

# ‘After the Caravels Sailed’: Continuing Wrong, State Responsibility, and the United Nations Resolution on the Slave Trade

Ezekiel Osei\*

Faculty of Law, Kwame Nkrumah University of Science and Technology

Corresponding Author:

[ezekiel.osei@knust.edu.gh](mailto:ezekiel.osei@knust.edu.gh)

**To Cite This Article:** ‘AFTER THE CARAVELS SAILED’: CONTINUING WRONG, STATE RESPONSIBILITY, AND THE UNITED NATIONS RESOLUTION ON THE SLAVE TRADE (E. OSEI, Trans.). (2026). *Journal of Advance Research in Social Science and Humanities* (ISSN 2208-2387), 12(5), 24-51. <https://doi.org/10.61841/nn-ssh-12-5-74>

## Abstract

This article examines whether the United Nations General Assembly’s Resolution 80/250, which declares the transatlantic trafficking of enslaved Africans and the racialised chattel enslavement of Africans the ‘gravest crime against humanity’ and identifies claims for reparations as ‘a concrete step towards remedying historical wrongs’, can be grounded in the law of state responsibility. The states that opposed the Resolution, and most of those that abstained, did not dispute the gravity of the trade. Rather, they denied that it could ground a present legal remedy, invoking the intertemporal principle of the *Island of Palmas* award. This article argues that this objection does not withstand scrutiny. It rests on a partial reading of *Island of Palmas*, which distinguishes the creation of a legal situation from its continued existence; it assumes a uniform lawfulness which the nineteenth-century treaty record contradicts; and it overlooks the distinction between Article 13 and Articles 14(2) and 15 of the Articles on State Responsibility. The article then develops a ‘doctrine of living harm’, according to which a situation originating in the trade is a continuing wrong only where a determinate obligation binds the state now, the state presently controls the situation, and its present conduct fails to conform to that obligation. Drawing on the case law of the Inter-American Court of Human Rights, the European Court of Human Rights, and the International Court of Justice, the article identifies three modes of continuing wrong (persisting illicit possession, composite wrong, and inherited structural injury) and the five obligations that follow from them.

## Keywords

transatlantic slave trade – reparations – intertemporal law – continuing wrongful acts – state responsibility – General Assembly Resolution 80/250

## 1 Introduction

### 1.1 Setting the Scene

On 25 March 2026, the United Nations General Assembly adopted Resolution 80/250 by a recorded vote of 123 in favour, 3 against, and 52 abstentions.<sup>1</sup> Ghana led the negotiations on the draft,<sup>2</sup> and the Resolution was championed

\* The author is a PhD student in International Law at the Faculty of Law, University of Cambridge, and an Affiliate Researcher at the Lauterpacht Centre for International Law, University of Cambridge. He is an Adjunct Lecturer at the Faculty of Law, Kwame Nkrumah University of Science and Technology, Kumasi, Ghana, and a consultant with the Centre for Human Rights, University of Pretoria, South Africa. His research interests include Public International Law, International Trade and Investment Law, Competition Law, African Union Law, Corporate Finance and Insolvency Law, and International Human Rights Law.

<sup>1</sup> Wedacli Chibelushi and Thomas Naadi, *UN Votes to Recognise Enslavement of Africans as ‘Gravest Crime against Humanity’*, BBC (Mar. 25, 2026), <https://www.bbc.com/news/articles/cvg06q36052o>; Brianne Blain, *UN General Assembly Adopts Resolution on the Transatlantic Slave Trade*, ASIL INT’L L. IN BRIEF (May 4, 2026), <https://asil.org/ilib/un-general-assembly-adopts-resolution-on-the-transatlantic-slave-trade/> (reporting the adoption of Resolution 80/250 on 25 March 2026 with 123 votes in favour, 3 against, and 52 abstentions).

<sup>2</sup> Damilola Banjo, *A UN Resolution Urging Reparatory Justice Wins Backing Without Western Support*, PASSBLUE (Mar. 25, 2026), <https://passblue.com/2026/03/25/a-un-resolution-urging-reparatory-justice-wins-backing-without-western-support/> (reporting that ‘Ghana led the negotiations for the nonbinding Assembly resolution over at least a year’s time’ and that the draft

by its President, John Dramani Mahama,<sup>3</sup> who addressed the Assembly on behalf of the African Group in terms that invoked the language of justice for the descendants of the victims of the transatlantic slave trade.<sup>4</sup> His phrasing was echoed at the same session by Esther Phillips, Poet Laureate of Barbados.<sup>5</sup> The Resolution declares the transatlantic trafficking of enslaved Africans and the racialised chattel enslavement of Africans the ‘gravest crime against humanity’.<sup>6</sup> It identifies claims for reparations as ‘a concrete step towards remedying historical wrongs against Africans and people of African descent’.<sup>7</sup> It calls for the ‘prompt and unhindered restitution’ of cultural items, including artworks, monuments, and archives, to their countries of origin without charge.<sup>8</sup> It encourages dialogue

was adopted during the commemoration of the International Day of Remembrance of the Victims of Slavery and the Transatlantic Slave Trade); see also *General Assembly: 75th Plenary Meeting, 80th Session – International Day of Remembrance of Victims of Slavery and Transatlantic Slave Trade*, UN WEB TV (Mar. 25, 2026), <https://webtv.un.org/en/asset/k1tk1to0zloza> (recording of the plenary meeting at which the Resolution was adopted).

<sup>3</sup> Ghana’s leadership may be explained by three factors. First, President Mahama acted in his capacity as the African Union Champion for Advancing the Cause of Justice and the Payment of Reparations, and the draft had been adopted by the AU Assembly in February 2026 before its submission to the General Assembly. See *Mahama to Present Historic Resolution on Slave Trade to UN in March*, THE PRESIDENCY (Feb. 15, 2026), <https://presidency.gov.gh/mahama-to-present-historic-resolution-on-slave-trade-to-un-in-march/>; Mohammed Ali, *President Mahama to Present AU-Backed Slave Trade Resolution at UN General Assembly in March*, GRAPHIC ONLINE (Feb. 15, 2026), <https://www.graphic.com.gh/news/general-news/au-backs-mahama-slave-trade-resolution-for-un-presentation-in-march.html> (noting that the President first announced the initiative at the eightieth session of the General Assembly in September 2025); Nicholas Mwangi, *AU Adopts Landmark Resolution on Slavery, Colonialism, and Reparatory Justice*, PEOPLES DISPATCH (Feb. 19, 2026), <https://peoplesdispatch.org/2026/02/19/au-adopts-landmark-resolution-on-slavery-colonialism-and-reparatory-justice/>. Second, the coast of present-day Ghana was a centre of the trade, and its forts and castles, inscribed on the World Heritage List in 1979, were ‘the focus of first the gold trade and then the slave trade’. See Aleem Maqbool, ‘Ghana Was the Crime Scene’: *The Country Leading the Demand for Slavery Reparations*, BBC NEWS (Aug. 17, 2026), <https://www.bbc.co.uk/news/articles/cy0j2r15dr1o>; UNESCO World Heritage Centre, *Forts and Castles, Volta, Greater Accra, Central and Western Regions*, <https://whc.unesco.org/en/list/34/>. Third, Ghana has long cultivated its ties with the African diaspora, notably through the right of abode discussed in section 4.2.2 *infra* and through the Year of Return, proclaimed in 2018 to mark ‘the 400th anniversary of the arrival of the first enslaved Africans to English North America in 1619’, and it co-organised with the AU the 2023 conference in Accra that adopted the Accra Proclamation on Reparations. See *Akufo-Addo Declares 2019 Diasporan Return Year*, GRAPHIC ONLINE (Oct. 1, 2018), <https://www.graphic.com.gh/news/general-news/akufo-addo-declares-2019-diasporan-return-year.html>; Accra Proclamation, *infra* note 35; see also Cynthia Prah, *Ghana Leads Historic UN Vote Declaring Slave Trade the Gravest Crime Against Humanity*, UNITED NATIONS GHANA (Mar. 25, 2026), <https://ghana.un.org/en/node/312495> (referring to Ghana’s ‘longstanding legacy as a gateway of African remembrance and reconciliation’).

<sup>4</sup> In his address to the UN General Assembly, President Mahama, *inter alia*, noted that ‘the atrocities that were committed against enslaved Africans, the myriads of injustices that were borne of slavery and carried forward into successive social frameworks, took place specifically because they were considered objects ... This resolution is a pathway to healing and reparative justice. This resolution is a safeguard against forgetting.’ See *President Mahama’s speech at UN to Commemorate International Day of Remembrance of Victims of Slavery*, MYJOYONLINE (Mar. 25, 2026), <https://www.myjoyonline.com/full-text-president-mahas-speech-at-un-to-commemorate-international-day-of-remembrance-of-victims-of-slavery/>; *SPEECH: President Mahama at a high-level event on reparatory justice at the UN*, THE PRESIDENCY (Mar. 24, 2026), <https://presidency.gov.gh/speech-president-mahama-at-a-high-level-event-on-reparatory-justice-at-the-un/>; see also *UN Resolution Urges Reparations*, *infra* note 5 (reporting that the President spoke on behalf of the 54-member African Group).

<sup>5</sup> See, e.g., the speech of Esther Phillips, First Poet Laureate of Barbados, to the delegates of the UN General Assembly, as reported in *UN Resolution Urges Reparations for Slavery’s ‘Historical Wrongs’*, UN NEWS (Mar. 25, 2026), <https://news.un.org/en/story/2026/03/1167199> (‘There are spirits of the victims of slavery present in this room at this moment, and they are listening for one word only: justice.’ ‘Because for them and for the world, there can be no peace without justice – reparatory justice – and that call is answered only when words are turned into action. The question is, what will you do?’).

<sup>6</sup> UN, *Declaration of the Trafficking of Enslaved Africans and Racialized Chattel Enslavement of Africans as the Gravest Crime against Humanity*, G.A. Res. 80/250, U.N. Doc. A/RES/80/250 (Mar. 25, 2026) (adopted at the 75th plenary meeting, on draft resolution A/80/L.48), <https://digitallibrary.un.org/record/4106660>, op. ¶¶ 2–3. The Resolution declares, in operative paragraph 2, ‘the trafficking of enslaved Africans and racialized chattel enslavement of Africans as the gravest crime against humanity’ and grounds the declaration in ‘the definitive break in world history, scale, duration, systemic nature, brutality and enduring consequences that continue to structure the lives of all people through racialized regimes of labour, property and capital’. For analyses of the textual structure of the Resolution, see Halima A. Kyerewah Adam & Cécile A. Attigbe Atayi, *Ghana Dispatch: UN General Assembly Declaration of Transatlantic Slave Trade as Crime Against Humanity Demanding Reparations*, JURIST (Apr. 6, 2026), <https://www.jurist.org/news/2026/04/ghana-dispatch-un-general-assembly-declares-transatlantic-slave-trade-a-crime-against-humanity-calls-for-reparations/>; Almaz Teffera & Bria Nelson, *Landmark UN Resolution on the Slave Trade: Global Majority Demand Structural Reforms, Accountability, Repair*, HUMAN RIGHTS WATCH (Mar. 30, 2026), <https://www.hrw.org/news/2026/03/30/landmark-un-resolution-on-the-slave-trade>; Ndubuisi Christian Ani, *Can the UN’s Transatlantic Slavery Decision Deliver Meaningful Reparations?*, INSTITUTE FOR SECURITY STUDIES (Apr. 9, 2026), <https://issafrica.org/iss-today/can-the-un-s-transatlantic-slavery-decision-deliver-meaningful-reparations>.

<sup>7</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 6.

<sup>8</sup> *Id.* op. ¶ 9. The phrase ‘prompt and unhindered’ mirrors language used in instruments addressing the return of cultural property removed during periods of colonial rule. See, e.g., G.A. Res. 3187 (XXVIII), ¶ 1 (Dec. 18, 1973) (affirming that ‘the prompt restitution to a country of its objets d’art, monuments, museum pieces, manuscripts and documents by another country, without charge,’ constitutes ‘just reparation for damage done’); cf. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, art. 7(b)(ii) [hereinafter

on ‘reparatory justice and reconciliation’ in collaboration with the African Union, the Caribbean Community, and the Organization of American States.<sup>9</sup> In one respect, as will be seen, it asks little that the states which voted against it or abstained have not already accepted in another form, since the structural measures it contemplates correspond to obligations that those states have assumed under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>10</sup> a point to which section 4.2.3(b) returns.

However, the explanations of vote disclose clear resistance on the part of the three states that opposed the Resolution and of many of the 52 that abstained. The United States, voting against, declared that it ‘does not recognize a legal right to reparations for historical wrongs that were not illegal under international law at the time they occurred’.<sup>11</sup> The United Kingdom, though it abstained, took the same position. Its representative declared that ‘there is equally no duty to provide reparation for historical acts that were not, at the time those acts were committed, violations of international law’.<sup>12</sup> It added that ‘[t]he principles of intertemporality and non-retroactivity are long-standing tenets of international law’.<sup>13</sup> The European Union, whose member states likewise abstained,<sup>14</sup> was more guarded, but its statement rested on the same premise. In its words, ‘[w]e are also concerned by certain legal references and assertions that are either inaccurate or inconsistent with international law. This includes suggestions of a retroactive application of international rules which was non-existent at the time and claims for reparations, which is incompatible with established principles of international law. The principle of non-retroactivity, a fundamental cornerstone of the international legal order, must be strictly upheld.’<sup>15</sup> Each of those statements rests on the same premise. Expressly in the case of the United Kingdom, and implicitly in the others, each relies on the principle formulated by Max Huber in the *Island of Palmas* arbitration, that ‘a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled’.<sup>16</sup> That principle, the intertemporal principle, was the principal legal answer given by the states that resisted the Resolution. It is invoked, in effect, as a temporal firewall. On this view, acts that occurred before the prohibition of slavery cannot be the subject of a remedy under the modern law of state responsibility, however grave those acts may have been and whatever harms they may have caused across generations.

## 1.2 Research Questions and Argument

Three questions arise. Is the trade, for the modern law of state responsibility, a completed wrong, or can situations originating in it amount to continuing ones? Does that law provide a ground for the Resolution’s claims? What obligations, if any, follow? This article argues that the objections of the United States, the United Kingdom, and the European Union rest on a partial reading of the intertemporal principle and of the law of state responsibility. The

---

1970 UNESCO Convention] (requiring, at the request of the State of origin, the recovery and return of cultural property stolen from a museum or public monument and documented in its inventory, if imported after the Convention’s entry into force for both States, subject to just compensation to an innocent purchaser).

<sup>9</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 13.

<sup>10</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 2(1)(c), Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD]. See section 4.2.3(b) *infra*.

<sup>11</sup> U.S. Mission to the United Nations, *Explanation of Vote for UNGA Resolution ‘Declaration of the Trafficking of Enslaved Africans and Racialised Chattel Enslavement of Africans as the Gravest Crime Against Humanity’* (Mar. 25, 2026), <https://usun.usmission.gov/explanation-of-vote-for-unga-resolution/>. The US also noted that ‘this resolution is also unclear as to whom the recipients of “reparatory justice” would be. The drafters and supporters of this resolution seem to believe it is them. The United States strongly objects to the cynical usage of historical wrongs as a leverage point in an attempt to reallocate modern resources to people and nations who are distantly related to the historical victims.’

<sup>12</sup> U.K. Mission to the United Nations, *UK Explanation of Vote on the Declaration of the Trafficking of Enslaved Africans and Racialised Chattel Enslavement of Africans as the Gravest Crime Against Humanity* (statement by Ambassador James Kariuki, Chargé d’Affaires) (Mar. 25, 2026), <https://www.gov.uk/government/speeches/uk-explanation-of-vote-on-the-declaration-of-the-trafficking-of-enslaved-africans-and-racialised-chattel-enslavement-of-africans-as-the-gravest-crime>. The United Kingdom’s position is examined in greater detail in sections 2.3 and 3, *infra*.

<sup>13</sup> U.K. Mission to the United Nations, *supra* note 12.

<sup>14</sup> See Teffera & Nelson, *supra* note 6 (reporting that the abstaining states included ‘all European Union member states’); Banjo, *supra* note 2.

<sup>15</sup> E.U. Delegation to the United Nations, *EU Explanation of Vote – UN General Assembly: Action on A/80/L.48 - Declaration of the Trafficking of Enslaved Africans and Racialized Chattel Enslavement of Africans as the Gravest Crime Against Humanity* (Mar. 25, 2026), [https://www.ecas.europa.eu/delegations/un-new-york/eu-explanation-vote-%E2%80%9393-un-general-assembly-action-a80l48-declaration-trafficking-enslaved-africans\\_en?s=63](https://www.ecas.europa.eu/delegations/un-new-york/eu-explanation-vote-%E2%80%9393-un-general-assembly-action-a80l48-declaration-trafficking-enslaved-africans_en?s=63).

<sup>16</sup> *Island of Palmas (Netherlands v. United States)*, 2 R.I.A.A. 829, 845 (Perm. Ct. Arb. 1928). Huber went further to state the second limb of the principle, namely that ‘[t]he same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.’

Resolution does not seek to make fifteenth-century conduct unlawful retrospectively. It observes that the trade and the enslavement it sustained produced situations that persist today, and it asks whether states are responsible for maintaining them.<sup>17</sup> The doctrinal frame, on this reading, is not retroactivity. It is the continuing breach, a wrong that remains actionable for as long as the conduct constituting it continues. The preambular recitals and operative paragraphs of the Resolution describe the consequences of the trade in the present tense, by reference to ‘consequences’ that ‘persist’ and ‘continue to structure’ contemporary lives.<sup>18</sup> The Resolution therefore invites a continuing-wrong reading, although the language of a political instrument cannot by itself establish that any wrong continues in law. Two features of the existing law make that reading available. First, the intertemporal principle as Huber formulated it in *Island of Palmas* contains a second limb, providing that the existence of a right, ‘in other words its continued manifestation, shall follow the conditions required by the evolution of law’.<sup>19</sup> The principle thus presupposes a distinction between the creation of a juridical situation and its continued existence. Second, the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) recognise breaches that extend in time. Article 14(2) provides that a breach by an act having a continuing character extends over the entire period during which the act continues, and Article 15(2) provides that a breach of composite character ‘extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation’.<sup>20</sup>

The Resolution has already attracted early scholarly commentaries, which have examined the objections advanced in the explanations of vote, possible routes around the intertemporal barrier, and the distance between the Resolution’s characterisation of the trade and any duty of reparation.<sup>21</sup> Against that background, the contribution to knowledge of this article is twofold. First, it clarifies the structure of the intertemporal objection and shows that, properly read, the principle on which the objecting states rely does not exclude a present wrong. Second, it offers a framework, the doctrine of living harm, which identifies with some precision which situations originating in the trade may be characterised as continuing wrongful acts and which may not. In this sense, the analysis may assist states, international organisations, and courts in giving legal content to the reparatory dialogue that the Resolution initiates.

