) 44.

[219] *Island of Palmas Case* (Netherlands v. United States of America) (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829, 845.

[220] On its application in international law of the treaties, see Vienna Convention on the Law of Treaties (adopted adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331, art 28.

[221] Gisela de Leon and Lisa J. Laplante, *Admissibility: Inter-American Commission on Human Rights (IACommHR), Inter-American Court of Human Rights (Inter-American Court)* (Max Planck Encyclopaedias of International Law 2023) 106-108.

68. In the criminal context, the Inter-American Court does not interpret or enforce criminal liability for actions that were not considered crimes under the law in force at the time they were committed, applying the principle of non-retroactivity.[222] Article 9 of the American Convention on Human Rights (ACHR) enshrines this: 'no one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed.'[223]

69. Beyond the criminal context, the Court applies non-retroactivity as a principle when assessing State responsibility for acts that predate the entry into force of the ACHR or the State's recognition of its jurisdiction.[224]

70. At the same time, the Inter-American Court has referred to the concept of the 'evolution of the law' when interpreting human rights norms in light of changing contexts and international standards.[225] The Inter-American Court stated early in 1999 that 'human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.'[226]

71. While the Inter-American Court has applied exceptions to the principle of non-retroactivity and inter-temporality in cases that involved serious human rights violations

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[222] *Mohamed v. Argentina* Judgement of November 23, 2012 (Preliminary objection, merits, reparations and costs) (Inter-American Court of Human Rights) 130; *Baena Ricardo et al v. Panama* Judgement of November 28, 2013 (Competence) (Inter-American Court of Human Rights) 107.

[223] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), OAS Treaty Series No. 36, article 9.

[224] *Serrano Cruz Sisters v. El Salvador* Judgement of November 23, 2004 (Preliminary objections) (Inter-American Court of Human Rights) 77-79; *Heliodoro Portugal v. Panama* Judgement of August 12, 2008 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights) 31-32.

[225] For example, on international environmental law, see *Advisory Opinion OC-32/25* of May 2, 2025 requested by the Republic of Chile and the Republic of Colombia, Climate Emergency and Human Rights (Inter-American Court of Human Rights) 300; and *Case of the Inhabitants of La Oroya v Peru* Judgement of November 27, 2023 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights) 16-37. On equal protection before the law and non-discrimination, see *Advisory Opinion OC-18/03* of September 17, 2003 requested by the United Mexican States, Juridical Condition and Rights of Undocumented Migrants (Inter-American Court of Human Rights) 101.

[226] *Advisory Opinion OC-16/99* of October 1, 1999 requested by the United Mexican States, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Inter-American Court of Human Rights) 114.

committed in the context of oppressive regimes (more below), it has not delved into the concept of 'evolution of the law' in the context of colonial atrocities, mentioning colonial legacies as mostly contextual background.[227]

72. In *Moiwana Community v. Suriname*, the Inter-American Court dealt with the 1986 killing by state agents and collaborators of 39 members of the Moiwana Village, which was settled by the N'djuka people in Suriname.[228] The Court contextualised the case by recounting the colonial origins of the N'djuka community, their 18th-century treaties with Dutch authorities, and their continued sociopolitical autonomy, highlighting the historical foundations of their claims despite the lack of legal recognition under Surinamese law.[229] The Court found Suriname to be responsible for the violation of the rights to humane treatment, freedom of movement and residence, property, and judicial guarantees and protection.[230]

73. In *Xákmok Kásek Indigenous Community v. Paraguay*, the Inter-American Court detailed the historical background on the dispossession of Indigenous Peoples in the Chaco, using it to contextualise their current lack of land rights and legal recognition.[231] The Xákmok Kásek community had been trying to recover their traditional territory through administrative and legislative actions since 1990.[232] The Inter-American Court found

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[227] *Moiwana Community v. Suriname* Judgement of June 15, 2005 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights); *Xákmok Kásek Indigenous Community v. Paraguay* Judgement of August 24, 2010 (Merits, reparations and costs) (Inter-American Court of Human Rights); *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* Judgement of February 6, 2020 (Merits, reparations and costs) (Inter-American Court of Human Rights); *Sales Pimenta v. Brazil* Judgement of June 30, 2022 (Preliminary objection, merits, reparations and costs) (Inter-American Court of Human Rights).

[228] *Moiwana Community v. Suriname* Judgement of June 15, 2005 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights), 86.

[229] *Moiwana Community v. Suriname* Judgement of June 15, 2005 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights).

[230] *Moiwana Community v. Suriname* Judgement of June 15, 2005 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights), 233.

[231] *Xákmok Kásek Indigenous Community v. Paraguay* Judgement of August 24, 2010 (Merits, reparations and costs) (Inter-American Court of Human Rights).

[232] *Xákmok Kásek Indigenous Community v. Paraguay* Judgement of August 24, 2010 (Merits, reparations and costs) (Inter-American Court of Human Rights).

Paraguay to have violated the community's rights to communal property, judicial guarantees and protection, life, and personal integrity.[233]

74. In *Sales Pimenta v. Brazil*, faced with the 1982 murder of Sales Pimenta, a lawyer and human rights defender who represented rural workers in Northern Brazil, the Court provided historical context on the enduring concentration of land ownership in Brazil rooted in colonial patterns, framing it as a structural factor underlying contemporary agrarian conflicts and the marginalisation of rural and Indigenous communities,[234] a finding that the Inter-American Court has also used in later cases involving violence against Brazilian rural workers as contextual background.[235]

75. When determining reparations, the Inter-American Court has not explicitly referenced colonial legacies as a source of its legal reasoning. In *Moiwana Community v. Suriname*, *Saramaka People v. Suriname*, and *Xákmok Kásek Indigenous Community v. Paraguay*, the Court ordered the respective States to provide compensation in the form of a sum of money to the groups on the grounds of 'immaterial,' 'non-pecuniary,' or 'moral' damage based on the connection of the groups to their lands.[236] The Inter-American Court is therefore unclear what work is done by the historical analysis of colonialism between the two ends: the background context, and the specific determinations of reparations.

QUESTION 1.2: What is the status of this law?

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[233] *Xákmok Kásek Indigenous Community v. Paraguay* Judgement of August 24, 2010 (Merits, reparations and costs) (Inter-American Court of Human Rights), 337.

[234] *Sales Pimenta v. Brazil* Judgement of June 30, 2022 (Preliminary objection, merits, reparations and costs) (Inter-American Court of Human Rights).

[235] *Antonio Tavares Pereira et al. v. Brazil* Judgement of November 16, 2023 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights) 59; *Muniz da Silva et al. v. Brazil* Judgement of November 14, 2024 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights) 39.

[236] *Moiwana Community v. Suriname* Judgement of June 15, 2005 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights) 195-196; *Saramaka People v. Suriname* Judgement of November 28, 2007 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights), 200-201; *Xákmok Kásek Indigenous Community v. Paraguay* Judgement of August 24, 2010 (Merits, reparations and costs) (Inter-American Court of Human Rights) 320-323.

76. The law, as stated above, is settled. However, Judge Cançado Trindade has been a strong dissenting voice on the Court in some relevant respects that might, in the future, be relied on to develop the law.

77. In *Blake v. Guatemala*, Judge Trindade highlighted that 'the examination of the incidence of the temporal dimension in law in general has not been sufficiently developed in contemporary legal science.'[237] In *Bámaca-Velásquez v. Guatemala*, he stated that by applying a dynamic interpretation of the law, 'one seeks to secure the *effet utile* (useful effect) of the American Convention on Human Rights in the domestic law of the States Parties, maximizing the safeguard of the rights protected by the Convention.'[238]

78. In one of his last years at the Inter-American Court, Judge Trindade commended the Court's evolving jurisprudence on the notion of the 'direct victim' of grave human rights violations to progressively include family members other than the person killed or disappeared. Judge Trindade explicitly affirmed in *La Cantuta v. Peru*, on the disappearance and extrajudicial killing of a professor and nine students in Lima in 1992, that 'jurisprudential evolution in this sense is comprehensible and promising: finally, the reaction of the Law to its violations in detriment of human beings is proportional to the gravity of the facts, of the violations to the rights protected.'[239]

QUESTION 2: What other principles or mechanisms of international law (if any) have been contemplated and/or applied as exceptions to the principle of inter-temporal law in the context of colonial and other past atrocities?

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[237] *Blake v. Guatemala* Judgement of January 24, 1998 (Merits) (Inter-American Court of Human Rights) Separate opinion of Judge A. A. Cançado Trindade 4.

[238] *Bámaca-Velásquez v. Guatemala* Judgement of November 5, 2000 (Merits) (Inter-American Court of Human Rights) Separate opinion of Judge A. A. Cançado Trindade 33.

[239] *La Cantuta v. Peru* Judgement of November 30, 2007 (Interpretation of the Judgment on Merits, Reparations, and Costs) (Inter-American Court of Human Rights) Separate opinion of Judge A. A. Cançado Trindade 69.

