Vanderbilt Journal of Transnational Law

Volume 35
Issue 4 *October 2002*

Article 6

2002

The African Holocaust: Should Europe Pay Reparations to Africa for Colonialism and Slavery?

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ABSTRACT

For many people of European descent, slavery is little more than an unpleasant memory of a bygone and distant era, largely remembered more for the glory of empires lost and faded dreams of conquest and exploration. For many Africans and African Americans, however, slavery remains an unhealed wound that is frequently, if not constantly, reopened by feelings of continued oppression, manipulation, and discrimination. These disparate views clashed most recently at the U.N. World Conference Against Racism, held in Durban, South Africa in September of 2001.

Inspired by the U.N. Conference in Durban, this Note analyzes the potential for reparations between European and African countries as a possible solution to the lingering issues of slavery and colonialism. It does not argue for or against African reparations. Rather, this Note traces the historical development of the reparations concept through treaties and judicial action and addresses the legal and practical viability of reparations for African states.

Throughout the analysis, this Note emphasizes the moral forces that permeate this area of international law. The law among states is largely defined by changing humanitarian ideals. Although this Note does not attempt to critique the

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* The Author's use of the term "African Holocaust" is not in any way intended to discount the importance of the Jewish Holocaust. In this instance, the Author uses the term to simultaneously recognize the extent of African suffering during the slave trade, and to signal to the reader that a comparison of the two genocidal events will comprise a significant part of this Note.

At the time of publication for this Note, the authors of four previous law review articles used the term "African Holocaust." *See* Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998); El-Obaid Ahmed El-Obaid & Kwando Appiagyei-Atua, *Human Rights In Africa—A New Perspective On Linking The Past To The Present*, 41 MCGILL L.J. 819 (1996); Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument For Legislative African American Reparations*, 147 U. PA. L. REV. 677 (1999); David Abraham & Kimberly A. McCoy, *Dealing With Histories of Oppression: Black And Jewish Reactions To Passivity And Collaboration In William Styron's Confessions of Nat Turner And Hannah Arendt's Eichmann In Jerusalem*, 2 RUTGERS RACE & L. REV. 87 (2000).

ultimate merits of these humanitarian arguments, it recognizes that their influence must be considered to properly evaluate the potential for African reparations.

By evaluating the legal avenues and pitfalls for African reparations, this Note seeks to advance the reparations discussion toward a permanent solution that is acceptable to all. Compensation for the oppressed is not the objective; nor is absolution for the oppressors. The real goal should be a lasting peace, devoid of both feelings of victimization and of undue blame. Humanity must find a way to put the issues of slavery and colonization to rest. Only by understanding the moral forces behind the dynamic concept of international human rights can a resolution that does not inspire future resentment be found.

To that end, this Note evaluates the development of the reparations concept since World War II regarding the Nazi Holocaust and other human rights violations. It discusses actions under the Alien Tort Claims Act and the Foreign Sovereign Immunities Act in light of judicial obstacles such as the Act of State Doctrine, the Nonjusticiable Question Doctrine, and the statute of limitations. Throughout the discussion, this Note brings to light the underlying sentiments that motivate the pursuit of reparations, encourage or discourage resolution by treaty or judicial settlement, and continue to inspire feelings of resentment and subjugation. Finally, this judicial and moral framework is superimposed onto African reparation claims for slavery and colonization to evaluate possible solutions through treaties or judicial action.

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I. INTRODUCTION

In early September 2001, delegates from the world's Western democracies joined representatives from across the globe at the U.N. World Conference Against Racism (WCAR or Conference), expecting a celebration of global tolerance and diversity.[1] The Conference was intended to showcase a new global community, characterized by a sweeping moral commonality on human rights issues and a condemnation of the now supposedly universally-recognized reprehensibility of slavery and colonization.[2] Delegates from the Western states expected to revel in the moral progress the international community has made since the earliest days of the League of Nations.[3]

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1. Rachel L. Swarns, *Race Talks Finally Reach Accord On Slavery and Palestinian Plight*, N.Y. TIMES, Sept. 9, 2001, at 1.

2. *Id.*

3. *Id.* For the purposes of this Note, the term "Western" refers to the states of western Europe, the United States and Canada.

What they found, instead, was an atmosphere of divisiveness that threatened to undermine the entire Conference.[4] European delegates were dismayed by lingering resentment over slavery and colonization.[5] Rather than easily passing a resolution against race and gender discrimination, the delegates were faced with the possibility of being condemned for centuries of slave trading and colonialism.[6] Ultimately, the WCAR served not as a shining example of global unity, but as a reminder of the deep-rooted divisions that continue to plague the international community.[7]

II. FREEDOM AND SELF-DETERMINATION FOR AFRICA

The perception of the reparation issue is fundamentally different for Africans than for African Americans. "While slavery is the family history that defines the African-American community, it is for many Africans an abstraction of the past, overshadowed by Africa's later struggles against European colonialism."[8] Although the African reparation movement necessarily includes many of the same claims of oppression and unjust enrichment as the African American perspective regarding slavery, the African view also focuses on the lingering economic effects of colonialism.[9] In particular, the African reparation movement concentrates on debt forgiveness rather than the educational and social reforms sought in the United States.[10]

Judge Fouad Ammoun of the International Court of Justice (ICJ) described the development of Africa "before there fell upon it the two greatest plagues in the recorded history of mankind: the slave-trade, which ravaged Africa for centuries on an unprecedented scale; and colonialism, which exploited humanity and natural wealth to a relentless extreme."[11] Although Africa is largely in ruins today, it once boasted thriving states and empires dating back to Roman times.[12] However, the economic position of modern Africa has continued to decline in the latter half of the twentieth century. For instance, the per capita income in Zaire dropped from $210 in 1968 to

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4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. Samson Mulugeta, *Seeing Slavery's Legacy; U.S. Blacks, Africans Differ*, NEWSDAY, Sept. 2, 2001, at A7.
9. *Id.*
10. *Id.*
11. Legal Consequences For States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 86 (1971) (separate opinion of Judge Ammoun).
12. *Id.*

$79 in 1983.[13] The rapid descent of per capita income is due to the combined effects of explosive population growth, a decline in agricultural production, and a stagnant industrial sector.[14] Some authors attribute Africa's poor agricultural and industrial performance to structural dependence on the West.[15] According to this view, European countries manipulate individual African states into producing the specific commodities desired in Europe to the detriment of the overall African economy.[16] For instance, one country may be encouraged to concentrate on exporting a particular mineral to the point of depletion, while another is geared towards producing a particular cash crop such as coffee or cotton.[17] The net result is that the African state is forced to import all of its other basic materials from Europe.[18]

The situation in Africa has deteriorated to the point that some commentators suggest that it should be written off as a lost cause and that the West should invest elsewhere.[19] The total debt of Africa, nearly $200 billion, is largely the result of African dependence on the West for food, machinery, and technology.[20] Additionally, the massive debt gives Europe and the United States a disproportionate influence over the internal affairs of the African states.[21] Some commentators contend that the West uses the International Monetary Fund (IMF) and World Bank to force the African states to develop along a prescribed economic model as a condition to borrowing additional money.[22] This internal meddling by the West inspires many of the deepest feelings of humiliation, frustration, and anger among African states.[23]

African states also attribute their continued underdevelopment to the desire by Europe and the United States to install African leaders who are easy to manipulate.[24] The result is what many Africans call "Africa's leadership crisis."[25] Many Africans are disillusioned after decades of coups, corruption, abuses of power and

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13. KINFE ABRAHAM, THE MISSING MILLIONS: WHY AND HOW AFRICA IS UNDERDEVELOPED 2 (1995).
14. *Id.* at 2-3.
15. ABRAHAM, *supra* note 13, at 4-5; WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA 25 (1982).
16. ABRAHAM, *supra* note 13, at 4.
17. *Id.*
18. *Id.*
19. ECONOMIC JUSTICE IN AFRICA: ADJUSTMENT AND SUSTAINABLE DEVELOPMENT 1 (George W. Shepherd, Jr. & Karamo N.M. Sonko eds., 1994).
20. HASKELL GEORGE WARD, AFRICAN DEVELOPMENT RECONSIDERED: NEW PERSPECTIVES FROM THE CONTINENT 22 (1989).
21. *Id.*
22. *Id.*
23. *Id.*
24. ABRAHAM, *supra* note 13, at 19.
25. WARD, *supra* note 20, at 31-34.