### 1.3 Scope, Caveats, and Structure

A number of caveats should be noted from the outset. First, this article is concerned with the responsibility of states under international law. It does not address the responsibility of private actors that participated in and profited from the trade, such as companies, banks, insurers, universities, and churches, nor does it address domestic litigation or individual criminal responsibility. Second, the article focuses on the transatlantic trade and the racialised chattel

<sup>17</sup> This reading finds explicit support in the text of the Resolution. See G.A. Res. 80/250, *supra* note 6, preamble, recital 17 (‘Recalling that the large-scale trafficking of enslaved Africans marked a profound rupture in human history whose consequences have extended across centuries and continents’). See also *id.* preamble, recital 30 (affirming that ‘grave crimes generate continuing obligations until addressed through truth, justice and reparation’); *id.* preamble, recital 31 (reaffirming, by reference to the articles on responsibility of States for internationally wrongful acts, the obligation ‘to cease the act if it is continuing’).

<sup>18</sup> See G.A. Res. 80/250, *supra* note 6, preamble, recitals 35, 40 & op. ¶¶ 3, 5.

<sup>19</sup> *Island of Palmas*, *supra* note 16, at 845. The second limb has been variously cited and ignored in subsequent practice. For an analysis of its underappreciation, see Steven Wheatley, *Revisiting the Doctrine of Intertemporal Law*, 41 OXFORD J. LEGAL STUD. 484, 489–97 (2021). See also T.O. Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT’L L. 285 (1980); Rosalyn Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 INT’L & COMP. L.Q. 501 (1997); Institut de Droit International, *The Intertemporal Problem in Public International Law* (Wiesbaden Session, Aug. 11, 1975).

<sup>20</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, art. 15(2) (2001) [hereinafter ARSIWA]. Article 15(2) provides that, in such a case, ‘the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation’. See generally James Crawford, *The International Law Commission’s Articles on State Responsibility* 141–47 (Cambridge University Press 2002).

<sup>21</sup> See, e.g., Luis Eslava, *Three Lessons from the UN Declaration on Enslavement: On Time, Responsibility, and International Law*, VERFASSUNGSBLOG (Apr. 9, 2026), <https://verfassungsblog.de/un-resolution-enslavement/>; Jerusa Ali & Kiran Mohan Vazhappally, *Analysing Objections to the UN Declaration on the Trafficking of Enslaved Africans*, EJIL: TALK! (Apr. 28, 2026), <https://www.ejiltalk.org/analysing-objections-to-the-un-declaration-on-the-trafficking-of-enslaved-africans/>; Matiangai Sirleaf, *Moving Beyond Recognition Toward Repair for Enslavement*, JUST SECURITY (May 8, 2026), <https://www.justsecurity.org/138316/beyond-recognition-toward-repair-enslavement/>; Dylan Jesse Andrian, *Establishing ‘Retrospective’ State Responsibility for the Crime Against Humanity of Transatlantic Slavery*, OPINIO JURIS (May 8, 2026), <http://opiniojuris.org/2026/05/08/establishing-retrospective-state-responsibility-for-the-crime-against-humanity-of-transatlantic-slavery/>; Bhavya Johari, *The Gravest Crime and the Wrong Claim: Reparations After the United Nations Declaration on Enslavement*, AUSTRALIAN OUTLOOK (Sept. 28, 2026), <https://www.internationalaffairs.org.au/australianoutlook/the-gravest-crime-and-the-wrong-claim-reparations-after-the-united-nations-declaration-on-enslavement/>.

enslavement it sustained, which are the subject of the Resolution. It does not examine other slave systems or colonial wrongs unconnected with the trade, although its conclusions may be relevant to them where the obligations at stake are of a similar nature. Third, the article is not concerned with the quantification of compensation. Finally, the analysis proceeds on the basis of the law of state responsibility as codified by the International Law Commission. Admittedly, those who consider that historical injustice is a matter for politics rather than law may find this premise unconvincing. The argument, however, is offered on the footing of the law as it stands, and not as a proposal for its reform.

This article proceeds as follows. First, it examines the genesis and text of the Resolution and reads the 123–3–52 vote as evidence of where states stand on reparations for historical injustice, without treating it as a source of new law (section 2). Second, it turns to the intertemporal objection (section 3). That section shows that the objection rests on a partial reading of *Island of Palmas*, that its historical premise is overstated, since the trade was prohibited by treaty for much of the nineteenth century, and that it overlooks the distinction the ARSIWA draws between Article 13, under which there is no breach without an obligation in force, and Articles 14(2) and 15, under which continuing and composite breaches extend across time. Section 4 develops the doctrine of living harm. It identifies the conditions under which a situation originating in the trade is a continuing wrongful act, the three modes in which those conditions may be met (persisting illicit possession, composite wrong, and inherited structural injury), and the five obligations that follow. Section 5 concludes the discussions in the article.

## 2 The Genealogy, Text, and Vote of Resolution 80/250

Resolution 80/250 is the culmination of decades of international advocacy.<sup>22</sup> This section traces the process that produced the Resolution, examines its preambular and operative text, including what the Resolution does not say, and parses the 123–3–52 vote.

### 2.1 The Road to the Adoption of Resolution 80/250 — A Brief Exegesis

The call for reparations for the enslavement of Africans took programmatic form at the First Pan-African Conference on Reparations, held at Abuja in 1993, which adopted the Abuja Proclamation calling for reparations for the slave trade and for other historic injustices resulting from colonisation.<sup>23</sup> The declaration of the slave trade as a crime against humanity was then advanced at the 2001 World Conference Against Racism at Durban, which adopted the Durban Declaration and Programme of Action.<sup>24</sup> The Durban Declaration acknowledged that ‘slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade, and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance’.<sup>25</sup> The formula was the product of a contested negotiation, and its wording is careful.<sup>26</sup> It declares that

<sup>22</sup> The history of formal reparations claims for slavery in international fora is conventionally traced to the early 1990s, when Chief M.K.O. Abiola convened a conference on reparations in Lagos in 1990 and the Organization of African Unity established its Group of Eminent Persons on reparations in 1992. See Giulia Bonacci, *Africa's Promise: Chief M.K.O. Abiola and Reparations for Slavery and Colonialism, 1990–1993*, 56 INT'L J. AFR. HIST. STUD. 141 (2023); see generally Ali A. Mazrui, *Black Reparations in the Era of Globalization* (Institute of Global Cultural Studies 2002). For a longer view, see Rhoda E. Howard-Hassmann with Anthony P. Lombardo, *Reparations to Africa* 31–58 (University of Pennsylvania Press 2008). For a doctrinal treatment of the CARICOM claim, see Andreas Buser, *Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to Compensate Slavery and (Native) Genocide*, 77 HEIDELBERG J. INT'L L. 409 (2017).

<sup>23</sup> See Pan-African Conference on Reparations for African Enslavement, Colonization and Neo-Colonization, *The Abuja Proclamation: A declaration of the first Abuja Pan-African Conference on Reparations for African Enslavement, Colonization and Neo-Colonization*, sponsored by The Organization of African Unity and its Reparations Commission, Apr. 27–29, 1993, Abuja, Nigeria, <https://africanlii.org/en/akn/aa-au/doc/declaration/1993-04-29/the-abuja-proclamation-a-declaration-of-the-first-abuja-pan-african-conference-on-reparations-for-african-enslavement-colonization-and-neo-colonization-sponsored-by-the-organization-of-african-unity-and-its-reparations-commission-april-27-29-1993-abuja-nigeria/eng@1993-04-29>.

<sup>24</sup> See Durban Declaration, *infra* note 25, ¶ 13; Leaphart, *infra* note 25, at 155–57. For contemporary reporting of the negotiations, see Chris McGreal, *Africans Back Down at the UN Race Talks*, THE GUARDIAN (Sept. 9, 2001), <https://www.theguardian.com/world/2001/sep/09/race.chrismcgreal>.

<sup>25</sup> World Conference Against Racism, *Racial Discrimination, Xenophobia and Related Intolerance, Declaration of the World Conference* (Durban Declaration), U.N. Doc. A/CONF.189/12 (Sept. 8, 2001), [https://www.ohchr.org/sites/default/files/Documents/Publications/Durban\\_text\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf), ¶ 13. The ‘crime against humanity’ language was retained in the final text of the Declaration. For the drafting history, including the differences between the unedited and edited versions of the Declaration, see Jerry V. Leaphart, *The World Conference against Racism: What Was Really Achieved*, 26 THE FLETCHER FORUM OF WORLD AFFAIRS 153, 155–57 (2002).

<sup>26</sup> See Leaphart, *supra* note 25, at 155–57 (contrasting the unedited and edited texts of the Declaration and recounting the withdrawal of the United States from the Conference); McGreal, *supra* note 24; *Debate Progresses at World Racism Conference* (CNN Saturday Morning News television broadcast Sept. 8, 2001), <https://www.cnn.com/TRANSCRIPTS/0109/08/smn.02.html>

slavery and the slave trade are a crime against humanity and adds that they should always have been so, which stops short of asserting that they were one under the law of their time. The recognition was nonetheless important, since it supplied the foundation on which later advocacy for reparatory justice would build.<sup>27</sup> Its operative content, however, was thin. It called upon the states concerned ‘to take appropriate and effective measures to halt and reverse the lasting consequences’ of the practices it condemned.<sup>28</sup> Yet, it did not specify what those measures should be or how they should be implemented.

Twelve years after the Durban Conference, in July 2013, the Caribbean Community (CARICOM) established the CARICOM Reparations Commission, with national reparations committees in each member state.<sup>29</sup> In March 2014, CARICOM Heads of Government unanimously adopted the Commission’s Ten-Point Plan for Reparatory Justice. The Plan called for (1) a full formal apology; (2) repatriation, with reference to the descendants of enslaved Africans now living in the Caribbean who wish to return to Africa; (3) an indigenous peoples’ development programme; (4) cultural institutions; (5) a public health crisis response; (6) illiteracy eradication; (7) an African knowledge programme; (8) psychological rehabilitation; (9) technology transfer; and (10) debt cancellation.<sup>30</sup> The Plan was, by design, both legal in form and operational in content. It identified the European powers that had engaged in colonial slavery (the United Kingdom, France, Spain, Portugal, the Netherlands, Norway, Sweden, and Denmark) as appropriate respondents,<sup>31</sup> and it demanded specific remedies. It also framed its claims in a way that the 2026 Resolution would later carry forward, presenting them not as retroactive punishment for past wrongs but as remediation for harms that continue to operate today.<sup>32</sup>

The African Union (AU) and its predecessor, the Organization of African Unity, also shaped the process that led to the adoption of the Resolution. As mentioned, the Abuja Proclamation called upon the international community to recognise the unique and unprecedented moral debt owed to African peoples and urged the payment of reparations.<sup>33</sup> The AU’s sustained engagement on reparations, however, began much later, during the General Assembly’s 2015–2024 International Decade for People of African Descent.<sup>34</sup> That engagement is reflected in the Accra Proclamation on Reparations;<sup>35</sup> in the 2025 AU Theme of the Year, ‘Justice for Africans and People of

---

(reporting that the European Union had resisted the ‘crime against humanity’ wording ‘because of the potential lawsuits’ before agreeing to it).

<sup>27</sup> See G.A. Res. 80/250, *supra* note 6, preamble, recital 5 (reaffirming the Durban Declaration and Programme of Action).

<sup>28</sup> Durban Declaration, *supra* note 25, ¶ 102 (calling upon the States concerned ‘to take appropriate and effective measures to halt and reverse the lasting consequences of those practices’); see also *id.* ¶¶ 100–101. The text is available at [https://www.ohchr.org/sites/default/files/Documents/Publications/Durban\\_text\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf).

<sup>29</sup> See Conference of Heads of Government of CARICOM, *Communiqué Issued at the Conclusion of the Thirty-fourth Regular Meeting of the Conference of Heads of Government of The Caribbean Community, 3–6 July 2013, Port-of-Spain, Trinidad and Tobago*, <https://caricom.org/communique-issued-at-the-conclusion-of-the-thirty-fourth-regular-meeting-of-the-conference-of-heads-of-government-of-the-caribbean-community-3-6-july-2013-port-of-spain-trinidad-and-tobago/>.

<sup>30</sup> CARICOM Reparations Commission, *CARICOM Ten Point Plan for Reparatory Justice*, <https://caricomreparations.org/caricom/caricoms-10-point-reparation-plan/>. On the Plan’s unanimous adoption by the Heads of Government on 11 March 2014, see *Reparations for Native Genocide and Slavery*, CARICOM, <https://caricom.org/reparations-for-native-genocide-and-slavery/>.

<sup>31</sup> See European Parliamentary Research Service, *Caribbean Slavery Reparation Claims Against Some European Countries*, EPRS BLOG (June 4, 2014), <https://epthinktank.eu/2014/06/04/caribbean-slavery-reparation-claims-against-some-european-countries/> (listing ‘Great Britain, France, Spain, Portugal, the Netherlands, Norway, Sweden and Denmark’).

<sup>32</sup> The Commission has since made the point explicit, framing its claims as remediation for ‘racialized chattel enslavement, the trafficking of enslaved Africans and genocide, [that] were carefully orchestrated to fuel the growth of Europe and systematically underdevelop Africa and the Caribbean. The legacies of these deeply entrenched historical systems of exploitation continue to shape global inequality until today.’ See CARICOM Reparations Commission, *Message: International Day of Remembrance of Victims of Slavery and Trans-Atlantic Slave Trade*, CARICOM NEWS (Mar. 25, 2025), <https://caricomreparations.org/message-caricom-reparations-commission-international-day-of-remembrance-of-victims-of-slavery-and-trans-atlantic-slave-trade/>. The framing closely parallels the continuing-wrong framework developed in section 4 *infra*.

<sup>33</sup> Abuja Proclamation, *supra* note 23. The Abuja Proclamation, *inter alia*, ‘urge[d] the OAU to call for full monetary payment of repayments through capital transfer and debt cancellation’ and further ‘urge[d] those countries which were enriched by slavery and the slave trade to give total relief from Foreign Debt, and allow the debtor countries of the Diaspora to become free for self-development and from immediate and direct economic domination’. The Proclamation was preceded by the OAU Council of Ministers Resolution on Reparation for Exploitation and Slavery in Africa, CM/Res.1339 (LIV) (1991), <https://www.peaceau.org/uploads/cm-res-1339-liv-e.pdf>. See also Ali A. Mazrui, *Who Should Pay for Slavery?*, 40 WORLD PRESS REVIEW 22 (1993).

<sup>34</sup> G.A. Res. 68/237, U.N. Doc. A/RES/68/237 (Dec. 23, 2013) (proclaiming 2015–2024 the International Decade for People of African Descent). The General Assembly has since welcomed the proclamation of 2025–2034 as the Second International Decade for People of African Descent. See G.A. Res. 80/250, *supra* note 6, preamble, recital 6.

<sup>35</sup> The Accra Proclamation on Reparations established three key bodies to facilitate the processes towards Africa’s quest for reparatory justice, namely, (1) the Committee of Experts on Reparations, (2) the Global Reparations Fund, and (3) the Office of AU Special Envoy on Reparations for Africans. It also recommended the creation of a ‘transcontinental partnership framework between the AU, CARICOM, Latin American States, and the African diaspora in Europe and all other regions in the world,

African Descent Through Reparations’;<sup>36</sup> in the extension of that theme into an AU Decade of Reparations (2026–2036), decided by the Executive Council at Malabo in July 2025 and taken forward by the Assembly at its February 2026 Addis Ababa summit;<sup>37</sup> and in the AU Decision on the qualification of slavery, deportation, and colonisation as crimes against humanity and genocide against the peoples of Africa.<sup>38</sup>

Since the turn of the century, a small number of European states have also begun the work of apology and partial restitution.<sup>39</sup> The Netherlands issued a formal apology for its role in the slave trade in December 2022.<sup>40</sup> Denmark’s foreign minister, Anders Samuelsen, apologised to Ghana in 2017 for Denmark’s role in the trade, which it conducted between its Gold Coast forts (in modern-day Ghana) and the Danish West Indies.<sup>41</sup> France’s position is more complex. The 2001 Taubira Law recognised the trade as a crime against humanity,<sup>42</sup> and President Macron’s April 2025 statement acknowledged that the 1825 indemnity imposed on Haiti ‘placed a price on the freedom of a young nation’.<sup>43</sup> Germany’s 2021 agreement with Namibia concerns the Herero and Nama genocide rather than the

including, where appropriate, relevant CSOs’. See African Union, *International Conference on Building a United Front to Advance the Cause of Justice and Reparations to Africans* (Accra Proclamation on Reparations) (Nov. 2023), <https://au.int/en/decisions/accra-proclamation-reparations>, ¶¶ 1–3, 5.

<sup>36</sup> The theme addressed historical injustices, including the transatlantic slave trade. See African Union, *Decision on the Theme of the Year 2025: Justice for Africans and People of African Descent Through Reparations*, Doc. EX.CL/1569(XLVI) (Feb. 2025), <https://au.int/en/theme/2025>.

<sup>37</sup> The Assembly’s February 2026 decision invited states ‘to intensify their efforts in implementing the Theme of the Decade of Justice for Africans and People of African Descent Through Reparations in their respective countries’. See African Union, *Decision on the Interim Report on Implementation of Assembly Decisions Related to the AU Theme of the Year 2025: ‘Justice for Africans and People of African Descent through Reparations’*, Assembly/AU/Dec.942(XXXIX) (Feb. 2026), ¶ 18, [https://au.int/sites/default/files/decisions/46188-Assembly\\_Decisions\\_31\\_March\\_E.pdf](https://au.int/sites/default/files/decisions/46188-Assembly_Decisions_31_March_E.pdf). The Resolution records the AU’s designation of 2026–2036 as the ‘Decade of Action on Reparations and African Heritage’. See G.A. Res. 80/250, *supra* note 6, preamble, recital 16. The extension of the theme into a decade was decided by the Executive Council at its Forty-Seventh Ordinary Session in Malabo on 10–11 July 2025 (EX.CL/Dec.1311(XLVII)), a decision that Assembly/AU/Dec.942(XXXIX) recalls. See *Africa’s Reparations Call Now a Unified Demand – President Mahama*, THE PRESIDENCY (July 15, 2025), <https://presidency.gov.gh/africas-reparations-call-now-a-unified-demand-president-mahama/>.