79. The jurisprudence of the Inter-American System reflects a dynamic commitment to the evolving interpretation of international law, particularly in the context of serious human rights violations and *jus cogens* norms. Though not focusing on colonial atrocities, the exceptions to the principle of non-retroactivity and inter-temporality in the context of oppressive regimes and human rights violations in Latin America applied by the IACHR and the Inter-American Court illuminate a jurisprudential openness for future engagement with historical injustices. The concepts explained below exemplify how the system's normative foundations may offer the fertile ground for the progressive recognition of colonial harms within the framework of international human rights law.

a) Continuing violations

80. Faced with the problem of objections to temporal jurisdiction in cases involving enforced disappearances during military and oppressive regimes, the Court has developed an extensive jurisprudence considering enforced disappearance as a continuing violation as long as the fate or whereabouts of the victim remain unknown, therefore enabling its jurisdiction.[240] According to the Court in *Osorio Rivera and Family Members v. Peru*, 'the relevant factor for the conclusion of an enforced disappearance is the establishment of the person's whereabouts or the identification of his remains, and not the presumption of his decease.'[241]

81. Besides enforced disappearance cases, in *Moiwana v. Suriname* the Inter-American Court affirmed that, even when the massacre carried out by State agents and collaborators in the Moiwana Village had occurred a year prior to Suriname's accession to the ACHR and its

[240] *Velásquez Rodríguez v. Honduras* Judgment of July 29, 1988 (Merits) (Inter-American Court of Human Rights) 155; *Gudiel Álvarez et al. v. Guatemala* Judgment of August 19, 2013 (Interpretation of the judgment on merits, reparations and costs) (Inter-American Court of Human Rights) 64; *Osorio Rivera and Family Members v. Peru* Judgement of November 26, 2013 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights) 31.

[241] *Osorio Rivera and Family Members v. Peru* Judgement of November 26, 2013 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights).

recognition of the Court's jurisdiction, the inability of numerous community members 'to return to those territories has allegedly continued,' therefore enabling the Court's jurisdiction over the forceful displacement.[242] This application is of interest to this analysis because, even when the massacre was conducted in the context of a civil war in Suriname, the Court made reference to the connection 'of vital spiritual, cultural, and material importance' of the Moiwana to their ancestral lands when affirming its temporal jurisdiction, recognising that the rights violation caused by the displacement extended beyond the initial act of violence and continued to affect the community's way of life.[243]

b) Specific and autonomous violations

82. In similar terms, but constituting a different category, the Inter-American Court has developed the concept of 'specific and autonomous violations'. Using this, it has extended its jurisdiction to address violations of the rights to a fair trial (Article 8 ACHR) and to judicial protection (Article 25 ACHR), in relation to States' obligation to respect rights (Article 1(1) ACHR), in cases of denial of justice occurring after the recognition of the Inter-American Court's jurisdiction even when the underlying events took place prior to that recognition.[244] In these cases, the Court does not directly address the issue giving rise to the case but, as it said in *Almonacid Arellano v. Chile*, 'during the course of a proceeding separate facts might occur which constitute specific and independent violations arising from denial of justice' related to the underlying event.[245]

83. In *Moiwana v. Suriname,* the Inter-American Court affirmed that 'the State's obligation to investigate [the massacre] can be assessed by the Court starting from the date when

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[242] *Moiwana Community v. Suriname* Judgement of June 15, 2005 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights), 43.
[243] *Moiwana Community v. Suriname* Judgement of June 15, 2005 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights), 101.
[244] *Serrano Cruz Sisters v. El Salvador* Judgement of November 23, 2004 (Preliminary objections) (Inter-American Court of Human Rights) 80-85.
[245] *Almonacid Arellano v. Chile* Judgement of September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs) (Inter-American Court of Human Rights)

Suriname recognized the Tribunal's competence. Thus, an analysis of the State's actions and omissions with respect to that investigation, in light of Articles 8, 25 and 1.1 of the Convention, falls within the jurisdiction of this Court.'[246] As noted before, Suriname had acceded the ACHR and recognised the Inter-American Court's jurisdiction after the massacre took place, but the specific and autonomous violations allowed the Inter-American Court to investigate the State's investigation of the massacre.

84. In a case involving sexual violence by police against three women in Brazil, *Favela Nova Brasilia v. Brazil*, the Commission sought the application of the 'specific and autonomous violations' doctrine to Brazil's obligation to investigate violence against women.[247] The Commission argued that 'the violations of the [Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)] that fall within the temporal jurisdiction of the Inter-American Court are those associated with the obligation to investigate acts of torture and acts of violence against women, stemming precisely from the same autonomous violations already mentioned in relation to Articles 8 and 25 of the American Convention.'[248] The Inter-American Court then accepted its jurisdiction to address the failures in the investigation occurred after Brazil's acceptance to the Court's jurisdiction, in 1998, in relation to the sexual attacks, occurred in 1994.[249]

c) Ius cogens

[246] *Moiwana Community v. Suriname* Judgement of June 15, 2005 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights), 43.

[247] *Cases 11.566 and 11.694 Cosme Rosa Genoveva and others (Favela Nova Brasília) Brazil* Observations of the Inter-American Commission on Human Rights on the preliminary objections raised by the State of Brazil, January 12, 2016 (Inter-American Commission on Human Rights). Translation from the original Spanish document, 18-24.

[248] *Cases 11.566 and 11.694 Cosme Rosa Genoveva and others (Favela Nova Brasília) Brazil* Observations of the Inter-American Commission on Human Rights on the preliminary objections raised by the State of Brazil, January 12, 2016 (Inter-American Commission on Human Rights). Translation from the original Spanish document, 18-24.

[249] *Favela Nova Brasilia v. Brazil* Judgement of February 16, 2017 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights) 50.

85. In *Aloeboetoe et al. v. Suriname*, the Inter-American Court invoked *jus cogens* norms to reject the applicability of a treaty from 1762 that had recognised the autonomy of the Saramaka people but also included provisions legitimising slavery.[250] In 1991, when deciding the merits, the Inter-American Court briefly presented the facts submitted by the Commission, including the killing of six members of the Saramaka tribe by soldiers, of which Suriname accepted responsibility.[251] In 1993, when deciding on the reparations and costs, the Court had to decide between the Commission's arguments that successors of the victims should be decided by the Saramaka customs and Suriname's position requesting that civil law applies.[252] In that context, the Inter-American Court referred to the 1762 treaty brought up by the Commission, affirming that 'the Court does not deem it necessary to investigate whether or not that agreement is an international treaty. Suffice it to say that even if that were the case, the treaty would today be null and void because it contradicts the norms of *jus cogens superveniens*,' in this case, the prohibition of slavery, therefore giving no consideration to the treaty as a source of interpretation or legal basis.[253]

d) Possible applications to colonial and other past atrocities

86. Structural discrimination, dispossession, and cultural erasure rooted in colonial practices may be conceptualised as ongoing human rights violations, particularly where States have failed to provide redress, recognition, or restitution.

87. In 2021, the Commission stated that current 'discrimination against Africans and their descendants is a consequence of the historical cycle of exclusion to which they have been subjected as a result of enslavement' established during colonial times, specifically between

[250] *Aloeboetoe et al. v. Suriname* Judgement of September 10, 1993 (Reparations and costs) (Inter-American Court of Human Rights), 57.
[251] *Aloeboetoe et. al. v. Suriname* Judgment of December 4, 1991 (Merits) (Inter-American Court of Human Rights).
[252] *Aloeboetoe et al. v. Suriname* Judgement of September 10, 1993 (Reparations and costs) (Inter-American Court of Human Rights), 55.
[253] *Aloeboetoe et al. v. Suriname* Judgement of September 10, 1993 (Reparations and costs) (Inter-American Court of Human Rights), 57.

the fifteenth and nineteenth centuries.[254] The Commission urged States 'to provide for competent and necessary judicial remedies so that the African Descent population can access justice in an effective, timely and suitable way, taking into consideration economic support for those who are in a situation of poverty and extreme poverty.'[255]

88. Also in 2021, the Commission said that 'from a justice perspective, [the right to self-determination of indigenous peoples] aims to remedy the consequences of the establishment of historically unequal relations between ethno-cultural groups during colonization.'[256] The Commission called on States to remove all barriers Indigenous Peoples face when trying to exercise their legal rights, as 'access to justice without discrimination is a necessary measure to guarantee the rights of indigenous and tribal peoples over their lands, territories, natural resources, and other aspects important for the exercise of self-determination.'[257]

89. The Inter-American Court has also recognised the presence of 'structural discrimination' in cases involving Afro-descendants and Indigenous Peoples, considering factors such as poverty, illiteracy, and unemployment.[258] In 2024, in *Quilombolas de Alcântara v. Brazil*, on the installation and operation of a military rocket launch base in the traditional lands of Afro Descendants communities, the Court said that 'the State incurs international responsibility when, faced with the existence of structural discrimination, it fails to adopt

[254] Inter-American Commission on Human Rights, *Economic, Social, Cultural and Environmental Rights of Persons of African Descent*, March 16, 2021, OEA/Ser.L/V/II. Doc. 109, 53.
[255] Inter-American Commission on Human Rights, *Economic, Social, Cultural and Environmental Rights of Persons of African Descent*, March 16, 2021, OEA/Ser.L/V/II. Doc. 109, 120.
[256] Inter-American Commission on Human Rights, *Right to Self-Determination of Indigenous and Tribal Peoples*, December 28, 2021, OEA/Ser.L/V/II. Doc. 413. Transcription from the English executive summary, 8.
[257] Inter-American Commission on Human Rights, *Right to Self-Determination of Indigenous and Tribal Peoples*, December 28, 2021, OEA/Ser.L/V/II. Doc. 413. Translation from the original Spanish document, 85.
[258] *Maya Kaqchikel Indigenous Peoples of Sumpango et. al. v. Guatemala* Judgement of October 6, 2021 (Merits, Reparations and Costs) (Inter-American Court of Human Rights) 139; *Dos Santos Nascimento and Ferreira Gomes v. Brazil* Judgement of October 7, 2024 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights) 56-61; *Quilombolas de Alcântara v. Brazil* Judgement of November 21, 2024 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights), 300.

specific measures with regard to the particular situation of victimization that reveals the vulnerability of a universe of individualized persons.'[259]

90. In summary, the Inter-American Human Rights System has developed a rich body of jurisprudence in response to authoritarianism and violence in Latin America. However, its engagement with colonial atrocities remains largely peripheral, often relegated to historical context rather than legal reasoning. As noted, the system can make use of its already existing doctrinal openings to support a more robust response. Drawing on its own evolving interpretation of human rights law, the IACHR and the Inter-American Court have the tools to confront enduring colonial legacies in the Americas.