human rights, and blind acceptance of advice from the West.[26] The installation of weak or incompetent leaders complements a policy of balkanization that promotes regional conflict and keeps African states susceptible to foreign influence.[27] Some authors suggest that the European powers intentionally prolong conflicts in Africa by providing arms, personnel, technical assistance, and financial support to achieve their own national agendas.[28] Beyond the destabilizing effects of extended disputes, armed conflicts are also a tremendous drain on the limited resources of Africa.[29] Africa spends eight billion dollars annually on its militaries.[30] There are approximately 16 countries involved in civil conflicts that have produced over 6.5 million refugees and 17 million displaced Africans.[31] Currently, Zaire, Sudan, Angola, Sierra Leone, and Somalia are at or near a state of collapse.[32] Many of the states in Africa have been undermined or overturned with such frequency that there are very few truly legitimate regimes or institutions to stabilize the region.[33]

However, some commentators contend that the West is not at all responsible for the conditions of Africa.[34] They contend that "many of the Asian and African colonies progressed very rapidly during colonial rule, much more so than the independent countries in the same area."[35] Additionally, the debt owed by African states represents resources that have been supplied to them, often supplemented with outright grants or aid.[36] "Difficulties of servicing these debts do not reflect external exploitation or unfavourable terms of trade. They are the result of wasteful use of the capital supplied, or inappropriate monetary and fiscal policies."[37] P.T. Bauer contends that "[t]he principal assumption behind the idea of Western responsibility for Third World poverty is that the prosperity of individuals and societies [in the West] generally reflects exploitation of others [in Africa]."[38]

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26. *Id.*
27. ABRAHAM, *supra* note 13, at 13.
28. Basil Enwegbara, *Africa-at-large; Need for African Military Force*, AFRICA NEWS, July 24, 2000, LEXIS, News Library, Afrnws File.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. P.T. BAUER, EQUALITY, THE THIRD WORLD, AND ECONOMIC DELUSION 75 (1982).
35. *Id.*
36. *Id.* at 78.
37. *Id.*
38. *Id.* at 75.

III. THE UPWARD MARCH OF MANKIND THROUGH INTERNATIONAL LAW

International law is not a fixed body of rules. Rather, it is an evolving, dynamic indicator of the collective moral progress among and within nations. Judge Ammoun of the ICJ eloquently remarked on the evolution of mankind's struggle with the issues of slavery and colonization in his separate opinion in *Legal Consequences For States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*:

> Historians have outlined the upward march of mankind from the time when *homo sapiens* appeared on the face of the globe, first of all in the Near East in what was the land of Canaan, up to the age of the greatest thinkers and, more particularly, throughout the whole of history of social progress, from the slavery of Antiquity to man's inevitable, irreversible drive towards equality and freedom. This march is like time itself. It never stops. Nothing can stand in its way for long. The texts, whether they be laws, constitutions, declarations, covenants or charters, do but define it and mark its successive phases. They are a mere record of it. In other words, the progressive rights which men and peoples enjoy are the result much less of those texts than of the human progress to which they bear witness.[39]

Judge Ammoun reflected on the evolution of international law in this case because it involved South African control over the political independence of Namibia. The U.N. Security Council called upon the ICJ to issue an advisory opinion regarding the legal consequences of South Africa's continued operation in Namibia as a mandatory, or national, tutor.[40] South Africa was empowered to act as a tutor for the developing state of Namibia under Article 22 of the League of Nations Covenant.[41] Paragraph 2 of Article 22 provides that "this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility...on behalf of the League."[42] In rejecting the continued authority of South Africa to function as a mandatory for Namibia, the ICJ reasoned that the United Nations contemplated an international trusteeship system that would provide a wider and more effective form of supervision for developing nations.[43]

In support of the majority opinion, Judge Ammoun retraced the development of positive international law concerning the rights to

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39. 1971 I.C.J. 16, 72-73 (1971) (separate opinion of Judge Ammoun).
40. *Id.* at 17, 23.
41. *Id.* at 28-29.
42. *Id.* at 29.
43. *Id.* at 33.

self-determination and international sovereignty.[44] He characterized the evolution of international law as "the fight of the peoples for freedom and independence, which has been going on ever since there have been conquering and dominating peoples and subject but unsubjugated peoples."[45] The right of self determination "before being written into charters that were not granted but won in bitter struggle, had first been written painfully, with the blood of peoples, in the finally awakened conscience of humanity."[46] Judge Ammoun traced the origins of equality, not to the Greek philosophers Plato and Aristotle "who both found words to justify inequality and slavery," but to the stoic philosophy of Zeno.[47] "The stoic philosophy, sowing for the first time in mankind's history the seeds of equality between men and between nations, influenced the greatest of the Roman jurisconsults . . . and then the doctors of Christianity through whom it was eventually transmitted to the Age of Reason."[48]

To a large extent, international law of the eighteenth, nineteenth, and early twentieth centuries developed according to the treaties made among five or six of the great powers of Europe.[49] The agreements were often used to justify slavery, colonization, and conquest.[50] Many of those treaty norms survived the formation of the League of Nations and the United Nations to become imbedded in modern international law.[51] Understandably, many developing states dispute the legitimacy of certain rules, not only because they were not involved in formulating them, but also because the rules do not reflect their developmental needs as former colonies.[52] Third World countries have had a profound impact on the development of human rights since the formation of the United Nations by adding a sense of natural justice, morality, and humane ideals to traditional Western concepts of state sovereignty in international law.[53]

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44. *Id.* at 74.
45. *Id.*
46. *Id.*
47. *Id.* at 77-78.
48. *Id.*
49. Concerning Barcelona Traction, Light And Power Co., 1970 I.C.J. 3, 308 (1970) (separate opinion of Judge Ammoun).
50. *Id.*, Legal Consequences For States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 86 (citing the 1885 Berlin Congress which held Africa to be *terrae nullius*). The term *terrae nullius* was used to describe geographic areas where the inhabitants lacked sufficient social and political organization to constitute independent sovereignty. Western Sahara, 1975 I.C.J. 12, 39 (1975). Western colonial powers could acquire sovereign rights over such "territory belonging to no-one" through simple occupation or conquest. *Id.*
51. Concerning Barcelona Traction, Light And Power Co., 1970 I.C.J. at 308.
52. *Id.* at 310.
53. *Id.* at 310-11.

IV. CONTEMPORARY HUMAN RIGHTS IN INTERNATIONAL LAW

In the past, traditional international law was largely restricted to relations between states.[54] The individual was not considered a proper "subject" of international law.[55] Therefore, traditional international law contained few restrictions on a state's conduct toward foreign nationals.[56] Those restrictions were largely confined to preventing denials of justice that limited a foreign national's access to the courts.[57] Traditionally, the injury to an individual was considered to be an injury to the state of his nationality.[58] "The offense being to the state, the remedy for the violation also runs to the state, although the injured person may have to exhaust domestic remedies before the state of nationality can formally seek reparation for the offense."[59] Although a state did possess limited authority in traditional international law to seek redress for injuries to its nationals by other countries, no state was permitted to interfere with another state's treatment of its own citizens.[60]

The modern concept of human rights in international law has developed extensively since the end of the World War II.[61] One of the founding purposes of the United Nations was "to achieve international co-operation . . . in promoting and encouraging respect for human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion."[62] The contemporary international law of human rights reflects general acceptance of two basic ideals.[63] First, every human being should have basic rights that are recognized and protected by his country.[64] Second, the recognition and protection of those rights, even by states toward their own citizens, is the proper subject of international law.[65] These basic assumptions are reflected in three major documents that form the basis of contemporary human rights in international law.[66] The U.N. General Assembly adopted the Universal Declaration of Human Rights in 1948, outlining a universal standard of civil, political, economic, social, and cultural rights.[67] This document laid

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54. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. VII, introductory note (1987).
55. *Id.*
56. *Id.*
57. *Id.*
58 *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* (citing U.N. CHARTER arts. 55-56).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

the foundation for both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[68] Agreements such as these, and the actions of states in accordance with them, have led to the development of a customary international law of human rights.[69]

A state violates the customary international law of human rights if it practices, encourages, or condones genocide, slavery, murder, torture, racial discrimination, or arbitrary imprisonment.[70] Generally, a state is not responsible for human rights violations by private individuals unless the state actively encourages the activity.[71] The state is not liable for failing to enact or enforce laws prohibiting most human rights violations by private individuals.[72] However, states have a duty under international law to make genocide a crime, and may have additional obligations if they are parties to one of the human rights agreements.[73] For instance, a party to the Covenant on Civil and Political Rights is liable for human rights violations by persons acting under color of state law, even if their actions were contrary to state policy.[74] Slavery, like genocide and other essential human rights, has been incorporated into the *jus cogens* body of customary international law.[75] No state may violate these fundamental human rights, regardless of whether that state is a party to an agreement providing for the protection of such rights.[76]

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68. *Id.*
69. *Id.*
70. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. VII, § 702 (1987).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

V. BIRTH OF THE REPARATIONS CONCEPT

A. *International Condemnation of the Crime of Genocide*

Slavery in the United States ended in 1865[77] with the end of the Civil War.[78] The international community took its first steps toward eradicating the slave trade with the International Convention to Suppress the Slave Trade and Slavery of 1926.[79] The U.N. General Assembly passed a resolution regarding the right of nations to determine their own course of national and cultural development in December 1952, and affirmed the independence of colonial countries and peoples in December 1960.[80] Since the former colonies gained their independence, the devastation of slavery and colonization has been overshadowed to a large degree by the issue of Holocaust reparations. Nevertheless, the efforts toward reparations for Nazi genocide form a useful model for examining the growing international concept of reparations.

