

A. Chapter 14: International Reparations Framework

I. INTRODUCTION

AB 3121 required the recommendations from the Reparations Task Force to “comport with international standards of remedy for wrongs and injuries caused by the state, that include full reparations and special measures, as understood by various relevant international protocols, laws, and findings.”¹ Therefore, this chapter lays out the international legal framework for reparations created in December 2005 by the United Nations General Assembly (UNGA) in Adopted Resolution 60/147.² Going forward, the UNGA framework shall be referred to as the “UN Principles on Reparation.”

In the UN Principles on Reparation, the UNGA held that any full and effective reparations scheme must include the following five forms of reparations:³

- (1) Restitution;
- (2) Compensation;
- (3) Rehabilitation;
- (4) Satisfaction; and
- (5) Guarantees of non-repetition.

While the UN Principles on Reparation are primarily based on the notion of State responsibility, the negotiators also reached a consensus that “non-State actors are to be held responsible for their policies and practices, allowing victims to seek redress and reparation on the basis of legal liability and human solidarity, and not [just] on the basis of State responsibility.”⁴ This can be found in Principle 3(c) which provides for equal and effective access to justice, “irrespective of who may ultimately be the bearer of responsibility for the violation.”⁵ Additionally, Principle 15 states, “in cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation for the victim.”⁶ This means that the funding, among other remedies, for reparations may come not only from the State of California, but also from non-state actors who helped perpetuate the hardships against enslaved persons and their Descendants.

¹ Gov. Code, § 8301.1, subd. (b)(3)(A).

² United Nations General Assembly, *Adopted Resolution 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, (March 21, 2006) (UN Principles on Reparation).

³ *Id.* at p. 7.

⁴ Van Boven, *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, United Nations Audiovisual Library of International Law at p. 3.

⁵ UN Principles on Reparation at p. 5.

⁶ *Id.* at p. 7.

II. INTERNATIONAL LEGAL FRAMEWORK FOR REPARATIONS

A. Overview

This section sets forth the legal framework for reparations under international law, specifically the UN Principles on Reparation, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”⁷

B. Who qualifies for reparations under the UN Principles on Reparation?

According to the international legal framework laid out by the UN Principles on Reparation, victims of gross violations of international human rights law and serious violations of international humanitarian law should be provided with full and effective reparations.⁸

The UN Principles on Reparation define victims as “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.”⁹ Furthermore, “the term ‘victim’ also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”¹⁰ Additionally, “a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”¹¹

In its 2018 practitioners’ guide on “The Right to a Remedy and Reparation for Gross Human Rights Violations,” the International Commission of Jurists (ICJ) highlighted that the word “victim” has many different meanings across international human rights systems.¹² However, the ICJ specified that for purposes of the UN Principles on Reparation, the definition of “victim” was meant to be broad.¹³ According to the ICJ, a “victim is not only the person who was the direct target of the violation, but any person affected by it directly or indirectly.”¹⁴ The ICJ cited how certain authorities “disfavor the distinction between direct and indirect victims,” so “reparations programmes should use a wide and comprehensive definition of ‘victim’ and should not distinguish between direct and indirect victims.”¹⁵ A comprehensive definition of the word

⁷ *Id.* at p. 1.

⁸ *Id.* at p. 7.

⁹ *Id.* at p. 5.

¹⁰ *Ibid.*

¹¹ *Id.* at p. 6

¹² International Commission of Jurists, [The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners’ Guide](#) (Revised Edition, 2018). At p. 35 (ICJ).

¹³ *Id.* at p. 36.

¹⁴ *Id.* at p. 34.

¹⁵ *Ibid.*

“victim” should include family members who have endured “unique forms of suffering as a direct result” of what happened to their loved ones.¹⁶

C. What constitutes gross violations of international human rights law and serious violations of international humanitarian law under the UN Principles on Reparation?

While the UN Principles on Reparation did not formally define either “gross violations of international human rights law” or “serious violations of international humanitarian law,” the ICJ elucidated the definitions of these terms. Specifically, the ICJ defined “gross violations” and “serious violations” collectively as the “types of violations that affect in qualitative and quantitative terms the most basic rights of human beings, notably the right to life and the right to physical and moral integrity of the human person.”¹⁷ The ICJ’s examples of gross and serious violations include “genocide, slavery and slave trade, murder, enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, deportation or forcible transfer of population, and systematic racial discrimination.”¹⁸ The ICJ also held that “harm should be presumed in cases of gross human rights violations.”¹⁹

D. What are victims’ rights to remedies under the UN Principles on Reparation?

Victims of gross violations of international human rights law and serious violations of international humanitarian law are entitled to certain remedies under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.²⁰

According to the UN Human Rights Committee, “the right to an effective remedy necessarily entails the right to reparation.”²¹ An effective remedy refers to procedural remedies whereas the right to reparation refers to restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. In short, victims are entitled to have effective procedural remedies available to them, which will in turn help them receive the reparations they are entitled to. To provide effective access to justice, a state must “establish functioning courts of law or other tribunals presided over by independent, impartial and competent individuals exercising judicial functions” and have “competent authorities to enforce the law and any such remedies that are granted by the courts and tribunals.”²²

¹⁶ *Ibid.*

¹⁷ *Id.* at p. xii.

