The potential role of the International Court of Justice in advancing Africa's reparatory justice agenda

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ABSTRACT: Through a doctrinal review of relevant literature, policy documents and legal instruments, this article investigates the question whether and in what way can the International Court of Justice (ICJ) be a pathway for the advancement of Africa's mission, to obtain reparations to redress the injustices arising from the trans-Atlantic enslavement and colonialisation of people of African descent. The legacy of injustices of trans-Atlantic slavery and colonisation continue to afflict present generations of the African peoples. These are in the form of deprivation of property and general underdevelopment, psychological trauma, loss of life of family members, the debt crisis and disproportionate vulnerability to climate change. Several states responsible for these injustices have withdrawn their consent to the ICJ's jurisdiction to settle (through binding legal decisions) disputes arising from the trans-Atlantic enslavement and colonisation of the African peoples. However, the ICJ still enjoys the jurisdiction to issue advisory opinions on any question of international law that is relevant and has practical impact. Though lacking legal binding force, the ICJ's advisory opinions have historically proven to be effective in strengthening local and international advocacy and political engagements on decolonisation of certain parts of Africa. Similarly, the ICJ's advisory opinion can be utilised to secure an authoritative affirmation of the right to reparations and obligations of states, which potentially can strengthen Africa's position in the political negotiations for reparations. This article recommends the African Union to request the ICJ to issue an advisory opinion on (a) whether states have obligations, under international law, to repair the damage caused through their role in the trans-Atlantic enslavement and colonisation of the African peoples; and (b) whether the international community has an obligation to establish an international judicial body to address these injustices, in light of the absence of such a body under the existing international legal framework.

TITRE ET RÉSUMÉ EN FRANÇAIS

Le rôle potentiel de la Cour internationale de Justice dans l'avancement de l'agenda africain en matière de justice réparatrice

RÉSUMÉ: À travers une analyse doctrinale de la littérature, des documents de politique et des instruments juridiques pertinents, cet article examine la question de savoir si, et de quelle manière, la Cour internationale de Justice (CIJ) peut constituer une voie pour faire progresser la mission de l'Afrique visant à obtenir des réparations afin de remédier aux injustices découlant de l'esclavage transatlantique et de la colonisation des peuples d'ascendance africaine. L'héritage des injustices liées à l'esclavage transatlantique et à la colonisation continue d'affecter les générations actuelles d'Africains, notamment sous la forme de privation de biens et de sous-développement général, de traumatismes psychologiques, de pertes humaines au sein des familles, de crises de la dette et d'une vulnérabilité disproportionnée face aux changements climatiques. Cet article explore le rôle potentiel de la CIJ dans la promotion de l'agenda africain sur les réparations. La revendication de réparations pour remédier

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aux dommages causés par les États à travers l'esclavage transatlantique et la colonisation des peuples africains repose sur une base juridique en droit international coutumier et doit être perçue comme une partie intégrante de la mise en œuvre du programme des Nations Unies (ONU) sur la décolonisation. Plusieurs États responsables de ces injustices issues de l'esclavage transatlantique et de la colonisation des peuples africains ont retiré leur consentement à la compétence de la CIJ pour trancher, par des décisions juridiquement contraignantes, les différends découlant de ces faits. Cependant, la CIJ conserve sa compétence pour rendre des avis consultatifs sur toute question de droit international pertinente et ayant un impact pratique. Bien que dépourvus de force juridique contraignante, les avis consultatifs de la CIJ se sont historiquement révélés efficaces pour renforcer le plaidoyer local et international, ainsi que les engagements politiques en faveur de la décolonisation de certaines régions d'Afrique. De même, la compétence consultative de la CIJ peut être utilisée pour obtenir une affirmation autoritative du droit à réparation et des obligations des États et des Nations Unies, ce qui pourrait potentiellement renforcer la position de l'Afrique dans les négociations politiques sur les réparations. Cet article recommande à l'Union africaine de solliciter de la CIJ un avis consultatif sur: (a) la question de savoir si les États ont l'obligation juridique internationale de réparer les dommages persistants qu'ils ont causés par l'esclavage transatlantique et la colonisation; et (b) si les membres de la communauté internationale, y compris les Nations Unies, ont l'obligation d'établir un organe judiciaire international pour traiter ces injustices.

TÍTULO E RESUMO EM PORTUGUÊS

O potencial papel do Tribunal Internacional de Justiça no avanço da agenda de justiça reparatória de África

RESUMO: Através de uma revisão doutrinária da literatura relevante, documentos políticos e instrumentos jurídicos, este artigo investiga a questão de saber se e de que forma o Tribunal Internacional de Justiça (TIJ) pode ser um caminho para o avanço da missão africana, para obter reparações que reparem as injustiças resultantes da escravização transatlântica e colonização de pessoas de ascendência africana. O legado das injustiças da escravatura transatlântica e da colonização continua a afetar as gerações atuais dos povos africanos. Estas manifestam-se sob a forma de privação de propriedade e subdesenvolvimento geral, trauma psicológico, perda de vidas familiares, crise da dívida e vulnerabilidade desproporcionada às alterações climáticas. Vários Estados responsáveis por estas injustiças retiraram o seu consentimento à jurisdição da TIJ para resolver (através de decisões legais vinculativas) litígios decorrentes da escravização transatlântica e colonização dos povos africanos. No entanto, a TIJ continua a gozar da jurisdição para emitir pareceres consultivos sobre qualquer questão de direito internacional relevante e com impacto prático. Embora careçam de força legal vinculativa, os pareceres consultivos do TIJ têm-se revelado historicamente eficazes no reforço da defesa local e internacional e dos envolvimentos políticos sobre a descolonização de certas partes de África. De forma semelhante, o parecer consultivo do TIJ pode ser utilizado para garantir uma afirmação autoritária do direito às reparações e obrigações dos Estados, o que potencialmente pode fortalecer a posição de África nas negociações políticas para reparações. Este artigo recomenda que a União Africana solicite ao TIJ que emita um parecer consultivo sobre (a) se os Estados têm obrigações, ao abrigo do direito internacional, de reparar os danos causados pelo seu papel na escravização transatlântica e colonização dos povos africanos; e (b) se a comunidade internacional tem a obrigação de estabelecer um órgão judicial internacional para enfrentar estas injustiças, tendo em conta a ausência de tal órgão no quadro jurídico internacional existente.

KEY WORDS: Africa; reparations; ICJ; Advisory Opinion; trans-Atlantic slavery; colonisation

CONTENT:

1 INTRODUCTION

This article investigates the question of whether and in what way the International Court of Justice (ICJ) can be a viable pathway for the advancement of Africa's mission to obtain reparations, to redress the injustices arising from the trans-Atlantic enslavement and colonialisation of people of African descent. Both the African regional[1] and international law[2] set out frameworks for reparations to redress gross violations of human rights, which frameworks encompass measures for restitution, compensation, rehabilitation, satisfaction and guarantees for non-repetition. Based on these frameworks, discussions at regional and international levels have attempted to identify specific measures that could constitute reparations for the trans-Atlantic slavery and colonisation of the African peoples. Notably, according to a draft resolution (which, however, was not adopted for lack of political consensus) prepared for adoption at the 2001 United Nations World Conference Against Racism:[3]

> Reparations to victims of slavery, slave trade and colonialism and their descendants should be in the form of enhanced policies, programs and measures at the national and international levels to be contributed to by States, companies and individuals who benefited materially from these practices, in order to compensate and repair the economic, cultural and political damage which has been inflicted on the affected communities and peoples, through inter-alia, a creation of a special development fund, the improvement of access to international markets of products from developing countries affected by these practices, the cancellation or substantial reduction of their foreign debt and a program to return art objects, historical goods and documents to their country of origin.

Similar measures were also proposed during the First Pan-African Conference on Reparations, held in 1993 in Abuja[4] and, more recently, by some scholars.[5] Based on these prior discussions, therefore, in this

1 See the African Union Transitional Justice Policy (September 2019) para 17 which states that 'the notion of justice refers to the provision of judicial and non-judicial measures that not only ensure accountability of perpetrators of violations, but also redress to individuals and communities that suffered violations', and para 18

2 which identifies the following as the core elements of redress: acknowledgment of responsibility and the suffering of victims; showing remorse; asking for forgiveness; paying compensation or making reparation; and reconciliation.

