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Race, Reparations, and International Law

*By E. Tendayi Achiume**

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I. Introduction

Mr. President, we remain resolute in our commitment to combating all forms of racism, racial discrimination and xenophobia and related intolerance whether that be at home or abroad . . . . Nonetheless, we have a number of concerns with this text . . . .

We do not agree with claims made in this resolution that states are required to make reparations for the slave trade and colonialism, which caused great suffering to many but were not, at that time, violations of international law. Moreover, these claims divert focus from the pressing challenges of tackling contemporary racism and global inequality—which are global challenges affecting all regions . . . .

Mr. President, we stressed last year that the importance of the fight against racism requires that we move forward together on a common path . . . . [W]e must come together to find a new approach, one that focuses on what we are all individually and collectively going to do to combat the scourge that is modern-day racism.[1]

The excerpted statement above was made on behalf of the United Kingdom at the United Nations Human Rights Council, explaining that nation's vote in opposition to a resolution

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[1] Rita French, *UN Human Rights Council 51: UK Explanation of Vote on Racism Resolution*, For., Commonwealth & Dev. Off. (Oct. 7, 2022), *at* https://www.gov.uk/government/speeches/un-human-rights-council-51-uk-explanation-of-vote-on-racism-resolution.

that annually aims to set a global agenda for "concrete action against racism, racial discrimination, xenophobia and related intolerance"[2] for United Nations member states. At least three features of this statement are noteworthy for my purposes.

The first is the UK's repudiation of any obligations on the part of colonial and enslaving powers to make reparation for "the slave trade and colonialism,"[3] a repudiation that frames colonialism, including the transatlantic trade in enslaved Africans as terrible but *lawful* events in the *past* that render reparations demands legally moot. Secondly, the UK presents demands for reparations as not only legally moot, but also as irresponsible distractions from "the pressing challenges of tackling contemporary racism and global inequality."[4] It establishes a wedge between the project of reparations and the project of the global governance of racism, indicting attempts to connect these two projects as normatively and strategically counterproductive. It also establishes a wedge between colonialism, including the transatlantic trade in enslaved Africans on the one hand, and contemporary racism on the other, calling instead for a "new approach, one that focuses on … the scourge that is modern-day racism."[5] And finally, the UK repudiates the Durban World Conference Against Racism on the ostensible grounds of "historic concerns over antisemitism."[6] In doing so, it dismisses entirely the 2001 World Conference Against Racism (Durban Conference) and its outcome—the Durban Declaration and Programme of Action (DDPA) as racist, eliding the fact that this convening, which as I discuss in more detail below, marked the largest transnational mobilization that combined demands for reparations with a framework for remaking the global governance of racism.[7]

Although the UK's statement was made on behalf one country, it captures the general orientation of the other colonial and former enslaving powers that form part of the Western Europe and Others Group (WEOG)—a consequential voting block and political influence within the United Nations.[8] In other words, one can read the UK's statement as representative of a more widely held orientation among the Western bloc, where reparations

[2] Human Rights Council Res. 51/32, at 1, UN Doc. A/HRC/RES/51/32 (Oct. 12, 2022).

[3] French, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] United Nations, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance Declaration and Programme of Actipn, (2001), *at* https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf [hereinafter Durban Declaration]

[8] WEOG contains countries geographically located in western Europe and also includes Israel, the United States, Australia, Canada, New Zealand, and Turkey. *See* UN Dep't Gen. Assembly & Conf. Mgmt., Regional Groups of Member States, *at* https://www.un.org/dgacm/en/content/regional-groups (last visited Apr. 27, 2025). In my former role as United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, I presented a report to the United Nations General Assembly on the obligations of members states to address reparations for racism rooted in colonialism and the transatlantic trade in enslaved Africans. E. Tendayi Achiume (Special Rapporteur), Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/74/321 (Aug. 21, 2019) [hereinafter Reparations Report]. My research and consultations in preparation for that report, as well as my broader interactions with WEOG representatives over the course of my mandate serve as the basis for my assessment that the position expressed by the United Kingdom is broadly representative of the bloc's orientation. Ongoing WEOG opposition to the DDPA, which I documented in a different report, E. Tendayi Achiume (Special Rapporteur), Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, paras. 12, 79–87, UN Doc. A/76/434 (Oct. 22, 2021) [hereinafter Durban Report], provides further support for the view I express.

and the global governance of racism are concerned. I contend in this Article that the three features of the UK's statement identified above also make explicit some of the unstated but nonetheless dominant conceptions of the problems of race and racism in international law, and how they relate to colonialism and reparations.

An ambition of this Agora Symposium is to consider the state of the field of international law in relation to the question of reparations. Central to what is at stake, is the conception of reparations that orients the project and study of reparations. What international legal scholarship there is on reparations for colonialism, including the transatlantic trade in enslaved Africans, has largely focused on the mandated remedial framework for internationally wrongful acts. It locates colonialism, including the transatlantic trade in enslaved Africans, as events in the past with the salient conclusion often being that there exists no international legal obligation to make reparation for colonialism and the transatlantic trade in enslaved Africans. There are important reasons why this approach has dominated, not least of all because it is an approach that reflects the narrow paradigm for reparations constructed by customary international law as captured by the Articles of States Responsibility for Internationally Wrongful Acts (ARSIWA).[9] But I caution against an approach that conflates and thereby reduces the normative and programmatic core of reparations for colonialism and the transatlantic slave trade only to providing remedies for unlawful conduct in the past. I instead advocate the worldmaking approach described by Sarah Riley Case and Olúfẹ́mi O. Táíwò and others that conceptualizes reparations as concerned foremost with the undoing of colonial relations, structures of domination, and patterns of distribution that still structure global relations.

At least one implication of this much broader conception of reparations for international law, is that it renders the entire field essential doctrinal terrain for the pursuit of reparations. Such a view marks a departure from the more traditional approach which, as mentioned above, has focused on the doctrine of state responsibility for internationally wrongful acts. As critical international legal scholars have argued, at a systemic level, international law and colonialism were mutually constitutive, and this law continues to reproduce colonial injustice. As a result, the international law of reparations should be understood as exceeding the bounds of the ARSIWA paradigm and its narrow construction of the problem of redress for historical injustice. The very content and structure of contemporary international law doctrine governing trade, migration, war, and so on are all essential terrain and require interrogation from the perspective of whether they reproduce or redress colonial injustice—in other words, from a reparative anti-colonial worldmaking perspective.

Even as I make the point that reparations implicate all of international law, my primary focus here is on the international law governing race and racism. One approach to race and racism in relation to colonialism and reparations considers the colonial meaning of race and colonial structures of racial domination to be problems of the past. Their place on the reparations agenda is among the list of egregious harms of the past, for which some remedial action may be warranted in the present alongside other harms such as mass violence or other forms of brutality. There is a genuine risk that even with the recent transnational focus on

[9] *See* Articles on Responsibility of States for Internationally Wrongful Acts, in Int'l Law Comm'n, Report of the International Law Commission on the Work of Its 53rd Session, 23 April–1 June and 2 July–19 August 2001, at 26–30, UN Doc. A/56/10 [hereinafter ARSIWA].

reparations, colonial race, and racism will be treated in this vein and reduced to the status of past harms.[10]

Such an approach does not go far enough to capture the technological value of race and racism—the powerful function they perform in reproducing and maintaining colonial relations and structures of domination. I argue a different approach is necessary—race and racism warrant being treated in international law as among the most consequential mechanisms of imperial ordering of people and places that were globalized by European colonial domination. Where the goal is justice for colonialism and its legacies—including, for example, historic greenhouse emissions—race and racism must be priority targets as enabling structures of the injustice at issue, and not simply considered as one of many wrongs one might choose to vindicate in due course. The contemporary international order remains tethered to historical colonial injustice, in part through the contemporary meaning and operations of race—a social construction that recapitulates colonial transnational hierarchies of people and place, even in the wake of the formal decolonization of much of the world. As such, race and racism and their contemporary global governance are priority terrain for the project of reparations. Relatedly, reparations are an urgent concern for the global governance of racism.

This Article proceeds as follows. Part II rejects the conception of the project of reparations that constructs the legal question of reparations as moot, and as a distraction from the pressing challenges of tackling contemporary racism and global inequality. I instead, as mentioned above advocate the worldmaking approach, concerned foremost with undoing of colonial relations, structures of domination and patterns of distribution that still structure global relations. I foreground the historical role of race and racism in colonial worldmaking and draw on the scholarship of philosopher Alasia Nuti to explain how race and racism operate as historical structures that reproduce colonial injustice into the present.

Part III considers the question: where does international law stand with respect to the structural reproduction of colonial hierarchy through racial injustice, and in particular, is international law fit for the purpose of reparative anti-colonial worldmaking? I draw on critical legal scholarship, especially that within the Third World Approaches to International Law (TWAIL) and Critical Race Theory (CRT) umbrellas,[11] to describe what I term the "colonial racial aphasia" of hegemonic international law. This is the tendency to elide race and racism altogether, or to treat their contemporary manifestations as wholly disconnected

[10] Consider the General Assembly climate change referral to the International Court of Justice. GA Res. 77/276, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (Mar. 29, 2023). Notwithstanding the foundational role colonialism, race, and racism have played in facilitating the extractive and industrial processes that produced the catastrophic greenhouse emissions and environmental destruction at the heart of the global crisis, and in structuring the global impacts of this crisis, see Written Statement of the Organisation of African and Caribbean and Pacific States (OACPS) (Obligation of States in Respect of Climate Change Advisory Opinion), para. 53 (Mar. 22, 2024) (arguing "it is a core contention of the OACPS that the fault-lines underpinning climate injustice convergence with those underpinning inequality and injustice arising from colonial domination and racial inequality"), the referral excludes any mention of colonialism and racism.

[11] Third World Approaches to International Law (TWAIL) is an umbrella of scholarship that interrogates the ongoing influence of European colonialism and other forms of imperialism on international law. For helpful background, see James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011), and James Thuo Gathii, *Twenty-Second Annual Grotius Lecture: The Promise of International Law: A Third World View*, 36 AM. U. INT'L. L. REV. 377 (2021).

from their colonial origins, which has the effect of thwarting reparations. In this respect, dominant approaches in international law, and indeed flagship global policymaking mirror the position advocated by the United Kingdom in its statement.

