

Bars to Recovery

The Caribbean Claim to Reparations for Slavery in International Law

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Introduction

In 2005, a group of British scholars and financial experts were asked to answer the question: "If the British were to pay the two million enslaved blacks in the Caribbean a retroactive wage, fixed at the lowest level of an English field worker for 200 years, plus a sum for their lost assets in Africa and trauma inflicted, what would be the sum of the settlement?" The figure suggested by the team came to 7.5 trillion pounds, more than three times the 2005 current GDP of Britain. The figure reflected the value of slave labour to British economic growth, and illustrates how a small island economy on the outskirts of Western Europe was able to emerge the major global economic force in the nineteenth century.¹

During the course of the four centuries between 1450 and 1850, millions of Africans were shipped across the Atlantic, primarily to colonies in North and South America and the West Indies, in what has been labelled the largest forced migration of a human population in human history.² This was a period characterised both by a massive boom in the economies and industries of what is now classed as the 'First World', and by the massive and systematic oppression of entire populations in the name of European development. The effect of the trans-Atlantic slave trade on African populations 'delivered' throughout the world was colossal, with some fifteen million African people forcibly removed from their homelands and shipped across the Atlantic Ocean as cargo on a voyage which would claim the lives of one in four of them.³ The effects of the global market in human flesh upon the Caribbean region were particularly devastating, as European colonisation and the chattelisation of Africans conjoined to overwhelm the island nations.

Millennia from the inception of slave practices in human history – following on from catastrophically overdue international abolition – contemporary European states are being faced with the ghosts of antecedent injustices. Widespread calls for reparations are now being given voice by the descendants of slavery both as individual human actors and as national citizens of a region which continues to bear the scars of European shackles. These calls recognise the unique circumstances of the peoples of the contemporary Caribbean, who are recognised as:

...the peculiarly disenfranchised beneficiaries of centuries of Western capitalist solicitude. They are illiterate rather than non-literate; countrified rather than rural; urbanized, but nearly

¹ Hilary Beckles "‘Slavery was a long, long time ago’: remembrance, reconciliation and the reparations discourse in the Caribbean" (2007) 38(1) *Ariel* 9 at 21-22.

² See generally Elizabeth Mancke *The creation of the British Atlantic world* (Johns Hopkins University Press, Baltimore, 2005).

³ Herbert Klein *Middle Passage* (Oxford University Press, Oxford, 1998).

without cities; industrialized, but without factories – and, often, agricultural but without land. Their poverty, rural styles, and agricultural dependence make them look like most of the Third World; but the similarities are deceptive and untrustworthy.⁴

The unique nature of the Caribbean, and the effects of the trans-Atlantic slave trade on its societies and economies, make the claims to reparations for slavery authored by the region sui generis, underpinned both by analysis which is universal and that which is premised on the particular, unparalleled context.

The primary focus of the Caribbean community (Caricom) in their claim for reparations are the contemporary problems which arise from the slave trade era, rather than the individual treatment of slaves in history. This moves the perspective away from an individualised conception of the perpetrators and victims of slavery, and towards a preoccupation with systemic concerns – institutional culpability and continuing societal suffering. In its initial aim of negotiating for reparations, Caricom seeks an apology for the slave trade from European powers, a repatriation program to enable Africans “stolen from their homes and forcefully transported to the Caribbean as the enslaved chattel and property of Europeans”⁵ to return to their homeland if they so desire, and financial redress for continuing harms of the slave trade.

The proposal for financial compensation does not demand direct pay-outs to the descendants of slaves, but rather focuses on the need to remedy structural inequities which arise in contemporary Caribbean societies as a result of historical slave practices. Caricom's ten-point action plan elaborating on the intentions and objectives of official reparationists, which includes the demands for full formal apologies and a repatriation programme, as well as identifying the need for programmes targeted towards addressing Indigenous peoples, African knowledge, the public health crisis, the building up of cultural institutions, the eradication of illiteracy, and psychological rehabilitation.⁶ The plan also calls for the transfer of technology from States which historically engaged in the slave trade, and the cancellation of debt. These demands echo the needs identified at the United Nations World Conference on Racism held in Durban in 2001 which recognised:⁷

...the need to develop programmes for the social and economic development of those societies

⁴Sidney Mintz *Caribbean Transformations* (Aldine Publishing, Chicago, 1974) at [37-38].

⁵Regina Moore “Professor Beckles: Ten-Point Plan makes a case for reparatory justice” (2014) The Barbados Advocate <www.barbadosadvocate.com>.

⁶CARICOM Secretariat “CARICOM Reparations Commission Press Statement” (press release, 10 December 2013); Martyn Day, Richard Stein and David Standard “CARICOM nations unanimously approve 10 point plan for slavery reparations” (2014) Leigh Day <www.leighday.co.uk>.

⁷World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance “Daily Highlights” (press release, 8 September 2001) [Durban Conference].

and the diaspora within the framework of a new partnership based on the spirit of solidarity and mutual respect in the following areas: debt relief, poverty eradication, building or strengthening democratic institutions, promotion of foreign direct investment and market access.

The requests of the Caribbean community are thus tied directly into remedying the harms which continue to pervade their societies and which have their origins in the trans-Atlantic slave trade, rather than on perpetuating the retention of ancient grudges.

Although these measures mimic many forms of development aid European nations presently provide to the Caribbean, they possess an important symbolic and psychological dimension absent in the context of charitable contributions. When the supply of resources to the Caribbean is framed in terms of 'aid', the historical relationship between the two groups of states is reinforced, with a paternal Europe sheltering a Caribbean incapable of looking after itself. As Gifford identifies, when European governments respond to injustices by way of development aid, it often carries with it an “overtone of condescension: the Africans are suffering because their leaders have messed things up, but we still help.”⁸ The call for reparations rather than aid therefore re-frames discourse around the provision of support to the Caribbean in a particularly significant manner, providing justification for the claim which exists independently from any practical change in the provision of resources from European governments.

Although it remains impossible to fully restore a situation to that which preceded the commission of the gross violation of human rights, formal redress for historical injustices can begin to acknowledge the experience of populations of victims and thereby facilitate progress. Reparations are particularly valuable in this task, and meaningfully distinguishable from other forms of support, as they are founded in a recognised legal entitlement and include an acknowledgement of wrongdoing.⁹ Establishing this legal basis for the transfer of resources to the Caribbean region would aid in protecting the contributions from the fluctuations of European domestic politics, demanding that they be elevated to the level of an obligation which governments have a duty to account for within their budgets.

