

THE TRANS-ATLANTIC SLAVE TRADE'S AFRICAN ELEPHANT IN THE
INTERNATIONAL COURTROOM: WEST AFRICA'S DEBT OF
REPARATIONS TO THE DESCENDANTS OF THE BLACK DIASPORA

Patricia M. Muhammad^{1*}

ABSTRACT

Legal scholarship concerning the crimes against humanity and exploited forced labor that characterized the Trans-Atlantic Slave trade has consistently focused on Western nation states²—in particular, the United States' obligation to pay restitution to Blacks of the African Diaspora. However, one of the most implacable voids regarding this discourse is the role that continental Africans in their governmental capacity played in ensuring that the Trans-Atlantic Slave trade flourished as an economically viable institution. This article will explore Central and West Africans' prominent legal function in the trade of human commodities. This article will also examine maritime law in the context of the West African coast and negotiations between African monarchs and slavers who represented both private financial interests, as well as those of several European Crowns from which they both mutually benefited. This paper will also demonstrate the proximate nexus of Africans' participation in the early stages of the Trans-Atlantic Slave trade and the harm Blacks of the Diaspora endured such as the atrocities of the Middle Passage which extended the crimes against humanity upon the shores of the Americas and the West Indies. This article concludes that African nations owe reparations to Black Americans of the African Diaspora under international law.

¹ Copyright © Patricia M. Muhammad, University of Baltimore School of Law, B.S., Morgan State University; author of *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. UNIV. INT'L L. REV. 883 (2004); *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations*,³ COLUM. J. OF RACE AND L. 147 (2013); *The Trans-Atlantic Slave Trade: European Slaving Corporations, the Papacy and the Issue of Reparations*, 26 WILLAMETTE J. OF INT'L L. AND DISP. RES. 173 (2019); *The U.S. Reparations Debate: Where Do We Go From Here*, N.Y.U. REV. OF L. & SOC. CHANGE—THE HARBINGER (2020).

² See generally Alfred L. Brophy, *Reconsidering Reparations*, 81 INDIANA L. J. 811 (year); see also generally Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are In Order for African Americans*, 20 HARV. BLACKLETTER L. J. 49 (2004); see also generally Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L. J. 81 (2004).

TABLE OF CONTENTS

I.	Introduction.....	82
II.	Africa's Participation in the Slave Trade	87
A.	Early Structure of the Trans-Atlantic Slave Trade	88
1.	Kidnappings and Prisoners of War	89
2.	Negotiations Between European Monarchs and West Africans	90
3.	African Racialization (through Critical Race Theory).....	92
4.	Expansion of the Trans-Atlantic Slave Trade	94
B.	Establishment and Succession of the Regimento	99
1.	Portugal and West African Powers.....	99
III.	Restitution (Reparations) and Participant African Nation States	103
A.	Legal Arguments in Support of Restitution.....	103
1.	U.N. Conventions.....	103
2.	Legal Strategies.....	111
B.	Types of Restitution	115
1.	Apologies from Nation States	115
2.	Financial Compensation.....	116
3.	Reparations	117
C.	Legal Arguments Opposing Restitution	118
1.	Sovereign Immunity.....	118
2.	Statute of Limitations.....	121
3.	Repatriation and Freedmen	121
IV.	Conclusion	122

I. INTRODUCTION

The Trans-Atlantic Slave trade has garnered extensive academic discourse in the areas of history, sociology, and law.³ For decades, scholar-activists and other advocates for reparations to Blacks of the African Diaspora have found support for their research and proposals in economics and the law of nations. Publicists, such as philosophers and early historians, established that the crimes against humanity that occurred throughout the tenure of this

³ See generally F. Michael Higginbotham, *A Dream Revived: The Rise of the Black Reparations Movement*, 58 N.Y.U ANN. SURV. OF AM. L. 447 (2003); see also Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. UNIV. INT'L L. REV. 883 (2004); see also generally Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations*, 147 COLUM. J. OF RACE & L. 147 (2013).

international institution violated public international law. Their economic analyses discuss the vast financial interests that both African and European governments had to consider to ensure that the slave trade was as profitable as their non-human wares, such as textiles and metals. Thus rendering these countries liable for monetary compensation to Blacks of the Diaspora.

Historians have steered the reparations debate toward European nation states for their facilitation, profiteering and leading the helm of crimes against enslaved Africans and their Black descendants. However, this legal and historical discussion has yet to adequately address the role of African kingdoms, specifically tribes and territories in the historic beginnings of the Trans-Atlantic Slave trade under the guise of public international laws. Many blacks of the Diaspora ancestry can be attributed to both Africans and Europeans. The likelihood of both functioning as pivotal actors within the slave trade presents a peculiar dynamic for their pursuit of reparations for the slave trade and its lingering legacies. Whether historians, scholars and grassroots activists' omissions are intentional due to cultural embarrassment of this probability or are due to political implications which may influence the reparations debate, is not clear.

This article will shift the scholarly paradigm concerning reparations, as well as illuminate Africans' intricate function in organizing and receiving financial efficacies from the slave trade. The Trans-Saharan slave trade marked a significant period in North and West African histories pre-sixteenth century.⁴ African slavery had already existed in one form or another,⁵ and trading in slaves had cultural and geographical implications in both North and West Africa.⁶ Religion and economics were also important factors in the

⁴ See Nathan Nunn, *The Long-Term Effects of Africa's Slave Trades*, 123 HARV. Q. J. OF ECON. 139, 141 (2008) ("Between 1400 and 1900, the African continent experienced four simultaneous slave trades. The largest and most well-known is the trans-Atlantic slave trade where, beginning in the fifteenth century, slaves were shipped from West Africa, West-Central Africa, and Eastern Africa to the European colonies in the New World. The three other slave trades—the trans-Saharan, Red Sea, and Indian Ocean slave trades—were much older and pre-dated the trans-Atlantic slave trade.").

⁵ See MUNYARADZI MAWERE, *THEORISING DEVELOPMENT IN AFRICA: TOWARDS BUILDING AN AFRICAN FRAMEWORK OF DEVELOPMENT* 50 (2017) ("During the trans-Saharan slave trade, slaves were taken from south of the Saharan desert to Northern Africa. In the Red Sea slave trade, slaves were taken from inland of the Red Sea and shipped to the Middle East and India. In the Indian Ocean slave trade, slaves were taken from Eastern Africa and shipped either to the Middle East and India or to plantation islands in the Indian Ocean.") (quoting Nunn, *supra* note 4, at 141-42.).

⁶ See JANINA M. KONCZACKI & ZBIGNIEW A. KONCZACKI, *AN ECONOMIC HISTORY OF TROPICAL AFRICA: THE PRE-COLONIAL PERIOD 171* (2018) ("There seems in fact to be a close correlation in West African between economic development (and political development, because indigenous commercial activity was largely king- or state-directed) and the growth of the institution of slavery as here defined. This growth was already well advanced before European sea trade with West Africa began in the fifteenth century, and certainly before the main commercial demand of Europeans on West Africa was one for slaves—which was not really

development of African slave trading. Additionally, Africans and African Arabs had already established slave trading prior to European explorations and expansion into North African and the western interiors along its seaboard.⁷ This article will examine the role that North Africans and primarily West African Catholic converts had during the inception of the Trans-Atlantic Slave trade. Both adherents to Christianity and Islam practiced slavery, whether as a cultural norm or based on interpretation of religious doctrine. However, this article will provide insight as to how race and classism, coupled with religious distinction, factored in and influenced North and West Africans' inclination to participate and help generate the infrastructure of the Trans-Atlantic Slave trade from the sixteenth century onward.

In order for this international market to garner financial success, North and West Africans would have to stabilize their source of African slaves. Amongst the Africans belies a tradition of enslaving captors of war⁸ and kidnapping other Africans rendered as immediate servants of the victors. However, this notion was not only practiced by Africans, but was also an accepted tradition among medieval Europeans. As the Trans-Atlantic Slave trade began to formalize, Europeans also initially kidnapped West Africans to become a staple of the slave trade and to ensure a steady flow of revenue for its European participants.⁹ Between the two, this paper will discuss how formal negotiations became the norm of international customary practice that would support the *Asiento*,¹⁰ as well as less formal slave trading agreements and licenses.

until the middle or the second half of the seventeenth century.") (quoting J. D. Fage, *Slavery and the Slave Trade in the Context of West African History*, 10 J. OF AFR. HIST. 393, 397 (1969)).

⁷ See *Legacy of the Trans-Atlantic Slave Trade: Hearing on H.R. 40 Before the Subcomm. on the Const., C.R., and C.L. of the H.R. Comm. on the Judiciary*, 110th Cong. 84 [hereinafter *Hearing*] (statement of Stephan Thernstrom, Winthrop Professor of History, Harvard University) ("No one doubts 'the fundamental injustice, cruelty, brutality, and inhumanity' of slavery in the United States and everywhere else it existed—including, let us note, Africa, where slavery was widespread long before Europeans first reached its shores. Africans, it should be underscored, played a vital role in both the transatlantic and the equally large Mediterranean slave trades, which could not have existed without their active engagement.").

⁸ See Patricia Muhammad, *The Trans-Atlantic Slave Trade: European Slaving Corporations, the Papacy and the Issue of Reparations*, 26 WILLAMETTE J. OF INT'L L. AND DISP. RES. 171 (2019); see also, e.g., PAUL LOVEJOY, *IDENTITY IN THE SHADOW OF SLAVERY* 5 (Wellington ed., 2000).

⁹ See generally France Nkokomane Ntloedibe, *Revisiting Modes Of Enslavement: The Role Of Raiding, Kidnapping and Wars in the European Slave Trade*, 16 AFR. IDENTITIES 349 (2018).

¹⁰ See Paul Lokken, *From the "Kingdoms of Angola" to Santiago de Guatemala: The Portuguese Asientos and Spanish Central America, 1595-1640*, 93 HISP. AM. HIST. REV. 171 (2013) ("The evidentiary basis for Silva Solis's estimates is uncertain at best, but his figures seem congruent with the likely impact of the preceding wave of involuntary migration from Africa to Spanish America during the era of the Portuguese asientos de esclavos (1595-1640)...").

Undoubtedly, the slave trade provided economic benefits to European monarchs and privateers. However, economics were not unilateral; just as European nation states benefited financially, so did African monarchs and merchants.¹¹ Africans were involved in negotiating the sale and price of African slaves to be sold to European merchants,¹² and later codified certain guidelines and policies concerning the slave trade in a series of agreements between the Portuguese and various rulers, and then later with the Dutch. Part II will elucidate how African parties and their European counterparts organized these quasi-legal instruments into a series of documents known as *Regimentos*,¹³ just as European monarchs negotiated peace and the slave trade monopoly amongst themselves by incorporating the terms of the *Asiento* into international treaties. As trading continued between African monarchs and their complements, contact between European slavers and merchants became more frequent, and increasing the former's interest in European goods. In order for African monarchs to maintain their elite privilege among the plebeians that they ruled,¹⁴ it was necessary for the African tribal-elite to possess goods that were unknown to other Africans, or that were simply branded as European. This garnered the curiosity of neighboring hostile tribes and monarchs and would be a primary motivator for the raid and capture of other Africans for sale to the European slave market. This section will also explore the expansion of the Trans-Atlantic Slave trade with regards to imported goods and exported African slaves to European traders, which

¹¹ See, e.g., Scott Key, *The Church Confronts Slavery, Race and Gender*, 2 PAC. J. 10 (2007) ("Wilberforce faced an uphill struggle. Powerful West Indies plantation owners, African merchants, ship owners and captains, and the British Crown were opposed, fearing the end of slavery might lead to a national recession and personal financial ruin.").

¹² See BARBARA KRAUTHAMER & CHAD WILLIAMS, MAJOR PROBLEMS IN AFRICAN AMERICAN HISTORY 30 (Cengage Learning 2d ed. 2017) ("The first and second documents are both from the eighteenth century describe the slave trade during its peak years, after it had become a more systematic mode for the purchase of millions of laborers for mines and plantations in the Americas. Both accounts describe negotiations between West African rulers and European traders in the business of purchasing and transporting captives from West.").

¹³ See MARCELLO CAETANO, REGIMENTO DOS OFICIAIS DAS CIDADES, VILAS E LUGARES DESTES REINOS: EDIÇÃO FACSIMILADA DO TEXTO IMPRESSO POR VALENTIM FERNANDES EM 1504 E NESTE ANO DE 1955 REIMPRESSO PELA FUNDAÇÃO DA CASA DE BRAGANÇA (1955); see generally, e.g., José C. Curto, *Alcohol Under the Context of the Atlantic Slave Trade*, 201 CAHIERS D'ETUDES AFRICAINES 51 (2011).

¹⁴ José C. Curto, *Alcohol Under the Context of the Atlantic Slave Trade*, 201 CAHIERS D'ETUDES AFRICAINES 51 (2011).

¹⁵ See Nunn, *supra* note 4, at 144 ("The slave trades also contributed to political instability by causing the corruption of previously established legal structures. In many cases, it became common to obtain slaves by falsely accusing others of witchcraft or other crimes."). Klein also writes that "communities began enslaving their own. Judicial penalties that formerly had taken the form of beatings, payment of compensation or exile, for example, were now converted to enslavement." *Id.*

subsidized their respective commercial interest to the detriment of enslaved Africans and their multi-heritage descendants.

Financial interests, the opening of territorial borders, and the increasing international relationships between African monarchs and European autocracies contributed to the European degradation, slaughter, and torture of Africans. These relationships rendered Africans to slave status with or without justification,¹⁵ to be traded as human commodities deemed as *piezas de raza* or simply *negroes*. Both Europeans and Africans are responsible for the crimes against humanity perpetrated against African slaves as well as Black descendants of multi-racial heritage, which directly resulted from the establishment and proliferation of the Trans-Atlantic Slave trade. It is therefore imperative that applicable African nation states are held just as accountable for reparations to Blacks of the Diaspora as their European counterparts. In order to hold these states accountable for reparations, Part III of this article will briefly examine possible legal arguments under international law in which Black descendants may be awarded restitution. This paper will examine various United Nations (hereinafter “U.N.”) Conventions, as well as the law of the high seas and other legal principles in order to substantiate legal claims that Blacks of the Diaspora may assert against participant African nation states. Further, this article will detail the types of restitution which may be rewarded as an introductory measure to compensate for the atrocities committed as a result of the Trans-Atlantic Slave trade.