¹⁸ *Ibid.*

¹⁹ *Id.* at p. 42.

²⁰ UN Principles on Reparation at p. 6.

²¹ Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 16.

²² ICJ at p. 55.

E. What must full and effective reparations include under the UN Principles on Reparation?

According to the international legal framework laid out by the UN Principles on Reparation, full and effective reparations must include: (1) Restitution; (2) Compensation; (3) Rehabilitation; (4) Satisfaction; and (5) Guarantees of non-repetition.²³

1. Restitution

“Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”²⁴

According to the ICJ’s interpretation of the UN Principles on Reparation, where a state can return a victim to the status quo, the state has “an obligation to ensure measures for its restoration.”²⁵ However, even though restitution is considered the primary form of reparation, the ICJ acknowledges that “in practice [restitution] is the least frequent, because it is mostly impossible to completely return [a victim] to the situation [they were in] before the violation, especially because of the moral damage caused to victims and their relatives.”²⁶ So, the ICJ holds that where complete restitution is not possible, as will often be the case, the state must “take measures to achieve a status as approximate as possible.”²⁷

2. Compensation

“Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”²⁸

According to the ICJ’s interpretation of the UN Principles on Reparation, compensation is “the specific form of reparation seeking to provide economic or monetary awards for certain losses,

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ ICJ at p. 173

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ UN Principles on Reparation at p. 7.

be they of material or immaterial, of pecuniary or non-pecuniary nature.”²⁹ The ICJ highlighted compensation previously awarded by claims commissions for cases with claims of “material and immaterial damage” and especially for cases with claims of “wrongful death or deprivation of liberty.”³⁰ The United Nations recognized a right to compensation “even where it is not explicitly mentioned” in a particular treaty and the Human Rights Committee “recommends, as a matter of practice, that [s]tates should award compensation”³¹ for state-sanctioned harms, based on the International Covenant on Civil and Political Rights.³²

It is important to note that international jurisprudence divides compensation into two categories: “material damages” and “moral damages.”³³ Material damages include, among other things, loss of actual or future earnings, loss of movable and immovable property, and legal costs.³⁴ Per the UN Principles on Reparation, any reparation proposals involving compensation for material damages must cover “lost opportunities, including employment, education and social benefits.”³⁵ Additionally, according to the European Court of Human Rights, in order for a victim to receive compensation, “there [generally] must be a clear and causal connection between the damage claimed by the applicant and the violation.”³⁶ However, “as far as existence of material damage can be demonstrated, the award does not depend on whether the victim can give detailed evidence of the precise amounts, as it is frequently impossible to prove such exact figures.”³⁷ Therefore, in the likely event that a victim lacks detailed information, “compensation [ought to be] granted on the basis of equity” as long as there is a “causal link between the violation and the damage.”³⁸

Per the UN Principles on Reparation, any reparation proposals involving compensation for moral damages must “encompass financial reparation for physical or mental suffering.”³⁹ Since “this [type of] damage is not economically quantifiable, the assessment must be made in equity.”⁴⁰ Furthermore, “since it is difficult to provide evidence for certain moral or psychological effects of violations, mental harm should always be presumed as a consequence of gross violations of human rights.”⁴¹ Finally, “for persons other than close relatives, harm may have to be shown so as to limit the number of persons who may claim compensation” but “the conditions for claiming compensation should not be impossible to meet.”⁴²

²⁹ ICJ at p. 174.

³⁰ *Id.* at p. 176

³¹ *Id.* p. 177.

³² *Ibid.*; Article 2(3)(a) International Covenant on Civil and Political Rights.

³³ ICJ at p. 180.

³⁴ *Id.* at p. 181.

³⁵ *Id.* at p. 187.

³⁶ *Id.* at p. 182.

³⁷ *Id.* at p. 189.