[259] *Quilombolas de Alcântara v. Brazil* Judgement of November 21, 2024 (Preliminary objections, merits, reparations and costs) (Inter-American Court of Human Rights), 300.

5. INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Introduction

91. The International Convention on the Elimination of All Forms of Racism (ICERD) was adopted on 21 December 1965 and entered into force on 4 January 1969. It was developed post-Second World War to 'take all necessary measures to prevent all manifestations of racial, religious and national hatred'.[260] ICERD rejects the twentieth century definition of racial discrimination as based on biological markers of difference and instead defines race as national, religious, geographical, linguistic, and cultural groups. The signatory parties carry a duty to protect their citizens from discrimination as defined under the ICERD.

92. ICERD's preamble asserts that it seeks to bring 'colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist … to a speedy and unconditional end', offering a means to acknowledge the contemporary presence of past harms under colonialism.[261] ICERD also recognises the impacts of the racialised legacy of capitalism as a systemic marker of present-day discrimination under Article 5 in the realisation of 'economic, social and cultural rights'.[262]

93. ICERD's understanding of racial discrimination goes beyond inter-personal or dyadic accounts to embrace structural racism. In this vein, Article 2.2 allows positive discrimination (i.e., affirmative action) to guarantee 'the full and equal enjoyment of human

[260] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Preamble.
[261] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Preamble.
[262] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Article 5(e).

rights and fundamental freedoms,' to 'overcome structural discrimination that affects people of African descent'.[263]

94. Under Article 6, signatory parties must offer 'effective protection and remedies' in the face of racial discrimination to their national courts. ICERD enshrines a compulsory inter-state complaints mechanism, which is unique among the UN international human rights treaties.[264] Where all domestic remedies are exhausted (Article 11), the Convention allows parties to raise disputes against another *state* (Article 11-13), which the Committee will investigate and give recommendations upon. This was first invoked by the State of Palestine against Israel,[265] and Qatar against the United Arab Emirates (UAE) and Saudi Arabia, both in 2018.[266] Parties may wish to bring a dispute about the application of the Convention to the International Court of Justice under Article 22, which has been invoked by Georgia against Russia,[267] Ukraine against Russia,[268] and Qatar against the UAE.[269]

95. Article 14 reserves the right to individual persons to make a complaint against a state. However, most signatory parties, such as the United States of America (US) and the United Kingdom (UK), have not ratified Article 14 thereby preventing individuals from gaining

[263] Committee on the Elimination of Racial Discrimination, 'General Recommendation No 34: Racial Discrimination against People of African Descent' (79th session, 2011) CERD/C/GC/34, para 7.

[264] Oliver Holmes, 'Palestine files complaint against Israel under anti-racism treaty' The Guardian (London, 23 April 2018) https://www.theguardian.com/world/2018/apr/23/palestinians-file-complaint-against-israel-under-anti-racism-treaty accessed 20 October 2025.

[265] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (State of Palestine v Israel) (Application Instituting Proceedings, 23 April 2018) https://www.icj-cij.org/case/173 accessed 20 October 2025.

[266] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates) (Provisional Measures) [2018] ICJ Rep 406.; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates) (Provisional Measures) [2018] ICJ Rep 406.

[267] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70.

[268] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation) (Judgment, 31 Jan 2024) ICJ Rep.

[269] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates) (Provisional Measures) [2018] ICJ Rep 406. Although, Article 22 bears its limitations, as some have argued that only those that have accepted the competences of Article 22 can be arbitrated under ICJ.

access to the Committee on the Elimination of all forms of Racial Discrimination (ICERD Committee).[270] The ICERD Committee monitors the implementation of the ICERD through a two-year review mechanism that requires all signatory parties to submit a report outlining their efforts to embed the ICERD into their national legislative measures, or upon the request of the ICERD Committee.[271]

QUESTION 1.1: What are the limitations on international or inter-state liability posed by the inter-temporal principle as applied to reparations for colonial and other past atrocities, including the application of the 'evolution of the law' element of the principle?

96. The inter-temporality principle was developed to evaluate sovereignty claims over a colonised state. It was enshrined in Article 13 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which states that 'an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.'[272]

97. Prominently, the first limb of the principle of inter-temporality has been invoked by Germany against demands for reparation by the Ovaherero and Nama people, who had suffered from colonisation in modern-day Namibia.[273] Germany, relying on the inter-temporality principle, argues that the concepts of genocide and ethnic cleansing are inapplicable to cases pre-dating 1948 (i.e., prior to the atrocities that Nazi Germany had

[270] The individual complaints mechanism under the ICERD came into operation in 1982, after it had been accepted by ten States Parties; since then, fifty-four cases have been dealt with by the Committee.
[271] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Article 9.
[272] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UNGA Res 56/83 (12 December 2001) annex, UN Doc A/RES/56/83.
[273] Nora Wittmann, 'An International Law Deconstruction of the Hegemonic Denial of the Right to Reparations' (2019) 68 *Social and Economic Studies* 103.

committed against the Jewish people), setting a clear barrier to the application of human rights jurisprudence retrospectively.[274]

98. The notion of inter-temporality can be challenged to some degree, however, as 'virtually all legal systems restricted the legality of enslavement to cases of captivity in just wars' and enslaved persons retained some fundamental rights, such as the right to life and the right to seek protection, in 'virtually all legal systems.'[275] Therefore, under the laws of former colonising states, the transatlantic slave trade was illegal.

99. The second element of the inter-temporality principle allows the assessment of the continuing effect of past acts under present-day law.[276] Article 14 ARSIWA thus defines the period of illegality to account for certain continuous acts. This can be read in conjunction with the obligations under Article 5 of the ICERD to 'undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law'.

100. Article 15 of ICERD, is applicable where the effects of colonialism constitute ongoing violations.[277] The commitment to recognising colonial crimes is emphasised in the protection of the right to self-determination of former colonies and indigenous communities under Article 15 of ICERD and General Recommendation No. 21.[278]

101. Original acts under colonialism — such as genocide, land appropriation, exploitation of natural resources, and starvation of local populations — manifest into contemporary racial inequality, most visibly in socio-economic disparity as set under Article 5 of ICERD. For

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[274] Germany, *Memorial in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2009] I.C.J. Pleadings, para 95 (12 June 2009).

[275] Rémi Fuhrmann and Melissa Schweizer, 'Ending the Past: International Law, Intertemporality, and Reparations for Past Wrongs' (2025) *German Law Journal* 1, 7.

[276] Island of Palmas (Netherlands v United States of America) (1928) 2 RIAA 829, 845.

[277] United Kingdom, Written Statement in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2018] I.C.J. Pleadings 8.6, 8.81 (15 February 2018).

[278] CERD Committee General Recommendation 21, The right to self-determination (Forty-eighth session, 1996), U.N. Doc. A/51/18, annex VIII at 125 (1996).

example, the ICERD Committee contends that the enduring repercussions of the slave trade and colonial crimes are mostly manifested in anti-blackness.[279]

102. The former Special Rapporteur on Racism and Xenophobia, Tendayi Achiume, further emphasised the importance of Article 6 of the CERD,[280] in access to reparations for the transatlantic slave trade: [281]

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

b. The contemporary manifestations of these, being the racially discriminatory effects of structures of inequality and subordination resulting from failures to redress the racism of slavery and colonialism.[282]

103. The UN Human Rights Council has emphasised the direct relationship between colonialism and the transatlantic slave trade as a driving force behind modern forms of racial violence.[283] The Concluding Observations on the combined sixteenth to twenty-third Periodic Reports of the Holy See further emphasise the ICERD's commitment to

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[279] United Nations Office of the High Commissioner for Human Rights, *'Invitation for feedback: First Draft General Recommendation on Reparations for the Transatlantic Trade in Africans for Chattel Slavery and the Ensuing and Continuing Harms Inflicted on People of African Descent'* (OHCHR, 2025), para 49.

[280] 'States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.'

[281] E Tendayi Achiume, Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action UNGA 74th Session, Provisional Agenda Item 70(b), UN Doc A/74/321 (2019) para 6(a)–6(b).

[282] See UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, *Report to the General Assembly* (21 August 2019) UN Doc A/74/321; *Report to the Human Rights Council* (12 August 2020) UN Doc A/HRC/45/44; and *Report to the General Assembly* (28 December 2020) UN Doc A/75/590, in which the Special Rapporteur, Tendayi Achiume, emphasises the centrality of Article 6 CERD to reparations for slavery, colonialism, and their contemporary structural manifestations.

[283] Michelle Bachelet, 'Statement by the UN High Commissioner for Human Rights at the 43rd Session of the Human Rights Council: Urgent Debate on Current Racially Inspired Human Rights Violations, Systemic Racism, Police Brutality against People of African Descent and Violence against Peaceful Protests' (17 June 2020) https://www.ohchr.org/en/statements/2020/06/urgent-debate-current-racially-inspired-human-rights-violations-systemic-racism accessed 4 November 2025.

addressing colonial atrocities, such as the transatlantic slave trade. The ICERD Committee asserted that the Vatican City State, Holy See, must 'provide moral reparation for the participation of the Catholic Church in the transatlantic slave trade and in the ruthless policies of colonialism in Africa,' and to 'hold a high-level dialogue, with representatives of Afro-descendants, on the role of the Catholic Church in the transatlantic slave trade and its consequences.'[284]

104. Therefore, ICERD plays a crucial role in addressing the ongoing impacts of colonialism by providing remedies and recommending reparations as outlined in Article 6 of CERD, thus offering a critical human rights mechanism to address colonial crimes retrospectively.

QUESTION 1.2: What is the status of this law?