This section will also briefly discuss general legal arguments that oppose African nations’ issuance of restitution to Blacks of the Diaspora. These arguments include procedural legal defenses, such as sovereign immunity and the issue of statute of limitations. Regardless of these legal obstacles, restitution is a reconciliatory measure which can be used to improve relations between Blacks of the Diaspora who continue to suffer from the vestiges of the Trans-Atlantic Slave trade, and those African nations which propagated and reaped profits¹⁶ to their detriment. Part IV clarifies the obligation for reparation advocates to provide a cohesive legal argument for restitution on an international platform based on justice and equity. Reparationists are thus required to seek restitution from historically documented participants, regardless of where this legal journey may lead. African nations are not exempt from the liability for the suffering, loss of culture, wages, indignities and human rights borne by Blacks of the Diaspora.

¹⁶ See LUCIANO CORDIERO, AFRICAN COMMITTEE OF THE LISBON GEOGRAPHICAL SOCIETY, PORTUGAL AND THE CONGO: A STATEMENT 7 (1883) (“But Angola not only enjoys many blessings of civilization, it is a progressive country too. True it is that in former times the slave trade was a source of much wealth to individuals and laid the foundation of many a colossal fortune (just as it did at Liverpool), and that since its suppression the colony has passed through a serious crisis.”).

Although Europeans were the direct inflictors of such pain, degradation, sorrow, and disenfranchisement on the shores of the West, African nations were the conspirators, accomplices that aided European slavers, merchants, corporations and monarchs, and provided a consistent framework for such atrocities to occur traversing time, culture and geography.¹⁷ This article concludes that African nations are therefore similarly accountable for the slave trade's crimes against humanity and its legacy as their European compliments, and thus they owe the debt of restitution to descendant Blacks dispersed throughout the Western world.

II. AFRICA'S PARTICIPATION IN THE SLAVE TRADE

As mentioned, Africans, Afro-Arabs (North Africans) and Arabs-Arabiya had long established slave trading amongst themselves and their landlocked neighbors prior to European contact.¹⁸ As Afro-Arabs expanded their trade, they also sought allies against encroaching Arabs to the north and east. Inland water arteries enabled North and West Africans to engage in and negotiate inter-nation state commerce for goods as well as slaves since the fifteenth century. Although historians concentrate on the natural barriers which prevented African to European contact, primarily geography, European advancement of sea faring vessels remedied this trade barrier. During this time period, European explorers were to follow their African trendsetters in trade and use these estuaries to trade with both inland West Africans and their Afro-Arab neighbors to the north for African slaves,¹⁹ precious metals, and other

¹⁷ See, e.g., MARINUS NIJHOFF, *THE LAW AND SLAVERY: PROHIBITING HUMAN EXPLOITATION* 43 (2015) ("In contrast to common perceptions that Europeans raided the African coast to gain slaves, traders in short order tapped into a market which already existed. However, these European traders facilitated the expansion of what would become an industrial scale slave trade not only by creating an ever-growing demand, but also by supporting the commercial and political ambitions of selected local African elite. These ambitions—which, for instance, would lead to the creation of the Ashanti and Dahomey Kingdoms in West Africa—transpired through warfare which, while producing territorial gains, also created as a by-product, the main source of slaves for the Atlantic trade.") (citing to JOHN THORNTON, *AFRICA AND AFRICANS AND THE MAKING OF THE ATLANTIC WORLD: 1400-1800* 125 (1999)).

¹⁸ *Hearing, supra* note 7.

¹⁹ See MAWERE, *supra* note 5; see also HERBERT S. KLEIN, *THE ATLANTIC SLAVE TRADE* 9 (Cambridge Univ. Press 2d ed. 2010) ("The arrival of the Portuguese explorers and traders on the sub-Saharan African coast in the early 1400s would ultimately represent a new development in the history of the slave trade in Africa in terms of the intensity of its development, the sources of its slaves, and the uses to which these slaves would be put. But initially there was little to distinguish the Portuguese traders from the Muslim traders of North Africa and the sub-Saharan regions. Portuguese interest was primarily directed toward controlling the North African Saharan routes by opening up a route from the sea. Their prime interest was gold, with slaves, pepper, ivory, and other products as only secondary concerns. Even when they began shipping slaves in 1444, they were mainly sent to Europe to serve as domestic servants, Africans had already arrived at these destinations via the overland Muslim-controlled caravan routes, and thus the new trade was primarily an extension of the older patterns.").

raw materials and manufactured goods. European-Christian expansion of trade and colonization were the driving forces behind the European monarchs' desire to extend their empires as well as their wealth through the acquisition of gold. The African west coast was the prime territory to exploit in order to achieve this goal.

During this period, West African societies initially became involuntarily acquainted with the seafaring and some military might of private European merchants. Africans had their own style of vessels and weaponry which they used to stave off aggressive and ambitious European explorers who sought to seize West Africa's natural resources. In order to stabilize a source of trade in goods, Europeans accepted that they had to initiate and cultivate diplomatic relations in order to create international trade agreements between the Portuguese monarchs and African rulers. A form of international custom would escalate the trading of African slaves beyond the Trans-Saharan region and culminate into the Trans-Atlantic Slave trade.

A. *Early Structure of the Trans-Atlantic Slave Trade*

Historians have well-documented that the beginnings of the Trans-Atlantic Slave trade was not a structured enterprise. With merchants and monarchs competing for the slave trading *Asiento* from the sixteenth century, Europeans' raid of African villages and pirating disrupted the stability of the slave trade market. Although not all raids on the African western seaboard were successful, such activities nevertheless intensified international trade relation.²⁰ Therefore, in order to mitigate harm or casualties for both Europeans, as well as Africans, under the Portuguese flag, the former concluded that intermittent trade in goods and African slaves could only be properly consummated by appealing to and appeasing African rulers.²¹ Thus, the African elite likely played a pivotal and integral role in establishing the Trans-Atlantic Slave trade²² by supplying African slaves of their own territories,²³ and from neighboring kingdoms, to fulfill European demand.

²⁰ See JOHN THORNTON, *AFRICA AND AFRICANS IN THE MAKING OF THE ATLANTIC WORLD: 1400-1800* 38-9 (Cambridge Univ. Press 1998).

²¹ See CORDIERO, *supra* note 16. *But see generally* France Nkokomane Ntloedibe, *supra* note 9.

²² See, e.g., ELISABETH HEIJMANS, *THE AGENCY OF EMPIRE: CONNECTIONS AND STRATEGIES IN FRENCH OVERSEAS EXPANSION (1686-1749)* 84-5 (2019).

²³ FRANK W. THACKERAY & JOHN E. FINDLING, *EVENTS THAT FORMED THE MODERN WORLD: FROM THE EUROPEAN RENAISSANCE THROUGH THE WAR ON TERROR* 150 (2012) ("To have a large, cheap labor force, the European colonists initiated the extensive use of African slaves on the Latin American plantations. Prince Henry the Navigator of Portugal had started the involvement of Europe in the modern slave trade, but the Spaniards subsequently expanded the trade to meet labor needs in the New World. The Native Americans had been decimated by European diseases, whereas the Africans proved more immune. Eventually Europeans purchased as many as 10 million Africans from local chieftains. Approximately 10 percent of

1. Kidnappings and Prisoners of War

Prior to Europeans' venture to the western shores of Africa, Africans had a long-standing tradition of raiding their African neighbors as a source of slaves.²⁴ The ruling classes' belief for the need to expand and exert their power was just as prevalent among African tribes and kingdoms in the fifteenth and sixteenth centuries²⁵ as it was to their European neighbors to the far north. However, Africans who captured Africans during raids, or as spoils of battles,²⁶ did have a form of slavery notably different from what would

the Africans died during the voyage to the Americas or soon after their arrival. The slave traders then auctioned off the survivors with approximately 70 percent of the African slaves ending up on Brazilian plantations.”)

²⁴ See KLEIN, *supra* note 19, at 68-69 (“The volume of slaves leaving the Congo and Angolan coasts was so steady that it had to have originated with both political as well as military initiatives. Prisoners taken in warfare, villagers seized in low-level raids in nonfortified zones, and persons condemned by their respective communities for economic or religious reasons all went to supply such a steady movement of slaves. In the eighteenth century (to 1810), these two regions sent some 2.5 million slaves into the Atlantic trade, of which 1.3 million were carried away by the Portuguese, and another 1.3 million were taken after 1811. These 3.8 million slaves obtained between 1700 and the 1860s represented 40 percent of the total estimated Africans shipped in the Atlantic slave trade from East and West Africa over the entire course of its existence, making the Congo and Angola unquestionably the single most important slave-producing area in Africa from the earliest days until the end of the Atlantic slave trade.”); see also Nunn, *supra* note 4, at 142 (“The most common manner in which slaves were taken was through villages or states raiding one another. Where groups of villages had previously developed into larger-scale village federations, relations between the villages tended to turn hostile. As a result, ties between villages were weakened, which in turn impeded the formation of larger communities and broader ethnic identities.”); Olatunji Ojo, *The Organization of the Atlantic Slave Trade in Yorubaland, ca.1777 to ca.1856*, 41 INT’L J. OF AFR. HIST. STUD. 82 (2008) (“Lagos did not limit its involvement to the importation of slaves—it also raided for slaves. From the 1790s to the 1830s, sources refer to attacks on Badagry and towns that provided sanctuary for factions in the Lagos monarchical conflicts. Prisoners from such attacks were sold into slavery.”).

²⁵ See SEAN STILWELL, SLAVERY AND SLAVING IN AFRICAN HISTORY 51 (2014) (“Predatory, slaving states became more common in West Africa between 1600 and 1800. Oyo, Dahomey, and Asante, for example, emerged during this period. These states were deeply involved in the transatlantic slave trade and became increasingly militarized. Their rulers acquired slaves by launching regular wars, raids, and by trading for them. They then used the generated wealth to centralize executive and state power. They became dependent on the slave trade politically and economically...”).

²⁶ See, e.g., JEFFREY A. FORTIN & MARK MEUWESE, ATLANTIC BIOGRAPHIES: INDIVIDUALS AND PEOPLES IN THE ATLANTIC WORLD SERIES: THE ATLANTIC WORLD 208 (2013) (“Benguela became one of the major slave ports of the transatlantic slave trade. The presence of foreign traders and their slave ships intown accelerated violence. African rulers, coastal traders, and Portuguese colonial agents became deeply involved in warfare that could enslaved people to feed the Atlantic demand.” [sic]); see also Nunn, *supra* note 4, at 143 (“The most dramatic example may be the Kongo kingdom of West-Central Africa. As early as 1514, the kidnapping of local Kongo citizens for sale to the Portuguese had become rampant, threatening social order and the King’s authority.”); Ojo, *supra* note 24, at 82 (“Lagos did not limit its involvement to

become the chattel slavery of the Trans-Atlantic Slave trade. Yet, the basic principles of slavery—depriving another of their liberty for unpaid, forced continued service and labor remained characteristic of both. The latter being more horrendous and arduous than its predecessor.

European sailors and merchants would also kidnap²⁷ Africans from the west inland to enslave them in perpetuity, while African members of the upper-class stratum became all too willing trade partners with such merchants beginning in the fifteenth and sixteenth centuries. There was a tri-fold purpose in establishing the Trans-Atlantic Slave trade: (1) Africans could eliminate Africans of rival villages or kingdoms, and thus expand their territories²⁸ and natural resources; (2) the African elite would voluntarily expand their trade in goods and slaves,²⁹ thereby internationally solidifying their rule,³⁰ expansion, and wealth within their respective African lands;³¹ and (3) Europeans would economically benefit from a stable source of *negroes* to trade with other European merchants, slaving corporations, and monarchs under the *Asiento*. As a result of their partnerships with African rulers, Europeans would have obtained free forced labor to cultivate the Americas and the Indies in order to provide other goods, such as sugar and tobacco, thereby continuing the cycle of barter in African slaves and normalizing the Trans-Atlantic Slave trade under an economic guise.

2. Negotiations Between European Monarchs and West Africans

Initial negotiations for slaves and goods during the sixteenth century between European monarchs, primarily Portugal and the rulers of West Africa, were amenable.³² Portugal did not necessarily have heightened military forces or goods that West Africans could not produce themselves.³³ Thus, the intercontinental trade was not based on exclusive necessity. From

the importation of slaves—it also raided for slaves. From the 1790s to the 1830s, sources refer to attacks on Badagry and towns that provided sanctuary for factions in the Lagos monarchical conflicts. Prisoners from such attacks were sold into slavery. In April 1809 Lagos was involved in a war between Itsekiri and Benin. The war, it seems, began when Portuguese slavers relocated to Lagos rather than pay what they owed to Itsekiri traders.”).

²⁷ See Ntloedibe, *supra* note 9.

²⁸ See THACKERAY & FINDLING, *supra* note 23; see also KLEIN, *supra* note 19.

²⁹ See HUGH THOMAS, *THE SLAVE TRADE* 793 (Simon & Schuster eds., 1999) (“This large labour force would not have been available to the Europeans in the Americas without the cooperation of African kings, merchants, and noblemen. Those African leaders were, as a rule, neither bullied nor threatened into making these sales (for sales they were, even if the bills were settled in textiles, guns, brandy, cowrie shells, beads, horses, and so on)”).

³⁰ See, e.g., KLEIN, *supra* note 19.

³¹ See *id.*

³² See KRAUTHAMER & WILLIAMS, *supra* note 12.