2 See 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 (December 2005) paras 15-23.

3 See K Tan 'Colonialism, reparations and global justice' in J Millers & R Kumar (eds) *Reparations: interdisciplinary inquiries* (2007) 280.

article the term 'reparatory justice' refers to a set of measures that must be undertaken to repair (redress) the ongoing injustices arising from the trans-Atlantic enslavement and colonisation of the African peoples, which measures include apologies, compensation, restitution and guarantees for protection against re-occurrence of similar injustices in the future. To what extent can the ICJ act as a pathway for obtaining reparatory justice for African peoples?

2 SIGNIFICANCE AND SCOPE OF THE STUDY

This question arises in the context of recent developments and debates (highlighted below) within the African Union (AU) which have called on academics and practitioners to assess the potential role of international law generally and the International Court of Justice (ICJ), in particular, in addressing the injustices caused through the tans-Atlantic enslavement and colonisation of people of African descent.

In 2023 the AU resolved to pursue reparatory justice to address the injustices and various forms of damage caused through the trans-Atlantic enslavement and colonisation of the African peoples. Following this resolution, the AU Commission,[6] in collaboration with the Economic, Social and Cultural Council (ECOSOC)[7] and civil society, organised an international conference on reparatory justice in November 2023 in Accra, and delegates at this conference resolved, amongst other actions, to explore the role of international law in the pursuit of reparatory justice.[8] In 2024, the Executive Council of the AU

4 See Declaration of the First Abuja Pan-African Conference on Reparations for African Enslavement, Colonisation and Neo-Colonisation (April 1993) which calls for responsible states to apologise, facilitate payment of compensation and debt cancellation. The Declaration is available at https://au.int/sites/default/files/newsevents/workingdocuments/44462-wd-TheAbujaProclamation.pdf (accessed 30 October 2025).

5 Eg, J Mavedzenge 'Towards a framework of reparatory measures for the enslavement and colonisation of the African people' (2024) 24 *African Human Rights Law Journal* 395-423 and L Umubyeyi 'Reparations for Europe's colonial crimes in Africa and slavery: a critical step in tackling Africa's contemporary challenges' *African Futures Lab* (2023), https://www.afalab.org/the-latest/2023-10-17-reparations-for-europes-colonial-crimes-in-africa-and-slavery-a-critical-step-in-tackling-africas-co/ (accessed 30 October 2025).

6 Decision 847(XXXVI) African Union Decision on Building a United Front to Advance the Cause of Justice and the Payment of Reparations to Africans, AU General Assembly (February 2023) Assembly/AU/Dec.847.

7 The Economic, Social and Cultural Council of the African Union.

8 Accra Proclamation on Reparations (17 November 2023) para 9, https://au.int/en/decisions/accra-proclamation-reparations (accessed 17 June 2025).

adopted a roadmap[9] on the pursuit of reparations, and highlighted the need to consider approaching the ICJ for an advisory opinion on the question of reparations to redress the injustices caused through the trans-Atlantic enslavement and colonisation of people of African descent. While the AU judicial system lacks jurisdiction,[10] the ICJ might have jurisdiction. This is why it is important to examine in this article how the AU can make use of the ICJ's jurisdiction to advance its mission for reparations.

The Executive Council of the AU has not yet formulated a specific legal question to be addressed by the ICJ but has (at this point) proposed that the AU consider seeking an advisory opinion from the ICJ. This proposal comes in the wake of some skepticism[11] regarding the effectiveness of international law, generally, and the ICJ advisory opinions, in particular. A key source of concern is that the ICJ advisory opinions lack legal binding authority,[12] and it has been argued by some[13] that this limits their effectiveness in advancing the reparatory justice agenda. This article engages with these concerns and argues that the ICJ's advisory opinion on the question of reparations for the trans-Atlantic enslavement and colonisation of the African peoples can play an effective role, notwithstanding its lack of legal binding authority. In order to maintain its particular focus and comply with word limit restrictions, this article does not engage in detail with questions relating to the procedures for dispensing the reparations as that issue can be best be addressed through a separate study.

In making the above arguments, the article is divided into four substantive parts. The first part of the article provides a brief discussion of the injustices caused through the trans-Atlantic enslavement and colonisation of the African peoples and analyses how these constitute serious and ongoing violations of international human rights law. The second part article explains the role of the ICJ in settling international law disputes and the types of jurisdictions enjoyed by the Court. The third part of the article traces the historical practical impact of the ICJ's advisory opinions in the struggle for decolonisation of Africa. The fourth part analyses the practical feasibility of obtaining an ICJ advisory opinion on whether there is an obligation to repair the damage

9 Roadmap for the Implementation of the AU Theme of the Year 2025, Justice for Africans and People of African Descent Through Reparations, AU Executive Council (July 2024) EX.CL/1569(XLVI).

10 Because states that are responsible for trans-Atlantic slavery and colonisation are the United States of America and European states and all that are not members of the African Union.

11 See M Kika 'The pursuit for legal claims on reparations for slavery and colonialism in Africa under international human rights law' Data for Governance Alliance Policy Brief15 (September 2023) 5. Also see N Wittmann 'International legal responsibility and reparations for transatlantic slavery' in F Brennan & J Packer (eds) *Colonialism, slavery, reparations and trade* (2012) 1-20.

12 See art 65(1) of the Statute of the International Court of Justice, June 1945 (Statute of ICJ) as interpreted by the ICJ in its Advisory Opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase (1950) 10. Also see ICJ Advisory Opinion on the Question of Western Sahara (1975) para 31.

13 See, eg, Kika (n 11) 5.

caused by the trans-Atlantic enslavement and colonisation of the African peoples and, if so, who the duty bearers are. The article ends with some recommendations of practical steps that must be considered by the AU in order to utilise the ICJ more effectively as a pathway for addressing the legal question of reparations for the trans-Atlantic enslavement and colonialism.

3 TRANS-ATLANTIC ENSLAVEMENT, COLONIALISM AND INTERNATIONAL HUMAN RIGHTS LAW

Some scholars[14] have already provided extensive and detailed accounts of the horrific treatment of Africans during the periods of the trans-Atlantic slave trade and colonisation. However, to provide context to the arguments that are advanced in the article, it is important to highlight some of the main injustices suffered by the victims during these historical episodes. During the trans-Atlantic enslavement, an estimated 12 million Africans were abducted from their homelands and sold as slaves and were forcibly trafficked to foreign territories, including in the United States of America and the Caribbean.[15] They were forced to provide hard unpaid labour mainly in agricultural plantations and industrial plants, while some were forced to provide domestic services.[16] Slaves who refused to provide the services demanded by their masters or who protested against the mistreatment were tortured while some were brutally killed.[17]

At the heart of colonialism was the desire by imperial powers to plunder Africa's natural resources.[18] Therefore, the colonisation of Africa included the forced removal of indigenous African peoples from their land, and the brutal killings of those who resisted the colonial occupation of their land.[19] For example, during the colonisation of Namibia by Germany, the indigenous groups of the Nama and Herero people (led by their traditional chiefs) resisted the attempts to force them off their land.[20] The German colonial forces targeted them and

14 See H Beckles 'The case for reparations' in D Dabydeen and others (eds) *The Oxford companion to black British history* (2007) 408-410; F Obeng-Odoom 'Reparations' (2024) 51 *Review of Black Political Economy* 458-478; W Rodney *How Europe underdeveloped Africa* (1972) 4-21.

15 See A Borucki and others 'Voyages: the Trans-Atlantic slave trade database' (2020), https://www.slavevoyages.org/ (accessed 30 October 2025).

16 Rodney (n 14) 4-21.

17 For a detailed discussion of case studies of some of the brutal killings, see Kika (n11) 2-3.

18 Rodney (n 14) 5.

19 As above.

20 M Häussler *The Herero genocide: war, emotion and extreme violence in colonial Namibia* (2021) 115-199. Also see R Paulose & R Rogo 'Addressing colonial crimes through reparations: the Mau Mau, Herero and Nama (2018) 7 *State Crime Journal* 369-388; K Ahmed 'Descendants of Namibia's genocide victims call on Germany to stop hiding' *Guardian* February 2023, https://www.theguardian.com/global-development/2023/feb/03/namibia-genocide-victims-herero-nama-germany-reparations (accessed 30 October 2025).

killed an estimated 65 000 Herero people and 10 000 Nama people.[21] Similar accounts were recorded in other parts of the continent, including in Kenya, where 320 000 indigenous Kikuyu people were detained and severely tortured, while some were raped and murdered, for resisting British colonial occupation of their land.[22] Cultural artefacts were also looted and transported to be displayed in European museums.[23]

Although some scholars[24] have argued that the trans-Atlantic enslavement and colonisation were lawful at the time, there has been extensive rebuttal of this argument in literature. Notably, Paulose and Rogo's analysis[25] of the United Kingdom and Germany's colonial measures in Kenya and Namibia (respectively) demonstrate that colonisation involved serious criminal violations of international human rights. The scholarship by Obeng,[26] Hippolyte,[27] Wittmann[28] and, more recently, Mavedzenge,[29] have demonstrated that slavery was a violation of customary international law in force at the time. A few more arguments, however, can be made to expand on the existing literature and demonstrate the potential legal basis for a claim for reparations.