<sup>38</sup> See African Union, *Decision on Qualification of Slavery, Deportation and Colonization as Crimes Against Humanity and Genocide Against the Peoples of Africa*, Assembly/AU/Dec.953(XXXIX) (Feb. 2026), [https://au.int/sites/default/files/decisions/46188-Assembly\\_Decisions\\_31\\_March\\_E.pdf](https://au.int/sites/default/files/decisions/46188-Assembly_Decisions_31_March_E.pdf). Decision 953 recalls the Assembly’s earlier decision on the same question, Assembly/AU/Dec.934(XXXVIII) of 16 February 2025, to which the Resolution itself refers. See G.A. Res. 80/250, *supra* note 6, preamble, recital 14.

<sup>39</sup> On restitution, see section 4.2.1(a) *infra*.

<sup>40</sup> See *Speech by Prime Minister Mark Rutte about the Role of the Netherlands in the History of Slavery* (Dec. 19, 2022), <https://www.government.nl/documents/2022/12/19/speech-by-prime-minister-mark-rutte-about-the-role-of-the-netherlands-in-the-history-of-slavery>. Rutte’s apology was followed in July 2023 by King Willem-Alexander’s formal apology delivered at the 160th anniversary of the abolition of slavery in the Dutch colonies. See *Speech by King Willem-Alexander at the commemoration of the role of the Netherlands in the History of Slavery*, Oosterpark, Amsterdam (July 1, 2023), <https://www.royal-house.nl/documents/2023/07/01/speech-by-king-willem-alexander-at-the-commemoration-of-the-role-of-the-netherlands-in-the-history-of-slavery>. See also Matt Murphy, *Dutch King Willem-Alexander Apologises for Country’s Role in Slavery*, BBC NEWS (July 1, 2023), <https://www.bbc.com/news/world-europe-66076562>; Donna Ferguson, *Dutch King Apologises for Country’s Historical Involvement in Slavery*, THE GUARDIAN (July 1, 2023), <https://www.theguardian.com/world/2023/jul/01/dutch-king-apologises-for-country-historic-involvement-in-slavery>.

<sup>41</sup> See Ben Hamilton, *International News in Brief: Denmark Apologises to Ghana for ‘Shameful’ Slave Trade Practices*, THE COPENHAGEN POST (Nov. 24, 2017), <https://cphpost.dk/2017-11-24/news/international-news-in-brief-denmark-apologises-to-ghana-for-shameful-slave-trade-practices/> (reporting the apology made in Ghana by Foreign Minister Anders Samuelsen, and that ‘[f]rom the Danish Gold Coast, [Denmark] dispatched thousands of slaves’ to its colonies in the West Indies); Gertrude Ankrah, *Denmark’s Apology on Slave Trade Welcoming*, GRAPHIC ONLINE (Nov. 25, 2017), [https://www.graphic.com.gh/daily-graphic-editorials/denmark-s-apology-on-slave-trade-welcoming.html#google\\_vignette](https://www.graphic.com.gh/daily-graphic-editorials/denmark-s-apology-on-slave-trade-welcoming.html#google_vignette). Before the apology, in March 2017, the Prime Minister of Denmark, Lars Løkke Rasmussen, acknowledged Denmark’s role in the enslavement of Africans, without formally apologising, and noted that there was no justification for the slave trade. See *Prime Minister Lars Løkke Rasmussen’s address at Transfer Day, St. Croix, 31 March 2017* (Mar. 31, 2017), <https://english.stm.dk/the-prime-minister/speeches/prime-minister-lars-loekke-rasmussens-address-at-transfer-day-st-croix-31-march-2017/>. On the Danish trade between the Gold Coast forts and the Danish West Indies, see generally Erik Gøbel, *The Danish Slave Trade and Its Abolition* (Brill 2016).

<sup>42</sup> See Law No. 2001-434 of 21 May 2001 Concerning the Recognition of Trafficking and Slavery as a Crime against Humanity, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000405369>, art. 1. The Taubira Law (named after the then-Deputy Christiane Taubira, later Garde des Sceaux) recognises the trade and slavery as a crime against humanity. Its operative provisions are interpretive rather than reparative.

<sup>43</sup> President Macron’s statement of 17 April 2025, marking the bicentenary of the 1825 ordinance, acknowledged that France had ‘subjected the people of Haiti to a heavy financial indemnity’ which ‘placed a price on the freedom of a young nation’, and announced a joint Franco-Haitian commission of historians, without addressing reparation for the ‘double debt’ (i.e., the indemnity itself plus the loans Haiti took to pay it). See Jean-Michel Hauteville, *Macron’s Commission on Haiti’s ‘Double Debt’ seen as a ‘very small step in the right direction’*, LE MONDE (Apr. 18, 2025), [https://www.lemonde.fr/en/france/article/2025/04/18/macron-s-commission-on-haiti-s-double-debt-seen-as-a-very-small-step-in-the-right-direction\\_6740374\\_7.html](https://www.lemonde.fr/en/france/article/2025/04/18/macron-s-commission-on-haiti-s-double-debt-seen-as-a-very-small-step-in-the-right-direction_6740374_7.html); Roger Cohen

trade, but, though contested, it offered at least a partial apology for violence committed in the course of colonial rule.<sup>44</sup> These initiatives matter because each acknowledges a wrong connected with enslavement or colonial rule. None of them, however, so far as the record shows, was framed as an acceptance of legal responsibility.<sup>45</sup>

Finally, UN human rights mechanisms prepared the ground. The Special Rapporteur on Contemporary Forms of Racism produced a report on reparations analysing the international human rights obligations of states ‘in relation to reparations for racial discrimination rooted in slavery and colonialism’.<sup>46</sup> The Permanent Forum on People of African Descent, established by the General Assembly in 2021, has repeatedly addressed reparatory justice in its sessions.<sup>47</sup> UN treaty bodies such as the Committee on the Elimination of Racial Discrimination (CERD) have recommended that states parties acknowledge and remedy historical wrongs as part of their compliance with non-discrimination obligations.<sup>48</sup> None of these mechanisms produced binding output, but their reports, recommendations, and concluding observations aggregated into a substantial body of soft law on which the Resolution could draw. The text of the Resolution, as adopted, was in one sense the product of a drafting process led by Ghana and, in another, the product of these convergent efforts. Its legal significance must therefore be assessed with care. A General Assembly resolution is not a source of binding obligations, and this one does not purport to create new rules. It may, however, serve as evidence of the views of states and as a statement of how a large majority of them characterise the trade and its present consequences.<sup>49</sup> Accordingly, the arguments developed in sections 3 and 4 do not depend on the Resolution having crystallised a new rule. They test the characterisation the Resolution adopts against rules of the law of state responsibility that already bind the states concerned.

## 2.2 Unpacking the Text of Resolution 80/250

The preamble of the Resolution sets out an ambitious normative framework. Read separately, the preamble can be made to seem aspirational and the operative section thin. Read together, they express a coherent position on the temporal character of the wrong. The preamble recognises that ‘the legacies of slavery and the transatlantic slave

---

& Ségolène Le Stradic, *France Acknowledges Devastating Effect of Debt Imposed on Haiti for Freedom*, THE NEW YORK TIMES (Apr. 19, 2025), <https://www.nytimes.com/2025/04/17/world/europe/france-haiti-debt-macron.html>. See also Tom Nouvian & Sylvie Corbet, *France's President Says Forcing Haiti to Pay for Its Independence Was Unjust*, THE HAITIAN TIMES (Apr. 17, 2025), <https://haitiantimes.com/2025/04/17/france-haiti-independence-indemnity/>.

<sup>44</sup> See Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, ¶¶ 1–18 (May 28, 2021), <https://www.parliament.na/wp-content/uploads/2021/09/Joint-Declaration-Documents-Genocide-rt.pdf>. The Declaration, which was negotiated over a period of six years, recognised the 1904–1908 events as genocide and committed Germany to a EUR 1.1 billion package over thirty years. See Sarah Imani & Karina Theurer, *The German-Namibian ‘Reconciliation Agreement’*, ZEITGEISTER (Aug. 2021), <https://www.goethe.de/prj/zei/en/art/22326696.html>; Philip Oltermann, *Germany agrees to pay Namibia €1.1bn over Historical Herero-Nama Genocide*, THE GUARDIAN (May 28, 2021), <https://www.theguardian.com/world/2021/may/28/germany-agrees-to-pay-namibia-11bn-over-historical-herero-nama-genocide>.

<sup>45</sup> See Han Chen, *Dutch Prime Minister Apologizes for Netherlands’ Role in Slave Trade*, AXIOS (Dec. 19, 2022), <https://www.axios.com/2022/12/19/netherlands-apology-slavery> (reporting Prime Minister Rutte’s statement that ‘the government is not offering compensation to descendants of enslaved people’); Geir Moulson, *Germany Recognizes Colonial Killings in Namibia as Genocide*, PBS NEWSHOUR (May 28, 2021), <https://www.pbs.org/newshour/amp/world/germany-recognizes-colonial-killings-in-namibia-as-genocide> (reporting Foreign Minister Heiko Maas’s statement that ‘legal claims to compensation cannot be derived from this’); see also *supra* note 42 (on the interpretive rather than reparative character of the Taubira Law); *supra* note 43 (President Macron’s statement, which did not address reparation for the ‘double debt’).

<sup>46</sup> See Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/74/321 (Aug. 21, 2019), <https://docs.un.org/en/A/74/321>.

<sup>47</sup> See G.A. Res. 75/314, U.N. Doc. A/RES/75/314 (Aug. 2, 2021), <https://docs.un.org/en/a/res/75/314> (establishing the Permanent Forum on People of African Descent). The Forum’s first three annual sessions addressed reparatory justice as a sub-theme. See First session of the UN Permanent Forum on People of African Descent (5–8 December 2022), <https://www.ohchr.org/sites/default/files/documents/issues/racism/forum-people-african-descent/1st-session/2022-11-24/PFPAD-1st-Session-concept-note-EN.pdf>; Second Session of the Permanent Forum on People of African Descent (30 May 2023–2 June 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/forums/forum-african-descent/sessions/session2/Concept-note-2nd-Session-PFPAD.pdf>; Third session of the Permanent Forum on People of African Descent (16–19 April 2024), <https://www.ohchr.org/sites/default/files/documents/issues/racism/forum-people-african-descent/3rd-session/concept-note-3-session-permanent-forum-people-african-descent-en.pdf>.

<sup>48</sup> See Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations on the combined 24th to 26th Periodic Reports of the United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CERD/C/GBR/CO/24-26 (2024), <https://docs.un.org/en/CERD/C/GBR/CO/24-26>; CERD, *Concluding Observations on the combined Twenty-Second and Twenty-Third Periodic Reports of France*, U.N. Doc. CERD/C/FRA/CO/22-23 (Dec. 14, 2022), <https://docs.un.org/en/CERD/C/FRA/CO/22-23>.

<sup>49</sup> See U.N. Charter arts. 10–14; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8) (‘General Assembly resolutions, even if they are not binding, may sometimes have normative value’); see also Ali & Vazhapully, *supra* note 21 (observing that the Resolution’s effect on customary international law ‘will depend almost entirely on what states do after the vote’).

trade persist today in the form of structural racism, racial inequalities, underdevelopment, marginalization and socioeconomic disparities affecting Africans and people of African descent in all parts of the world'.<sup>50</sup> It thus presents the problem as one presently in operation and not wholly past. Read with the operative paragraphs, this framing locates the subject of remedy in the situation that persists today rather than in the original acts considered in isolation. Whether that situation amounts in law to a continuing wrong is a separate question, which section 4 addresses.

Other preambular recitals describe the slave trade itself. The Resolution describes it as having involved the forced displacement of millions of Africans over four centuries;<sup>51</sup> as having converted human reproduction into 'a mechanism of capital accumulation' and ushered in 'the racial capitalist system';<sup>52</sup> and as having constituted not the acts of cruel individuals but a 'systematic, widespread and institutionalized regime' involving states as well as private entities and institutions.<sup>53</sup> That last formulation matters. It rejects any characterisation of the trade as a private commercial activity for which states bear no responsibility. The Resolution treats the trade as state action, and the historical record supports that view. The trade was organised through state-issued licences and charters, state-administered monopolistic companies (including the Royal African Company chartered in 1672 under the Stuart monarchy of Charles II and governed by his brother James, Duke of York), state-supported insurance regimes, and state-enforced property in human persons.<sup>54</sup> The rules of attribution point in the same direction. Even where the immediate captors or transporters were nominally private merchants, they operated under royal charters granting them the right to build forts, deploy military force, and negotiate treaties.<sup>55</sup> Under the customary rule codified in Article 5 of the ARSIWA, the conduct of an entity empowered by internal law to exercise elements of governmental authority is attributable to the state.<sup>56</sup> That rule is itself subject to the intertemporal principle, since attribution must also be assessed by the law of the time.<sup>57</sup> It is submitted, however, that the result would not differ, since the powers conferred by the charters were attributes of sovereignty exercised on the sovereign's behalf. Accordingly, the argument that the trade was a purely private enterprise is difficult to sustain. The significance of this point for what follows should not be overstated. Attributing the historical trade to states does not make the trade a present wrong. What it does is identify the states whose present conduct, in retaining what was taken or in maintaining what was built, is in question.

The operative section is easily mistaken for a catalogue of condemnation, but such a reading overlooks its legal function. Its first four paragraphs are an exercise in legal characterisation. Paragraph 1 condemns the trade as the 'most inhumane and enduring injustice against humanity',<sup>58</sup> and paragraph 2 declares it the gravest crime against humanity.<sup>59</sup> Paragraph 3 locates the gravity of the wrong in its 'definitive break in world history, scale, duration, systemic nature, brutality and enduring consequences that continue to structure the lives of all people through

<sup>50</sup> G.A. Res. 80/250, *supra* note 6, preamble, recital 40.

<sup>51</sup> *Id.* preamble, recital 18.

<sup>52</sup> *Id.* preamble, recitals 33–35. The economic literature on the relationship between slavery and the Industrial Revolution is contested but substantial. *See generally* Eric Williams, *Capitalism and Slavery* 3–168 (University of North Carolina Press 1944) (founding the school that links slavery to industrial accumulation); Joseph E. Inikori, *Africans and the Industrial Revolution in England: A Study in International Trade and Economic Development* 1–486 (Cambridge University Press 2002); Sven Beckert, *Empire of Cotton: A Global History* (Knopf 2014). Compare Stanley L. Engerman, *The Slave Trade and British Capital Formation in the Eighteenth Century*, 46 THE BUSINESS HISTORY REVIEW 430–43 (1972) (questioning the magnitude of the connection).

<sup>53</sup> G.A. Res. 80/250, *supra* note 6, preamble, recital 36. The Resolution's explicit attribution of the trade to states, alongside private entities and institutions, is a substantive doctrinal move.

<sup>54</sup> On the state-organised character of the trade, *see generally* David Beck Ryden, *West Indian Slavery and British Abolition 1783–1807* (Cambridge University Press 2009); Robin Blackburn, *The Making of New World Slavery: From the Baroque to the Modern 1492–1800* (Verso 1997). For the Resolution's own account of the state-licensed monopolies, company charters and slave codes through which the trade was organised, *see* G.A. Res. 80/250, *supra* note 6, preamble, recital 21. On the Royal African Company, its charter and its governance, *see* K.G. Davies, *The Royal African Company* (Longman 1957). On the treatment of enslaved persons as insured property, *see* *Gregson v. Gilbert* (1783) 3 Doug. 232, 99 Eng. Rep. 629 (K.B.) (the *Zong*).

<sup>55</sup> *See* Davies, *supra* note 54.

<sup>56</sup> ARSIWA, *supra* note 20, art. 5 & commentary (conduct of a person or entity empowered by the law of the State to exercise elements of governmental authority is attributable to the State); *see also id.* art. 8 (conduct directed or controlled by a State).

<sup>57</sup> *See* *Island of Palmas*, *supra* note 16, at 845; ARSIWA, *supra* note 20, art. 13 commentary ¶ (1) (treating Article 13 as an application of the general principle of intertemporal law).

<sup>58</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 1. The adjective 'enduring' frames the wrong as ongoing rather than completed, a framing developed throughout section 4.

<sup>59</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 2.

racialized regimes of labour, property and capital'.<sup>60</sup> Two words in that sentence do more than rhetorical work. The first is 'enduring', and the second is the present-tense 'continue'. A drafter content to condemn a closed historical wrong would have had little reason to use either. Their presence reflects a choice about the temporal shape of the wrong, a choice to describe it as a condition that persists rather than an episode that ended. Consequences that continue are not, by themselves, a continuing breach, and section 4.1 insists on that distinction. The choice of tense matters because it poses the question that the law of state responsibility must answer, namely whether the persisting situation is maintained by present conduct in breach of present obligations. Paragraph 4 goes further and classifies the trade as a violation of *jus cogens*.<sup>61</sup> Read literally, this would apply a peremptory norm that emerged only in the twentieth century to conduct of earlier centuries, which Article 13 of the ARSIWA does not allow.<sup>62</sup> The classification is better read as a statement about the present. To place the prohibition among the peremptory norms is to deny that any title founded on slavery can now be maintained against it, which is the reading of the second limb of the intertemporal principle developed in section 3.1. Paragraph 5 reaffirms the 'profound and lasting impacts' of slavery and colonialism and of the persistence of racial discrimination, and recognises how 'this continues to cause immense suffering, cultural disruption, economic exploitation, emotional trauma and unending discrimination',<sup>63</sup> again in the present tense and again describing a situation that has not closed.