105. The ICERD Committee interprets and supervises compliance with the ICERD but issues recommendations which are not binding. Where a state accepts ICJ jurisdiction, the ICJ's judgments may be binding between the parties.[285]

106. For individual communications under Article 14 (where permitted), exhaustion of this domestic remedy is generally a requirement.

107. The ICERD Committee has consistently invoked the liability for reparations of States implicated directly and indirectly in the transatlantic slave trade and system of chattel slavery primarily through General Recommendations No. 33 (2009) and 34 (2011).[286] This is notwithstanding the principle of inter-temporality: 'even if it could be concluded that the transatlantic trade and chattel slavery were lawful, derogations from the inter-temporal principle have been deemed appropriate in the interest of advancing justice' citing the

[284] ICERD Committee, Concluding Observations on the Combined Sixteenth to Twenty-Third Periodic Reports of the Holy See (11 January 2016) CERD/C/VAT/CO/16–23, para 24.
[285] ICERD, Article 22.
[286] ICERD Committee, General Recommendation No 33: Follow-up to the Durban Review Conference (75th sess, 29 Sept 2009) CERD/C/GC/33; ICERD Committee, General recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials (17 Dec 2020) UN Doc CERD/C/GC/36.

Nuremberg and Tokyo Trials.[287] The advancement of moral obligations over the statutory protection mechanisms of states perpetrating violence was most prominently invoked at the Nuremberg Tribunals.[288]

a) Germany v Ovaherero and Nama peoples

108. In 1904, German military forces systematically targeted and killed an estimated eighty per cent of the Ovaherero and fifty per cent of the Nama people in German colonies over a period of four years, which is present day Namibia. In 1985, the UN Special Rapporteur on Prevention and Punishment of the Crime of Genocide described 'the massacre of the Herero tribe by the Germans in South West Africa in 1904' as 'an early case of genocide'.[289] Affected communities have since brought several cases against the German government in domestic and supranational courts, asking for recognition and reparations under Article 2 of the International Covenant on Civil and Political Rights; the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; and Article 6 ICERD.[290]

109. The German government, however, relied on the inter-temporality principle, arguing that the Nama and the Ovaherero people were not considered civilised state actors and thus refused to apply the principles of self-determination retrospectively.[291] Although the

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[287] United Nations Office of the High Commissioner for Human Rights, *'Invitation for feedback: First Draft General Recommendation on Reparations for the Transatlantic Trade in Africans for Chattel Slavery and the Ensuing and Continuing Harms Inflicted on People of African Descent'* (OHCHR, 2025), para 41.

[288] Nora Wittmann, 'An International Law Deconstruction of the Hegemonic Denial of the Right to Reparations' (2019) 68 *Social and Economic Studies* 103.

[289] Economic and Social Council, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* (1985) UN Doc E/CN.4/Sub.2/1985/6, para 24.

[290] See *Report on German and Namibian Negotiations on a Joint Declaration without Meaningful Ovaherero and Nama Participation* 16.

[291] Wissenschaftlicher Dienst des Deutschen Bundestages, *Der Aufstand der Volksgruppen der Herero und Nama in Deutsch-Südwestafrika (1904–1908): Völkerrechtliche Implikationen und haftungsrechtliche Konsequenzen* [*The Uprising of the Herero and Nama Ethnic Groups in German South West Africa (1904–1908): International Law Implications and Liability Consequences*] (Research Paper No 112, 27 September 2016) 6.

German government offered a formal apology in 2021, it asserted its historical and moral responsibility, rather than *legal* responsibility, for the later-named genocide committed in Namibia, to deny that the Nama and Ovaherero peoples have a legal right to reparations.[292]

110. A number of critiques have been levelled against this.[293]

a. First, this denial violates ICERD. Article 6 of ICERD requires States Parties to provide 'effective protections and remedies' from competent tribunals and institutions for 'any acts of racial discrimination' and the related right to seek 'adequate reparation or satisfaction for any damage suffered as a result of such discrimination'.

b. Secondly, the inter-temporality principles application as the rule against non-retroactivity has been inconsistently applied to the detriment of African peoples. The Nuremberg and Tokyo trials, in the aftermath of the Second World War, offered an exception to applying the inter-temporality principle. Here, the international military tribunal diverged from the non-retroactivity principle and resorted to principles of natural law to address inhumane treatment by the Nazi regime that culminated in the genocide of Jewish and Roma people.[294] Judge Al-Khasawneh, writing in the ICJ, has highlighted that Nuremberg must be recognised as a precedent for the position that the absence of positive law necessitates the application of morality under natural law to the inter-temporality principle.[295]

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[292] Wissenschaftlicher Dienst des Deutschen Bundestages, *Der Aufstand der Volksgruppen der Herero und Nama in Deutsch-Südwestafrika (1904–1908): Völkerrechtliche Implikationen und haftungsrechtliche Konsequenzen* [*The Uprising of the Herero and Nama Ethnic Groups in German South West Africa (1904–1908): International Law Implications and Liability Consequences*] (Research Paper No 112, 27 September 2016) 4.

[293] Karina Theurer, *"Minimum Legal Standards in Reparation Processes for Colonial Crimes: The Case of Namibia and Germany"* (2023) 24 *German Law Journal* 1146–1168.

[294] KS Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2008) 94; S Garibian, 'Crimes against Humanity and International Legality in Legal Theory after Nuremberg' (2007) 9 *Journal of Genocide Research* 93, 96.

[295] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Judgment) [2002] ICJ Rep 303, Separate Opinion of Judge Al-Khasawneh 503, para 16.

c. Inconsistencies in the applicability of international human rights frameworks and reparatory gestures have been criticised as reflecting international law's endeavours to maintain geopolitical power relations that favour the interests of former colonising states.[296] Theurer therefore suggests that decolonial approaches to the applicability of the inter-temporality principle must always ask which laws were in place at the time: those of the colonising or of the colonised.[297] There is continuous emphasis on the legal frameworks of colonising states. Under this argument, Germany must extend its legal recognition to the people of the modern state of Namibia and acknowledge the genocide of the Ovaherero and Nama people — the effects of which continue to disadvantage people of African descent today.

d. Thirdly, it is arguable that these harms are continuous, and thus not subject to inter-temporality's strictures. Influential scholars such as Mutua and Achiume have emphasised that reparations for crimes amounting to racism under colonialism, similar to those committed during WWII, constitute a continuous harm under Article 6 of the CERD.[298]

111. In terms of reparations, uncovering the truth has been highlighted as a necessary ingredient. Former colonial states must fulfil their 'obligations to guarantee full public disclosure of the truth about all state-sponsored and private harms, benefits, consequences [of their colonial actions against the Nama and Ovaherero people],'[299] as recommended by

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[296] Ntina Tzouvala, 'The Alibis of History, or How (Not) to Do Things with Inter-temporality' (CIL Dialogues, 8 February 2023) https://cil.nus.edu.sg/blogs/the-alibis-of-history-or-how-not-to-do-things-with-inter-temporality/ accessed 20 October 2025.

[297] Karina Theurer, 'Minimum Legal Standards in Reparation Processes for Colonial Crimes: The Case of Namibia and Germany' (2023) 24 *German Law Journal* 1146, 1147–48.

[298] Makau Mutua, 'Reflecting on the Genocide of the Ovaherero and Nama Peoples 115 Years Later' in Judith Hackmack and Karina Theurer (eds), *Colonial Repercussions: Namibia* (2019) 20–21; E Tendayi Achiume, Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action UNGA 74th Session, Provisional Agenda Item 70(b), UN Doc A/74/321 (2019) para 6(a)–6(b).

[299] United Nations Office of the High Commissioner for Human Rights, *'Invitation for feedback: First Draft General Recommendation on Reparations for the Transatlantic Trade in Africans for Chattel Slavery and the Ensuing and Continuing Harms Inflicted on People of African Descent'* (OHCHR, 2025), para 84.

the ICERD Committee based on ICERD Articles 4, 5, 6 and 7. The ICERD Committee suggests that victims of colonial crimes deserve to know the truth, 'since the right to truth is directly linked to the right to remedy, including the right to an effective investigation, verification of facts, and public disclosure.'[300]

b) Palestine v Israel

112. In 2018, the State of Palestine invoked the ICERD's inter-state mechanism by submitting an application under Article 11 of ICERD. The State of Palestine listed several incidents that amount to violations of Article 3's prohibition on apartheid and racial segregation by being treated as second-class citizens under Israeli jurisdiction, affected by the demolition of homes, and being victims of ongoing acts of violence and killings of the Palestinian people.[301]

113. In August 2024 the ICERD Committee published the final report of the *ad hoc* Conciliation Commission.[302] The report discusses Israel's responsibilities under Article 2(1) of ICERD; reviews claims of past and ongoing racial discrimination, including those under Article 3; and policies impacting Palestinians in the Occupied Palestinian Territory under Article 5.

114. The report highlights the 'the compulsory nature of the conciliation procedure' under Articles 11 to 13 of ICERD, which differs from other human rights treaties, such as the American Convention on Human Rights, which offer *optional* complaint mechanisms.[303] As parties to ICERD, both Israel and the State of Palestine are required to participate in these

[300] United Nations Office of the High Commissioner for Human Rights, *'Invitation for feedback: First Draft General Recommendation on Reparations for the Transatlantic Trade in Africans for Chattel Slavery and the Ensuing and Continuing Harms Inflicted on People of African Descent'* (OHCHR, 2025), para 65.
[301] United Nations Office of the High Commissioner for Human Rights, *'Invitation for feedback: First Draft General Recommendation on Reparations for the Transatlantic Trade in Africans for Chattel Slavery and the Ensuing and Continuing Harms Inflicted on People of African Descent'* (OHCHR, 2025), para 65.
[302] Committee on the Elimination of Racial Discrimination, *Report of the Ad Hoc Conciliation Commission (State of Palestine v Israel)*, UN Doc CERD/C/113/3 and Add.1–Add.2 (22 August 2024).
[303] CERD/C/113/3, para 31.

proceedings in good faith.[304] This obligation specifically mandates that both States cooperate with the Conciliation Commission by attending scheduled meetings, submitting written declarations, and providing evidence aimed at amicably resolving the dispute. They may also submit proposals to support this process.