This paper explores the international legal framework within which the Caribbean claim for reparations is situated, particularly the bars to establishing an international legal obligation owed by

⁸Anthony Gifford “Pipe Dream or Necessary Atonement (2007) 36 Index on Censorship 89 at 94.

⁹Naomi Roht-Arriaza and Katharine Orlovsky “A Complementary Relationship: Reparations and Development” in Pablo de Greiff and Roger Duthie (eds) *Transitional Justice and Development: Making Connections* (Social Science Research Council, New York, 2009) at 172.

contemporary European states to the modern Caribbean community. Part one addresses the attempt to overcome temporal limitations on liability through the identification of quantifiable and proximate harms within the Caribbean. This extant detriment frames discussions over the present duty to compensate upon former slave-trading nations, and the concomitant prosperity which continues to reap the benefits of the trans-Atlantic trade. Parts two and three have their foundation in the Articles on State Responsibility drafted by the International Law Commission in 2001, which defines an internationally wrongful act of a State as conduct consisting of an act or omission which is attributable to the State under international law and which constitutes a breach of an international obligation of the State.¹⁰ Part two is concerned with state responsibility and causation in relation to historical grievances with contemporary harms, while part three traces the prohibition against slavery in international law. This inquiry revolves around the strict international legal character of slavery, rather than moral permissibility, and concludes that although the trans-Atlantic slave trade represented a fundamentally unacceptable treatment of global citizens, the international prohibition against slavery had not then crystallised in international law. The fourth part acknowledges the resultant tension between international law and justice, and posits a potential alternative course for the international legal claim through retroactive application of norms. Part five transgresses the strict legal framework, addressing the political alternatives available in the international arena where enforcing obligations upon sovereign states can prove problematic. This part queries whether political settlements are capable of providing a sufficient remedy, and whether obfuscatory tendencies in reality do more harm than good.

Although there is a significant amount of discourse concerning reparations and slavery internationally, there is very little analysis of the Caribbean claim within legal scholarship. This paper seeks to assemble the material on slavery, reparations, state responsibility, and historical grievances in relation to gross violations of human rights and humanitarian law in order to address the Caribbean calls. It involves discussion of a number of passages which Caricom could attempt to navigate in order to achieve justice and the obstacles afflicting each of these routes, maintaining a focus on the international arena and excluding analysis on the potential for municipal legal remedies. Although recognising that the trans-Atlantic slave trade was a moral aberration on the history of modern Europe is intuitive, finding the means to rectify those wrongs is a titanic task. In the contemporary moral environment, however, such an endeavour is demanded regardless of the conclusion in order to support the Caribbean region's liberation from being shackled behind bars to recovery.

¹⁰*Responsibility of States for Internationally Wrongful Acts* GA res 56/83 A/res/56/83 (2001) [Articles on State Responsibility], considered to be a codification of existing international law rather than as development.

Part I: A People in Chains

Identifying Quantifiable and Proximate Harms in the Contemporary Caribbean

The *Dred Scott* judgement of the US Supreme Court in 1857 provides disconcerting evidence of the extent to which slave practices entrenched racist ideologies throughout the Western world and provided a foundation for the widespread denial of the rights and humanity of African Americans.¹¹ In a case which declared that African Americans could not be citizens of the United States regardless of whether they were enslaved or free, and that they therefore could not have standing to sue in the federal court, the Court labelled the 'Negro' African race as beings of an inferior order with no rights which white men were bound to respect. The judiciary of the time had no qualms with denying African slaves the human status attributed to their European masters, displaying with unabashed candour the predominant social narratives of the time which characterised 'Negroes' as not only worth less than their white counterparts, but as lacking even the base level of humanity required to found citizenship.

The *Dred Scott* judgement is but one constituent part of an international network of case law and legislation which corralled blacks away from the general, 'civilised', rights-bearing population, deeply entrenching racist narratives and norms. Countless decisions denying the capacity of Black People to possess human identities and affirming a concomitant lack of obligation upon Whites to temper their treatment of the African population prevailed throughout the Western world. These rulings, in conjunction with a myriad of legislative provisions permitting and protecting slave practices, spawned monumental inequalities between the two races which, according to reparationists, continue to plague contemporary societies.

The continuity of the harms originating in slave practices which accrue to Black populations in the modern context form the basis of many of the contemporary calls for reparations for slavery. This focus re-conceptualises the 'victims' of the trans-Atlantic slave trade as they exist in the traditional paradigm in such a manner as to extend the category beyond the enslaved individuals who directly suffered under European domination. This discourse re-frames the resultant damage within the Caribbean epidemic in the modern as well as expired communities of the region.

International law does not, in an absolute sense, demand that there be identifiable victims of a wrongful act or omission suffering in a tangible and material way in order to found a claim of

¹¹*Dred Scott v Sandford* 1857 60 US 323.

international wrongdoing. Instead, international legal understanding identifies the characterisation of global illegality as stemming *prima facie* from the contravention of international norms irrespective of deleterious practical consequences, and a subsequent duty to provide reparations is assumed.¹² Despite this, there is an identifiable propensity amongst commentators to demand that the further element of 'damage' to another state be established in order to found international responsibility.¹³ This perspective operates within a consequentialist rather than a normative international legal framework, refusing to assume that a practice is automatically illegitimate simply by virtue of its performance when functional detriment cannot be clearly established.

As Crawford qualifies, this requirement is not a general rule but is instead dependent on the nature and content of the primary obligation in question.¹⁴ For the purposes of assessing the necessity of an element of damages in constituting a claim, without determining the precise terms of the legal provision, contemporary formulations of the prohibition against slavery can be speculatively ascribed to the historical context. Although there are some deviations in the specific character of the obligations imposed and the prohibitions expressed, general framing founded in a plethora of international instruments and commentaries characterises the global embargo in consistent terms which assume sufficient harm from the acts or omissions constituting their fulfilment. This precludes the conviction that those claiming international wrongdoing engage in discourse over whether or not there has been 'damage'. The international prohibition against slavery, now clearly formulated in the 1926 Slavery Convention¹⁵ and the 1956 Supplementary Convention¹⁶ is thus constructed essentially as a strict liability offence, satisfied upon conduct constituting its performance rather than being dependent upon tangible 'harms'.

With the characterisation of slavery as an international prohibition thereby framed so as to assume the automatic illegitimacy of any course of action by a State which engages in or supports the practice, identifying quantifiable harms is not a necessary element of the discussion over whether acts of previous governments were *prima facie* contrary to international laws. In order to justify the conclusion that European States breached international laws, Caribbean nations need only establish that their colonial oppressors in fact engaged in activities which were impermissible at the time of

¹²See Dinah Shelton "Righting Wrongs: Remedies in the Articles on State Responsibility" (2002) 96 AJIL 833.