³³ See THOMAS, *supra* note 29, at 375 (“Africans desired European goods: Wadström described how this ‘pillaging’ was ‘practised’ by individuals who, tempted by the merchandise brought by the Europeans lie in wait for one another.”).

the sixteenth to seventeenth centuries, the Portuguese and the rulers of the Congo memorialized a series of negotiations regarding the long-term barter in African slaves and goods. His began with the Congo's ruler Nzinga Nkumu (João), who converted to Catholicism to appease Portugal and thereby gain access to their goods and culture. Ecclesiastical and diplomatic relations ensured a regulated bi-lateral chattel slave trade at the expense of African subjects.

The terms of the international agreement provided that Nzinga would supply African slaves for export to Portuguese traders at a cost determined by their European buyers.³⁴ As Africans already had a steeped tradition of enslaving each other in West and Central Africa, the Congolese ruler agreed to provide African slaves sourced from neighboring territories through raids, war, and conquest, in order to fulfill the requirement contract for goods. According to some historians, however, with the passage of time and new rulers, Manuel of Portugal and Afonso I of the Congo provided a slave output that was initially insufficient to fulfill the increased demands of the Portuguese.³⁵

During this transition of royal power, Portuguese slavers who settled in the Congo took severe, unauthorized privileges of poaching Africans, which purportedly caused Afonso to seek an official declaration from King

³⁴ See, e.g., Asiento de Negros, Gr. Brit.-Spain, Mar. 26, 1713; see also EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES TO 1648 171 (Francis Gardiner Davenport ed., Carnegie Inst. of Wash. 4th ed., 1917) ("8. That whereas experience has shewn it to be very prejudicial to the interest of his Catholick Majesty, and his subjects, that it hath not had them, endured great hardships for want of having their lands and estates cultivated, from whence arose the necessity of using all imaginable ways of getting them; even though it were fraudulently) it is made an express condition of this contract, that the said assientists may import and vend said negroes in all the ports of the North Sea, and that of Buenos Ayres at their choice...And it is provided at the same time, that the negroes which are carried to the ports of the Windward coast Sancta Martha, Cumana, and Maracaybo, shall not be sold by the said assientists, for more than after the rate of three hundred pieces of eight each, and for as much less as is possible, to encourage the inhabitants of those places to buy them; but as to the other ports of New-Spain, its islands, and Terra-Firma, it shall be lawful for the said assientists to sell them at the best prices they shall be able to get...").

³⁵ See 27 JEFFREY A. FORTIN & MARK MEUWESE, ATLANTIC BIOGRAPHIES: INDIVIDUALS AND PEOPLES IN THE ATLANTIC WORLD (2013) ("Benguela became one of the major slave ports of the transatlantic slave trade. The presence of foreign traders and their slave ships intown accelerated violence. African rulers, coastal traders, and Portuguese colonial agents became deeply involved in warfare that could enslaved people to feed the Atlantic demand."). See also Nunn, *supra* note 4, at 14 ("The most dramatic example may be the Kongo kingdom of West-Central Africa. As early as 1514, the kidnapping of local Kongo citizens for sale to the Portuguese had become rampant, threatening social order and the King's authority."); Ojo, *supra* note 24, at 8 ("Lagos did not limit its involvement to the importation of slaves—it also raided for slaves. From the 1790s to the 1830s, sources refer to attacks on Badagry and towns that provided sanctuary for factions in the Lagos monarchical conflicts. Prisoners from such attacks were sold into slavery. In April 1809 Lagos was involved in a war between Itsekiri and Benin. The war, it seems, began when Portuguese slavers relocated to Lagos rather than pay what they owed to Itsekiri traders.").

Manuel.³⁶ Although ignored by several Portuguese slavers and merchants, the Portuguese Crown issued its first (slaving) *Regimento* in 1512, which granted Afonso of Congo official regulatory control of which African slaves were to be exported into the Trans-Atlantic Slave trade's international channels. Just as the *Asiento* became the official slave trading contract between European monarchs,³⁷ the *Regimento* issued by Portugal served a similar legally binding purpose between the Crown and certain African nations. Although Afonso of Congo and those that he chose to be the emissaries of the European royal ranks in the Congo greatly benefited, African commoners were enslaved regardless of being Catholic-Christian converts or general innocent members of the West African populace.

It is worth noting that the *Regimentos* were not solely trade agreements between Portugal and the Congo, but rather a series of rules and strictures for European, as well as African merchants and slavers, to adhere to in order to sustain a structured international trade in African slaves. The *Regimento* not only provided the legal obligations, just as any other treaty under international law, but it also provided a form of best business practices that would purportedly provide seamless links in the intercontinental chain in the barter of African slaves. Nevertheless, the Congolese and other African rulers and laymen stratified, facilitated, and aided the Portuguese Crown in obtaining African slaves,³⁸ regardless if they were of Congolese citizenry or alleged prisoners of wars enslaved as prized spoils to be exported across the Atlantic—never to see their homeland again.

3. African Racialization (through Critical Race Theory)

It is through a precarious lens that one must understand the socio-political climate of the African regions in which natives considered themselves distinct from one another. Modern iterations by laity based on an Orientalist presupposition that Africans “sold their own people” is inaccurate

³⁶ See THOMAS, *supra* note 29, at 109-11 (“Yet Portuguese demand, because of the insatiable desires of the settlers of São Tomé, and because some local Portuguese insisted on being paid their wages in slaves, still outran supply. After a while, Afonso was persuaded to abandon his royal monopoly and henceforth, as if he had been a European monarch, sought merely to tax the exports of slaves, not to control them. Other African peoples apart from the Congolese began to adapt to the new conditions of trade. Thus the Pangu a Lungu, a people who had seized a stretch of the north coast of the river Congo, were beginning to raid its south bank specifically to obtain slaves. By 1526, King Afonso was complaining that he slave dealers, whom, of course, he initially had encouraged were leaving his realm depopulated...”). *But see generally* Ntloedibe, *supra* note 9.

³⁷ See W.E.B. DUBOIS, THE NEGRO 91 (1915) (“The Pope’s Bull or Demarkation, 1493, debarred Spain from African possessions, and compelled her to contract with other nations for slaves. This contract was in the hands of the Portuguese in 1600; in 1640 the Dutch received it, and in 1701 the French.”).

³⁸ See STILWELL, *supra* note 25.

and exposes the lack of understanding many Westerners have of African tribes and culture. Africa is a continent which, before colonialism ushered the form of modern nation states, was already fragmented among tribes and chieftains. Within one region, Africans fought, pillaged, and captured other Africans.

It is within this context of racialization that some Africans had no hesitation in selling other Africans to European slavers and explorers; just as they sold and captured other Africans before the arrival of European slavers and explorers. Africans did not view each other as the same, and by not having had contact with white Europeans, they did not have any context of black versus white. Therefore, it was tribe against tribe, or African region against African region. This is akin to Irish and Italians viewing and maintaining separate ethnic and cultural identities, but in the broader sense they are all Europeans. Thus, African rulers who monopolized the barter in African slaves did not view the human merchandise as part of *their* people (tribe), or cultural affiliation. Using critical race theory, Africans who authorized and profited from the barter of other Africans based their justifications on linguistic, cultural, and social differences. The enslaved were the “others” to be disposed of in the same way that most Portuguese and Spanish explorers perceived any portion of the inhabitants of the entire continent of Africa. For some, it was regardless of the same ethnotype; a person, family, or tribe who was not under the same chieftain as another, would be considered as “other.” Thus, the domineering tribe justified the subjugation of neighboring Africans under the guise of a potential threat to its survival.

Further, as Africans were already in dispute with other Africans due to language, cultural, and regional differences, religion expanded the rift amongst them. As African rulers embraced European goods, their interest in the religion that Europeans practiced also increased. The Congo’s Afonso, who converted to Catholicism and encouraged missionary work among his people, worked with Portuguese slavers to continue to enslave an already divisive African region. He negotiated with middlemen to enslave not only Africans of other regions, but also those Africans who had not embraced the new religion. This helped to justify his position as Congo’s ruler and further ingratiated himself with the Portuguese Crown. After Kongo’s Afonso realized that the increased European demand for slaves was more significant than anticipated, he began to compromise his position as leader, negotiator, and as the foremost religious authority within his region. Some slavers circumvented the established custom of barter and continued to steal Africans from the Congo. Other slavers respected the region’s slave trading protocol. However, Afonso further compromised the security of the Congo by granting formal permission to the slavers to *also* capture and enslave their fellow Congolese.

4. Expansion of the Trans-Atlantic Slave Trade

As West and Central African rulers continued their international relations and financial partnerships with primarily the Portuguese and Spanish throughout the sixteenth and seventeenth centuries, these governmental actors reaped great profits. Although captured Africans were rendered as chattel slaves, nothing more than a semblance of any other tangible object viewed as inanimate goods by both European and Africans alike,³⁹ the Portuguese did not value captured Africans based on their innate humaneness. Rather, they valued captured Africans based on the estimated amount of labor and production they were to provide.

Due to West and Central Africans' continued admiration and covetousness of European goods out of vain consumption rather than necessity,⁴⁰ their barter of captured Africans inherently devalued their humanity with no bounds or acknowledgement of moral code or civilized law. It is this reckless disregard for human life and other barbarities that Europeans justified African enslavement. The Portuguese Crown, in particular, also rendered the same conclusion. In the early stages of the trade's development, under the guise of Catholicism and the Papacy reinforced similar beliefs through its creation and sponsorship of the coveted *Asiento* slave trading license.

However, the expansion of the Trans-Atlantic Slave trade through West African slaves as commodities arguably cannot be reduced primarily to one reason. As West African nations and territories were a different people culturally, they were also varied in social structures and religious beliefs.⁴¹

³⁹ See Nunn, *supra* note 4, at 14 ("Because slaves were legally defined as property, those engaged in the buying and selling of slaves had a strong incentive to correctly identify the birthplace or 'nation' of slaves"). Moreno Fraginals writes that "the slave trade was the business that involved the greatest amount of capital investment in the world during the eighteenth and nineteenth centuries. And a business of this size would never have kept up a classificatory scheme had it not been meaningful (in overall general terms, in keeping with reality) in designating in a very precise way the merchandise that was being traded." See *id.* at 190.

⁴⁰ See KLEIN, *supra* note 19.

⁴¹ See Ojo, *supra* note 24, at 79-80. ("If Dahomian policies made Lagos an attractive market, an even greater attraction was the unprecedented supply of slaves resulting from the near simultaneous outbreaks of warfare in the Central Sudan and Yorubaland. A religious war led by Usman dan Fodio broke out in 1804 after decades of intense social tensions in Hausaland. Over the next two decades the war spread throughout the Central Sudan, producing thousands of slaves annually. As the slaves were transported through Yorubaland to be sold on the Atlantic coast, conflicts erupted between Hausa slaves retained in Yorubaland and their owners. In 1817 the conflict developed into an open revolt, which in turn fueled existing political and socioeconomic tensions in the region. With the rise of Lagos, Yorubaland became intimately drawn into the Atlantic trade. Its proximity to the Yoruba interior increased the violence associated with slaving, creating an expanding slaving frontier in the interior. Slave trading and violence were mutually reinforcing. Slaving operations intensified regional interstate rivalries; warfare weakened civilian chiefs, boosted soldiering, and pitted soldiers against their monarchs.").

Consequently, different West African kingdoms, whether in the sixteenth, seventeenth, eighteenth, or the nineteenth centuries, had multiple motives in capturing their West African neighbors and providing Europeans with increased African slaves as exports. Thus, West and Central African participation in the international market is based on racial and religious intent, as well as economic gain.

a. Slavers, Goods, and Commodities

West African rulers and the Portuguese alike valued adult African male slaves the most, while women and children were not of high economic worth in their estimation⁴² for entry into the international slave market. Yet, the valuation of African slaves was not always determined by these factors and was distinct for slave purchasers who forced female slaves to birth additional slave labor to work the plantations. The Portuguese oft-times engaged in devaluing African slaves purchased on the western African seaboard in order to purchase the most slaves for the least amount. This subsequently inflated the African slaves' market value to maintain an economic stronghold that could not be achieved by mere possession of the Papal-endorsed *Asiento*. As African rulers and chiefs coordinated price negotiations, this devaluation supports the assertion that they were liable for violating anti-dumping principles based in international trade law, as well as for violating the most basic of human rights under codified modern standards of international law.

Although the Portuguese and Spanish Crowns were inclined to African hand-spun cloth for trade, these market participants preferred captured African neighbors and their kinfolk⁴³ as equivalent trade goods of Western and Central African kingdoms.⁴⁴ Africans themselves negotiated for

⁴² See THOMAS, *supra* note 29, at 40 ("Throughout the slave trade, women and children were less sought after than men in the prime of life. This was a contrast with the Arab trade in West African slaves across the Sahara, in which women were more important-as they were in some African coast slave markets (Benin in the sixteenth century, Senegambia in the late seventeenth), where they, because of their part in agriculture, as in bearing children, fetched a price double that of men.").

⁴³ See Nunn, *supra* note 4, at 14 ("A number of characteristics of Africa's slave trades make them distinct from previous slave trades. First, the total volume of slaves traded was unprecedented. During the trans-Atlantic slave trade alone, approximately 12 million slaves were exported from Africa. Another 6 million were exported in the other three slave trades. These figures do not include those who were killed during the raids or those who died on their journey to the coast."). The total effect of the slave trades, according to calculations by Patrick Manning, was that by 1850 Africa's population was only half of what it would have been had the slave trades not taken place. *See id.* at 171. Africa's slave trades were also unique because, unlike previous slave trades, individuals of the same or similar ethnicities enslaved one another. *See id.*

⁴⁴ See JAMES A. RAWLEY & STEPHEN D. BEHRENDT, *THE TRANSATLANTIC SLAVE TRADE: A HISTORY* 179 (2005).