³⁸ *Ibid.*

³⁹ *Id.* at p. 204.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

3. Rehabilitation

“Rehabilitation should include medical and psychological care as well as legal and social services.”⁴³

According to the ICJ’s interpretation of the UN Principles on Reparation, victims are entitled to rehabilitation of their dignity, their social situation and their legal situation, and their vocational situation.”⁴⁴ Relying on the Convention Against Torture’s assessment of rehabilitation, the ICJ also provided “rehabilitation must be specific to the victim, based on an independent, holistic and professional evaluation of the individual’s needs, and ensure that the victim participates in the choice of service providers.”⁴⁵ Furthermore, “the obligation to provide the means for as full rehabilitation as possible may not be postponed and does not depend on the available resources of the [s]tate.”⁴⁶ Finally, rehabilitation “should include a wide range of inter-disciplinary services, such as medical and psychological care, as well as legal [rectification of criminal records or invalidation of unlawful convictions] and social services, community and family-oriented assistance and services; vocational training and education.”⁴⁷

4. Satisfaction

“Satisfaction should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;

⁴³ UN Principles on Reparation at p. 8.

⁴⁴ ICJ at p. 206.

⁴⁵ *Id.* at p. 207.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.”⁴⁸

According to the ICJ’s interpretation of the UN Principles on Reparation, satisfaction is a “non-financial form of reparation for moral damage or damage to the dignity or reputation” and can come in the form of a condemnatory judgment, the acknowledgement of truth, or the acknowledgement of responsibility and fault.⁴⁹ Satisfaction includes “the punishment of the authors of the violation.”⁵⁰ Furthermore, “the UN Updated Principles on Impunity recommend that the final report of truth commissions be made public in full.”⁵¹ This is supported by the UN Human Rights Commission’s resolution on impunity which recognizes that “for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators, including the accomplices, of these violations are essential steps towards rehabilitation and reconciliation.”⁵²

Another important factor when it comes to satisfaction is a public apology as well as a public commemoration.⁵³ The public apology is to help “in restoring the honour, reputation or dignity of a [victim].”⁵⁴ The public commemoration “is particularly important in cases of violations of the rights of groups or a high number of persons, sometimes not individually identified, or in cases of violations that occurred a long time in the past.”⁵⁵ A public commemoration “in these cases has a symbolic value and constitutes a measure of reparation for current but also future generations.”

5. Guarantees of non-repetition

“Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

⁴⁸ UN Principles on Reparation at p. 8.

⁴⁹ ICJ at pp. 207-209.

⁵⁰ *Id.* at p. 209.

⁵¹ *Ibid.*

⁵² *Id.* at p. 210; see also Human Rights Commission resolutions: 2001/70, para 8; 2002/79, para 9; 2003/72, para 8.

⁵³ *Id.* at p. 211.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.”⁵⁶

According to the ICJ’s interpretation of the UN Principles on Reparation, the guarantee of non-repetition derives from general international law.⁵⁷ A guarantee of non-repetition is an aspect of “restoration and repair of the legal relationship affected by the breach.”⁵⁸ According to the International Law Commission, “Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship.”⁵⁹ Guarantees of non-repetition overlap with international human rights law because “States have a duty to prevent human rights violations.”⁶⁰ A guarantee of non-repetition is “required expressly” as part of the “legal consequences of [a state’s] decisions or judgments.”⁶¹ This express requirement is supported by the UN Commission on Human Rights, the Human Rights Committee, the Inter-American Court and Commission on Human Rights, the Committee of Ministers and Parliamentary Assembly of the Council of Europe, and the African Commission on Human and Peoples’ Rights.⁶² Another measure that falls under the guarantee of non-repetition is “the necessity to remove officials implicated in gross human rights violations from office.”⁶³ Finally, a guarantee of non-repetition can and often must involve “structural changes” that must be “achieved through legislative measures” to ensure that the violations cannot ever happen again.⁶⁴

International and National Genocide Framework

The term “genocide” was first coined by Raphael Lemkin, a Polish-Jewish jurist who advocated for legal protections for ethnic, religious, and social groups. In his 1944 book, *Axis Rule in Occupied Europe*, Lemkin wrote:

⁵⁶ UN Principles on Reparation at pp. 8-9.

⁵⁷ ICJ at p. 135.

⁵⁸ *Id.* at p. 136.

⁵⁹ *Id.* at p. 137.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Id.* at pp. 138-139.

⁶³ *Id.* at p. 140.