¹³James Crawford *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, Cambridge, 2002) 61 at [84].

¹⁴*Ibid.*

¹⁵Slavery Convention (opened for signature 25 September 1926, entered into force 9 March 1927).

¹⁶Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (opened for signature 7 September 1956, entered into force 30 April 1957).

their commission.¹⁷ Research and discussion which is able to formulate connections between historical practices and present day social and economic falterings within Caribbean nations remains, however, a valuable contributor to the discussion over whether that claim can be considered to remain in existence despite arguments that the wrongs have passed over into the annals of history.

Present accountability and duties to compensate for slavery are frequently denied within the contemporary context purely on the basis that the wrongdoing was temporally confined to the era in which it occurred. Such commentators conclude that liability cannot be extrapolated from the historical context into the present. This was the perspective propounded by the House of Lords, headed by Lord Wilberforce, in 1996 when it rejected a reparations motion on the grounds that the experiences existed in the distant past, and that there were no individuals alive who could fulfil the role of plaintiff in the case of litigation.¹⁸

This is a narrative which pervades not only academic and governmental reparations discourse, but also the general mentality of modern societies. Whether because they live in an 'enlightened' state which accepts the humanity and equal status of people of all races in their entirety, or because they conceptualise of obligations and duties as fundamentally individualised and thereby only connected to the direct perpetrators and victims, modern populations have a tendency to sever their sense of connection to unjust circumstances which originate from amorphous or historical provenances. Beckles identifies:¹⁹

...the most effective strategy still used by the British government to thwart reparations advocates and protect the royal family [as] the argument that colonial slavery is far too remote to be subject to recuperative legal procedures.

This is a position echoed throughout much of the Western literature on the topic, which focuses on the historical dimensions of the claim to reparations and positions those claims exclusively within that historical context, thereby legitimising the alienation of responsibility.

Claims relating to historical wrongdoing fail to cohere with classical remedial paradigms of individual victims and perpetrators, quantifiable loss and direct causative links,²⁰ thus making them fundamentally harder for the global audience to grapple with. Views differ as to the means by which historical barriers can be circumvented in the context of claims for slavery, some of which appeal to

¹⁷ Articles on State Responsibility, above n 10.

¹⁸ (14 March 1996) 570 GBPD HL 1042.

¹⁹ Beckles, above n 1, at [19].

²⁰ See Dinah Shelton *Remedies in International Law* (2nd ed, Oxford University Press, Oxford, 2005) at [428].

the moral dimensions of the claims whilst others rely on legal technicalities. One perspective on the mechanism for expansion of liability is premised on the attribution of causes of action to individual slaves who were the victims of wrongdoing, and the inheritance of that claim by succeeding generations.²¹ These characterisations of the present standing of Caribbean citizens to sue for the wrongs of the past become somewhat tenuous, however, as inter-generational gaps increase, descendants become a much less direct and more amorphous group, and the perpetrators of the injustices fade out of existence or change so dramatically that they can no longer be considered culpable for the wrongdoing.

An alternative contention to resolve issues of historicity is evidenced in the so-called *Rawagede* judgement.²² Although occurring within the context of Dutch domestic law, this decision provides some support for the contention that statutes of limitations cannot hold force in the relation to international crimes. It is possible to extrapolate from this conclusion that the same principle should apply in relation to general relegations of global atrocities to the silent pages of history books, which should not be allowed to persevere over the interests of justice.²³ There is, however, a distinction drawn in international law between actions for compensation and international crimes, which allows for the application of statutes of limitation to reparations claims except where the result would be unduly restrictive. This is enunciated in principle 7 of the *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* which articulates:²⁴

Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

This creates some dissonance in the context of the international claim for reparations for slavery, with questions as to the extent to which present Caribbean interests are restricted by the denial of standing to make a claim for compensation, and whether those limitations are to be considered 'unduly'

²¹See for instance Stephen Kershner "The Inheritance-Based Claim to Reparations" (2002) 8 *Legal Theory* 243 which argues that the descendants of slaves cannot found a claim to compensation on the basis of harms to contemporary Caribbean citizens as these individuals owe their existence to slavery and thus cannot be considered to have been harmed by the trade. Kershner claims that present generations may have a course of action, however, through the inheritance of their ancestors' claims.

²²*Rechtbank's-Gravenhage (Stichting Komitee Utang Kehormaten Belanda v Netherlands)* (trial judgement) [2011] LJN:BS 8793.

²³See Liesbeth Zegveld "'Victims' Reparations Claims and International Criminal Courts: Incompatible Values?" (2010) 8 *Journal of International Criminal Justice* 79 at 106-107.

²⁴*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* GA Res 60/147 A/Res/60/147 (2005).

restrictive. This discussion necessarily involves consideration of the degree to which contemporary Caribbean citizens continue to feel the deleterious effects of historical slave practices.

The identification of present, continuing harms serves both to substantiate claims for reparations relating to historical wrongdoing, and to justify the levels of compensation requested and required, which goes beyond pure discussion over the existence of a breach of international laws. The objective of reparations within international law, as articulated by the Permanent Court of International Justice in the *Chorzow Factory* case, must be to “wipe out all the consequences of the illegal act” as far as is possible.²⁵ This becomes a somewhat Herculean task in the context of historical slave practices in the Caribbean region, as the widespread and systematic chattelisation of both the Indigenous populations and 'imported' Africans dramatically altered social and economic structures within the island nations, and fuelled a veritable machine of oppression which touched on many aspects of Caribbean life and development.

Reparationists point to “poverty, landlessness and underdevelopment, as well as the crushing of culture, the loss of identity the inculcation of insecurity among Black people and the indoctrination of Whites in a racist mindset [sic]” as the result of historical slavery, and as continuing to severely limit the lives of people in the Caribbean.²⁶ The present harms identified by reparationists may be demarcated along three distinct but interconnected lines: economic disenfranchisement, social inequity and cultural annihilation. Harms in all three of these areas are articulated as continuing to such an extent that they demand redress, even in the new century where the individual perpetrators of slave practices cannot be prosecuted. Many of these negative consequences are tied into the natural effects of widespread slave practices, accumulating in any instance of systematic objectification of a human population; reference to the residues of slavery in areas external to the Caribbean are therefore contributive to the discussion. These harms are particularly marked within the region however, as the extent to which European nations overwhelmed Caribbean states with slaves, slave practices, and slave traditions was without precedent and remains without parallel.²⁷

Gifford acknowledges those commentators who deny advertence to historical practices in attempting to address present inequalities, noting:²⁸

There are those that say that the past is the sad past and we should simply concentrate on the

²⁵*Factory at Chorzow (Germany v Poland) (Merits)* [1928] PCIJ (series A) No 17.