The first is that, under customary international law, states have an obligation to treat human beings with dignity. [30] There existed no justifiable basis for treating Africans as inferior to other human beings, even at the time of the trans-Atlantic enslavement or colonisation. The argument that customary international law at the time of the trans-Atlantic enslavement and colonialisation recognised the duty of states to respect and protect the dignity and human rights of all peoples is underscored in the United Nations (UN) Charter which states that

> the peoples of the United Nations [are] determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and *to reaffirm* faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. [My own emphasis].[31]

21 Ahmed (n 20).

22 Paulose & Rogo (n 20) 369-388. Also see Kika (n 11) 3.

23 As above.

24 Eg, see I McDougle 'The legal status of slavery' (1918) 3 *Journal of Negro History* 240-280, who argues that although the morality of slavery is questioned, it remained a legally entrenched institution until explicitly abolished by positive law.

25 Paulose & Rogo (n 20) 369-388.

26 F Obeng-Odoom 'Capitalism and the legal foundations of global reparations' (2023) 4 *Journal of Law and Political Economy* 610-614.

27 AR Hippolyte 'Unearthing the legitimacy of CARICOM's reparations bid' (2014) *SSRN* 1-27.

28 N Wittmann *Slavery reparations time is now: exposing lies, claiming justice for global survival: an international legal assessment* (2013).

29 Mavedzenge (n 5) 395-423.

30 Codified in the Universal Declaration of Human Rights (1948), specifically under art 1.

31 Preamble to the UN Charter (1945) (my emphasis).

On the basis of the above, the United Nations General Assembly (UNGA) adopted a resolution in 1960 on decolonisation, and the Assembly justified adopting this resolution because it was being

> mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations *to reaffirm* faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom.[32]

From the reading of both the UN Charter and UNGA's resolution above, it is clear that although international legal instruments that expressly recognise the right to dignity for all peoples emerged after 1945, they were simply reaffirming and codifying the obligations (in relation to respect for human dignity) that already existed in customary international law prior to the adoption of those international instruments.

Therefore, through actions that include abducting Africans from their homelands and selling them as slaves to perform forced labour, and depriving them of their land and killing those who resisted colonial occupation, states that perpetrated or aided the trans-Atlantic enslavement and colonisation of the African peoples violated international human rights law and have an obligation to repair the continuing violations arising from their actions.[33] For example, as a result of the forced removal of their ancestors from their homeland during the trans-Atlantic enslavement, there are present-day generations of Africans who remain cut off from their cultural history, which has caused them psychological trauma.[34] As a direct result of targeted brutal killings conducted during colonialism, certain indigenous groups were nearly exterminated. For example, it is estimated that German colonial forces killed 65 000 of the 80 000 Herero people living in South West Africa (Namibia), and 10 000 of an estimated 20 000 Nama people were also killed.[35] The enduring legacy of these brutal killings is not only the loss of family members for those who survived, but also the agony of living as a minority tribe with a very limited impact in democratic processes.

In addition, 70 per cent of the prime farming land in Namibia is now owned by German Namibians (who constitute 2 per cent of the country's population) as a direct result of colonial occupation.[36]

32 See Preamble to UN General Assembly Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples (1960).

33 Some scholars have already provided an in-depth analysis of these continuing violations. Eg, see Mavedzenge (n 5) 5-10 and Obeng-Odoom (n 26) 610-614.

34 S Longman-Mills and others 'The psychological trauma of slavery: the Jamaican case study' (2019) 68 *Social and Economic Studies* 79-101. Also see R Eyerman *Cultural trauma: slavery and the formation of African American identity* (2001) 75-91.

35 T Whewell 'Germany and Namibia: what's the right price to pay for genocide?' *BBC* 1 April 2021, https://www.bbc.com/news/stories-56583994 (accessed 30 October 2025).

36 As above. Also see Häussler (n 20) 115-199.

A recent study[37] has demonstrated that through political independence, several African states inherited debts accumulated by colonial powers and most of these debts had very little to do with facilitating development in the colonial states. Such debts have contributed to the ongoing debt crisis in Africa, creating other challenges, including poor infrastructure and restricted financial capacity for governments to provide social services such as basic education and healthcare services.[38] Contemporary international law remedies, including on reparations, are applicable when addressing these continuing wrongs.[39] In his recent contribution to this discourse, Mavedzenge[40] extensively discussed the nature of reparations that are due, and these include unreserved apologies by states who perpetrated or aided these wrongs, direct compensation paid by relevant states to the victims and their families[41] as well as restitutionary measures (including paying off the colonial debts), and undertaking reforms of multilateral institutions to ensure fair representation of Africa in the leadership and decision-making processes.

4 REPARATIONS AS CONTINUATION OF OBLIGATION TO DECOLONISE

In addition, the pursuit for reparations to redress the damage caused through the trans-Atlantic enslavement and colonisation of African peoples should be perceived as the continuation and escalation of the decolonisation process, which the UN formally began through the historic UNGA Resolution 1514 (XV) of 1960. The UNGA justified adopting this resolution on the basis that the UN was conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental

37 K Manduna & L Umubyeyi 'Debt cancellation is not enough! repairing economic colonial injustices through radical reform of the international financial architecture' *African Futures Lab* (2024) 6-7, https://www.afalab.org/the-latest/2024-07-17-debt-cancellation-is-not-enough/ (accessed 30 October 2025).

38 As above.

39 ICJ advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory (2004). Also, in several legal cases of enforced disappearances in Latin America, victims' families received remedies under contemporary human rights law decades later. See, eg, *Velásquez Rodríguez v Honduras* Inter-American Court of Human Rights (1988) and *Blake v Guatemala* Inter-American Court of Human Rights (1998).

40 Mavedzenge (n 5) 11-21.

41 Eg, through the Luxembourg Agreements of 1952 Germany created a fund to compensate Holocaust victims, while the Japanese government also established a private fund of US $6 million to compensate Asian women and their families who were forced into sexual slavery by the imperial Japanese army before and during World War I. See R Spitzer 'The African Holocaust: should Europe pay reparations to Africa for colonialism and slavery' (2001) 35 *Vanderbilt Journal of Transnational Law* 1326-1327.

freedoms for all without distinction as to race, sex, language or religion.[42]

Therefore, the UN's ultimate intention for ending colonialism is to create conditions for equal respect and protection of human rights for all. It is impossible to achieve this objective without recognising and enforcing the obligation of states to repair the existing damage they caused through colonial occupation. In this respect, former colonial states should be held accountable for their obligation to repair the harm caused through their colonial policies and actions, including loss of life and torture suffered by Africans who resisted colonial occupation, and deprivation of African land and other property because of colonial occupation.

It is trite that colonialism was found, including by the ICJ, to be a violation of the international legal right to self-determination and the right to territorial integrity of the colonised people.[43] Therefore, if the international community has already accepted the legal position that colonial states violated these rights under international law, it should (as a natural consequence) accept that the same states have a legal responsibility to repair the ongoing damage they caused through the violation of these rights. Therefore, the demand for reparations to address these damages should be perceived both legally and conceptually, as an integral part of decolonisation and the responsible colonial states have a natural obligation to remedy these damages through reparations.