⁶⁴ *Ibid.*

By ‘genocide’ we mean the destruction of a nation or of an ethnic group. . . Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.⁶⁵

Lemkin argued for international law to recognize genocide as a crime, and in 1948, the United Nations General Assembly passed the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).⁶⁶ The Genocide Convention has since been ratified by 149 states.⁶⁷

As the United Nations has noted, the “popular understanding of what constitutes genocide tends to be broader” than as it is legally defined.⁶⁸ The Genocide Convention defines genocide with a mental element (*mens rea*) and a physical element (*actus reus*). For the mental element, a perpetrator must have the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.⁶⁹ The physical element is described as the act of killing or causing serious bodily or mental harm, the imposition of measures intended to prevent births within such group, the deliberate inflicting of conditions of life calculated to bring about the group’s physical destruction, or the forcible transferring of children of the group to another group.⁷⁰ The Genocide Convention does not specify a punishment for genocide, only that persons charged with genocide “shall be tried by a competent tribunal of the [s]tate in the territory of which the act was committed” or by an international tribunal with jurisdiction over the territory.⁷¹

The 1948 Genocide Convention takes the position that “cultural destruction does not suffice, nor does an intention to simply disperse a group,” as genocide.⁷² Prior to the passage of the Genocide Convention, the United Nations had passed a resolution defining the crime of genocide as “a denial of the right of existence of entire human groups” with no mention of intent.⁷³ After

⁶⁵ Holocaust Encyclopedia, *Coining a Word and Championing a Cause: The Story of Raphael Lemkin* <<https://tinyurl.com/LemkinUSHMM>> (as of Mar. 16, 2023).

⁶⁶ Office on Genocide Prevention and the Responsibility to Protect, United Nations, *Genocide* <<https://tinyurl.com/GenocideUN>> (as of Mar. 14, 2023).

⁶⁷ Office on Genocide Prevention and the Responsibility to Protect, United Nations, *Genocide* <<https://tinyurl.com/GenocideUN>> (as of Mar. 14, 2023).

⁶⁸ Office on Genocide Prevention and the Responsibility to Protect, United Nations, *Genocide* <<https://tinyurl.com/GenocideUN>> (as of Mar. 14, 2023).

⁶⁹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 <<https://tinyurl.com/UNGenocideConvention>> (as of Mar. 14, 2023).

⁷⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 <<https://tinyurl.com/UNGenocideConvention>> (as of Mar. 14, 2023).

⁷¹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 <<https://tinyurl.com/UNGenocideConvention>> (as of Mar. 14, 2023)

⁷² Office on Genocide Prevention and the Responsibility to Protect, United Nations, *Genocide* <<https://tinyurl.com/GenocideUN>> (as of Mar. 14, 2023).

⁷³ The Crime of Genocide, Dec. 11, 1946, U.N. General Assembly Resolution 96(1).

“intense political brokering” by United States officials who feared being accused of genocide for the United States’ treatment of both indigenous peoples and the Black population for government officials’ involvement in lynchings and the Ku Klux Klan, the 1948 Genocide Convention was adopted without mention of cultural destruction and with the added mental element requiring demonstration of intent.⁷⁴

Although then-President Harry Truman’s administration supported the Genocide Convention during its development in the United Nations, it encountered strong resistance in Congress and among academics over concerns of domestic sovereignty. A representative of the American Bar Association criticized the Convention on the grounds that it could be used to classify attacks on individual African Americans as “genocide.”⁷⁵ As a result, the Genocide Convention was not ratified during Truman’s term. The next administration, under President Dwight Eisenhower, withdrew executive branch support for the Convention for domestic political reasons.⁷⁶

Presidents John F. Kennedy and Lyndon Johnson took no action to reverse course, and when President Richard Nixon endorsed ratification, Senate hearing witnesses again raised warnings that the Convention could expose the United States to foreign judgment on racial issues and on America’s military behavior in Vietnam.⁷⁷

Finally under President Ronald Reagan, nearly 40 years after the United Nations approved the Genocide Convention, the United States implemented legislation to ratify the Convention, with the Genocide Convention Implementation Act of 1987 (Genocide Act), becoming the 98th nation to do so.⁷⁸ The Genocide Act added the crime of genocide to the federal criminal code, but with a more heightened intent requirement than is found in the Genocide Convention. Under the Genocide Act, the offense of genocide is committed when an individual, with “the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial or religious group,” kills members of that group, causes serious bodily injury or permanent mental impairment through drugs, torture, or similar techniques to members of that group, imposes measures intended to prevent births within the group, subjects members of the group to conditions of life that are intended to cause the physical destruction of the group, or forcibly transfers children of the group to another group.⁷⁹ To be covered by the statute, the offense must be committed within the United States or be committed by a person who is a citizen or permanent resident of the United States, a stateless person whose habitual residence is in the United States, or present in the

⁷⁴ Hinton, *Black Genocide and the Limits of Law*, Opinio Juris (Jan. 13, 2022) <<https://tinyurl.com/HintonOJ>> (as of Mar. 17, 2023).

