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# The Injustices of Reparations

*By Antony Anghie**

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## I. Introduction

The campaign for reparations for colonial violence, slavery, and exploitation is now becoming a global phenomenon, as claims are being pursued in different jurisdictions and international forums.[1] Each of these claims has its own specific legal character because of various factors including the forum in which it is brought, the applicable law, and the identity of the plaintiffs. Nevertheless, many reparations claims are based on appeals to international law, to developments in international human rights law and international criminal law, and specific prohibitions on slavery and genocide. It would appear intuitive that international law would provide remedies to the blatant injustices that are the subject of

* Professor of Law, S.J.Quinney School of Law, University of Utah, Salt Lake City, United States and National University of Singapore, Singapore. My thanks to Amiel Valdez for superb research assistance.

[1] *See* Tendayi Achiume, Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, UN Doc. A/74/321 (Aug. 21, 2019); *see also* Caribbean Community (CARICOM) Reparations Commission, at https://caricomreparations.org/caricom. For the ongoing efforts of the Herero and Nama to gain reparation, see Kate Connolly, *UN Representatives Criticise Germany Over Reparations for Colonial Crimes in Namibia*, Guardian (Apr. 28, 2023), *at* https://www.theguardian.com/global-development/2023/apr/28/un-representatives-criticise-germany-over-reparations-for-colonial-crimes-in-namibia. For general overviews of the different dimensions of reparations claims, see, e.g., Carsten Stahn, *Reckoning with Colonial Injustice: International Law as Culprit and as Remedy?*, 33 Leiden J. Int'l L. 823 (2020).

these claims. Slavery and exploitation have been denounced in the Durban Declaration[2] and genocide and crimes against humanity including apartheid and other such practices are listed in the statute of the International Criminal Court.[3] International law, however, has been largely a creation of the European powers; and historically, the law has facilitated rather than remedied colonial violence.[4] It is unsurprising then that many claims for reparations encounter some basic legal obstacles.[5] This is hardly coincidental. A legal system that is based on conquest will not readily permit an inquiry into its imperial origins, far less remedies for the injustices it permitted, indeed, mandated.

The concept of reparations, broadly, the duty to remedy a wrong is surely inherent to the idea of justice itself.[6] Unsurprisingly then, it is a controversial topic that has been extensively discussed and analyzed by historians, philosophers, political theorists, economists and others who have argued for different understandings of reparations and the claims that should be accepted and rejected.[7] For international lawyers, however, the crucial question is: which of the many versions of reparations is adopted in the current legal system and allows victims to pursue their claims with some prospect of success? It is the disparity between what appear to be compelling moral claims to reparations, and what the current international legal system allows for that drives much of the debate on reparations, and that animates communities seeking reparations. It is because of the strictures of the current system of reparations that scholars arguing for colonial reparations develop a wide-ranging jurisprudence that extends beyond a strictly positivist notion of the law to include natural law, equity, fairness and general principles.

This Article then seeks to explore two dimensions of this situation. The first dimension explores ways in which the arguments for colonial reparations can be advanced in the current, established legal system, which presents many difficulties to such claims. Principal among these is the question of inter-temporality, the argument that slavery and colonial exploitation were morally wrong, but not illegal at the time they were committed. I explore the ways in which the case brought by Nauru against Australia[8] in the International Court of Justice (ICJ), a claim essentially for reparations for colonial exploitation, was based on the

[2] United Nations, Durban Declaration and Programme of Action, *at* https://www.un.org/en/fight-racism/background/durban-declaration-and-programme-of-action.

[3] Rome Statute of the International Criminal Court, Arts. 6–7, *opened for signature* July 17, 1998, 2187 UNTS 90 (*entered into force* July 1, 2002) [hereinafter ICC Statute].

[4] As Tendayi Achiume puts it, "international legal doctrine has a longer history of justifying and enabling colonial domination than it does of guaranteeing equal rights to all human beings." Achiume, *supra* note 1, at 4–5.

[5] *See* Steven Ratner, *Reparations for Colonialism Beyond Legal Responsibility*, 119 AJIL 2 (2025) (in this issue). This raises the issue that Steven Ratner explores of whether international law is the best means to seek reparations.

[6] The term "reparations" is expansive, including not only financial compensation, but also restitution, rehabilitation, and guarantees of non-repetition. *See* Achiume, *supra* note 1, para. 37. For the argument linking reparations with *jus cogens*, see Dire Tladi, Jus Cogens *and Reparations: Can We Just End the Separation?*, 119 AJIL 2 (2025) (in this issue).

[7] *See, e.g.*, Richard M. Buxbaum, *A Legal History of International Reparations*, 23 BERK. J. INT'L L. 314 (2005); OLÚEFMI O. TÁÍWÒ, RECONSIDERING REPARATIONS (2022); COLONIALISM, SLAVERY, REPARATIONS AND TRADE: REMEDYING THE PAST? (Fernne Brennan & John Packer eds., 1st ed. 2013); ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (1st ed. 2000); REPARATIONS: INTERDISCIPLINARY INQUIRIES (Jon Miller & Rahul Kumar eds., 2007); Sinja Graf, *Law, Time, and (In)Justice After Empire: Germany's Objection to Colonial Reparations and the Chronopolitics of Deflection*, 17 INT'L THEORY 1 (2025).

[8] Certain Phosphate Lands in Nauru (Nauru v. Austl.), Judgment, 1992 ICJ Rep. 240 (June 26).

concept of trusteeship, the argument that colonial powers breached the trust responsibilities they owed to people placed under their protection, this in the hope of enriching the ongoing discussion on inter-temporality.

The established system of international law does not readily allow for colonial claims. Thus, the second part of this Article focuses on this framework, the established framework of international law, the decisive framework which colonial claims struggle to satisfy.[9] This is the law, broadly, of state responsibility.[10] It might seem that radical changes must be made to the existing law if colonial claims are to be countenanced as legal. In response, I argue that the current system of reparations is itself, in many respects, radical, and that this may be revealed by exploring a series of questions. How was state responsibility created? Whose interests, which actors, does this system serve? How does a particular vision of justice become legalized? And what might be learned by the nascent, emerging system of colonial reparations from a closer understanding of the existing system? My argument here is that the current system of reparations has itself developed through and relied strategically on a jurisprudence including natural law, general principles and equity. The question then is how an appreciation of this process of legal change that created the existing system may then be transferred to the jurisprudence regarding colonial claims.

In exploring these issues I argue that while claims for colonial reparations have focused on the existing framework, seeking to satisfy its requirements or calling for its amendment, little attention has been paid to the established system which has facilitated and created what I term the "Western" system of reparations. While the claims for reparations for colonial violence are met by numerous legal obstacles, the Western system of reparations is established, authoritative, functioning, and expanding with immense impact on peoples of the developing countries—and, increasingly, for people of the Global North as well. My claim, then, is that parallel to the campaign for colonial reparations, there exists, and has existed, an entire system of reparations that has been successfully established in international law as representing the governing framework.[11] This system of reparations has been so successful that it has become a major feature of global governance, and it has been hardly recognized, indeed, as being, precisely, a system of reparations even though as it developed, it was understood by the architects of that legal framework to be quite explicitly about the legal issue of reparations.[12] It is a system of reparations that, in modern times, was driven by developments in foreign investment law. The need to protect the rights of foreigners, aliens played a major role in the creation of the rules of state responsibility. I seek to explore how this system of rules came into existence, and what actors, politics, and competing interests drove its creation and equally important, imagined a world in which such a legal system was indispensable for global well-being.

[9] *See* Ratner, *supra* note 5.

[10] *See* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AJIL 833 (2002). On the integral relationship between colonial claims and the classic law of state responsibility, see Andreas Buser, *Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to Compensate Slavery and (Native) Genocide*, 77 HEIDELBERG J. INT'L L. 409 (2017).

[11] I have sketched this argument out in Antony Anghie, *Rethinking International Law: A TWAIL Retrospective*, 34 EUR. J. INT'L L. 7 (2023). *See id.* at 93–103.

[12] Here I follow Anne Orford who argues for the importance, of "seeing what is seen." *See* Anne Orford, *In Praise of Description*, 25 LEIDEN J. INT'L L. 609 (2012).

There are, then, two frameworks for reparations in play, one, the colonial claims for reparations is uncertain, nascent, doubted, and dismissed; the second is established, comprehensive, and operating with great effect and consequence. Indeed, it serves the function of delegitimizing the first framework, advocates for whom have to contend with the second framework, seeking to challenge, amend, expand, placate, and supplicate, the decisive demands of the established "liability" model. How then are we to understand the relationship between these two systems, not only jurisprudentially, but in their operations in the world? This is the broader question I consider. The essential point I make here is that the law of reparations is dynamic and continuously evolving; and that we cannot understand the role of reparations in the world, or more specifically, the role of international law in creating systems of reparations in the world, with all the distributional consequences that follow, without considering this dynamic. It is argued that allowing colonial reparations would not only cause jurisprudential incoherence, but social and political upheaval as endless claims will follow. This overlooks the social and political upheaval caused by the current system of reparations by which resources are transferred from poor countries to rich countries. It is the peoples in the Global South struggling to cope with poverty and environmental devastation and debt obligations that undermine health and welfare expenditure who are the major victims of this upheaval.

This Article proceeds then by exploring how trusteeship might add to the repertoire of legal principles that might be used to advance claims for colonial reparations. I draw upon the Nauru case, the jurisprudence relating to reparations, and its relationship to natural law principles.

The next part studies the emergence of what I have termed the "Western" system of reparations. This is based on the law of state responsibility. It may be seen as a continuation of earlier instances in which colonial powers extracted reparations from the colonized. Further, state responsibility was a principal means by which corporations could seek reparations, through an effective and strategic recourse to natural law principles that culminated in the current investor-state regime. I then suggest how our understanding of the international law of reparations and its effects on the world might be enriched by seeing these two dimensions of reparations and their relationship to each other and what these visions of reparations suggest about the legal imagination and its role in bringing about change in the international system.

## II. The Jurisprudence of Reparations: Trusteeship and the Issue of Retroactivity

Much of the current discussion on reparations is haunted by the tensions generated by the fact that while the moral and ethical case for reparations is compelling,[13] fidelity to the law—and we are all surely trained to internalize the noble goal of fidelity to the law—prevents the payment of reparations. It is notable that even scholars who conclude that international law does not support the claim for reparations argue that something has to be done, given the grave injustices driving the claims for reparations.[14]

[13] *See, e.g.*, Ta-Nehisi Coates, *The Case for Reparations*, Atlantic (2014); TÁíwò, *supra* note 7.
[14] *See, e.g.*, Buser, *supra* note 10.