The central normative statement of the Resolution is in paragraph 6, which affirms the importance of addressing historical wrongs 'in a manner that promotes justice, human rights, dignity and healing' and describes claims for reparations as 'a concrete step towards remedying historical wrongs'.<sup>64</sup> Earlier instruments, notably the Durban Declaration, gestured towards reparatory ideals but stopped short of endorsing reparations claims in operative language.<sup>65</sup> Resolution 80/250 goes further by placing the remediation of historical wrongs against Africans and people of African descent in its operative text. The legal significance of that step should be neither exaggerated as a rupture in international law nor dismissed as mere exhortation. Paragraph 7 adds a comparative observation. It notes that reparations and other forms of redress have been provided in respect of other grave crimes, whereas 'no comprehensive reparatory framework has yet been realized' for the slave trade,<sup>66</sup> and it presents this as an omission to be corrected rather than as a settled state of affairs. Paragraph 8 then specifies what the dialogue it urges should contain, listing 'a full and formal apology' and 'measures of restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition and changes to laws, programmes and services to address racism and systemic discrimination'.<sup>67</sup> The list reproduces, almost term for term, the forms of reparation in the UN Basic Principles on the Right to a Remedy. Those Principles add rehabilitation to the restitution, compensation, and satisfaction provided for in Article 34 of the ARSIWA, and they treat as a form of reparation the guarantees of non-repetition that the ARSIWA places alongside cessation in Article 30(b). The final element of paragraph 8, the reform of laws and programmes, is itself a guarantee of non-repetition, the most forward-looking and structural of those forms.<sup>68</sup> The borrowing suggests that the Assembly framed reparation in the vocabulary of legal responsibility rather than in that of charity or apology alone.

Of the operative paragraphs, paragraph 9 comes closest to a concrete legal demand. It calls for the 'prompt and unhindered restitution' of cultural property, *objets d'art*, monuments, archives, and documents of value to their countries of origin, and it adds the qualifier that the return is to be 'without charge'.<sup>69</sup> It is submitted that this qualifier is legally significant, since it may be read as a position on title. The phrase is not new, as it already appears

<sup>60</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 3.

<sup>61</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 4; cf. ARSIWA, *supra* note 20, arts. 26, 40–41.

<sup>62</sup> See *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5) (listing 'protection from slavery' among the obligations owed *erga omnes*); ILC, Draft Conclusions on Peremptory Norms, *infra* note 98, annex, item (f); ARSIWA, *supra* note 20, art. 13.

<sup>63</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 5.

<sup>64</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 6.

<sup>65</sup> Durban Declaration, *supra* note 25, ¶¶ 100–101 (noting that 'some States have taken the initiative to apologize and have paid reparation, where appropriate', and calling on others 'to find appropriate ways' to restore the dignity of the victims).

<sup>66</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 7.

<sup>67</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 8.

<sup>68</sup> On the recognised forms of reparation, see ARSIWA, *supra* note 20, arts. 34–37. The catalogue in operative paragraph 8 also tracks the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law*, G.A. Res. 60/147, annex, princs. 18–23 (Dec. 16, 2005), <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation> [hereinafter *Basic Principles*].

<sup>69</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 9. On the restitution of objects taken under colonial conditions, see Felwine Sarr & Bénédicte Savoy, *The Restitution of African Cultural Heritage: Toward a New Relational Ethics* 27–42 (2018). See also Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press 2006).

in General Assembly Resolution 3187 (XXVIII) of 1973, where it may be read simply as allocating the cost of return.<sup>70</sup> Its significance here lies in its combination with the Resolution's characterisation of the trade as the gravest crime against humanity. To insist on return without payment is to deny the holding institution the defence of the good-faith purchaser, that is, the argument that an object acquired in the ordinary course and held for generations has become the lawful property of its present possessor. The premise of paragraph 9 is that no valid title ever formed in objects taken in the course of enslavement or colonial appropriation, and that the passage of time cannot supply one. Section 4.2.1(a) accepts that premise for objects whose title rests on enslavement, and more cautiously for colonial takings. The provision also treats the present retention, and not only the original taking, as the relevant conduct. On this view, retention is not an innocent present fact attached to a completed past wrong, but a continuing wrong in its own right that lasts for as long as the retention continues.<sup>71</sup> Because the objects in question, and the conduct that dispersed them, are spread across many states and institutions, the obligation that paragraph 9 describes is not owed by one state alone. Where several states are responsible for the same wrongful act, the responsibility of each may be invoked,<sup>72</sup> a feature that matters when the argument turns from characterisation to remedy (section 4.2.2).

The remaining paragraphs show the kind of instrument the Resolution was meant to be, and they do so most clearly through what it declines to say. It does not determine liability, and it does not require the payment of any specified sum. Instead of seeking to close a historical episode through a single backward-looking judgment, it establishes a standing process. Paragraph 10 encourages support for reparatory initiatives, and paragraph 12 invites voluntary contributions to coordinated work on remembrance, education and research;<sup>73</sup> paragraph 13 invites regional bodies to develop frameworks for dialogue;<sup>74</sup> and paragraphs 11 and 15 task the Secretary-General with coordination and reporting, while paragraph 16 keeps the matter on the Assembly's agenda.<sup>75</sup> This choice of method, which favours a continuing and supervised mandate over a definitive settlement, is consistent with the continuing character that the earlier paragraphs attribute to the problem.

### 2.3 The 123–3–52 Vote and What It Reveals

The Resolution carried 123 in favour, 3 against, and 52 abstaining, with the balance of the membership absent.<sup>76</sup> The geographical distribution of the vote is revealing. The Resolution was supported by every African Union member present, every member of the Caribbean Community, most of Latin America (Argentina voted against, Paraguay abstained, and Bolivia, Ecuador and Venezuela did not vote), and most of the Asia-Pacific group. Among the states of Europe, by contrast, support was almost wholly absent, with the United Kingdom and every member of the European Union abstaining and Belarus, the Russian Federation and Serbia (together with Türkiye, if it is counted as a European state) standing as the exceptions.<sup>77</sup> The pattern largely separates the states of Africa and the Caribbean, whose populations bore the trade, from the European states that organised it and profited from it.<sup>78</sup> That alignment cautions against reading the 123 votes as the disinterested judgment of the international community on a question of law. It does not, however, deprive the vote of evidentiary weight. That nearly two-thirds of the

<sup>70</sup> See G.A. Res. 3187 (XXVIII), *supra* note 8, ¶ 1.

<sup>71</sup> ARSIWA, *supra* note 20, art. 14(2). The treatment of a present retention as a continuing wrongful act is developed in section 4.2.1(a) *infra*.

<sup>72</sup> On the allocation of responsibility among several states for the same wrongful act, see ARSIWA, *supra* note 20, art. 47 & commentary ¶¶ (1)–(3) (providing that where several states are responsible for the same wrongful act, the responsibility of each may be invoked).

<sup>73</sup> G.A. Res. 80/250, *supra* note 6, op. ¶¶ 10, 12.

<sup>74</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 13.

<sup>75</sup> G.A. Res. 80/250, *supra* note 6, op. ¶¶ 11, 15–16.

<sup>76</sup> The recorded vote was 123 in favour, 3 against, and 52 abstaining, with 15 members not voting. See G.A. Res. 80/250, *supra* note 6 (voting record); UN News, *UN Resolution Urges Reparations for Slavery's 'Historical Wrongs'* (Mar. 25, 2026), <https://news.un.org/en/story/2026/03/1167199>.

<sup>77</sup> For the regional composition of the vote, see G.A. Res. 80/250, *supra* note 6 (voting record). For an itemised list, see *UN Vote on Ghana's Slavery Motion: Who Said No and Who Abstained*, GHANAWEB (Mar. 25, 2026), <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Breakdown-of-Vote-on-Ghana-s-UN-Slavery-Motion-The-countries-who-voted-no-and-53-who-abstained-2027431> (listing Paraguay among the abstaining states, and Belarus, the Russian Federation, Serbia and Türkiye among the states voting in favour; the list also places the Netherlands among the states voting in favour, contrary to other reports that all European Union member states abstained); Banjo, *supra* note 2; see also Ben Norton, *West Refuses to Condemn Slavery in UN General Assembly Vote*, Geopolitical Economy Report (Mar. 25, 2026), <https://geopoliticaleconomy.com/2026/03/25/west-condemn-slavery-un-vote/>. The United Nations transcript of the meeting, which is automatically generated and is not an official record, records the Netherlands' statement that its 'delegation has abstained on this resolution'. See *General Assembly: 75th Plenary Meeting, 80th Session*, UN TRANSCRIPTS (Mar. 25, 2026), <https://transcripts.un.org/ga/80/75>.

<sup>78</sup> See sources cited *supra* note 52.

membership voted for an instrument that expressly invokes the law of state responsibility<sup>79</sup> is not without legal significance. The orthodox account of customary international law identifies a rule through the practice of states and their sense of legal obligation, and a resolution of this kind, while not itself a source of law, is, as mentioned in section 2.1, among the materials from which both may be inferred.<sup>80</sup> Thus, while the vote does not by itself establish a customary rule of reparation, it reveals that a large majority of states was prepared to associate itself, in the operative voice, with a legal characterisation that the most powerful states resisted.

The three negative votes rest on objections of different kinds and different strength. The United States gave the objection its clearest legal form, declaring that it ‘does not recognize a legal right to reparations’ for conduct that was not unlawful under the law of its time,<sup>81</sup> which is the intertemporal objection in its purest statement. Argentina and Israel relied instead on a complaint that the United States also pressed, namely that to describe one atrocity as the gravest assumes a hierarchy among crimes against humanity that the law does not recognise, a concern that the European statement echoed and that has support in the scholarship.<sup>82</sup> It is respectfully submitted that Argentina’s further complaint,<sup>83</sup> that the Resolution singles out one crime and leaves others aside, is less persuasive. Since international criminal law does not formally rank crimes against humanity by gravity,<sup>84</sup> the Resolution’s use of ‘gravest’ is better understood as a political and moral claim about the scale of the slave trade and, so understood, it need not diminish the gravity of other atrocities, the Holocaust among them, which was the concern Israel expressed. Such moral emphasis should not be confused with the legal structure of the instrument and does not displace the legal characterisations in the operative paragraphs of the Resolution. Moreover, an instrument may address one wrong without implying that no other exists. The Resolution is confined, by its title and its first three operative paragraphs, to the transatlantic trade and the racialised chattel system it produced,<sup>85</sup> a self-limitation that dismisses the charge of selectivity on its own terms.

The fifty-two abstentions are equally instructive. This group, which includes the United Kingdom, all members of the European Union, Switzerland, Norway, Iceland, Canada, Australia, and Japan, comprises a significant number of former colonial powers and developed states.<sup>86</sup> The explanations of vote of the United Kingdom and the European Union reveal a dual position, combining acknowledgement of the gravity of the slave trade with rejection of the legal consequences proposed by the Resolution.<sup>87</sup> By conceding that the trade was a moral enormity with

<sup>79</sup> G.A. Res. 80/250, *supra* note 6, preamble, recital 31 (reaffirming that ‘under international law, including the principles of the articles on responsibility of States for internationally wrongful acts, States bear responsibility for internationally wrongful acts’).

<sup>80</sup> On the identification of customary international law through state practice and *opinio juris*, see Int’l Law Comm’n, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, concl. 12 (2018), [https://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_13\\_2018.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf) (addressing the role of resolutions of international organisations); *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, ¶¶ 70–74, 77 (Feb. 20).

<sup>81</sup> U.S. Mission to the United Nations, *supra* note 11.

<sup>82</sup> For Argentina’s position, see *Por qué Argentina rechazó en la ONU nombrar la trata de esclavos africanos como ‘el crimen más grave de la humanidad’*, INFOBAE (Mar. 26, 2026), <https://www.infobae.com/politica/2026/03/26/por-que-argentina-rechazo-en-la-onu-nombrar-la-trata-de-esclavos-africanos-como-el-crimen-mas-grave-de-la-humanidad/> (quoting the Foreign Ministry); for Israel’s, see Isaac Donkor Distinguished, *Israel Explains Why It Voted Against Ghana’s UN Resolution on Slave Trade*, MODERN GHANA (Mar. 28, 2026), <https://www.modernghana.com/news/1481759/why-israel-voted-against-ghanas-un-resolution.html> (reporting the statement of the Israeli Embassy in Ghana). On the European hierarchy objection, see E.U. Delegation to the United Nations, *supra* note 15. On the contested claim that crimes against humanity admit of no hierarchy, see generally M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011); for the parallel United States objection to ranking crimes against humanity, see U.S. Mission to the United Nations, *supra* note 11.

<sup>83</sup> See *Por qué Argentina rechazó*, *supra* note 82 (reporting the Foreign Ministry’s objection to characterising slavery as the gravest crime against humanity while leaving other crimes aside, and its complaint that the text was closed to amendment); cf. Paul E. Lovejoy, *Transformations in Slavery: A History of Slavery in Africa* (Cambridge University Press, 3d ed. 2011) (on the medieval Islamic slave trade, among other systems).

<sup>84</sup> See *Prosecutor v. Tadić*, Case Nos. IT-94-1-A & IT-94-1-Abis, Judgment in Sentencing Appeals, ¶ 69 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000) (‘there is in law no distinction between the seriousness of a crime against humanity and that of a war crime’); Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415 (2001); see also E.U. Delegation to the United Nations, *supra* note 15 (stating that ‘no legal hierarchy between crimes against humanity exists’).

<sup>85</sup> G.A. Res. 80/250, *supra* note 6, tit. & op. ¶¶ 1–3.

<sup>86</sup> For the composition of the group, see sources cited *supra* note 77.

<sup>87</sup> On the two-theme pattern in the explanations of abstention, see E.U. Delegation to the United Nations, *supra* note 15; U.K. Mission to the United Nations, *supra* note 12; *Ireland Among EU States to Abstain in UN Slavery Vote*, RTE (Mar. 28, 2026), <https://www.rte.ie/news/2026/0328/1565643-united-nations-slavery/>; Human Rights Watch, *Landmark UN Resolution on the Slave Trade* (Mar. 30, 2026), <https://www.hrw.org/news/2026/03/30/landmark-un-resolution-on-the-slave-trade>. For an analysis of these objections, see Ali & Vazhapully, *supra* note 21 (describing the United Kingdom’s position that intertemporality and

enduring consequences, these states narrowed the disagreement to a point of law, namely whether such wrongs are legally cognisable under the modern law of state responsibility. These abstentions therefore disclose a broad agreement on the facts and moral character of the trade and concentrate the remaining resistance in the intertemporal objection. Accordingly, the principal barrier to the aims of the Resolution is not a factual dispute but a disagreement about the temporal reach of international law, which is the subject of section 3.

### 3 The Intertemporal Objection and Why It Fails

The states that opposed or abstained from the Resolution did not, for the most part, deny that the slave trade was a wrong of the first order. What they denied was that the wrong could ground a present legal remedy. As mentioned, the United States,<sup>88</sup> the United Kingdom,<sup>89</sup> and the European Union,<sup>90</sup> rested that denial on the absence of an obligation in force when the trade was carried out, that is, on the intertemporal principle as stated in the *Island of Palmas* arbitration.<sup>91</sup> On this view, the principle operates as a temporal firewall.<sup>92</sup> Acts that preceded the modern prohibition of slavery lie permanently beyond the reach of the modern law of state responsibility, however grave they were and whatever harms they set in motion. This article refers to the proposition on which that firewall rests as the ‘closure thesis’, according to which the lawfulness of an act at the moment of its commission settles, once and for all, whether it can ground a claim for reparation. This section argues that the intertemporal objection does not withstand serious scrutiny.<sup>93</sup> The closure thesis combines three distinct claims, which are examined in turn. The first is interpretive. It reads *Island of Palmas* as a rule of temporal closure, taking the first of Huber’s two limbs and leaving aside the second, which subjects the continued existence of a legal situation to the law as it evolves (section 3.1). The second is historical. It assumes that the trade was lawful throughout the period in which the harms now at issue were produced, whereas for the greater part of the nineteenth century the trade was prohibited by treaty and by an emerging customary rule (section 3.2). The third is doctrinal. It treats Article 13 of the ARSIWA, under which no act breaches an obligation that was not in force when the act occurred, as though it were the only rule on the time of a breach, and thus overlooks the rule that a breach of a continuing or composite character extends across the whole period during which the conduct persists (section 3.3).

#### 3.1 The Two Limbs of the Intertemporal Principle and the Closure Thesis

The passage the objecting states invoke is shorter than the principle it is taken to state. Huber did not announce a rule of temporal closure. What he drew was a distinction. As regards the question which of several legal systems applies, he wrote, ‘a distinction must be made between the creation of rights and the existence of rights’.<sup>94</sup> The first limb, which is the one the objection quotes, requires that the act creating a right be judged by the law in force when the right arises. The second, which follows in the same sentence, is the one the objection omits. The same principle, Huber continued, ‘demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law’.<sup>95</sup> The principle thus distributes the assessment of a legal situation across two moments rather than freezing it at the first. The second limb should not be overstated. It has had an

---

non-retroactivity ‘cannot be circumvented by recourse to the concept of continuing harms’ as its ‘most significant legal claim’, and its charge that the sponsors cannot have it both ways as ‘the strongest of all the objections’).

<sup>88</sup> U.S. Mission to the United Nations, *supra* note 11. The reading offered here treats the statement as a doctrinal objection grounded in intertemporal law and sets aside the separate policy complaint, in the same statement, about the reallocation of modern resources, which is not a legal argument.

<sup>89</sup> U.K. Mission to the United Nations, *supra* note 12.

<sup>90</sup> E.U. Delegation to the United Nations, *supra* note 15.

<sup>91</sup> *Island of Palmas*, *supra* note 16, at 845.

<sup>92</sup> For a critique of this premise, see Eslava, *supra* note 21 (questioning the assumption that the past ‘can be neatly separated from the present’ and observing that the United States and the European Union ‘rely, in different ways, on a doctrine of non-retroactivity’).

<sup>93</sup> Others have rejected the objection by different routes. See Sirleaf, *supra* note 21 (arguing that ‘the purpose of the intertemporal principle at its core is about providing notice’, so that states invoking it as a legal barrier to reparations are ‘disingenuous’); Andrian, *supra* note 21 (relying on the *Eichmann* judgment to argue that the prohibition may be treated as part of international law since ‘time immemorial’, and that Article 13 of the ARSIWA should ‘admit of a similar flexibility’ to that which the principle of legality admits in respect of *jus cogens* norms). The argument of this article depends on neither proposition. It accepts that the trade must be appraised in the light of the law contemporary with it, and locates the wrong in present conduct.

<sup>94</sup> *Island of Palmas*, *supra* note 16, at 845.