I conclude in Part IV by reflecting on the role that transnational social and political movement resistant to racial injustice can play in orienting international lawyers' momentum in the direction of reparative anti-colonial worldmaking. I also briefly consider the insights gained by framing decolonization as a requirement of reparative anti-colonial worldmaking.

II. Reparations, Worldmaking, and Structures of Historical Injustice

In this Part, I seek to do two things. First, to advocate an approach in international law to reparations that moves beyond the ARSIWA conception and instead understands reparations as an anti-colonial worldmaking project. This requires confronting European colonialism, including the transatlantic trade in the enslavement of Africans, as itself a worldmaking project, as historic injustice that has been structurally reproduced over time and that is manifest in the present. Secondly, I propose that the global governance of contemporary racism is a crucial mechanism through which reparative anti-colonial worldmaking is mediated. This is because contemporary race and racism operate as a transnational historical structure that reproduces colonial hierarchy in the present. This reproduction is not determined by law alone, but law, including international law, has a meaningful influence on this reproduction, especially the doctrine governing the bounds of the legitimate use and meaning of race.

What does the project of reparations mean for international law and international lawyers? The doctrinal landscape that has dominated what limited international legal scholarship there is on the topic, is that captured by the ARSIWA.[12] It is arguably this minefield of the law of state responsibility that has set the terms of debate and the programmatic agenda of proponents of reparations,[13] and understandably so. Article 13 of the ARSIWA codifies the infamous (in reparations circles) intertemporal principle and colonial and former enslaving powers have consistently clung to this principle as an insurmountable legal barrier to

[12] *See, e.g.*, Max du Plessis, *Reparations and International Law: How Are Reparations to Be Determined (Past Wrong or Current Effects), Against Whom, and What Form Should They Take?*, 22 Windsor Y.B. Access Just. 41, 49 (2003); Stephen Pete & Max du Plessis, *International Law and Reparations for the Atlantic Slave Trade: A Case Study in Legal Obfuscation*, 31 S. Afr. Y.B. Int'l L. 243, 255–60 (2006); Luke Moffett & Katarina Schwarz, *Reparations for the Transatlantic Slave Trade and Historical Enslavement: Linking Past Atrocities with Contemporary Victim Populations*, 36 Neth. Q. Hum. Rts. 247 (2018); Steven Ratner, *Reparations for Colonialism Beyond Legal Responsibility*, 119 AJIL 507 (2025); Katarina Schwarz, Reparations for Slavery in International Law: Transatlantic Enslavement, the Maangamizi, and the Making of International Law (2022). Also relevant doctrinally, is the better developed reparations regime created by international human rights law and principles. For an overview of these obligations as they relate to racism rooted in colonialism and slavery, see Reparations Report, *supra* note 7, paras. 34–35. The literature referenced above has variously considered remedies that may be available through international criminal law or international human rights law, for example, but I would argue state responsibility as structured by customary international law remains foundational. In her contribution to this Agora, Anne Orford provides an illuminating account of the legal and political contexts of the drafting of the ARSIWA, *Reparations, Climate Change, and the Background Rules of International Law*, 119 AJIL 452, 11–14 (2025).

[13] *See, e.g.*, *Reparations Under International Law for Enslavement of African Persons in the Americas and the Caribbean*, ASIL Proc. of the Symposium (2022); *Quantifying Reparations for Transatlantic Chattel Slavery*, ASIL Proc. of the Symposium (2024) (summarizing an historic, two-part initiative proposed by Judge Patrick Robinson of the International Court of Justice and co-sponsored by the American Society of International Law and The University of the West Indies, Office of the Vice Chancellor, that addressed various dimensions of legal claims for reparations for enslaved Africans in the Americas and the Caribbean).

reparations, insisting that colonialism, including the transatlantic trade in enslaved Africans were not prohibited by international law during the historical periods for which reparations are demanded. A growing body of work, operating primarily within the ARSIWA framework, contests this assertion, and while that contestation is important,[14] it hardly begins to exhaust the field of work—even at the level of examining relevant doctrine—entailed by the question of reparations.[15]

In an illuminating reflection on the multi-sited reparations advocacy of Caribbean nations, theorists, and activists, Sarah Riley Case argues that "reparations are foremost a horizon of transformation away from accumulative ways of life that spread from Europe to the world, structuring the present reality."[16] She describes the Caribbean as "a fulcrum of anti-imperial thought that has generated many such worldmaking programs for international law[,]" and identifies its approach to reparations as a "worldmaking program[]" responsive to colonial and (post-)colonial hegemony but also anchored in "self-assured traditions of abolition, independence, Pan-Africanism, and regional solidarity."[17] Riley Case's framing of reparations is instructive on multiple levels. It helpfully reminds that just as the transatlantic trade in enslaved Africans and the broader enterprise of European colonial domination cannot be reduced to mere "breaches" of international legal obligations, international legal approaches to reparations must in equal measure resist reductive impulses, and instead begin from the premise that the ambition of reparations implicates worldmaking, or at the very least, an unmaking of the world wrought by European colonial domination.

The question of how to conceptualize, let alone address historic injustice on the scale of colonialism, including the transatlantic trade in enslaved Africans is, of course, profoundly complex.[18] In this Part II, I draw on the work of two political philosophers—Olúfẹ́mi O. Táíwò and Alasia Nuti—to elaborate on Riley Case's invitation to appreciate reparations as a program of worldmaking, and specifically to situate the global governance of race/racism and international law within this program. I apply features of their conceptualizations of reparations and historic injustice respectively, to develop a theoretical account of contemporary race and racism's relationship to colonial injustice and to the legal dimensions of the project of reparations.

[14] *See, e.g.*, Antony Anghie, *The Injustices of Reparations*, 119 AJIL 423 (2025) (arguing that the principle of trusteeship may serve as a basis for claims for colonial reparations that are not foreclosed by the intertemporal principle); *see also* Orford, *supra* note 12 (arguing that since the 1940s international law has been understood to include state obligations to prevent transboundary harm that provide a basis for challenging climate injustice.)

[15] Lavanya Rajamani's contribution to this Agora highlights, for example, the efforts of historic emitters of greenhouse gas emissions to limit debates on climate justice to the legal framework established by the Paris agreement. Lavanya Rajamani, *Empowering International Law to Address Claims for Climate Reparations*, 119 AJIL 484 (2025).

[16] Sarah Riley Case, *Looking to the Horizon: The Meaning of Reparations for Unbearable Crises*, 117 AJIL UNBOUND 49, 49 (2023); *see also* Antony Anghie, *Rethinking International Law: A TWAIL Retrospective*, 34 EUR. J. INT'L L. 7, 93–103 (discussing the Third World perspectives on reparations in this vein); Anghie, *supra* note 14.

[17] Riley Case, *supra* note 16, at 49. Vasuki Nesiah's conceptualization of reparations similarly pushes beyond an account that constructs reparations as about addressing colonial injustice as an event in the past. 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).

[18] Recent philosophical reflections on historic injustice that are helpful for reparations debates include: CATHERINE LU, JUSTICE AND RECONCILIATION IN WORLD POLITICS (2017); ALASIA NUTI, INJUSTICE AND THE REPRODUCTION OF HISTORY: STRUCTURAL INEQUALITIES, GENDER AND REDRESS (2019); and OLÚFẸ́MI O. TÁÍWÒ, RECONSIDERING REPARATIONS 20 (2002).

A. Race, Racism, and Colonial Worldmaking

Táíwò draws on a transnational, anti-colonial, and anti-slavery canon to develop what he terms the "constructive view" of reparations as a worldmaking project.[19] He describes the contemporary world system as "Global Racial Empire,"[20] a legacy of European colonialism "in which laws and norms maintain the unjust distribution of racial capitalism."[21] Within this landscape racial disparities in access to wealth, public health, and other social goods that structure intra- and international relations are the "present accumulated imprint of past racist distribution of resources and infrastructure."[22] Drawing on the political philosophy of Charles Mills, he describes the contemporary operation of white[23] supremacy as maintaining the Global North as the location of accumulations of advantage and the Global South as the location of the accumulation of disadvantage.[24] The constructive view of reparations he advocates, and which he develops specifically in response to the world as constituted by transatlantic slavery and colonialism, is thus "a historically informed view of distributive justice, serving a larger and broader worldmaking project. Reparation, like the broader struggle for social justice, is concerned with building the just world to come."[25]

For international lawyers in particular, Táíwò's analysis invites an important insight: the question of reparations cannot be siloed within and confined to the ARSIWA's state responsibility paradigm, with its emphasis on discrete breaches and its temporal strictures. Instead, the question of reparations must be refracted across the entire field of international law to the extent that this field remains a means of perpetuating "the world" as constituted by colonialism, and as maintained by (post-)colonial imperialisms.[26]

On this reparative anti-colonial worldmaking view, reparations must provide an adequate response to the colonial DNA of the global order, including the fundamental place of race/racism in colonial worldmaking. Critical theorists of race have long argued the mutually constitutive relationship among race, racism, and European colonial domination, identifying race and racism as both outputs and means of this domination.[27] Within European colonial empire "race became the fundamental criterion for the distribution of the world population

[19] TÁÍWÒ, *supra* note 18, at 20.

[20] *Id.* at 14–68.

[21] *Id.* at 98.

[22] *Id.* at 26.

[23] It is the policy of the *American Journal of International Law* in keeping with the Associated Press's guidance not to capitalize "white" as opposed to Black and Indigenous. On how this policy aids in rendering whiteness as a transnational racial identity and structure invisible, on how other institutions have chosen to capitalize the term, see Matiangai V.S. Sirleaf, *Rendering Whiteness Visible*, 117 AJIL 484 (2024).

[24] TÁÍWÒ, *supra* note 18, at 51.

[25] *Id.* at 74.

[26] A significant body of international legal literature exists arguing the persistence of colonial relations and structures of domination in the ostensibly "post" colonial global order. Canonical texts in this regard include: ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (1st ed., 2004); SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY (2011); and SIBA N'ZATIOULA GROVOGUI, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW (1996).