The classic, and accepted law of reparations requires, simplifying considerably, a victim, a "person" whose rights have been violated, and a perpetrator, a state, that breached the law, thus incurring the responsibility to remedy the wrongdoing. This might be termed the "liability model" of reparations. Claim for colonial reparations are immediately confronted by the argument that such claims are retroactive and violate the principle of inter-temporality, that basically holds that an event must be assessed according to the law applicable at the time.[15] The authority for this proposition is found in the statement of Judge Huber in the *Island of Palmas Case*.[16] Huber stated that "a juridical fact [is] 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."[17] The second element of inter-temporality follows "[t]he 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 the law."[18]

Applying this principle, it would seem that colonial reparations cannot be legally sustained as colonial exploitation and violence were not illegal at the time these practices took place. Rather, it is only in recent times, with the developing law of human rights, international humanitarian law, the law of apartheid and other related areas of law, that such practices were made illegal. The principle of inter-temporal law has been recently explored by a large and critical literature that has revisited the issue of reparations with a new creativity and rigor.[19] One major response to the inter-temporal rule focuses on the ongoing effects of colonialism and how these should be assessed in the context of evolving international law. Another related line of argument developed by some scholars challenges the assumption that animates much of the literature on this topic, that Western international law, in all its Eurocentricity and racism entirely governs the claims for reparations and that however repugnant this international law was, its application and effects should be accepted. We cannot change the past. Against this view, scholars such as Karina Theurer, Mamadou Hébié,[20] and Matthias Goldmann, have argued that there is no reason to accept the Eurocentric view in of all these matters. Further, they have argued that even a Western international law did not always,

[15] *Id.*

[16] Island of Palmas Case (Neth., U.S.), PCA Case No. 1925-01, Final Award, 831, 845 (Apr. 4, 1928) [hereinafter Island of Palmas Case]; Philip C. Jessup, *The Palmas Island Arbitration*, 22 AJIL 735 (1928). The classic article on the topic is T. O. Elias, *The Doctrine of Intertemporal Law*, 74 AJIL 285 (1980). There is a large literature on the topic, see, e.g., Steven Wheatley, *Revisiting the Doctrine of Intertemporal Law*, 41 Oxford J. Legal Stud. 484 (2021). The Namibian claim for reparations arising from the genocide in what was German South-West Africa has generated an extensive literature on this specific issue. For an excellent overview, see Karina Theurer, *Minimum Legal Standards in Reparation Processes for Colonial Crimes: The Case of Namibia and Germany*, 24 Ger. L.J. 1146 (2023).

[17] *Island of Palmas Case*, *supra* note 16, at 845.

[18] *Id.* (a case that has so many repercussions for colonial issues was itself a product of colonial issues, although these are hardly explicitly recognized).

[19] *See, e.g.,* Theurer, *supra* note 16; Stahn, *supra* note 1; Andreas von Arnauld, *How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality*, 32 Eur. J. Int'l L. 401 (2021); Matthias Goldmann, *The Ambiguity of Colonial International Law: Three Approaches to the Namibian Genocide*, 37 Leiden J. Int'l L. 580 (2024); Nora Wittman, *Global Assessment of the Legality of Transatlantic Chattel Slavery*, *in* Reparations Under International Law for Enslavement of African Persons in the Americas and the Caribbean: Proceedings of the Symposium May 20–21, 2021, at 32–39 (Justine N. Stefanelli & ASIL eds., 2022).

[20] *See* Mamadou Hébié, *Transatlantic Chattel Slavery 1450–1550*, *in* Reparations Under International Law for Enslavement of African Persons in the Americas and the Caribbean, *supra* note 19, at 39–55. This symposium contains a number of important pieces on this topic.

invariably, and consistently legitimize slavery and colonialism.[21] Thus, Hébié has argued that chattel slavery was not legal under Western international law. Andreas von Arnauld has suggested that within the Western tradition itself there were significant divisions among Western international lawyers regarding the legality of colonial exploitation and the rights of native peoples. Goldmann has found extensive and remarkable evidence of the views of non-European societies, the leaders of Namibian tribes and their articulation of their laws in the encounter with German officials and settlers. What might be termed a "polycentric legal order" existed in relations between Germany and the Overherero. There is no compelling reason, after all, to accept the Western version of the initial relationship, and the dissonance arising when two legal systems are in play, must surely have significance for all that followed, including the conquest from which most colonial powers derived their legality.[22] In all these different ways, these scholars have attempted, broadly, to shape a jurisprudence that is less formalist; it is infused by historical research and draws upon equity and natural law rather than the strictly positivist law that is relied on by the liability model of reparations.

The case brought by Nauru against Australia might be used to expand and enrich this jurisprudence. Nauru is a small island in the Pacific that was extremely rich in the phosphates, a source of fertilizer. In the Nauru case, the government of Nauru brought action against Australia on the basis that Australia, together with New Zealand and the United Kingdom, had benefitted from the exploitation of Nauru's phosphates, and had devastated the environment of the country when mining out those phosphates. Australia, the United Kingdom, and New Zealand were granted a mandate over Nauru by the League of Nations. Australia administered the island as mandate, and then as a trust territory under the terms of the trusteeship provisions of the United Nations (UN) Charter. One of the principal arguments made by Nauru was that Australia—indeed the three partner governments—had violated the terms of the mandate, which established a trust relationship, one that required the partner governments to administer the island as a "sacred trust [for] civilisation," meaning that the administering entity had to exercise its powers to advance the "well-being and development" of the people under their control.[23] One of the essential elements of trusteeship is that dependent peoples must be protected, their well-being looked after. In this respect, trusteeship derived from humanitarian concerns, and could be viewed as a predecessor of modern human rights. Slavery and colonial exploitation would violate the principle of trusteeship.

Nauru argued that these violations continued in the UN period, in violation of the trusteeship obligations of the UN Charter, which outlined in far more detail than the Mandate system the obligations of the partner governments. Many of the trusteeship obligations would be recognizable as human rights principles. Indeed, Article 76 asserts that the basic objective of the trusteeship system, in accordance with the UN Charter, is to "encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[24] International human rights law may have emerged with the United Nations, after World War II, but it is arguable that many human

[21] Wittman, *supra* note 19.

[22] *See* Goldmann, *supra* note 19.

[23] Covenant of the League of Nations, Art. 22, June 28, 1919, 108 LNTS 188, *at* https://www.ungeneva.org/en/about/league-of-nations/covenant.

[24] UN Charter, Art. 76, *at* https://www.un.org/en/about-us/un-charter.

rights principles were included in the older principle of trusteeship. Further, the explicit purpose of a trust relationship, in its broadest sense, is to ensure that the trustee cannot benefit from the assets of the trust, and is accountable for any breaches of trust and that it should act as a guardian toward a ward.[25]

The concept of trusteeship was devised precisely to prevent the exploitation that had been such a driving element of colonial rule. The Nauru case was unique with respect to the problem of illegality, then, because the partner governments assumed and exercised control over Nauru by virtue of treaties creating the mandate and trusteeship systems. It is arguable however, that the principle of trusteeship was a principle of customary international law and indeed, more broadly, a general principle of international law that furthered justice.

The legal character of the trusteeship principles embodied in the mandate and trusteeship systems was further affirmed by language in the Covenant, which asserted that "securities for the performance of the trust should be embodied in this Covenant."[26] Aware of the many previous failures of attempts to protect the rights of natives, the League sought to create a system by which substantive trust obligations could be enforced through legal means. Thus, the mandate for Nauru contained the provision which enabled other member of the League of Nations to bring action against the mandatory power in the Permanent Court of International Justice in the event of a "dispute" relating to the "interpretation or application of the provisions of the mandate."[27] It is the corresponding clause of the mandate for South-West Africa that served as the basis for the monumental cases brought against South Africa by Ethiopia and Liberia. Notably, the colonized peoples could not bring action on their own behalf. They had to rely on members of the League to act in their interest. The cases have been a landmark in international jurisprudence for a number of reasons, and acquire an ever-changing significance, as it represents the first major effort of developing countries to use the resources of international law to bring about decolonization, to hold the mandate system to its promise of protecting the rights of dependent peoples. The violations of human dignity suffered by the peoples of South-West Africa, that is, Namibia, were another instance of the sorts of indignities and violence that the trusteeship agreement sought to protect against.[28]

### *A. Trusteeship in International Law*

The principle of trusteeship had a long history that arose with and applied even during the colonial enterprise and thus may be used to overcome the inter-temporal argument. It is arguable that the principle of trusteeship had been an essential and accepted principle of international law since its modern beginnings. Certainly, the architects of the mandate system considered this history of trusteeship when creating the institution.[29] Inspiration was

[25] *See* QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 11 (1930).

[26] *See* Covenant of the League of Nations, *supra* note 23, Art. 22(1). For a detailed account, see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16, paras. 47–49 (June 21).

[27] Mandate for Nauru, Art. 7 (Dec. 17, 1920), *at* https://tile.loc.gov/storage-services/service/gdc/gdclccn/22/00/42/03/22004203/22004203.pdf.

[28] For instance, Ethiopia and Liberia focused on the apartheid system. *See* South West Africa Cases (Eth. v. S. Afr.; Liberia v. S. Afr.), Preliminary Objections, Judgment, 1962 ICJ Rep. 319 (Dec. 21).

[29] *See* WRIGHT, *supra* note 25, at 3–15.

provided by Francisco de Vitoria, in the lectures he delivered in the 1530s, which are considered among the very first works of modern international law. Vitoria, when considering the legal grounds on which the Spanish could govern the Indians, the Indigenous peoples of the Americas, presented a view that "[i]t might therefore be argued that for their own benefit the princes of Spain might take over their administration, and set up urban officers and governors on their behalf, or even give them new masters, so long as this could be proved to be in their interest."[30] Vitoria states of this argument, "I myself do not dare either to affirm or condemn it out of hand."[31] His hesitance persists but he reiterates that Spanish rule might be justified "if everything is done *for the benefit and good of the barbarians, and not merely for the profit of the Spaniards.* But[,] it is in this latter restriction that the whole pitfall to souls and salvation is found to lie."[32] Several other Spanish clerics and scholars, such as Palacios Rubios and, famously, Las Casas, had written in defense of the Indians.[33]

In his study of the principle of trusteeship, Christopher Weeramantry points to the variety of thinkers and legal systems that promoted the principle of trusteeship as a way of protecting human dignity of dependent peoples. Edmund Burke, in his famous attack on Warren Hastings, for his exploitation of India, accused him of breaching this trust, and indeed, in his opening speech of indictment, used the term, "sacred trust," the very term that was to later appear in Article 22 of the League of Nations, which referred to the "sacred trust of civilization."[34] The concept of a trust relationship, further, was to be found in the United States relationship with Native Americans. Chief Justice Marshall stated that the Native Americans "are in a state of pupillage; their relation to the United States resembles that of a ward to his guardian."[35] British legislation in many colonies placed restrictions on the alienation of native lands in order to prevent them from being exploited by private land traders.[36] The roots of this system too could be traced back to the idea of trusteeship. In the sphere of international law itself, the idea of trusteeship was embodied for instance in Article 6 of the Treaty of Berlin which grandiosely and ironically declared in part that "[a]ll the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being."[37] All the great powers of Europe at the time were signatories to this Treaty.