<sup>95</sup> *Id.*

uneven career, and it does not require that every settled right be revalidated each time the law changes.<sup>96</sup> Its more modest claim is that new rules may attach conditions to the continued existence of a situation, so that the law governs the present life of that situation without undoing the act that created it.<sup>97</sup> So read, the principle does not support the objection. Suppose that the capture and sale of enslaved Africans created legal situations which the law of the time did not prohibit, such as property in persons and possession of objects taken in the course of enslavement. The first limb concedes that those situations were not unlawful in their creation. The second asks a different question, namely whether they may still claim the protection of the law today. They may not, at least to the extent that their only title is the lawfulness of slavery under a superseded order. The prohibition of slavery is now a peremptory norm (*jus cogens*), and a title that depends on the negation of that norm cannot be maintained against it.<sup>98</sup>

True, a new peremptory norm does not retroactively invalidate rights acquired before its emergence, a principle reflected, for rights created through the execution of a treaty, in Article 71(2)(b) of the Vienna Convention on the Law of Treaties.<sup>99</sup> However, the same provision states its limit. Rights so acquired may be maintained only to the extent that their maintenance is not itself in conflict with the new norm.<sup>100</sup> The International Law Commission has restated that limit in its conclusions on peremptory norms, and Article 41(2) of the ARSIWA, which forbids states to recognise as lawful a situation created by a serious breach of a peremptory norm, points in the same direction.<sup>101</sup> Article 41(2) cannot itself be applied to situations created before the norm emerged, but it confirms that the law withdraws its protection from a situation whose maintenance would contradict a peremptory norm. Where the continued existence of a situation consists in the continued assertion of a title founded on enslavement, as with the retention of the human remains of the enslaved or of objects taken from them, maintenance and conflict are one and the same. This conclusion, it should be stressed, concerns only the legal protection of such titles. Whether the denial of protection generates a present obligation to act, and for which states, depends on whether the situation is still maintained and can still be traced, which is the question addressed in section 4.

The *Chagos* Advisory Opinion may be cited in this context. There, the United Kingdom argued, *inter alia*, that the 1965 detachment of the Archipelago was not unlawful because self-determination was not then a rule of customary international law.<sup>102</sup> The International Court of Justice (ICJ) held that the right had crystallised before 1965, so that the detachment was unlawful when it occurred.<sup>103</sup> The Opinion is therefore not authority for the proposition that later law may render unlawful the continuation of a situation that was lawfully created. Its value lies elsewhere. Having found the original act unlawful, the Court did not confine the wrong to 1965. It held that the United Kingdom's continued administration 'constitutes a wrongful act entailing the international responsibility of that State', a wrong 'of a continuing character', and the Assembly affirmed as much.<sup>104</sup> In other words, the Court treated

<sup>96</sup> The objection is usually traced to Philip C. Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT'L L. 735, 739–40 (1928), who feared that the second limb would render titles perpetually insecure. The history of the criticism is recounted in Wheatley, *supra* note 19, at 489–97.

<sup>97</sup> Wheatley, *supra* note 19, at 503–08.

<sup>98</sup> See ARSIWA, *supra* note 20, art. 26 ('Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.'). Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. The classification of the prohibition of slavery as peremptory is widely accepted. See ILC, Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), U.N. Doc. A/77/10, concl. 23 & annex, item (f) (2022). The same logic is codified for treaty-based situations in Article 71(2)(b) of the same Convention.

<sup>99</sup> Vienna Convention on the Law of Treaties, *supra* note 98, art. 71(2)(b) (rights created through execution of a treaty conflicting with a new peremptory norm may be maintained only to the extent that their maintenance is not itself in conflict with that norm). See also ARSIWA, *supra* note 20, art. 13 commentary ¶ (5) (addressing the emergence of new peremptory norms and Vienna Convention article 71(2)(b)).

<sup>100</sup> Vienna Convention on the Law of Treaties, *supra* note 98, art. 71(2)(b) (providing that such rights, obligations or situations 'may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law').

<sup>101</sup> ILC, Draft Conclusions on Peremptory Norms, *supra* note 98, concl. 12(2); ARSIWA, *supra* note 20, art. 41(2) & commentary.

<sup>102</sup> See Tom Frost & C.R.G. Murray, *The Mists of Time: Intertemporality and Self-Determination's Territorial Integrity Rule in the ICJ's Chagos Advisory Opinion*, 25 MELB. J. INT'L L. (2024) (advance copy), [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0009/5160195/Frost-Final-17-November-2024-without-Track-Changes.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0009/5160195/Frost-Final-17-November-2024-without-Track-Changes.pdf) (summarising the United Kingdom's argument that 'at that time self-determination was merely a general principle', and citing Written Statement of the United Kingdom ¶¶ 8.47–8.77).

<sup>103</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95, ¶¶ 152–62, 170–74 (Feb. 25).

<sup>104</sup> *Chagos*, *supra* note 103, ¶¶ 177–78 (holding that the continued administration 'constitutes a wrongful act entailing the international responsibility of that State', of a continuing character, which the United Kingdom is obliged to end 'as rapidly as

the maintenance of the situation as present conduct of the administering state, measured by the law in force while that conduct continued. That is the structure on which section 4 builds.

The explanations of vote proceed from the opposite premise, although they express it in different registers. The United States framed the matter as a question of recognition,<sup>105</sup> the United Kingdom as a question of duty,<sup>106</sup> and the European Union as a question of method.<sup>107</sup> Recognition, duty, and method are, however, three expressions of the same closure thesis. The thesis draws on a genuine principle of international law, namely that a state should not be judged by standards that did not exist when it acted. The difficulty is not that the principle is false. It is that the principle proves less than the objection requires. At most, it establishes that the original acts of capture cannot be treated as breaches of obligations that did not bind the states concerned when those acts were committed. It does not, however, establish that there is no present wrongful conduct. Thus, the objecting states answer a claim about a closed past, whereas the Resolution makes a claim about the present, asking whether the situation that the trade produced, and that the responsible states continue to maintain, is lawful under modern international law.<sup>108</sup> Accordingly, once the policy complaint voiced by the United States, about the use of historical wrongs ‘in an attempt to reallocate modern resources’,<sup>109</sup> is set aside, the legal objection is reduced to the closure thesis, and the closure thesis depends on an assumption it does not examine, namely that the trade is a completed event whose effects are legally inert.

### 3.2 *The Historical Premise of the Closure Thesis*

The closure thesis, as noted, assumes that the trade was lawful at the time it was carried out. It therefore presupposes a long period of uniform lawfulness, a settled legal world in which the trafficking of enslaved Africans continued with the law’s approval until, at some point in the twentieth century, the law changed. The historical record does not bear this out. For the greater part of the nineteenth century, the trade was prohibited by a dense and expanding network of treaties, and the powers that now invoke intertemporal law did more than any others to build that network and the customary rule that followed it.<sup>110</sup> Abolition began in domestic law. Denmark prohibited the trade for its subjects by an edict of 1792 that took effect in 1803,<sup>111</sup> and in 1807 Britain and the United States outlawed their nationals’ participation in it, Britain by the Abolition of the Slave Trade Act<sup>112</sup> and the United States by a statute prohibiting the importation of enslaved persons from the start of 1808.<sup>113</sup> What had been domestic prohibition became an international project at the Congress of Vienna. On 8 February 1815, the eight assembled powers, including France, Spain, and Portugal, signed a Declaration on the Abolition of the Trade.<sup>114</sup> Its relevant passages read as follows:

Having taken into consideration that the commerce, known by the name of ‘the Slave Trade’ has been considered, by just and enlightened men of all ages, as repugnant to the principles of humanity and universal morality; . . . [T]he Plenipotentiaries . . . proclaim[], in the name of their Sovereigns, their wish of putting an end to a scourge, which has so long desolated Africa, degraded Europe, and afflicted

---

possible’); G.A. Res. 73/295, ¶ 2 (May 22, 2019) (affirming, in line with the advisory opinion, that the continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of the United Kingdom).

<sup>105</sup> U.S. Mission to the United Nations, *supra* note 11.

<sup>106</sup> U.K. Mission to the United Nations, *supra* note 12.

<sup>107</sup> E.U. Delegation to the United Nations, *supra* note 15.

<sup>108</sup> *cf.* G.A. Res. 80/250, *supra* note 6, op. ¶¶ 3, 5.

<sup>109</sup> U.S. Mission to the United Nations, *supra* note 11.

<sup>110</sup> See Martinez, *infra* note 111, at 554 (‘Over several decades, Britain convinced one country after another to ratify increasingly powerful treaties.’), 579 n.130 (describing the resulting network as ‘a hub-and-spoke system with Britain at the center’); see also *infra* note 123.

<sup>111</sup> The Kingdom of Denmark banned the importation of slaves into its West Indian possessions by an edict of 1792 that took effect in 1803. See Edict of the King of Denmark and Norway, Concerning the Slave Trade, Mar. 16, 1792, in 1 B.S.P. 971; Bernard H. Nelson, *The Slave Trade as a Factor in British Foreign Policy, 1815–1862*, 27 J. NEGRO HIST. 192, 193–94 (1942); Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 555–62 (2008). The contrary judicial voices of the period, *The Antelope*, 23 U.S. (10 Wheat.) 66, 120–22 (1825) (Marshall, C.J.) (the trade, however contrary to the law of nature, was not contrary to the law of nations as to states that had not renounced it), and *Le Louis* (1817) 2 Dods. 210, 249–51, 165 Eng. Rep. 1464, 1478–79 (High Ct. Adm.) (same), speak to the era before the treaty network matured, and so confirm rather than refute the claim in the text, that prohibition consolidated through treaty and practice across the century rather than arriving complete; neither decision touches the second limb of the intertemporal principle or the continuing characterisation.

<sup>112</sup> See An Act for the Abolition of the Slave Trade, 1807, 47 Geo. 3, Sess. 1, c. 36 (U.K.).

<sup>113</sup> See Act of Mar. 2, 1807, ch. 22, 2 Stat. 426.

<sup>114</sup> See Declaration of the Powers on the Abolition of the Slave Trade, Feb. 8, 1815, *reprinted in* Final Act of the Congress of Vienna, Annex XV. See also G.A. Res. 80/250, *supra* note 6, preamble, recital 23 (recalling ‘the Final Act of the Congress of Vienna, Act No. XV’).

humanity; . . . Too well acquainted, however, with the sentiments of their Sovereigns, not to perceive, that however honorable may be their views, they cannot be attained without due regard to the interests; the habits, and even the prejudices of their subjects; the said Plenipotentiaries at the same time acknowledge that this general Declaration cannot prejudice the period that each particular Power may consider as most advisable for the definitive Abolition of the Slave Trade.<sup>115</sup>

The Declaration, taken on its own, was more aspiration than command, since it fixed no date and created no enforcement machinery. It was nonetheless the first multilateral instrument to treat the trade as a matter of international concern,<sup>116</sup> and its annexation to the Final Act of the Congress, as Act No. XV, placed it among the instruments of the Vienna settlement rather than leaving it a mere statement of sentiment.<sup>117</sup> Over the following decades, this aspiration hardened into obligation. From 1817 onwards, Britain concluded a series of bilateral treaties, eventually drawing in most of the Atlantic maritime states, which prohibited the trade, authorised the mutual search of suspected vessels, and established mixed commission courts to adjudicate the cases of captured slave ships.<sup>118</sup> Those courts, sitting at Freetown, Havana, Rio de Janeiro, and elsewhere, were international tribunals in a recognisable sense. They were composed of judges of different nationalities, they applied a body of treaty law binding several states, and between 1817 and 1871 they adjudicated the fate of captured vessels and freed some eighty thousand people from the holds of slavers.<sup>119</sup> By the time the trade was condemned again in the General Act of the Berlin Conference of 1885<sup>120</sup> and, comprehensively, in the Brussels Conference Act of 1890,<sup>121</sup> the prohibition had moved from treaty law binding particular pairs of states towards multilateral obligations of general application. The 1926 Slavery Convention then codified the commitment of states to suppress the trade and to bring about the abolition of slavery.<sup>122</sup>

<sup>115</sup> Jerome Reich, *The Slave Trade at the Congress of Vienna—A Study in English Public Opinion*, 53 J. NEGRO HIST. 129, 139–40 (1968) (quoting delegates to the Declaration of the Powers on the Abolition of the Slave Trade (Feb. 8, 1815), in 32 PARLIAMENTARY DEBATES 200–01 (T.C. Hansard ed., London 1816)).

<sup>116</sup> See Martinez, *supra* note 111, at 574 (describing the Declaration as ‘a nonbinding declaration that condemned the slave trade’ and observing that ‘the idea of an international body aimed at suppression of the slave trade first emerged during these negotiations at Vienna’); Randall Lesaffer, *Vienna and the Abolition of the Slave Trade*, OXFORD PUBLIC INTERNATIONAL LAW, <https://opil.ouplaw.com/page/498> (last visited Oct. 14, 2026) (crediting the Declaration with having ‘introduced abolition of the slave trade as a principle in general international law’).

<sup>117</sup> See *supra* note 114 (Declaration annexed to the Final Act as Act No. XV); G.A. Res. 80/250, *supra* note 6, preamble, recital 23.

<sup>118</sup> Martinez, *supra* note 111, at 569–79 (describing the bilateral treaties of 1817 and the establishment of the mixed commission courts). For example, on 24 December 1814, Britain and the United States declared that ‘the traffic in slaves is irreconcilable with the principles of humanity and justice’, and both nations pledged to ‘use their best endeavours’ to abolish the trade, though the treaty did not include particular mechanisms for enforcing this promise. See Treaty of Peace and Amity Between His Britannic Majesty and the United States of America art. X, Gr. Brit.-U.S., Dec. 24, 1814, 2 B.S.P. 357, 364. Aside from that, other bilateral treaties were concluded with the Netherlands (Anglo-Dutch Treaty, signed on 4 May 1818, 5 B.S.P. 125), Portugal (Anglo-Portuguese Treaty, signed on 28 July 1817, 4 B.S.P. 85), and Spain (Anglo-Spanish Treaty, signed on 23 September 1817, 4 B.S.P. 33). See Martinez, *supra* note 111, at 552 n.2, 577 n.121. Martinez records that ‘more than twenty nations—including all the Atlantic maritime powers—had signed international treaties committing to the abolition of the trade’. *Id.* at 556. The United States joined the mixed court system only in 1862, by a treaty that provided for the mutual visit of suspected vessels and established mixed courts at Sierra Leone, the Cape of Good Hope, and New York. See Treaty for the Suppression of the African Slave Trade, U.S.-Gr. Brit., arts. I, IV, Apr. 7, 1862, 12 Stat. 1225, 52 B.S.P. 50; Martinez, *supra* note 111, at 577 (noting also that France never participated).

<sup>119</sup> Martinez, *supra* note 111, at 550, 553, 579–95 (noting that the courts sat at Freetown, Havana, Rio de Janeiro, and Suriname and that they freed approximately eighty thousand people between 1817 and 1871). On the antislavery treaty network as a foundation of modern international human rights law, see also *id.* at 550 (describing the antislavery courts as ‘the first international human rights courts’).

<sup>120</sup> See General Act of the Berlin Conference on West Africa, art. 6, Feb. 26, 1885, 165 C.T.S. 485 (‘All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves . . . to help in suppressing slavery, and especially the slave trade.’). *Id.* art. 9 (‘[T]rading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers’).

<sup>121</sup> See Brussels Conference Act (General Act—Slave Trade), arts. I et seq., July 2, 1890, 173 C.T.S. 293.

<sup>122</sup> See Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention art. 2, Sept. 25, 1926, 60 L.N.T.S. 253 (undertaking ‘[t]o prevent and suppress the slave trade’ and ‘[t]o bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms’); *id.* pmb. (recalling the General Act of the Brussels Conference of 1889–90 and the Convention of Saint-Germain-en-Laye of 1919, which revised the General Act of Berlin of 1885 and the General Act and Declaration of Brussels of 1890). See also G.A. Res. 80/250, *supra* note 6, preamble, recital 24 (welcoming the centenary of the Convention); David Weissbrodt & Anti-Slavery International, *Abolishing Slavery and Its Contemporary Forms*, ¶¶ 5, 63, U.N. Doc. HR/PUB/02/4 (2002), <https://www.ohchr.org/sites/default/files/Documents/Publications/slaveryen.pdf> (recording that ‘between 1815 and 1957 some 300 international agreements were implemented to suppress slavery’, and describing the measures of the Brussels Act of 1890 to control and prevent the slave trade); see generally Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff 2008).

Two conclusions follow, and their limits should be stated plainly. First, the objecting states cannot claim that the trade enjoyed uniform legal protection throughout its operation. For much of the period in which the wealth and holdings now at issue were consolidated, the trade was prohibited by treaties binding most of those states. Britain, which built the treaty network and staffed the mixed commission courts, is poorly placed to argue that the trade was lawful when the harms now in question were produced.<sup>123</sup> Second, and conversely, the record does not show that the trade was unlawful from its inception. The courts of the early nineteenth century held that the trade, however contrary to the law of nature, did not violate the law of nations as regards states that had not renounced it, and each prohibition bound a state only from the moment it assumed the relevant obligation.<sup>124</sup> In addition, the treaty record concerns the trade and not the institution of slavery itself, which the Resolution addresses alongside the trade. Slavery remained lawful in the British colonies until the Slavery Abolition Act 1833 took effect in 1834, and the apprenticeship that replaced it ended only in 1838; it remained lawful in the French colonies until 1848, in the Dutch colonies until 1863, in the United States until the Thirteenth Amendment of 1865, and in Brazil until 1888.<sup>125</sup> The historical argument therefore narrows the period to which the closure thesis can apply, more for the trade than for the institution it supplied, but it does not dispose of the thesis. Even if the objecting states' premise were granted *arguendo*, that the trade was lawful throughout the period in which the harms now at issue were produced, the law of state responsibility would still reach the situations that the trade produced, where present conduct maintains them, through the mechanics of a continuing breach. The wrong this article identifies is not the original act frozen in time, but the continuing situation, whose lawfulness is measured by the obligations currently in force.