115. The effectiveness of this procedure depends on states' cooperation. Israel refused to recognise the report under the premise that they do not accept the scope of Article 22 of ICERD, illustrating the lack of enforcement jurisdiction over racially motivated crimes.[305] Due to the obligatory nature of the inter-State procedure, Israel's refusal to participate does not prevent the Conciliation Commission from fulfilling its duties under Articles 12 and 13 of ICERD nor does it absolve the Conciliation Commission from those responsibilities.[306] Thus, the mechanism can be understood as a route to exposing moral obligations despite its lack of enforcement jurisdiction, raising concerns regarding the ICERD's failure to provide a preventative mechanism against racially motivated crimes.

116. In 2024 the ICJ issued an Advisory Opinion at the request of the UN General Assembly on legal consequences of Israeli policies in Occupied Palestinian Territory.[307] Under the application of Article 3 of ICERD, the ICJ reasoned that Palestinian communities suffer from a legal system that separates Palestinians from the Jewish People.[308] The ICJ ruled that Israel must 'provide full reparation for the damage caused by its internationally wrongful acts'.[309] Yet, the Advisory Opinion does not *explicitly* use the term 'apartheid' in

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304 CERD/C/113/3, para 31.

305 CERD/C/113/3, para 31, 32.

306 CERD/C/113/3, para 7, 8.

307 The General Assembly of the United Nations requests an advisory opinion from the Court on 'the obligations of Israel in relation to the presence and activities of the United Nations, other international organizations and third States' in and in relation, https://www.icj-cij.org/node/205029.

308 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* [2024] ICJ (Advance Copy), [229]. The Court observed that 'Israel's legislation and measures impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities. For this reason, the Court considers that Israel's legislation and measures constitute a breach of Article 3 of CERD.'

309 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (International Court of Justice, General List No 186, 19 July 2024), [270].

relation to Israel, and instead lists the overall violations Israel committed against the Palestinian people, which amounted to racial segregation.[310] This is not to deny, however, that the Advisory Opinion found Israel to have violated the prohibition against apartheid in addition to racial segregation under Article 3 of ICERD, as noted in the supporting Declaration of Judge Brant.[311]

117. Achiume, then Special Rapporteur on racism, criticised the ruling for failing to address the role of self-determination of the Palestinian people and for omitting to mention forms of racial domination inflicting by Israel, leaving a gap to understand the applicability of ongoing settler colonial practices that justify genocidal atrocities.[312] Although Article 3 has the potential to encompass continuous effects of racial segregation, the Advisory Opinion on Palestine illustrates the ICJ's reluctance to engage with the jurisprudence of the ICERD, undermining its potential. This can be contrasted with the ICERD Committee wider interpretation of Article 3, on the prohibition of apartheid systems,[313] to eradicate the *consequences* of past policies of segregation, offering a crucial outlook to address continuous forms of colonialism.[314]

118. Although the Palestine vs Israel case presents an opportunity to examine the applicability of ICERD to contemporary forms of colonialism, it does not address the ongoing repercussions of former colonial crimes by states that are no longer under colonial rule.

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[310] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (International Court of Justice, General List No 186, 19 July 2024).

[311] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* [2024] ICJ (Advance Copy), Declaration of Judge Brant (19 July 2024), para 4: 'I agree with the Court's conclusion that, by creating a physical and juridical separation within the Occupied Palestinian Territory, Israel has breached Article 3 of CERD prohibiting apartheid and racial segregation'. Judge Brant notably reached this conclusion by relying on the evolutive treaty interpretation according to the second limb of the principle of inter-temporality.

[312] E Tendayi Achiume, 'Race, Reparations, and International Law' (2025) 119 *American Journal of International Law* 397, 397–422 https://doi.org/10.1017/ajil.2025.10088

[313] Committee on the Elimination of Racial Discrimination, *General Recommendation No 19: Racial Segregation and Apartheid (Article 3)* (18 August 1995) CERD General Recommendation No 19., para 4.

[314] Committee on the Elimination of Racial Discrimination, *Report of the Ad Hoc Conciliation Commission (State of Palestine v Israel)*, UN Doc CERD/C/113/3 and Add.1–Add.2 (22 August 2024), para 8, para 31, para 44.

c) Ukraine v Russia

119. On 16 January 2017, Ukraine filed an application in the ICJ instituting proceedings against the Russian Federation concerning alleged violations of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (ICSFT) and of the ICERD.[315] As a basis for the ICJ's jurisdiction, Ukraine invoked Article 24 of the ICSFT and Article 22 of the ICERD.

120. Russia argued that 'Ukraine cannot rely on incidents that allegedly occurred prior to what the Respondent calls the "reunification" of Crimea with the Russian Federation on 18 March 2014, since they are not within the Court's jurisdiction *ratione temporis* [temporal jurisdiction] as defined in the 2019 Judgment'.[316]

121. In its 2019 Judgment, the ICJ held that Ukraine's claim alleging a "pattern of conduct" of racial discrimination by the Russian Federation was admissible. The ICJ agreed that the Russian Federation had violated its obligations under Article 2(1)(a) and Article 5(e)(v) of ICERD by forbidding the use of the Ukrainian language in the education system and enforcing the strict speaking of Russian in schools after the re-unification with Crimea in 2014.[317]

122. However, the ICJ found that 'the alleged violations to be examined by the Court are more apparent than real'. This seemingly highlights the difference between *real* (intentional) versus *apparent* (consequential) experience of racial discrimination.

123. This distinction between apparent and real discrimination cannot be sustained under the ICERD insofar as the ICERD adopts a structural view of racism. Article 1(1) of ICERD defines racial discrimination as differentiating measures which have 'the purpose *or* effect'

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[315] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Provisional Measures) [2017] ICJ Rep 104.

[316] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Provisional Measures) [2017] ICJ Rep 104, para 207.

[317] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Provisional Measures) [2017] ICJ Rep 104, para 207.

of impairing the human rights of the person. Under such a definition, the ICERD recognises the indirect *effects* of racism that do not arise from intent but are systematically reproduced through institutional practices. These effects, however, negatively and disproportionately impact members of certain racialised groups. Indeed, the ICERD has emphasised that Articles 1 and 2(2) of ICERD, amongst others, 'require states to undertake special measures to eliminate the harms of law and policy that reinforce structural racism; *de jure* racial discrimination, and the persistence of *de facto* material and social inequality, including the material and social inequalities stemming from the legacies of transatlantic chattel slavery still suffered by the descendants of enslaved persons. The persistent denial of access to effective reparations is a separate and distinct form of racial discrimination and a violation of Article 2(2) of the ICERD.'[318]

d) Qatar

124. In 2018, the government of Qatar brought a case before the ICJ alleging discrimination against its nationals in the UAE and Saudi Arabia. UAE and Saudi Arabia had implemented sanctions against Qatari nationals who had previously been accused of funding religious fundamentalist groupings in the region.[319] The measures implemented by the UAE discriminated against Qatari nationals in areas such as university access, housing, and prevented Qataris from bringing cases to the courts or tribunals of the UAE.

125. In Qatar's case against the UAE, the ICJ held that the dispute fell outside the material jurisdictional scope of the ICERD as the ICERD's protection against discrimination based on 'national origin' could not be read to include present nationality.[320]

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[318] United Nations Office of the High Commissioner for Human Rights, *'Invitation for feedback: First Draft General Recommendation on Reparations for the Transatlantic Trade in Africans for Chattel Slavery and the Ensuing and Continuing Harms Inflicted on People of African Descent'* (OHCHR, 2025), para 91.

[319] International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, General List No 172.

[320] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Judgment on Preliminary Objections, 4 February 2022), [105].

126. Meanwhile, the ICERD Committee had previously concluded that 'national origin' in the ICERD included nationality.[321] The ICERD noted that 'xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices.'[322] Qatar, the UAE, and other states settled the dispute and suspended proceedings.[323]

e) Armenia v Azerbaijan

127. In 2024, Armenia brought proceedings against Azerbaijan, invoking Article 22 of ICERD to examine whether environmental harm to Armenians amounted to racial discrimination.[324]

128. The ICJ reasoned that the question before it was 'not whether Armenia was bound by the obligations under CERD during the relevant interval' (which it was), but 'whether Article 22, under which Azerbaijan has given its consent to the Court's jurisdiction, provides a jurisdictional basis for the Court to entertain Azerbaijan's claims in respect of alleged acts that took place before Azerbaijan became party to the Convention.'[325] The relevant date was that when Azerbaijan acquired obligations under ICERD: 15 September 1996.

129. The ICJ therefore held that it lacked temporal jurisdiction to examine claims related to events between 23 July 1993 and 15 September 1996, as Azerbaijan had not yet acceded to the ICERD. Curiously, the ICJ pointed to Article 28 of the Vienna Convention on the Law

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[321] Committee on the Elimination of Racial Discrimination, *General Recommendation No 30 on Discrimination against Non-Citizens* (2005) CERD General Recommendation No 30, para 5.

[322] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, Preamble.

[323] William Thomas Worster, 'The Divergence Between the ICJ and the Committee on the Elimination of Racial Discrimination regarding Nationality-Based Discrimination' (ASIL Insights, 30 Nov 2022) https://www.asil.org/insights/volume/26/issue/13 accessed 20 October 2025.

[324] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* (Application, 12 November 2024).