More generally, the institution of trusteeship was well-established in private law, in the Roman law that so powerfully influenced international law. The broad ideas of guardianship

[30] Francisco de Vitoria, *On the American Indians*, *in* FRANCISCO DE VITORIA, VITORIA: POLITICAL WRITINGS AT 290, Question 3, Art. 8, para. 18 (Anthony Pagden & Jeremy Lawrance eds., 1st ed. 1991).

[31] *Id.*

[32] *Id.* at 291 (emphasis in original).

[33] *See* CHRISTOPHER WEERAMANTRY, NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP 78 (1992).

[34] *Id.* at 80.

[35] *Id.* at 82. Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1, 17 (1831); the Spanish origins of the U.S. law is studied in Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 17–18 (1942).

[36] WEERAMANTRY, *supra* note 33, at 83.

[37] General Act of the Berlin Conference on West Africa, Art. 6, Feb. 26, 1885.

or wardship were developed to protect minors and the infirm;[38] and this idea was the explicit basis of Vitoria's argument that the Indians could be considered wards of the Spanish, as the Indians were likened to children[39] in need of protection. Vitoria's words serve as the foundation of the argument made by eminent international lawyers such as Quincy Wright, in his masterly work on the mandate system, that trusteeship over dependent peoples had always been a governing principle of international law.[40] Other scholars such as Duncan Hall claimed that the ideas of the sacred trust and trusteeship emerged from early humanitarian concerns for native peoples—this is a reference to the Spanish writers—and further, "as a guiding principle of government policy, with unbroken historical continuity up to the present day, it dates from British government proclamations and parliamentary discussions in the eighteenth century, including those relating to the slave trade."[41] Crucially, Hall points to consistency, state practice entrenched in parliamentary procedures and a principle that encompasses the slave trade. Hall demonstrates that this principle animated a number of significant legal instruments including the British Royal Proclamation of 1763 following the Seven Years War, which treated the lands the British acquired from France as being held in trust intended to protect the "several Nations or Tribes of Indians."[42] Trusteeship, as mentioned earlier, was central to Burke's indictment of Warren Hastings for all his depredations in India. Importantly, Burke proclaimed: "I impeach him [Hastings] in the name of the people of India."[43] And further, pointing to the enduring natural law roots of trusteeship, he said: "I impeach him in the name of human nature itself."[44] He argued that what is being tried is "the cause of Asia in the presence of Europe."[45] Burke, in other words, viewed trusteeship as a universal principle, and one that served as a foundation for legal proceedings.[46] The trust, then, was a general principle of all legal systems; and a system drawing upon "private law analogies" appeared to have readily assimilated this principle into international law itself.

The legal and institutional structure of trusteeship was evident in colonial legislation, which provided in various forms for remedies.[47] The principle of trusteeship, its substance, its institutional and legal forms, took on this character in the Anglo-Saxon world, influencing British colonial policy, as well as the approach of the United States to the Native Americans. It is likely, however, that the same ideas informed French and German thinkers and colonial

[38] For a detailed and expert comparative study, see Certain Phosphate Lands in Nauru (Nauru v. Austl.), Memorial of the Republic of Nauru, Appendix 3 (ICJ Apr. 1990), *at* https://www.icj-cij.org/sites/default/files/case-related/80/6655.pdf.

[39] Vitoria, *supra* note 30, at 291.

[40] WRIGHT, *supra* note 25, at 3–23 (gives an overview based on the writings of scholars, colonial policies, and cases in national systems such as the United States).

[41] H. DUNCAN HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP 97 (1948).

[42] *Id.* at 98.

[43] *Id.* at 99.

[44] *Id.*

[45] *Id.*

[46] For the complications of Burke's application of trusteeship to slavery in the West Indies, however, see Parvathi Menon, *Edmund Burke and the Ambivalence of Protection for Slaves: Between Humanity and Control*, 22 J. HIST. INT'L L. REV. 246 (2020).

[47] *See* ALPHEUS HENRY SNOW, THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS, INCLUDING A COLLECTION OF AUTHORITIES AND DOCUMENTS (1918); SALIHA BELMESSOUS, NATIVE CLAIMS: INDIGENOUS LAW AGAINST EMPIRE, 1500–1920 (2011).

policy. German mining legislation, for instance, offered significant protection for native populations such as the Nauruans.[48] As such, the principle of trusteeship might be added to the jurisprudence being developed in different ways by scholars such as Hébié, Wittman, von Arnauld, Theurer, and Goldmann. A strong case can be made to suggest that this was a pan-European concept of customary international law. After all, we see even in this brief survey how an idea that had its origins in Roman private law, adopted and extended by Spanish jurists, incorporated into international treaty law, domestic legislation, and indeed, expressed even for instance in the Japanese-Korea treaty leading to the annexation of Korea, the Berlin Treaty of 1885 all suggest a binding obligation. It is also arguable that trusteeship is a general principle of law, and as such, a valid source of law by virtue of Article 38(1)c of the Statute of the ICJ.[49]

### *B. The Contemporary Relevance of Trusteeship*

I have argued that the principle of trusteeship included principles that would later be refined and clarified in the law of human rights. Many of these principles are relevant to current reparations claims. The CARICOM campaign for reparations includes at Point 5 an "Assistance in Remedying the Public Health Crisis" and at Point 6, "Education Programmes." A common theme in each of these points is that colonial rule driven by exploitation, failed to provide proper educational and health care and that the consequences are still being felt by peoples in the Caribbean and the governments trying to address these ongoing crises. It is arguable that the colonial governments failed, in these very specific respects, to discharge the rights of the Caribbean peoples by advancing and promoting their progress toward self-government. Article 73 of the UN Charter, which deals with Non-self Governing Territories, incorporates the concept of trusteeship, referring again to a "sacred trust." Most significantly, that same article refers to the "well-being of the inhabitants of these territories" and specifically requires colonial states to "ensure" the "political, economic, social, and educational advancement" of the peoples.[50] "People"—even colonized people—have personality under international law. They are explicitly provided protection by the UN Charter itself. And the Nauru case holds in effect that when that protection is not provided, those "people," upon becoming sovereign states, may take action in the international realm for a violation of international law. Many questions, about causality, the passage of time, and so on remain. But an argument can be made, based on trusteeship, and the provisions of the UN Charter which track the protections initially connected with trusteeship, to a failure to provide proper health and educational systems.[51] What this also indicates is that at least some of the claims made by CARICOM are based on existing law, rather than the larger

[48] On the German law applicable to Nauru and the protections it offered to the people of Nauru, see WEERAMANTRY, *supra* note 33, at 180–200, dealing with the German law applicable to its protectorates, the *Schutzgebietegesetz*, of 1900.

[49] *See* Memorial of the Republic of Nauru, *supra* note 38. For an outstanding study of Nauru in a broader colonial and historical context, see CAIT STORR, INTERNATIONAL STATUS IN THE SHADOW OF EMPIRE: NAURU AND HISTORIES OF INTERNATIONAL LAW (2020).

[50] UN Charter, *supra* note 24, Art. 73(a). Article 76, which has similar language, deals with Trust Territories.

[51] The Trusteeship Council inquired into issues such as educational advancement in relation to Nauru. *See* Antony Anghie, *The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445, 466–68 (1993).

question of the legality of slavery. The inter-temporal problem does not arise in such a stark form.

### *C. Retroactivity and Nuremburg*

The principle of trusteeship offers one solution to the problem of retroactivity as do the works of scholars discussed above, such as Hébié, von Arnauld, and Theurer. However, as scholars and campaigners have pointed out, the problem of retroactivity has been raised and addressed in many other cases. Retroactivity was an issue squarely confronting the prosecutors at Nuremburg, the basic argument being that the accused were on trial for actions, such as "*[c]rimes against humanity*,"[52] that were not illegal under international law at the relevant time. The defendants alleged that the principle of *nullum crimen sine lege* was being violated. The Tribunal responded vigorously to these arguments, asserting that the "*ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field."[53] The Tribunal in *Alstotter* basically suggested that international law was comparable to the common law, and that "to apply the ex post facto principle to judicial decisions of common international law would have been to strangle that law at birth."[54] Further, the Tribunal resorted to a version of natural law in reaching its decision, positivist international law having been proved to be so tragically deficient and inadequate to deal with atrocities committed by the Nazis. The Tribunal states that "in the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation on sovereignty, but is in general a principle of justice."[55] If justice is the desired goal, then it is just to take actions against the Nazis when they "persecuted and murdered countless Jews and political opponents in Germany," as those Nazis "knew that what they were doing was wrong."[56] Makua wa Mutua has explored in detail the ramifications of the Nuremburg approach and how it provides support for claims for reparations. As he argues, "Nuremberg is a great example of a constitutional moment in which a society realizes that certain abuses, though not criminalized, are so inimical to morality and decency that leaving them unpunished sets an untenable precedent."[57] Equally importantly, it was precisely the principle of "crimes against humanity" that prevailed against the charge of retroactivity in Nuremberg and colonial crimes must surely fall within this same category, a point made in the Durban Declaration.

[52] *See* Charter of the International Military Tribunal, United Kingdom of Great Britain and Northern Ireland, United States of America, France, Union of Soviet Socialist Republics, Art. 6(c), Aug. 8, 1945 ("*[c]rimes against humanity*" was a particularly innovative charge developed by Hersch Lauterpacht). See also PHILIPPE SANDS, EAST WEST STREET: ON THE ORIGINS OF "GENOCIDE" AND "CRIMES AGAINST HUMANITY" (1st ed. 2016), for a superb account of its evolution. Lauterpacht's words resonate: "To lay down that crimes against humanity are punishable is, therefore, to assert the existence of rights of man grounded in a law superior to the law of the State." HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 36 (1950).

[53] *See* TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 974 (1951), *at* https://tile.loc.gov/storage-services/service/ll/llmlp/2011525364_NT_war-criminals_Vol-III/2011525364_NT_war-criminals_Vol-III.pdf [hereinafter *U.S. v. Alstotter*].

[54] *Id.* at 975; *see also* JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 571 (3rd ed. 2010).

[55] *U.S. v. Alstotter*, *supra* note 53, at 975.

[56] *Id.* at 976, citing Sir David Maxwell-Fyfe.

[57] Makau wa Mutua, *Reparations for Slavery: A Productive Strategy?*, *in* TIME FOR REPARATIONS: A GLOBAL PERSPECTIVE 24 (Jacqueline Bhabha, Margareta Matache & Caroline Elkins eds., 2021).