The international community began taking steps to prevent similar international atrocities immediately following World War II.[81] In 1948, the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide

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77. Lincoln's Emancipation Proclamation of 1863 declared "forever free" the slaves in those Confederate states still in rebellion. The blacks in the loyal Border States were not affected, nor were those in specific conquered areas in the South. . . . The presidential pen did not formally strike the shackles from a single slave. Where Lincoln could presumably free the slaves—that is, in the loyal Border States—he refused to do so, lest he spur disunion.

THOMAS A. BAILEY & DAVID M. KENNEDY, THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 457-60 (9th ed. 1991).

78. [Lincoln's] immediate goal was not so much to liberate the slaves as to strengthen the moral cause of the Union at home and abroad. This he succeeded in doing. At the same time, Lincoln's proclamation, though of dubious constitutionality, clearly foreshadowed the ultimate doom of slavery. This was legally achieved by action of the states and by their ratification of the Thirteenth Amendment in 1865, eight months after the Civil War had ended.

Id. at 458.

79. International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter Slavery Convention].

80. Concerning Barcelona Traction, Light And Power Co., 1970 I.C.J. 3, 311 (1970).

81. Matthew Lippman, *Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium*, 23 HOUS. J. INT'L L. 467, 469-71 (2001).

Convention), in large part because of the memory of the Holocaust.[82] The Genocide Convention proclaimed that genocide[83] is a crime under international law, whether committed in a time of peace or war and regardless of whether it is done for religious, political, or other reasons.[84] Although the Genocide Convention is limited to protecting national, ethnic, racial, and religious groups,[85] it is still an important step toward preventing another event similar to the Holocaust.[86] Prosecutions for atrocities began almost immediately after the end of World War II.[87] In the first major post-war genocide case, Adolf Eichmann was executed by Israel for his role in exterminating the Jews.[88] The Genocide Convention, in conjunction with the Universal Declaration of Human Rights of 1948, the Nuremburg Trials, and the Nuremburg Principles, form the foundation of the modern concept of international human rights.[89]

B. *Social and Political Dynamics Underlying the Call for Reparations*

The concept of Holocaust reparations for lost wages and lost property cannot be separated from the massive loss of life that accompanied the persecution of the Jewish people.[90]

> We are talking about crimes committed in anticipation of the Holocaust, accompanying the Holocaust, or in consequence of it. In a word, we are talking about thefticide—the greatest mass theft on the occasion of the greatest mass murder in history. . . . [B]ehind every dormant Swiss account, behind every plundered property, behind every gold dental bridge, behind every unrecovered insurance policy, is the narrative/horror of the Holocaust.[91]

To a large extent, Holocaust reparations were driven by the convergence of three different perspectives on the atrocities of Nazi Germany. First, Germany was eager to escape the stigma associated

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82. *Id.* at 471-72.

83. The term genocide was first used in RAPHAEL LEMICIN, AXIS RULE IN OCCUPIED EUROPE, at xi-xii (1944). *See also* Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 453 n.93 (1998).

84. Westley, *supra* note 83, at 470-72.

85. Political groups, women, homosexuals, and professional groups are not protected by the Genocide Convention. *Id.* at 484-85.

86. *Id.* at 471-72.

87. *Id.* at 492-93.

88. Adolf Eichmann was the Head of Jewish Affairs for the Gestapo in Nazi Germany. *Id.* at 492-94.

89. Irwin Cotler, *The Holocaust, Thefticide, and Restitution: A Legal Perspective*, 20 CARDOZO L. REV. 601, 601 (1998).

90. *Id.* at 602.

91. *Id.* at 602-03.

with its role in the Holocaust.[92] Second, the Jewish survivors were understandably driven to regain at least a portion of the personal and familial wealth lost during their persecution.[93] Third and most complex, the former Allied Powers wished to aid the Jewish people without hindering future developments elsewhere.[94]

However, the United States and other Allied Powers were somewhat reluctant to support the Jewish claims for reparations against Germany for several reasons. The United States feared it would ultimately bear the cost of the reparations as it attempted to rebuild Germany under the Marshall Plan.[95] Further, the United States was also concerned that the financial burden of reparations would hinder Germany's recovery and that U.S. support of the Jewish claims would undermine U.S. attempts to secure Germany as an ally.[96]

A fourth opposition to the development of Holocaust reparations included several of the European countries that either conducted business with, or were occupied by, Germany. These countries developed a "series of myths, anchored both in revisionist law and revisionist history, that sought to deny, escape, insulate, or immunize states and their government agents [from] responsibility for restitution."[97] Austria, for instance, claimed that it was really the first victim of Nazi aggression when it was annexed by Germany in March 1938.[98] Likewise, France asserted that the Vichy regime that controlled France during German occupation was a foreign government for which the it could not be held responsible.[99] Similar myths developed in the Netherlands, Switzerland, and Eastern Europe—all with the purpose of shifting the blame for collaboration, association, and acquiescence in the Holocaust.[100]

The significance of this fourth perspective, embodied in national sentiments of nonresponsibility, lies not in questionable historical accuracy, but in what the existence of such myths says about assigning moral blame to national groups. Nations[101] are generally and understandably unwilling to scrutinize their roles in transcendent horrors like the Holocaust.[102] Such introspection may

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92. Westley, *supra* note 83, at 454-55 n.103 (citing NANA SAGI, GERMAN REPARATIONS: A HISTORY OF THE NEGOTIATIONS 1-2 (1980)).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Cotler, *supra* note 89, at 603.

98. *Id.*

99. *Id.* at 605.

100. *Id.* at 603-12.

101. The author uses the term nations to denote the ethnic polity of a region, such as the French or German peoples, rather than the State of France or Germany.

102. Cotler, *supra* note 89, at 603-12.

undermine national pride and necessitate a broad re-evaluation of national conduct toward other groups. An example of this phenomenon is the payment of reparations by the United States to Japanese Americans interned during World War II, discussed below.[103]

VI. REPARATIONS BY TREATY

A. *The Power of Moral Pressure*

Treaty reparations for Jewish survivors of the Holocaust began immediately following World War II. Germany voluntarily agreed to compensate the survivors of the Holocaust under the leadership of Chancellor Konrad Adenauer, who believed the German people owed a moral duty to compensate the Jewish people for their material losses and suffering.[104] In September 1952, Germany signed the Luxembourg Agreements that formed the basis of the unprecedented *Weidergutmachung* legislation designed to compensate Jewish victims.[105] As David Ben Gurion remarked,

> There is a great moral and political significance to be found in the Agreement itself. For the first time in the history of relations between people, a precedent has been created by which a great State, as a result of moral pressure alone, takes it upon itself to pay compensation to the victims of the government that preceded it. For the first time in the history of a people that has been persecuted, oppressed, plundered and despoiled for hundreds of years in the countries of Europe a persecutor and despoiler has been obliged to return part of his spoils and has even undertaken to make collective reparation as partial compensation for the material losses.[106]

The Luxenbourg Agreements reunified Germany and created a fund to compensate Holocaust victims who were imprisoned in concentration camps for at least six months, isolated in ghettos, or in hiding for at least eighteen months.[107] The Allied Powers also forced Imperial Japan to pay reparations to Allied prisoners of war in the

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103. The United States was forced to critically evaluate its own violation of the rights of Japanese Americans during World War II as a result of U.S. support of the Jewish reparations claims. See discussion *infra* Part VI.B.