[325] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* (Application, 12 November 2024), [44].

of Treaties 1969 which permits the retrospective application of treaty obligations where intended by the treaty.[326] However, the ICJ did not analyse whether ICERD did have such an intention leaving this question open.

130. However, another avenue for addressing the ongoing nature of the racialised impact of environmental harm rooted in colonialism was offered in the ICJ's latest Climate Advisory Opinion. The ICJ recognised the continuous nature of colonialism to justify reparations for environmental damages incurred, providing a significant acknowledgement of the adversarial impact of climate change on formerly colonised societies and thereby deepening existing racial divisions.[327] Although the ICJ did not explicitly address the inter-temporality principle,[328] the possibilities of using this avenue to address colonial atrocities remains open.

QUESTION 2: What other principles or mechanisms of international law (if any) have been contemplated and/or applied as exceptions to the principle of inter-temporal law in the context of colonial and other past atrocities?

a) Addressing complicity through the Genocide Convention

131. Although there has been little reference made to the inter-temporality principle, states have argued that racial discrimination under colonialism has led to crimes against humanity, and

[326] Naphtali Ukamwa, 'Judging Time Under the Silence of a Compromissory Clause: A Reflection on Retroactivity of (Human Rights) Treaties and Jurisdiction Ratione Temporis in Armenia v Azerbaijan' (Opinio Juris, 7 January 2025) https://opiniojuris.org/2025/01/07/judging-time-under-the-silence-of-a-compromissory-clause-a-reflection-on-retroactivity-of-human-rights-treaties-and-jurisdiction-ratione-temporis-in-azerbaijan-v-armenia/ accessed 20 October 2025.

[327] *Obligations of States in respect of Climate Change (Advisory Opinion)* [2025] ICJ (Advance Copy), para 28: 'to adequately respond to these questions, it is clear that the Court must address the colonialism and racism that underpins the unlawful conduct and patterns its effects around the world'.

[328] *Obligations of States in respect of Climate Change (Advisory Opinion)* [2025] ICJ (Advance Copy) para 97: 'While these temporal issues may be particularly relevant for an *in concreto* assessment of the responsibility of States for breaches of obligations pertaining to the protection of the climate system, the present opinion is not concerned with the invocation and determination of the responsibility of individual States or groups of States.'

thus invoked the Rome Statute 1998, where Apartheid is trialled on the basis of individual criminal liability.

132. In the case of the State of Palestine v Israel, Judge Iwasawa noted in a Separate Opinion that apartheid is 'both a violation of international human rights law and an international crime and thus may entail State responsibility and individual criminal responsibility. Like genocide, the international crime of apartheid requires the presence of *dolus specialis* (special intent) towards a particular group'.[329]

133. While there is a standard for demonstrating an intent to segregate a group, the Nicaragua v. Germany case shows how the Fourth Geneva Convention (Genocide Convention) can be used to prove complicity in undermining right to self-determination in ICERD.[330] Thus, states have a special obligation to end apartheid and, in failing to do so, are undermining their duty to uphold the right to self-determination of the Palestinian people under the Genocide Convention.[331]

134. As the effects of racial crimes often accumulate into crimes against humanity, the Genocide Convention is perhaps a relevant avenue for exploration. However, racial crime must be recognised as a systemic issue that affects all aspects of life and manifests throughout historical changes, without necessarily leading to mass atrocities. Focusing only on most extreme forms of human destruction in international law highlights the role of human rights treaties such as the ICERD to encompass a wider scope of harms. ICERD was originally drafted as a preventative mechanism against racially motivated mass killings

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[329] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* [2024] ICJ (Advance Copy), Separate Opinion of Judge Iwasawa (19 July 2024), para 20.

[330] *Illegal Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany).* Nicaragua noted that '[b]oth Nicaragua and Germany are also parties to the CERD…in the case of racial discrimination as in the case of apartheid, States have a common interest in ensuring that these violations are brought to an end'. In assisting, supplying, and failing to pressure Israel, Germany breached its obligations under the Genocide Convention, Fourth Geneva Convention, to uphold the right to self-determination of the Palestinian people.

[331] United Nations Working Group of Experts on People of African Descent, 'Statement to the Media on the Conclusion of its Official Visit to Belgium, 4–11 February 2019' (Brussels, 11 February 2019) .

during the Second World War, aimed at creating a framework of accountability that could be invoked *before* genocide occurs.

b) Domestic courts

135. In December 2024, the Brussels Court of Appeal recognised the colonial atrocities committed by the Belgian government in Congo and ordered compensation to be paid to mixed-race children subjected to kidnapping. [332] The case was brought by five women of mixed Congolese and Belgian descent, who had been forcibly taken from their mothers and placed under the guardianship of the Catholic commission, only to be abandoned when Congo gained independence.

136. The Tribunal of first instance acknowledged that kidnapping mixed-race Congolese Belgian children was a crime against humanity. However, it invoked the inter-temporality principle to conclude that the Belgian government could not be held responsible for a crime not recognised as such at the time.[333]

137. The Brussels Court of Appeal overturned the Tribunal's decision citing the Nuremberg Charter, Article 10, to argue that acts of persecution and inhuman treatment could qualify under international law as crimes against humanity, whether occurring in wartime or peacetime.[334] The Brussels Court of Appeal ordered the payment of €50,000 to each plaintiff as compensation for the moral damages caused by the colonial racial oppression policy.[335]

138. The 2019 UN Working Group of Experts on People of African Descent (WGPAD) visited Belgium to assess the human rights situation of people of African descent living in

[332] Cour d'appel de Bruxelles (francophone), 2 déc. 2024, 2022/AR/262, *Affaires des Métis (Anonyme)*, available at https://www.uclouvain.be/system/files/uclouvain_assetmanager/groups/cms-editors-cedie/newsletter/Appel-Bruxelles-02.12.2024-AFFAIRES-DES-METIS_Anonyme.pdf (accessed 3 Nov 2025).
[333] Tribunal civil francophone de Bruxelles, *Affaires des Métis*, 8 December 2021, 20/4655/A, 16.
[334] Cour d'appel de Bruxelles (francophone), 2 déc. 2024, 2022/AR/262, para 37.
[335] Cour d'appel de Bruxelles (francophone), 2 déc. 2024, 2022/AR/262, para 55.

Belgium. It offered an alternative means to address ongoing racial discrimination as a continuous act of colonialism. In the case of Belgium, the WGPAD emphasised that Belgium must acknowledge its colonial past to tackle modern forms of racism.[336] The WGPAD report emphasised that 'the root causes of present-day human rights violations lie in a lack of recognition of the true scope of the violence and injustice of colonisation. As a result, public discourse does not reflect a nuanced understanding of how institutions may drive systemic exclusion from education, employment and opportunity.'[337]

139. In its first findings, the WGPAD encouraged Belgium to confront its colonial past; apologise for the atrocities committed during the colonial period; and set up a truth commission.[338] The ICERD Committee has since highlighted the significance of establishing truth commissions through various international human rights treaties to confront and recognise the ongoing racial discrimination rooted in colonialism and the transatlantic slave trade.[339] The Special Rapporteur for the promotion of truth, justice, reparation, and guarantees of non-recurrence remarked that '[m]emorialization takes many forms and should be a tool for fostering recognition of otherness, the consideration of all persons as rights holders and the promotion of peace, justice and social coexistence.'[340] Hackmack and Imani argue that international law, as it currently stands, is overly-individualistic, tending to minimise the impacts of racism to personal anecdotes rather than addressing the structural consequences of colonialism; instead, victim-centred tribunals,

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336 Jérôme de Hemptinne, 'Historic Ruling: Brussels Court of Appeal Declares Colonial Forced Removal and Segregation of Métis Children Crimes Against Humanity' (2025) *Journal of International Criminal Justice* mqaf009 https://doi.org/10.1093/jicj/mqaf009 accessed 20 October 2025.

337 United Nations Working Group of Experts on People of African Descent, *Report of the Working Group of Experts on People of African Descent on its Mission to Belgium* (26 August 2019) UN Doc A/HRC/42/59/Add.1, para 2.

338 United Nations Working Group of Experts on People of African Descent, *Report of the Working Group of Experts on People of African Descent on its Mission to Belgium* (26 August 2019) UN Doc A/HRC/42/59/Add.1.

339 United Nations Office of the High Commissioner for Human Rights, *'Invitation for feedback: First Draft General Recommendation on Reparations for the Transatlantic Trade in Africans for Chattel Slavery and the Ensuing and Continuing Harms Inflicted on People of African Descent'* (OHCHR, 2025), para 84.

340 Fabián Salvioli, Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice (Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation & Guarantees of Non-Recurrence, UN Doc A/HRC/45/45, 9 July 2020)para 32.

such as truth commissions, must be established to appreciate the nature and scope of violence perpetrated.[341] However, caution is needed as 'the logic of marginalisation, exclusion, negative stereotyping, dehumanisation, and denialism corrupts these instruments, making their use perversely contrary to their original purpose.'[342]

140. This WGPAD report concludes that the ICERD's jurisprudence on applying current norms to past acts remains contested and evolving. While the ICERD can interpret obligations, it lacks binding enforcement authority, and states often impose admissibility barriers, such as the requirement to exhaust domestic remedies.

c) Bi-lateral treaties

141. Italy and Libya concluded a bilateral which recognised the retrospective application of international law and provided for compensation of 5 billion dollars over the next 20 years for the colonisation of Libya from 1911 to 1943.[343] This route to reparations, however, requires the will of former colonial powers.