²⁶Gifford, above n 8, at [93].

²⁷See generally Arthur Stinchcombe *Sugar island slavery in the age of enlightenment: the political economy of the Caribbean world* (Princeton University Press, Princeton, 1995).

²⁸Gifford, above n 8, at 96.

injustices of the present day...But we do not live in an historical vacuum...Every act of discrimination, every racial attack, every vote for a neo-Fascist party, is a reminder that the doctrine of White superiority, which was used to justify the traffic in Black humans, still has potency.

A plethora of historians, sociologists, anthropologists and economists now identify the connections between present inequalities and systematic slave practices. These authors point to the widespread destruction of languages and culture that went hand in hand with the mass enslavement of Black populations and the classification of such as less than human beings, the denial of a cultural voice and ability to practice traditions and the stunting of the development of educational systems and cultural institutions which were not developed within the Caribbean region because of the structure of slave societies.²⁹ Economic inequalities stemming from slavery also permeate Caribbean states, with both direct and indirect underdevelopment amongst localised populations tying into historical practices. Forced landlessness and alienation from productive resources crippled the economic enfranchisement of emancipated slave populations, the descendants of whom were also denied the benefit of an inheritance because their forebears were not paid for their labour. More ubiquitously, the nature of the plantation economies cultivated by colonisers created systemic reliance on European masters in order to continue functioning, fuelling structural and ineluctable inequalities within the contemporary Caribbean. As Mintz identifies:³⁰

...the uses to which African slaves were put in the Caribbean region between its 'discovery' and the total abolition of slavery were 'industrial' uses, even though they often were concealed within a rural setting. After slavery, the same major modes of labor use persisted; the Caribbean region continued to serve as an arena of European imperial power, its economic character largely framed by the plantation system, its governments the puppets of the metropolises, its labor drawn from elsewhere by a variety of schemes, all marked by elements of coercion and deception.

Many modern treatises undertake the extensive historical, sociological and economic analysis necessary to connect historical slave practices to present inequalities and underdevelopment within the Caribbean region and other communities of slave descendants.³¹ These works result in growing acceptance for the contention that the trans-Atlantic slave trade contributed markedly to the systemic

²⁹ See generally Stinchcombe, above n 27; Hilary Beckles *Britain's Black Debt: Reparations for Slavery and Native Genocide* (University of West Indies Press, Kingston, 2013); and Ogaga Ifowodo *History, Trauma and Healing in Postcolonial Narratives: Reconstructing Identities* (Palgrave Macmillan, Hampshire, 2013).

³⁰ Mintz, above n 4, at 31.

³¹ See Walter Rodney *How Europe Underdeveloped Africa* (Howard University Press, Washington, 1974); Hilary Beckles, above n 29; and Randall Robinson *The Debt: What America Owes to Blacks* (Penguin, London, 2001).

deprivation which continues to plague the Caribbean region. The lasting impacts of historical slave practices are particularly difficult to ignore when confronted with evidence of programmes such as the Haiti payment plan demanded by France in order to gain international recognition for the states. This 'agreement' required the Caribbean nation pay 150 million francs for French 'losses' in the region which included enslaved peoples in its inventory. This program is considered by many to be the principal reason for the abject poverty of Haiti today, despite the movement to forgive the debt in the early 21st century.³² As the United Nations World Conference on Racism recognised:³³

...historical injustices have undeniably contributed to poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, particularly in developing countries.

This allows discussion to move beyond questions of proximity and damages to address the connection which modern European governments have to the historical practices which culminated in the inequitable status quo, and the extent to which that can be utilised in recognising a legal duty to provide redress.

The framing of the identity of the victim in the context of international law contributes to this discourse, which characterises the nature of the harms identified in the endeavour to ensure reparations as predominantly communally experienced. As identified by the Permanent Court of International Justice in 1924, the right sought to be vindicated in an inter-state dispute is that of the state and not that of the individual or direct victim, thus moving away from paradigmatic formulations dealing with direct victims and perpetrators.³⁴ The Caribbean community's framing of its claim to compensation in terms of the collective therefore serves a dual function: firstly in assisting the overriding of temporal limitations, and secondly in framing the demands consistently with the inter-state context.

This is an approach reflective of the Third World context in particular, within which identity derives from self-identification, which in turn arises from the “historical and continuing experience of subordination at the global level that they feel they share.”³⁵ Matsuda elaborates on the strength of the collective identities which arise within the context of historical oppression, not only from the initially overt discriminatory practices, but also from the external framing of individuals within those

³²See generally Paul Sutton *Politics and Power in Haiti* (Palgrave Macmillan, New York, 2013).

³³Durban Conference, above n 7.

³⁴*Mavrommatis Palestine Concessions Case (Greece v UK)* [1924] PCIJ (series A) No 2.

³⁵Obiora Chinedu Ikafor “Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective” (2005) 43 *Osgoode Hall LJ* 171 at 174

groups as severable from and inferior to the general population:³⁶

Victims necessarily think of themselves as a group, because they are treated and survive as a group. The wealthy black person still comes up against the color line. The educated Japanese still comes up against the assumption of Asian inferiority. The wrongs of the past cut into the heart of the privileged as well as the suffering.

A historical instance evidencing the strength of these communal identities lies in the formation and experience of the Israeli state after the Second World War.³⁷ West Germany's provision of reparations for the costs of resettling Jewish refugees vindicate claims based on collective narratives of oppression in a particularly terminal context, as the state of Israel then claiming for compensation had not existed at the time when the Nazi regime committed its crimes against the Jews.³⁸

This approach is also consistent with the political agenda of the Organisation of African Unity in advancing what is deemed “African consciousness”, which recognises “the great importance African peoples attach to the values of solidarity, tolerance and multiculturalism” and constitutes the moral ground and the inspiration for the communal African struggle.³⁹ This perspective empowers reparationists to overcome the barriers of historicity and the passing of the direct victims of slave practices, linking present harms to the trans-Atlantic slave trade through a continuous collective identity which continues to bear the marks of European whips. Du Plessis similarly links the collective African identity to the claim for reparations for historical wrongdoings, elaborating:⁴⁰

From this perspective group identity allows all Africans to perceive the call for reparation through the lens of communalism and collectivism, and to identify a continuing and uncompensated wrong to a corpus of Africans throughout the world. The result of this is that the same factor that would inhibit a claim for reparation from the dominant perspective becomes an empowering means for achieving reparation when viewed from the perspective of an African consciousness.