104. Westley, *supra* note 83, at 454-55.

105. *Id.* at 455.

106. *Id.* at 455-56.

107. Marilyn Henry, *Germany Okays Extension of Reparation Fund*, JERUSALEM POST, Apr. 5, 1996, at 18.

1951 San Francisco Peace Treaty.[108] Notably, treaties, rather than judicial proceedings, created all of these early forms of reparations.

Other nations have also addressed the issue of reparations for their own past actions. In 1994, the Japanese legislature considered the issue of reparations for victims of the atomic bombings of Hiroshima and Nagasaki.[109] The Japanese government also established a private fund of six million dollars to compensate Asian "comfort women" forced to serve the Imperial Japanese Army in World War II.[110] Also in 1994, the Austrian government took steps to normalize relations with Israel by considering payment of reparations to Holocaust victims.[111] In 2001, French and U.S. officials negotiated a settlement to end litigation brought against French banks that held Jewish assets and were looted by the Nazis during World War II.[112]

B. *Overcoming Reluctance to Look Inward*

Several of the aforementioned countries are still criticized for being too slow to acknowledge their responsibility for atrocities committed during World War II. "The trouble with Austria, in contrast to Germany, is the lingering perception of a former Nazi country that has been too slow and too shallow in recognizing the enormous responsibility it has to the Jewish people."[113] Likewise, "the Japanese have never admitted their culpability or paid more than derisory amounts in compensation to their victims."[114]

In order to champion the cause of reparations for Holocaust victims, the United States needed to turn a critical eye to its own conduct in World War II.[115] On August 10, 1988 President Reagan signed the Civil Liberties Act authorizing the payment of $1.2 billion to the families of Japanese Americans interned during World War II.[116] The Civil Liberties Act is the earliest U.S. precedent of compensation for racially motivated acts.[117] In recent years, this

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108. Yuichi Shibata Yomiuri Shimbun, *Britain Abandoned POW claims in '55*, DAILY YOMIURI, Aug. 17, 1998, at 2.

109. *Premier Wary Over A-bomb Reparations*, MAINICHI DAILY NEWS, July 23, 1994, LEXIS, News Library, Mainws File.

110. *Japan Establishes Private Fund for "Comfort Women" Reparations*, DEUTSCHE PRESSE-AGENTUR, Apr. 7, 1995, LEXIS, News Library, DPA File.

111. *Two Cheers for Austria*, JERUSALEM POST, Nov. 13, 1994, at 6.

112. Angela Doland, *France Nears Agreement on Holocaust Reparations*, JERUSALEM POST, Jan. 10, 2001, at 6.

113. *Two Cheers for Austria*, *supra* note 111.

114. Andrew Roberts, *The Debt Japan Owes These Men*, DAILY MAIL (LONDON), Sept. 17, 1993, at 28.

115. Westley, *supra* note 83, at 451; *A Debt of Honor*, WASH. POST, Oct. 3, 1989, at A24.

116. *A Debt of Honor*, *supra* note 115.

117. Tuneen E. Chisolm, *Sweep Around Your Own Front Door*, 147 U. PA. L. REV. 677, 713-14 (1999).

aggressive self-investigation has expanded to form the basis for the slavery reparation issue in the United States. "As a world leader emphasizing the need for international relations grounded upon democracy and human rights, the United States [must] face the dilemma of how to deal with its own past and its most egregious historical injustices, an obvious example being the legacy of slavery."[118]

VII. REPARATIONS IN THE COURTS

A. *The Alien Tort Claims Act*

The courts, rather than the political arena, have increasingly become the forum for reparations disputes around the world. However, a growing concern exists among Jewish leaders that the Holocaust reparations are often misrepresented as a simple property dispute.[119] They point out:

> [C]ompensation is not just about money, it is about the symbolic recognition of a moral debt, and a commitment to teach new generations. Nobody wants to paint respectable modern German companies with a Nazi tar brush. Six million people were murdered because they were Jews, and for them or their relatives, there is no compensation on earth. But as a secondary crime, they were also robbed. That is an issue we can and should do something about. Wherever it is still possible, it is still necessary.[120]

A significant body of law has developed in the United States for the adjudication of international human rights claims in U.S. courts.[121] The Alien Tort Claims Act (ATCA), enacted by Congress in the Judiciary Act of 1789, originally provided for federal jurisdiction in international cases involving alien plaintiffs.[122] *Filartiga v. Pena-Irala* is the seminal case involving the ATCA.[123] In that decision, the court held that a claim involving deliberate torture fell within federal subject matter jurisdiction because such torture violated the customary norms of well-established international law.[124] Dr. Joel Filartiga and his daughter, Dolly Filartiga, were citizens of the

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118. *Id.* at 677.
119. *Id.*
120. *Id.*
121. Derek Brown, *Litigating the Holocaust: A Consistent Theory in Tort for the Private Enforcement of Human Rights Violations*, 27 PEPP. L. REV. 553, 563 (2000).
122. *Id.*
123. *Id.*
124. *Id.*

Republic of Paraguay.[125] Dr. Filartiga was a longstanding opponent of the government of Paraguay under President Alfredo Stroessner.[126] Dolly Filartiga arrived in the United States in 1978 and subsequently applied for permanent political asylum.[127] The Filartigas alleged that Americo Norberto Pena-Irala (Pena) wrongfully caused the death of Dr. Filartiga's seventeen-year-old son, Joelito, by the use of torture.[128] They contended that Pena, then Inspector General of the Police in Asuncion, Paraguay, kidnapped and tortured Joelito Filartiga.[129] Asuncion Police took Dolly Filartiga to Pena's home and confronted her with Joelito's body.[130] As Dolly fled from the house, Pena followed after her shouting, "Here you have what you have been looking for for so long and what you deserve. Now shut up."[131] Dr. Filartiga brought a criminal action in the Paraguayan courts, but government officials allegedly threatened his attorney with murder and inexplicably disbarred him.[132]

Pena moved to the United States in 1978 under a visitor's visa.[133] Upon learning of his presence in the United States, the Filartigas commenced this action in U.S. federal court under the ATCA and international human rights law.[134] The Second Circuit held that deliberate torture perpetrated under the color of state authority is contrary to the customary international law of human rights, regardless of the nationality of the parties.[135] The court also held that the ATCA provided federal jurisdiction where an alleged torturer is present within the borders of the United States and is served with process by a foreign national.[136] The Second Circuit recognized that the United States "is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations."[137] The court explained that in order to "[i]mplement[ ] the constitutional mandate for national control over foreign relations, the First Congress established original district court jurisdiction over 'all causes where an alien sues for a tort only [committed] in violation of the law of nations.'"[138] In order to determine the appropriate sources of international law, the Second

125. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 878-79.
135. *Id.* at 880.
136. *Id.* at 878, 887-88.
137. *Id.* at 877.
138. *Id.* at 878 (citing Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified as amended at 28 U.S.C. § 1350 (1994)).

Circuit looked to the U.S. Supreme Court for guidance.[139] The Supreme Court has said that international law "may be ascertained by consulting the works of jurists, writings professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[140]

B. *The Act of State Doctrine and the Foreign Sovereign Immunities Act*

Based on the *Filartiga* decision, other U.S. courts have entered judgments against former foreign government officials for human rights violations. In *In re Estate of Ferdinand Marcos, Human Rights Litigation*, the Ninth Circuit held the estate of the former President of the Philippines liable for $1.2 billion in damages for human rights violations.[141] Up to ten thousand people in the Philippines were allegedly tortured, executed, or abducted by military intelligence forces during the presidency of Ferdinand Marcos.[142] President Marcos fled the Philippines to Hawaii with his family and loyal supporters in 1986.[143] Survivors and family members of victims who suffered under the Marcos administration from 1971 to 1986 soon filed several lawsuits.[144] The suits were consolidated into a class action in 1991. The Ninth Circuit rejected the assertion that Marcos' actions while President of the Philippines were protected by the Act of State Doctrine in an unpublished opinion.[145] The Act of State Doctrine provides:

> In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.[146]

The Ninth Circuit stated that "[e]ven though characterized as a dictator, [Marcos] was not himself the sovereign—government—of Venezuela within the Act of State Doctrine."[147] The court also held

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139. *Id.* at 880.