142. Moreover, such treaties may perpetuate neocolonialism and indirect control. For example, Italy's payments to Libya are not directly transferred to the Libyan government but were instead arranged through a development plan aimed at improving Libya's infrastructure. In return, Libya is expected to make efforts to combat "illegal migration". The very reciprocal relationship itself contradicts the purpose of reparations for colonial harms;

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[341] Judith Hackmack and Sarah Imani, 'Reparations for European Colonialism: From the Movement to the Law and Back?' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2023: Global Law, Politics, Ethics, Justice* (Oxford University Press 2024 (online edn, Oxford Academic, 5 Nov 2024)) https://doi.org/10.1093/oso/9780197795392.003.0010 accessed 20 October 2025.

[342] Robert Mark Simpson, 'Dignity, Harm, and Hate Speech' (2013) 32 *Law and Philosophy* 701, 708. See Committee on the Elimination of Racial Discrimination, *General Recommendation No 35: Combating Racist Hate Speech* (26 September 2013) UN Doc CERD/C/GC/35, para 32.

[343] *Treaty of Friendship, Partnership and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya* (signed 30 August 2008, entered into force 2 March 2009) para 146–147.

however, illicit routes of migration have mainly arisen as a means to escape the modern consequences of colonialism, which are rooted in the exploitation of natural resources.[344]

[344] E Tendayi Achiume, 'Decolonizing Migration' (2019) 128 *Yale Law Journal* 2192.

6. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

QUESTION 1.1: What are the limitations on international or inter-state liability posed by the inter-temporal principle as applied to reparations for colonial and other past atrocities, including the application of the 'evolution of the law' element of the principle?

a) Recognition and Application of the Inter-temporal Rule

143. The inter-temporal principle has been a primary defence for states seeking to avoid accountability for historical wrongs. One notable context, explored in detail here, is in the case of comfort women — women and girls whom the Imperial Japanese Armed Forces forced into sexual slavery in occupied countries and territories before and during Second World War.

144. In its periodic reviews, Japan has consistently argued that the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which entered into force in 1981, cannot be applied retrospectively to events that occurred during Second World War.[345] This is a direct application of the first limb of the inter-temporal principle, asserting that Japan's obligations under the Convention did not exist at the time of the atrocities and therefore cannot be the basis for a legal claim today. Japan has also maintained that all claims were settled by post-war treaties, such as the 1951 San Francisco Peace Treaty and the 2015 agreement with the Republic of Korea.[346]

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[345] Committee on the Elimination of Discrimination against Women, 'Committee on the Elimination of Discrimination against Women Examines Reports of Japan' (16 February 2016) https://www.ohchr.org/en/press-releases/2016/02/committee-elimination-discrimination-against-women-examines-reports-japan accessed 12 October 2025.

[346] Ministry of Foreign Affairs of Japan, 'Japan's Efforts on the Issue of Comfort Women' https://www.mofa.go.jp/policy/postwar/page22e_000883.html accessed 11 October 2025.

145. In the *Alonzo et al. v Philippines* communication before the CEDAW Committee, the Philippine government argued that the case should be inadmissible for lack of temporal jurisdiction.[347] The basis for this argument was that the atrocities occurred in the 1940s, before the Philippines ratified CEDAW's Optional Protocol in 2004 which allows for individual complaints. This position sought to use the inter-temporal principle to block the Committee's jurisdiction over the matter entirely.

146. The CEDAW Committee concluded that the claim was admissible. It's treatment of inter-temporality, in the form of temporal jurisdiction, was swift:[348]

> The Committee … takes note of the authors' argument that the subject matter of the communication [i.e., that the discrimination against them is continuing in nature] is focused not on the wartime sexual slavery system maintained by the Japanese Imperial Army but on the continuous discrimination against the authors by the State party. In that regard, the Committee observes that, since 2003, when the Optional Protocol entered into force for the State party, it has had the obligation to provide recognition and effective and adequate remedies and to promptly attribute redress for the continuous discrimination suffered by the authors.

147. These examples demonstrate how the inter-temporal principle might be used as a shield, preventing both perpetrator states and victims' states of nationality from being held accountable for historical gender-based violence under modern human rights treaties.

b) Inter-temporality and the 'Evolution of the Law'

148. While the inter-temporal principle is well-established, its application is not absolute. Its limitations are becoming increasingly apparent through the evolutive interpretation of

[347] *Natalia M Alonzo and others v Philippines* (Communication No 155/2020) UN Doc CEDAW/C/84/D/155/2020 para 6.14.
[348] *Natalia M Alonzo and others v Philippines* (Communication No 155/2020) UN Doc CEDAW/C/84/D/155/2020, para 8.5.

international law by treaty bodies and domestic courts, particularly through the concept of 'evolution of the law'.

149. In November 2023, the Seoul High Court ruled in favour of comfort women survivors against the Japanese government,[349] employing the 'evolution of the law' principle to overcome traditional legal barriers like state immunity.

150. The Seoul High Court conducted a survey of international and domestic legal practice to conclude that customary international law has evolved from a doctrine of absolute immunity to one of restrictive immunity. It found a clear trend in international conventions (such as the UN Convention on Jurisdictional Immunities of States) and the domestic laws of numerous countries that deny state immunity for torts causing personal injury that occur within the territory of the forum state.[350] The Seoul High Court concluded that this exception applies regardless of whether the act is classified as a sovereign or commercial act.[351]

151. This reasoning shows that, while the original act is a historical event, the procedural rules governing access to justice (such as state immunity) are not frozen in time. The Seoul High Court's decision demonstrates that a domestic court can apply a modern, evolved understanding of customary international law to establish jurisdiction over a historical wrong. This evolutive approach suggests that the inter-temporal principle, while applicable to the substantive wrong, does not necessarily bar the application of evolved procedural norms that open pathways to justice. This dynamic approach suggests that domestic courts may apply evolved interpretations of customary law, which do not bind the ICJ.

152. The court also distinguished its ruling from the 2012 ICJ judgment in *Jurisdictional Immunities of the State*.[352] In that case, the ICJ upheld Germany's immunity for atrocities committed by

[349] *Compensation for Damage (Others)* Case No 2021Na2017165 (Seoul High Court, 33rd Civil Chamber).
[350] *Compensation for Damage (Others)* Case No 2021Na2017165 (Seoul High Court, 33rd Civil Chamber), [27].
[351] *Compensation for Damage (Others)* Case No 2021Na2017165 (Seoul High Court, 33rd Civil Chamber), [28].
[352] *(Germany v Italy: Greece intervening)* [2012] ICJ Rep 99.

its armed forces in Italy during World War II. The Seoul High Court, however, noted that the ICJ's ruling was narrowly confined to acts committed 'in the course of conducting an armed conflict'.[353] The Seoul High Court then determined that, while the Japanese Empire was at war in China and Southeast Asia, the Korean Peninsula itself was not a site of active armed conflict in the sense intended by the ICJ. Therefore, the systematic abduction of women from Korea, an illegally occupied territory, did not fall within the factual scenario addressed by the ICJ, rendering its precedent inapplicable.[354] This distinction is crucial, as the Seoul High Court was adjudicating on the claims of individuals, a domain increasingly governed by human rights principles. This contrasts with the ICJ's traditional focus on inter-*state* responsibility, a difference in scope that is also central to bodies like the CEDAW Committee, which deals with state obligations to individuals rather than inter-state disputes.

QUESTION 1.2: What is the status of this law?

153. The ambiguity of the law is starkly illustrated by the sequence of rulings in South Korean courts. In 2021, two different chambers of the Seoul Central District Court issued contradictory judgments on the comfort women issue. One chamber rejected Japan's claim to state immunity, finding that the atrocities were a crime against humanity, while another chamber dismissed a similar case, upholding state immunity and citing concerns about diplomatic conflict.[355] This judicial divergence within the same court highlights the profound lack of settled law on the matter.

[353] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99, [78].
[354] *Compensation for Damage (Others)* Case No 2021Na2017165 (Seoul High Court, 33rd Civil Chamber), [30]-[31].
[355] Daniel Mandell, Another Blow to the Sovereign Shield: South Korean Court Rejects Japan's Sovereign Immunity Defense in "Comfort Women" Case' (ASIL, 28 February 2024) https://www.asil.org/insights/volume/28/issue/5 accessed 11 October 2025.

154. The law is being actively developed through what can be described as a transnational 'judicial dialogue'. National courts are not simply passive recipients of international law. They are active participants in interpreting, shaping, and challenging its content.[356] The Seoul High Court's innovative 2023 ruling, for instance, was inspired by the Italian Constitutional Court's defiance of the 2012 ICJ judgment in the *Jurisdictional Immunities of the State* case. The ICJ upheld Germany's immunity, but the Italian court pushed back, creating a legal opening.[357] Similarly, the Seoul High Court crafted a novel legal distinction to arrive at a different conclusion. This dialogue explicitly shows how human rights and domestic courts are shaping the evolution of international law from the bottom up.

155. This model of legal development is now being exported. The recent lawsuit filed in April 2024 by the families of 18 survivors in Shanxi, China, was directly inspired by the legal victories in South Korea.[358] This demonstrates that a progressive ruling in one national jurisdiction can create a powerful precedent, empowering victims and lawyers elsewhere. This process might create a ripple effect that can gradually shift the global consensus on fundamental principles like state immunity.[359]

QUESTION 2: What other principles or mechanisms of international law (if any) have been contemplated and/or applied as exceptions to the principle of inter-temporal law in the context of colonial and other past atrocities?

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[356] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) ch 3.

[357] Giuseppe Cataldi, 'The Implementation of the ICJ's Decision in the Jurisdictional Immunities of the State case in the Italian Domestic Order: What Balance should be made between Fundamental Human Rights and International Obligations?' https://esil-sedi.eu/fr/the-implementation-of-germany-v-italy/ accessed 11 October 2025; Corte Costituzionale, Sentenza 238/2014, ECLI:IT:COST:2014:238.