European manufactured or processed metals, both precious and industrial, as adequate equivalents.⁴⁵ According to historians, the Trans-Atlantic Slave trade reached its economic apex in the late eighteenth century.⁴⁶ Regardless of the nuances in financial waning or trade activity, African rulers, merchants, slavers, and all others who engaged in slave raiding, kidnapping, transporting, capturing and selling of other Africans for delivery into the Trans-Atlantic Slave trade and in the facilitation thereof, gained financial benefit as a result of engaging in these human rights atrocities.

b. Revenue

Despite the co-existence and overlap of other inter-continental trades, the Trans-Atlantic Slave trade, from the sixteenth to nineteenth centuries, provided extensive profits, sources of manufactured goods, and human chattel for both West African and European participants. Yet, the most financial gain that European participants, monarchs, merchants, bankers, and slavers garnered can be readily estimated based on the terms of several European treaties which included the *Asiento*, slave licenses, as well as certain historical archives. Such sources include what fees European market participants tendered, such as import taxes and licensing fees, to slave trade monopolists. Yet, the same data is difficult to ascertain for their African counterparts due to the lack of historical preservation of records.⁴⁷ However, historians have extrapolated and delineated the volume and estimated value of African slaves which Europeans extracted from trading points on the West African seaboard during this time frame and have concluded that:

The available data suggests that in the 1680s, the current value of Africans export of slaves and commodities to the Atlantic World totaled £6.5 million. African imports are estimated at £1.7 million. In the course of the next ninety years, total exports in current values expanded to around £31.7 million for the 1780s. Imports increased even more dramatically to £18.5 million for that decade. By the 1820s,

⁴⁵ See generally Chris Evans & Göran Rydén, 'Voyage Iron': An Atlantic Slave Trade Currency, its European Origins, and West African Impact, 239 PAST & PRESENT 41 (2018); see also KLEIN, *supra* note 19, at 112.

⁴⁶ See David Eltis et al., *Slave Prices, the African Slave Trade, and Productivity in the Caribbean 1674-1807*, 58 ECON. HIST. REV. 673, 680 (2005) ("The slave trade meanwhile reached its all-time high point in the final years of the eighteenth century, with, on average, more than three times the number of slaves arriving in the Caribbean in the period 1780–1805 than in the last quarter of the seventeenth century. Rapid expansion of output in terms of both value and volume, when combined with rises in prices of inputs (in the form of slaves) relative to prices of outputs (in this case, sugar), are strongly suggestive of productivity improvements.").

⁴⁷ See, e.g., Ojo, *supra* note 24, at 77 ("One reason for this is that Yorubaland did not become a major slaving region until after 1790, when slaving operations were largely "illegal" and records were poorly kept.").

total exports had fallen back to £27.7 million and imports to £10.6.⁴⁸

The above-referenced economic data does not account for *which* African nation state or territory was responsible for what specific amount of African slave exports for any specific period; nor does it account for actual profits. Yet, one historian has provided detailed and recent estimates on the number of slaves embarked, specifically from Angola.⁴⁹ As other historians have calculated broad estimates of slaves obtained by various European slavers,⁵⁰ the Slave Trade voyages database⁵¹ provides a detailed, though not exhaustive⁵² estimated *volume* of African slaves that European and African merchants exported from distinct points of the West African seaboard from the seventeenth to the nineteenth centuries.⁵³ This data provides an economic glimpse as to the estimated revenue African monarchs may have generated as result of the Trans-Atlantic Slave trade. In addition, other historians have recently approximated the volume of African slaves imported from West Africa, with caution to accuracy, their ethnicity, and to the extent possible from which region the African slaves were extracted.⁵⁴

⁴⁸ See David Eltis & Lawrence C. Jennings, *Trade Between Western Africa and the Atlantic World in the Pre-Colonial Era*, 93 AM. HIST. REV. 936, 939-40 (1988).

⁴⁹ See Daniel B. Domingues da Silva, *The Atlantic Slave Trade from Angola: A Port-by-Port Estimate of Slaves Embarked, 1701–1867*, 46 INT'L J. AFR. HIST. STUD. 105 (2013).

⁵⁰ See, e.g., *id.* at 105-06; see also, e.g., Oja *supra* note 24, at 80.

⁵¹ See generally *The Trans-Atlantic Slave Trade Voyages Database*, EMORY U., <http://www.slavevoyages.org/tast/database/search.faces> (last visited Sep. 27, 2020); see also Domingues da Silva, *supra* note 50, at 105. The Voyages Database is a website that hosts the most complete database of slaving voyages available to the public.

⁵² See Lokken, *supra* note 10, at 173-74. At the time of writing this paper, meanwhile, the Trans-Atlantic Slave Trade Database records only two arrivals of slave ships to Central America between 1595 and 1640: one in 1613 to the Guatemalan port of Santo Tomás de Castilla and a second in 1640 simply to ‘Guatemala.’”

⁵³ See Domingues da Silva, *supra* note 50, at 105; see also Roger Anstey, *The Slave Trade of the Continental Powers, 1760-1810*, 30 ECON. HIST. REV. 259 (1977) (discussing historians' extrapolation of the volume of African slaves from the western seaboard for export to the Trans-Atlantic Slave trade through European participants including the Portuguese British, French and Danish). The database has information on 7,839 voyages that carried or attempted to carry slaves from West Central Africa and calculates the number of captives shipped between the eighteenth and nineteenth centuries at approximately 4,441,900 slaves. The methodology used to generate these estimates is available in print as well as in the website itself and it is well accepted within the academic community.”

⁵⁴ See Lokken, *supra* note 10, at 193-94. With what degree of precision can these West Central Africans be identified? It has often been observed that labels appearing in slave trade documentation should not be trusted to reveal much about an enslaved individual's ethnic identity beyond a port of departure or a general region of origin. In the particular case of West Central Africa, even the most precise labels may be of little more cultural significance than broader designations. Linda Heywood and John Thornton argue that the region's principles ‘share quite similar linguistic, social, cultural, and political forms, making for a much more

Although volume, race, and gender are relevant factors as to pricing and revenues for both Europeans and Africans, trade currency and valuation equalizing standards between Africans and Europeans, especially the Portuguese, are difficult to ascertain. The pricing and revenues depend upon which African nation traded with the Portuguese during the sixteenth and seventeenth centuries, as well as how European merchants, and traders in general, deflated or inflated the value of African slaves at the point of sale.⁵⁵ For example, certain African kingdoms valued beads as a form of currency in exchange for goods and captured Africans reduced to chattel slavery. Other African kingdoms accepted horses and European steel imports as sufficient consideration in fulfillment of trade agreements. Thus, Europeans who placed a higher value on their particular goods likely negotiated reduced prices of African slaves while maintaining a high valuation of their imports. Regardless of the medium of exchange, there is no adequate, widespread, or known preservation of African (i.e., the Congo, Luanda, Ntamba, Ndongo, Angola, etc.) records readily accessible. Thus, it is difficult to properly deduce the monetary extent of African profiteering by the prices negotiated at the point of sale in the barter of African slaves⁵⁶ with European merchants and slaves from the early establishment of the Trans-Atlantic Slave trade in the sixteenth century.⁵⁷

Although it would be helpful, it is not necessary to extract data about the specific financial gains of West African rulers and monarchs that resulted from their intricate, commercial involvement at the geographical inception points and embarkment ports of the Trans-Atlantic Slave trade. This is because this paper does not argue for a *quid quo pro* valuation for monetary restitution for the vestiges of the slave trade to the harmed descendants of the African Diaspora. To do so would not only garner unduly burdensome economic calculations, but would also put restorative justice advocates in the same position as African and European kingdoms, merchants, slavers, and bankers because they too placed a financial estimate on the value of a Black person's life. It is merely necessary within the bounds of international custom to provide sufficient evidence that African nation states participated, generated revenue, and furthered the crimes against humanity against

uniform set of beliefs and practices than any of the other regions of Atlantic Africa'; they also emphasize West Central Africans' long engagement with Iberian Catholic practices.

⁵⁵ See, e.g., KLEIN, *supra* note 19, at 111-12.

⁵⁶ *But cf.* e.g., Eltis & Jennings, *supra* note 48; see also *id.* (the sample analyzed here is clearly for slaves with the lowest life expectancy of all); *id.* at 1209-13 (there is no extensive or reliable numerical evidence on deaths among Africans in the year after disembarkation and sale, but African-born slaves in nineteenth-century Cuba were valued about six percent below their Creole counterparts after standardizing for age, gender, and occupation); *id.* (historians calculate the estimated prices of slaves once in the Americas but provide no indication of value of African slaves at the point of sale and embarkment on the African western seaboard to European merchants and slavers).

⁵⁷ See CORDEIRO, *supra* note 16.

Africans, in particular, by selling them to European market participants. This alone provides a reason for Black descendants of the Diaspora to validly seek restitution for such atrocities in an international forum.

B. Establishment and Succession of the Regimento

Amongst the European Powers, international trade agreements became the primary diplomatic and legal tool to settle and codify territorial disputes and wars, economic interests that were mutually beneficial, and royal marriages. History dictated that the same reasoning be applied to international agreements between European powers and those of West Africa, as the enforcement of such bilateral treaties proved to be just as difficult with regards to the Trans-Atlantic Slave trade.

1. Portugal and West African Powers

As early as the late fifteenth century, the Portuguese made explorative contact with Africans along its continental western seaboard. Although slave trading with the Portuguese was in its infancy stage, the institution rapidly became an official enterprise with freely participating West African rulers. These official slave trade agreements between the Congo and the Portuguese Crown promulgated what the Royal Ordinances some historians have termed the *Regimento*.

During the sixteenth century, Portugal would introduce bilateral trade agreements to the ruler or chiefs of the Congo. The evolution of Portuguese-West African trade relations was codified at the behest of the then-Congolese ruler Afonso I (Nkemba). Although the Portuguese Crown already had advanced recordation of Roman law as their primary legal standard for Iberian society and institutions, West Africa relied heavily on oral tradition and spontaneous accumulation of neighboring geographical territories as its primary diplomatic arsenal of choice. Consequently, the Portuguese Crown provided the rulers of the mayacongo, a group of distinct territories known as Mtamba, Ndongo and Luanda later unified under the name Kongo, with written rules and legal standards about how the Congolese rulers may stratify their governmental structure and the monopolistic, slave trading relationship that they would cultivate within the West African region.

The Congolese chiefs voluntarily continued their international relations with the Portuguese Crown, but also demanded that they be the legal authority in determining which African slaves were to be provided to the Portuguese, as well as what region the African slaves were to be extracted. These official Royal Ordinances, termed *Ordañações Afonsinas*, became the immediate binding legal instruments between the Crown and the Congo, and expanded and constricted territorially as wars dictated. These royal

ordinances, as well as Portuguese rulership, spanned the entire length of the sixteenth century, as demonstrated in Table 1-1*.

Historical records indicate that it was not until the 1520s that a Congolese chief, Afonso I, sought to limit the slave trading activities of Portuguese merchants. Zealous Portuguese merchants ensured that the supply of African slaves breached the confines of the Congo's then-boundaries and populace, despite the Portuguese Crown and the *mayacongo* having consummated an international agreement to the contrary. These pleas to the Crown cannot be viewed as desperate attempts of a West African ruler to abolish slave trading of fellow Africans. Rather, they must be understood for its historical reality—that the *mayacongo* merely sought to reinforce its sole legal right to regulate the slave trade on the shores of Africa.

1502	Congo/Kongo	Portugal	Ordenaçãoe Regimento dos Pesos. ⁵⁸
1504	Congo/Kongo	Portugal	Regimento dos oficiais das Cidades, Vilas e Lugares deste Reinos. ⁵⁹
1509-1520	Congo/Kongo	Portugal	Regimentos das cazas das Indias e Mina. ⁶⁰
1512	Congo/Kongo	Portugal	Regimentos Artigos dos sisas. ⁶¹ (1) Portugal sent artisans to revamp Congo's infrastructure; and (2) Congo provides Portugal with slaves.
October 17, 1516	Congo/Kongo	Portugal	Regimento e Ordenações da Fazenda. ⁶²
1519	São Tomé	Portugal	Regimento of São Tomé trade, February 8, 1519. ⁶³
1520	Ndongo vs.	Portugal	Portugal supports Ndongo. ⁶⁴

⁵⁸ See AMÍLCAR DE MELO AMÍLCAR DE MELO, PORTUGAL ECONOMICO, POLÍTICO E SOCIAL (2016).

⁵⁹ See CAETANO, *supra* note 13.

⁶⁰ See generally DAMIÃO PERES, REGIMENTO DAS CAZAS DAS INDIASE E MINA (1947).

⁶¹ See PIUS ONYEMECHI ADIELE, THE POPES, THE CATHOLIC CHURCH AND THE TRANSATLANTIC ENSLAVEMENT OF BLACK AFRICANS 1418-1839 436 (2017) (discussing the purpose of the 1512 Regimento and the lack of initial effect on the Kongolese inhabitants); see also 1 ANTÓNIO BRÁSIO, MONUMENTA MISSIONARIA AFRICANA: AFRICA OCIDENTAL 234 (1952).

⁶² See 2 ANTÓNIO BRÁSIO, MONUMENTA MISSIONARIA AFRICANA: AFRICA OCIDENTAL 132 (1958), <https://archive.org/details/monumentamission02bras/page/n27/mode/2up>; see also JOSÉ ANASTÁCIO DE FIGUEIREDO RIBEIRO, SYNOPSIS CHRONOLOGICA DE SUBSIDIOS AINDA OS MAIS RAROS PARA A HISTORIA E ESTUDO CRITICO DA LEGISLAÇÃO PORTUGUEZA 1143-1549 (1790).

⁶³ See 4 ANTÓNIO BRÁSIO, MONUMENTA MISSIONARIA AFRICANA: AFRICA OCIDENTAL 124-33 (1965).

⁶⁴ 2 TIMOTHY J. STAPLETON, ENCYCLOPEDIA OF AFRICAN COLONIAL CONFLICTS 53 (2016).