The basic point is that an entire system of law was created, over objections based on retroactivity, to further the cause of justice. The simple question is why such an approach cannot be adopted to deal with the massive crimes against humanity that were committed in a colonial context. What is also notable here is, more broadly, the jurisprudential resources used to address these objections in a manner that sought to preserve the integrity of the law. It is notable, for instance, that recourse was made to a "principle of justice." Within the vocabulary of international law, such a jurisprudence engages with a particular legal universe, one that has close affinities with natural law, and equity, often the bridge between "justice" and a narrower application of strictly positive law. And, equity is a principle of international law.[58]

## III. Western and Colonial Reparations

The second part of my exploration on reparations focuses on what I have termed the "Western" or "colonial law of reparations."[59] Here, I explore two broad issues. Firstly, European powers, in the course of colonization, claimed reparations from non-European peoples. What can we learn about the law of reparations through a study of some instances in which this has occurred? Secondly, I seek to explore aspects of the existing, established law of reparations, the basis of the "liability" model. This is the legal framework that, explicitly or implicitly, sets the criteria and the conditions that claims for reparations must satisfy. State responsibility, the immense and consequential body of law that is central to international law itself, is the foundation of the law of reparations. The broad questions I have in mind are: who created this body of law? What were the principles, the concepts, the intellectual framework, and the contestations, that led to the creation of this law? What are the connections, for instance, between property and reparations, legal personality and reparations, and war and reparations? In broad terms, then, I seek to understand the jurisprudence of reparations in the socio-political context in which it developed.

### *A. Reverse Colonial Reparations: Historical Instances*

The origins of the Western system of reparations that currently prevails may be linked to what I term "reverse colonial reparations," that is, reparations claimed by the colonizers from the colonized. One instance of "reverse colonial reparations" is suggested by the Treaty of Nanking. Here notoriously, the United Kingdom claimed 12 million dollars in "reparations" from China, because China sought to end the opium trade that was debilitating its people.[60] The United Kingdom asserted that China had violated the natural law principle of the right to trade by opposing the opium trade; and that consequently the British government was compelled to wage a war whose costs China had to bear. The reparations paid by China, twelve million dollars, amounted to a sum as large as the Alaska purchase.[61] Simply, then,

[58] Bin Cheng, *11 Justice and Equity in International Law*, 8 Current Legal Prob. 185 (1955).

[59] I have sketched this concept earlier. *See* Anghie, *supra* note 11.

[60] *See* Treaty of Nanjing (Nanking), Great Britain-China, Art. VI, Aug. 29, 1842, 93 CTS 465, which states that "The Government of Her Britannic Majesty having been obliged to send out an expedition to demand and obtain redress for the violent and unjust Proceedings of the Chinese High Authorities towards her Britannic Majesty's Officer and Subjects."

[61] *See* Xue Hanqin, Chinese Contemporary Perspectives on International Law: History, Culture and International Law (2012).

imperial forces postulated a law that had been ostensibly violated and prescribed the remedies, including compensation, that had to be paid. It is the imperial power that creates the framework for reparations. It was common for colonized peoples to pay for the costs of their own conquest, both formally and informally. Conquest, after all, passes title to territory, all the intricate rules of property collapsing inelegantly when confronted by the successful use of force.

Another such instance of "reverse colonial reparations" arises from the scandalous fact that Haiti had to pay reparations to France for the losses French citizens suffered as a result of the stunningly successful Haitian slave revolt against their masters.[62] The massive "debt" that Haiti incurred because of this crippled Haiti's prospects of emerging as a successful sovereign state. The international system, ruled over by European and Western powers, had to ensure that any efforts by a non-European people, especially slaves, to establish themselves as equal members of the international community had to be opposed at all costs. As the Haitian historian Jean Casimir put it, "[t]he state of Haiti was born into a world that considered its very existence inconceivable and undesirable."[63] Haiti was burdened with a debt, an "indemnity" it had to pay, of 150 million francs—reparations to France and French slave owners in order to win international recognition. International personality came at an enormous cost, which basically crippled the new, sovereign state of Haiti. The payment of the debt involved borrowing money at high interest rates from French banks, hence giving rise to the infamous "double debt." In broad terms, the case of Haiti was emblematic of the dilemma, the trauma, facing colonial nations as they fought and achieved independence. Simply, in many cases, independence, winning sovereign status came at the cost of incurring debt. Indonesia, for instance, had to pay its Dutch colonial master upon achieving independence.[64]

In another variation of this theme, the British government, following the Slavery Abolition Act of 1833 took loans of fifteen million pounds, and a further five million pounds later to finance the slave compensation package. The compensation was paid, not to the slaves, but to the slave owners.[65] British taxpayers continued to pay off this loan and interest until 2015. Indeed, slaves themselves were made to pay for their own freedom, once again, through a manipulation of legal doctrine. Kris Manjapra points out that "[a]t the stroke of midnight on [August 1,] 1834, the enslaved were freed from the legal category of slavery—and instantly plunged into a new institution called 'apprenticeship.'"[66] This new institution

[62] For a detailed and illuminating analysis of this, see Liliana Obregón, *Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt*, 31 LEIDEN J. INT'L L. 597 (2018); Vasuki Nesiah, *A Double Take on Debt: Reparations Claims and Regimes of Visibility in a Politics of Refusal*, 59 OSGOODE HALL L.J. 153 (2022); KRIS MANJAPRA, BLACK GHOST OF EMPIRE: THE LONG DEATH OF SLAVERY AND THE FAILURE OF EMANCIPATION (2022).

[63] MANJAPRA, *supra* note 62, at 58.

[64] *See* Nesiah, *supra* note 62; *see also* Hendri F. Isnaeni, *Colonial Reparations*, HISTORI BERSAMA (Aug. 13, 2010), *at* https://historibersama.com/colonial-reparations. Here, the claim is that at the Roundtable Conference in the Hague in 1949 leading to Indonesian independence, Indonesia paid a "colonial debt" to the Netherlands that was estimated at 4.5 billion guilders (6.5 billion had been initially claimed). This money was crucial for the post-war reconstruction of the Netherlands. Other such instances no doubt can be traced.

[65] *See* Kris Manjapra, *When Will Britain Face Up to Its Crimes Against Humanity?*, GUARDIAN (Mar. 29, 2018), *at* https://www.theguardian.com/news/2018/mar/29/slavery-abolition-compensation-when-will-britain-face-up-to-its-crimes-against-humanity.

[66] *Id.*

once again, required the supposedly liberated slave to work for free. Further, the compensated slaver owners used their funds to establish new plantations, extending beyond the Caribbean to British plantation colonies in Africa and Asia. Here, indentured laborers—not slaves—manned these plantations. Indentured labor technically may not have been slavery, but it was a legal institution that enabled further exploitation of labor.[67]

### *B. Reparations and State Responsibility*

The principle of reparations is integrally tied to the framework of state responsibility. The international law of reparations is classically based on the *Chorzów* case, the principle 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."[68] The principle is set out in its authoritative form in Article 31 of the Draft Articles on State Responsibility, which states that: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[69] This is law that is explored and elaborated on in studying the jurisprudence of reparations and state responsibility.[70] The duty to pay reparations is one of the foundational elements, of the framework for the venerable system of law, the law of state responsibility.

Historically, the development of this law took place in the context of what might be termed, broadly, neocolonial economic tensions. The whole structure of state responsibility was initially focused on the question of the rights of aliens, that is, the rights of Western aliens in Latin America after those states had won their independence in the nineteenth century.[71] The term "alien" encompassed both natural persons and, in time, as a result of a very deliberate campaign, corporations. State responsibility could arise in relation to any state violation of international law—as Article 1 of the Draft Articles of State Responsibility make clear.[72] However, historically, the development of the law of state responsibility was intimately connected with the issue of the protection of the rights of aliens.[73] This body of

[67] MANJAPRA, *supra* note 62, at 106-8.

[68] Factory at Chorzów (Ger. v. Pol.), 1927 PCIJ (Ser. A) No. 9 (July 26). *Chorzów* sets the framework against which the reparations claims for slavery and racism are advanced. *See* Achiume, *supra* note 1, at 12–23, para. 31. There is now a searching literature that focuses on different dimensions of the *Chorzów* case, its limits and implications for the broader issue of reparations, see Felix E. Torres, *Revisiting the* Chorzów Factory *Standard of Reparation – Its Relevance in Contemporary International Law and Practice*, 90 NORD. J. INT'L L. 190 (2021); Andreas von Arnauld, *The Third World and the Quest for Reparations: Afterword to the Foreword by Antony Anghie*, 34 EUR. J. INT'L L. 787 (2023).

[69] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Art. 31, [2001] 2 Y.B. INT'L L. COMM'N 26, UN Doc. A/56/10.

[70] THE LAW OF INTERNATIONAL RESPONSIBILITY (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

[71] *See* KATHRYN GREENMAN, STATE RESPONSIBILITY AND REBELS: THE HISTORY AND LEGACY OF PROTECTING INVESTMENT AGAINST REVOLUTION (1st ed. 2021); ALAN TZVIKA NISSEL, MERCHANTS OF LEGALISM: A HISTORY OF STATE RESPONSIBILITY (1870–1960) (2024). As Nissel argues, "This history [of state responsibility] is but a series of stories about how merchants and their advocates used legalism to protect foreign investment abroad," *Id.* at 5.

[72] *See* Draft Articles on Responsibility, *supra* note 69, Art. 1.

[73] *See* Y. Matsui, *The Transformation of the Law of State Responsibility*, *in* STATE RESPONSIBILITY IN INTERNATIONAL LAW 39 (René Provost ed., 2002), referring to the memorandum entitled "Survey of International Law in Relation to the Work of Codification" which asserted that the treatment of aliens had constituted in practice the most conspicuous application of the law of state responsibility.

law was designed to protect British and American investors, especially in Latin America in the nineteenth century. As the character of economic relations between the center and periphery changed, so too did the debates and contests over the principles of this law. Even up to the 1950s, the broad topic of state responsibility in fact focused on "the responsibility of a State to damage done in its territory to the person or property of foreigners."[74]

Much of the preceding debate centered on the proposition famously enunciated by Elihu Root in 1910, that there existed a "standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the [whole] world."[75] Thus aliens were protected by this ostensibly universal standard and an injury or loss suffered by an alien could violate this standard and give rise to state responsibility. It is notable further, that Root himself, like the Nuremberg Tribunal, focuses not so much on positive law—perhaps because Latin American countries would have fiercely dissented—but on a "standard of justice," the justice to be enjoyed by aliens as economic actors. The League of Nations efforts to codify the law focused on a related set of issues, such as the protection of foreigners from damage caused by private individuals, and acts of armed force or authorities in the suppression of insurrection.[76] Broadly, for instance, a failure of the state to protect the alien from the actions of rebels could incur state responsibility.

For F.S. Dunn, the function of this standard was clear: it was "essential to a continuation of the existing social and economic order of European capitalist civilization."[77] Imperialism was an integral element of this "European capitalist civilization,"[78] and it was hardly surprising that Latin-American scholars saw it as such, and Carlos Calvo and Luis Drago responded by formulating the famous doctrines named after them,[79] this as a way to protect their sovereignty.

### *C. Decolonization and the Battle Over State Responsibility*

The topic of state responsibility was contested again when countries that emerged from colonialism, the so-called new states, sought to regain control over their natural resources, citing in support the principle of permanent sovereignty over natural resources, by nationalizing the foreign corporations that controlled those assets. These foreign corporations had obtained concessions from the colonial states, the Netherlands for instance granting mineral concessions to Dutch corporations operating in Indonesia. Upon independence, formerly colonized states seeking to consolidate their economic status, began nationalizing such foreign corporations. Nationalizations in Asia and Africa became now a major concern of Western states and indeed, international lawyers.[80] In response, Western

[74] *See* Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AJIL 517, 522 (1910); *see also*, Matsui, *supra* note 73, at 4, *citing* Garcia-Amador's First Report, 1956-II Y.B. INT'L L. COMM'N, at 176–80, UN Doc. A/CN.4 96.