The widespread and systematic nature of the atrocities therefore contribute to the very discourse that demands their redress, forcing enslaved populations into a shared experience of victimhood which

³⁶Mari Matsuda “Looking to the Bottom: Critical Legal Studies and Reparations” (1987) 22 Harv CR-CL L Rev 323 at 376.

³⁷See generally Robert Wistrich *The Shaping of Israeli Identity: Myth, Memory and Trauma* (Taylor and Francis, Hoboken, 2014).

³⁸Lord Anthony Gifford “The Legal Basis of the Claim for Reparations” (paper presented to the First Pan-African Congress on Reparations, Abuja, 27 April 1993).

³⁹See “Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Regional Conference for Africa” (2001) World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance <www.un.org/WCAR>

⁴⁰Max du Plessis “Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery” (2003) 25 Hum Rts Q 624 at 643-644.

fuels the formulation of a communal identity which exists outside of the individuals initially constituting its form. This unification helps to frame a discourse which acknowledges a superordinary ipseity which transcends the bounds of natural lives and thereby leaves the door unlocked for a claim to redress by present citizens of the collective.

Through this re-framing of conceptions of victimhood, and the identification of contemporary harms within the Caribbean region intertwined with historical slave practices, reparationists build a rhetorically persuasive case for redress. This avoids exclusively counter-factual discourse involving a comparison between the reality of the contemporary Caribbean and a speculative alternative future existing in a world without the trans-Atlantic slave trade, as conducted by Lambert.⁴¹ Reparationists are instead aligned with scholarship on memory, haunting, and the lingering effects of trauma, which acknowledge the recurring nature of past experience, particularly in the context of grave injustices.⁴² With this conceptual framework in place, the purported bar to reparations constructed by the temporal divide is dissolved, allowing for discussion of the direct responsibility of contemporary European governments for the historical conduct that resulted in the present harms.

⁴¹See David Lambert “Black-Atlantic Counterfactualism: Speculating About Slavery and its Aftermath” (2010) 36 *Journal of Historical Geography* 286.

⁴²See Bill Schwarz “Not Even Past Yet” (2004) *History Workshop Journal* 101; Steve Pile *Real Cities: Modernity, Space and the Phantasmagorias of City Life* (Sage, London, 2005); and Karen Till *The New Berlin: Memory, Politics, Place* (University of Minnesota Press, Minneapolis, 2005). For more cautious perspectives on the development of 'memory studies' see Kerwin Klein “On the Emergence of Memory in Historical Discourse” (2000) 69 *Representations* 127; and Walter Michaels “You Who Never Was There: slavery and the New Historicism, deconstruction and the Holocaust” (1996) 4 *Narrative* 1.

Part II: A Wrong without a Wrongdoer

State Responsibility and Causation

The most vocal objections to the Caribbean claim for reparations – and arguments which have significant persuasive force – engage in a deliberately futile search for wrongdoers and villains within the contemporary European environment. They engage in the rhetoric of blameworthiness – which they fail to find amongst the present populations of previous colonial powers – and lacking which they also fail to find a foundation for the claim against those people and their (also blameless) governments. These claims go so far as to characterise the claim to reparations for slavery as “absurd, frivolous, or unworthy of serious consideration.”⁴³

These commentators find the historical nature of the events in question to be a quagmire in which the quest for reparations is cemented, and the deaths of the direct victims and perpetrators in question are therefore considered fatal to the claim, irrespective of whether international law would otherwise support the Caribbean venture. These commentators, however, in focusing on the individuals who either suffered under or directly contributed to the trans-Atlantic slave trade, overlook an important element of the Caribbean claim and the nature of the legal relationship which is addressed, enunciated within part one of this paper. Concomitant to the deviant nature of the victims in question, framed as Caribbean societies and communities of slaved descendants rather than individuals, is the characterisation of the identified defendant. The proposed action seeks redress from European states as entities unto themselves, rather than from the individual actors within government apparatuses who operated during the period in question. A much more nuanced approach is therefore required in order to identify whether the actions and omissions of States constituted within the temporal limits of their own terms in power are attributable to the present governments of European nations.

Article 2 of the Articles on State Responsibility identifies the first element of international wrongdoing as the existence of an act or omission which is attributable to that State in international law.⁴⁴ This prerequisite to establishing State responsibility is recognised in a number of decisions both preceding and succeeding the codification of international law in the International Law Commission's draft Articles.⁴⁵ As a general rule, international law recognises that the only conduct

⁴³Vince Verdun “If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans” (1993) 67 Tulane Law Review 597 at 625.

⁴⁴Articles on State Responsibility, above n 10.

⁴⁵See for instance *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 64, at 3 identifying the first step in establishing State responsibility as determining how far the acts in question could be regarded as “imputable to the Iranian State”.

attributable to a State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs.⁴⁶ In order to satisfy this first element of international liability, reparationists are required to establish an evidential foundation for the contention that these nations, through their agencies, involved themselves in the slave trade and slave practices.

On this matter, history provides compelling evidence to support the Caribbean claim that European governments and associated agencies were engaged in the slave trade to a sufficient degree as to support a finding that the actions could be legally attributed to those States for the purposes of international law. This first stage in the analysis involves attributing responsibility to the governments in question as they existed during the period of the trans-Atlantic slave trade, from which present culpability may be extrapolated or denied. A direct example of the engagement of State apparatuses in the slave trade are the taxes which were imposed by governments on slave traders for slaves purchased from the coasts of Africa. This practice began in the 15th and 16th centuries, with the Portuguese government establishing an early monopoly on the slave trade by regulating access to the African continent, and stretched across the developed nations of Europe. The Spanish likewise government imposed various taxes on the purchase, import, and export of African slaves, while the French government in the latter part of the 17th century imposed duties on each slave that traders transported through the trans-Atlantic slave trade. Governments also benefited from slavery by requiring merchants to obtain licenses and permits to participate in the trade, for which the State levied fees.⁴⁷ These policies, directly implemented by European governments, regulated and legitimised the slave trade, placing the chattelisation of human lives within the same sphere as other mercantile practices which could be regulated and taxed. Above and beyond regulatory oversight of the trade, European governments embroiled themselves within the slave market by granting private contracts to businessmen in order to facilitate trafficking, and by setting up official corporations and companies which engaged in various activities relating to the commodification of human actors. Contracts and treaties were also negotiated between European governments, constructing an international framework within which the trans-Atlantic slave trade could operate.⁴⁸

Although there is a body of international law which depends on the intention of the relevant State organ or agents, rather than just upon their action (or omission), this formulation is connected to the nature and content of the prohibition in question rather than being a prerequisite for international

⁴⁶Articles on State Responsibility, above n 10, ch 2.