140. *Id.* (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

141. *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1480 (9th Cir. 1994); Brown, *supra* note 121, at 563 n.101.

142. *In re Estate of Ferdinand Marcos*, 25 F.3d at 1469.

143. *Id.*

144. *Id.*

145. *Id.* at 1470.

146. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. IV, ch. 1, § 443(1).

147. *In re Estate of Ferdinand Marcos*, 25 F.3d at 1471 (quoting Jiminez v. Aristeguieta, 311 F.2d 547, 557 (5th Cir. 1962)).

that the Foreign Sovereign Immunities Act (FSIA) does not prevent the court from exercising jurisdiction over foreign officials who act beyond the scope of their authority.[148] The FSIA provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.[149]

The court treated the allegations of torture as true for the purpose of determining jurisdiction, and reasoned that acts such as torture and abduction were beyond the scope of Marcos' authority as president.[150] The court recognized that the FSIA is subject to restrictive interpretation that limits sovereign immunity to inherently governmental acts, but does not prevent jurisdiction over commercial or private acts of foreign individuals or instrumentalities.[151] Because Marcos acted beyond the scope of his inherent governmental authority, and because "the prohibition against official torture carries with it the force of a *jus cogens* norm, which enjoys the highest status within international law," the Ninth Circuit upheld the district court's assertion of federal jurisdiction.[152]

The Estate of Marcos (The Estate) also argued that federal jurisdiction was prohibited by the arising-under clause of Article III of the U.S. Constitution.[153] The Estate contended that Article III required at least one of the parties to be a U.S. citizen.[154] The Ninth Circuit rejected this argument by relying on *Verlinden B.V. v. Central Bank of Nigeria*, a Supreme Court decision that employed a broad conception of the arising-under clause to empower Congress to grant federal subject matter jurisdiction in disputes involving foreign plaintiffs.[155] Under the court's reasoning, actions against a foreign state under the FSIA necessarily involve issues of substantive federal law and therefore arise under federal law within the meaning of Article III of the Constitution.[156]

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148. *Id.* at 1470.
149. 28 U.S.C. § 1330(a) (2002).
150. *In re Estate of Ferdinand Marcos*, 25 F.3d at 1470-72.
151. *Id.* at 1472.
152. *Id.* at 1473.
153. *Id.* at 1474.
154. *Id.*
155. *Id.* (citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 492 (1983)).
156. *Id.*

The role of the FSIA in actions arising from World War II atrocities has not yet been adequately settled.[157] Hugo Princz, a U.S. citizen and Holocaust survivor, filed suit in 1992 against the Federal Republic of Germany to recover money damages for injuries and slave labor he endured as a prisoner in Nazi concentration camps.[158] Ruling that the lawsuit lacked subject matter jurisdiction, the court declined to answer whether the FSIA, enacted in 1976, applied retroactively to the events of World War II.[159] From 1812 to 1952, the U.S. State Department routinely requested immunity in all cases involving friendly foreign governments.[160] The international community began to exclude commercial and private acts from the protection of sovereign immunity during the first half of the twentieth century.[161] This restrictive approach was incorporated into U.S. jurisprudence in 1952 when the State Department began requesting immunity for friendly governments on a case-by-case basis.[162] The FSIA substantially codified this approach in 1976.[163] Therefore, most courts apply the FSIA only to events after 1952.[164] However, the court recognized a strong argument favoring retroactive application of the FSIA to events before 1952.[165] Congress provided that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."[166]

The FSIA provides for several exceptions to sovereign immunity.[167] First, states are not immune from actions based on commercial activities of the sovereign outside the territory of the United States that have direct effect in the United States.[168] In determining if a state is performing a commercial activity, "the issue

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157. Christopher P. Meade, Note, *From Shanghai to Globocourt: An Analysis of the "Comfort Women's" Defeat in* Hwang v. Japan, 35 VAND. J. TRANSNAT'L. L. 211, 271 (2002).

158. Princz v. Federal Republic of Germany, 26 F.3d 1166, 1168 (D.C. Cir. 1994).

159. *Id.* at 1168-71.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 1170 (citing Carl Marks & Co. v. Union of Soviet Socialist Republics, 841 F.2d 26 (2d Cir. 1988)); Jackson v. People's Republic of China, 794 F.2d 1490, 1497-98 (11th Cir. 1986); Slade v. United States of Mexico, 617 F. Supp. 351 (D.D.C. 1985). *Cf.* Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 791 (2d Cir. 1980) (holding that the FSIA does not apply retroactively to case filed before effective date of statute). *Contra* Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 851 n.1 (S.D.N.Y. 1978) (applying FSIA to acts that arose before the Act's effective date).

165. *Princz*, 26 F.3d at 1170.

166. *Id.* (quoting 28 U.S.C. § 1602 (2002)).

167. *Id.* at 1171.

168. *Id.* (citing 28 U.S.C. § 1605(a)(2) (2002)).

is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'"[169] The threshold for direct effect in the United States is fairly low.[170] "To be 'direct' within the meaning of the FSIA an effect need not be 'substantial' or 'foreseeable' so long as it is more than 'purely trivial' and 'it follows as an immediate consequence of the defendant's . . . activity.'"[171] The second major exception to the FSIA is waiver.[172] Although it recognized the importance of human rights in international law, the court rejected the contention that a state impliedly waives its sovereign immunity when it acts beyond the bounds of *jus cogens* international law.[173] The court was reluctant to find a waiver of sovereign immunity because it did not agree to arbitration or file responsive pleadings without raising the immunity defense.[174] Ultimately, the court declined to assert jurisdiction without a clearer grant by Congress:

> We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong.[175]

The U.S. District Court for the District of Columbia also declined to decide whether the FSIA applies retroactively to actions before 1952.[176] In *Hwang Geum Joo v. Japan*, fifteen former "comfort women" filed suit against Japan alleging they were forced to serve as sex-slaves to the Imperial Army of Japan during World War II.[177] Like the court in *Princz*, the *Hwang* court recognized strong arguments in favor of retroactive application of the FSIA.[178] However, even assuming arguendo that the FSIA did apply, the court held that none of the exceptions to foreign sovereign immunity applied.[179] The court first held that Japan did not waive its sovereign immunity because it did not indicate a willingness to be sued for

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169. *Id.* at 1172 (quoting Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 613 (1992)); Millen Indus. v. Coordination Council for N. Am. Affairs, 855 F.2d 879, 884 (D.C. Cir. 1988).
170. *Id.*
171. *Id.* (quoting *Weltover*, 504 U.S. at 614).
172. *Id.* at 1173.
173. *Id.*
174. *Id.* at 1174.
175 *Id.*
176. Meade, *supra* note 157, at 271.
177. Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52, 54-55 (D.D.C. 2001).
178. Meade, *supra* note 157, at 271-72.
179. *Id.*

reparations in the Potsdam Declaration.[180] The court agreed with the *Princz* decision, as have the Second, Seventh, and Ninth Circuits, that violations of *jus cogens* international law do not constitute an implied waiver of sovereign immunity.[181]

Even if a violation of *jus cogens* did serve as an implied waiver of sovereign immunity, the comfort women would still need to prove that the Japanese actually violated international law in order to prevail on their ATCA claim.[182] As one author has explained, although *Filartiga* noted that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among nations of the world today," it is still very unclear whether that holds true where the plaintiff brings a claim fifty or sixty years after the alleged events.[183] Despite *Filartiga*'s preference for applying the most current conception of international law, Japan would have a strong claim that holding its 1940s-era conduct under the microscope of 2000-era international law would punish Japan ex post facto.[184] "The 'principle' that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal" in U.S. jurisprudence.[185]

Having rejected the claims of implied and explicit waiver of sovereign immunity, the court then rejected the assertion that the Japanese actions fell within the commercial exception.[186] The court emphasized the context within which the Japanese allegedly operated the brothels.[187] The court recognized that such establishments "routinely exist as commercial ventures engaged in by private parties," but explained that "Japan's alleged conduct did not occur in this context."[188] Although the court recognized that Japanese soldiers paid a fee to use the comfort stations, it still held the state was not engaged in a commercial activity.[189] As one commentator points out, however, there may be little difference between the kidnapping and forced prostitution endured by the comfort women and the human trafficking and forced prostitution that still victimizes

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180. *Id.*
181. *Id.* at 273.
182. *Id.*
183. *Id.* (quoting Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)).
184. *Id.*
185. *Id.* (quoting Hughes Aircraft Co. v. U.S. *ex rel.* Schumer, 520 U.S. 939, 946 (1997)).
186. *Id.* at 276-77.
187. *Id.*
188. *Id.* (quoting Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52, 64 (D.D.C. 2001)).
189. *Id.* at 277.