5 ROLE OF THE INTERNATIONAL COURT OF JUSTICE

The primary role of the ICJ is to settle legal disputes between states by way of interpreting and enforcing international law.[44] It would have been the ideal court to enforce obligations of states to repair the harm they caused through carrying out and or aiding the trans-Atlantic enslavement and colonisation of the African peoples. However, the ICJ has jurisdiction to settle legal disputes only between states that have consented to the Court's competency to issue binding decisions in those disputes.[45] States can also consent to the Court's jurisdiction but exclude the Court's competency to adjudicate certain types of legal disputes in which those states are involved.[46] Several states[47] that were responsible for the trans-Atlantic enslavement and colonisation have

42 See Preamble to the United Nations Declaration on the granting of independence to colonial countries and peoples, adopted by General Assembly Resolution 1514 (XV) on 14 December 1960.

43 See, eg, ICJ Advisory Opinion on Namibia (1971) 31 and ICJ Advisory Opinion on the Question of Western Sahara (1975) paras 54-55.

44 Art 1 of the Statute of ICJ, read together with art 92 of the UN Charter.

45 Art 36 of ICJ Statute as interpreted in ICJ Advisory Opinion on the interpretation of peace treaties with Bulgaria, Hungary and Romania, First Phase (1950) 10.

46 Art 36(2) Statute of the ICJ.

47 Including Spain, the United Kingdom, Germany and Portugal.

consented to the ICJ's jurisdiction over disputes other than those based on facts arising from the period of the trans-Atlantic enslavement and colonisation of African peoples.

For example, the United Kingdom (UK) has deposited legal instruments stipulating that it accepts the ICJ's jurisdiction only over disputes whose facts arose after 1 January 1987.[48] Spain has excluded from its acceptance of the ICJ's jurisdiction all disputes whose facts arose before 29 October 1990,[49] while Germany has submitted to the ICJ's jurisdiction but only over disputes whose facts arose after 30 April 2008.[50] Portugal submitted to the ICJ's jurisdiction in December 1955. However, in February 2005 it revised its position and now recognises the ICJ's jurisdiction only over legal disputes whose facts arose after 26 April 1974. By virtue of these conditions imposed by states on the ICJ's jurisdiction, African states cannot engage the ICJ to issue legally binding decisions on claims for reparations relating to the role of these states in the trans-Atlantic enslavement and colonisation.

However, the withdrawal of jurisdictional consent does not affect the ICJ's competency to issue advisory opinions on questions of international law that concern these states that have withdrawn from the ICJ's jurisdiction, as long as the request has been correctly filed by the relevant entities,[51] and the request contains specific international legal question(s) that are relevant and have practical and contemporary implications.[52] This position was confirmed by the ICJ in its advisory opinion on Western Sahara, where the Court rejected Spain's objection to the Court's competence to issue an advisory opinion on the basis that Spain had not consented to the ICJ's competency to issue advisory opinions on questions that affect Spain.[53]

The AU, in collaboration with the Caribbean Community (CARICOM)[54] and others, can request an advisory opinion from the ICJ concerning the international legal rights and obligations in respect of reparations for the trans-Atlantic enslavement and colonisation of the African peoples. Such a request can be formulated to seek the ICJ's opinion on the consequences on international law, of the activities of states involved in the trans-Atlantic enslavement and colonisation, and whether the member states of the international community have an

48 Declaration recognising the jurisdiction of the Court as compulsory: United Kingdom of Great Britain and Northern Ireland (22 February 2017) para 1, https://www.icj-cij.org/declarations/gb (accessed 17 June 2025).

49 Declaration recognising the jurisdiction of the Court as compulsory: Spain (29 October 1990) para 1(d), https://www.icj-cij.org/declarations/es (accessed 17 June 2025).

50 Declaration recognising the jurisdiction of the Court as compulsory: Germany (30 April 2008) para 1(ii)(a), https://www.icj-cij.org/declarations/de (accessed 17 June 2025).

51 Requests for advisory opinions can be filed by the United Nations General Assembly (UNGA), the United Nations Security Council (UNSC) and other organs of the UN as authorised by the UNGA. See art 65(1) of the ICJ Statute, read together with art 96 of the United Nations Charter, June 1945.

52 ICJ advisory opinion on the question of Western Sahara (1975) para 73.

53 ICJ (n 52) paras 25-30.

54 As above.

obligation, under international law, to establish special tribunals to adjudicate and settle legal claims of reparations for the enslavement and colonisation of African peoples.

6 IMPACT OF THE ICJ'S ADVISORY OPINIONS

Scepticism about the ICJ's advisory opinions emanate from the fact that they lack legal binding authority.[55] Though they lack legal binding authority, the ICJ's advisory opinions can be critical for clarifying states responsibility under international law in respect of the trans-Atlantic enslavement and colonisation of Africans, and such clarification can be utilised to mobilise and galvanise global support for the reparatory justice campaign and strengthen the AU's diplomatic engagements with the responsible states.

Historically, the ICJ's advisory opinions have proven to be useful in the fight to end colonial occupation of certain parts of Africa. As will be demonstrated below through the analysis of the ICJ's role in the decolonisation of Namibia, Western Sahara (ongoing) and Mauritius, the ICJ's advisory opinions had a profound impact of affirming the rights of the colonised people, amplifying voices of the oppressed groups who were resisting colonial occupation and attracted global attention and material support to enable liberation fighters to resist colonial occupation. This is notwithstanding their lack of legal binding authority. Although the selected case studies of the ICJ's advisory opinions are all concerned with territorial questions,[56] they are still relevant for purposes of drawing lessons on the usefulness of the ICJ's advisory opinions in the advancement of the reparations agenda for African peoples. This is because all the selected case studies are linked to decolonisation[57] and, as discussed earlier, the fight for reparations to redress the harms caused through the trans-Atlantic enslavement and colonisation of the African peoples is a continuation of the decolonisation process. Second, the selected case studies concern the interpretation of states obligations in the context of international law and this is similar to the role which the AU would be requesting the ICJ to perform should it submit a request for an advisory opinion on states obligations regarding the completion of decolonisation and redress of the harms caused through colonialism and slavery.

55 ICJ advisory opinion on the question of Western Sahara (1975) para 31 where the Court held that '[t]he Court's reply is only of an advisory character: as such, it has no binding force. It nevertheless carries great legal weight and moral authority, the effect of which depends on the prestige of the Court as the principal judicial organ of the United Nations.'

56 Implying questions regarding whether under international law, a state has a valid claim for sovereignty over a disputed territory. Eg, in the case of Namibia, South Africa claimed sovereignty over the territory of Namibia, while Morocco claims sovereignty over Western Sahara.

57 In the sense that all these case studies (Namibia, Western Sahara and Chagos Islands) concern a legal demand for the end of colonial occupation by external powers.

6.1 Namibia

From 1884, Namibia (then known as South West Africa) was a German colony.[58] In 1919 the League of Nations officially took Namibia away from Germany and placed it under the mandate of the Union of South Africa.[59] This meant that Namibia was not considered an independent state and the Union of South Africa would have the powers to administer and pass legislation that governs Namibia, on behalf of the League of Nations, and these powers must be exercised for 'the well-being'[60] of the people of Namibia.

Notwithstanding these powers assigned to the Union of South Africa, Namibia was not legally considered a colony of the Union of South Africa but a territory under 'temporary' administration by the Union of South Africa, on behalf of the League of Nations.[61] In practice, however, the Union of South Africa proceeded to rule Namibia as its fifth province, with vast tracts of land being taken away from indigenous communities by the government of the Union of South Africa and being given to Afrikaners from South Africa.[62]

In 1946 the League of Nations was dissolved and all its powers and responsibilities were transferred to the UN.[63] Following the dissolution of the League of Nations, South Africa claimed that it had now assumed sole mandate over Namibia. Some members of the UNGA were not in agreement with South Africa's claim. In 1949, as a result of lobbying by various African and some of the European states, the UNGA requested an advisory opinion from the ICJ on the international legal status of South West Africa (Namibia).[64] In 1950, the ICJ issued the requested advisory opinion holding as follows:[65]

> The authority which the Union Government [of South Africa] exercises over the territory [Namibia] is based on the Mandate [given by the League of Nations]. If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.