⁴⁷See generally Moses Finley *Classical Slavery* (Taylor and Francis, Hoboken, 2014); and Justin Roberts *Slavery and Enlightenment in the British Atlantic* (Cambridge University Press, New York, 2013).

⁴⁸See generally James Walvin *Atlas of Slavery* (Taylor and Francis, Hoboken, 2014).

rules. As recognised in part one, characterisations of the prohibition against slavery and correlated duties are generally consistent throughout history, with the contentious elements of the discussion revolving around the point at which those obligations accrued to States rather than the content of the rule. Slavery does not require a special form of intention as arises in situations of genocide and similarly prescribed crimes, instead resting on the performance of the actions which qualify the State as having engaged in the slave trade.

Although there is abundant evidence to support the contention that European governments themselves engaged directly in the slave trade, there is also support for the contention that a more remote connection to the practice could still found international responsibility. International law generally allows for State responsibility to exist where the State does not participate directly in the acts in questions, but instead fails to take measures to address acts which are being committed.⁴⁹ This formulation of state obligation is premised on a duty existing upon the state in international law, which, upon a finding that international law at the time prohibited slavery as a crime against humanity, would fairly uncontroversially arise in the context of massive and widespread internationally unlawful conduct in which the state was complicit.

Attributing conduct amounting to a breach of what would constitute 'international wrongdoing' in terms of slavery and the slave trade to European states during the period in which the trans-Atlantic slave trade operated would be a relatively undissembling task. The primary caveat to establishing liability would be the requirement that primary obligations had crystallised prior to the acts in question. In ascribing this conduct to present European governments, however, difficulties arise in extrapolating past responsibility to successor governments; exigencies which continue to increase as time passes. Such attribution is necessary, however, in order to found a reparations claim in the present against a governmental entity not immediately responsible for the wrongs claimed against.

Much authority is brought to bear in rallying against the extension of responsibility to modern states, founded upon a dominant theory of rights which assumes that a non-wrongdoer should not be required to pay for a wrong.⁵⁰ These commentators distinguish between contemporary European governments and their counterparts in millennia past to such an extent that they cannot justify the

⁴⁹See *Corfu Channel (United Kingdom of Great Britain and Northern Ireland) (Merits)* [1949] ICJ Rep 1, at 22-23, where the ICJ held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence; and *Case Concerning United States Diplomatic and Consular Staff in Tehran*, above n 45, at 31-32 in which the responsibility of Iran was founded upon the inaction of its authorities which had failed to take appropriate steps when such were clearly called for.

⁵⁰Tuneen Chisolm "Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations" (1999) 147 U Pa L Rev 677 at 710.

imposition of responsibility for past actions upon the present entity. These authors would therefore conclude that, even if the prohibition against slavery can be said to have been operating throughout the period in which the trans-Atlantic slave trade proliferated or any part thereof, liability could not be attached to European nations today. This assumption is littered throughout both international and domestic jurisprudence relating to slavery and a plethora of other historical wrongs. State responsibility, however, cannot be formulated within the same frameworks as individual liability for wrongs committed, instead requiring a more holistic conception of the nature of the State as an entity rather than just a temporally limited collection of individual actors.

A number of international decisions reinforce the position that international recognition of wrongful conduct of a State is not necessarily premised upon a specific form of intent exercised within the minds of individuals operating within the state organ, but can derive from failures of the state organ as a whole. Such decisions, which include *Corfu Channel*⁵¹ and the *Case Concerning United States Diplomatic and Consular Staff in Tehran*⁵² can be viewed as abstracting notions of State responsibility in a manner which allows for an entity not directly culpable (in an individual, intent based sense) for the wrongdoing to nevertheless be held liable. A lack of direct intent or action within a successor state is therefore not sufficient justification in and of itself to deny the culpability of that latter embodiment of the State entity for the actions of its predecessors. The formulation of the nature of the State entity is therefore already distinct from that of an individual, who may be held accountable for a failure to act but always on the basis of a direct and individualised connection to the duty and subsequent failure rather than a more amorphous and systematic failure as may be attributed to a state.

The legal identity of a State also alienates it from a need for direct or individualised conceptions of duties, responsibilities and wrongdoing. The Articles on State Responsibility recognise that a State “is treated as a unity, consistent with its recognition as a single legal person in international law,”⁵³ and thus is characterised as an entity not fundamentally tied to any particular individual within that framework, but rather as possessing an identity unique unto itself. This approach mirrors the formulation of collective Caribbean identity articulated in part one. In attributing particular actions or omissions which form the basis of wrongdoing and thereby an asserted duty to provide a remedy in international law, the State, as a subject of international law, is analogous to a company rather than an individual, and cannot be limited to the amorphous amalgam of individuals of which it is comprised at any given time. The temporal limits which apply to natural persons and restrict liability

⁵¹*Corfu Channel*, above n 49.

⁵²*Case Concerning United States Diplomatic and Consular Staff in Tehran*, above n 45.

⁵³Crawford, above n 13, at 83.

to a single lifetime cannot therefore be seen to operate in the same manner within this arena.

This approach to characterising the legal identity of a state is consistent with the acceptance by West Germany prior to World War Two of a duty to meet the Israeli claim for reparations for the costs of resettling Jewish refugees.⁵⁴ The newly formulated state acknowledged this responsibility as incumbent upon itself despite the fact that it was a different state, territorially as well as politically, from the German Reich which had been responsible for the atrocities in question. The extension of liability beyond the State which itself committed the acts in question, to an entirely new state formed from the ashes of the wrongdoer provides support for an understanding of state responsibility which transcends the current constitution of that state and reinforces a conception of State identity which maintains continuity through history and which requires significant interruption in order to be severed. Although the harms to the State claiming reparations in this scenario were more proximate than those relating to contemporary claims to compensation for Caribbean slavery, the relationship between the German Reich and West Germany was much more dissonant than the present correlation between past and present European governments. Despite some brief interruptions in governmental structures and institutions within the European nations now subject to claims, the States in question have predominantly retained an identical or prodigiously proximate identity to that which they held during the period of the trans-Atlantic slave trade.⁵⁵

The recent victory in the British courts of survivors of the 'Mau Mau uprising' lends credence to the proposition that historicity in itself is not enough to sever the relationship of the state to historical injustices.⁵⁶ The contention advanced by the UK Foreign and Commonwealth Office (FCO) during the trial that liability for the atrocities should rest with the Kenyan Republic as the successor government to the Kenyan Colony, bolsters a conception of state responsibility which does not cease with time or the natural evolutions of governmental structures. Although the *Mau Mau case* was concluded through political channels, it nevertheless assists the legal claim by providing evidence of state practice and understanding of the nature of obligations in respect of historical claims.