hundreds of thousands of women and children each year and generates over seven billion dollars annually.[190]

C. *Statute of Limitations, the Impact of Treaties, and the Nonjusticiable Question Doctrine*

In *Iwanowa v. Ford Motor Co.*, the U.S. District Court of New Jersey addressed the issues of the statute of limitations, the impact of treaties upon claims brought under the ATCA, and the political question doctrine.[191] Iwanowa claimed that "[b]y knowingly utilizing unpaid, forced labor under inhuman conditions, [defendants] violated the law of nations, including the Hague Convention and the Geneva Convention."[192] The complaint alleged that Iwanowa "was literally purchased, along with 38 other children from Rostock [sic], by a representative of [the Germany Ford Werke Company]."[193] The court explained that "[t]he use of unpaid, forced labor during World War II violated clearly established norms of customary international law. . . . Such assertions suffice to support an allegation that Defendants participated in slave trading." The court observed that most courts recognize that the ATCA provides both federal subject matter jurisdiction and a right of action for violations of international law.[194] Iwanowa was a citizen of the Soviet Union during World War II.[195] The court explained that the London Debt Agreement precluded her pursuit of reparations against Ford Werke by judicial means.[196] "[O]nly the government of the country of which the forced laborer was a national at the time the forced labor claims arose can pursue such claims. In short, Iwanowa must press her individual claims through the governments of the successor states to the U.S.S.R."[197]

Turning to the issue of statute of limitations, the *Iwanowa* court acknowledged that the ATCA does not provide a specific statute of limitations.[198] Therefore, the court must apply the "most closely analogous statute of limitations under state law."[199] However, the court recognized a narrow exception when another federal statute or rule "clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make the [federal statute] a significantly more appropriate

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190. *Id.*
191. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 474 (D.N.J. 1999).
192. *Id.* at 437.
193. *Id.*
194. *Id.* at 441-42 (citing Jama v. U.S. I.N.S., 22 F. Supp. 2d. 353, 362-63 (D.N.J. 1998)). *See also* Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996).
195. *Iwanowa*, 67 F. Supp. 2d at 453.
196. *Id.* at 456.
197. *Id.*
198. *Id.* at 462.
199. *Id.* (citing DelCostello v. Int'l Bhd. Of Teamsters, 462 U.S. 151, 152 (1983)).

vehicle for interstitial lawmaking."[200] The court, following decisions by other courts, chose to apply the statute of limitations in the Torture Victim Protection Act of 1991 (TVPA).[201] The TVPA provides for a ten-year statute of limitations.[202] Because the London Debt Agreement precluded Iwanowa's individual claim until it was replaced on March 15, 1991, the statute of limitations was tolled until that date and would expire on March 15, 2001.[203] The moratorium on individual claims under the London Debt Agreement ended with the ratification of the Two-Plus-Four Treaty in 1991.[204] The ten-year statute of limitations had not expired by the time Iwanowa filed this action against Ford Werke in 1998.[205] However, the statute of limitations against Ford Werke's parent, Ford Motor Company, in the United States was not tolled by the London Debt Agreement and had therefore expired.[206] The court also held that Iwanowa's claims for unjust enrichment and quantum meruit had expired under the applicable state law statute of limitations of six years.[207]

The *Iwanowa* court also dismissed Iwanowa's World War II forced labor claims because they raised nonjusticiable political questions.[208] "The Political Question Doctrine holds that a federal court having jurisdiction over a dispute should decline to adjudicate it on the ground that the case raises questions which should be addressed by the political branches of government."[209] The political question doctrine is of great importance in the area of foreign affairs:

> The very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confined by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should only be undertaken by those directly responsible to the people whose welfare they advance or peril. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[210]

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200. *Id.* (citing Reed v. United Transp. Union, 488 U.S. 319, 324 (1989)).

201. *Id.* (citing Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1195-96 (S.D.N.Y. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 192-93 (D. Mass. 1995)).

202. *Id.* at 462 (citing 28 U.S.C. § 1350 (2002)).

203. *Id.* at 465.

204. *Id.*

205. *Id.* at 466.

206. *Id.*

207. *Id.* at 476.

208. *Id.* at 483.

209. *Id.* (citing Baker v. Carr, 369 U.S. 186, 210 (1962); Atlee v. Laird, 347 F. Supp. 689, 701 (E.D. Pa. 1972)).

210. *Id.* at 484 (quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

The court listed several reasons for avoiding political questions, including (1) unmanageably large quantities of relevant materials, (2) inability of parties to provide all materials necessary for a sound judgment, (3) difficulty in predicting the political consequences of a decision on the merits, (4) lack of applicable standards to formulate a judgment on the merits, and (5) difficulty in reviewing decisions made by political branches of government.[211] The court also expressed a concern that a decision on the merits might represent a "lack of respect to the coordinate branches of government."[212] The court reasoned that reparations have always been part of the negotiation process after the conclusion of hostilities, and as such, the issue falls squarely within the power of the executive branch.[213]

D. *State Action in Foreign Affairs*

In *In re World War II Era Japanese Forced Labor Litigation*, Chinese and Korean nationals sought compensation from Japanese companies for forced labor during World War II.[214] Unlike U.S. citizens, the action was not barred by the peace treaty with Japan because the Chinese and Korean governments were not parties to that agreement.[215] This case was unique because the California legislature specifically provided a cause of action for individuals who were used as forced labor by the Nazis and their allies during World War II.[216] The California government enacted the statute to "help right the wrong which occurred over 50 years ago during World War II when men, women and children were forced into slave labor."[217] However, the court rejected the California enactment because it infringed on federal control of foreign affairs.[218] In addition to rejecting the claims based on the California statute, the court also held that the statute of limitations had expired on the ATCA claims.[219] Like the court in *Iwanowa*, this court employed the ten-year statute of limitations from the TVPA.[220] The court recognized that the statute of limitations taken from the TVPA could be subject

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211. *Id.*
212. *Id.* at 485.
213. *Id.*
214. *In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1164 (N.D. Cal. 2001).
215. *Id.* at 1165 (analyzing Cal. Civ. Proc. Code § 354.6 (Deering 2001)).
216. *Id.* at 1173.
217. *Id.* (quoting Governor Gray Davis of California who signed Cal. Civ. Proc. Code § 354.6 into law).
218. *Id.* at 1173-75.
219. *Id.* at 1173-75, 1181.
220. *Id.* at 1181.

to equitable tolling, but that the plaintiffs in this case failed to assert that they were prevented from bringing their claims sooner.[221]

These cases form the legal scaffolding upon which Holocaust litigation has proceeded in the United States.[222] Most of the recent cases involving Holocaust litigation have been conducted as class actions because they are well-suited to resolving human rights issues that often involve conduct toward an identifiable group or class of persons.[223] Although the class action is one of the most complex forms of federal litigation, "justice is often better served in mass tort cases through 'collective, rather than disaggregative, processes.'"[224]

E. *Holocaust Reparations Settlements*

In *In re Holocaust Victim Asset Litigation*, three separate trials were combined for pretrial purposes.[225] The cases involved claims against Union Bank of Switzerland, Swiss Bank Corporation, and Credit Suisse.[226] The causes of action included breach of contract, breach of fiduciary duty, conversion, conspiracy, and unjust enrichment.[227] The banks were pressured to settle the disputes, brought by twenty states and thirty cities that threatened to impose sanctions on the banks "for not resolving the suit and meeting their moral and legal obligations."[228] The plaintiffs' lawyers also filed additional actions in Washington, D.C. and California courts.[229] The banks agreed to pay $1.25 billion to "targets and victims of Nazi persecution" in a 1998 settlement.[230]

In Germany, Deutsche Bank, Dresdner Bank, Daimler-Benz, Volkswagen, BMW, and others have been the subjects of multi-billion-dollar lawsuits.[231] At least fifteen lawsuits were filed in 1999 alone against German companies that allegedly benefited from slave labor under the Nazi regime.[232] As recently as 1999, German