In conclusion, the ICJ unanimously contended that

> the Union of South Africa acting alone has not the competence to modify the international status of the territory of South West Africa (Namibia), and that the competence to determine and modify the international status

58 D Smuts *Death, detention and disappearance: a lawyer's battle to hold power to account in 1980s Namibia* (2019).

59 Art 22 Treaty of Versailles, June 1919.

60 Arts 22 and 23(b) Treaty of Versailles, June 1919.

61 As above.

62 Smuts (n 58) 3.

63 Resolution to dissolve the League of Nations, adopted by the Assembly of the League of Nations on 18 April 1946.

64 United Nations General Assembly Resolution 6 xii 49 of December 1949 para 1.

65 ICJ advisory opinion on the international status of South West Africa (1950) para 8.

> of the territory rests with the Union of South Africa acting with the consent of the United Nations.[66]

Although the ICJ did not declare Namibia to be an independent state, its advisory opinion delegitimised the Union of South Africa's efforts to annex Namibia, because the ICJ essentially ruled that South Africa's legal claim over Namibia was based on a misinterpretation of international law.[67] Therefore, the ICJ's advisory opinion legally weakened South Africa's position in this dispute over Namibia, setting the stage for the decolonisation of Namibia.[68]

In addition, the ICJ's advisory opinion of 1950 influenced further discussions within the UNGA, on the question of the independence of Namibia. For instance, in December 1950 the UNGA adopted Resolution 449 (V) A, welcoming the 1950 opinion of the ICJ[69] and, further, declaring that the UN shall, in accordance with the ICJ's advisory opinion, supervise the administration of Namibia by South Africa.[70] Therefore, although lacking binding legal force, the ICJ's advisory opinion led to the UNGA taking the official position, for the first time, that the Union of South Africa did not have sole mandate over Namibia, notwithstanding the dissolution of the League of Nations. This was a groundbreaking step which was enabled by the ICJ's advisory opinion of 1950.

South Africa rejected the ICJ's findings and continued to occupy Namibia. In response, in 1966 the UNGA revoked the Union of South Africa's mandate over South West Africa and declared that the territory was now under the direct supervision of the UN.[71] In 1968 the UNGA adopted 'Namibia' as the new name for South West Africa.[72] This was yet another clear indication that the UN had adopted the ICJ's advisory opinion of 1950 which rejected South Africa's claim over Namibia,[73] and which affirmed that the UN had the ultimate authority over Namibia.[74] In the exercise of this authority, and in response to South Africa's defiance, the UNGA revoked South Africa's mandate and renamed the territory.[75]

When South Africa continued to defy these resolutions, the UNSC adopted Resolution 269 of 1969, declaring the Union of South Africa's

66 ICJ (n 65) para 16.

67 As above.

68 Weakened because the ICJ disapproved of South Africa's claim that it was legally empowered to assume sovereignty over the territory of Namibia because of the dissolution of the League of Nations in 1946.

69 See Preamble to United Nations Resolution 449 (V) A on the status of the territory of South West Africa, https://www.refworld.org/legal/resolution/unga/1954/en/7488 (accessed 30 October 2025).

70 Preamble (n 69) para 1.

71 UN General Assembly Resolution 2145 (XXI) of 1966, para 1.

72 UN General Assembly 2372 (XXII) on the question of South West Africa of 1968 para 1.

73 ICJ advisory opinion on the international status of South West Africa (1950).

74 ICJ (n 73(19.

75 UN General Assembly 2372 (XXII) on the Question of South West Africa of 1968 para 1.

occupation of Namibia to be an aggressive encroachment on the UN's authority and called for South Africa's immediate withdrawal.[76] This resolution signified growing international concern over South Africa's occupation of Namibia.

International pressure on South Africa to withdraw from Namibia increased in 1971, following another ICJ advisory opinion which confirmed that South Africa's administration of Namibia was in violation of international law, and that UN members are obliged to refrain from recognising or supporting South Africa's illegal occupation of the territory.[77] In addition to the Organisation of African Unity (OAU) (now AU), several countries joined in the proceedings and submitted written statements. These include France, Czechoslovakia, Finland, Hungary, Nigeria, India, Republic of Vietnam, Yugoslavia and the United States of America.[78] The participation of these countries by way of submitting written statements[79] that supported Namibia's right to self-determination signified further internationalisation of Namibia's cause for independence.

As mentioned above, in its advisory opinion[80] the ICJ noted that UN member states had an international legal obligation to refrain from co-operating with or recognising the Union of South Africa's occupation of Namibia. Prior to the issuance of this advisory opinion, domestic anti-colonial groups[81] and some of the UN member states were calling for the international isolation of South Africa. Therefore, in essence, the ICJ's advisory opinion emboldened and validated their demands by confirming[82] that, indeed, the international community had a legal obligation under international law to isolate South Africa as a sanction for its continued illegal occupation of Namibia.[83]

Four years after the 1971 ICJ's advisory opinion, in 1976 the United Nations Security Council (UNSC) adopted Resolution 385 condemning South Africa's continued 'illegal'[84] occupation of Namibia and calling for a free and fair election under UN supervision.[85] Of note is that under this Resolution, the UNSC welcomed the ICJ's advisory opinion of 1971, and described South Africa's occupation of Namibia as unlawful – thereby borrowing from and reinforcing the language used in the ICJ's advisory opinions of 1950 and 1971.[86] Previously in its 1969 Resolution, the UNSC had described South Africa's continued presence

76 UN Security Council Resolution 269 of 1969 para 3.

77 ICJ Advisory opinion on the legal consequences for states on the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276/1970 (1971) para 133.

78 ICJ (n 77) para 6.

79 ICJ (n 77) para 10.

80 ICJ (n 77) para 133.

81 Including the Southwest African Peoples' Organisation. See Smuts (n 58) 4.

82 ICJ (n 77) paras 123-127.

83 ICJ (n 77) para 133.

84 UN Security Council Resolution 385 (1976) para 7.

85 As above

86 UN Security Council (n 84) Preamble.

in Namibia as an 'aggressive encroachment on UN authority'.[87] It did not describe it as 'unlawful' as it did in its Resolution of 1976 which followed the ICJ advisory opinion of 1971. Thus, the ICJ's advisory opinions had a positive impact of emboldening the international community to properly characterise South Africa's occupation of Namibia as illegal, and not just an encroachment on the authority of the UN. In doing that, the UNSC amplified the local voices of Namibian liberation fighters who had similarly framed South Africa's occupation of Namibia as an illegality that must be resisted.[88] As confirmed by historians, the calls by the UNSC and the ICJ for the international isolation of South Africa contributed towards South Africa's willingness to negotiate and agree to the political independence of Namibia in 1990.[89]

Crucially, the ICJ advisory opinions discussed above had a profound impact on the domestic anti-colonial political activities in Namibia. They emboldened the indigenous people to organise and take political action to resist colonialism. As recorded by Smuts,[90] the ICJ's advisory opinions issued between 1950 and 1971 as well as the resolutions adopted by the UNGA and the UNSC to welcome and endorse those opinions were immediately followed by 'the rise in black political movements and [colonial] resistance within Namibia'.[91] Notably, in 1958, the Ovamboland Peoples' Congress was officially set up, and this was followed by the formation of the South West African National Union (SWANU) in 1959, as well as the Herero Chief's Council in the same year.[92] The three organisations led a defiance campaign against the colonial government's forced eviction of indigenous people from their land. For example, in 1959 they organised a protest against the eviction of indigenous people from Windhoek, resulting in clashes with the South African police which left at least 11 people dead.[93] In the same year (1959), the South West African Peoples' Organisation (SWAPO) was formed, incorporating the Ovamboland Peoples' Congress.[94] In 1966 SWAPO commenced armed resistance against the colonial government.[95] In 1971 a crippling labour strike was organised by these groups, to protest against the inhumane treatment of black workers.[96] In the same year, SWAPO welcomed the ICJ advisory opinion of 1971 and declared that it was increasing its anti-colonial guerilla activities against South Africa.[97]

87 UN Security Council Resolution 269 of 1969 para 3.

88 Smuts (n 58) 4.

89 As above. Also see P Hayes and others *Namibia under South African rule: mobility and containment, 1915-46* (1998) 196.

90 A Namibian lawyer who actively participated in the struggle for independence of Namibia.

91 Smuts (n 58) 4-5.

92 As above.

93 Smuts (n 58) 5.

94 As above.

95 As above.

96 Smuts (n 58) 6.

97 As above.

The formation of domestic anti-colonial groups and the increase in domestic anti-colonial political action during this period, demonstrates that the ICJ advisory opinions issued between 1950 and 1971 set in motion a chain reaction which included international condemnation and isolation of South Africa and the rise in local resistance against the colonial government in Namibia.[98] The ICJ's advisory opinions on their own did not end colonialism in Namibia. However, they contributed towards the rise in both domestic and international pressure which eventually forced South Africa to withdraw from Namibia.[99]

6.2 Western Sahara

Another case in point is the role played by the ICJ in the ongoing campaign for the complete decolonisation of Western Sahara. Spain formally withdrew from Western Sahara in 1975, handing over the territory to Morocco and Mauritania in terms of a joint agreement.[100] This agreement was concluded without consultation and approval of the people of Western Sahara.[101] The people of Western Sahara rejected the occupation of their territory by Morocco and Mauritania, arguing that they are a sovereign territory and they are not part of either state. With the help of the OAU, they lobbied the UN to support their cause for independence.