The approach to victims taken by reparationists identified in part one, in focusing on structural and systematic harms which accrue to entire populations in the contemporary Caribbean, formulates a conception of the collective which continues after the extinction of the initial class of plaintiffs who

⁵⁴See Roni Stauber "Realpolitik and the Burden of the Past: Israeli Diplomacy and the 'Other Germany'" (2003) 8 *Israel Studies* 100; and Jay Geller *Jews in post-Holocaust Germany* (Cambridge University Press, Cambridge, 2005).

⁵⁵See generally Archibald Alison *History of Europe* (AS Barnes and Co, New York, 1857); and Harold James *Europe Reborn: A History 1914-2000* (Taylor and Francis, Hoboken, 2014).

⁵⁶*Mutua and others v The Foreign and Commonwealth Office* [Mau Mau case].

could have made a direct claim for the injustices inflicted upon them. This conception of the immediate victims of slavery as a class rather than as a multiplicity of individuals alters the nature of the aggrieved party in the context of the reparations claim so that the 'victim' of the wrongdoing is conceived of as a collective which is not directly dependent on any of the individuals within it. The same re-framing can occur in relation to understandings of state entities, constructing conceptions of both the state and the victims as legal entities which do not have a natural life but which continue to hold responsibility and a claim to redress so long as the shared identity of that entity or collective survives.

With the communal perspective in place, advertence to the Rome Statute of the International Criminal Court (ICC) in support for the claim to reparations carries little more than rhetorical weight as ICC processes rely upon individualised criminal law, only applicable to natural persons.⁵⁷ In addition to this, there are structural limitations within the ICC and the way states choose to interact with the institution that prevent retroactive application of the court's jurisdiction.⁵⁸ The obstacles to extending the jurisdiction of the ICC transgress the natural appeal and symbolic power which the court offers. Although reference to the ICC allows some broad support for the characterisation of particular actions as egregious crimes against humanity within the contemporary environment, it does little to engage with the historical dimension of the Caribbean claim.

The Caribbean cause of action engages both this past narrative and conceptions of the parties as collective entities rather than individuals in a way which does not comfortably align with the criminal paradigm, but which does speak more directly to a claim for compensation. Conceptualising of the state entity as the perpetrator of the wrongs in question as an individualised institution with a natural life which was extinguished at the point at which power was passed to a succeeding government fails to engage with discourse around the Caribbean claim and the nature of state entities. That a succeeding government can be held responsible for the acts of its predecessors is trite law, and an insufficient foundation in itself to justify refusing redress. Characterisation of the nature of the claim and the continuing harms is able to significantly alleviate the pressure of temporal bars in both the characterisation of the victims that maintain a right to a remedy, and the natural descendant institutions of the original wrongdoers. The severance of the connection between present and past European governments cannot be established by reference to the structure of the states, and the opposition therefore relies upon the claims having washed away with the tide of history. This

⁵⁷See Ikafor, above n 35.

⁵⁸Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002). The bar against domestic limitation periods which is constructed in relation to ICC offences is therefore of little direct value to the Caribbean claim.

contention is much harder to maintain in light of the evidence brought to bear in part one connecting the harms within the contemporary Caribbean to the trans-Atlantic slave trade, and the complementary analyses which identify the continuously accruing benefits of the slave trade within European economies.⁵⁹

Although this formulation of state responsibility entails accusations of potentially infinite liability upon contemporary states for wrongdoings throughout human history, these are naturally tempered by the requisite relationship between modern institutions and their predecessors, and the identification of harms and benefits which remain active in the present environment. The finding of sufficient proximity between modern Europe and those states conducting the trans-Atlantic slave trade is thus not as radical as some commentators wish to express, and should not be seen as opening the 'floodgates' to endless claims for ancient wrongs.

⁵⁹Extensive analyses have been conducted to connect present economic successes to the benefits of the trans-Atlantic slave trade. See generally Beckles, above n.29; Robinson, above n 31; and Randall above n 31. The fact that economic necessity was one of the most common arguments against abolition throughout the history of the trade in itself provides powerful support for the contention that European economies benefitted massively from the centuries of unpaid labour which they extracted from the slave trade.

Part III: A Crime against Humanity but Not Against the Law

Tracing the Prohibition against Slavery in International Law

Establishing sufficient connections between past and present societies in both the Caribbean and European regions carries no formal legal force unless it is also established that the conduct in question contravened an established international norm. The Articles on State Responsibility recognise the second element necessary to define an internationally wrongful of a state as the requirement that the act or omission in question constitutes a breach of an international obligation of the state.⁶⁰ This formulation aligns with the characterisation of wrongful conduct articulated in the decision in *United States Diplomatic and Consular Staff in Tehran*.⁶¹ Building on article 2, article 13 recognises the doctrine of inter-temporal law, providing that:⁶²

An act of a state does not constitute a breach of an international obligation unless the state is bound by the obligation in question at the time the act occurs.

The prerequisite for a finding of international wrongdoing is thus articulated as a prohibition in force upon the State at the time of the act or omission constituting the alleged breach of a State's obligations.

In order to circumvent the requirement of identifying the exact point at which an international obligation can be said to have crystallised, many commentators choose to forego the assumption that there was a point in time at which slavery was permissible and later a moment at which international law had fully developed to counter that opinion. Instead, these authors choose to engage the rhetoric of fundamental humanity as an extra-temporal concept, contending that slavery has always been a crime against humanity and axiomatically illegal at international law, regardless of the actions taken by individual States purportedly providing evidence to the contrary.

Claims that slavery is a crime against humanity in the modern world are thankfully predominantly intuitive for contemporary global citizens.⁶³ Slavery is now viewed as a practice which was always

⁶⁰Articles on State Responsibility, above n 10, art 2.

⁶¹Above n 45. The ICJ in this case articulated the requirements of establishing international wrongdoing, including identifying that, in relation to the conduct of a state, the court: “must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.”