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221. *Id.*
222. Brown, *supra* note 121, at 564.
223. *Id.* at 564-65.
224. *Id.* at 565 (quoting David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 567-68 (1987)).
225. *Id.* at 567.
226. *Id.* at 566-68.
227. *Id.* at 566.
228. *Id.* at 567-68 (quoting Michael J. Bayzler, *A Measure of Justice for Holocaust Survivors*, ORANGE COUNTY REG., Aug. 23, 1998).
229. *Id.*
230. *Id.*
231. Joan Gralla, *WJC Weighs Sanctions Against Deutsche Bank*, NAT'L POST, Feb. 8, 1999, at C8.
232. *Never Too Late*, JERUSALEM POST, Jan. 17, 1999, at 6.

companies agreed to pay $1.8 billion in additional reparations to Holocaust victims who had not received earlier compensation.[233]

Reparations litigation is not limited to actions by Holocaust survivors. Although discouraged by the Chinese government, Chinese citizens are actively seeking reparations in Chinese courts against Japan for invasion of mainland China during World War II.[234] In 1998, the United States settled a class-action lawsuit filed by twelve hundred Latin Americans of Japanese decent who were interned during World War II.[235]

F. *Moral Underpinnings of Judicial Resolutions*

In the court setting, the controlling principle requires that the state or the companies were unjustly enriched by seizures of property or forced labor.[236] The objective of the courts and the settlement agreements is to return the value of the labor or property to the victims.[237] However, the motivating force behind cases like *In re World War II Era Japanese Forced Labor Litigation* and *In re Holocaust Victim Asset Litigation* is often the perception by legislatures and government officials of Jews as the ultimate victims of the government actions during World War II.[238] Not only are the former Allied Powers still motivated by a sense of empathy for the suffering of the Jewish people, but the German companies and former Nazi supporters are also eager to settle disputes to distance themselves from the near-universal condemnation of the Nazi regime.[239] Governments, banks, and companies alike have political and economic incentives to throw off the label of Nazi sympathizers and rejoin the civilized world.[240] As the next section examines the claims of African states for reparations, bear in mind the possible similarities between the universal condemnation of the Nazi regime and the rejection of slavery.

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233. *Report: German Firms to Pay 3 Billion Marks to Slave Labour Victims*, DEUTSCHE PRESSE-AGENTUR, Feb. 14, 1999, LEXIS, News Library, DPA File.

234. Agnes Cheung, *War-claims Activist Warned*, SOUTH CHINA MORNING POST, Mar. 3, 1995, at 8.

235. *U.S. Will Pay Reparations to Former Latin American Internees*, N.Y. TIMES, June 15, 1998, at A19.

236. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999).

237. *Id.*

238. *Compare In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160 (N.D. Cal. 2001), *with* Brown, *supra* note 121, at 564-68.

239. *See generally* Brown, *supra* note 121.

240. *Id.*

VIII. POTENTIAL AFRICAN REPARATIONS

A. *Prohibition of Slavery as* Jus Cogens *International Law*

Any discussion of the prospect of African reparations must necessarily begin with an assessment of the legal status of the institutions of slavery and colonization. As discussed earlier, slavery has been rejected by the United States and the international community for over seventy-five years.[241] During that time, the prohibition has been sufficiently incorporated into the customary international law to be fairly characterized as a *jus cogens* international law of human rights. The rejection of colonialism has also been fully incorporated into customary international law, although its claim to *jus cogens* status may be affirmed less vigorously within the international community than that of slavery. As a result of the universal condemnation of slavery, colonialism, genocide, and war crimes, states generally possess universal jurisdiction to define and punish violations of those basic rights.[242] However, as a possible lingering effect of the earlier international law of near universal foreign immunity,[243] courts remain reluctant to review the actions of foreign states, particularly when a significant amount of time has lapsed.[244]

B. *African Reparations Under the Foreign Sovereign Immunities Act*

One alternative is to bring an action in a U.S. court for violation of the international law of human rights against those countries or companies that perpetrated slavery and colonization against a state in Africa. Courts in the United States can only exercise jurisdiction in cases involving international law if they fall within one of the exceptions to the Foreign Sovereign Immunities Act (FSIA).[245] The institution of slavery is arguably within the exception to the FSIA for commercial activity. Although the *Hwang* court held that operation

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241. *Compare* U.S. CONST. amend. XIV, *with* Slavery Convention, *supra* note 79.

242. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. IV, ch. 1, § 404 (1987).

243. Princz v. Federal Republic of Germany, 26 F.3d 1166, 1168-69 (D.C. Cir. 1994).

244. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d. 424 (D.N.J. 1999); *see also In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d. 1160 (N.D. Cal. 2001).

245. Princz, 26 F.3d at 1168-69.

of brothels by the Japanese government was not a commercial activity,[246] that case is distinguishable from the institution of slavery. In the case of the Imperial Army of Japan, the brothels operated primarily for the purpose of satisfying the sexual needs of the troops in order to further the military objectives of the Empire.[247] In the case of European conquest of the African states, however, the institution of slavery and the conquest and colonization itself was a means of furthering the commercial interests in labor and resources of the European empires. The task of establishing slavery as a commercial activity exception to the FSIA is eased to the extent that African states can demonstrate that European governments have coordinated their efforts with private shipping, mining, and agricultural businesses to that end.[248]

Additionally, African states can make a colorable argument that the European powers and the United States have impliedly or explicitly waived sovereign immunity as it applies to events before 1952 by imposing retroactive application of the FSIA and reparations generally to Axis Powers after World War II.[249] To the extent that those countries have held Germany accountable for reparations to Jewish victims of the Holocaust,[250] African states could argue that the same countries have exposed themselves to accountability for their own misdeeds. This argument will necessarily run afoul of the U.S. Supreme Court's concern for ex post facto prosecution.[251] Surmounting this obstacle will hinge upon the ability of the African states to characterize the *jus cogens* status of the international human rights law relating to slavery as a transcendent truth that should have been recognized by the slave-trading states during the time of slavery. This argument will necessarily take on a tone similar to the criminal law concept that ignorance of the law is no defense. The African states could argue that the slave-trading states can be held liable for their actions even if they believed they were acting within the norms of international law at the time. This position can be fortified by pointing to the Swiss Banks and German companies that have been held accountable for their collusion with the Nazis, although they were acting within the bounds of international law at the time.

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246. Meade, *supra* note 157, at 276-77.

247. *Id.*

248. *See id.* (discussing government commercial activity in the context of slavery and colonization).

249. *See id.* (discussing the FISA and the Axis Powers after World War II).

250. *See* Brown, *supra* note 121, at 566-68.

251. Meade, *supra* note 157, at 273.

C. *African Reparations Under the Alien Tort Claims Act*

Another alternative is to file a suit for reparations in the United States under the Alien Tort Claims Act (ATCA). The primary difficulty with this avenue of slavery reparations is the ten-year statute of limitations derived from the Torture Victim Protection Act (TVPA).[252] African states could argue that the statute of limitations was tolled by the delayed development of a cause of action in international law.[253] This argument reflects the condition of customary international law that is formulated and developed according to the evolving conception of human rights within the international community. The African states would argue that a cause of action did not exist and that, therefore, the statute of limitations did not begin to run until the concept of the prohibition of slavery as a facet of the *jus cogens* body of international law reached a sufficient level of general acceptance. This argument is, of course, susceptible to the contention that a state cannot be liable under a cause of action until that cause of action actually exists.[254]

Alternatively, the African states could argue that the statute of limitations was equitably tolled by the refusal of the slave-trading states to recognize the *jus cogens* status of the prohibition of slavery. This argument suggests that the continued practice of slavery until the end of the nineteenth century and the survival of colonialism into the twentieth century represent a fraudulent misrepresentation of the true nature of human rights upon the international community by slave-trading states. By employing this argument, the African states place the slave-trading states in a "catch-22" scenario. From one perspective, the slave-trading states' continued insistence that slavery is not a transcendent evil represents a continuation of that fraud on the international community. However, acceptance of the freedom from slavery as a universal right extending back through time opens the slave-trading states to the same responsibility for their actions. Additionally, African states that have remained in a state of tutelage, as described by Judge Ammoun in *Security Council Resolution 276*, might argue that their subordinate status on the world stage entitles them to equitable tolling of their causes of action.

At the time of publication for this Note, a class action complaint was initiated in federal district court that will present this equitable tolling argument in the context of reparations for African-

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252. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d. 424, 462 (D.N.J. 1999).

253. *Id.*

254. This argument is similar to the familiar tort concept that a breach of duty cannot exist unless a duty first exists.