### 3.3 The Temporal Extension of Breach

The third claim of the closure thesis concerns the structure of the law of state responsibility itself. The intertemporal objection reads Article 13 of the ARSIWA as though it answered every question about the time of a breach. It does not. Article 13 identifies when an obligation must be in force for conduct to breach it. Article 14 identifies how long a breach lasts, and in doing so it distinguishes an act that is completed when performed from an act having a continuing character. Suppose that the wrong alleged is not the completed historical act of transportation, but the present retention of objects taken in the course of the trade, or the present maintenance of a structure of racialised disadvantage that the responsible state has the power to dismantle. Under Article 14(2) of the ARSIWA, the breach constituted by such conduct 'extends over the entire period during which the act continues'.<sup>126</sup> If the conduct continues into the present, the time relevant for the purpose of Article 13 includes the present, and the conduct is measured by the obligations in force now. The intertemporal requirement is thus satisfied without attaching a modern obligation to a seventeenth-century act, which Article 13 forbids. It is satisfied because a wrong of a continuing character is still occurring and is governed by the law in force while it occurs.<sup>127</sup> The same is true of a breach of a composite character, which under Article 15(2) extends over the entire period during which the actions or omissions of the series are repeated and remain not in conformity with the obligation,<sup>128</sup> although such a breach can be constituted only by acts performed while that obligation is in force.<sup>129</sup>

<sup>123</sup> On the British role in building and enforcing the antislavery regime, see Martinez, *supra* note 111, at 562–85. The point is not that Britain acted from disinterested motives but that, having treated the trade as unlawful and suppressed it by force, it cannot now characterise the trade as having been lawful throughout. The International Law Commission illustrates the intertemporal principle with this very history. The umpire of the United States–Great Britain Mixed Commission held Great Britain responsible for incidents dating from a time when the slave trade was considered lawful (the *Enterprise*, *Hermosa* and *Créole*), but not for later incidents occurring after the trade had come to be prohibited by all civilised nations (the *Lawrence* and *Volusia*). See ARSIWA, *supra* note 20, art. 13 commentary ¶ (2).

<sup>124</sup> See *The Antelope* and *Le Louis*, *supra* note 111.

<sup>125</sup> See Slavery Abolition Act 1833, 3 & 4 Will. 4 c. 73 (U.K.); Décret du 27 avril 1848 relatif à l'abolition de l'esclavage dans les colonies et possessions françaises (Fr.); Wet van 8 augustus 1862 houdende opheffing der slavernij in de kolonie Suriname (Neth.) (effective July 1, 1863); U.S. Const. amend. XIII (1865); Lei No. 3.353, de 13 de maio de 1888 (Lei Áurea) (Braz.). On the entry into force of the 1833 Act on August 1, 1834 and the end of apprenticeship in 1838, see *The 1833 Abolition of Slavery Act and Compensation Claims*, THE NATIONAL ARCHIVES (U.K.), <https://www.nationalarchives.gov.uk/explore-the-collection/explore-by-time-period/georgians/1833-abolition-of-slavery-act-and-compensation-claims/>.

<sup>126</sup> ARSIWA, *supra* note 20, art. 14(2).

<sup>127</sup> This reading of Articles 13 and 14(2) in combination is consistent with the Commission's statement that the function of Chapter III is to specify 'when and for what period of time there is or has been a breach of an international obligation'. See ARSIWA, *supra* note 20, general commentary ¶ (3)(c).

<sup>128</sup> ARSIWA, *supra* note 20, art. 15(2).

<sup>129</sup> *Id.* art. 15 commentary ¶ (11) ('the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed').

The general commentary to the ARSIWA points in the same direction. It distinguishes the primary rules, which define the content of obligations, from the secondary rules of responsibility, and it observes that a primary rule may require a state to pay compensation or to restore the status quo ante after an activity has been completed, even a lawful one.<sup>130</sup> In such cases, the commentary continues, it is ‘the failure to . . . restore the status quo which would engage the international responsibility of the State’.<sup>131</sup> The lawfulness of the original activity therefore does not settle the question of present responsibility. Where a primary duty to restore exists, the wrong is the present failure to perform it, and that failure is judged by present law. The significance of this point for the slave trade is, however, conditional. The commentary shows that the law can locate a wrong in a present failure to restore. It does not show that a duty to restore exists in relation to the trade. That depends on identifying a determinate primary obligation that binds the state now, and it is to that task, and to the conditions under which a situation originating in the trade amounts to a continuing wrong, that section 4 turns.

#### 4 The Doctrine of Living Harm and State Responsibility for the Transatlantic Slave Trade

Section 3 showed that the closure thesis cannot, by itself, exclude a present wrong. It did not show that a present wrong exists. This section addresses that question in two steps. First, it develops the doctrine of living harm, which identifies the conditions under which a situation originating in the trade is a continuing wrongful act rather than the consequence of a completed one, and it tests those conditions against the authorities that point the other way (section 4.1). Second, it sets out the three modes in which those conditions may be met and the five obligations that follow from them (section 4.2), and it then examines persisting illicit possession (section 4.2.1), composite wrong (section 4.2.2), and inherited structural injury (section 4.2.3) in turn.

##### 4.1 Conceptualising the Doctrine of Living Harm

The *doctrine of living harm*, as this article uses the term, is a test for distinguishing between two kinds of situation that originate in the trade, namely those that constitute a continuing wrongful act of a state today and those that are merely the lasting consequences of acts completed long ago. Its central proposition is that the wrong, where there is one, lies exclusively in present conduct, that is, in what a state is now doing, or failing to do, in breach of an obligation that binds it now.<sup>132</sup> Two consequences follow. First, the doctrine does not claim that the illegality of the trade survives into the present, and it does not depend on the trade having been unlawful when it was carried out. Second, the history of the trade plays a limited but indispensable role. It explains how the present situation came about and allows that situation to be traced to particular states, but it does not carry the wrongfulness of the original acts forward in time. In this respect, the doctrine does not seek an exception to the intertemporal principle. Rather, it accepts the core of that principle and applies it, measuring past acts by the law of their time and present conduct by the law in force now.

A doctrine of this kind must be carefully confined if it is not to become a limitless duty to repair the past, and the limits of the doctrine of living harm are part of its content. A situation qualifies only if three conditions, examined below, are met. There must be a determinate obligation binding the state now, there must be present conduct of that state, by act or omission, bearing on whether the situation continues, and that conduct must fail to conform to the obligation. The second condition is decisive in practice. It confines the doctrine to situations that the state presently controls and could bring to an end, and it excludes disadvantage whose persistence no longer depends on anything the state does. The doctrine therefore reaches considerably less than the language of the Resolution might suggest. It does not reach diffuse enrichment, and it does not reach structures that now lie within the exclusive control of other states, including the independent states of the Caribbean and Africa in which much of the disadvantage associated with the trade is concentrated.<sup>133</sup> Reasonable observers may consider this too narrow. It is, however, the price of an account that the law of state responsibility, as it currently stands, can accommodate.

<sup>130</sup> ARSIWA, *supra* note 20, general commentary ¶¶ (1), (4)(c).

<sup>131</sup> *Id.* (‘it would be the failure to pay compensation, or to restore the status quo, which would engage the international responsibility of the State concerned’).

<sup>132</sup> *Cf.* Johari, *supra* note 21 (contrasting a claim about ‘what was done to the ancestors’, which must be run through intertemporal law century by century, with a claim about present racial discrimination, which, in the author’s words, ‘need not be run at all’). The doctrine of living harm likewise locates the wrong in the present, but it is not confined to discrimination and extends to the retention of objects and to composite wrongs (sections 4.2.1 and 4.2.2).

<sup>133</sup> *See, e.g.,* Nathan Nunn, *The Long-Term Effects of Africa’s Slave Trades*, 123 Q.J. ECON. 139 (2008).

The distinction on which the doctrine rests is between a wrong and its effects. In the explanations of vote, the social and economic legacies of the trade are treated as consequences, the momentum of a history whose wrongful conduct ended long ago and which therefore lies beyond the temporal reach of state responsibility.<sup>134</sup> That characterisation is often correct. A harm is *living*, in the sense used in this article, only where its persistence depends on present conduct of the state, whether an act or an omission, and not merely on the passage of time. Where that is so, the state is answerable not for the conduct of its predecessors but for its own present choice to maintain the situation. Article 14 of the ARSIWA supplies the framework for drawing that distinction. A breach by an act not having a continuing character occurs at the moment when the act is performed, even if its effects continue.<sup>135</sup> A breach by an act having a continuing character extends over the entire period during which the act continues and remains not in conformity with the obligation.<sup>136</sup> The explanations of vote do not refer to Article 14. Translated into the language of the ARSIWA, however, the closure thesis amounts to the claim that every present legacy of the trade falls under Article 14(1). The objecting states do not seriously contest that the effects of the trade persist. Their position, so reconstructed, is that those effects are the consequences of acts completed long ago and therefore fall outside the notion of a continuing breach.

That position is correct as a statement of the rule but mistaken in its application. If the persistence of consequences were enough to make a breach continuing, Article 14(1) would lose most of its content, since almost every grave wrong leaves lasting effects. The commentary makes clear that an act does not have a continuing character merely because its effects extend in time.<sup>137</sup> What must continue is the conduct, not the harm. It follows that a situation originating in a past wrong is a continuing wrongful act, rather than the lingering effect of a completed one, only when the three conditions identified above are met, namely a present obligation binding the state, present conduct of the state, whether an act or an omission,<sup>138</sup> bearing on whether the situation continues, and a present failure of that conduct to conform to the obligation. As mentioned, the second condition carries most of the analytical weight. A situation is the continuing conduct of a state to the extent that it persists through what the state is now doing or declining to do, and that the state could end.<sup>139</sup> Where persistence is something the state presently controls, the situation is conduct and the wrong is a present one. Where it persists by a momentum the state no longer governs, it is an effect, and Article 14(1) consigns it to the past. The criterion is not an invention of this article. Article 30 of the ARSIWA obliges a responsible state to cease a wrongful act that is continuing,<sup>140</sup> and since cessation is intelligible only in respect of conduct the state is able to stop, the availability of cessation already presupposes control. The same idea is implicit in the words ‘remains not in conformity’ in Article 14(2).<sup>141</sup> The temporal character of a wrong and the moment of its first illegality are therefore separate questions. Keeping them apart allows the historical origins of the trade to be distinguished from the present conduct that sustains its legacies, and it is on that basis that the obligations examined below are identified.

Perhaps the strongest challenge to the approach taken here is the 1938 judgment of the Permanent Court of International Justice in the *Phosphates in Morocco* case. Italy argued there that the measures culminating in the dispossession of an Italian national formed ‘a single, continuing and progressive illegal act’.<sup>142</sup> The Permanent Court did not accept that characterisation. Rather, it treated the situation complained of as ‘a legal position’

<sup>134</sup> See *supra* notes 11, 12, 15.

<sup>135</sup> ARSIWA, *supra* note 20, art. 14(1) (‘The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.’); *id.* art. 14 commentary ¶ (6) (‘An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues.’).

<sup>136</sup> *Id.* art. 14(2) (‘The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation’). See generally Joost Pauwelyn, *The Concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems*, 66 BRIT. Y.B. INT’L L. 415 (1995).

<sup>137</sup> ARSIWA, *supra* note 20, art. 14 commentary ¶ (6) (‘An act does not have a continuing character merely because its effects or consequences extend in time.’); see also *supra* note 135.

<sup>138</sup> ARSIWA, *supra* note 20, art. 2 (an internationally wrongful act may consist of ‘an action or omission’).

<sup>139</sup> This is the agency-and-control criterion the article proposes as its central analytical contribution. It states explicitly the principle already implicit in the Articles’ treatment of cessation and in the present-tense formulation of Article 14(2). See *infra* notes 140–141.

<sup>140</sup> ARSIWA, *supra* note 20, art. 30(a) (a responsible State is ‘under an obligation to cease that act, if it is continuing’); see *id.* art. 30 commentary ¶ (3) (recording the ‘two essential conditions intimately linked’ identified in the *Rainbow Warrior* arbitration, ‘namely that the wrongful act has a continuing character and that the violated rule is still in force’).

<sup>141</sup> *Id.* art. 14(2) (‘remains not in conformity’); see also *id.* art. 30 commentary ¶¶ (4), (7).

<sup>142</sup> *Phosphates in Morocco (It. v. Fr.)*, Preliminary Objections, 1938 P.C.I.J. (ser. A/B) No. 74, at 23 (June 14).

resulting from legislation of 1920 which, by reason of its date, fell outside its jurisdiction.<sup>143</sup> The 2013 judgment of the Grand Chamber of the European Court of Human Rights in *Janowiec v. Russia* points in the same direction. There, the Court held that the ‘Convention values’ clause could not be applied to events that preceded the adoption of the Convention, and the time that had elapsed between the Katyn killings and the critical date was too long for a genuine connection to be established.<sup>144</sup> It is submitted that neither decision is inconsistent with the doctrine developed here, although both mark its limits. In each case, the applicant sought to carry the wrongfulness of an originating act, or a procedural duty derived from it, across the temporal divide. The doctrine of living harm does not attempt that crossing. In other words, it asks whether present conduct, measured by present obligations, is wrongful in itself, and it treats the originating act only as the means by which the situation is identified and traced.

Two clarifications are in order. First, the doctrine does not create a new category of wrong. A situation that meets its three conditions is a continuing wrongful act under Article 14(2) of the ARSIWA in the ordinary way, and the obligation breached is one that the state already bears. What the doctrine adds is a method of identification, which explains which present situations can be traced to the trade, which states bear obligations in respect of them, and why the history of the trade is relevant to tracing rather than to wrongfulness. Absent such a method, the obligations examined below would remain disconnected from the history that the Resolution invokes. Second, the label ‘living harm’ should not be misread. The harm is ‘living’ only in the sense that present conduct still produces it, and it is that conduct, not the harm as such, that the law measures.

## 4.2 Modes of Continuing Wrong and the Resulting Obligations

It does not follow from the doctrine that every legacy of the trade is a continuing wrongful act. It follows only that some situations originating in the trade may be, where the three conditions are met, and that where they are met the consequences are concrete duties under the law of state responsibility rather than moral aspirations. This article identifies three modes in which the conditions can be satisfied, namely persisting illicit possession, composite wrong, and inherited structural injury. Each mode generates its own obligations, and together they yield five. Not all of them are reparation in the strict sense. Some require the cessation of a continuing wrong or compliance with a primary rule, while others take the form of restitution or satisfaction. The first mode, persisting illicit possession, generates the obligation to restore cultural objects and human remains and, as its corollary, the obligation to give access to the archives of the trade (section 4.2.1). The second mode, composite wrong, generates the obligation to administer nationality and civil status without discrimination against descendants (section 4.2.2). The third mode, inherited structural injury, generates the obligations to audit sovereign debt traceable to the trade and to offer guarantees of non-repetition (section 4.2.3).

### 4.2.1 Persisting Illicit Possession and the Obligation of Restitution

#### (a) Material Restitution

The first mode of continuing wrong is the persisting illicit possession of things wrongfully taken and never returned. Its clearest instances are the objects that paragraph 9 addresses, including artworks, regalia, human remains, manuscripts, and sacred objects removed from African societies and held today by the states that took them or by their public institutions.<sup>145</sup> The wrong is not the original taking, which in most cases is a completed act. The wrong is the present retention. The object is held now, without the consent of the society of origin, and the holding is something the state does now and could cease by returning it.<sup>146</sup> Each of the three conditions must be shown, and the first is the most demanding. Article 35 of the ARSIWA cannot supply it, because restitution is a consequence of a wrongful act and not the source of one, and to invoke it in order to establish the wrong would be

<sup>143</sup> *Id.* at 25–26.

<sup>144</sup> *Janowiec v. Russia* [GC], App. Nos. 55508/07 & 29520/09, ¶¶ 146, 151, 157 (Eur. Ct. H.R. Oct. 21, 2013).

<sup>145</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 9 (calling for restitution ‘without charge’ of cultural property, *objets d’art*, monuments, archives, and documents to countries of origin). On the scale of such holdings, see Sarr & Savoy, *supra* note 69, as reported in Farah Nayeri, *Museums in France Should Return African Treasures, Report Says*, N.Y. TIMES (Nov. 21, 2018), and Kate Brown, *The Idea Is Not to Empty Museums’: Authors of France’s Blockbuster Restitution Report Say Their Work Has Been Misrepresented*, ARTNET NEWS (Jan. 24, 2019), <https://news.artnet.com/art-world/archives/restitution-report-critics-1446934> (90 to 95 per cent of Africa’s cultural heritage held outside the continent, largely by major museums).

<sup>146</sup> This is the central characterisation of the first mode, and the move on which it depends, namely that the wrong is the present retention and not the past taking. See section 2.2 *supra*.

circular.<sup>147</sup> The present obligation must therefore be found in the primary rules. Two sources are available, and they differ in strength. The first is the peremptory prohibition of slavery read with the second limb of the intertemporal principle, as explained in section 3.1. Where the only title to an object or to human remains is one founded on enslavement, its maintenance is itself in conflict with the peremptory norm, and the retention is wrongful now. The second source, which extends to objects removed in the course of colonial appropriation, is the guarantee of equal participation in cultural activities under Article 5(e)(vi) of ICERD, read together with the series of General Assembly resolutions calling for restitution.<sup>148</sup> That body of practice is growing, but it would be premature to present it as a settled customary rule, and for this second class of objects the argument is correspondingly weaker.

Once a present obligation is identified, the remaining conditions present little difficulty. There is present conduct in the continued holding, which the state performs and controls, and present non-conformity, because the holding answers to no valid title. The retention is structurally similar to the unlawful detention and occupation that the commentary gives as paradigms of continuing wrongful acts.<sup>149</sup> *Loizidou v. Turkey* supplies a close analogy. The European Court of Human Rights there faced the argument that the loss of the applicant's property in Northern Cyprus was a completed act beyond its jurisdiction *ratione temporis*,<sup>150</sup> and rejected it on the ground that she had not lost title and that the continuous denial of access to her property was a continuing violation.<sup>151</sup> Not every persisting deprivation is a continuing wrong, however, and the contrast marks the boundary of the mode. In *Blečić v. Croatia*, the Grand Chamber of the European Court of Human Rights held that the termination of a specially protected tenancy was an instantaneous act falling outside its temporal competence.<sup>152</sup> The difference between the two cases lies in the criterion rather than in a change of approach. In *Blečić*, the right was extinguished by the terminating act, leaving no entitlement for any continuing conduct to violate. In *Loizidou*, the right survived, so that title remained a present fact.<sup>153</sup> Persisting illicit possession falls on the *Loizidou* side of the line only where no good title ever passed.<sup>154</sup> That is the position where title rests on enslavement, and it is the position that paragraph 9 of the Resolution takes in respect of colonial takings as well.

This characterisation answers the two defences that a possessing state would raise. The first is that an object held openly for a century has become the property of its holder through something akin to prescription. That defence fails on its own terms. Title to movable objects is, in the first instance, a matter for the law of the place where they are held,<sup>155</sup> and acquisitive prescription in international law is a doctrine of territorial title.<sup>156</sup> Both, however, presuppose possession that the law will protect. The international wrong lies not in a defect of domestic title as such, but in the state's maintenance, through its law and its institutions, of a holding that the peremptory norm forbids it to protect. Where the holder is a public museum whose trustees act under statute, their conduct is attributable to the state as that of an organ or of an entity exercising elements of governmental authority.<sup>157</sup> The ICJ made a related point in *Namibia*, where it held that South Africa, by 'occupying the Territory without title', incurred responsibility for 'a continuing violation of an international obligation',<sup>158</sup> and it follows that a situation so

<sup>147</sup> See ARSIWA, *supra* note 20, arts. 28, 31, 34–35 (restitution as one of the forms of reparation that follow, as a legal consequence, from an internationally wrongful act).