[27] *See, e.g.*, BERNARD M. MAGUBANE, THE MAKING OF A RACIST STATE: BRITISH IMPERIALISM AND THE UNION OF SOUTH AFRICA, 1875–1910 (1996); DAVID THEO GOLDBERG, THE RACIAL STATE (2002); Aníbal Quijano & Michael Ennis, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM SOUTH 533 (2000).

into ranks, places and roles in . . . society's structure of power."[28] By the nineteenth century, "race" within the paradigm of European empire fused pseudo-scientific biological claims about racial categories to claims of moral superiority and inferiority of variously classified peoples.[29] And to be clear, even during the peak of colonial race science, "race" was a messy, inchoate category.[30] Writing on the establishment of the settler colony of South Africa, Joel Modiri, for example, describes European subjugation of "the indigenous African population and other oppressed groups"—all comprised of various peoples—and their racialization as "'Blacks' in the process of inventing the political category of whiteness."[31] It bears underscoring that the colonial construction of race included the fabrication of "whiteness." Relying on racialized stereotypes of natives and their colonizers, colonial authorities were able to promulgate legally sanctioned regimes of coercion and domination over the lives of the people they colonized.[32] Suffice it to say race and racism where crucial technologies of colonial worldmaking.

B. Race/Racism and the Structural Reproduction of Colonial Domination

The twentieth century marked the formal end of most, though by no means all European colonial empire. On the account of the United Kingdom referenced in Part I, and on the account implicit in hegemonic international legal doctrine,[33] this era of formal decolonization also heralded the end of colonial race and racism, thereafter to be replaced by "modern-day racism." In effect, however, formal decolonization for colonized and enslaved peoples marked a transition not to full self-determination but instead to different modes of imperial domination compatible with, even if contested by post-colonial statehood.[34] Formal decolonization neither dismantled colonial race as a transnational structure, nor did it fundamentally disrupt the hierarchy of people and places characteristic of colonial racial ideology. This is not to say, as I will elaborately shortly, that the past and the present are *identical*. But notwithstanding significant shifts in the manifestations and operation of imperial relations and structures of domination, where race and racism are

[28] Quijano & Ennis, *supra* note 27, at 535.

[29] *See, e.g.*, Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219 (1999). I do not here recount the place of religion—Christianity in particular—in the racialization of non-Europeans over the course of colonial expansion but this history is material. *See, e.g.*, GROVOGUI, *supra* note 26, at 7–10, 16–25; Rabiat Akande, *An Imperial History of Race-Religion in International Law*, 118 AJIL 1 (2024).

[30] Mahmud describes, for example, how in colonial India, as in many other places, "race" was used to describe myriad religious, caste, tribal, national and ethnic identities, and the attendant racial stereotypes produced were "always unstable, contingent and malleable, always available to be turned on their head, depending upon who was using them and for what purpose." Mahmud, *supra* note 29, at 1228. The shifting demands of colonial rule produced this instability, and Mahmud notes that the only constant was "the imperative to maintain colonialism as a rule of difference and domination." *Id.* at 1224.

[31] Joel Modiri, *Azanian Political Thought and the Undoing of South African Knowledges*, 68 THEORIA: J. SOC. & POL. THEORY 42, 43 (2021); *see also* MARILYN LAKE & HENRY REYNOLDS, DRAWING THE GLOBAL COLOUR LINE: WHITE MEN'S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY 3 (1st ed., 2008) (providing a historiography of the production and spread of "Whiteness" as a "transnational form of racial identification, that was, as [DuBois] noticed, at once global in its power and personal in its meaning, the basis of geo-political alliances and a subjective sense of self").

[32] *See, e.g.*, Mahmud, *supra* note 29, at 1231–42.

[33] *See* Part II *infra*.

[34] *See, e.g.*, GROVOGUI, *supra* note 26.

concerned, past remains present. I employ Alasia Nuti's political theory of historical-structural injustice to crystallize the latter point. She offers an instructive approach to conceptualizing the means through which historical structural injustice is reproduced over time.[35]

For Nuti, history is "embedded … in the present through long-term structures."[36] History is thus not only comprised of discrete events but also of long-term structures, and among the examples she offers to illustrate this, is that of the enslavement of Africans in the United States. She describes slavery not merely an event in history but as "also characterised by long-term structures that constituted its possibility of existence and that may have outlived the 'event' of slavery…."[37] Slavery is thus also appropriately understood as instituting a historical structural injustice,[38]—an injustice that was initiated in the past but is reproduced over time in different ways even if its original forms may appear to have ended. In her account of the structural dimensions of slavery, Nuti includes "those long term structures, such as the creation of racial hierarchies, that sustained the institution of slavery over time during its different phases."[39] She proposes that we see the persistence of historical structural injustices not simply as legacies of the past but as new outputs—structural reproductions carried forward into the present,[40] and significantly, they are carried forward through different means than may have been salient in the past. On her account, these new reproductions of historic injustice generate "stringent obligations of justice and redress,"[41] including in the register of reparations.[42] She also makes an important point regarding the plurality of historical structural injustices, and thus advocates a "pluralistic account of structural injustice, which highlights both the similarities and differences between types of structural injustice by looking at the role unjust history plays in their formation and persistence."[43] My present concern is colonial racial justice, which can by no means exhaust the multiple and intersectional structural dimensions of colonial injustice, but is nonetheless an integral part of it.

The harms of colonialism have appropriately been variously conceptualized. Here, I am especially concerned with the relations among peoples and places that colonialism instantiated and institutionalized in the global order, namely a hierarchical ordering that dictated European primacy on a planetary scale. I am also concerned with the mechanisms of this hierarchical ordering or the modes of European domination—the *how*. In other words, I am concerned with *colonial relations and structures of domination* as historical structural

[35] Alasia Nuti, *Unjust History and Its New Reproduction—A Reply to My Critics*, 24 ETHICAL THEORY & MORAL PRAC. 1245 (2021); Within legal scholarship, the work of Zinaida Miller traces the role of temporality and its judicial construction in attempts to adjudicate accountability of historic racial injustice. Zinaida Miller, *The Injustices of Time: Rights, Race, Redistribution, and Responsibility*, 52 COLUM. HUM. RTS. L. REV. 647 (2021).

[36] NUTI, *supra* note 18, at 25.

[37] *Id.* at 26.

[38] Nuti defines "historical-structural injustices" as "unjust social-structural processes enabling asymmetries between differently positioned persons, which started in the past and are reproduced in a different fashion, even if the original form of injustice may appear to have ended." *Id.* at 44.

[39] *Id.*

[40] *Id.*

[41] Nuti, *supra* note 35, at 1246.

[42] NUTI, *supra* note 18, at 157.

[43] *Id.* at 10.

injustices that are constitutive of our global order (the world) and that are reproduced into the present notwithstanding the formal repudiation of colonialism in international law.

Race and racism are central among the structures or conditions of possibility that facilitate the reproduction of colonial relations and structures of domination as historical structural injustices. As a result, we should understand race and racism as *transnational historical structures* that continue to reproduce colonial relations and structures of domination across space and time. To be clear, I am proposing that racialization and racism are not merely colonial injustices themselves but are also at the same time structures through which colonial injustice of various kinds is reproduced. The form and means that race and racism take vary across place and time but they still facilitate hierarchical ordering of people and places with striking faithfulness to the colonial ranking that constructed whiteness as its apex.[44] This is the case even for nations that have been formally decolonized. Today, "historically contingent social systems of meaning" and the "elements of morphology and ancestry [to which they attach]"[45] remain pervasively, *though not exclusively* anchored in the logics of European colonialism, including as instantiated in the transatlantic enslavement of Africans.

To a great extent, a preoccupation of my work as UN Special Rapporteur sought to document this racial reproduction of historical injustice on a global scale.[46] The contemporary meaning of Blackness, for example, retains the colonially constructed presumptions of danger, inferiority, "otherness" and so on that are manifest transnationally, say in the frameworks that construct and govern criminality.[47] So, too, the contemporary meaning of whiteness retains the colonially constructed presumptions of superiority and so on.[48] At the same time, as Nuti stresses—positing the reproduction of historical injustice (in my case, colonial relations and structures of domination) through what I am calling transnational historical structures (race and racism), accommodates recognition of the salience of *change* to those structures and to the injustices they carry forward.[49] People racialized as Black, for example, are legally entitled to own land in places such as southern Africa, where prior to formal decolonization, land ownership was limited primarily to people racialized as white. This is an important and emancipatory shift in the legal meaning of Blackness. But land ownership in the region remains profoundly inegalitarian on a racial basis in significant part due to legal, economic, political and social regimes that reproduce colonial relations and structures of domination even though these regimes differ from those that obtained under formal colonial domination. The contemporary meaning and function of Blackness or any other colonially originated racial classification shifts over time but retains

[44] Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387 (2006).

[45] IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 10 (10th anniv. ed., 2006).

[46] *See, e.g.*, E. Tendayi Achiume (Special Rapporteur), Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Global Extractivism and Racial Equality UN Doc. A/HRC/41/54 (May 14, 2019); Note by the Secretary-General, Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, UN Doc. A/74/321 (Aug. 21, 2019).

[47] *See, e.g.*, UN High Commissioner for Human Rights, Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers Through Transformative Change for Racial Justice and Equality, at 25, UN Doc. A/HRC/57/67 (July 25, 2024).

[48] *See, e.g.*, Matiangai V. S. Sirleaf, *White Health and International Law*, *in* RACE, RACISM & INTERNATIONAL LAW (Devon W. Carbado, Kimberlé Crenshaw, Justin Desautels-Stein & Chantal Thomas eds., forthcoming 2025).

[49] NUTI, *supra* note 18, at 27–28.

its colonial core, keeping people and places fixed in their colonially stipulated hierarchy.[50] In this sense, the historical structural injustice of colonial relations and structures of domination is reproduced, but it is reproduced through different means, and also manifests differently.