[75] Root, *supra* note 74, at 521–22.

[76] Matsui, *supra* note 73, at 6.

[77] Frederick Sherwood Dunn, *International Law and Private Property Rights*, 28 COLUM. L. REV. 166, 175–76 (1928), cited in Matsui, *supra* note 73, at 16

[78] *See* NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW (1st ed. 2020).

[79] Luis M. Drago, *State Loans in Their Relation to International Policy*, 1 AJIL 692 (1907).

[80] For a sense of the importance of this issue in the 1950s, see Bin Cheng, *The Rationale of Compensation for Expropriation*, 44 TRANSACTIONS GROTIUS SOC'Y 267 (1958).

states argued that nationalizations had to be accompanied by compensation, payable according to international standards, and that a failure to pay such compensation was a violation of international law and incurred state responsibility. Astonishingly, it was the West that asserted that the developing countries had "unjustly enriched themselves," and that their property rights had been illegally expropriated and that the developing countries had thus incurred state responsibility. Intense debates took place over the doctrine of state succession, whether the new states were bound, and to what extent, by the actions of their preceding colonial masters. Thus, the issue of the rights of aliens, an issue central to "capitalist civilization" was connected to state responsibility, acquired rights, and state succession.

It is hardly surprising then, that S.N. Guha Roy, in his seminal article presenting the Third World perspective on state responsibility, an article that appeared in the *American Journal of International Law,* deals centrally with the issue of reparations. As Guha Roy puts it, "this much can hardly be doubted, that reparation as a germinal principle of bare justice runs as much through different systems of municipal law as through international law."[81] What is equally important about Guha Roy's article, written at the height of the debate about permanent sovereignty over natural resources, is that its discussion on reparations takes the form of a review of the ongoing debate on state responsibility in the specific context of the law of aliens, that is, the law that was deployed to seek compensation for nationalization. The framework of state responsibility was profoundly shaped then, by this tussle. Guha Roy argued that the rules of state responsibility had been established, essentially, by colonial powers to the exclusion of the colonized states, and that a new law of state responsibility was called for because "the birth of a new world community has brought about a radical change which makes the traditional basis of obligation outmoded."[82] During this period, reparations for aliens was a topic dealt with by a deeply divided International Law Commission (ILC), where lawyers and jurists from developing countries countered and contested Western versions of state responsibility.

### *D. Reparations and Internationalized Contracts*

The disputes in the ILC on state responsibility and alien rights were so intransigent that Roberto Ago, succeeding Garcia-Amador, the ILC special rapporteur who had grappled unsuccessfully with the topic, decided to exclude the rights of aliens as a principal focus, and concentrate instead on the so called "secondary rules" of state responsibility, the rules dealing with the effects and obligations following upon a violation of any rule of international law giving rise to state responsibility. This shift generated criticism. Prominent lawyers such as Richard Baxter and Myres McDougal argued that severing the historic connection between state responsibility and alien protection was artificial and would lead to a very abstract discussion.[83] Alien rights having been excised from state responsibility, the task of completing the Draft Articles on State Responsibility, at the heart of which lay the *Chorzów*

[81] S. N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AJIL 863 (1961).

[82] *Id.* at 888.

[83] R. R. Baxter, *Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens,* 16 SYRACUSE L. REV. 745, 747–48 (1965), cited in Matsui, *supra* note 73, at 4. Baxter argued that "the circumstances under which responsibility attaches and the remedies to be provided for the violations of the rules of law cannot be divorced from the substantive rules of conduct themselves." For an incisive account of how the

standard, could be continued and finalized under James Crawford. Reparations for aliens however, had also been developing in parallel in another arena: arbitration.

Classically, only states could claim reparations. But a series of developments that took place over the last seven or eight decades have ensured that the corporation can claim reparations under international law, and, further, do so by bringing cases in arbitral tribunals specially created to hear their claims. Each of these developments represents a radical change. This jurisprudence emerged again, in response to the battle over nationalization. The Iranian nationalization of the Anglo-Iranian corporation has significant consequences that extend to the present. In legal terms, the nationalization led to the major case in the ICJ, the *Anglo-Iranian* case.[84] There, the United Kingdom unsuccessfully argued that the concession agreement between Iran and the Anglo-Iranian oil company could be likened to a treaty, and hence, existed on the international plane, creating international obligations governed by international law.[85] The Court denied this argument. Following the *Anglo-Iranian* case, a dedicated team of lawyers worked on what was to become the Abs-Shawcross Draft, named after Dr. Herman Abs, a prominent German banker, and Sir Hartley Shawcross, renowned as the British prosecutor at Nuremberg.[86] The Abs-Shawcross collaboration, immortalized by the draft treaty was disconcerting and incongruous to say the least, given that Abs because of his senior position at Deutsch Bank, worked closely with the Nazis that Shawcross had made his name prosecuting. But such awkward differences as may have arisen were immaterial, as they were both united in the larger cause of furthering international commerce. Abs was a brilliant financier who played a prominent role in the post-war German miracle and Shawcross had furthered his career as a lawyer for a major multinational, Shell.[87]

The Abs-Shawcross treaty contained provisions that were startling at the time as a result of which what was intended to be a multilateral treaty never came into being. However, those provisions eventually became basic elements of the foreign investment regime. Concession agreements were contracts between the corporation and the state and traditionally governed by the national law of the host country. In order to escape the strictures of national jurisdiction, Sir Elihu Lauterpacht proposed the "umbrella clause" by which the contractual provisions between corporation and state would assume an international character akin to a treaty provision between states. Lauterpacht himself recognized the radical step he was taking: "[f]or an 'umbrella treaty' of this character I regret that I have been unable to find any direct precedent . . . ."[88] Equally radically, the draft treaty proposed that corporations, rather

"secondary" rules reproduced the advantages enjoyed by corporations, see B.S. Chimni, *The Articles of State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective*, 31 EUR. J. INT'L L. 1211.

[84] Anglo-Iranian Oil Co. (UK v. Iran), Judgment, 1952 ICJ Rep. 93 (July 22). *See also* Sundhya Pahuja & Cait Storr, *Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited*, *in* THE INTERNATIONAL LEGAL ORDER: CURRENT NEEDS AND POSSIBLE RESPONSES: ESSAYS IN HONOUR OF DJAMCHID MOMTAZ (James Crawford, Abdul G. Koroma, Said Mahmoudi & Alain Pellet eds., 2017).

[85] Yuliya Chernykh, *The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention*, *in* INTERNATIONAL INVESTMENT LAW AND HISTORY (Stephan W. Schill, Christian J. Tams & Rainer Hofmann eds., 2018).

[86] For a superb study of this initiative, see NICOLÁS M. PERRONE, INVESTMENT TREATIES AND THE LEGAL IMAGINATION: HOW FOREIGN INVESTORS PLAY BY THEIR OWN RULES 51–80 (1st ed. 2021).

[87] Chernykh, *supra* note 85, at 249, *citing* HARTLEY SHAWCROSS, LIFE SENTENCES: THE MEMOIRS OF LORD SHAWCROSS (1995).

[88] *See* Anglo-Iranian Oil Company Limited Persian Settlement – Opinion, cited in Chernykh, *supra* note 85, at 263.

than relying on the classic doctrine of diplomatic protection, would be empowered to initiate actions themselves, sue states in an international forum.[89]

In a parallel but related set of developments, a series of arbitral decisions sought, in a different, arena, to "internationalize" the contract, elevate it beyond the national realm and ensure that contractual terms in agreements between states and foreign corporations now took the form of international obligations.[90] In this way, the sovereign right of a country to manage its own affairs, to develop its own laws as applied by its own court system was undermined and the corporation was elevated to an international actor who could invoke principles such as *pacta sunt servanda* to protect its rights. More peculiarly, this internationalization only applied to concession agreements entered into by developing countries. The differentiation was justified on the grounds that developing countries benefitted uniquely from such agreements. The novelty of all these developments were not lost on international lawyers. M. Sornarajah has critically examined the steps by which contracts were internationalized.[91] Ian Brownlie pointed out that "[b]efore the Second World War the view that concession contracts operated on the plane of international law was heretical."[92] Derek Bowett, examining such agreements, raised the question of "why such contracts are "only internationalized" if concluded by developing States."[93] These objections to the theory were understandable, given that the ICJ had decided that contracts between states and corporations could not be likened to treaties.

### *E. Bilateral Investment Treaties and Expanding Corporate Power*

With the advent of bilateral investment treaties, many of the innovations of the Abs-Shawcross draft including Lauterpacht's great innovation, the "umbrella clause" became standard. The contract had become internationalized. Further, open ended and vague terms that created new grounds of liability and compensation, such as "fair and equitable treatment" and "full protection and security" became standard terms now in bilateral investment treaties. "Stabilization clauses," another common feature in investment treaties, sought to ensure that no changes would be made to the legal system in ways that would impact the investment. The legal framework existing at the time the investment was made had to be preserved. The concept of "expropriation" was expanded to explicitly encompass "indirect expropriation."

Equally significantly, the corporation was granted even further power. The *Chorzów* case, the defining case for reparations, established that a wrong done to the corporation could give

[89] *See* Abs-Shawcross Draft Convention on Investments Abroad, Art. VII, as cited in Herman Abs & Hartley Shawcross, *The Proposed Convention to Protect Private Foreign Investment: A Round Table*, 1 J. PUB. L. (presently EMORY L.J.) 115 (1960).

[90] For expert and authoritative analysis of the internationalization of contracts, see M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 78–133 (2015). For a recent analysis illuminatingly tracing these developments, see ANDREA LEITER, MAKING THE WORLD SAFE FOR INVESTMENT: THE PROTECTION OF FOREIGN PROPERTY 1922–1959 (1st ed. 2023).

[91] M. SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 81–168 (1986); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 358–68 (5th ed. 2021).

[92] Ian Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects) (Volume 162)*, HAGUE ACAD. COLLECTED COURSES ONLINE 308 (Jan. 2, 1979).

[93] Derek William Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 BRIT. Y.B. INT'L L. 49 (1989).

rise to international liability. Classically, however, the corporation had to make its claims through the mechanism of diplomatic protection. With the advent of bilateral investment treaties however, the corporation was empowered to make claims for reparations on its own behalf without seeking the protection of the state-a protection granted through the terms of the treaty. The corporation was thus explicitly given standing in the international system. The corporation, through bilateral investment treaties, were empowered to directly sue states at the international level. Equally significantly, these claims could be brought in international arbitral tribunals created especially for this purpose. The earlier law of state responsibility was based on the person, the "foreign alien"; but this law was driven by the alien understood very specifically as an "investor," as the alien corporation, and it was around the interests of the corporation, an economic entity intent created for profit that the new system was created, a system based on the goal of "corporate reparations." The treaties were asymmetrical as states could not sue corporations for violations of international law such as human rights law.