⁷⁵ Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 43.

⁷⁶ Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 54.

⁷⁷ Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 55.

⁷⁸ Roberts, *Reagan Signs Bill Ratifying U.N. Genocide Pact*, N.Y. Times (Nov. 5, 1988) <<https://tinyurl.com/NYTReagan>> (as of Mar. 14, 2023).

⁷⁹ See Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091, subd. (a)-(b), Pub.L. No. 100-606 (Nov. 4, 1988). The code was later amended to include a punishment by death. See Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 1091, Pub.L. No. 103-322 (Sept. 13, 1994).

United States.⁸⁰ A person who attempts or conspires to commit the offense of genocide faces the same punishment as one who completes the offense.⁸¹

Genocide scholars have developed other frameworks outside of the narrow legal frameworks of the Genocide Convention and the Genocide Act. For example, in his early writings on genocide, Lemkin viewed genocide as a process, rather than an event, that involved “one destruction of the national pattern of the oppressed groups; the other, the imposition of the national pattern of the oppressor,” a view that encompasses “structural” genocide.⁸² Since the 1960s, scholars have developed the conception of genocide as encompassing structural and institutional violence; this type of violence can include discrimination by institutions, the globalization of food systems that lead to poverty and starvation, and the effects of internal colonialism by government institutions on indigenous populations.⁸³ Cultural genocide (known as “ethnocide”),⁸⁴ also derived from Lemkin’s early writings,⁸⁵ encompasses “the destruction of a group’s cultural, linguistic, and existential underpinnings, without necessarily killing members of the group.”⁸⁶

Applicability to African Americans

When the acts perpetrated upon African Americans have been committed with the intent to destroy them, in whole or in part, as a group, African Americans have been victims of genocide, as the Genocide Convention defines the term. While the intent requirement is understood to be the more difficult element of genocide to prove,⁸⁷ a number of scholars regard the acts committed by the United States federal government, state and local governments, and its citizens against African Americans, from enslavement onward, as constituting genocide under the Convention.⁸⁸ When alternative frameworks for understanding genocide are employed, there is less room for debate that genocidal acts have been committed against African Americans in the United States. African Americans for centuries have suffered harms and atrocities, inflicted on the basis of race and without regard for their humanity. Slavery inflicted death and serious bodily and mental harms,⁸⁹ and the trafficking of enslaved people caused the “forcible transfers of

⁸⁰ 18 U.S.C. § 1091, subd. (e).

⁸¹ 18 U.S.C. § 1091, subd. (d).

⁸² Hinton, *Black Genocide and the Limits of Law*, *Opinio Juris* (Jan. 13, 2022) <<https://tinyurl.com/HintonOJ>> (as of Mar. 17, 2023); see also Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 89.

⁸³ See Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) pp. 27-28, 40.

⁸⁴ See Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p.22.

⁸⁵ See Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p.10 (“Genocide does not necessarily mean the immediate destruction of a nation It is intended rather to signify a coordinate plan . . . with the aim of . . . disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups.”).

⁸⁶ Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 95.

⁸⁷ Office on Genocide Prevention and the Responsibility to Protect, United Nations, *Genocide* <<https://tinyurl.com/GenocideUN>> (as of Mar. 14, 2023).

⁸⁸ See Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 115; James, *The Dead Zone: Stumbling at the Crossroads of Party Politics, Genocide, and Postracial Racism* (Summer 2009) 108:3 *South Atlantic Quarterly* 459, 460-467; Bowser, et al., *Ongoing Genocides and the Need for Healing: The Cases of Native and African Americans* (Dec. 2021) 15:3 *Genocide Studies and Prevention* 83, 85.

⁸⁹ See California Task Force to Study and Develop Reparations Proposals for African Americans, *Interim Report* (June 2022) pp. 59-64 <<https://tinyurl.com/TFInterimReport>> (as of Mar. 14, 2023) (hereafter Task Force Report).

children” from their families to plantations unknown.⁹⁰ The Ku Klux Klan and others committed innumerable lynchings and systematically visited racial terror against African Americans, killing and causing serious bodily harm while government officials participated or turned a blind eye.⁹¹ By 1931, at least 30 states had passed eugenics laws that deliberately targeted African Americans for involuntary sterilization, an imposition of “measures intended to prevent births.”⁹²