To be clear colonial and post-colonial conceptions of race are not intended to exhaust the totality of contemporary social constructions of race. Consider, for example, important scholarship theorizing whiteness among Europeans as structured in part by the imperial rivalry between Eastern and Western European hegemony.[51] In addition, it bears mentioning that as a mechanism that operationalizes colonial relations and structures of domination, and that reproduces them over time, race and racism are globalized technologies.[52] I mean this in a number of respects. The first is geographic and speaks to the global or planetary scale of racialization and its injustices.[53] But the second sense speaks to the fact of race/racism's global amenity to diverse imperial projects even beyond those directed by European colonial powers, a formation I take to include the United States and the other former British dominions.[54] White supremacy remains the dominant organizing principle of the international order. But at the same time, colonial racializations are profitable for elite and hegemonic actors globally, irrespective of the racialization of these actors. Black racialization, for example, specifically Black racialization in the present that retains the vestiges of racial meaning produced through the transatlantic enslavement of Africans, accumulates advantage including economic profit—to nations, corporations, and individuals racialized as Black, Chinese, Arab, Indian, and so on.

C. The Global Governance of Race/Racism and Reparative Anti-colonial Worldmaking

Racialization can and is wielded as a means of domination by peoples irrespective of where they are situated in the colonial racial hierarchy, and reparative anti-colonial worldmaking must be concerned with disrupting this technology, because the technology itself is a constitutive feature of colonial and (post-)colonial injustice. What is at stake in the project of

[50] This point about the structural conditions of racialization is consistent with the fact that some individual Black and other non-white elites enjoy tremendous privilege. In the contemporary period, see, e.g., B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004) (describing the emergence of an imperial "transnational capitalist class," which is multiracial in its composition); James T. Gathii & Olabisi D. Akinkugbe, *Corporate Structures and the Attribution Dilemma in Multinational Enterprises*, *in* STATES, FIRMS, AND THEIR LEGAL FICTIONS: ATTRIBUTING IDENTITY AND RESPONSIBILITY TO ARTIFICIAL ENTITIES (Melissa J. Durkee ed., 2024) (describing the role of African elites in facilitating neocolonial corporate enterprise in Africa).

[51] Ivan Kalmar, *Race, Racialisation, and the East of the European Union: An Introduction*, 49 J. ETHNIC & MIGRATION STUD. 1465 (2023).

[52] For an illuminating account of race as a technology of global economic governance, and on what it means to describe race as technological see generally, Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. REV. 1860 (2021). *See also* Carmen G. Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J. L. & POL. ECON. 127 (2022) (describing "race-making" as a technology of profit accumulation).

[53] Consider the role of colonial racial injustice in structuring the causes and consequences of catastrophic levels of greenhouse emissions at the center of the planetary climate crisis. Carmen G. Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, 11 OÑATI SOCIO-LEGAL SERIES 108 (2021).

[54] *See, e.g.*, Rudabeh Shahid & Joe Turner, *Deprivation of Citizenship as Colonial Violence: Deracination and Dispossession in Assam*, 16 INT'L POL. SOCIO. (2022) (analyzing the Indian Hindu nationalist use of citizenship-stripping—a colonial and racialized institution—to entrench anti-Muslim racism).

reparations, then, is not simply relations between the colonized and the colonizers, but also relations among the colonized, and within colonizing nations as well.

When the project of reparations is appreciated as one of anti-colonial worldmaking, and when contemporary race and racism are appreciated as central among the means through which coloniality is structurally reproduced overtime, the contemporary global governance of racism (including through international law) is legible as a crucial site of contestation. Among the foundational insights of Critical Race Theory (CRT) is that law constructs race,[55] *inter alia*, because law defines the "spectrum of domination and subordination that constitutes race relations."[56] Examining the legal construction of race includes examining "the extent to which law ascribes racialized meanings to physical features and ancestry, and of the ways in which law translate[s] ideas about race into the material societal conditions that confirm and entrench those ideas."[57] Colonial law played an important part in the social construction of race as biological fact, and as a basis for instituting relations of domination. In fact, law itself is a structure that has been central to maintaining the role of race and racism in aiding the reproduction of the injustices of colonialism,[58] an issue that I take on more

[55] For a bibliography of CRT scholarship on legal construction of race in the United States, see HANEY LÓPEZ, *supra* note 45, at 185–86. On CRT and international law, see, e.g., James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other*, 67 UCLA L. REV. 1610 (2020); RACE, RACISM & INTERNATIONAL LAW, *supra* note 48.

[56] HANEY LÓPEZ, *supra* note 45, at 8.

[57] *Id.* at 10. For a detailed exposition of the legal construction of race in the United States, replete with examples, see *id.* at 78–108. A sizeable body of critical scholarship in international law offers a range of examples across subfields, implicitly tracing how international law constructs race and reproduces colonial injustice. *See* note 53 *supra*. Also important to note is that the legal forms that racialization takes, as argued by Rob Knox, are shaped by inter-imperial rivalry. Robert Knox, *Race, Racialisation and Rivalry in the International Legal Order*, *in* RACE AND RACISM IN INTERNATIONAL RELATIONS: CONFRONTING THE GLOBAL COLOUR LINE 186–87 (Alexander Anievas, Nivi Manchanda & Robbie Shilliam eds., 2015).

[58] For work variously detailing the ongoing role of international law in the construction and propagation of race and racism, and colonial injustice see, for example, E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445 (2022); E. Tendayi Achiume & Asli U. Bali, *Race and Empire: Legal Theory Within, Through and Across National Borders*, 67 UCLA L. REV. 1386 (2021); Justin Desautels-Stein, *A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights*, 67 UCLA L. REV. 1536 (2021); Darryl Li, *Genres of Universalism: Reading Race into International Law, with Help from Sylvia Wynter*, 67 UCLA L. REV. 1686, 1692 (2021); Christopher Gevers, *"Unwhitening the World": Rethinking Race and International Law*, 67 UCLA L. REV. 1652 (2021) (describing the depoliticization, dehistoricization, and domestication of race in international law); James Thuo Gathii, *Beyond Color-Blind International Economic Law*, 117 AJIL UNBOUND 61 (2023); James Thuo Gathii & Ntina Tzouvala, *Racial Capitalism and International Economic Law: Introduction*, 25 J. INT'L ECON. L. 199 (2022); Knox, *supra* note 57; Mahmud, *supra* note 29; Natsu Taylor Saito, *Race, Indigeneity, and Migration*, 117 AJIL UNBOUND 43 (2023); Carmen G. Gonzalez & Athena D. Mutua, *Introduction: Special Issue on Racial Capitalism and Law*, 2 J. L. & POL. ECON. 121 (2022); JOHN REYNOLDS, EMPIRE, EMERGENCY AND INTERNATIONAL LAW (2017); *See, e.g.*, James Thuo Gathii, *Financing Climate Change Through a Racial Capitalism Lens*, 41 WIS. INT'L L.J. 521 (2024); Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. REV. 1860 (2021); Katherine Fallah & Ntina Tzouvala, *Deploying Race, Employing Force: "African Mercenaries" and the 2011 NATO Intervention in Libya*, 67 UCLA L. REV. 1580 (2021); Usha Natarajan, *A Third World Approach to Debating the Legality of the Iraq War*, 9 INT'L CMTY. L. REV. 405 (2007); Vasuki Nesiah, *The Law of Humanity Has a Canon: Translating Racialized World Order into "Colorblind" Law*, 43 POL. & LEG. ANTHROP. REV. 15 (2020); Makau wa Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001); Carmen G. Gonzalez, *Climate Change, Race, and Migration*, 1 J. L. & POL. ECON. 1 (2020); Matiangai Sirleaf, *Racial Valuation of Diseases*, 67 UCLA L. REV. 1820 (2021); MOHSEN AL ATTAR ET AL., EMANCIPATING INTERNATIONAL LAW: CONFRONTING THE VIOLENCE OF RACIALISED BOUNDARIES (forthcoming 2025); RACE, RACISM & INTERNATIONAL LAW, *supra* note 48; Ntina Tzouvala, *Invested in Whiteness: Zimbabwe, the von Pezold Arbitration, and the Question of Race in International Law*, 2 J. L. & POL. ECON. 266 (2022); Frédéric Mégret, *Racial Panics and the Making of (White) International Law*, *in* RACE, RACISM & INTERNATIONAL LAW, *supra* note 48.

concertedly in Part III. My point here is to connect a foundational insight from CRT on the relationship between law and race/racism, to a framework for understanding reparations as a global project to disable the reproduction of colonial relations of domination.

Reparative anti-colonial worldmaking entails undoing race and racism as mechanisms for the structural reproduction of colonial injustice. In so far as race and racism are means of reproducing economic, political, social, and epistemic dominance, by deploying scripts that associate morphology, ancestry, geography, and self-determination on terms defined through colonialism, reparations require legal frameworks that disable the economic, political, social, and epistemic dominance they enable. A crucial site for these ambitions is the global governance of race and racism, which is comprised of binding international law, non-legally binding normative and policy frameworks, and an institutional infrastructure that is concentrated within the UN's international human rights system.[59] Reparations necessitate tackling contemporary racism and global inequality, and conversely, the global governance of contemporary racism is fundamental to the project of reparations.

III. The Legal Reproduction of Historical Injustice Through the Global Governance of Racism

A. International Law and Colonial Racial Aphasia

International law's formal narrative is of the unequivocal repudiation of the European colonial biological conception of race, and of racial *discrimination* in particular.[60] Few would dispute the pinnacle status of the customary international law prohibition on racial discrimination as *jus cogens*.[61] In addition, across the international legal framework enshrining human rights, discrimination on the basis of race, color, ethnicity, and related grounds is prohibited across treaty regimes, with the International Convention on the Elimination of Racial Discrimination (ICERD) offering the most crystalized definition of and framework for the prohibition on racial discrimination.[62] So-called soft law frameworks have also developed within the UN framework intended to tackle the more broadly framed problem of "racism, racial discrimination, xenophobia and related intolerance," with the most important being the Durban Declaration and Programme of Action.