	Kongo/Congo		
1520-1550	Benin	Portugal	(1) Engaged in slave trade with Portugal (2) 1520s also when Benin stopped expanding, reduction of slave exports, ⁶⁵ resumed slave trade in seventeenth century. ⁶⁶
1550s	Coté d'Voire & Benin	Portugal	Portuguese in Coté d'Voire and Benin. ⁶⁷
1574/1575	Luanda (Angola) and Congo	Portugal/ King Sebastião	Portugal builds fort to obtain more slaves. ⁶⁸
May 20, 1595	Congo & Angola	Portugal	Papal bull officially made Congo & Angola separate states. ⁶⁹
March 18, 1605	West Africa	Portugal	Navegaçã o Para o Ultramar ⁷⁰ (royal decree): Closes ports to foreign navigation to maintain a monopoly.
March 26, 1607	Angola	Portugal	Regimento for the Governor of Angola ⁷¹
September 22, 1611	Angola	Portugal	Regimento de Governador de Angola. ⁷²

Generally, the Royal Ordinances relevant to the Portuguese Crown's dealings in the slave trade with West Africa comprised of three notable conditions. First, African chiefs and rulers would have to provide an agreed upon number of slaves to Portuguese slaves per annum, while the Portuguese would provide distinct European goods as imports for the consumption of the African elite. Second, the Portuguese Crown would provide substantive rules, ordinances, and instructions for the African (Congo and Angolan) rulers to implement. They concerned the structure of the African government and were

⁶⁵ Michael Ediagbonya, *A Study of the Portuguese-Benin Trade Relations: Ughoton as a Benin Port (148 -1506)*, 2 INT'L. J. OF HUM. AND CULTURAL STUD. 206, 214 (2015).

⁶⁶ See *id.* at 211.

⁶⁷ See generally Evans & Rydén, *supra* note 45, at 41-70.

⁶⁸ See AFRICA, LATIN AMERICA, AND THE CARIBBEAN: THE CASE FOR BILATERAL AND MULTILATERAL COOPERATION 173 (Sabella O. Abidde ed. 2018).

⁶⁹ ATLANTIC HISTORY: A CRITICAL APPRAISAL 91 (Jack P. Greene & Philip D. Morgan, eds., Oxford Univ. Press 2009) ("A papal bull of 1596 created the archdiocese of Angola and Kongo, but São Salvador, rather than Luanda, was its see.").

⁷⁰ See 5 ANTÔNIO BRÁSIO, MONUMENTA MISSIONARIA AFRICANA: AFRICA OCIDENTAL 124-33 (1965).

⁷¹ *Id.* at 264.

⁷² See 6 ANTÔNIO BRÁSIO, MONUMENTA MISSIONARIA AFRICANA: AFRICA OCIDENTAL 21 (1965)

implemented by African rulers to provide, of their own accord, stratified privileges to their immediate officials, such as the mixed Afro Portuguese middlemen⁷³ and merchants in addition to the full-blooded Portuguese slave traders.⁷⁴ Third, this quasi-legal agreement also outline the terms of Portuguese military support for the newly minted protectorates against neighboring African territories that encroached.

Some historians have asserted the phantasmagoric argument that African nations were already at a disadvantage in regard to their bargaining power with the Portuguese Crown as early as the sixteenth century. However, this is a fallacy in the legal sense. The African rulers elicited the royal ordinances from the Portuguese in order to emulate its society, including the creation of a new classism in which African royalty and its cohorts primarily and consistently benefitted. It must also be emphasized that African states already had and maintained a form of slave trading centuries prior to European contact and promoted the enslavement of other Africans to obtain local financial efficacies.⁷⁵ Regardless of the nature of slavery, a form of class hierarchy permeated participant African nation states, characterized by the use of economic and military power, in which they held other Africans in subservient positions to the benefit of the elite. Thus, this was not a new legal concept that the Portuguese introduced nor was it forced on West and Central African rulers.⁷⁶

⁷³ See David Eltis, *Iberian Dominance and the Intrusion of the Northern Europeans into the Atlantic World: Slave Trading as a Result of Economic Growth*, 22 *ALMANACK* 495, 512 (2019) (“From the slave traders’ viewpoint, the success of this system was less due to the island bases than to the interactions between the Portuguese and Africans. These were of a kind that no other Europeans were able to replicate. The links between coastal bases and the sources of captives in the interior were established and maintained by lançado traders of mixed Portuguese and African heritage.”); see also GWENDOLYN MIDLO HALL, *SLAVERY AND AFRICAN ETHNICITIES IN THE AMERICAS: RESTORING THE LINKS* 83 (2005).

⁷⁴ *AFRO-LATINO VOICES: NARRATIVES FROM THE EARLY MODERN IBERO-ATLANTIC WORLD 1550-1812* (Kathryn J. McKnight & Leo J. Garofalo eds., 2009) The Atlantic slave trade began to take shape in the early fifteenth century with Portuguese traders and raiders seeking new trade routes and claiming territories for Portugal south along the West African coast. *Id.* During this first century, the Portuguese merchants used their seafaring strength to establish sea routes along the coast and to insert themselves into land-based West African trade networks. *Id.* They acted primarily as intermediaries and bought and sold kola nuts, cattle, salt, ivory, gold, and enslaved people, depending on African traders for goods and people. *Id.*

⁷⁵ See, e.g., KLEIN, *supra* note 19; see also Nunn, *supra* note 4.

⁷⁶ See THOMAS, *supra* note 29, at 14; see also *id.* at 793. Africa was not in these years a mere silent, participant in the supply of slaves to two distant European empires. *Id.* The overthrow at the Battle of Tondiki of the great Songhai empire by a Moorish army sent down the great Western caravan route by the Sultan from Marrakesh had immeasurable consequences for the international market in slaves. *Id.* Despite their victory, Berber (Moorish) control was far from certain, even if the main Songhai cities of Gao and Timbuktu, and internecine disputes disturbed the completeness of the Pashas' triumph. *Id.* The consequence was that, quite independent of the growing European demand, every day there was more slaves in the interior of Africa. *Id.* This large labour force would not have been available to the Europeans in the Americas without the cooperation of African kings, merchants, and noblemen. *Id.* Those African leaders were, as a

III. RESTITUTION (REPARATIONS) AND PARTICIPANT AFRICAN NATION STATES

The concept of restitution for crimes against humanity has been clearly established by international norm and law.⁷⁷ Publicists have long recognized the importance of restitution as a form of financial restorative justice that is not only morally demanded but required in order for modern societies which house members of dominant social and political structure and members who are historic victims or survivors of such, to progress in social, political, and economic development.

International law has an integral role in the legal structure of restitution for crimes against humanity. With regards to the Trans-Atlantic Slave Trade, many of these international standards are primarily codified in various U.N. Conventions and maritime law.

A. Legal Arguments in Support of Restitution

1. U.N. Conventions

The U.N. has provided several legal instruments as guidance for the international community (i.e., nation states) to adhere to based on international custom and for the furtherance of universal human rights. The U.N. Conventions are unique as their passage does not provide an automatic, legally-binding effect on nation states around the world. Generally, in order for a U.N. Convention to do so, a nation state or other recognized state actor must first become a signatory to these instruments and must then ratify them in order to be held legally accountable for their structure. Nevertheless, certain UN Conventions have a greater impact on nation states that have directly participated in specific crimes against humanity, such as those that have furthered the development of the Trans-Atlantic Slave trade.

a. Slavery Conventions

The Slavery Conventions of 1926 and 1953⁷⁸ provide crucial legal insight into the crux of the Trans-Atlantic Slave trade, which is characterized by horrific acts in which participants deprived many Africans and those of the

rule, neither bullied nor threatened into making these sales (for sales they were, even if the bills were settled in textiles, guns, brandy, cowrie shells, beads, horses, and so on). *Id.*

⁷⁷ Contracting Out (Functions in relation to the Welfare Food Scheme) Order 1996 (U.K.), https://publications.parliament.uk/pa/ld199596/ldhansrd/vo960314/text/60314-24.htm#60314-24_head1.

⁷⁸ See generally United Nations The Slavery Convention, Sept. 25, 1926, 212 U.N.T.S. 17; Protocol to Amend the Slavery Convention, Oct. 23, 1953, 182 U.N.T.S. 51.

Diaspora of basic human rights. These basic human rights include the right not to be tortured, as well as the right to not to be the subjects of a mass depopulation as slavers. The participants of the Trans-Atlantic Slave trade have also facilitated acts of committed genocide, rape, and forcibly displaced Africans and those of the Diaspora, while depriving their victims of their culture, heritage and language.

These Conventions were so unprecedented that the League of Nations, the U.N.'s predecessor, which promulgated these official standards as its initial endeavor to abolish the international slave trade.⁷⁹ Arguably, the *statutory* intent was not to solely hold European nation states accountable for these human rights violations. There are no such distinctions made in the original instrument, but rather any nation state which is guilty thereof includes certain West and Central African empires that were the facilitators, as well as the financial beneficiaries from the export and displacement of Africans, of a lost passage of culture, race, and economic depravity.

b. Geneva Convention

One of the consistent legal issues that advocates for restitution must surmount is the non-applicability of retroactivity in certain areas of criminal law. Similar to an aspect of municipal criminal law, criminal acts that have occurred before they were made unlawful by nation states cannot be prosecuted.⁸⁰ This also applies to the U.N. Geneva Convention, which became effective in 1949 under the auspices of the League of Nations. One may validly argue that although the Geneva Convention did not exist until centuries after the Trans-Atlantic Slave trade, its intent and applicability may be utilized as a legal standard for measuring the extent to which African nations participated in the torture and decimation of Africans and succeeding Black American generations. In addition, one of the primary factors that the international community considered when formulating what would become the League of Nations was to abolish the Trans-Atlantic Slave trade throughout the world. Thus, a product of this intent still applies to claims of restitution against African nation states that have actively participated in this international market.

Lastly, one does not need to search beyond the Nuremberg Tribunal to know that although the Holocaust was lawful under the Third Reich, and

⁷⁹ See Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, *supra* note 1, at 933 (the Slavery Convention of 1926 generally states which acts comprise slavery and slave trading in Africans and based on the intent of the signatories, was premised upon the Brussels Act, which intended to terminate the slave trading of Africans); *see also* The Slavery Convention, *supra* note 78; *see also* Convention Revising the General Act of Berlin, Feb. 26, 1885, 8 L.N.T.S. 25 (the Slavery Convention represented the first international convention of its kind to focus on slavery and the African slave trade).

⁸⁰ *See* U.S. CONST. art. I, § 9, cl. 3, §10.

indeed made mandatory based on rhetoric to protect German identity, crimes against humanity were still prosecutable in the international arena after World War II. Although the Geneva Conventions were adopted in four installments, each installment contained legal protocols pertaining to war. The Third Geneva Convention concerned the slave trade, badges, and incidents of slavery.

The Third Geneva Convention prescribes the treatment of noncombatants and civilians during the time of war or armed conflict. Specifically, it states that regardless of whether one party is armed and the other is not, the Geneva Convention still applies. Historical documents provide a wealth of knowledge of the extent that Central and West Africans engaged in slave trading prior to European contact.⁸¹ Once West African rulers entered into formal agreements with the Portuguese monarchs to provide a steady supply of slaves, they increased their raids and declaration of wars against their West and Central African neighbors,⁸² regardless of whether any actual conflict existed.⁸³ This method of conducting international trade with the Portuguese, as well as other European nations, would replicate itself among the African rulers of Angola, Guinea, Senegal and the Niger.⁸⁴ Although African rulers converted to Christianity, emulated the practice of their European contemporaries, and declared war upon their non-Christian counterparts since the seventeenth century, these African empires made a conscious decision to do so without European coercion or deceit.

The Geneva Convention also provides that noncombatants are to be treated humanely “without any adverse distinction founded on race, colour,

⁸¹ See LATIN AFRO-LATINO VOICES: NARRATIVES FROM THE EARLY MODERN IBEROATLANTIC WORLD, *supra* note 74 (“During this first century, the Portuguese merchants used their seafaring strength to establish sea routes along the coast and to insert themselves into land-based West African trade networks. They acted primarily as intermediaries and bought and sold kola nuts, cattle, salt, ivory, gold, and enslaved people, depending on African traders for goods and people.”); see also CORDIERO, *supra* note 16, at 8 (“In Africa we found this odious institution ingrained into the manners, the beliefs, and, let us add, the wants of the people. We believed it to be in our power to utilize this institution to the benefit of European civilization; but we strove at the same time to modify slavery by dispelling its darkness, and making shine upon and through it the beneficent light of instruction and of the Christian faith, which was the only civilization of the time.”).

⁸² See STILWELL, *supra* note 25; see also GARDINER, *supra* note 35.

⁸³ MAWERE, *supra* note 5; *Hearing*, *supra* note 7; see also Nunn, *supra* note 4, at 14. The most dramatic example may be the Kongo kingdom of West-Central Africa. As early as 1514, the kidnapping of local Kongo citizens for sale to the Portuguese had become rampant, threatening social order and the King’s authority.

⁸⁴ See KONCZACKI & KONCZACKI, *supra* note 6, at 40 (“In essence this is that economic and commercial slavery and slave-trading were not natural features of West African society, but that they developed, along with the growth of states, as a form of labour mobilization to meet the needs of a growing system of foreign trade in which, initially, the demand for slaves as trade goods was relatively insignificant...The European demand for slaves for the Americas, which reached its peak from about 1650 to about 1850, accentuated and expanded the internal growth of both slavery and the slave trade.”).

religion or faith...,” and notwithstanding the just mentioned facts, Africans also initiated raids and wars based on tribalism and status as a pre-colonial tradition and therefore their conduct distinguished amongst themselves and their neighbors based on the criterion of “race.”⁸⁵

The Geneva Convention further elaborates the types of prohibited conduct that warring nation states must not engage in towards civilians, and enumerates certain crimes against humanity, such as cruel treatment and torture. West African slavers, merchants, and rulers who kidnapped other Africans definitively violated these international norms when they sought to enslave and torture other Africans and facilitate centuries of unspeakable human rights atrocities⁸⁶ under the supervision and authority of European monarchs—especially the Portuguese, merchants, bankers and slavers. For those who resisted a life of servitude and a ghastly future, their resistance was met with death by both West African and European forces. These actions also violated the Geneva Convention.