Acts against African Americans that constitute genocide when committed with the requisite intent continued after the United States ratified the Genocide Convention. To this day, the American legal system continues to over-police African American communities, disproportionately kill and commit acts of violence against African Americans, and disproportionately imprison and execute African Americans, causing serious physical and mental impairment and having the effect of separating families and preventing births.⁹³ Although the last recorded lynching in the United States was in 1981, the civil rights organization Julian has identified at least eight suspected lynchings in Mississippi alone since 2000.⁹⁴ Seven of these deaths were by hanging and each ruled as a suicide by law enforcement, despite suspicious circumstances; the other was a racially-motivated beating by a group of 10 white teenagers.⁹⁵ Academics have also identified the involuntary sterilization of African American women through welfare incentive programs in the 1990s as an example of a violation of the Genocide Convention—specifically, its prohibition against the systemic elimination of specific populations.⁹⁶

The framing of the United States’ treatment of African Americans as a genocide is not new. Even before the Genocide Convention, in 1946, the National Negro Congress delivered an eight-page petition (1946 Petition) to the U.N. Secretary-General asking him to take action to address the subjugation of African Americans, particularly in the South, where 10 million Black people lived in deplorable conditions.⁹⁷ Although the U.N. declined to act, the 1946 Petition successfully drew attention to the plight of African Americans.⁹⁸

Further, on October 23, 1947, in order to spur the United States government’s slow pace of racial reform, the NAACP, led by W.E.B. Du Bois, presented U.N. officials with a 95-page “Appeal to

⁹⁰ See Task Force Report, *supra*, at 59-60.

⁹¹ See Task Force Report, *supra*, at 96-117.

⁹² See Task Force Report, *supra*, at 407.

⁹³ See Task Force Report, *supra*, at 377-389.

⁹⁴ Brown, ‘Lynchings in Mississippi never stopped’, Wash. Post (Aug. 8, 2021) <<https://tinyurl.com/BrownWaPo>> (as of Mar. 17, 2023); See, e.g., Julian, *Willie* <<https://tinyurl.com/JulianWillie>> (as of Mar. 17, 2023).

⁹⁵ Brown, ‘Lynchings in Mississippi never stopped’, Wash. Post (Aug. 8, 2021) <<https://tinyurl.com/BrownWaPo>> (as of Mar. 17, 2023)

⁹⁶ Muhammad, *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations* (2013) 3 Colum. J. Race & L. 147, 200; see also Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse* (1994) 3 Am. U. J. Gender & L. 15, 21 & n. 55 (identifying state legislation that conditioned receipt of welfare benefits on Norplant use by mothers of beneficiaries, who at the time were disproportionately Black children in those states, and explaining that states did not fund Norplant removal despite a medical provider being needed to remove the implant).

⁹⁷ Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPPolitico> (as of Mar. 17, 2023).

⁹⁸ Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPPolitico> (as of Mar. 17, 2023).

the World!” (1947 Petition). Intended as an improvement of the 1946 Petition⁹⁹ Du Bois framed the petition as “a frank and earnest appeal to all the world for elemental justice against the treatment which the United States has visited upon [African Americans] for three centuries.”¹⁰⁰ The detailed 1947 Petition lambasted the United States for denying a host of human rights to its African American minority population and garnered much more attention than the previous 1946 Petition.¹⁰¹ Du Bois sought support from First Lady Eleanor Roosevelt, a member of the American delegation to the United Nations, but Roosevelt informed him that the matter was “embarrassing” to the State Department and that “no good could come from such a discussion.”¹⁰² Although Du Bois extensively publicized the petition, providing a copy to each U.N. ambassador with a request that the topic be placed before the General Assembly, no U.N. committees or commissions took action.¹⁰³

Next, in December 1951, less than a year after the Genocide Convention went into effect, the Civil Rights Congress, a civil rights organization fighting discrimination in the United States,¹⁰⁴ headed by Paul Robeson and William L. Patterson, presented a 240 page petition entitled *We Charge Genocide* (1951 Petition) to the United Nations.¹⁰⁵ *We Charge Genocide*, one of the very first petitions presented to the United Nations on the subject of genocide, detailed 152 lynchings and 344 other crimes of violence of African Americans by lynch mobs and police between 1945, the year the U.N. was established, and 1951, in addition to the thousands of crimes committed prior to 1945.¹⁰⁶ The 1951 Petition also emphasized the countless African Americans who died each year as a result of health care, employment, education and housing discrimination.¹⁰⁷

American representatives at the United Nations, including Eleanor Roosevelt, fiercely argued against the introduction of the 1951 Petition, claiming that the United States government was anti-discrimination and anti-segregation.¹⁰⁸ Partly to sway the United States to ratify the

⁹⁹ [cite source from fn that follows]

¹⁰⁰ Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPolitico> (as of Mar. 17, 2023); Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 38-39.

¹⁰¹ Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPolitico> (as of Mar. 17, 2023).