I have offered here an unsatisfactory sketch of foreign investment law and investment arbitration. These are topics that have been studied extensively, exhaustively, in far more expert detail. What then is the utility of studying this vast topic in terms of the prism, the lens of reparations, or more specifically, corporate reparations? At one level, this is merely to remind us of the historical origins of the system of reparations as it exists now in international law. The system of state responsibility, driven by the topic of reparations, was essentially created, beyond the somewhat abstract ideas of Vattel, to protect foreign property, initially in the newly independent states of Latin America. And something might be learned about the politics, the strategies, and the personnel involved in the process, and how extraordinary innovations took place, departing from settled principles of international law —relating to standing, legal personality, and breach. This might be seen, as it has been by many, as a triumph of ingenuity, a demonstration of the adaptability of international law to create the structures indispensable to social progress and economic growth. The investment regime might be seen as comparable to the human rights revolution, for instance. Most crucially, further, this regime was created through the consent of the states subjected to it. Countries have now signed more than 3,000 investment agreements in one form or another. The success of the regime, with its formidable system of enforcement, one lacking in virtually all other areas of international law, is one of the prominent features of modern international law. At one level, then, my effort is simply to understand how this formidable regime of reparations came about and how it operates, and how a particular vision of justice became legalized.

As many scholars, such as M. Sornarajah,[94] Kate Miles,[95] Grietje Baars[96] and David Schneidermann,[97] have argued, however, foreign investment law, like the law of state responsibility criticized by Rao, could be viewed as a neocolonial system, one that was devised to prevent developing countries from regaining control of their resources, and to

[94] Sornarajah, *supra* note 90.

[95] Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital (1st ed. 2013).

[96] Grietje Baars, The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy (2019).

[97] David Schneiderman, Investment Law's Alibis: Colonialism, Imperialism, Debt and Development (1st ed. 2022).

facilitate the transfer of resources from the poor world to the rich world. In this respect, Western reparations can be connected with an earlier system of reverse colonial reparations. It is a paradox that corporations were central to colonial expansion, and yet developing states now sought to encourage corporations to operate in their countries by entering into bilateral investment treaties. Developing countries, fearful of the extraordinary power of corporations and their impact on their hard-won sovereignty, had attempted to manage that power through the United Nations, which set up a Commission on Transnational Corporations.[98] At the same time, these countries, particularly in the 1990s, entered into these treaties. The puzzle that developing countries entered into these agreements that were often so disadvantageous to them has also been the subject of ongoing study.[99] But much had to do with the promise of development, the ideology of development, and in particular, especially after the Cold War, the policies propagated by the Bretton Woods institutions that made liberalization and foreign investment imperative. The International Centre for the Settlement of International Disputes (ICSID), which is central to the modern investor-state system, is after all a part of the World Bank Group.[100]

Within this broader, decisive world view the legal regime of bilateral investment treaties was natural and logical. Many developing countries suffered from a lack of expert knowledge and capacity, a befuddlement as to the meaning of these complex terms, such as the umbrella clause, and an overestimation of the benefits of investment treaties. Nevertheless they entered into them because of the promise of foreign investment and the entire apparatus of neoliberal ideology, and institutionalism promoting this system, one that in many ways derives from the colonial and indeed, post-colonial history I have attempted to sketch.[101] The broad point is that the authoritative vision of reparations depends on the dominant vision of global justice and indeed, the legal imagination in constructing that vision of justice and devising the legal regimes that would further it.

The system of what might now be termed "corporate reparations" thus came into existence. Among legal systems, it is unparalleled in its reach and effectiveness. Most ironically, it developed precisely in response to the efforts of developing countries to regain control over their own resources, to end the exploitation by colonial corporations. Whereas the Nauru case was unique and singular, a situation where an extraordinary combination of historical circumstances enabled Nauru to bring action based on the mandate and trusteeship treaty obligations, the system of corporate reparations became institutionalized and wide-ranging, a crucial aspect of global governance itself, because allied with the ideology of development. What is equally significant is that this system facilitates cross border reparations, as it were. Human rights law, as embodied for instance, in the two major covenants, civil and political rights and economic and social rights, do not readily allow people in the Caribbean to make claims against the United Kingdom for colonial

[98] *See* KHALIL HAMDANI & LORRAINE RUFFING, UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS: CORPORATE CONDUCT AND THE PUBLIC INTEREST (2015).

[99] *See* LAUGE N. SKOVGAARD POULSEN, BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY: THE POLITICS OF INVESTMENT TREATIES IN DEVELOPING COUNTRIES (1st ed. 2015). There are also doubts about the positive impact of bilateral investment treaties.

[100] For this history, see TAYLOR ST JOHN, THE RISE OF INVESTOR-STATE ARBITRATION: POLITICS, LAW, AND UNINTENDED CONSEQUENCES (2018).

[101] SCHNEIDERMAN, *supra* note 97.

exploitation. The use of the concept of trusteeship raises complications because it is premised on the Western view that non-European peoples were in some respect, backward or immature, in need of protection. But it does provide one means of exposing, even within the European system itself, bases of responsibility for the ongoing effects of colonialism. And it is these ongoing effects that are central to the validity of colonial claims despite the inter-temporal rule.

### *F. Fairness and Equity: The Natural Law Jurisprudence of Corporate Reparations*

Corporations were empowered to advance claims for reparations under international law, first through arbitration and then investment arbitration. Equally significantly, the development of the applicable law has, over time, expanded the ability of corporations to argue that their rights have been violated and that compensation is therefore payable. That expanding law has in many respects drawn upon the related notions of justice, equity, fairness, general principles and natural law.

The jurisprudence of the Nuremberg Tribunals, and indeed, the innovative work being done on how principles relating to the law of reparations may be re thought, amended, adapted, to negate the injustices of colonialism, has, in broad terms, suggested recourse to natural law and its associated concepts of equity and furthering justice.[102] This form of jurisprudence promises to ameliorate in some way the injustices that may be furthered through the strict application of positive law. My broad argument here is that it is precisely by recourse to broad notions and principles of justice and equity and "general principles" that corporate reparations have been furthered. In some of the earliest arbitrations dealing with concession agreements, arbitrators had already identified "general principles of international law" as a source of applicable law. Thus, Lord McNair wrote a very influential article on "general principles," which argued for the recognition of the rights of private property and the principle of unjust enrichment, this in relation to the rights of corporations.[103] These principles of commercial law, principles that were integral to the municipal law of Britain, were presented as so "universal" that they represented a "modern law of nature," in the words of Lord Asquith in the Abu Dhabi Award.[104] In broad terms then, a system of arbitration, specifically set up to protect the rights of private parties, developed a rich and innovative jurisprudence, that drew upon general principles, equity, and natural law, all this in ways that broadly furthered the interests of the corporation and enhanced its powers to claim reparations.

Equity is a recognized principle in international law. Advocates of this position point to Article 38(1)(c) of the Statute of the ICJ, general principles, to justify this position. In the case of investment law, however, equity is a principle that is expressly included in bilateral investment treaties. The United States model Treaty of 2012, for instance, states:

[102] Similarly, von Arnauld proposes a way of using "ethical principles" as a "gateway to *juris genesis*." *See* von Arnauld, *supra* note 19, at 407.

[103] Lord Arnold McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1 (1957).

[104] *See* Petroleum Development Ltd v. The Sheikh of Abu Dhabi, 18 ILR 144 (1951).

> Each party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.[105]

It is notable that it is the "covered investments," property itself, that enjoys the right to "equitable treatment" and "full protection and security." The treaty seems to set limits to these rights by referring to the "customary international law minimum standard," stating that the treaty provision does not "create additional substantive rights."[106] Arbitral decisions, however, have continuously expanded the meaning of "equitable treatment." Arbitrators, innovatively held that any disappointment of the "legitimate expectations" of the investor amounted to inequitable treatment. The concept of "legitimate expectations" was "plucked from the air."[107] "Inappropriate behaviour" by a state could violate legitimate expectations.[108] Surveying the arbitral cases that brought about the dramatic expansion of the already open concept of "equitable treatment" through this recourse to a vague standard of "legitimate expectations," a concept perhaps derived from the concept of legitimate expectations in administrative law, M. Sornarajah comments that "[a] standard vaguely formulated has been shrouded in further vagueness involving a notion of inappropriate behaviour defined circularly as involving unfairness and inequity."[109]

This is not the place to explore more closely all the complexities regarding the equitable standard and legitimate expectations and the various divisions found in arbitral awards regarding these principles, their validity, scope and application.[110] But for the limited purpose of my exploration, the point is that these broad concepts, with their invocations of "equity" and "justice" have been developed to further the claims of corporations to reparations; and, equally importantly, these corporations have ready access to tribunals, to judicial remedies; and these tribunals are manned, as it were, by a small and elite community of international lawyers who are intent on preserving this system[111] that has been explicitly designed to protect and further the interests of corporations.[112]

The jurisprudence of international investment law is innovative, creative, and opportunistic, as even this unsatisfactory summary coverage of "equitable treatment" and "legitimate expectations" suggests. The decisions made by arbitral awards, often inconsistent,

[105] *See* U.S. Model Bilateral Investment Treaty, Art. 5(1) (2012), *at* https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[106] *Id.* Art. 5(2).

[107] *See* SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, *supra* note 91, at 445.

[108] Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, cited in SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, *supra* note 91, at 445.

[109] *See* SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT, *supra* note 91, at 445.

[110] *Id.* at 438–56.

[111] Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387 (2014).

[112] For an overview of these issues based on empirical research and socio-legal studies, see THE LEGITIMACY OF INVESTMENT ARBITRATION: EMPIRICAL PERSPECTIVES, (Daniel Behn, Ole Kristian Fauchald & Malcolm Langford eds., 1st ed. 2022). For an examination of the recent struggles of developing countries and investment treaties, see Mavluda Sattorova & Oleksandra Vytiaganets, *Learning from Investment Treaty Law and Arbitration: Developing States and Power Inequalities*, *in* THE LEGITIMACY OF INVESTMENT ARBITRATION: EMPIRICAL PERSPECTIVES 501 (Daniel Behn, Ole Kristian Fauchald & Malcolm Langford eds., 2022). For the complications investment treaty arbitration has caused for the classic law of state responsibility, see Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 EUR. J. INT'L L. 617 (2013). The corporation had outgrown the framework it initially relied on.

are not readily appealable. As such, international investment law offers a cornucopia of principles to draw upon by arbitrators constructing innovative grounds of liability, and who doubtless seem themselves as nobly furthering the cause of international justice, dealers in virtue.[113] It is within this hallowed forum, furthermore, that new concepts of "investment" and "property" are being developed, enabling foreign investors to make claims that would never be recognized in domestic law using valuation techniques that are highly questionable.[114] In the *Tethyan* case, an award of amounting to six billion dollars was handed down against Pakistan[115] in relation to an expectation of a right. The concept of "legitimate expectations" was central to the case. In the *Rockhopper* case, the Italian government's measures to ban offshore mining in a designated area was held by an ICSID Tribunal to be an "expropriation." Italy was ordered to pay an award of one hundred and eighty-five million pounds, the compensation amounting to two hundred forty million pounds when interest was taken into account. As commentators noted, what was striking about this award was not only the defensiveness of the Tribunal and their claim that the award did not in any way inhibit the regulatory power of the Italian government. It was also the fact that the putative production concession that was allegedly appropriated had not as yet been officially granted. That is, the notion of property rights was extended to a "right to a concession," rather than the concession itself.[116] It is doubtful whether such an attenuated "right," the right to a concession would have been recognized in any system of national law.