In 1974, and following discussions at its twelfth session during which both Morocco and Mauritania insisted that Western Sahara belonged to them, the UNGA adopted Resolution 3292 (XXIX) on the Question of Spanish Sahara, which noted:[102]

> During the discussion a legal difficulty arose over the status of the said Territory [of Western Sahara] at the time of its colonisation by Spain. Considering, therefore, that it is highly desirable that the General Assembly, in order to continue the discussion of this question at its thirtieth session, should receive an advisory opinion on some important legal aspects of the problem ... [The General Assembly] decides to request the International Court of Justice ... to give an advisory opinion at an early date on the following questions: (i) Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain a territory belonging to no one (*terra nullius*)? If the answer to the first question is in the negative, what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

98 As discussed in Smuts (n 58) 4-5.

99 As above.

100 Declaration of principles on Western Sahara by Spain, Morocco and Mauritania, 14 November 1975, https://peacemaker.un.org/sites/default/files/document/files/2024/05/ma-mr-es751114declarationprinciplesonwesternsahara0.pdf (accessed 17 June 2025).

101 As above. The agreement was between Spain, Morocco and Mauritania and did not involve Western Sahara as the territory was assumed to be a joint part of Morocco and Mauritania.

102 UN General Assembly Resolution 3292 (XXIX) on the question of Spanish Sahara (1974) paras 9-12.

Thus, the first crucial role played by the ICJ's advisory opinion was to clarify the international legal position regarding the political status of Western Sahara at the time of its colonisation by Spain. This was critical for purposes of evaluating whether Morocco and Mauritania had a legitimate claim, under international law, over the sovereignty of Western Sahara.[103] In its advisory decision, which was reached after having received written statements from Morocco and Mauritania claiming ownership of Western Sahara, the ICJ held that neither Morocco nor Mauritania had sufficient ties with the people of Western Sahara before the territory's colonisation by Spain and, therefore, the joint administration was illegal and unjustified.[104] Although lacking binding legal force, this clarification severely weakened Morocco and Mauritania's bargaining position within the UNGA, and strengthened the position of the states and groups that were advocating the full independence of Western Sahara. Morocco and Mauritania's bargaining position was weakened because the ICJ's advisory opinion exposed the illegitimacy of their legal claim over Western Sahara.[105]

In addition, the participation by several states (from across the globe) in the proceedings before the ICJ demonstrated the internationalisation of the dispute beyond Morocco, Spain and Mauritania. The following states participated in the proceedings before the ICJ: Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, France, Guatemala, Mauritania, Morocco, Spain, Nicaragua, Zaire, Fanama and Algeria.[106] Thus, through the ICJ's advisory opinion, the question of Western Sahara became a matter of concern to the wider international community,[107] and this contributed towards the increase in international pressure in support of the decolonisation of Western Sahara.[108]

Further, the ICJ's advisory opinion also crystallised the UN's position on the legal status of Western Sahara. For instance, prior to the ICJ's advisory opinion, the UNGA took a neutral position on whether or not Western Sahara was a part of Morocco and Mauritania.[109] It referred the question to the ICJ for an advisory opinion.

103 Morocco and Mauritania had claimed this right. See ICJ advisory opinion on Western Sahara (1975) paras 90-94.

104 ICJ advisory opinion on Western Sahara (1975) paras 105-107.

105 The illegitimacy was exposed when the ICJ ruled that neither Morocco nor Mauritania had prior ties to Western Sahara which could justify their claims over the territory. See ICJ advisory opinion on Western Sahara (1975) paras 105-107.

106 ICJ advisory opinion on Western Sahara (1975) paras 5 & 10-11.

107 As several states became involved. See above.

108 Eg, following the ICJ advisory decision, the Organisation of African Unity (now AU) welcomed the advisory opinion and resolved to hold an Extraordinary Summit Meeting devoted to the question of Western Sahara. See AHG/Res. 92 (XV) Resolution of the question of Western Sahara (July 1978) para 2, https://www.peaceau.org/uploads/ahg-res-92-xv-en.pdf (accessed 17 June 2025).

109 UN General Assembly Resolution 3292 (XXIX) on the question of Spanish Sahara (1974) paras 9-12.

At its subsequent session held in 1978 (after postponing discussions over the matter twice),[110] the UNGA welcomed the ICJ's findings, and resolved that it was going to act on the basis of the advisory opinion.[111] UNGA concluded that it 'reaffirm[ed] the inalienable right of the people of Western Sahara to self-determination and independence'[112] and recommended the OAU (now AU) to ensure that the question of Western Sahara was resolved 'in accordance with the right of peoples to self-determination'[113] as had been held by the ICJ in its advisory opinion. Therefore, the ICJ's advisory opinion had a significant influence on the discussions by the international community regarding the legal status of Western Sahara. As demonstrated above, the advisory opinion emboldened and provided a legal justification for the UNGA to shift its position from being neutral to explicitly demanding Western Sahara's independence.

At the same time, the ICJ's advisory opinion explicitly affirmed the right to self-determination for the people of Western Sahara, thereby emboldening the local liberation fighters to scale up political action against the occupation of their territory. The Court noted:[114]

> In short, the decolonisation process to be accelerated which is envisaged by the General Assembly in this provision is one which will respect the right of the population of Western Sahara to determine their future political status by their own freely expressed will. In the present instance, the information furnished to the Court shows that at the time of colonisation Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them.

These findings validated the position of local pro-liberation groups, including *Frente POLISARIO*,[115] which justified their resistance to Morocco and Mauritania's rule on the basis that Western Sahara was an independent state, and that its people have a right to determine their political status through a free and fair referendum. Emboldened by the ICJ's advisory opinion, *Frente POLISARIO* increased its armed resistance, especially against Mauritania.[116] Algeria was hosting *Frente POLISARIO* military bases and provided the movement with military

110 In 1976 and 1977, in order to give the Organisation of African Unity an opportunity to discuss the issue. See UN General Assembly Resolution 31/45 on the question of Western Sahara (1977) para 3.

111 UN General Assembly Resolution 33/31 on the question of Western Sahara (1978) para 6 where the Assembly noted that '[r]ecalling the advisory opinion delivered by the International Court of Justice on 16 October 1975 on the question of Western Sahara, particularly in relation to the principle of the right of the people of Western Sahara to self-determination'.

112 UN General Assembly Resolution 33/31 (n 111) para 14.

113 UN General Assembly Resolution 33/31 para 11.

114 ICJ Advisory opinion on Western Sahara (1975) paras 70 & 81.

115 Popular Front for the Liberation of Saguia el-Hamra and Río de Oro, a pro-independence movement, launched a guerrilla campaign against both Mauritania and Morocco. See E Jensen *Western Sahara: anatomy of a stalemate?* (2005) 13-15.

116 M Pabst 'The Western Sahara conflict' (1999) 29 *Scientia Militaria, South African Journal of Military Studies* 71.

and other material support.[117] The ICJ's advisory opinion also provided legal legitimacy for Algeria and other states to continue rendering their support to *Frente POLISARIO*.[118]

As a result of both the armed resistance by local groups led by *Frente POLISARIO*, and international pressure, in 1979 Mauritania withdrew from the joint agreement with Morocco on the administration of Western Sahara. [119] This marked a significant advancement in the process of decolonisation of Western Sahara. Although Morocco today continues to occupy Western Sahara, it is evident that the ICJ's advisory opinion of 1975 played a significant role towards the withdrawal of Mauritania's historic step towards full decolonisation of Western Sahara.

Beyond emboldening the UNGA to affirm the right to self-determination for the people of Western Sahara, the ICJ's advisory opinion also laid the legal foundations for the international community to take practical steps towards the complete decolonisation of Western Sahara. For example, in 1979 the UNGA officially recognised[120] *Frente POLISARIO* as the legitimate representative of the people of Western Sahara. This was a momentous step which underscored, in practical terms, the rejection by the ICJ and the international community of Morocco's claims over Western Sahara.