Americans.[255] The suit was filed against four companies in the United States that allegedly participated in the slave trade.[256] The first count of that action alleges conspiracy by the companies and asserts that they acted individually and in concert with their industry groups to profit from uncompensated labor derived from slavery.[257] The second count demands the production of records from the period of slave trading.[258] The plaintiff class asserts that the defendants knew or should have known of the existence of these records and that the defendants should be required to produce them.[259] The third count asserts that the defendants committed human rights violations by enslaving and persecuting the ancestors of the African American class members.[260] Counts four and five allege conversion and unjust enrichment, respectively, for the failure by the defendant companies to compensate the enslaved ancestors of the plaintiff class for their labor.[261] The complaint asserts that the general lack of reliable shipping records from the period, the unwillingness of companies to release their records, and the reluctance on the part of Congress to address the issue of reparations justify the delay by the plaintiff class in bringing this action.[262] Arguably, the plaintiffs should not be made to suffer because of the lack of diligence in record keeping and reluctance in producing those records by the defendant companies.[263]

D. *African Reparations and the Nonjusticiable Question Doctrine*

Whether African states pursue slavery reparations under international law by way of the FSIA, or as a tort under the ATCA, they will still have to contend with the nonjusticiable question doctrine. First and foremost, the African states should argue that the slave-trading states are completely unwilling to negotiate or consider any form of compensation or reparations by legislative or executive means. The African states should point to the overwhelming size of the injustice perpetrated over centuries of colonial domination and enslavement as a dual indicator of both the reason why treaty settlement is impossible and why judicial remedy is essential. The African states should argue that the debt is so great that slave-trading states will never give repayment an adequate consideration.

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255. Complaint and Jury Trial Demand, Farmer-Paellman v. FleetBoston Fin. Corp., ¶ 45 (E.D.N.Y. filed 2002), *available at* www.findlaw.com [hereinafter Complaint].

256. *Id.* ¶¶ 27-31.

257. *Id.* ¶¶ 50-51.

258. *Id.* ¶¶ 52-54.

259. *Id.*

260. *Id.* ¶¶ 57-61.

261. *Id.* ¶¶ 62-70.

262. *Id.* ¶¶ 45-49.

263. *Id.*

For the same reason, however, African states should argue that it is imperative that some organ of government address the issue. Judicial resolution of the reparation issue is necessary because treaty or legislative action by the other branches of Western governments is unlikely. To strengthen this argument, the African states should actively pursue settlements by treaty or U.N. resolution. On the one hand, the potential for litigation may help the African states achieve their primary objectives of debt forgiveness and a formal apology through international agreement. On the other hand, the failure to reach such an agreement will fortify the assertion that diplomatic resolution is impossible.

E. *Adequate Evidence to Document the African Injury*

Underlying the issue of the nonjusticiable question doctrine and of litigation generally is the ability of the African states to adequately document the injuries sustained from centuries of slavery and colonization. Not only must the African states locate those companies that profited from the slave trade that are still in existence, but they must also obtain whatever documentation may still exist of the numbers and origins of slaves transported to the New World. Obviously, slave traders and slave owners in the new world would not have kept detailed records of the identities and origins of their property. Even if such records did exist, they most likely would not have withstood the passage of time. However, the African states should argue that equitable doctrines should prevent the slave-trading states from continuing to prosper from their lack of diligent record keeping. At the very least, the African states could pursue their objective of debt forgiveness by claiming that the accumulated national debts of their countries is a rough approximation of the damage sustained at the hands of Imperial Europe.

F. *The Impact of Moral Outrage on African Reparations*

In assessing the potential for slavery reparations, the impact of international moral outrage on the success of Holocaust reparations should not be overlooked. For that reason, the likelihood of reparations for African states may be expected to be directly proportional to its similarity with the Holocaust situation. On its face, it appears that the Africans have suffered to a similar degree under slavery and colonization as did the Jews under the Nazis. Certainly, the dual horrors of slavery and colonization oppressed and subjugated a comparable number of persons as the Nazi Holocaust. The duration of that suffering was also far greater that the six years of World War II. Therefore, the carnage of slavery and colonization can be fairly characterized as an African Holocaust.

However, there may be a fundamental difference in the lack of intent to harm the African people in the same way the Nazis intended to harm the Jews. There were certainly legitimate political and economic reasons for the countries in the West to engage in colonization. No European country could afford to withdraw unilaterally from the race to colonize, or fail to utilize fully new colonies through slave labor without sacrificing its own security at home. It is much more difficult for courts or countries to accept an assignment of moral culpability when there is no clear evidence of malice. At most, the colonial powers are guilty of recklessly disregarding the interests of the African states when pursuing their own survival.

Likewise, a significant difference exists between the Allied Powers laying blame on a handful of surviving Nazi leaders and laying blame on generations of their own ancestors. This point helps to illustrate precisely why the reparations issue, particularly in a courtroom setting, tends to exaggerate tensions. If the issue was raised entirely in a political setting, the West would have room to maneuver. It could empathize with the descendants of former colonial subjects and propose measures to offset the lingering effects of colonization without necessarily making a formal apology or publicly accepting blame. Similarly, proponents of the reparations movement could obtain the economic relief they seek in the form of debt forgiveness with much less opposition from the West, assuming African states forego a formal apology and acknowledgment of wrongdoing by European nations. By keeping their options open in treaty negotiations, the Western and African states can reduce tensions and concentrate on a realistic evaluation of the merits of the reparation claims and the secondary benefits of, for instance, a stabilized African market for European goods.

However, when the issue is presented in the form of litigation, the stakes are raised. Even though the parties can still negotiate a settlement, any settlement is, at least in the eyes of the observing public, both an admission of responsibility and an acknowledgement of the moral legitimacy of the reparations cause in proportion to the amount of the settlement. In litigation, the parties are engaged in a type of formalized battle that removes political alternatives. The motivation to fight for the cause itself and to win a moral victory in the form of a formal apology is more likely to move to the forefront in litigation. Likewise, the slave-trading states will be encouraged to avoid an apology at all costs in order to prevent any admission of guilt. The net effect is that each side will be more likely to be consumed by the desire to hold the moral high ground, or to obtain a perceived moral victory or vindication at the expense of the real objectives. For the African states, there is a greater risk that tempers will flare, as they did at the World Conference Against Racism. As a result, they will not receive the debt forgiveness they so desperately

need. The West, of course, wants to put the entire issue to rest, but not at the price of its dignity and cultural heritage. England, for instance, even in its post-colonial state, is not prepared to sacrifice the legacy of the British Empire because of the nostalgic sentiments and feelings of national identity that underlie the retention of its monarchy. Similarly, the United States has reason to fear that a settlement with African states regarding slavery could open the floodgates to reparation actions by African American descendents of former slaves in the United States.

There may be some very good arguments for why the West should not be held responsible for colonization and slavery. Of course, no Western democracy that considers itself to be morally sophisticated would ever make such arguments. An open defense of slavery would have the same public consequences as a defense of the Nazis. However, it is not entirely clear that slavery or colonization is a transcendent moral evil comparable to the extermination of the Jews, for which all people at all times should be held accountable. Slavery was a thriving institution long before the United States or the Roman Catholic Church existed. It did not become morally reprehensible until we, as a civilization, decided it was morally reprehensible. In the United States, that recognition of the reprehensibility of slavery took four bloody years of Civil War and a constitutional amendment. The remnants of colonization lasted even longer.

IX. CONCLUSION

If the international community chooses to assign moral culpability to the West for colonization and slavery, then that is its prerogative. However, perhaps that choice should be recognized as just that, a choice. The international community may be better served if it casts off any illusions it has about an overarching, permanent moral framework that applies equally to all wrongdoers at all times. The recognition of the international law of human rights as an evolving moral framework may help European and African states alike to set aside the issue of blame and apology for slavery in order to concentrate on the continuing plight of the African continent and the strained relations between nations.

In discussing the potential for African reparations, lasting peace must not be forgotten as the ultimate goal. Although it is feasible to shape the dynamic international law to support or deny reparations for slavery and colonization, this must not be done in a way that inspires lingering resentment. In the end, it is that lingering resentment that has created this confrontation. The underlying moral sentiments must be recognized and openly discussed to reach a

final peace that is acceptable to everyone involved. Otherwise, this problem will arise again in the future.

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** J.D. candidate 2003, Vanderbilt University. I wish to thank the staff and members of the Vanderbilt Journal of Transnational Law for their tireless efforts and fruitful criticism in the development of this Note. I would especially like to acknowledge the helpful insights of Michelle Lyons and Jeffrey Usman in this process.

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