The Geneva Convention transitions its international standards from civilians to those persons which it considers prisoners of war. One of its key inclusions is that “inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had the time to form themselves into regular armed units.”⁸⁷ Throughout the sixteenth and seventeenth centuries, Africans raided neighboring villages to supply slaves for the Trans-Saharan Slave trade, as well as for the beginning stages of the Trans-Atlantic Slave trade.

Since Africans conducted raids that were often spontaneous and frequent, West Africans targeted civilians⁸⁸ who were not engaged as combatants as there were no wars to fight in. Some of these civilians, like any other member of a civilized society, were artisans, craftsmen, and agriculturalists who were skilled in survival techniques but not part of any formal military armed conflict. Nevertheless, when the freedom of these African civilians was curtailed by outside forces with the intent to permanently deprive, the former took up arms and naturally defended themselves, regardless of the likelihood of success. Therefore, the Geneva Convention applies to those civilians who acted with arms, in self-defense, during declared wars and unprovoked aggression by their West African neighbors.

However, as with most UN Conventions, the Geneva Convention is not generally applicable to nation states that did not ratify them. Nevertheless,

⁸⁵ See Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁸⁶ See generally Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, *supra* note 1.

⁸⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 13, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

⁸⁸ See LATIN AFRO-LATINO VOICES, *supra* note 76.

potential claimants may argue that the Nuremberg Tribunal was not necessarily a voluntary court, and that the human rights atrocities were so egregious that it prosecuted German officials and profiteers based on the interests of justice, not on the convenience of a timeline.

c. Rome Statute of ICC

The Rome Statute of the International Criminal Court (hereinafter “ICC”) embodies the rules and legal protocols based in international law. The ICC’s focus is similar to the standard of the Nuremberg Military Criminal Tribunal, whose purpose was to prosecute individual actors who committed crimes against humanity against Europeans of Jewish descent. Article 5 of the Rome Statute clarifies the ICC’s subject-matter jurisdiction to include “(a) the crime of genocide; (b) crimes against humanity, (c) war crimes; and (d) the crime of aggression.”⁸⁹ The international community has well established that each act of torture, kidnapping, rape torture, genocide and enslavement, which characterized the Trans-Atlantic Slave trade, is a crime against humanity and therefore lies within the Court’s jurisdiction. This can be seen through proclamations in early British and French slave cases, as well as through writings of historians and scholars. In addition, the war crimes as discussed in subsection (b) are also criminal matters governed by the Rome Statute.

However, two legal caveats may hinder the use of the Rome Statute to further legal claims for restitution remain. The first is that the Rome Statute’s provision does not have a retroactive application similar to the one in Geneva Convention. This seemingly contradict with another portion of the Rome Statute, as well as the U.N. Convention of the Inapplicability of Statute of Limitations for Crimes Against Humanity. The Rome Statute clearly states: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”⁹⁰ Thus, the crimes against humanity committed throughout the Trans-Atlantic Slave trade are governed by the Rome Statute. However, the Rome Statute states that it has jurisdiction over crimes which were criminal at law when the statute was enacted. Basing this legal notion on criminal law principles, this red herring is surmountable because as early as the sixteenth century, British, Scottish, and French courts deemed slavery a crime with limited exception. Since the ICC is an international court using international customs, as well as the common law standard of multiple jurisdictions, the Trans-Atlantic Slave trade and the succeeding municipal slavery which spanned from the sixteenth to the nineteenth centuries were

⁸⁹ *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (1998) (last amended 2010).

⁹⁰ *Id.* at art. 29.

crimes during the time the Rome Statute was enacted, and also, while the ICC was established by established nation states.

Another legal issue is that the Rome Statute is crafted in such a manner as to enable the ICC to prosecute natural persons. Arguably, most current West and Central African nation states that were actively involved in the international slave trade are not natural persons. However, claimants may make the legal argument that African rulers of Ndongo, Mtamba, Luanda, Angola, Congo, Sierra Leone, Gambia, as well as others, had the legal personalities of natural persons that would prosper from the trade that they represented.⁹¹ African rulers personally profited from the slave trade as officials who furthered government function⁹² by dividing the excess currency and goods amongst themselves,⁹³ family members, African merchants, and governmental coiffures.⁹⁴ In its inception, Ndongo leadership, in conjunction with the approval of the Portuguese Crown, exerted local authority over the African interior trade. Ndongo was not the only African nation that maintained control of their portion of the African slave trade within the interior. During the eighteenth century, various other African tribes and kingdoms, such as Lagos, exercised similar quasi-autonomy of their contribution of slaves during the Trans-Atlantic Slave trade and its subsequent illegal period.⁹⁵ As a result, the African rulers' legal personalities as natural persons became intertwined with the sovereignty that it transformed into and helped to establish in succeeding years. Therefore, the Rome Statute still applies and, at the very least, is a noteworthy standard to measure the validity of legal claims for restitution.

*d. U.N. Convention on the Non-Applicability of Statutory
Limitations to War Crimes and Crimes Against Humanity*

There is no prosecutorial doubt that the nation states, which acted as market participants, are liable for crimes against humanity that European

⁹¹ ANTONIO DE SILVA REGO, PORTUGUESE COLONIZATION IN THE SIXTEENTH CENTURY: A STUDY OF ROYAL ORDINANCES (REGIMENTOS) 101-02 (1965) (“Angola, on the other hand, as well as the Congo, was in a different position. The territory was subdivided among various chieftains. These exercised certain social authority as their ‘kings’ or sovereigns other more powerful landlords. There existed a society, an organization. The ‘kings’ had an army at their disposal, and they felt they were the lawful representatives of authority. All through the 16th century and in the first half of the 17th century, the African lords had been regarded by the Portuguese as lawful holders of power.”).

⁹² See, e.g., HEIJMANS, *supra* note 22; see also *id.*

⁹³ See generally KLEIN, *supra* note 19.

⁹⁴ See generally CORDIERO, *supra* note 16.

⁹⁵ See, e.g., Ojo, *supra* note 24, at 81-82 (“As is evident in many slave narratives, slaves were moved in batches from the interior to Lagos, staying for short period at the hinterland trade ports. Ali Eisami and Samuel Crowther were sold around 1820 and were transferred several times as they moved through Hausa and Yoruba towns toward Lagos.”).

merchants, bankers, overseers, slavers, and explorers facilitated or directly committed in furtherance of the Trans-Atlantic Slave trade. The U.N.'s Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity⁹⁶ states in relevant part:

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3(1) of 13 February 1946 and 95(1) of 11 December 1946 of the General Assembly of the United Nations, particularly the “grave breaches” enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3(1) of 13 February 1946 and 95 (1) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhumane acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.⁹⁷

The Charter of the International Military Tribunal enumerates war crimes to include:

Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.⁹⁸

Western African sovereignties raided and declared war on their Eastern and Central African neighbors to provide a steady flow of slaves for specifically the Portuguese and the Europeans, generally, from the sixteenth to the seventeenth centuries.⁹⁹ These wars led to the genocide, deportation,

⁹⁶ United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. 1, Nov. 11, 1970, 73 U.N.T.S. 754.

⁹⁷ *Id.*

⁹⁸ Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 280.

⁹⁹ *See, e.g.*, THOMAS, *supra* note 29, at 109 (“But the Portuguese demand for these captives after the decline of their source in Benin soon began to seem excessive. Afonso had only a few slaves available, those being attained in wars with the neighboring Tio state of Makako, higher up the

and depopulation of African villages and territories¹⁰⁰ as these proclaimed spoils included innocent civilian populations and, at times African royalty.¹⁰¹ Consequently, kidnapped Africans, once brought to the western seaboard and delivered to European slavers, continued to endure ill-treatment upon schooners through what became known as the *Middle Passage*. European slave trade participants prohibited and limited their African prisoners of war from accessing clothing, fresh air or water, or proper hygiene. Thus, these captives lay as passengers in their own waste. They were also the victims of other forms of torture and abuse at the hands of their captors. Hence, the arduous voyage for these African prisoners of war continued throughout the high seas. Therefore, West African empires which enjoyed the dual legal personalities of natural persons (rulers), and of nation states, cannot use a statute of limitations defense against claimants of the African Diaspora who seek restitution for the atrocities of the Trans-Atlantic Slave trade.

Further, as subsection (b) explicitly details, crimes against humanity are prosecutable whether they occurred in times of peace or war. So, regardless of whether the raids were acts on behalf of the government in an unorganized manner, or whether tribal leaders declared a formal war to source slaves to the Europeans, they are still deemed human rights violations under international law with no time limit for prosecution.

However, the U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity contains peculiar similarities to both the Rome Statute, as well as the Charter of the Nuremberg Military Tribunal. Under all three U.N. standards, the legal focus is upon individuals and not state actors. Since crimes against humanity are based in internationally accepted municipal felonies, such as murder, mayhem, kidnapping, and rape, these offenses are prosecuted against natural persons. It is noteworthy that the Convention's first Article, which includes those who collaborated, facilitated, or otherwise participated in these human rights atrocities in their capacity as government officials are held accountable for their acts inasmuch that they furthered the goals of such territories and nation states.

As mentioned, claimants may argue that the African monarchs cloaked themselves with the legal personalities of individual actors when the body of the West African rulership engaged in and directed the kidnapping,

River Congo, near Malembo Pool. So the Congolese began to raid their neighbors, the Mbunda. Yet Portuguese demand, because of the insatiable desire of settlers of São Tomé, and because some local Portuguese insisted on being paid their wages in slaves, still outran supply.”).

¹⁰⁰ See Gregory E. O'Malley & Alex Boruck, *Patterns in the Intercolonial Slave Trade Across the Americas Before the Nineteenth Century*, 23 REVISTA TEMPO ARTIGO 7, 323 (2017) (“As depopulation of indigenous peoples persisted during the first two centuries of Spanish colonialism, the labor shortage in Spanish colonies gave rise to significant demand for enslaved Africans.”); see also THOMAS, *supra* note 29, at 40.

¹⁰¹ See *supra* note 83.

imprisonment, murder, maiming, and wide scale genocide in order to economically benefit from the Trans-Atlantic Slave trade via sourcing to European monarchs, their representatives, and merchants. Thus, the U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity remains at the legal disposal of potential claimants for restitution.

2. Legal Strategies

Potential claimants for restitution have a myriad of U.N. Conventions and legal precedents that they can use to successfully argue their cases. However, the time span of the Trans-Atlantic Slave trade, the change of sovereign borders, and the dispersing of descendants of the African Diaspora, requires additional legal strategies for the best, long-term legal outcome. Despite claimants' legal arguments and international law, the collective must determine which forum is the most appropriate and effective.

a. Proposed Criminal/Military Tribunal Versus U.S. Federal Courts

In order for claimants to adjudicate suits for reparations, they must avail themselves of a proper judicial forum. Arguably, there are two primary options for which they may achieve this: a proposed Tribunal or the use of American federal courts. Claimants will encounter several legal hurdles which appear more difficult to surmount, should they unanimously decide to assert their claims in the United States federal court system. Since the issue of reparations concerns descendants of the African Diaspora—which extends to applicable class members worldwide, it would be a great and seemingly insurmountable burden to certify a cohesive class for federal court. Issues with verifying lineage, citizenship, language barriers, and travel, though appearing initially a practical issue, also translate to legal barriers. For instance, the sheer volume to verify standing of potential claimants may be deemed an undue burden of resources on the American federal court system.

In addition, descendants of those who have suffered human rights violations as a result of the Trans-Atlantic Slave trade, and are not American citizens, would not be able to assert claims under the Alien Tort Act. Unlike their foreign-born contemporaries, those who are not American citizens are not permitted to sue civilly for certain acts committed by those who violate American or international law under the Act. By title alone, it appears that the statutory intent omits crimes against humanity, yet the statute references international law and norms that include human rights violations. However, precedent has demonstrated that the types of cases the federal court hears are both civil and criminal in nature. However, the Alien Tort Statute still limits foreign claimants from seeking remedies in federal courts, and consequently

excludes a significant portion of legal claimants who have standing, such as those of multi-racial heritage and historically categorized Black Americans.

This certified class confronts yet another detriment regarding its proposed use of American federal courts. These legal obstacles are typical standard defenses that the American government and other state actors will assert, such as sovereign immunity and claimants' lack of standing. Although these defenses are typical, they are surmountable based on certain legal counterarguments that will be discussed later. However, their assertions appear to have a greater impact in a standard federal court, rather than in a Criminal/Military Tribunal dedicated to adjudicating restitution claims for the crimes against humanity that certain European and African nations have committed as part of the Trans-Atlantic Slave trade.

One of the greatest legal advancements since the development of international law is the recognition that scholars, publicists, and practitioners have given to the establishment of specialized tribunals as necessary for the gravest of human offenses. The U.N., in conjunction with members of the international community, has established three well-known tribunals to adjudicate crimes against humanity. They have also provided excellent criteria of the proposed Tribunal for the atrocities of the Trans-Atlantic Slave trade.

The international community established the Nuremberg Military Tribunal for the human rights violations committed by Poles and Germans against the European Jewish population, the International Criminal Tribunal for Rwanda (hereinafter "ICTR") and its governmental genocide against its own ethnic population, and the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY"). It founded each of these courts based on principles of international law and focused the prosecutorial capabilities of these courts on actors and facilitators of crimes against humanity and vulnerable populations. The only major contrast to the ICTR and ICTY is that inclusive of the aforementioned, the proposed Tribunal would include a civil branch of its adjudicatory powers in order to resolve claims for restitution for descendants of the African Diaspora, who still endure the legacies of the international trade in African slaves. In addition, the proposed Tribunal would focus on nation states that actively participated and financially benefited from the Trans-Atlantic Slave trade. Their historical facilitation and profiteering substantially contributed to the development of their economies and prosperous viability. However, centuries later, these nation states still implemented policies that lacked the enforcement of established laws enacted to protect those very descendants.