All of the above might suggest a positive state of affairs—a doctrinal landscape fit for the purpose of unseating race and racism as a transnational historical structure that reproduces colonial relations and structures of domination. But the reality is rather different. In fact, international law's hegemonic conceptualizations of race and racism tend to elide and obfuscate their colonial genealogy, and the manner in which they reproduce colonial

[59] For overview of this architecture, see E. Tendayi Achiume & Gay McDougall *Anti-racism at the United Nations*, 117 AJIL Unbound 82; Rosana Garciandia & Philippa Webb, *The UN's Work on Racial Discrimination: Achievements and Challenges*, 25 Max Planck Y.B. UN L. Online 216 (2022).

[60] On the failure of the human rights framework to address racism in particular, see Anna Spain Bradley, *Human Rights Racism*, 32 Harv. Hum. Rts. J. 1 (2019).

[61] *See* Dire Tladi (ILC Special Rapporteur), Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*), paras. 91–101, UN Doc. A/CN.4/727 (Jan. 31, 2019). In his contribution to this Agora, Professor Tladi makes the case for ending the forced separation between *jus cogens* and reparations. Dire Tladi, Jus Cogens *and Reparations: Can We Just End the Separation?*, 119 AJIL 530 (2025).

[62] For an overview, see Garciandia & Webb, *supra* note 59, at 219–22. On the failure of the human rights framework to address racism in particular, see Spain Bradley, *supra* note 60.

injustice. In this sense, as it stands, international law operates more as a part of the problem (reproduction of colonial racial injustice) than as a part of the solution (reparative anti-colonial worldmaking). Recent legal scholarship maps a range of the deficiencies of international law practice and scholarship in this regard.[63] Here I draw on some of that scholarship and offer additional insights on these deficiencies, connecting them to illustrative jurisprudence concerning race and racism, and analyzing their implications for reparations. My goal is to highlight some of the ways international law aids the reproduction of colonial injustice through its construction of race and racism. I pay particular attention to how this law on racial discrimination currently frustrates, and in some cases actively prevents reparations.

Overall, international law exhibits what we might term *colonial racial aphasia*, drawing on the insights of Ann Laura Stoler and Debra Thompson. In her critique of French historiography, Stoler describes colonial aphasia as a "political disorder" characterized by "both the occlusion of knowledge as a political form and 'knowing' as a cognitive act."[64] Aphasia is "a dismembering, a difficulty speaking, a difficulty generating vocabulary that associates appropriate words and concepts with appropriate things[,]" where colonialism is concerned.[65] Thompson builds on Stoler's conceptualization of aphasia in this sense, to argue that the field of international relations exhibits a similar condition—racial aphasia—which entails a "calculated forgetting, an obstruction of discourse, language and speech" regarding how "the modern world system was founded on, and continues as, a hierarchical racial order."[66] For Thompson, racial aphasia produces "collective silences" regarding the racism as a global and pervasive social structure, and these silences themselves contribute to link "our racist pasts to the still racist present ...."[67]

I combine Stoler and Thompson's terminology—both of whom are concerned with colonial racial injustice as a historical and contemporary phenomenon—to describe hegemonic international law's[68] approach to race and racism.[69] As noted in the prior part, the

[63] *See* note 58 *supra*.

[64] Ann Laura Stoler, *Colonial Aphasia: Race and Disabled Histories in France*, 23 PUBLIC CULTURE 121 (2011). To be clear, I adopt the terminology of "aphasia" in order to situate my analysis within a discussion that has coined a particular usage of this term that may not fully overlap with the medical condition.

[65] *Id.* at 125. She aptly notes that in French scholarship "race talk is everywhere ... but its relationship to scholarship on colonialism remains severed from analysis of a contemporary racial state. *Id.* at 153.

[66] Debra Thompson, *Through, Against and Beyond the Racial State: The Transnational Stratum of Race*, 26 CAMB. REV. INT'L AFFS. 133, 135 (2013).

[67] *Id.* at 135.

[68] I use the term "hegemonic international law" to describe the dominant or controlling interpretations and applications of international law, for example in international and regional courts and within the broader framework of global governance. I do so in order to maintain the legibility of contestation among the interpreters and the appliers of international law, and perhaps also to signal the imperial hierarchies operationalized in the course of legal interpretation and application.

[69] Stoler and Thomas detail the particulars of how colonial and racial aphasia respectively are manifest in their respective disciplines. Here I describe the particularities of how colonial racial aphasia manifests in international law, drawing on my own analysis and that of other critical legal scholars who have been attentive to these particularities even if their critique employs different terminology. I have previously relied on Thompson's work to critique the aphasic tendency of the global human rights system, E. Tendayi Achiume, *Putting Racial Equality onto the Global Human Rights Agenda*, 28 SUR INT'L J. HUM. RTS. 141 (2018), and of the international frameworks governing migration, E. Tendayi Achiume, *Racial Borders*, *supra* note 58. I extend those prior analyses here to the specific question of reparations.

global governance of racism encompasses more than binding international law, but my focus in this part is the latter.[70] Colonial racial aphasia in international law entails complete silence on the relevance of race and racism, or where either is considered, colonial racial aphasia results in constructions of race and racism that sever them from their constitutive and reproduced colonial context. The result is that when hegemonic international law ostensibly disavows racism and/or colonialism, its aphasic construction of both perversely operates as a means through which the historic structural injustice of colonialism is reproduced. In doing so, reparative anti-colonial worldmaking is effectively thwarted. I emphasis "hegemonic" in the prior sentence because international law also exhibits judicial and related contestation of colonial racial aphasia, some of which I highlight in this part. But time and again, this contestation is overridden.

B. The Reproduction of Colonial Relations and Structures of Domination Through and in Spite of International Law

What I am calling colonial racial aphasia has been the subject of increasing analysis by critical legal scholars, even though this scholarship has not typically been advanced as addressing the question of reparations in international law.[71] What this scholarship has done is diagnose a series of interpretive and constructive moves that give effect to colonial racial aphasia in international law.[72] Central among these moves, which are distinct but overlapping, is the adoption by hegemonic international law of accounts of race and racism that are "depoliticized,"[73] "dehistoricized,"[74] and "domesticated" or "fragmented."[75] The following examples vividly manifests a number of the constitutive moves that enact colonial racial aphasia. I analyze them for what they tell us about the role international law's doctrine on racial discrimination currently plays vis-à-vis the project of reparative anti-colonial worldmaking.

[70] In prior work I have provided examples of the colonial racial aphasia of global policy-making. *See, e.g.*, E. Tendayi Achiume (Special Rapporteur), Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc. A/HRC/50/60 (June 17, 2022). As such, the dynamics canvassed in this Part should be understood as salient beyond international law to encompass the broader global governance framework applicable to race and racism.

[71] *See* note 58 *supra*.

[72] *See, e.g.*, Gevers, *supra* note 58, at 1656–58.

[73] *Id.* at 1658. According to Darryl Li, international law "flattens" race by reducing it to a "generic form of invidious social differentiation[,]" Li, *supra* note 58, at 1692, a "local and vague" category, whereas, Li argues, it is important to theorize racialization as a specific, "transregional (if not global)" process. *Id.* at 1689. Part of this specificity entails situating the origins of anti-Black forms of racism in their settler colonial, transnational contexts and accounting for the attendant political economy of these contexts.

[74] Gevers, *supra* note 58, at 1658. He notes that this "dehistoricizing shift was an explicit project of the West from the 1950s onward, as the problem of racism was '[e]ternali[zed]' (such that it was 'a problem for which everyone [bears] responsibility,' thereby 'implicat[ing] everyone and no one in particular')." *Id.* at 1658 n. 23. Ntina Tzouvala highlights the temporal dimensions of this dehistoricization. Tzouvala, *supra* note 58, at 228.

[75] When domesticated, "race and racial domination are understood as operating in distinct domestic spheres, separated off from one another; as opposed to being understood transnationally or globally[.]" Gevers, *supra* note 58, at 1658 n. 24; *see also* Li, *supra* note 58, at 1692 (arguing that international law fragments race such that "[r]ace exists as a doctrinal category in international law mostly as an object of regulation within states rather than a category that also inflects relations between them)."

A cornerstone of European colonial domination was the continental-scale theft of land from Indigenous peoples, and the consolidation of racially stratified ownership of this land.[76] As such, reparations—even narrowly construed as repair for completed breaches in the past—squarely implicate questions of (post-)colonial land reform. My interest here, however, is in examining the role of race/racism and law in the reproduction of colonial land relations, highlighting in particular how the prohibition on racial discrimination is mobilized in ways that frustrate reparative anti-colonial worldmaking. I do so through brief consideration of two legal disputes arising out of the land reform program pursued by the Mugabe regime under its controversial Fast Track Land Reform Program (FTLRP), one decided by a southern African regional tribunal,[77] and the other by an investment arbitration tribunal.[78]

In 1980, when Zimbabwe gained independence from British colonial and settler rule, 6,000 white commercial farmers owned 42 percent of the country secured through legal frameworks that on a racial basis dispossessed the Black majority of all but the most arid, infertile land.[79] By 2000, five years before the FTLRP was adopted, Zimbabwe's agrarian economy was still dominated by white-owned farms.[80] The FTLRP authorized the uncompensated, compulsory seizure of agricultural lands for redistribution, and formed part of a broader attempt by then-President Mugabe violently to remain in power.[81] In its broader context, I would not characterize the FTLRP as per se a reparative, anti-colonial worldmaking endeavor. That said, its core proposition—the redistribution of land whose title was colonially and racially designated—is a necessary feature of reparative anti-colonial worldmaking and it is the adjudication of this core proposition that interests me.

Mike Campbell, a white Zimbabwean commercial farmer who had purchased his farm prior to independence, initiated a class action lawsuit that challenged the government's forced, uncompensated acquisition of farms.[82] Central to this suit, which was ultimately adjudicated before the Southern African Development Community (SADC) Tribunal— at the time the apex regional tribunal—was the litigants' claim that although the FTLRP did not *de jure* target farms on the basis of race, *in effect* it targeted only the land of white farmers in Zimbabwe and as a result constituted unlawful discrimination under regional and international human rights law.[83] The Zimbabwean government countered, *inter alia*, that redress of structural inequality produced by colonial dispossession that agglomerated land to

[76] See, e.g., on the Anglo-imperial history of land theft, JOHN C. WEAVER, THE GREAT LAND RUSH AND THE MAKING OF THE MODERN WORLD, 1650–1900 (2003) and on its racial nature in particular, BRENNA BHANDAR, COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP (2018).