<sup>148</sup> See G.A. Res. 80/250, *supra* note 6, op. ¶ 9. On the positive-law anchors of the present obligation, see ICERD, *supra* note 10, art. 5(e)(vi); G.A. Res. 3187 (XXVIII), *supra* note 8 (restitution of works of art to countries victims of appropriation), the first in a series continued most recently in G.A. Res. 79/133 (Dec. 6, 2024) (return or restitution of cultural property to the countries of origin).

<sup>149</sup> See ARSIWA, *supra* note 20, art. 14 & commentary (unlawful detention and unlawful occupation as paradigm continuing wrongful acts); the retention of a wrongfully held object is structurally identical, being a continuing exercise of wrongful dominion over a thing rather than over a person or a territory.

<sup>150</sup> *Loizidou v. Turkey* (Merits), App. No. 15318/89, ¶¶ 40–47 (Eur. Ct. H.R. Dec. 18, 1996) (rejecting the characterisation of the deprivation as an instantaneous act and dismissing the objection *ratione temporis*).

<sup>151</sup> *Id.* ¶¶ 63–64.

<sup>152</sup> *Blečić v. Croatia* [GC], App. No. 59532/00, ¶¶ 79–86 (Eur. Ct. H.R. Mar. 8, 2006).

<sup>153</sup> The two holdings are reconciled by the survival or extinction of the underlying entitlement. In *Loizidou*, title survived the purported taking, whereas in *Blečić* the right was extinguished by the terminating act, so that nothing subsisted for any continuing conduct to violate. See *Loizidou*, *supra* note 150, ¶¶ 63–64; *Blečić*, *supra* note 152, ¶¶ 85–86.

<sup>154</sup> See *Loizidou*, *supra* note 150, ¶¶ 40–47 (holding that the applicant could not be deemed to have lost title to her property); *cf. id.* (Bernhardt, J., dissenting).

<sup>155</sup> See, e.g., *Winkworth v. Christie Manson & Woods Ltd.* [1980] Ch. 496 (Eng.) (holding that title to movables stolen in England and sold in Italy was governed by Italian law as the law of the place where they were situated at the time of the disposition).

<sup>156</sup> See *Kasikili/Sedudu Island (Bots./Namib.)*, Judgment, 1999 I.C.J. 1045, ¶¶ 96–99 (Dec. 13) (examining acquisitive prescription as a ground of title to territory and its conditions).

<sup>157</sup> ARSIWA, *supra* note 20, arts. 4–5.

<sup>158</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶¶ 117–18, 133.

maintained cannot ripen into title. The maxim *ex injuria jus non oritur* expresses the reason.<sup>159</sup> The same characterisation also meets a related defence, namely the loss of the right to invoke responsibility through acquiescence under Article 45(b) of the ARSIWA.<sup>160</sup> A respondent state might argue that centuries of diplomatic silence amount to acquiescence. Yet a wrong renewed each day presents no completed lapse of time from which acquiescence could be inferred. Moreover, Article 45 speaks of the conduct of an injured state, and many of the communities from which objects were taken lacked, for most of the relevant period, the international legal personality needed to present a claim.<sup>161</sup> Their silence cannot be treated as the valid waiver or acquiescence that Article 45 presupposes.

The second of the two defences, that of the good-faith purchaser, fails because no one can transfer a better title than he holds,<sup>162</sup> which is the position the Resolution takes in insisting on restitution without charge.<sup>163</sup> The strength of the mode lies in its confinement to discrete things still held and traceable to the wrong. It does not reach wealth long dissolved into general prosperity, over which no present control can be shown because it no longer exists as an object of possession. It is in the restitution of cultural objects that characterisation and remedy converge most completely. Return is not one remedy among several but the content of cessation itself, so that the act which ends the wrong and the act which repairs it are the same.<sup>164</sup> Article 35 of the ARSIWA makes restitution the primary form of reparation, displaced only where return is materially impossible or would impose a burden out of all proportion to the benefit, and neither exception applies to an identified object held in a public collection.<sup>165</sup>

Treaty law does not supply the settled rule that, as noted, is lacking for colonial takings. The 1970 UNESCO Convention binds most possessor states to recover and return stolen cultural property documented in the inventories of public institutions, subject to just compensation to an innocent purchaser, but it operates only prospectively and leaves colonial-era takings untouched.<sup>166</sup> Recent state practice is therefore of greater interest. Each return may be read as conceding, in conduct, that the holding answered to no valid title, and each legislated exception to the inalienability of public collections confirms that the obstacle lay in the possessor's own law.<sup>167</sup> Practice has also answered the concern that restitution would empty museums, since transfers of ownership have been paired with loans running in the other direction. What the law requires is the transfer of title, not the removal of every object.<sup>168</sup> In the United Kingdom, the principal remaining obstacle is the statutory bar on the trustees of the British Museum disposing of objects in the collection,<sup>169</sup> although human remains of persons who died less than a thousand years before the relevant provision came into force in 2005 may be transferred under the Human Tissue Act 2004.<sup>170</sup> Where the obligation applies, that bar is not a defence. A state may not invoke its internal law to justify the non-performance of an international obligation,<sup>171</sup> and the maintenance in force of legislation contrary to an obligation

<sup>159</sup> See *Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. 7, 76–77, ¶ 133 (Sept. 25).

<sup>160</sup> ARSIWA, *supra* note 20, art. 45(b) & commentary; see also *id.* art. 45 commentary ¶ (6).

<sup>161</sup> See generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

<sup>162</sup> The maxim *nemo dat quod non habet* carries the original defect of title through every subsequent transfer, so that the present holder, however innocent its own acquisition, holds what was never validly alienated; the good-faith-purchaser defence cannot perfect a title that never came into existence. The rule is applied in international law. See *Island of Palmas*, *supra* note 16, at 842 ('It is evident that Spain could not transfer more rights than she herself possessed.'). Some civil-law systems protect the good-faith acquirer of movables, see, e.g., Code civil [C. civ.] art. 2276 (Fr.), but that protection operates within domestic law and cannot cure a defect arising from the negation of a peremptory norm.

<sup>163</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 9; see section 2.2 *supra* (reading 'without charge' as a denial that valid title ever passed).

<sup>164</sup> See section 4.1 *supra*; ARSIWA, *supra* note 20, arts. 30(a), 35.

<sup>165</sup> ARSIWA, *supra* note 20, art. 35(a)–(b).

<sup>166</sup> 1970 UNESCO Convention, *supra* note 8, arts. 7(b)(ii), 15; see also UNESCO, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, <https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural> (States Parties, including the United Kingdom, which deposited its instrument of acceptance on 1 August 2002).

<sup>167</sup> Loi 2020-1673 du 24 décembre 2020 relative à la restitution de biens culturels à la République du Bénin et à la République du Sénégal [Law 2020-1673 of December 24, 2020 on the Restitution of Cultural Property to the Republic of Benin and the Republic of Senegal], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, Dec. 26, 2020, arts. 1–2 (derogating from the inalienability of the public collections to permit the transfers); see Sarr & Savoy, *supra* note 69, at 71–79 (on derogations from the inalienability of public collections).

<sup>168</sup> On the loan arrangements accompanying the transfer, see Joint Declaration on the Return of Benin Bronzes and Bilateral Museum Cooperation, Ger.-Nigeria, July 1, 2022.

<sup>169</sup> British Museum Act 1963, c. 24, § 5 (U.K.) (confining the trustees' power of disposal to narrow categories such as duplicates and objects unfit to be retained).

<sup>170</sup> Human Tissue Act 2004, c. 30, § 47 (U.K.) (empowering the Trustees of the British Museum, among other bodies, to transfer such remains).

<sup>171</sup> ARSIWA, *supra* note 20, art. 32; Vienna Convention on the Law of Treaties, *supra* note 98, art. 27.

is the Commission's own example of a continuing wrongful act.<sup>172</sup> The obligation also carries the limits of its mode. It reaches the traceable object and stops there. For objects destroyed or beyond identification, compensation takes the place of restitution under Article 36 of the ARSIWA.<sup>173</sup> That substitution cannot operate in reverse, however, for a possessor cannot make a traceable object untraceable by withholding the provenance research that would trace it.<sup>174</sup>

The characterisation of retention as a continuing wrong also clarifies who may invoke responsibility today. Where retention is wrongful because it maintains a title founded on the negation of a peremptory norm, the obligation breached is owed to the international community as a whole. Accordingly, any state may invoke the responsibility of the retaining state and claim cessation, as well as performance of the obligation of reparation in the interest of the beneficiaries of the obligation breached.<sup>175</sup> In addition, the states of origin, including successor states such as Ghana and Benin, may invoke responsibility as injured states where the breach specially affects them.<sup>176</sup> The fact that, as mentioned, the communities from which objects were taken lacked international legal personality at the time does not, therefore, leave the present wrong without a claimant.

#### *(b) Archival Access and the Denial of Truth*

The Resolution lists archives among the objects of restitution, which places registers, manifests, and company records within the first mode alongside physical artefacts.<sup>177</sup> The obligation, however, goes beyond physical return. The principles on combating impunity recognise an inalienable right to the truth and corresponding duties to preserve the archives of grave violations and to facilitate access to them,<sup>178</sup> and a descendant's claim of origin often cannot be substantiated without the ledgers in which the trade recorded itself.<sup>179</sup> Feasibility is not in doubt. Voyage databases have documented the trade ship by ship,<sup>180</sup> and the documentation of dispersed collections across institutions is already under way.<sup>181</sup> Any withholding of these records, or of access to them, is therefore best understood as part of the persisting illicit possession, and not as a separate mode of injury. Access also matters for the other modes, since without it neither descent for the purposes of section 4.2.2 nor traceability for the purposes of section 4.2.3 can be established.

#### *4.2.2 Composite Wrong and the Obligation of Non-Discriminatory Administration*

The second mode, composite wrong, rests on Article 15 of the ARSIWA. Article 15(1) provides that a breach through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the others, is sufficient to constitute the wrongful act, so that the breach lies in the series rather than in any single constituent. The paradigms are genocide, apartheid, and systematic racial discrimination, each wrongful by virtue of its systematic character.<sup>182</sup> It is tempting to treat the trade itself as a composite act of this kind and to conclude that the lawfulness of any single voyage or sale is immaterial. That conclusion should be resisted. Article 15 does not suspend Article 13. A composite breach can be constituted only by acts performed while the obligation defining the series is in force, and the voyages and sales of the seventeenth and eighteenth centuries preceded the obligations on which such an argument would depend. The Resolution's characterisation of

<sup>172</sup> ARSIWA, *supra* note 20, art. 14 commentary ¶ (3) (maintenance in force of legislation contrary to an obligation as a paradigm continuing wrongful act).

<sup>173</sup> ARSIWA, *supra* note 20, arts. 35(a), 36.

<sup>174</sup> See *Factory at Chorzów (Ger. v. Pol.)*, Jurisdiction, Judgment No. 8, 1927 P.C.I.J. (ser. A) No. 9, at 31 (July 26) (a party may not take advantage of its own wrong); cf. *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005), ¶¶ 99–103.

<sup>175</sup> ARSIWA, *supra* note 20, art. 48(1)(b), (2) & commentary.

<sup>176</sup> *Id.* art. 42(b)(i).

<sup>177</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 9.

<sup>178</sup> Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1, princs. 2–3, 14–15 (Feb. 8, 2005), <https://docs.un.org/en/E/CN.4/2005/102/Add.1> (the inalienable right to the truth, the duty to preserve memory, and measures for the preservation of, and access to, archives).

<sup>179</sup> Cf. *infra* note 190 (admitting proof of descent by civil documentation, attested testimony, or approved DNA evidence).

<sup>180</sup> Trans-Atlantic Slave Trade Database, SLAVEVOYAGES, <https://www.slavevoyages.org> (consolidating the surviving port, company, and court records of more than 36,000 voyages).

<sup>181</sup> See, e.g., *Digital Benin Project Unveils Online Platform*, MUSEUMS ASSOCIATION (Nov. 15, 2022), <https://www.museumsassociation.org/museums-journal/news/2022/11/digital-benin-project-unveils-online-platform/> (documenting more than 5,200 objects held by more than 131 institutions in 20 countries).

<sup>182</sup> ARSIWA, *supra* note 20, art. 15 commentary ¶ (2).

the trade as a systematic regime of states<sup>183</sup> therefore matters for attribution and for the allocation of responsibility among the states involved, but it does not, on its own, turn the historical trade into a present composite breach. The composite mode is accordingly confined to series of acts that fall within the period of obligations now in force. Article 15(2) of the ARSIWA ties the temporal extension of a composite breach to the repetition of its constituent acts.<sup>184</sup>

The physical acts of the trade, the voyages, captures, and sales, are not being repeated.<sup>185</sup> Its juridical dimension is a different matter. The trade converted persons into property and severed them from political community, and that severance can be renewed by present acts of the state, in particular by the administration of nationality and civil status in ways that systematically disadvantage the descendants of the enslaved.<sup>186</sup> Where such acts are performed while the prohibition of racial discrimination binds the state, they are capable of forming a series defined in aggregate as wrongful, and the breach lasts for as long as they are repeated. The link with the trade is not that these acts continue the original wrong. It is that they reproduce, under present law, the exclusion on which the trade depended, and that the persons affected are identified by that same history.<sup>187</sup> The Human Rights Committee took a comparable approach in *Lovelace v. Canada*, where it treated the continuing effects, after the entry into force of the Covenant, of a status lost under earlier legislation as capable of giving rise to a present violation.<sup>188</sup>

Two strands of practice are relevant here, and they should not be confused. The first concerns states of origin. For example, Ghana's statutory right of abode for persons of African descent<sup>189</sup> and Benin's 2024 law recognising the nationality of Afro-descendants able to evidence a deported ancestor<sup>190</sup> readmit to the political community those whom the trade removed, and they correspond closely to the repatriation element of the CARICOM plan.<sup>191</sup> This practice shows that readmission is feasible and that descent can be proved. It is not, however, reparation in the sense of the law of state responsibility, since Ghana and Benin are not the states responsible for the trade. The second strand concerns the states in which descendants now live. There, the obligation is to administer nationality and civil status without discrimination. The judgments of the Inter-American Court of Human Rights against the Dominican Republic concern persons of Haitian descent and not the transatlantic trade as such. Their relevance is that they treat the discriminatory denial of nationality and of birth registration to persons identified by descent as a present violation of the state's obligations, whatever the historical roots of the exclusion.<sup>192</sup> That strand is not confined, however, to states without responsibility for the trade. In the United Kingdom, the Windrush Lessons Learned Review found that the wrongful treatment of members of the Windrush generation was 'foreseeable and avoidable' and reflected 'an institutional ignorance and thoughtlessness towards the issue of race and the history of the Windrush generation'.<sup>193</sup> Whether such failings form a series defined in aggregate as wrongful is a question of

<sup>183</sup> See G.A. Res. 80/250, *supra* note 6, preamble & op. ¶¶ 3–4.

<sup>184</sup> ARSIWA, *supra* note 20, art. 15(2) (the breach 'extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity').

<sup>185</sup> The distinction is deliberate. The physical constituent acts of the trade, the voyages, captures, and sales, are not being repeated, and the argument does not claim otherwise. What is repeated is the juridical constituent, the administrative severance of descendants from civic status, which is why the composite breach remains open on the reading advanced here. Resting the argument on the gravity or persistence of harm alone would repeat the error identified *supra* note 135.

<sup>186</sup> See ARSIWA, *supra* note 20, art. 15 & commentary; Comm. on the Elimination of Racial Discrimination, General Recommendation No. 34: Racial Discrimination Against People of African Descent, U.N. Doc. CERD/C/GC/34 (Oct. 3, 2011), <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-34-racial-discrimination-against-people-african> (treating structural and systemic racial discrimination against people of African descent as a present pattern requiring positive measures of correction). On the 'natal alienation' of the enslaved, see generally Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Harvard University Press 1982).

<sup>187</sup> See G.A. Res. 80/250, *supra* note 6, op. ¶ 3 ('racialized regimes of labour, property and capital').

<sup>188</sup> *Lovelace v. Canada*, Comm'n No. 24/1977 (R.6/24), ¶¶ 11, 13.1, 19, U.N. GAOR, 36th Sess., Supp. No. 40, U.N. Doc. A/36/40, annex XVIII, at 166 (Hum. Rts. Comm. July 30, 1981).

<sup>189</sup> Immigration Act, 2000 (Act 573) § 17 (Ghana) (right of abode for a person of African descent in the Diaspora).

<sup>190</sup> Loi 2024-31 du 2 septembre 2024 relative à la reconnaissance de la nationalité béninoise aux Afro-descendants en République du Bénin [Law 2024-31 of September 2, 2024 on the Recognition of Beninese Nationality of Afro-Descendants in the Republic of Benin] (Benin) (admitting proof of descent by civil documentation, attested testimony, or approved DNA evidence); see Benin: *A New Law on the Recognition of Nationality for People of African Descent*, GLOBALCIT (2025), <https://globalcit.eu/benin-a-new-law-on-the-recognition-of-nationality-for-people-of-african-descent/>.

<sup>191</sup> CARICOM Ten Point Plan, *supra* note 30 (point two, repatriation).

<sup>192</sup> Case of Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶¶ 253–64 (Aug. 28, 2014) (nationality, the prohibition of its arbitrary and discriminatory deprivation, and the position of persons of Haitian descent); *Case of the Girls Yean and Bosico v. Dominican Republic*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶¶ 141–42, 174 (Sept. 8, 2005).

<sup>193</sup> Wendy Williams, *Windrush Lessons Learned Review: Independent Review*, HC 93, at 7 (Mar. 19, 2020), <https://www.gov.uk/government/publications/windrush-lessons-learned-review>.

fact, but the example shows where the inquiry would begin. It is in this second strand, and only there, that the composite mode generates an obligation, owed by the state whose present administration is in question.