Despite the challenges that certain U.N. Conventions and precedent Tribunals present, the proposed Tribunal is the most inclusive international judiciary with the ability to adjudicate claims of restitution and crimes against humanity.

b. Jurisdiction

Presuming that the international community has expressed 'regret' for the Trans-Atlantic Slave trade¹⁰² and are the forerunners in establishing the proposed Tribunal, it is necessary to address procedural claims and defenses, including the issue of jurisdiction. Although there are several legal theories to establish jurisdiction to adjudicate claims for restitution, the proposed Tribunal will include subject-matter jurisdiction, maritime jurisdiction, and in rem jurisdiction, in its consideration of adjudicating restitution claims.

i. Subject-matter Jurisdiction

As the proposed Tribunal is based on U.N. Conventions and international law, subject matter jurisdiction is crafted in the same manner as that of the Rome Statute of ICC. Therefore, the proposed Tribunal will have jurisdiction over the "(a) the crime of genocide; (b) crimes against humanity; (c) war crimes; (d) the crime of aggression" that were committed as a part of and in furtherance of the Trans-Atlantic Slave trade.¹⁰³ The proposed Tribunal will have the authority to adjudicate claims and crimes against humanity as committed not only by several European nations, but also West and Central African nation states who committed such atrocities for their own economic benefits.

ii. Maritime Jurisdiction

Although maritime jurisdiction is often associated with violations of international law and crimes and claims regarding occurrences in the high seas and the vessels which navigate thereto, maritime jurisdiction also includes less obvious waters. The U.N. Convention on the Law of the Seas provides several instances in which navigable waters, despite their location or expanse, are subject to maritime jurisdiction as defined by international law. Aside from extensive oceans, these estuaries include rivers and the areas in which they flow in compilation,¹⁰⁴ bays,¹⁰⁵ seas,¹⁰⁶ inlets, and ports.

Central Africa had already established trade routes with its northern African neighbors for goods and slaves before the sixteenth century. These

¹⁰² World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/CONF.189/12, at 12 (2001).

¹⁰³ See Muhammad, *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations*, *supra* note 1, at 5.

¹⁰⁴ See United Nations Convention on the Law of the Sea art. 9, Dec. 10, 1982, 1833 U.N.T.S. 561.

¹⁰⁵ See *id.* at art. 10.

¹⁰⁶ See *id.* at art. 3, 4.

trade routes were established during the Trans-Saharan Slave trade and subsequently became the primary mode of transport of slaves from the African interior to the West African coast.¹⁰⁷ Contrary to the laymen assertion that most descendants of the African Diaspora are from the Western African seaboard, Europeans, with the aid of African merchants, transported captured Africans in locally manufactured vessels through several main rivers: the Niger River, the Congo River, the Cwanzaa River, the Gambia River, and the Senegalese River. Although these initial transactions during the fifteenth century were not historically marked as the geographical inception point of the Trans-Atlantic Slave trade by most scholars, these were long-term supply points which provided West African fortresses a steady supply of African slaves to European merchants for the international market.

Further, the Convention states which circumstances that a coastal state may exercise criminal and civil jurisdiction. The kidnapping, detainment and eventual genocide of these Africans are traced to these commercial transactions amongst certain African rulers, elite, merchants, and European slavers. Therefore, the enslavement and interior transport of captured Africans on the interior navigable waters¹⁰⁸ subject African nation states to maritime jurisdiction.

Not only are kidnapping and enslavement criminal offenses in contravention of international law and U.N. standards, the U.N. Convention on the Law of the High Seas¹⁰⁹ specifically prohibits the transport of slaves through navigable waters:

“Every State shall take effective measures to prevent and permit the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board and ship, whatever its flag, shall *ipso facto* be free.”

The conduct of African merchants, slavers and agents of African rulers clearly violate this international legal standard and is historically documented to be the exact opposite. Since many of these slave trade facilities worked on behalf of or in conjunction with these African rulers,¹¹⁰ claimants may argue that liability is imputed to the applicable African monarchs and nation states.

iii. In rem Jurisdiction

The proposed Tribunal may also exercise *in rem* jurisdiction of both the tangible and intangible property of West and Central African nation states

¹⁰⁷ See CORDIERO, *supra* note 16.

¹⁰⁸ See Peter Ekeh, *Benin, the Western Niger Delta, and the Development of the Atlantic World*, 1 UMEWAEN: J. OF BENIN AND EDO STUDIES 7-8 (2016).

¹⁰⁹ See United Nations Convention on the Law of the Sea, *supra* note 106.

¹¹⁰ See LATIN AFRO-LATINO VOICES, *supra* note 76.

that were historically complicit in the Trans-Atlantic Slave trade. Traditionally, *in rem* jurisdiction provides that a sovereignty may exercise jurisdiction over the property within its territory. In order to properly apply this type of legal procedure, the proposed Tribunal must assert its jurisdiction on the African western seaboard. As vessels within the African exterior navigated through landlocked African territories during the sixteenth to the eighteenth centuries, those vessels remained under the jurisdiction of the African nations in which the estuaries flowed until they reached the western coastal waters and ports, and then subsequently poured into international waters. Arguably, these vessels are still under the auspices of these African nations by ownership and by flag, but nonetheless can be subject to *in rem* jurisdiction under international law.

Most nation states, including African nation states when they engage in commercial trade as their schooners and commodities entered the high seas, have adopted the legal directives contained in the U.N. Convention on the Law of the High Seas and subjected themselves to *in rem* jurisdiction. African rulers and merchants bartered Africans as slave chattel within the interior and upon the vast international waters, so they therefore have availed themselves to *in rem* jurisdiction.

B. Types of Restitution

Restitution in international and various municipal laws is primarily comprised of tangible assets. No expression of regret or sorrow can compensate for the crimes against humanity committed in furtherance of the Trans-Atlantic Slave trade. Ironically, is that two distinct lineages of people, those who are the descendants of the African Diaspora and those who are the descendants of continental Africans, are placed in the same ethnic and racial categories by the very nations that facilitated the birth of a new people through enslavement and forced migration. The history of commissions, councils, and movements that involved quests for restitution, demand an apology for human rights violations regardless of their adequacy in restorative justice, financial awards, and additional gestures of reconciliation between survivors, descendant populations, and governments which had significant influence in their current state of affairs. Several African nation states in which reparations must demand an apology from include Benin, Ghana, Uganda, Cameroon, Angola, Gambia, Senegambia, Congo, Nigeria, Niger, and the Democratic Republic of Congo.

1. Apologies from Nation States

According to certain reports, Benin and Ghana not only issued apologies for their role in the Trans-Atlantic Slave trade, but also asked for forgiveness from the descendants of the African Diaspora in the West. Ghana

appears to be the only African nation state to have not only issued multiple apologies but have also put forth efforts to provide gestures to Black descendants to further the reconciliation process. For instance, Ghanaian Catholic Bishop Charles Palmer Burkle issued an apology for Africa's role in the Trans-Atlantic Slave trade and the suffering that African slaves and their progeny endured for centuries. Ghana has also provided tour packages for slave fortresses and historical sites to the multi-ethnic descendants of Africans. A notable site included in these tour packages is Goree Island, a famous slave port fortress. Although these voyages are not *au gratis*, they do provide a vital bridge of history between the new people and a portion of their continental ancestral homeland.

Unfortunately, other African nations remain silent or blatantly refuse to accept responsibility for their nations' participation in the Trans-Atlantic Slave trade. Ironically, Nigeria, like several other African nation states, seeks restitution from European nations for the latter's neo-colonialist pursuits, which had detrimental infrastructure and economic impact on Nigeria. However, Nigeria refuses to recognize its role in the destruction, genocide, rape, kidnap, and enslavement of Africans and their descendants.¹¹¹ It also fails to see the reciprocal necessity of reconciliation for nations and their populations to progress further in cultural and economic dialogue and development.

2. Financial Compensation

The most glaring form of tangible restitution that claimants may request from participant African nation states is financial compensation. Just as with their potential demands from certain European countries, the Trans-Atlantic Slave trade's numerous facilitators destroyed African populace, devastated families, and robbed generations of descendants of the African Diaspora of the opportunities to work humanely for wage and to transfer wealth to their progeny. This has caused, in addition to badges and incidents of slavery throughout the West, a disparate impact of financial loss and continuous barriers for such descendants to equitably compete for advancement in the workplace, in education, and in land ownership. Financial compensation is not solely restricted to the current monetary form but is rather also the value of capital in such precious metals including gold, silver, and platinum. This form of restitution is also possible for claimants to obtain in the form of stock or intangible tangible assets such as electronically transferable wealth and mineral rights. Since African nation states are well known for their possession of such natural resources, and these forms of goods

¹¹¹ See David Smith, *African Chiefs Urged to Apologise for Slave Trade*, THE GUARDIAN (Nov. 18, 2009, 10:48 AM), <http://www.theguardian.com/world/2009/nov/18/africans-apologise-slave-trade>.

were used to facilitate the Trans-Atlantic Slave trade with European merchants and governments, the same should be used to fulfill claims of restitution.

In addition, claimants may assert reconciliation measures that African nation states may engage in, such as the conveyance of land to the descendants of the African Diaspora. Since the progeny of enslaved Africans were forcibly removed, kidnapped, and separated from their families¹¹² by both Africans and Europeans alike, they lost their land, country, and culture. The provision of land as a restorative justice measure is not unique in restitution and legal history. A poignant example is the New Zealand's government return of land to the Waikato people for their loss of property and resources due to war and colonization.¹¹³ Land, just as owning a home in the United States, is considered by many as the foundation of attaining tangible, intergenerational wealth. Claimants have an adequate legal right to demand such restitution from participant African nation states.

3. Reparations

Claimants can potentially assert that their ancestors were forcibly removed from their homeland under horrendous conditions, and were stripped of their name, identity, and culture through enslavement as forced migration and loss of access communal land.¹¹⁴ Because Africans did not fully embrace the concept of private land ownership as delineated in European society and law from the sixteenth to eighteenth centuries, African rulers deprived other Africans of the benefit of property. This is based on historical communal manner of living in which all who were capable cultivated the land for sustenance and commercial enterprise to tribal and band establishment and development to intergenerational loss of oral tradition and history.

Descendants of the Diaspora may also argue that African nations owe them ownership in preserved government lands, as well as sustaining African nations' current laws regarding real property, and private ownership rights in land parcels contained therein. Further, some claimants may desire dual citizenship as well as a right of return to Africa. Though descendants of the Diaspora are more distinct in culture, language, and religion compared to their continental African contemporaries. Some still maintain that their bloodlines extend either solely or more so than to African than any other genetic

¹¹² See HEATHER A. HORST & ANDREW GAMER, *JAMAICAN AMERICANS (THE NEW IMMIGRANTS)* 26 (2007) ("The slave trade was organized in such a way to break the bounds of family, kin, language, and culture by selling family members to different owners.").

¹¹³ See Muhammad, *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations*, *supra* note 1, at 160.

¹¹⁴ See O'Malley & Boruck, *supra* note 102, at 314, 335.

inheritance they possess as a result of the activities inherent in the proliferation of the Trans-Atlantic Slave trade.

To date, Ghana is the only African nation state that has provided a modicum of reconciliatory offer to descendants of the African Diaspora in remembrance of and in solidarity with cultural recognition of the horrors of the slave trade. The nation of Ghana has endeavored to pen diplomatic relations with American descendants of the African Diaspora for dual citizenship, as well as historic tours to Africa's western seaboard, especially Goree Island and the Door of No Return.

Although no amount of money, land, or apologies can clear the memory of devastation, pain, suffering, and annihilation of the African and descendant populace that was hurled into the throws of the international market of human commodities, nor the legacies thereto, claimants may convincingly argue that they have a right to ask African nation states to provide financial compensation and diplomatic pathway for their return, claims to land, and their remaining in what they deem their African homeland.

C. Legal Arguments Opposing Restitution

African nation states that seek to hinder reconciliatory measures in the form of restitution claims have two legal arguments. These legal counterarguments and defenses are well known in international law but are not insurmountable. African nation states may assert the legal defense of sovereign immunity and the statute of limitations.

1. Sovereign Immunity

African governments may argue that nation states that are recognized by the international community are not subject to civil suits or adjudication of the slave trade's human rights atrocities. There are several indispensable components of sovereign immunity as recognized by international law. The U.N. Convention on Jurisdictional Immunities notably prohibits one state from having the rogue ability to exercise jurisdiction of another nation state, without its permission.¹¹⁵ In its strictest interpretation, both parties must be recognized sovereignties in order for this clause to apply. Descendants of the African Diaspora can legally argue that as a class, they remain as natural persons, and therefore have the legal right to assert jurisdiction over participant African nations for restitution. Also, to support the claimants' assertion, these immunities apply where another state court is attempting to be used as a judicial forum. Here, the subject class is to assert claims in the proposed Tribunal which shall have international recognition. In

¹¹⁵ See United Nations Convention on Jurisdictional Immunities of States and Their Property art. 10, Feb. 28, 2005, UN Doc. A/RES.59/38 (not yet entered into force).

addition, African nation states had not only contracted with European monarchs, and in particular, the Portuguese, but also with European merchants, slavers, and slave brokers, which are natural persons. The U.N. Convention states:

3. Whereas State enterprise or other entity established by a State which has an independent legal personality and is capable of
 - (a) suing or being sued, and
 - (b) acquiring, owning or possessing and disposing of property, including property that State has authorized it to operate or manage, is involved in proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.¹¹⁶

Thus, in order for African nation states to successfully assert sovereign immunity as a defense under international law, they must fulfill both prongs of these criteria. Although participant African nation states acted as sovereigns and market participants in bartering their fellow Africans to Europeans, there are no known recorded African slave trading companies established or incorporated under State recognition as many of the European monarchs founded. Thus, claimants may successfully argue that African nations legal personalities were natural persons rather than distinct, private corporate entities.