[77] I base my abbreviated description of the background and facts of these cases on two previously published works, E. Tendayi Achiume, *Transformative Vision in Liberal Jurisprudence on Racial Equality: Justice Moseneke's Legacy, in* A WARRIOR FOR JUSTICE: ESSAYS IN HONOR OF DIKGANG MOSENEKE (Penelope Andrews, Dennis Davis & Tabeth Masengu eds. 2018); E. Tendayi Achiume, *The SADC Tribunal: Socio-Political Dissonance and the Authority of International Courts*, *in* INTERNATIONAL COURT AUTHORITY (Karen Alter, Laurence Helfer & Michael Rask Madsen eds., 2018).The reader may consult these for more detail as well as fuller references. My analysis here builds on that prior work, which concerned the legal construction of race, to draw lessons specifically pertinent to the question of reparations.

[78] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award (July 28, 2015) [hereinafter *von Pezold* Award].

[79] Achiume, *SADC Tribunal, supra* note 77.

[80] *Id.*

[81] *Id.* at 15.

[82] *Id.* at 8.

[83] *Id.*

whites on a racial basis would in effect entail redistribution of predominantly white-owned farms.[84] It also noted that a number of Black-owned farms had also been targeted for acquisition and that compensation would ultimately be paid to all from whom land had been acquired.[85] On these facts, the Tribunal found that the government had violated the prohibition on racial discrimination because the FTLRP had an "unjustifiable and disproportionate" impact on "Zimbabwean white farmers only[,]" in violation of the International Convention on the Elimination of Racial Discrimination.[86]

The decision of the SADC Tribunal was surprising for a number of reasons, not least because the text of ICERD explicitly permits race-conscious "special measures" or affirmative action.[87] On the one hand, there were dimensions of the FTLRP that were legitimately flawed and unlawful, including from a perspective that genuinely prioritizes egalitarian land redistribution and racial justice in the country.[88] But as I have argued in more detail elsewhere, the Tribunal's finding of racial discrimination seemed not to rest on these flaws, and instead on the fact of "unjustifiable and disproportionate" impact on "Zimbabwean white farmers only." In this regard, the *Campbell* decision is a stunning example of the depoliticization and the dehistoricization of race in a context where the contemporary salience of colonial injustice and the racial nature of that injustice were vividly manifest. Nowhere in the Tribunal's reasoning does it consider the fact that prior to independence, and indeed when the farm owned by the lead plaintiff in the suit was purchased, *whiteness* was the formal basis for title in the vast majority of Zimbabwe's arable land.[89] The Court is also dismissive of the fact that at the time of the FTLRP "large tracts of land [were] held almost exclusively by white farmers in Zimbabwe . . . ."[90] The Tribunal's conceptualizations of race and racial discrimination severed both from the historical and political colonial context that constructed their meaning, and as a result produced doctrine in the name of non-discrimination that further entrenched colonial racial meaning in the present. If whiteness in Rhodesia meant a legal entitlement to arable land, and Blackness meant the negation of such an entitlement, the Tribunal's decision effectively reproduces this colonial structure into the present.[91]

Ntina Tzouvala's analysis of an international arbitral decision concerning the FTLRP further illuminates the work legal doctrine does to reproduce the colonial meaning of race even while professing a commitment to curtailing racial discrimination.[92] Seven years after *Campbell*, an investment arbitration tribunal issued the *von Pezold* decision following claims

[84] *Id.* at 9.
[85] *Id.*
[86] *Id.*
[87] International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1.4, Dec. 21, 1965, 660 UNTS 195 [hereinafter ICERD].
[88] *See* Achiume, *supra* note 77, at 15–16; Tzouvala, *supra* note 58, at 227.
[89] The Tribunal briefly noted that "the acquisition of land in Zimbabwe has had a long history" but immediately dismissed this history as irrelevant for the merits decision stating "we need to confine ourselves only to acquisitions carried out under [the FTLRP]." Mike Campbell (Pvt.) Ltd. and Others v. Republic of Zimbabwe, SADCT Case No. 2/2007, Judgment (Nov. 28, 2008).
[90] Tzouvala, *supra* note 58, at 228.
[91] E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 UCLA L. Rev. 1481 (2021).
[92] Tzouvala, *supra* note 58. Due to space constraints I only briefly summarize her analysis here but recommend the article in its entirety for its illumination of what I have called colonial racial aphasia.

brought by white foreign investors owning large commercial farms in Zimbabwe under bilateral investment treaties between Zimbabwe and Germany and Switzerland respectively.[93] The timber farms at issue in this case were initially planted by the British South Africa Company (BSAC) following the forcible displacement of Indigenous communities who were forced into native compounds, and in the course of the colonial settlement of then-Rhodesia.[94] The tribunal found that through the FTLRP, Zimbabwe had failed to provide "a legitimate reason for implementing an unjustified policy that discriminated against the landowners on the basis of their skin-color and foreign ancestral heritage, thereby contravening its obligation *erga omnes* not to engage in racial discrimination."[95]

The *von Pezold* award manifests colonial racial aphasia.[96] In this regard, Tzouvala observes the depoliticization and dehistoricization of race and racism in the tribunal's analysis, in which it constructed a firm temporal separation between the past as the locus of racial discrimination, and an egalitarian present that eschews that past altogether.[97] Notably she underscores the racial and temporal function of property rights in Zimbabwe, where private property rights were created to vest the economic interests of white settlers in land.[98] In a 1919 British Privy Council decision adjudicating whether the British Crown or the BSAC held the title to large tracts of then Southern Rhodesia, the Council was unequivocal: "Whoever now owns the unalienated lands, the natives do not."[99] The Council was also unequivocal about why so-called natives were incapable of holding title to their land: "Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged."[100]

Of course, the *von Pezold* tribunal said no such thing about contemporary Black Zimbabweans, even as it denied Indigenous communities with ancestral claims to the land the opportunity to participate as *amici* in the arbitration.[101] But as Tzouvala notes, in its insulation of the litigants' property title from attempts to undo their racial foundations, international law is mobilized by the tribunal, in effect, to maintain colonial racial injustice as a contemporary feature of Zimbabwean's relationship to their land.[102] Among the remedies ordered by the tribunal, was restitution of the litigants' commercial farmland. The

[93] *Id.* at 229.

[94] Ciaran Cross, *"Whoever Owns the Land, the Natives Do Not":* In re Southern Rhodesia, CRITICAL LEGAL THINKING (July 26, 2018).

[95] *Von Pezold* Award, *supra* note 78, para. 657.

[96] It relied on conceptions of race, racism, and even post-colonial statehood that elide their "historically specific relationship" with colonialism and imperialism, and the relevance of that relationship for the decision before them. Tzouvala, *supra* note 58, at 231. The tribunal insisted that "there [was] ample evidence that the Claimants were targeted in the present case on the basis of skin colour." *Von Pezold* Award, *supra* note 78, para. 467.

[97] Tzouvala, *supra* note 58, at 231–35. She also analyzes how the tribunal confines the responsibility for undoing the racial inegalitarianism of land ownership in Zimbabwe to the Zimbabwean state to the exclusion of the United Kingdom, notwithstanding that country's responsibility for the establishment of the injustice and its subsequent reproduction. *Id.* at 236–41.

[98] *Id.* at 234–36.

[99] In re Southern Rhodesia [1919] AC 211, 235 (PC).

[100] *Id.* at 233.

[101] Cross, *supra* note 94.

[102] Tzouvala, *supra* note 58, at 234.

prohibition on racial discrimination was constructed by the tribunal in a manner that pits this prohibition at odds with the project of reparations.

The examples above concern the interpretation of the prohibition on racial discrimination by a regional tribunal and an international arbitral tribunal. The one that follows concerns the International Court of Justice (ICJ), the apex adjudicatory body of the international order, and its approach to ICERD and to the *jus cogens* prohibition on racial discrimination.[103]

In 2024, per a request from the United Nations General Assembly, the International Court of Justice issued the advisory opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*.[104] A comprehensive analysis of this opinion's engagement with race as a structure that reproduces colonial injustice exceeds my current remit, but even the brief analysis that follows is sufficient to make the point that the ICJ's approach to the prohibition on racial discrimination actively stifles the legal project of halting the reproduction of this injustice.

The Palestine Advisory Opinion put squarely before the ICJ the questions, *inter alia*, of whether Israel's policies in the Occupied Palestinian Territories amount to: (1) prohibited discrimination under the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and ICERD; (2) segregation or apartheid in breach of Article 3 of ICERD;[105] and (3) violations of the right to self-determination under international law. In a historic decision, the ICJ found in the affirmative on all three questions.[106] However, both the reasoning and findings of the Court again undermined the potential of the prohibition on racial discrimination in international law to serve as a meaningful counter to the contemporary reproduction of colonial relations and structures of domination. An article published by Noura Erakat, Darryl Li, and John Reynolds prior to, but in partial anticipation of the Advisory Opinion, provides helpful context for parsing this judgment.[107]

Erakat et al. make the persuasive case that the question of Palestine in international law and the construction of the prohibition of apartheid in that regard paradigmatically demonstrates the necessity of international law critique and praxis that grapples with race and colonialism as constitutive of each other and of international law for that matter. They note two discernable conceptions of apartheid in international law: "an anti-colonial reading that emphasized the denial of a collective right to self-determination by an oppressive regime of racial domination; and a more liberal interpretation, as systemic discrimination within a state's legal system against individuals from a particular racial group."[108] Apart from the expressive ramifications of the different framings, they also entail different diagnoses of the salient harm, thereby necessitating different remedies. The former, which emphasizes

[103] For a related analysis of how the ICJ's Qatar decision frustrates reparative anti-colonial worldmaking, see E. Tendayi Achiume, *27th Annual Grotius Lecture: For Whom Is International Law* (forthcoming 2025).

[104] Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion (ICJ July 19, 2024) [hereinafter Palestine Advisory Opinion].

[105] ICERD, *supra* note 87, Art. 3 ("States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.")

[106] Palestine Advisory Opinion, *supra* note 104.