But the larger point is that these arbitral awards are creating new forms of "rights," a right to a concession, a right to claim violation of "legitimate expectations." In effect, new grounds of liability, the crucial issue in reparations, are being continuously constructed. And these rights are proprietary in character, rights that may be the basis for awards amounting to millions if not billions of dollars.[117] The decisions of these tribunals are, then, extraordinarily consequential. The sums of money involved, for the developing countries against whom these awards are made, are sufficient to wipe out health, education and welfare budgets. The compensation—the reparations—handed to corporations is increasing all the time.[118] The valuation standards are controversial and questionable.

It is because arbitrators have interpreted these wide-ranging terms in startling and expansive ways that states, including, ironically, the rich, developed states that promoted the whole regime, have attempted to define in more detail their understanding of terms such as

[113] YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

[114] For a critique of current practices, see Juan Carlos Boué, *The Investor-State Dispute Settlement Damages Playbook: To Infinity and Beyond*, 24 J. WORLD INVEST. TRADE 372 (2023).

[115] Sofia De Murard, *Tribunal Finds Pakistan Breached FET, Expropriation and Non-impairment Obligations in the Context of a Mining Joint Venture with Australian Investor Tethyan Copper Company*, INT'L INST. SUSTAINABLE DEV. (IISD) (Dec. 17, 2019), *at* https://www.iisd.org/itn/2019/12/17/tribunal-finds-pakistan-breached-fet-expropriation-non-impairment-obligations-mining-joint-venture-with-australian-investor-tethyan-copper-company-tethyan-copper-company-v-pakistan-icsid-arb-12-1.

[116] *See* Toni Marzal, *Polluter Doesn't Pay: The Rockhopper v. Italy Award*, EJIL:TALK! (Jan. 19, 2023), *at* https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award.

[117] For my argument that it is these awards that in effect create new forms of property, see Antony Anghie, Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*: "All That Is Solid Melts into Air,"* 30 ICSID REV. 356 (2015).

[118] *See* Jonathan Bonnitcha & Sarah Brewin, *Compensation Under Investment Treaties*, IISD BEST PRAC. SERIES (Nov. 2020), https://www.iisd.org/system/files/publications/compensation-treaties-best-practicies-en.pdf; Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*, 83 MOD. L. REV. 1246 (2020).

"minimum standard of treatment" and "fair and equitable." They have done so by specifying in recent model treaties, for instance, that "fair and equitable" means "fair and equitable" as established by customary international law.[119] As the *Eco Oro* case suggests, however, even this may not be enough.[120] Equally importantly, the prospect of being sued by corporations inhibits developing countries from passing environmental regulation. This is the so-called "chilling effect."

In any event, the excesses of investment arbitration have become now so obvious that investor-state dispute settlement (ISDS) was excluded as between the United States and Canada in the United States-Mexico-Canada Agreement that replaced NAFTA. Western European states including France, Germany, the Netherlands, Italy, and Spain, have withdrawn or are withdrawing from the Energy Charter which had been negotiated and promoted, perhaps on the happy assumption that the system would only apply to the countries of Eastern Europe as they emerged from communism. The European Parliament has approved the withdrawal of the Union from the ECT.[121] This is following the trend of many developing countries.[122]

These withdrawals by major states in the developed world, authors and relentless promoters of the system, must surely establish a basic point that pertains to the issue of why developing countries first signed onto bilateral treaties and then recoiled against them: they simply did not intend the system to expand and operate in the way that it eventually did. In this respect—as in many others—the developed world is experiencing a crisis that was first felt, in a more dramatic way, in the developing world itself. Further, the economic emergence of China and India has led to investors from those countries purchasing assets in the West, and those countries run the risk of being at the receiving end of a system they had championed and richly benefitted from. As a consequence of these developments, the whole investor state regime is subject to new and close scrutiny.[123] What is being realized now by Western countries are many dimensions of investment law that were identified much earlier by M. Sornarajah, as his erudite writings,

[119] For example, the Free Trade Commission established in the North American Free Trade Agreement (NAFTA) decided that various terms in NAFTA, including "minimum standard of treatment" and "full protection and security," referred to customary international law standards. The point is reinforced in Article 5 of the U.S. Model Bilateral Treaty of 2012. For the argument that norms such as "fair and equitable" are of a generative character and that state efforts to curtail arbitrators' judgments in interpreting such terms can be likened to Canute's efforts to stop the tide, see W. Michael Reisman, *Canute Confronts the Tide: States Versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, 30 ICSID REV. 616 (2015).

[120] Here, the arbitral tribunal found that Colombia's environmental measures had violated the bilateral investment treaty even though the treaty explicitly provided that the state could make regulations directed at environmental protection, see *Majority in* Eco Oro v. Colombia *Finds Violation of Minimum Standard of Treatment, Holds That a General Environmental Exception Does Not Preclude Obligation to Pay Compensation*, IISD (Dec. 20, 2021), *at* https://www.iisd.org/itn/2021/12/20/majority-in-eco-oro-v-colombia-finds-violation-of-minimum-standard-of-treatment-holds-that-a-general-environmental-exception-does-not-preclude-obligation-to-pay-compensation. However, tellingly, in the damages phase of the case, no damages were awarded. For an arbitral decision which contrastingly upheld the environmental provision, see Red Eagle Exploration Ltd. v. Republic of Colombia, ICSID Case No. ARB/18/12, Award (Feb. 28, 2024). Even though successful, Colombia incurred significant costs in fighting the case.

[121] *See EU Notifies Exit from Energy Charter Treaty and Puts an End to Intra-EU Arbitration Proceedings*, EUR. COMM'N (June 27, 2024), *at* https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3513.

[122] For instance Ecuador recently voted against the use of arbitration to settle disputes. *See Ecuador Referendum Rules Out ISDS Return, Underlining Public Support for a Sustainable Path*, IISD (Apr. 22, 2024), *at* https://www.iisd.org/articles/press-release/ecuador-referendum-rules-out-isds-return-underlining-public-support.

[123] See, e.g., the ongoing deliberations of UNCITRAL, Working Group III: Investor-State Dispute Settlement Reform, *at* https://uncitral.un.org/en/working_groups/3/investor-state.

spanning now more than four decades on the development and ramifications of arbitration and investor state dispute settlement, have been proven to be brilliantly prophetic.

## IV. Structural Injustice and Reparations

Colonialism has created the modern world. It has created structures of power, inequality, and hierarchy that continue to operate in the world through international law, and that determine the way in which economic, political, and intellectual resources are produced, allocated, and distributed.[124] It is precisely because the "new states" realized that colonialism continued on in this structural form through what Nkrumah called "neo-colonialism," that the new states sought to restructure the global system of economic relations. The ambitious efforts to create a "New International Economic Order" sought to overcome the structural injustice of colonialism.[125] This campaign, however, largely failed. Indeed, as I have hinted, it was the threat of the NIEO that prompted the creation of the new law of foreign investment.[126] The campaign for reparations in many respects is another version of the campaign for the NIEO.

Structural injustice contributes to the continuing impoverishment of those who are the descendants of the colonized. The CARICOM claims are based on the ongoing effects of colonialism for the people in that region. Many efforts to counter structural injustice are couched in the language of reparations-for instance, the claims for climate reparations.[127] The Western system of reparations obstructs and inhibits such efforts. This is not simply because that system presents legal obstacles to such claims; but because in a very real and material ways, the system of reparations prevents effective action by developing countries seeking to protect their own people against, for instance, climate harms.

The calls for environmental justice by many actors, particularly the small island states, have been a feature of international environmental negotiations now for many years.[128] The small island states face a number of climate-induced crises that threaten their very existence as territorial states. Different communities have attempted to pursue their claims for environmental reparations in many forums. Like the claim for reparations for slavery, however, this initiative faces many challenges—relating to the norms that have been ostensibly violated, the parties that can be said to be responsible, the inter-temporal rule and causation. The effort to establish a system of "state responsibility for environmental harm"

[124] For a powerful account of racism as a structure, see in this collection of essays, E. Tendayi Achiume, *Reparations, Race and International Law*, 119 AJIL 397 (2025).

[125] *See* Achiume, *supra* note 1.

[126] Antony Anghie, *Legal Aspects of the New International Economic Order*, 6 Humanity J. 145 (2015).

[127] For a philosophical approach to structural injustice, see the pioneering work of Iris Marion Young & Martha Nussbaum, Responsibility for Justice (2011). For discussions on the relationship between structural injustice and colonialism, see Catherine Lu, *Responsibility, Structural Injustice, and Settler Colonialism*, *in* What Is Structural Injustice? 107 (Jude Browne & Maeve McKeown eds., 1st ed. 2024). For a particularly interesting article that focuses on structural injustice and reparations, focusing on the CARICOM case, see Maeve McKeown, *Backward-Looking Reparations and Structural Injustice*, 20 Contemp. Pol. Theory 771 (2021).

[128] Maxine Burkett, *Climate Reparations*, 10 Melb. J. Int'l L. 509 (2009); Sarah Riley Case, *Looking to the Horizon: The Meanings of Reparations for Unbearable Crises*, 117 AJIL Unbound 49 (2023).

has been beset by complications that may be traced back at least to the defining *Trail Smelter* case.[129]

This claim for reparations, arising like slavery from a colonial past is still uncertain, more a political and moral claim than a legal one. This is despite the fact that environmental disasters invariably reproduce systems and structures of disadvantage that had been established by colonialism. Remedies for the structural injustice of environmental harms are compelling. In his eloquent book, Olúfẹmi Táíwò insists that climate reparations are essential for addressing the ongoing effects of colonialism.[130] This is for two broad reasons. First, it is the Global North that has been largely responsible for the environmental crisis. Second, however, it is those communities already made vulnerable by the larger operations of colonialism—and not just with respect to the environment—who will be most affected by the environmental catastrophes that now have become intense, overwhelming and devastating.