¹⁰² Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 39.

¹⁰³ Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 41.

¹⁰⁴ Encyclopedia Britannica, *Civil Rights Congress* <<https://www.britannica.com/topic/Civil-Rights-Congress>> (as of April 25, 2023).

¹⁰⁵ Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPolitico> (as of Mar. 17, 2023).

¹⁰⁶ Glenn, “*We Charge Genocide*” *The 1951 Black Lives Matter Campaign*, U. of Wash. Mapping American Social Movements Project, <https://depts.washington.edu/moves/CRC_genocide.shtml> (as of Mar. 14, 2023).

¹⁰⁷ Glenn, “*We Charge Genocide*” *The 1951 Black Lives Matter Campaign*, U. of Wash. Mapping American Social Movements Project, <https://depts.washington.edu/moves/CRC_genocide.shtml> (as of Mar. 14, 2023).

¹⁰⁸ Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 50-51.

Convention he was lobbying for, the 1951 Petition was even dismissed by Lemkin himself. Lemkin portrayed the petition as a maneuver by “communist sympathizers” to divert attention from the genocide of “Soviet-subjugated people,”¹⁰⁹ though one scholar noted that *We Charge Genocide* presented America’s violence against African American people in a manner that was consonant with Lemkin’s early writings, in which he presented a more holistic conception of genocide.¹¹⁰ Other opponents similarly stigmatized the Civil Rights Congress as “disloyal” and the petition as “Communist propaganda.”¹¹¹ In the face of opposition from the United States and the hostile environment created by the Cold War and the Red Scare, the United Nations refused to accept the 1951 Petition.¹¹²

In 1964, Malcolm X and the staff of the Organization of African-American Unity drafted a document entitled “Outline for Petition to the United Nations Charging Genocide Against 22 Million Black Americans” (1964 Petition) and enquired about procedural mechanisms to bring a genocide case in front of the U.N. Commission on Human Rights.¹¹³ The 1964 Petition charged economic genocide, including the denial of fair housing and jobs, committed against African Americans as illustrative of “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” and segregation, discrimination, and racial terror as causing “serious mental harm” to African Americans, in violation of Articles II(b) and II(c) of the Genocide Convention.¹¹⁴ The 1964 Petition further charged police, the Ku Klux Klan and White Citizens councils with targeted killings on the basis of race, in violation of Article II, Section I of the Genocide Convention.¹¹⁵ The 1964 Petition asserted that law enforcement and government officials were complicit in these acts of violence and also liable under Article III’s ban on conspiracies and complicity to commit genocide.¹¹⁶ Malcolm X was assassinated before he could present the 1964 Petition to the United Nations and it was not advanced after his killing.¹¹⁷

Nearly 60 years later, debate remains over whether the atrocities committed against African Americans fit within the *legal* framework set forth in the Genocide Convention and the Genocide

¹⁰⁹ Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, Politico (Dec. 26, 2021) <https://tinyurl.com/CRCPolitico> (as of Mar. 17, 2023).

¹¹⁰ *Ibid.* (referencing Moses, Raphael Lemkin, Culture, and the Concept of Genocide, https://www.dirkmoses.com/uploads/7/3/8/2/7382125/moses_lemkin_culture.pdf).

¹¹¹ Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 56.

¹¹² Martin, *Internationalizing “The American Dilemma”: The Civil Rights Congress and the 1951 Genocide Petition to the United Nations* (Summer 1997) 16:4 J. of American Ethnic History 35, 54; Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 115.

¹¹³ Nier, *Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations Human Rights Provisions and Institutions* (1997) 16 Pa. State Intl. L.Rev. 149, 178-179.

¹¹⁴ Nier, *Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations Human Rights Provisions and Institutions* (1997) 16 Pa. State Intl. L.Rev. 149, 180-181.

¹¹⁵ Nier, *Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations Human Rights Provisions and Institutions* (1997) 16 Pa. State Intl. L.Rev. 149, 181.

¹¹⁶ Nier, *Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations Human Rights Provisions and Institutions* (1997) 16 Pa. State Intl. L.Rev. 149, 181-182.

¹¹⁷ Nier, *Guilty as Charged: Malcolm X and His Vision of Racial Justice for African Americans Through Utilization of the United Nations Human Rights Provisions and Institutions* (1997) 16 Pa. State Intl. L.Rev. 149, 179.