[358] Ming Gao, 'Message from behind China's High-Profile "Comfort Women" Lawsuit against Tokyo' (Lowy Institute, 30 May 2024) https://www.lowyinstitute.org/the-interpreter/message-behind-china-s-high-profile-comfort-women-lawsuit-against-tokyo accessed 11 October 2025.

[359] See for example, Anthea Roberts, *Is International Law International?* (Oxford University Press 2017).

a) The 'Continuing Violation' Doctrine

156. The CEDAW Committee's 2023 decision in *Alonzo et al. v Philippines* provides a clear application of the doctrine of continuing violations. The case was brought by the Malaya Lolas ('Free Grandmothers'), Filipina survivors of the Japanese military's sexual slavery system, against their own government for its failure to secure reparations on their behalf.

157. The Philippines argued that the case was inadmissible for lack of temporal jurisdiction because the atrocities occurred before it ratified CEDAW's Optional Protocol. As described above, the CEDAW Committee rejected this argument on the basis of it's framing of the nature of the violation. It reasoned that the violation being claimed was not the original act of sexual slavery committed by Japan in the 1940s, but the Philippines' continuous and ongoing failure to provide reparations, social support, and official recognition to the survivors.[360] This failure to act, the Committee found, constitutes a persisting form of gender-based discrimination that has continued into the present day, long after the Philippines' ratification of the Optional Protocol. This ongoing omission by the state is a violation in and of itself, thus falling squarely within the Committee's temporal jurisdiction.

158. On the merits, the Committee found that this ongoing failure constituted discrimination, noting that the Philippine state provides esteemed treatment and numerous benefits to war veterans who are predominantly male, while the female survivors of sexual slavery received no such support or remedy. This differential treatment devalued the suffering of women survivors and was a clear violation of the state's obligations under CEDAW.[361]

[360] *Natalia M Alonzo and others v Philippines* (Communication No 155/2020) UN Doc CEDAW/C/84/D/155/2020, para 8.5.
[361] *Natalia M Alonzo and others v Philippines* (Communication No 155/2020) UN Doc CEDAW/C/84/D/155/2020, para 9.2.

159. This mechanism bypassed the inter-temporal principle because it shifts the legal focus from a past, time-barred event to a present and ongoing state failure. It establishes that while a peace treaty may settle inter-*state* claims, it cannot extinguish a state's separate and *independent* human rights obligations towards its own people.

b) Pre-existing customary international law

160. Another mechanism is to ground claims in customary international law that existed at the time of the atrocity. The 2023 Seoul High Court judgment used this approach by noting that Japan's actions violated multiple international treaties that it had ratified at the time, as well as its own domestic penal code.[362] These included the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907), which required respect for 'family honor and rights'; the 1921 International Convention for the Suppression of the Traffic in Women and Children and the 1925 International Convention for the Suppression of the White Slave Traffic, which criminalized the abduction and trafficking of women and girls for immoral purposes; the 1926 Slavery Convention; and the 1930 ILO Forced Labour Convention, which Japan ratified in 1932.

161. By referencing these instruments, the court underscored that the comfort women system was illegal even under the international legal standards of the 1930s and 1940s. This approach bypasses the inter-temporal problem associated with modern human rights treaties by anchoring the illegality of the act in contemporaneous law.

c) Application to broader colonial and historical atrocities

162. Through its General Recommendation No. 39 and its 2015 inquiry concerning Canada, the CEDAW Committee has explicitly linked the historical legacies of colonialism to the

[362] *Compensation for Damage (Others)* Case No 2021Na2017165 (Seoul High Court, 33rd Civil Chamber), [33]-[34].

current, systemic discrimination faced by Indigenous women.[363] The CEDAW Committee's inquiry found that Canada's failure to effectively address the high rates of murder and disappearance of Indigenous women constituted a 'grave violation' of their rights, with roots traced back to the 'legacy of the colonial period'.[364] The CEDAW Committee's work explicitly frames these contemporary issues as a direct continuation of Canada's colonial history, thereby creating an obligation for reparations for these colonial harms. This conceptualises the entire structure of the post-colonial state as a continuing manifestation of historical discrimination, allowing for claims that point toward transformative remedies aimed at decolonisation and the restoration of collective rights.

163. While CEDAW lacks a specific recommendation on slavery, its principles on intersectional discrimination provide a powerful framework. In its Concluding Observations on countries like Colombia and Brazil, the Committee has expressed concern about the 'multiple, intersecting forms of discrimination' faced by women of African descent, linking their situation to structural racism rooted in historical legacies.[365] By linking the specific, compounded disadvantages faced by Afro-descendant women today as a continuation of the interaction of historical and continuing injustices (such as slavery, colonialism and sexism), a strong case can be made under the CEDAW framework for targeted, gender-sensitive reparations for these colonial harms.

164. In the context of gender-based violence, the CEDAW Committee has emphasised that reparations should include diverse measures such as monetary compensation, provision of legal, social and health services for complete recovery, satisfaction and guarantees of non-

[363] Committee on the Elimination of Discrimination against Women, 'General recommendation No. 39 (2022) on the rights of Indigenous women and girls' (26 October 2022) UN Doc CEDAW/C/GC/39; 'Report of the inquiry concerning Canada' (30 March 2015) UN Doc CEDAW/C/OP.8/CAN/1.

[364] Committee on the Elimination of Discrimination against Women, 'Report of the inquiry concerning Canada' (30 March 2015) UN Doc CEDAW/C/OP.8/CAN/1, paras 214 and 217.

[365] Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined eighth and ninth periodic reports of Brazil' (6 June 2024) UN Doc CEDAW/C/BRA/CO/8-9; Committee on the Elimination of Discrimination against Women, 'Concluding observations on the 9th periodic report of Colombia' (14 March 2019) UN Doc CEDAW/C/COL/CO/9.

repetition. Such reparations should be adequate, promptly attributed, holistic and proportionate to the gravity of the harm suffered.[366] Furthermore, states should establish specific funds or budget allocations for reparations to victims of gender-based violence and design transformative reparations programmes that address underlying discrimination.[367]

165. Another significant legacy of colonialism is the persistence of discriminatory legal codes inherited from former colonial powers. Many post-independence states retained legal frameworks that included gender-biased provisions. For example, laws in some Francophone African countries restricting women's employment or requiring a husband's permission for a married woman to open a bank account mirror ordinances from the former French colonial administration.[368] Similarly, remnants of the 1960 Spanish Civil Code in Equatorial Guinea still require a husband's permission for a woman to sign a contract.[369] These inherited laws perpetuate economic disempowerment and constitute a continuing form of discrimination that falls under the purview of CEDAW, particularly Articles 11 (employment), 13 (economic and social life), and 15 (equality before the law). Plural legal systems, where customary or religious laws operate alongside state law, might further entrench these historical inequalities, making family law a site of particular

[366] Committee on the Elimination of Discrimination against Women, General Recommendation No. 33 on women's access to justice, 3 August 2015, CEDAW/C/GC/33, para 19(b).

[367] Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 26 July 2017, CEDAW/C/GC/35, para 33.

[368] Katharine M Christopherson and others, 'Tackling Legal Impediments to Women's Economic Empowerment' (IMF Working Paper No 2022/037, 18 February 2022) https://www.elibrary.imf.org/view/journals/001/2022/037/article-A001-en.xml#:~:text=Legal%20impediments%20related%20to%20property%20law%20appear,norms%20can%20further%20interfere%20with%20property%20rights, accessed 26 October 2025.

[369] Katharine M Christopherson and others, 'Tackling Legal Impediments to Women's Economic Empowerment' (IMF Working Paper No 2022/037, 18 February 2022) https://www.elibrary.imf.org/view/journals/001/2022/037/article-A001-en.xml#:~:text=Legal%20impediments%20related%20to%20property%20law%20appear,norms%20can%20further%20interfere%20with%20property%20rights, accessed 26 October 2025.

resistance to reform as evidenced by the high number of state reservations to Article 16 of CEDAW concerning equality in marriage and family relations.[370]

166. Gender discrimination in nationality laws is a clear example of a continuing colonial legacy. Under Article 9(2) of CEDAW, States Parties must grant women equal rights with men with respect to the nationality of their children. However, discriminatory nationality laws, under which women cannot pass their nationality to their children on equal terms with men, were widely exported by colonial powers such as Britain and France and were retained by many states after independence.[371] This ongoing discrimination creates a risk of statelessness for children, limits their access to education and healthcare, and violates women's fundamental rights. The CEDAW Committee, along with other human rights mechanisms like the Universal Periodic Review, has consistently addressed this issue, issuing specific and detailed recommendations for legislative reform to bring national laws in line with the Convention. For instance, the CEDAW Committee urged Algeria in 2005 to expedite the revision of its Code of Algerian Nationality to align with Article 9, following which Algeria amended its law allowing women to transmit nationality to their children.[372] Conversely, Togo is among the countries that still maintain discriminatory provisions preventing women from passing their nationality to their children or foreign spouses, despite CEDAW Committee recommendations in 2012 urging amendment of its Nationality Code.[373]

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[370] *Convention on the Elimination of All Forms of Discrimination against Women* (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, see declarations and reservations to art 16, available at United Nations Treaty Collection https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&clang=_en accessed 26 October 2025.

[371] Institute on Statelessness and Inclusion, 'Every Mother's Right Every Child's Right' (Factsheet) https://files.institutesi.org/gender_factsheet.pdf accessed 26 October 2025.

[372] Committee on the Elimination of Discrimination against Women, *Concluding comments: Algeria* UN Doc CEDAW/C/DZA/CC/2 (15 February 2005) paras 9, 26. See also UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Algeria* UN Doc A/HRC/8/29 (23 May 2008) para 9.

[373] Committee on the Elimination of Discrimination against Women, *Concluding observations on the sixth and seventh periodic reports of Togo* UN Doc CEDAW/C/TGO/CO/6-7 (8 November 2012) para 29.

END