To date, under international law, *Frente POLISARIO* continues to be recognised as the official representative of the people of Western Sahara. For instance, in 2021 the Court of Justice of the European Union (CJEU) decided a case[121] in which *Frente POLISARIO* and others challenged the legality of an agreement between Morocco and the European Union (EU) which involved fishing in the Western Saharan waters. Morocco and the EU argued that *Frente POLISARIO* lacked legal capacity to appear before the Court, with Morocco insisting that it is the official representative of Western Sahara.[122] However, the Court rejected this and ruled that *Frente POLISARIO* has been recognised 'internationally as a representative of the people of Western Sahara, even if that recognition is confined to the self-determination process of that territory'.[123] The Court concluded that *Frente POLISARIO* could appear before it to seek judicial protection of the right of the people of Western Sahara to choose how they want to utilise their resources (self-determination).[124]

The CJEU went on to invalidate the Morocco-EU agreement to the extent that it involved fishing within Western Saharan waters. The Court stated that it 'takes the view that, in so far as the agreements at

117 Pabst (n 116) 72.

118 As above. Also see Jensen (n 115) 13-15.

119 Pabst (n 116) 72.

120 UN General Assembly Resolution 34/37 (1979) para 7.

121 *Front Polisario v Council* General Court of the European Union, Cases T-344/19 and T-356/19 of September 2021.

122 *Front Polisario* (n 121) para 101.

123 *Front Polisario* (n 121) paras 148-153.

124 *Front Polisario* (n 121) para 153.

issue apply expressly to Western Sahara and, as regards the decision concerning the Sustainable Fisheries Partnership Agreement, to the waters adjacent to that territory, they concern the people of that territory and require the consent of its people'.[125]

Due to the absence of consent from the people of Western Sahara, expressed through their official representative *Frente POLISARIO*, the Court ruled that the agreement was invalid.[126] This decision demonstrates the weakened position of Morocco to act internationally on behalf of Western Sahara, demonstrating the enduring impact of the ICJ's advisory opinion of 1975 which provided the legal basis for the UNGA to recognise *Frente POLISARIO* as the official representative of the people of Western Sahara, albeit on matters relating to their right to self-determination.

Although there are set-backs, including the United States' recognition[127] in 2020 of Morocco's sovereignty over Western Sahara and the UK's support for Morocco,[128] the decisions of the CJEU in 2021 in *Front Polisario v Council* (*Fisheries*) and *Front Polisario v Council* (*Association Agreement*) are a start reminder of Morocco's legally weakened position on its claims over Western Sahara.[129] This is a practical consequence of the ICJ's 1975 advisory opinion which catalysed a chain reaction characterised by a series of UNGA resolutions affirming the right to self-determination of the people of Western Sahara.

To date, scholars[130] and political leaders of the struggle for Western Sahara's independence continue to reference[131] the ICJ advisory opinion of 1975 and the subsequent UNGA resolutions, as evidence that Morocco's continued occupation of their territory is a violation of international law. This demonstrates the enduring positive impact of the ICJ's advisory opinion of 1975 in affirming the right to self-determination for the people of Western Sahara and the legitimacy of their cause for independence from Morocco.

125 As above.

126 As above.

127 See Proclamation on recognising the sovereignty of the Kingdom of Morocco over the Western Sahara, 10 December 2020, https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-recognizing-sovereignty-kingdom-morocco-western-sahara/ (accessed 17 June 2025).

128 https://www.theguardian.com/world/2025/jun/01/uk-swings-behind-moroccos-autonomy-proposal-for-western-sahara (accessed 17 June 2025).

129 For a similar view, also see A Hintermayer 'The EU's engagement in Western Sahara' *Africa Desk* 31 July 2025, https://www.itssverona.it/extractivism-in-a-forgotten-conflict-the-eus-engagement-in-western-sahara (accessed 30 October 2025).

130 See, eg, G Joffé 'Sovereignty and the Western Sahara' (2010) 15 *Journal of North African Studies* 375-384.

131 See Western Sahara Campaign UK's petition: 'We call on the British government to demand justice for the Saharawi and Western Sahara', https://www.change.org/p/we-call-on-the-british-government-to-demand-justice-for-the-saharawi-and-western-sahara (accessed 17 June 2025).

6.3 Mauritius

The ICJ has also been instrumental in the campaign for the complete decolonisation of Mauritius. Prior to granting independence to Mauritius in 1965, the UK excised Chagos Archipelago (Chagos islands) from Mauritius, and incorporated the islands into the British Indian Ocean Territory.[132] As part of the efforts to complete its decolonisation, Mauritius successfully lobbied the UNGA to adopt Resolution 71/292 of 2017, in which the Assembly decided:[133]

> In accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions: (a) Was the process of decolonisation of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?; (b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago?

In 2019 the ICJ issued its advisory opinion holding that the separation of Chagos islands from Mauritius in 1965 was in violation of the right to self-determination, as recognised under international law.[134] It also held that the decolonisation of Mauritius could not be regarded as complete in light of the United Kingdom's continued administration of Chagos islands – a part of Mauritius.[135] The Court also clarified that the UK had a responsibility to end its administration of Chagos islands as rapidly as possible.[136]

Although it lacked binding legal force, the ICJ's advisory opinion influenced further discussions within the UNGA, in favour of the decolonisation of Mauritius. For example, in the 2019 session, straight after the publication of the ICJ's advisory opinion, the UNGA adopted Resolution 73/295 in which the Assembly welcomed the ICJ's findings indicating that the decolonisation of Mauritius remained incomplete in light of the UK's administration of the Chagos islands.[137] On the basis of the ICJ's findings, the General Assembly resolved:[138]

> Since the decolonisation of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the continued administration of the Chagos Archipelago by the United

132 ICJ advisory opinion on legal consequences of the separation of the Chagos Archipelago from Mauritius (2019) para 47.

133 UN General Assembly Resolution 71/292 (2017) para 8.

134 ICJ Advisory opinion on legal consequences of the separation of the Chagos Archipelago from Mauritius (2019) paras 181-183.

135 As above.

136 ICJ (n 134) para 182.

137 Preamble to the UN General Assembly Resolution 73/295 (2019).

138 Preamble (n 137) para 2-3.

> Kingdom of Great Britain and Northern Ireland constitutes a wrongful act entailing the international responsibility of that State; the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible … and the United Kingdom of Great Britain and Northern Ireland [must] withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution, thereby enabling Mauritius to complete the decolonisation of its territory as rapidly as possible.

Thus, the ICJ's advisory opinion was impactful in assisting the UN to crystallise its position on the legal status of Chagos islands, as well as emboldening the UNGA to take a stronger position than it had done in its previous resolutions. For instance, although the UNGA discussed the question of Chagos islands at its sessions in 2016[139] and 2017,[140] it did not take a position on the legal status of the territory. In 2019, and welcoming the ICJ's advisory opinion,[141] the UNGA took a firmer position calling for the UK's withdrawal within a period of no more than six months from the adoption of the resolution.[142] This indicated a major shift in the position of the UN, as a direct result of the 2019 ICJ's advisory opinion on the question of Chagos islands.

In addition, the ICJ's advisory opinion tremendously helped to increase international support for Mauritius's cause for its decolonisation. This was evident in the record number of UN member states that voted in support of the UNGA Resolution 73/295 to welcome the ICJ's advisory opinion, and to implement decolonisation measures that are in accordance with the ICJ's findings. A total of 116 states voted in favour of this Resolution, while only six states[143] opposed it.

As a result of increasing international pressure, in 2022 the UK announced[144] that it was commencing negotiations with Mauritius on the question of sovereignty over the British Indian Ocean Territory, 'taking into account the recent international legal proceedings'[145] – referring to the ICJ's advisory opinion of 2019 on Chagos islands.[146] In 2024 the UK and Mauritius signed an agreement under which Chagos islands were handed back to Mauritius, but Mauritius would allow the United States of America and the UK to continue operating a military

139 In 2016 the Assembly resolved that discussion on the need to request an advisory opinion from ICJ be put on the agenda for the 2017 session. UN General Assembly Resolution 71/292 (2017) para 7 where the Assembly noted 'its decision of 16 September 2016 to include in the agenda of its seventy first session the item entitled Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965', on the understanding that there would be no consideration of this item before June 2017.