Act.¹¹⁸ The opponents of charging genocide claim that the specific intent to destroy African Americans required to legally prove genocide is too difficult to establish.¹¹⁹ This can be unsurprising given the efforts the United States undertook to bring about a legal framework for genocide that would exclude its own conduct.¹²⁰ As one scholar notes, however, the dispute over the requirement of genocidal intent does not negate that the United States’ “treatment of African Americans before and after WW II satisfied the *actus reus* of genocide,” meaning that the result of genocide still occurred, regardless of intent. *We Charge Genocide* is richly supported by disturbing detail concerning the tens of thousands of Black men and women killed for no reason other than their race, the massive mental trauma caused by segregation and other legalized forms of discrimination, and the appalling conditions of life to which Black people were deliberately subjected.”¹²¹

While cognizant of the legal definition’s *mens rea* requirement, other scholars have identified the American system of slavery as genocide, pointing out that the institution of slavery and the trans-Atlantic slave trade, by “utilizing every genocidal strategy listed in the UN Genocide Convention’s definition” inflicted

incalculable demographic and social losses. . . . The killing and destruction were clearly intentional, whatever the counter-incentives to preserve survivors of the Atlantic passage for labor exploitation. . . . If an institution is deliberately maintained and expanded by discernible agents, though all are aware of the hecatombs of casualties it is inflicting on a definable human group, then why should this not qualify as genocide?¹²²

Additionally, enslavers

were very much aware of the outcomes of their activities [demonstrating the intent required by the legal definition of genocide] . . . The traumatization of slaves was practiced, refined, and intentional. How to beat, abuse, torture, publicly humiliate, and terrorize slaves to control and motivate them to obey and work were the basis of endless discussion, exchange, consultation, and advisement among slave masters.¹²³

¹¹⁸ See Heller, *Is “Structural Genocide” Legally Genocide? A Response to Hinton*, *Opinio Juris* (Dec. 30, 2021) <<https://tinyurl.com/HellerOJ>> (as of Mar. 17, 2023); Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 114.

¹¹⁹ Heller, *Is “Structural Genocide” Legally Genocide? A Response to Hinton*, *Opinio Juris* (Dec. 30, 2021) <<https://tinyurl.com/HellerOJ>> (as of Mar. 17, 2023).

¹²⁰ Hinton, *Black Genocide and the Limits of Law*, *Opinio Juris* (Jan. 13, 2022) <<https://tinyurl.com/HintonOJ>> (as of Mar. 17, 2023).

¹²¹ Hinton, *Black Genocide and the Limits of Law*, *Opinio Juris* (Jan. 13, 2022) <<https://tinyurl.com/HintonOJ>> (as of Mar. 17, 2023).

¹²² Jones, *Genocide: A Comprehensive Introduction* (3rd ed. 2017) p. 115.

¹²³ Bowser, et al., *Ongoing Genocides and the Need for Healing: The Cases of Native and African Americans* (Dec. 2021) 15:3 *Genocide Studies and Prevention* 83, 85.

One scholar labeled slavery a “multi-generational holocaust” because the damage done by slavery, including abuse and trauma, “went on long enough and occurred frequently enough for post-traumatic stress disorder (PTSD) to become intrinsic to African American culture.”¹²⁴

Outside of the narrow legal frameworks of the United Nations and the United States, academics acknowledge that the cultural destruction, social death, and subjugation of African Americans has resulted in the equivalent of a cultural and social genocide.¹²⁵ Furthermore, even scholars who take the very narrow definition of genocide as framed in the Genocide Convention and Genocide Act nonetheless acknowledge that the United States’ treatment of African Americans can be described as gross crimes against humanity including persecution, extermination, and apartheid.¹²⁶ Regardless of which definition of genocide is used, slavery and the slave trade, murder, kidnapping, rape, torture or other cruel, inhuman or degrading treatment or punishment as well as systematic racial discrimination—atrocities and harms that have purposefully and collectively been visited upon African Americans—are all recognized as “gross violations of international human rights law” or “serious violations of international humanitarian law” that warrant reparations.

III. STATUTES OF LIMITATIONS

When it comes to reparations, there are no statutes of limitation. “Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.”¹²⁷

¹²⁴ Bowser, et al., *Ongoing Genocides and the Need for Healing: The Cases of Native and African Americans* (Dec. 2021) 15:3 *Genocide Studies and Prevention* 83, 88.

¹²⁵ Hinton, *Black Genocide and the Limits of Law*, *Opinio Juris* (Jan. 13, 2022) <<https://tinyurl.com/HintonOJ>> (as of Mar. 17, 2023).

¹²⁶ Heller, *Is “Structural Genocide” Legally Genocide? A Response to Hinton*, *Opinio Juris* (Dec. 30, 2021) <<https://tinyurl.com/HellerOJ>> (as of Mar. 17, 2023).

¹²⁷ UN Principles on Reparation at p. 5.