The existential fight to preserve the environment, to protect people suffering from the worst effects of environmental destruction, is surely one of the greatest challenges that the human community confronts at the moment. Reparations for climate change are denied. What is astonishing, however, is that even efforts by already vulnerable developing countries to protect their environment as best they can are being gravely undermined by precisely the system of "corporate reparations" that has driven the creation of the regime of state responsibility. Developing country efforts to protect their own environment are being met by foreign investment cases.[131] As UN Special Rapporteur for Human Rights and the Environment David Boyd starkly puts it, "Claims under the ISDS process are used to challenge climate and environmental actions taken by States and to demand billions of dollars in compensation."[132] The figures cited in the Report are sobering: "[a]t the merits stage, fossil fuel investors win 72[%] of [the] cases, forcing Governments to pay more than $77 billion in compensation to date."[133] This system of reparations is by far the most effective system in place: "the $95 billion awarded in a dozen ISDS cases likely exceeds the total amount of damages awarded by all courts to victims of human rights violations in all States worldwide, ever."[134]

The paradigm I had suggested earlier as driving reparations, the colonial reparations paradigm, is no longer adequate to capture these developments, as reparations are now being

[129] See on this issue, and the divergent developments in state responsibility, the essays by Anne Orford, *Reparations, Climate Change, and the Background Rules of International Law*, 119 AJIL 25 (2025) and Lavanya Rajamani, *Empowering International Law to Address Claims for Climate Reparations*, 119 AJIL 25 (2025) (in this issue). The advisory opinion, just handed down by the International Court of Justice, significantly elaborates and clarifies the issue of responsibility for harm caused by climate change and the duty of reparation. *See* Obligations of States in Respect of Climate Change, Advisory Opinion (ICJ July 23, 2025), *at* https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf. The impact of this opinion must be left for a later occasion.

[130] TÁíWÒ, *supra* note 7.

[131] KYLA TIENHAARA, THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE: PROTECTING FOREIGN INVESTORS AT THE EXPENSE OF PUBLIC POLICY (2009).

[132] Special Rapporteur David R. Boyd, Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environmental Action and Human Rights, para. 1, UN Doc. A/78/168 (July 13, 2023).

[133] *Id.*, para. 5.

[134] *Id.*, para. 41.

claimed against Western states. Indeed, Western states, suddenly subject to a system they had been so instrumental in creating, have now commenced a wide-reaching review of the ISDS, that are taking place in various forums including UNCITRAL and the OECD.[135] The term "corporate reparations" is more accurate to describe this phase of a long trajectory in reparations, with corporations now possessing independent standing to bring about claims. It was a process that was developed in the colonial encounter, but that has now extended beyond it, tracking a new phase of capitalism and the corporation as the vanguard of the process. Nevertheless, it remains the case that it is developing countries that are most affected by corporate reparations. As Boyd puts it: "[t]he ISDS system has especially devastating consequences for the global South, perpetuating extractivism and economic colonialism."[136] The vast majority of claims are brought against developing countries by investors in developed countries, and countries of the Global North "are eliminating their exposure to ISDS claims but preserving the ability of their investors to continue extracting wealth and exploiting the global South through the continued use of ISDS claims and threats."[137]

This dynamic, of how the established system of reparations based on the "liability model" contrasts with and counters the efforts made to claim structural reparations is also evident in the case of the CARICOM claims. These claims, which range from an apology to development programs for Indigenous peoples, to measures to address a public health crisis, have not been accepted.[138] The Caribbean nations face ongoing financial challenges in dealing with these grave and continuing problems, a form of structural injustice that can be attributed to colonialism and its aftermath. At the same time, however, the liability regime established by the investor-state regime operates with great effect and consequence, as Jason Haynes and Antonius Hippolyte trace in detail.[139] Their study examines the circumstances and pressures that led Caribbean countries to sign investment treaties, and the effects of these treaties in operation. Their argument, drawing on the work of David Schneiderman, is that "the international investment regime is colonial in its nature, content, and practical operation."[140] The argument is supported by the detailed analysis of several of the major investment cases originating in those treaties. Apart from the extensive tax and other concessional benefits enjoyed by investors, and the compensation they won, it is clear that the investor-state regime inhibits the regulatory power of governments, as in the case of environmental regulation. Seen in this way, the current legal regime not only obstructs international change, but prevents countries from achieving anything resembling structural change even in their own sovereign territory.

[135] *See, e.g.*, OECD, INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE: A COMPANION VOLUME TO INTERNATIONAL INVESTMENT PERSPECTIVES (2005).

[136] Special Rapporteur Boyd, *supra* note 132, para. 8.

[137] *Id.*, para. 20.

[138] Sean Coughlan, *No UK Apology Over Slavery at Commonwealth Summit*, BBC (Oct. 19, 2024), *at* https://www.bbc.com/news/articles/c0qzkg0ldqzo.

[139] Jason Haynes & Antonius Hippolyte, *The Coloniality of International Investment Law In the Commonwealth Caribbean*, 72 INT'L COMP. L. Q. 105 (2023).

[140] *Id.* at 109. For an earlier study of these and related themes by a Jamaican scholar, see NORMAN GIRVAN, CORPORATE IMPERIALISM: CONFLICT AND EXPROPRIATION (1976)

*A. Structural Injustice: Debt and Reparations*

The failure to pay a debt is a basis for reparations. Indeed, as I have mentioned, the law of state responsibility emerged in part as an effort to protect European and American bondholders when their investments in Latin America failed. I have made the argument that the system of ISDS is, first, an established system for the claiming of reparations. Many of the same arguments could be made with respect to the international system for the management of debt. Colonial debt often accompanied the winning of sovereign status, and that debt has continued.[141] Debt has been a perpetual and indeed, intensifying reality for the vast majority of developing countries. As Mohammed Bedjaoui noted in 1979, "[t]he more and more unbearable indebtedness of these countries has become a structural phenomenon."[142] The programs of the IMF that have been intended to solve the problem of debt have, rather, exacerbated them. The austerity and structural adjustment programs prescribed by the IMF have intensified inequality and taken a heavy toll on the social welfare of many states. In a world beset by crises, health, environmental, and financial, every crisis increases the debt burden of the poorer countries, translating and transferring massive human suffering into the ambit of this regime that has basically continued to enrich the developed states. The original debt of developing countries was 6.18 billion dollars; the total external debt of developing countries in 2007 was 3.3 trillion dollars; the total amount paid in debt servicing by developing countries during this period was 7.7 trillion dollars.[143] The ability of governments to sustain social, health, and education systems has been crippled as a result, giving rise to what James Gathii has termed "debt governance." The situation is further exacerbated by the ability of debt holders to now turn, precisely, to ISDS, with all the features I have outlined above, to pursue their claims. The ability of private creditors, backed by vulture funds, to use investment arbitration and recourse to other such forums in order to leverage their rights has disrupted debt negotiations. All these developments have profoundly affected the socioeconomic well-being of the people in these debtor countries.[144] It is unsurprising then, that a major claim of the CARICOM countries is debt cancellation.[145] It is in this context that principles such as trusteeship might be used to point to the ongoing effects of the colonial past.

[141] SOVEREIGN DEBT DIPLOMACIES: RETHINKING SOVEREIGN DEBT FROM COLONIAL EMPIRES TO HEGEMONY (Pierre Pénet & Juan Flores Zendejas eds., 2021).

[142] MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 41 (1979).

[143] For figures, see MANFRED B. STEGER, GLOBALIZATION: A VERY SHORT INTRODUCTION 42 (6th ed. 2023). *See also* JASON HICKEL, THE DIVIDE: GLOBAL INEQUALITY FROM CONQUEST TO FREE, Ch. 5 (2017). See also for further information about the extent and impact of debt, UNCTAD, Topsy-Turvy World: Net Transfer of Resources from Poor to Rich Countries, UNCTAD Policy Brief No. 78 (May 2020), *at* https://unctad.org/system/files/official-document/presspb2020d2_en.pdf; UNCTAD, A World of Debt Report 2024, *at* https://unctad.org/publication/world-of-debt.

[144] *See* Geoffrey Adonu, *The Case Against International Arbitration in Sovereign Debt Contexts*, *in* HOW TO REFORM THE GLOBAL DEBT AND FINANCIAL ARCHITECTURE (James Thuo Gathii ed., 2023) (which discusses the ramifications of the ICSID decision in *Abaclat v. Argentina*, which ruled that sovereign bond claims qualified as an investment and could be enforced via investment treaty arbitration). *See also* Ohio Omiunu & Titilayo Adebola, *Sovereign Debt as Investments: Dispute Resolution and Restructuring in Times of Crisis*, *in* HOW TO REFORM THE GLOBAL DEBT AND FINANCIAL ARCHITECTURE (James Thuo Gathii ed., 2023). The volume as a whole gives important insights into the issue of debt and its many effects.

[145] *See* CARICOM Reparations Commission, *10-Point Reparation Plan*, *at* https://caricomreparations.org/caricom/caricoms-10-point-reparation-plan.

## V. By Way of a Conclusion

In the landmark case which traces the origins of the modern sovereignty of the United States, Justice Marshall famously stated "[c]onquest gives a title which the courts of the conqueror cannot deny."[146] Whatever the elaborate and extensive protections granted by international law to sovereignty and territory, conquest transforms everything. Imperialism is of course, most explicitly furthered by conquest. And Marshall's frank acknowledgement of the limitations under which he was exercising his judicial function reverberates in the debate on reparations. It is argued that we cannot undo the past and that the structural injustices created by colonialism are too fundamental and overwhelming to be remedied by reparations; that allowing reparations claims would create large scale social instability and endless litigation, and that it would completely disrupt the logic of the existing jurisprudence. Ironically then, international law cannot now undo the injustices that international law played such a profound role in creating.

My purpose has been, in response, to point to ongoing injustices effected by the law of reparations, the current system of reparations, through foreign investment and debt regimes, that transfer resources from the poor to the rich, and to make visible their historical origins, understood in various respects, in the colonial encounter and its ongoing aftermath. There are then two visions of reparations at play, one the claim for colonial reparations, and the second, the existing system of reparations. And the existence of these competing visions of reparations surely indicates that the campaign for reparations must take place on two fronts. While rethinking for instance, the inter-temporal rule, it must also explore, understand, and contest the ongoing system of Western/corporate reparations that has such significant consequences not only for developing countries and its peoples, but the whole global community as inequality and environmental devastation intensify.

Finally, we might focus on the role of legal imagination in an unjust world, and our own training as lawyers, our fealty to the law, its coherence, and comprehensiveness. Nicolas Perrone in his pioneering work, demonstrates how norm entrepreneurship, the work of legal imagination, was instrumental in creating the foreign investment system of reparations.[147] In her brilliant study of reparations, Vasuki Nesiah urges us to note that "Legal concepts that were once errant and marginal may move to center stage while settled interpretations may be rendered doctrinaire and out-of-date. This process can yield legal arguments that are innovative composites of the settled and the unsettling in ways that have resonance with what has been termed 'recombinant narrative.'"[148] It is in this respect that the two principal sections of this article might be seen as engaging with the topic of reparations in an effort to enrich our legal imagination in order to address the ongoing injustices of the world that international law played such a profound role in creating.

[146] Johnson v. McIntosh, 21 U.S. 543, 40 (1823).
[147] Perrone, *supra* note 86.
[148] Nesiah, *supra* note 62.