However, African states may still argue that because African rulers authorized, pursuant to international agreements, the kidnapping of Africans through raids and wars to ensure a steady supply of slaves, they are subject to subsection (b) and still have the right to sovereign immunity. Yet, there are several additional legal counterarguments that claimants have in response to African nation states' assertion of acting as a corporation throughout the tenure of the Trans-Atlantic Slave trade. They can thus use these counterarguments to impute personal liability on those various nation states. One such argument is the legal concept of closely held corporations. Descendants can legally claim that because African rulers and nations were the private benefactors and their legal personalities were intimately proximate one to another, African nations are still financially accountable for restitution for the crimes against humanity which facilitated the commercial aspect of the Trans-Atlantic Slave trade. In addition, under international business law, partnerships, unless specified otherwise, are held "personally" liable for losses including claims to assets. Africans' formal partnerships with Europeans, and at other times, official partnerships with African slave merchants, including rulers as well as raiders to capture, enslave, and forcibly migrate other Africans for the

¹¹⁶ *Id.*

international slave trade,¹¹⁷ renders such nations liable for restitution to descendants of the Diaspora.

Another manner in which claimants may succeed in overcoming the sovereign immunity defense is case precedent. Should African nation states maintain that they should be treated as corporations during the slave trade, they are still legally liable for restitution. In the United States, the U.S. Supreme Court has upheld corporations' arguments that they should be treated as natural persons with regard to implementing or upholding certain policies that have the effect of discriminating and impeding the rights of others. Since African rulers and states may argue that they were market participants in the slave trade, their legal personality as corporation can still be held accountable for the resultant human rights atrocities. Claimants may also argue that at the time of the Trans-Atlantic Slave trade, and at least decades after its abolition, slaves had no recourse to sue African governments for their suffering and the slave trade's legacies. Descendants had chattel status and, therefore, as a collective, did not have adequate legal avenues to institute causes of actions as natural persons, regardless of the reality of them being so. The change of borders, leadership, and dynamics of international law and commercial trade did not permit class action against government for crimes against humanity, unpaid wages, and loss of land. Therefore, descendants can argue that for centuries, Africans, as well as European nation states, did not have the capacity of suing or being sued.¹¹⁸

Lastly, a basic legal concept which lends itself in both civil and criminal law is that one cannot lawfully contract to commit criminal offenses in furtherance of commercial endeavors, whether considered a natural person or a corporation. Thus, African nation states' counterarguments and legal defenses will fail as the U.N.'s standard, as well as international law's intent, is not to recognize sovereign immunity for the lawful attainment of persons as chattel goods. Since African rulers unlawfully kidnapped their African neighbors, the possession of whom they deemed chattel are not protected goods or property as delineated in subsection (b). Thus, African nation states do not meet the dual requirements to successfully assert sovereign immunity against restitution claimants.

One final hurdle within this subcategory is the ambiguity of the formation of African nation states centuries after their then-territorial lands or borders either expanded or contracted due to internal conflict, wars, and colonialism. For example, the *mayacongo* existed during the seventeenth century in several West African regions, which later became known as the

¹¹⁷ See *supra* note 83.

¹¹⁸ See Muhammad, *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations*, *supra* note 1, at 193.

"Kongo" as recognized by the Portuguese Crown. Yet, many years later, these states are still in part subsumed in the Democratic Republic of Congo and the Republic of Congo.

Despite their current political or territorial status, these nation states, and other African nations, still receive the beneficial legacy of their ancestral participation in the Trans-Atlantic Slave trade. They still enjoy portions of the land on which slaves were captured, harbored, bled, and coerced to embark away from on a long and tortuous journey to the Americas through the Middle Passage. Governments, currencies, history, and lands, which are associated with the slave trade and rulers who obtained financial gain still exist. If one were to still argue that her current nation did not exist as it does today, one may easily counter that the West African governments then cannot claim sovereign immunity, because it was not sovereign at the time. However, cartography cannot eliminate the legacy of the travesties of the slave trade which still adversely affects Blacks of the Diaspora. Experts in history, geography, law, and political science all sustain a role in ensuring the apportionment of liability for those respective West African states for their debt of restitution.

2. Statute of Limitations

African nations may also assert the defense of statute of limitations to descendants' claims for reparations. Generally, amongst most modern, democratic nations, the statute of limitations exists for civil claims either by a municipally set term of years from the date of the transaction, or when the potential claimant knew or should have known of the harm arising from a transaction or incident. Descendants of the Diaspora may argue that their ancestors did not have the opportunity as a collective to seek restitution for lost wages, loss of land, wrongful death, and other torts because they were not allowed to sue in courts or generally to appear as witnesses in court during the periods of the Trans-Atlantic Slave trade, municipal slavery, and the early 20th century due to Black Codes and Jim Crow laws. Thus, the standard circumstances when applying a statute of limitations would have a disparate impact on a historically vulnerable population and are contrary to the letter and intent of international law with regards to civil actions arising from crimes against humanity. Therefore, it should not apply.

3. Repatriation and Freedmen

Although not a legal defense, African governments may purport that not all Africans in the West were brought to the Americas as slaves during the sixteenth to nineteenth centuries. As such, some descendants of the Diaspora ancestors were not slaves. To counter this historical fallacy, claimants must

exclude continental Africans who migrated voluntarily to the United States and European nations during and since the 1970s, along with other ethnic groupings such as Arabs or North Africans. Claimants may then argue that although a few Africans were freedmen in the Americas during the time of the slave trade and municipal slavery, the vast majority endured a lifetime of servitude, rape, living in squalor, destitution, loss of family,¹¹⁹ culture, refinement, and generations of lost opportunity for economic and community development. For those African free men who lived in the United States, they did not consistently enjoy the rights of a human being. African and Black freedmen were often marginalized, lynched, and captured into municipal slavery despite their 'free' status. Therefore, both Africans and Europeans established a racist institution of depopulation and enslavement that had a disparate impact on the majority of descendants of the Diaspora. These descendants still endure the legacies of the slave trade and municipal slavery in nearly all facets of life. These legacies extend to housing, education, employment, and the criminal justice system. Africans who argue that free Africans existed in the Americas during the height of the slave trade neglect to understand that freedom is solely not being free of cast iron shackles and the horrid sting of the bullwhip, but it entails the liberty to move about without hindrance, hardship, fear of enslavement because of one's skin color or ethnicity. It does not mean living within a shadow of human anonymity because of the inevitability of being lynched, marginalized, unfairly persecuted, and discriminated against by society and government. Thus, these 'free' men did not fully or equitably possess freedom in the traditional sense, but merely free in literal script.

IV. CONCLUSION

Contrary to sentimentalized iterations of African participation in the Trans-Atlantic Slave trade,¹²⁰ Africans were not deceived into bartering and

¹¹⁹ See, e.g., Jeffrey R. Kerr-Ritchie, *Rebellious Passage: The Creole Revolt and America's Coastal Slave Trade* 58 (2019); see also David Eltis & Lawrence C. Jennings, *Trade Between Western Africa and the Atlantic World in the Pre-Colonial Era*, 93 *Am. Hist. Rev.* 936, 938 (1988) ("Slaves constituted a large part of the exchange on the African coast and were obviously more likely than not commodities to be acquired by orce or theft. Trade for slaves would thus have a more socially disruptive impact than trade for the same value of commodities.").

¹²⁰ See Henry Louis Gates, Jr., *Ending the Slavery Blame-Game*, *N.Y. TIMES* (April 22, 2010), http://www.nytimes.com/2010/04/23/opinion/23gates.html?pagewanted=all&_r= ("Advocates of reparations for the descendants of those slaves generally ignore this untidy problem of the significant role that Africans played in the trade, choosing to believe the romanticized version that our ancestors were all kidnapped unawares by evil white men, like Kunta Kinte was in "Roots." The truth, however, is much more complex: slavery was a business, highly organized and lucrative for European buyers and African sellers alike.").

conveying other Africans as slaves to European merchants and slavers.¹²¹ Neither were the majority of slave-trading African monarchs and raiders adherents to the religion of Islam in the development of this international commerce. It was not until certain African rulers converted to Roman Catholicism and sought to appease their European partners in African slave trading that Africans of the interior became subject to chattel slavery *en masse*. In addition, Europeans did not have a well-placed economic advantage to subdue African rulers to provide African slaves for the international chattel market due to maritime superiority which also indicates African elite *willingness* to engage in the barter of other Africans.. Although this may have played a role in the inception of diplomatic relations, African rulers generally entered into informal international relations with the Portuguese, as well as other European nations, to provide slaves as goods as well as manufactured, cultivated, or produced chattel for overseas consumption¹²² without undue duress¹²³ from their overseas trading partners.

African rulers, merchants, and laymen, similar to their European counterparts, voluntarily engaged in the Trans-Atlantic Slave trade. Whether to ingratiate themselves with European monarchs and ecclesiastical efficacies which were intertwined with economic profits, Africans engaged in a pivotal role in facilitating the international trade to ensure their own financial gain¹²⁴ to the detriment of Africans and Black Natives of the Diaspora who suffered humiliation, degradation, and what would become considered one of the most heinous crimes against humanity in modern history.

African tribal leaders, slavers, and others in positions of cultural authority, adopted Portuguese ordinances and voluntarily entered into bilateral agreements with the Portuguese Crown. As a result, Central and West African nations have availed themselves of the standards of international custom, including those pertaining to compensation and accountability for

¹²¹ See THORNTON, *supra* note 20, at 44.

¹²² See, e.g., TREVOR P. HALL, BEFORE MIDDLE PASSAGE: TRANSLATED PORTUGUESE MANUSCRIPTS OF ATLANTIC SLAVE TRADING FROM WEST AFRICA TO IBERIAN TERRITORIES 1513-26 (2016) ("On two occasions the translated Cape Verde horse was exchanged in West Africa for four or five human beings. African armies and Portuguese lancados used horses in cavalries throughout the Senegal to Sierra Leone Region.").

¹²³ See KLEIN, *supra* note 19, at 113 ("In short, the Africans were neither passive actors peoples innocent of the market economy, and were able to deal with the Europeans on the basis of equality. They were already well integrated into a market economy and responded to market incentives as well as any peoples of western Europe.").

¹²⁴ See *supra* note 24; see also A.G. HOPKINS, AN ECONOMIC HISTORY OF WEST AFRICA 25 (2019) ("From the point of view of economic development, the chief disadvantage of slavery is not that it is inefficient, but that it limits the expansion of the market by holding down purchasing power and by concentrating effective demand in the hands of a few luxury consumers. This consideration was irrelevant to the aims of West African rulers. Politics in a pre-industrial society is largely the art of redistributing a relatively fixed national income with a degree of inequality which is sufficient to make life luxurious for the rulers without at the same time provoking discontent on such a scale as to endanger the existence of the state.").

human rights atrocities in which they had participated, controlled,¹²⁵ and facilitated upon their shores¹²⁶ as accessories.

As legal scholars and historians focus on the European complicity in the Trans-Atlantic Slave trade and their financial benefits, scholars and grassroots advocates have yet to provide adequate discourse on the legal aspects of African involvement within the historical, international market.¹²⁷ The primary purpose of restitution is for reconciliation and, of course, for the alleviation of economic disenfranchisement that resulted from the legal systems and international institutions that gained financially at the expense of Africans and Black progeny's lives, dignity, and humanity.

There is a special psychological void for Blacks of the Diaspora to be characterized in the same racial and cultural class as their African contemporaries. This is especially true as they do not share the same language, general culture, and are from many different bloodlines, which for separates them into distinct identities. Yet, many West Africans who have migrated to the United States have accepted the advantages of affirmative action and laws stemming from the Civil Rights movement, while looking with disdain upon the very same American Blacks who fought to create the foundation for these opportunities.

Restitution will never be sufficient to compensate for the role African rulers as well as Europeans had in facilitating the horrors and demise of Blacks of the Diaspora. Yet, for reparations to initiate the reconciliatory process, the entire history must be set forth to the extent as historical records may enlighten.

In recent years, representatives of *some* African governments have issued apologies for their institutional participation in the Trans-Atlantic Slave trade.¹²⁸ Although apologies are necessary components of reconciliation, the reality is that monetary compensation is also of vital

¹²⁵ See Gates, *supra* note 120, ¶ 6.

¹²⁶ See, e.g., Ojo, *supra* note 24, at 77 (“The delivery of slaves from the interior was largely the work of ethnic trade organizations (especially the Hausa, Yoruba, Edo, and Fon), each of which was controlled by prominent citizens and dominated particular trading zones. In eastern Yorubaland trade was in the hands of the Ekhengbo (forest traders) of Benin. Oyo and Hausa Muslim traders dominated trade in the northern and western districts for many years, while the Fon brought slaves from the Dahomian region. The Ijebu controlled the coastal zone of slave trafficking. After 1820, struggles over control of the southern end of the trade was in part responsible for the Egba-Ijebu/Ife wars.”).

¹²⁷ See Gates, *supra* note 120, ¶ 6.

¹²⁸ See Tom Roberts, Ghanaian Bishop Offers Apology for Africans’ Part in Slave Trade, NAT’L CATH. REP. (Sept. 13, 2002), http://www.natcath.org/NCR_Online/archives/091302/091302i.htm; see also Theodore R. Johnson III, *Africans Have Apologized for Slavery, So Why Won’t the US?*, THE ROOT (June 17, 2014), <https://www.theroot.com/africans-have-apologized-for-slavery-so-why-won-t-the-17908>.

importance to Blacks of the African Diaspora. African nations which participated in the Trans-Atlantic Slave trade have similar legal obligations as European nation states to provide reparations. Failure to do so is to neglect the validity of the international slave trade and to ignore a more accurate, expanded narrative of such a pivotal point in human rights and modern world history.