140 UN General Assembly Resolution 71/292 of 2017.

141 UN General Assembly Resolution 73/295 (2019) para 2.

142 UN General Assembly Resolution 73/295 (n 142) para 3.

143 Namely, Australia, Hungary, Israel, Maldives, United Kingdom and the United States of America.

144 https://www.theguardian.com/world/2022/nov/03/uk-agrees-to-negotiate-with-mauritius-over-handover-of-chagos-islands (accessed 17 June 2025).

145 As above.

146 As above.

base on one of the islands (Diego Garcia) for an initial period of 99 years, subject to the payment of a fee to Mauritius.

Thus, in the struggle to complete the decolonisation of Mauritius, the ICJ's advisory opinion played a critical role in clarifying that, under international law, the Chagos islands belong to Mauritius. Although lacking binding legal force, this advisory opinion legally delegitimised the UK's claim over Chagos islands, and it galvanised international pressure that forced the UK to end its colonial administration of the territory.

7 FEASIBILITY OF EFFORTS TO SEEK ICJ ADVISORY OPINION ON REPARATORY JUSTICE

An analysis of the process of decolonisation of Namibia and Mauritius and the examination of the ongoing struggle for the decolonisation of Western Sahara reveals that the ICJ's advisory opinions had a profound impact, even though they are legally non-binding. They helped to galvanise international pressure on the colonising states, kept the international community engaged on the cause and plight of the oppressed, affirmed and validated the rights of the oppressed, and they emboldened the oppressed groups to undertake increased political action against colonial regimes. The ICJ's advisory opinion can also be used strategically, to promote the cause for reparatory justice, in ways that are similar to the way in which it was utilised to promote decolonisation in the cases considered above.

In any case, some of the advisory opinions clarified that colonial occupation was a violation of international law, particularly the right to territorial integrity and self-determination. By making such findings, these advisory opinions have laid a legal foundation for potential positive findings by the ICJ, should a request for an advisory opinion on reparations for colonialism be made. This is precisely because, if colonial states were found to be in violation of international law when they occupied other peoples' territories, then they should also be held accountable to redress the existing damage that is attributed to their colonial occupation of these territories.

However, a further question that could arise (as it also arose in the context of the request for the ICJ's advisory opinion on state obligations for climate change)[147] is whether it would be practically feasible for the AU to file a request for an advisory opinion, in light of the ICJ's rules of procedure and possible resistance from the states that are responsible for the trans-Atlantic enslavement and colonisation. In order to address this question, it is necessary to consider both the legal requirements that must be met, and the geo-political dynamics that

147 M Fitzmaurice & A Rydberg 'Using international law to address the effects of climate change: a matter for the International Court of Justice?' (2023) 4 *Year Book of International Disaster Law Online* 282-305.

must be navigated, for the AU to successfully engage the ICJ for an advisory opinion on the question of reparatory justice.

In terms of article 96(1) of the UN Charter, the UNGA and the UNSC have the authority to request the ICJ to issue advisory opinions on any question of international law. In addition, the UNGA is permitted by article 96(2) to authorise any other organ of the UN or specialised agencies to request an advisory opinion on legal questions arising in the scope of their activities. A study of the ICJ case registry shows that the ICJ's advisory opinions have been requested primarily by the UNGA.[148] It seems prudent, therefore, that the AU should consider lobbying the UNGA to adopt a resolution seeking the advisory opinion on the question of reparatory justice for Africans. In terms of article 18(1) of the UN Charter, resolutions of the UNGA on all 'important questions' must be supported by a two-thirds majority. Decisions on all other questions require a simple majority of the members present and voting.[149] These rules notwithstanding, in practice it is not always clear whether draft resolutions require a two-thirds majority or a simple majority in order to be adopted by the UNGA.[150] Considering the potential resistance that is likely to arise from powerful states that were responsible for the enslavement and colonisation of Africans, it is prudent to assume that a draft resolution on the question of reparatory justice for the African people would require a two-thirds majority in order for it to be adopted by the UNGA. In any case, historically, requesting advisory opinions from the ICJ has always been considered an 'important question' that requires approval by two-thirds majority.[151]

The UNGA consists of 193 member states. Of these, 55 are African states, 48 are Asian, 44 are European, 33 are Latin American and Caribbean states, two are North American states while 14 are Oceanian states. A draft resolution on the question of reparatory justice would need support from at least 130 UNGA member states. In order to secure this level of support, the AU would need to forge alliances and collaborate with other regional groups. Naturally, the first ally of the AU should be CARICOM by virtue of sharing a common interest on reparations. CARICOM and AU regions have a combined total of 88 states in the UNGA. They would need to reach out to some of the friendly states in Asia and Europe in order to secure the two-thirds majority to support the draft resolution. Historically, Africa has been able to secure support from some of the Asian and European states, including Russia, India and China.[152]

A further legal requirement to be met is that the request to the ICJ must involve a question of international law that is relevant and has

148 https://www.icj-cij.org/cases (accessed 17 June 2025).

149 Art 18(3) UN Charter, 1945.

150 See analysis by P d'Argent 'Article 65' in A Zimmermann and others (eds) *The Statute of the International Court of Justice: a commentary* (2019) 1790.

151 This also includes the recent UN General Assembly Resolution A/77/L.58 (2023) to request an ICJ advisory opinion on climate change.

152 Including the question of decolonisation. These states have voted in favour of decolonisation of territories in Africa.

practical impact. This position was confirmed by the ICJ in various cases, including in its advisory opinion on Western Sahara where the Court stated that '[t]he function of the Court is to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose.[153]

As has already been discussed earlier in this article, the claim for reparatory justice is not moot because present generations of Africans are suffering from damage that are directly linked to the trans-Atlantic enslavement and colonisation. The damages include environmental degradation, increased vulnerability to climate change, existing socio-economic inequalities between Africans and other races as a result of the deprivation of natural resources, and the psychological harm being endured by African families as a direct result of the abuse suffered during colonialism and the forced migration of their enslaved ancestors. Therefore, the question of whether states have obligations, under international law, to repair the existing damage caused through their role in the trans-Atlantic enslavement and colonisation, and whether the international community has an obligation to establish an international judicial body to address these injustices are questions that are relevant and have a practical and contemporary effect. Further, these questions fall squarely within the doctrine of state responsibility, which entails that when a state violates an international legal rule through acts of commission or omission, that state assumes legal responsibility toward other states or the international community.[154] Consequently, these questions can be considered by the ICJ through an advisory opinion.

8 CONCLUSION

The ICJ exercises two types of jurisdiction, namely, the competence to adjudicate disputes between states and issue binding decisions and the competence to issue advisory opinions. Various states that are responsible for the trans-Atlantic enslavement and colonisation of the African people have withdrawn their consent to the ICJ's jurisdiction to make binding decisions in disputes related to the trans-Atlantic enslavement and colonisation. However, the ICJ does not need the consent of the states in order to issue an advisory opinion on a question of international law whose interpretation has a practical and contemporary effect.

Although lacking legal binding force, the ICJ's advisory opinions have historically proven to be useful for strengthening local and international advocacy including on decolonisation of certain parts of Africa. An analysis of the process of decolonisation of Namibia and Mauritius and the examination of the ongoing struggle for the

153 ICJ Advisory opinion on Western Sahara (1975) para 73.

154 B Chimni 'The articles on state responsibility and the guiding principles of shared responsibility: a TWAIL perspective' (2020) 31 *European Journal of International Law* 1211-1221.

decolonisation of Western Sahara reveals that the ICJ's advisory opinions helped to galvanise international pressure on the colonial states, kept the international community engaged on the cause and plight of the oppressed, affirmed and validated the rights of the oppressed, and emboldened the oppressed groups to undertake increased political action against colonial regimes.

In light of the evident usefulness of these opinions in the decolonisation process thus far, the AU should consider partnering with the CARICOM and other regional groups to sponsor and table a draft resolution before the UNGA, to seek the ICJ's advisory opinion on the question of reparatory justice for the African people. The AU should seek the ICJ's advisory opinion on two important questions, namely, (a) whether states have obligations, under international law, to repair the damage caused through their role in the trans-Atlantic enslavement and colonisation of the African peoples; and (b) whether the international community has an obligation to establish an international judicial body to address these injustices, in light of the absence of such a body under the existing international legal framework.