[107] Noura Erakat, Darryl Li & John Reynolds, *Race, Palestine, and International Law*, 117 AJIL UNBOUND 77 (2023).

[108] *Id*. at 79; *see also* Li, *supra* note 58, at 1695–96.

apartheid as a denial of self-determination on the basis of and through race, necessitates "collective liberation and land back."[109] It calls for legal and political realization of the right of the Palestinian people to collective self-determination. The latter enables avoidance of "reckoning with the material imperatives of decolonization in the face of an ongoing settler project . . . [and] can potentially be remedied by formal equality, without necessarily having to directly confront the colonial conquest and political economy that the apartheid regime has consolidated."[110] For this reason, they note the prohibition on apartheid must be understood centrally to concern self-determination, and in particular the denial of self-determination through racial domination.

In the Palestine Advisory Opinion, the Court found that "Israel's legislation and measures impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the [Israeli] settler and Palestinian communities. For this reason, the Court found that Israel's legislation and measures constitute a breach of Article 3 of [I]CERD."[111] As David Keane observed following the opinion that the Court's language could be read as a finding of racial segregation, apartheid, or both.[112] Judges on the Court adopted different perspectives on this question—at least two interpreting the Court to have concluded that Israel's conduct amounted to apartheid,[113] and at least two concluding that it did not.[114] To the extent that the Court can be read as having concluded that Israel's conduct amounted to apartheid, the reasoning of the majority opinion supports a liberal conception of apartheid that eschews an anti-colonial conception.[115] Its analysis of the application of Article 3 of ICERD, constructs the harm visited upon Palestinians by Israel as that of physical and juridical separation between Palestinian and Israeli settler communities.[116] This is as opposed to the harm specifically of colonial racial domination that circumscribes the

[109] Erakat, Li & Reynolds, *supra* note 107, at 79.

[110] *Id.* at 80 ("Apartheid could be 'ended,' in that sense, without decolonization, restitution, or redistribution.").

[111] Palestine Advisory Opinion, *supra* note 104, para. 229.

[112] David Keane, "*Racial Segregation and Apartheid" in the ICJ Palestine Advisory Opinion*, EJIL:TALK! (July 31, 2024), *at* https://www.ejiltalk.org/racial-segregation-and-apartheid-in-the-icj-palestine-advisory-opinion. For a deeper analysis of Article 3, including the history of its application to Israel by CERD, and legal issues relevant to the ICJ's ultimate analysis, see David Keane, Palestine v. Israel *and the Collective Obligation to Condemn Apartheid Under Article 3 of ICERD*, 23 MELB. J. INT'L L. 1 (2022).

[113] *See* Palestine Advisory Opinion, *supra* note 104 (dec., President Salam) [hereinafter Salam Declaration]; Palestine Advisory Opinion, *supra* note 104 (dec., Tladi, J.) [hereinafter Tladi Declaration]. Judge Tladi finds that notwithstanding the reigning international legal reluctance to attach the term "apartheid," the Court's finding is "an acceptance that the policies and practices of Israel constitute a breach of the prohibition of apartheid, which itself is a peremptory norm of international law." Tladi Declaration, *supra* note 113, paras. 36–37.

[114] Palestine Advisory Opinion, *supra* note 104, para. 13 (sep. op., Iwasawa, J.); Palestine Advisory Opinion, *supra* note 104, para. 8 (sep. op., Nolte, J.).

[115] Judge Tladi's Declaration adopts a more compelling anti-colonial orientation, one that he presents as consistent with the majority's analysis. He addresses racial domination alongside curtailed Palestinian self-determination as constitutive of Israel's apartheid regime in the Occupied Palestinian Territories. Tladi Declaration, *supra* note 113, paras. 39–40.

[116] Palestine Advisory Opinion, *supra* note 104, paras. 225–29. Note that this harm also includes "systemic discrimination" as a violation of Article 2 of the ICCPR, ICESCR, and ICERD. As Victor Kattan, notes this is not a term used in the text of any of these three treaties, although the Apartheid convention references the practice of "systematically oppressing." Ardi Imseis et al., *The Just Security Podcast: Assessing the Recent Response of International Law and Institutions in Palestine and Israel*, JUST SECURITY (Aug. 21, 2024), *at* https://www.justsecurity.org/98801/podcast-international-law-israel-palestine.

self-determination of Palestinians through racialization.[117] In the relevant paragraphs the Court makes no mention of racial domination in relation to its finding of Israel's breach of Article 3, and the Court is similarly silent on apartheid's connection to self-determination.

Returning to my point above about the seeming hollowness of the hegemonic articulation of the customary international law prohibitions on racial discrimination (and apartheid), the Court's avoidance of the norms in the Palestine Advisory Opinion is a case in point. In his separate concurring opinion, Judge Tladi notes that "the Court heard many arguments about the definition of apartheid in customary international law," which is not defined in ICERD, and thus the Court had the "opportunity to provide a standard definition of apartheid under customary international law."[118] Such a definition would have been an opportunity to elaborate an anti-colonial conception of apartheid as domination that racially circumscribes self-determination. The Court was willing to speak to "the principle of the prohibition of discrimination" generally, which it described as "now a part of customary international law."[119] It identified, *inter alia*, provision of the ICCPR and ICESCR, and Article 1(1) of ICERD as giving effect to that principle. But the application of the customary international "the principle of the prohibition of discrimination" to race and racism in the opinion is left unstated. The Court also failed to make any specific mention of the prohibition of racial discrimination as *jus cogens*.

With respect to self-determination, the Palestine Advisory Opinion was historic, in being the first ICJ decision to pronounce the right of self-determination as *jus cogens*.[120] It found that Israel's policies in the Occupied Palestinian violate this norm, but the Court also cleaved its self-determination analysis from any analysis of race or racialization as technologies through which the breach of self-determination is achieved. It is noteworthy, as highlighted by Erakat et al. that with respect to a comprehensive international legal accounting of the question of Palestine, the very framing of the General Assembly request for an advisory opinion, tactical as it may have been, itself limited the question before the Court to the self-determination of only a fraction of the Palestinian people, limiting scrutiny to Israel's occupation "without confronting the racial and colonial regime[s] in which it is embedded."[121]

To return to the question that opened this Part: Where does international law stand with respect to the structural reproduction of colonial hierarchy through racial injustice? I have argued that notwithstanding formal repudiation of colonialism and its means and forms of domination, international law's hegemonic operationalizations of the prohibition on racial discrimination tend not to disrupt the structural reproduction of colonial racial injustice. The interpretation and application of international legal doctrine governing race/racism

[117] On Israel's colonial foundations and the racialization of Palestinians, see, e.g., NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE 23–60 (2019), and on the colonial legal construction of whiteness in Israel, and its implications for Palestinians, Mizrahim, and Jews of Middle Eastern origin, see Noura Erakat, *Whiteness as Property in Israel: Revival, Rehabilitation, and Removal*, 31 HARV. J. RACIAL & ETHNIC JUST. 69 (2015).

[118] Tladi Declaration, *supra* note 113, para. 38.

[119] Palestine Advisory Opinion, *supra* note 104, para. 189.

[120] Tladi Declaration, *supra* note 113, para. 14. As Professor Tladi notes in his contribution to this Agora, the Palestine Advisory Opinion also puts on display the ICJ's reluctance to consider the legal consequences of *jus cogens* for reparations. Tladi, *supra* note 61.

[121] Erakat, Li & Reynolds, *supra* note 107, at 81. On Palestine and settler colonialism, see, e.g., Omar Jabary Salamanca, Menza Qato, Kareem Rable & Sobhi Samour, *Past is Present: Settler Colonialism in Palestine*, 2 SETTLER COLONIAL STUD. 1 (2012).

tends to frustrate shifts that are more oriented toward reparative anti-colonial worldmaking, and this is achieved through approaches to contemporary forms of race, racism, xenophobia, and related intolerance that cleave them from their colonial past and reproduced present.

IV. Conclusion: Reparations as Decolonization

I have advocated for the necessity of an approach that understands reparations as concerned with undoing the injustice of colonial relations and structures of domination past and present, and with undoing the means through which this injustice is reproduced. The project of reparations is one of anti-colonial worldmaking. In particular I have argued that in light of the role that race, and racism play in effecting the reproduction of unjust colonial relations and structures of domination, the global governance of contemporary racism, racial discrimination, xenophobia, and related intolerance is a crucial site that mediates reparative anti-colonial worldmaking. Contrary to the approach manifest by former and ongoing colonial powers, and by hegemonic international law, contemporary race and racism as global concerns are intimately tied to colonial domination. Race and racism are forms of colonial injustice, but they are also as means through which colonial relations and structures of domination are reproduced. Eliding the ongoing intimacy between race and racism on the one hand, and colonial relations and structures of domination on the other—what I have termed colonial racial aphasia—thus short-circuits the project of reparations.

To conclude this Article, I return to a central question I have sought to address: How does the question of race and racism relate to the project of reparations in international law? I have argued that race and racism are fundamental terrain—they operate as crucial technology of unjust colonial ordering. International law and global governance frameworks more broadly help construct the meaning of race and racism, and the hegemonic operation of the law and these frameworks remain oriented toward obstructing reparative anti-colonial worldmaking. Yet this orientation is contested—jurisprudentially and more importantly, politically—through transnational mobilizations that have shown themselves capable of puncturing the colonial racial aphasia of the status quo, even if they as yet have been unable to carry the day. International law and the broader normative regime within which it is embedded will not achieve reparations. However, global governance regimes shape the battle terrain and conditions of possibility for these reparations. Legal doctrine and policy frameworks are capable of producing material differences in racial justice outcomes and this is a crucial reason that racially marginalized groups have refused to cede international norms as a terrain of struggle. It is also the reason the imperial hegemons—especially colonial and former colonial powers—remain actively invested in determining the content and trajectory of anti-racism norms.