#### 4.2.3 *Inherited Structural Injury and the Obligations of Audit and Non-Repetition*

The third mode, inherited structural injury, locates the wrong neither in the retention of a thing nor in the repetition of constituent acts, but in a present omission. It concerns a state that maintains, within its own jurisdiction or through instruments it still controls, a structure of racialised disadvantage produced by the trade, and that fails to perform a present obligation to dismantle it.<sup>194</sup> The wrong is not the disadvantage, which considered by itself is a consequence. The wrong is the omission, the continuing failure to discharge a determinate duty over a structure the state presently controls. An omission is conduct, and conduct that fails a present obligation is a continuing wrongful act.<sup>195</sup> True, the disadvantage is precisely the kind of lasting consequence that Article 14(1) of the ARSIWA declines to treat as a breach.<sup>196</sup> However, Article 14(1) consigns to the past the originating conduct and the effects it set in motion, not the state's present failure to do what it is now obliged to do. This mode would fail only if it treated the disadvantage itself as the wrong.

The omission counts as a continuing wrong only where the state has the present capacity to alter the structure.<sup>197</sup> An omission is wrongful only against a determinate obligation to act, and there is no free-floating duty to repair the past.<sup>198</sup> Three obligations are relevant. The first is the prohibition of racial discrimination, which has a positive dimension requiring states to dismantle structural discrimination and not merely to refrain from it.<sup>199</sup> The second is self-determination, which the ICJ treated as the source of a continuing wrong where a colonial administration was maintained against it.<sup>200</sup> The third is the obligation concerning retention developed under the first mode. Where one of them is engaged, the omission to perform it is a continuing wrong. Where none is, the disadvantage is a consequence and not a breach. The mode extends an existing pattern rather than inventing one, and the closest case is *Moiwana Community v. Suriname*.<sup>201</sup> The originating atrocity, the 1986 massacre of an N'djuka Maroon village, fell outside the Inter-American Court's temporal jurisdiction.<sup>202</sup> The Court held that it was nonetheless competent over situations that had not ceased to exist, and it found continuing violations in the community's displacement and inability to return, in the failure to recover the remains, and in the injury to a people unable to perform the rites its traditions required.<sup>203</sup>

Thus, the wrong remedied was not the massacre but the state's present failure to undo the situation it had produced.<sup>204</sup> The analogy has limits that should be acknowledged. Suriname's responsibility arose from its own conduct in 1986 and its later failures, not from the enslavement of the community's ancestors, even though the

<sup>194</sup> This is the characterisation of the third mode, namely that the wrong is a present omission to perform a determinate duty of repair over a structure the State presently controls, not the disadvantage considered as a consequence. See ARSIWA, *supra* note 20, art. 2 (omission) and the duty to restore, *supra* notes 130–131.

<sup>195</sup> See ARSIWA, *supra* note 20, art. 2 (a wrongful act may consist of an omission); *id.* art. 14(2) (continuing character); *id.* art. 30 (cessation of a continuing wrong). The mode treats the omission, not the disadvantage, as the conduct that the obligation measures.

<sup>196</sup> This is the strongest objection to the third mode, stated in its strongest form so that it may be met rather than evaded. See *id.* art. 14(1); *supra* note 135.

<sup>197</sup> The criterion set out in section 4.1 *supra*, notes 139–141, does the work, since the omission counts as a continuing wrong only where the State has the present capacity to alter the structure, that is, only where the structure's persistence lies within the State's present agency rather than beyond its reach.

<sup>198</sup> See ARSIWA, *supra* note 20, art. 12 (a breach exists when conduct is not in conformity with what an obligation requires) and art. 2.

<sup>199</sup> On the positive dimension of the non-discrimination obligation, see CERD, General Recommendation No. 34, *supra* note 186; ICERD, *supra* note 10, art. 2(1)(c) (each State Party to amend, rescind, or nullify laws and regulations which have the effect of creating or perpetuating racial discrimination).

<sup>200</sup> See section 3.1 *supra* and sources cited therein. On the internal dimension, see G.A. Res. 2625 (XXV), annex, principle V (Oct. 24, 1970); International Covenant on Civil and Political Rights art. 1(1), Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1(1), Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>201</sup> *Moiwana*, *supra* note 174; see also *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 155–157, 181 (July 29, 1988) (treating enforced disappearance as a continuing violation lasting until the fate of the victim is determined).

<sup>202</sup> *Moiwana*, *supra* note 174, ¶ 39.

<sup>203</sup> *Id.* ¶¶ 108–111 (continuing denial of freedom of movement and residence through the community's displacement); *id.* ¶¶ 99–103.

<sup>204</sup> *Id.* ¶¶ 113–121.

N'djuka descend from Africans who freed themselves from slavery.<sup>205</sup> The case shows how a continuing omission can be separated from an originating act beyond a tribunal's reach. It does not show that such an omission can be traced back to the trade itself, which is the step this mode requires, and which depends on the traceability discussed below. The advisory practice of the ICJ points in the same direction. In *Namibia*, the Court located the wrong in the continued maintenance of an unlawful administration, and the corresponding obligation was to bring it to an end.<sup>206</sup> In the *Wall* Advisory Opinion, it identified obligations to cease the wrongful conduct, to dismantle the structure built, to return property seized, and to make reparation.<sup>207</sup> Both opinions treat the maintenance of an unlawful structure as a continuing wrong attracting cessation and repair.<sup>208</sup> In both, however, the structure was unlawful from the outset under the law then in force. The Resolution's call for guarantees of non-repetition and changes to laws uses the vocabulary proper to such a wrong,<sup>209</sup> but its application to structures created before the relevant obligations existed rests on the omission analysis set out above and not on these opinions alone.

#### (a) Sovereign-Debt Audits and Traceable Extraction

The same analysis extends from administrative structures to sovereign debt, but it requires a distinction between diffuse wealth and traceable financial extraction. It would be tempting to move directly from the general enrichment the trade produced to a present duty of debt cancellation. The limits of the first mode close that route, since wealth dissolved into general prosperity is no longer held as an object of possession and no present control over it can be shown.<sup>210</sup> Any claim relating to debt must therefore be confined to traceable extraction.<sup>211</sup> What the third mode yields in this context is, first, an obligation of audit. Article 37 of the ARSIWA requires satisfaction for injury not made good by restitution or compensation, and the Basic Principles include among the forms of satisfaction verification of the facts and full and public disclosure of the truth.<sup>212</sup> Since satisfaction is a consequence of a wrongful act, the audit is owed as satisfaction only where a continuing wrong under this mode has been established. Before that point, a duty of inquiry is better located in the primary obligation itself, since a state bound to dismantle a structure of racialised disadvantage must first identify it, and the positive dimension of the prohibition of racial discrimination implies a duty to find out what that structure is and how it is sustained.<sup>213</sup> The audit's function is verification, that is, tracing which present obligations and flows derive from the trade and from the indemnities that accompanied its abolition. The Haitian case shows why such verification matters. The ordinance of 1825 made recognition of Haiti's independence conditional on an indemnity to the dispossessed former enslavers, financed by loans whose servicing consumed Haitian revenue well into the twentieth century, a burden that France has acknowledged.<sup>214</sup>

The audit may also disclose a basis for cessation, but only on narrower conditions. Where it identifies an obligation still being serviced that is traceable to the wrong, the servicing is present conduct within the creditor's control, and the control condition is met. Whether that conduct is wrongful depends on a present obligation it fails to respect. Claims of this kind sometimes invoke the doctrine of odious debt, but that doctrine has been developed mainly in relation to the succession of states to the debts of a predecessor regime and does not readily fit the present case.<sup>215</sup> A more promising ground is the principle against unjust enrichment obtained through coercion, of which the

<sup>205</sup> *Id.* ¶ 86 (recording that the N'djuka are descended from Africans brought to Suriname and enslaved who freed themselves and established autonomous communities); see also *Saramaka People v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007) (the Maroon people likewise descended from self-liberated enslaved Africans held entitled to collective property and the beneficiaries of positive State obligations).

<sup>206</sup> *Namibia*, *supra* note 158, ¶¶ 118, 133.

<sup>207</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 150–153 (July 9).

<sup>208</sup> See *Namibia*, *supra* note 158, ¶¶ 117–18, 133; *Wall*, *supra* note 207, ¶¶ 150–53.

<sup>209</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 8 ('guarantees of non-repetition and changes to laws, programmes and services to address racism and systemic discrimination').

<sup>210</sup> See section 4.2.1(a) *supra*.

<sup>211</sup> See section 4.2.1(a) *supra*; cf. CARICOM Ten Point Plan, *supra* note 30 (point ten, calling for debt cancellation).

<sup>212</sup> ARSIWA, *supra* note 20, art. 37(2); Basic Principles, *supra* note 68, princ. 22(b).

<sup>213</sup> See CERD, General Recommendation No. 34, *supra* note 186; ICERD, *supra* note 10, art. 2(1)(c) (requiring each State Party to 'take effective measures to review governmental, national and local policies').

<sup>214</sup> See sources cited *supra* note 43 (the 1825 ordinance, the loans contracted to service the indemnity, and President Macron's April 2025 acknowledgement and joint commission of historians); see also Hilary McD. Beckles, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (University Press of the West Indies 2013); *How Haiti Paid for Its Freedom – Twice Over*, UN NEWS (Apr. 2025), <https://news.un.org/en/story/2025/04/1162406> (recording that Haiti finally settled the resulting debt in 1947).

<sup>215</sup> Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1203–06 (2007).

Haitian indemnity, exacted under the threat of naval force, is a documented example.<sup>216</sup> That ground meets its own intertemporal difficulty, since the invalidity of agreements procured by coercion is a rule of the twentieth century, codified in Article 52 of the Vienna Convention on the Law of Treaties, which under its Article 4 applies only to treaties concluded after its entry into force.<sup>217</sup> The status of the principle against unjust enrichment in inter-state claims also remains uncertain.<sup>218</sup> Where the audit discloses only dissolved enrichment, or servicing that has long since ended, no duty of cancellation arises, and the claim passes to the structural obligations and to the measures that paragraph 8 places before states.<sup>219</sup> The compensation paid to slave-owners under the Slavery Abolition Act 1833, financed by borrowing of £20 million that HM Treasury records as fully repaid only in 2015, illustrates the second case, since the flows can be traced but the servicing has ended.<sup>220</sup> The audit therefore does not presuppose the nullity of any debt. It asks for the verification of present flows, consistently with the principles of transparency and good faith that the General Assembly has endorsed for sovereign debt processes, and it gives the responsible state a determinate means of discharging its obligation.<sup>221</sup>

#### (b) Guarantees of Non-Repetition

Guarantees of non-repetition are the legal consequence most closely suited to the third mode, since a wrong located in the maintenance of an exclusionary structure is not remedied until the structure is dismantled. Article 30(b) of the ARSIWA provides for such guarantees as a consequence of responsibility where circumstances so require, while the primary rules of international human rights law supply their content.<sup>222</sup> The final element of paragraph 8 asks for exactly this, in relation to the racialised regimes identified in paragraph 3.<sup>223</sup> The content of the demand is not new. It corresponds to the positive dimension of the prohibition of racial discrimination, and in particular to the duty under Article 2(1)(c) of ICERD to amend, rescind, or nullify laws and regulations which have the effect of creating or perpetuating racial discrimination.<sup>224</sup> This brings the analysis back to an observation made in section 1.1, that the Resolution asks for little that the objecting states have not already accepted. Every state that voted against the Resolution, and every abstaining state named in section 2.3, is a party to ICERD and has accepted the primary obligation on which structural non-repetition draws, subject, in the case of the United States, to a reservation limiting that obligation as it bears on private conduct.<sup>225</sup> The practice of international bodies is consistent with this reading, although it is thinner than is sometimes suggested. In *Moiwana*, the Inter-American Court ordered forward-looking legislative and administrative measures for a state's present failure to repair a situation produced by an atrocity beyond its temporal jurisdiction.<sup>226</sup> Germany's commitments to Namibia, though contested by representatives of the affected communities, show a former colonial power offering structural

<sup>216</sup> *How Haiti Paid for Its Freedom – Twice Over*, *supra* note 214 (describing the indemnity as accepted while Haiti was 'besieged by French warships').

<sup>217</sup> Vienna Convention on the Law of Treaties, *supra* note 98, arts. 4, 52.

<sup>218</sup> See Christina Binder & Christoph Schreuer, *Unjust Enrichment*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 9, 11 (last updated Aug. 2013) (observing that the case law 'does not demonstrate that there is a general "rule" against unjust enrichment'); cf. *Sea-Land Service, Inc. v. Iran*, Award No. 135-33-1, 6 Iran-U.S. Cl. Trib. Rep. 149, 168–69 (1984) (applying the principle in a claim by a private company against a state).

<sup>219</sup> G.A. Res. 80/250, *supra* note 6, op. ¶ 8.

<sup>220</sup> See Slavery Abolition Act 1833, *supra* note 125; Letter from HM Treasury, FOI2018/00186 (Jan. 31, 2018), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/680456/FOI2018-00186 - Slavery Abolition Act 1833 - pdf for disclosure log\\_003 .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/680456/FOI2018-00186_-_Slavery_Abolition_Act_1833_-_pdf_for_disclosure_log_003_.pdf) (stating that the money borrowed 'was therefore fully repaid in 2015'); cf. *This Is What We Know About the Government Loan to Pay Slave Owners Compensation After Slavery Was Abolished in 1833*, FULL FACT (July 2, 2020), <https://fullfact.org/economy/slavery-abolition-act-loan/> (noting that it is not known how much of the original loan was repaid in 2015).

<sup>221</sup> G.A. Res. 69/319, annex (Sept. 10, 2015) (Basic Principles on Sovereign Debt Restructuring Processes, naming transparency, good faith, and sustainability among the principles governing sovereign debt workouts), <https://docs.un.org/en/A/RES/69/319>.

<sup>222</sup> ARSIWA, *supra* note 20, art. 30(b) & commentary; Basic Principles, *supra* note 68, princ. 23 (guarantees of non-repetition, including institutional reform and the review and reform of laws contributing to or allowing gross violations).

<sup>223</sup> G.A. Res. 80/250, *supra* note 6, op. ¶¶ 3, 8.

<sup>224</sup> ICERD, *supra* note 10, art. 2(1)(c); CERD, General Recommendation No. 34, *supra* note 186.

<sup>225</sup> See Status of Ratification: International Convention on the Elimination of All Forms of Racial Discrimination, U.N. TREATY COLLECTION, <https://treaties.un.org>. The United States ratified subject to reservations, including one limiting its obligations under article 2(1)(c) and (d) as they bear on private conduct. See *id.* ch. IV.2, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg\\_no=IV-2&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-2&chapter=4).

<sup>226</sup> *Moiwana*, *supra* note 174, ¶¶ 209–15 (ordering legislative and administrative measures to secure the community's property rights in its traditional territories, including a mechanism for their delimitation, demarcation and titling, together with guarantees of safety for returning members and a community development fund).

measures in response to a wrong that it declined to treat as giving rise to a legal obligation of reparation.<sup>227</sup> What the Resolution adds is therefore not a new obligation. It is a characterisation that connects existing obligations to the history that produced the structures those obligations now require states to dismantle.

## 5 Conclusion

This article has shown that Resolution 80/250 is more than a symbolic gesture, although its legal significance lies in a narrower place than its rhetoric suggests. The Resolution poses a question that the law of state responsibility is equipped to answer, namely whether any part of the situation the trade produced is maintained by states today in breach of obligations that bind them now. The states that opposed or abstained from the Resolution did not, for the most part, contest the gravity of the trade. They relied instead on the intertemporal principle, treating it as a firewall that places the trade, and everything it produced, beyond the reach of the law of state responsibility. It is respectfully submitted that this objection, referred to here as the closure thesis, does not withstand scrutiny. The thesis reads Max Huber's formulation in the *Island of Palmas* arbitration as a rule of temporal closure and omits the second limb, which subjects the continued existence of a legal situation to the evolution of the law. It also treats Article 13 of the ARSIWA as though it were the only rule on the time of a breach and so overlooks the rules on continuing and composite breaches in Articles 14(2) and 15. The historical record adds a further difficulty, since for much of the nineteenth century, the trade was prohibited by treaties binding most of the objecting states. That record narrows the period to which the closure thesis can apply, but it does not show that the trade was unlawful from its inception. Even if the trade is assumed to have been lawful throughout, the principle that a state is judged by the law of its time says nothing about conduct that is still occurring.

On that basis, this article has proposed the doctrine of *living harm*. The doctrine does not carry the illegality of the trade into the present. It accepts the core of the intertemporal principle and locates the wrong exclusively in present conduct. A situation originating in the trade is a continuing wrongful act only where three conditions are met, namely a determinate obligation binding the state now, present conduct of that state, by act or omission, which it controls and could bring to an end, and a present failure of that conduct to conform to the obligation. Three modes satisfy those conditions, namely persisting illicit possession, composite wrong, and inherited structural injury. The same conditions confine the doctrine. The doctrine does not reach diffuse enrichment, and it does not reach structures that now lie within the exclusive control of other states. It therefore reaches less than the language of the Resolution might suggest, and that restraint is what allows it to fit within the existing law.

The doctrine yields five obligations, each tied to the mode that generates it. The first mode generates the restitution of cultural objects and human remains, together with access to the archives of the trade. The second generates the non-discriminatory administration of nationality and civil status in the states where descendants now live. The third generates an audit of sovereign debt traceable to the trade and guarantees of non-repetition. Not all of them are reparation in the strict sense. Some, such as the non-discriminatory administration of nationality and civil status, require compliance with a primary rule. The others correspond to recognised legal consequences of an internationally wrongful act, namely cessation and guarantees of non-repetition, on the one hand, and reparation in the forms of restitution and satisfaction, on the other. Restitution rests on firmer ground where title is founded on enslavement than for objects taken in the course of colonial appropriation, where it depends on a practice that is growing but not yet settled. The audit is owed as satisfaction for an established structural wrong and, before then, as an incident of the primary obligation to dismantle the structure; it leads to cessation only where it discloses traceable obligations that are still being serviced.

All in all, this article does not ask international law to rewrite its history. It shows that the existing rules of state responsibility, applied as they stand, do not require every legacy of enslavement to be treated as legally inert. Thus, the voyages across the Atlantic ended, and the law of the time governs them. However, the retention of what was taken, the discriminatory administration of those whom the trade displaced, and the maintenance of structures that states still control are present conduct, and present law governs them. Where such conduct fails an obligation that binds the state now, the harm is living and the obligation to end it is present.

<sup>227</sup> Joint Declaration, Germany–Namibia, *supra* note 44 (the EUR 1.1 billion development commitment); Moulson, *supra* note 45 (reporting the German government's position that 'legal claims to compensation cannot be derived from this').