A historic transnational mobilization that sought to advance the global project of reparations, was the Durban Conference. Over 4,000 NGO representatives were accredited for the official conference, more than 7,000 participated in the NGO forum, and 163 UN member states sent representatives.[122] In total an estimated 18,800 participated in this historic conference, which was preceded by four regional preparatory conferences.[123]

[122] Durban Report, *supra* note 8, para. 23.
[123] *Id.*

The outcome of the Durban Conference was the DDPA, an ambitious volley intended to reorient the global approach to anti-racism, and ultimately the regional, national, and local conditions of racialized hierarchy. The DDPA identifies the transatlantic slave trade and colonialism as among the major sources and manifestations of racism, racial discrimination, xenophobia, and related intolerance.[124] With respect to colonialism, the DDPA states the effects and persistence of "structures and practices [of colonialism] have been among the factors contributing to lasting social and economic inequalities in many parts of the world today[.]"[125] It articulates a conception of contemporary racism, racial discrimination, xenophobia, and related intolerance that firmly connects them to colonial racial injustice. It also sets an agenda for economic and financial redistribution for the purpose of substantive racial equality; and a framework for implementation and follow-up mechanisms at the national, regional, and international levels.[126] Although the Declaration falls short of articulating a legal obligation on colonizing and enslaving states to provide reparations, it succeeded in articulating the structural continuity of racial meaning from the colonial past to the neocolonial present, the identification of which is a pre-condition for repair. To this day, WEOG states have worked to undermine the DDPA framework.[127]

Since Durban, the most pointed transnational mobilization to resist colonial racial injustice was the 2020 transnational racial justice uprisings. In 2020, a movement that had gained momentum in the United States under the banner "Black Lives Matter" catalyzed a transnational mobilization against racism, with an emphasis on understanding contemporary racism as rooted in the legacies of the transatlantic trade in enslaved Africans, and colonialism more broadly. With respect to reparations in particular, at the time of the racial justice uprisings I argued that demands central to the mobilization were effectively demands for reparations as I have described the project in this Article.[128] At the heart of the mobilization was a critique of the global reproduction of the racial injustices of colonialism and the transatlantic slave trade, especially in the realm of policing and law enforcement. I also argued that many of the social movements that catalyzed and led the protests have also been long at work producing granular knowledge on what reparations for colonial racial injustice can look like in their respective contexts.[129] It is not an overstatement to describe what occurred in 2020 as a seismic shift in the global policy and popular discourse on racism as a historical structure,[130] even if this shift also catalyzed tremendous backlash and subsequent retrenchment.

[124] Durban Declaration, *supra* note 7, para. 13.

[125] *Id.*, para.14.

[126] *See, e.g.*, *id.*, paras. 157–59, 163–92.

[127] I addressed the human rights concerns with WEOG's opposition to the DDPA in a report to the General Assembly, see Durban Report, *supra* note 8, and provide a more detailed exposition in a forthcoming publication, Achiume, *supra* note 103.

[128] E. Tendayi Achiume, *Black Lives Matter and the UN Human Rights System: Reflections on the Human Rights Council Urgent Debate*, EJIL:TALK! (Dec. 15, 2020), *at* https://www.ejiltalk.org/black-lives-matter-and-the-un-human-rights-system-reflections-on-the-human-rights-council-urgent-debate.

[129] *See e.g.*, *Reparations*, M4BL, *at* https://m4bl.org/policy-platforms/reparations (last visited Apr. 27, 2025); Andrea Ritchie et al., *Reparations Now Toolkit*, M4BL (2019), *at* https://m4bl.org/wp-content/uploads/2020/05/Reparations-Now-Toolkit-FINAL.pdf.

[130] The Office of the High Commissioner for Human Rights and the UN Human Rights Council are both sites where the 2020 racial justice uprisings shifted conceptions of racism to more meaningfully account for the persisting (or reproduced) structures of colonial injustice associated with it. Examples include the OHCHR's

At the heart of what unifies TWAIL scholars in particular, is a shared understanding of colonialism and international law as mutually constitutive. Put differently, colonialism and international law are ontologically connected. If that is the case, one might reasonably ask what TWAIL scholars are doing when we engage international law with anti-colonial and reparative worldmaking intentions. There is no law of any kind that could deliver repair for colonialism and slavery—this truism draws attention to a range of economic, social, political, and cultural determinants of injustice that cannot be dictated by law. At the same time, it remains the case that international law is instrumental to the arsenal that is intentionally and inadvertently wielded by former and contemporary colonial and enslaving powers to obstruct good faith efforts to reorient toward the ideal of repair. At least one motivation for engaging in legal debates about reparation is the aspiration of mitigating the harm perpetrated through international law, or more ambitiously the aspiration of prefiguring institutional arrangements that instantiate more just forms of interconnection.

What might the latter entail? Put differently, what should international lawyers *do* where reparative anti-colonial worldmaking to undo racial injustice is concerned? It is, of course, beyond the scope of this Article and indeed beyond the scope of the expertise of international legal scholars or any academics to articulate in any meaningful detail a utopic vision of the remade world(s) that are the destinations or outputs of reparations understood as worldmaking. That said, I have sought to highlight the role that critical legal scholarship that situates race and racism in their constitutive colonial context can constructively play in disrupting the reproduction of colonial injustice. I have also highlighted the contributions and ambitions of Durban. To be clear, Durban does not represent a perfect, neat, "realistic" solution to the problem of colonial racial injustice. We who are invested in anti-colonial worldmaking perpetually labor under the thumb of the expectation of perfectly formed solutions we are supposed to arrive at under conditions that are more structurally fertile for the problem (colonial racial justice) than the solution (anti-colonial worldmaking), and this expectation is itself a feature of that structure. I have instead offered the examples of Durban and the 2020 racial justice uprisings as interventions that, in the words of Vasuki Nesiah, "might denaturalize [the] status quo, and advance an alternative analysis of . . . international law and the ongoing legacies of a world order forged in the crucible of colonialism, slavery, and capitalism."[131]

Nesiah proposes that demands for reparations, including in the register of legal claims can serve to "refuse and interrupt"[132] what I have described as the reproduction of colonial

Four-Point Agenda Towards Transformative Change for Racial Justice and Equality, which includes among the set of urgent measures required to end systemic racism, the need for states to: "Recognise that behind contemporary forms of racism, dehumanisation and exclusion lies the failure to acknowledge the responsibilities for enslavement, the transatlantic trade in enslaved Africans and colonialism, and to comprehensively repair the harms." UN High Commissioner for Human Rights, Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent Against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers, at 23, UN Doc. A/HRC/47/53 (June 1, 2021). For its part, the Human Rights Council has established Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement, OHCHR, Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement, *at* https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-racial-justice-law-enforcement (last visited Apr. 27, 2025), and hosted its first ever high-level panel on colonialism, slavery and contemporary racism. For examples of other shifts, see Achiume & McDougall, *supra* note 59.

[131] Nesiah, *supra* note 17, at 159.

[132] *Id.*; *see also* Riley Case, *supra* note 16, at 52.

injustice. They do so by unsettling the narratives and structures propagated by international law to maintain this status quo. For Nesiah, a politics of refusal of the status quo of international law and the colonial world systems it reproduces serves the critical function of making alternative worlds seeable and knowable.[133] Anti-colonial worldmaking is a constructive project, but it is not one that could ever be actualized by anything as crude as a top-down blueprint developed *a priori* by well-meaning intellects of any stripe, let alone international legal academics. In so far as Durban and the 2020 transnational racial justice uprisings retell the story of the relationship among race, colonialism and reparations, we might see them as enacting critical politics of refusal and interruption of the reproduction of colonial racial injustice. They might also helpfully reorient international lawyer's attention and energy away from reifying the status quo, toward scholarship and praxis that can disrupt colonial relations and structures of domination and in doing so begin to prefigure anti-colonial worlds.[134]

TWAIL and other post-colonial international law scholars have devoted significant energy to precisely this project, but within the paradigm of decolonization, rather than that of reparations per se. Outside of law, Adom Getachew offers an incisive political theory of decolonization that highlights its worldmaking ambitions, against a standard view that treats decolonization as primarily a moment of domestic nation-building for formerly colonized nations.[135] Getachew argues compellingly that for Black anti-colonial nationalists, the project of decolonization was one that necessitated "the pursuit of international nondomination [and] entailed a thoroughgoing reinvention of the legal, political, and economic structures of the international order."[136] Decolonization as anti-colonial worldmaking entailed a reordering of the international system, especially to ensure that its mechanisms for ensuring the political and economic domination of colonial powers over colonized peoples would be replaced with mechanisms more conducive to an egalitarian order premised on genuine recognition of and respect for the self-determination of the formerly colonized. The failures of anti-colonial world-making attempts in the 1970s, as TWAIL scholars have argued, are manifest in the enduring *neo*coloniality of the international order, a condition sustained *through* international law and not just in spite of it. As such, international law has been and remains a crucial lever in the pursuit of decolonization as a project of worldmaking, and a significant body of critical international legal scholarship maps and challenges the neocoloniality of international law.[137]

As a practical matter, the canon of TWAIL and other critical scholarship that has attempted to chart a path away from the neocoloniality of international law in effect, is also doing the work of charting a path toward reparations as anti-colonial worldmaking. On the one hand decolonization and reparations are distinct paradigms and projects that cannot be collapsed into one another. But the project of reparations entails decolonization, and as Joel

[133] Nesiah, *supra* note 17, at 185–87.

[134] Riley Case, *supra* note 16, at 49.

[135] Adom Getachew, Worldmaking After Empire: The Rise and Fall of Self-Determination 2 (2019). On Black anti-colonial worldmaking ambitions, see also Musab Younis, On the Scale of the World: The Formation of Black Anticolonial Thought (2022).

[136] *Id.* at 25.

[137] For examples from across the subfields of international law, see Research Handbook on Third World Approaches to International Law (Antony Anghie et al. eds., forthcoming 2025).

Modiri beautifully put it: "Decolonisation is an insatiable reparatory demand, an insurrectionary utterance, that always exceeds the temporality and scene of its enunciation. It entails nothing less than an endless fracturing of the world colonialism created."[138]

[138] Joel Modiri, *Cacophony, Autocritique and Abolition: Impression Points on Decolonisation and the Law School*, Keynote Address, *in* Folúkẹ́ Adébísí, *Decolonising the Law School: Presences, Absences, Silences . . . and Hope*, 54 LAW TEACHER 471 (2020).