⁶²Articles on State Responsibility, above n 10, art 13.

⁶³This sentiment is qualified on the basis that slavery has only been explicitly and absolutely made de jure illegal in all countries relatively recently. Mauritania did not abolish the practice until 1981, and it was not until 2007 that slavery became a crime in that state. Likewise, slavery in Niger was not criminalised until 2003 despite abolition in 1960 and prohibition in 1999. See generally Kevin Bales *Disposable*

fundamentally unacceptable, regardless of its prevalence, leading to conclusion that the act of slavery, being so reprehensible as to offend the conscience of mankind and directed against civilian populations, is a crime in international law and always has been.⁶⁴ Unfortunately these claims are more rhetorical and emotive than they are legal in character, glossing over the requirements of international law, and ignoring differences in positions and perspectives of people and governments active during the period of the trans-Atlantic slave trade. These claims thereby overlook the widely valued doctrine of inter-temporal law.

There is a significant amount of evidence to support the stated official position of the British government that there was a period in history in which slavery could not be characterised as a crime against humanity, being legal both internally and internationally.⁶⁵ In recognising the development of customary international law, the beliefs and practices of the states involved become particularly important, as these elements constitute the basis of the formation of customary laws.⁶⁶ Problematically for reparationists, much of the evidence brought to bear in implicating European governments in the atrocities of slavery also serves to undermine the contention that the practice contravened international law from its inception. Although individual state practice and domestic laws may not be decisive in determining international customs with the force of law, they do contribute to the framework of international norms and evidence the extent to which states considered themselves to be bound by such norms.⁶⁷

That slavery was a widespread practice globally, and not limited to European powers, in the past is undeniable. Evidenced in the records of almost every ancient civilisation known to contemporary scholars, from the architects of the Great Pyramids to Mesopotamia, slave practices have transfused human history.⁶⁸ Despite expressions of opposition resulting in various degrees of governmental

People: New Slavery in the Global Economy (2nd ed, University of California Press, Berkeley, 2004).

⁶⁴Gifford, above n 8, at 91.

⁶⁵This position was explicated at the Durban Conference, above n6, where the British government maintained both the internal and the international legality of slavery during the period of the trans-Atlantic slave trade.

⁶⁶See generally Christiana Ochoa “The Individual and Customary International Law Formation” (2007) 48 *VJIL* 119; Jan Vos *The Function of Public International Law* (Springer, Dordrecht, 2013); Antonio Cassese *International Law* (2nd Ed, Oxford University Press, Oxford, 2005); and Malcolm Shaw *International Law* (Cambridge University Press, Cambridge, 2014).

⁶⁷Article 3 of the Articles on State Responsibility, above n 9, recognises that the characterisation of an act of a State as internationally wrongful is governed by international law, and is not affected by the characterisation of the same acts as lawful by internal law. Crawford, above n 13, also acknowledges, however, that the content and application of internal laws can be relevant to the question of international responsibility, particularly in the context of customary international laws, in providing support for or against the proposition that state practice and opinion juris existed at the time.

⁶⁸See generally Jean Allain *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford University Press, Oxford, 2012).

limitation on the trade, clear and consistent national and international stances decrying the practice were conspicuously absent until the 19th and 20th centuries. Abolition up until this era was sporadic and frequently indecisive; states oscillated between freedom for slavers and liberty for the enslaved, with various degrees of regulation in the process. In 1315, for instance, the king of France, Louis X, published a decree declaring “France signifies freedom” and therefore that all slaves who set foot on French soil should be freed.⁶⁹ This was not a proclamation which could be classified as indicative of state practice and *opinio juris*, however, as the subsequent actions of the French state ran directly counter to this articulation of the temporary monarch.

Thomas Jefferson too reneged on an initial position opposing slavery. Having declared that George III had “waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery” in 1776, he went on to justify the continuation of the practice by adverting to the belief that Black people “are inferior in the faculties of reason and imagination...(and) unfortunate difference of colour, and perhaps of faculty, is a powerful obstacle to the emancipation of these people.”⁷⁰ The vicissitude evidenced by the Founding Fathers and the French was echoed throughout Europe, leaving substantial questions about the extent to which domestic law permitted the trans-Atlantic slave trade to continue unchecked, but leaving little to substantiate claims that customary international law had always prohibited the practice. The claim for reparations for activities conducted during the period of the trans-Atlantic slave trade is therefore contingent upon the behaviour being characterised as international wrongdoing having occurred subsequent to the crystallisation of an international prohibition.⁷¹

An assertion which cannot be considered overriding in this context is the contention that Europeans at the time were the global minority, and as such could not rightfully establish the rules and content of international law by themselves.⁷² This statement is essentially true in its conclusion that international law cannot be promulgated and enforced universally by a select group of states, but is a self-defeating prophesy in its attempt to claim international illegality, as it requires the formulation

⁶⁹Christopher L. Miller *The French Atlantic Triangle: Literature and Culture of the Slave Trade* (edition, publisher, place, date) at 20.

⁷⁰Rodney Coates “If a Tree Falls in the Wilderness: Reparations, Academic Silences, and Social Justice” 83 *Social Forces* 841 at 860-861.

⁷¹The Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 26 May 1969, entered into force 27 January 1980), considered a codification of existing law, identifies the sources of international law including customary international law which arises from the practice of states in combination with *opinio juris*. See generally Antonio Cassese *International Law* (2nd Ed, Oxford University Press, Oxford, 2005).

⁷²See Nora Wittmann “Slavery Reparations are a Must” (2009) 488 *New African* 24.

of an international prohibition on the basis of the beliefs of another, allegedly larger but still limited, group of states. When levied in favour of reparationists, this argument that the preponderance of state opinion favoured prohibition must be stretched further than it would in order to justify permissibility of the slave trade, as it limits the presumed freedom of state actions rather than allowing for it. In a classical system which relied upon the premise that states are naturally sovereign and therefore unlimited in their power except where limitations are agreed to, this claim is particularly difficult to justify without explicit and consistent global opposition for which only a minority of states deviated.⁷³

This disavowal also falters in practice, as it assumes that European claims to the legality of slavery are advanced without reference to the positions of African political entities, who are wrongly ignored as subjects and authors of international law and illegitimately characterised as 'primitive' and 'uncivilised'.⁷⁴ Although some commentators undoubtedly do omit reference the African perspective within this discussion, thereby reinforcing Eurocentric discourse which continues to deny the African people a contemporary as well as a historical voice, a nuanced evaluation of the interactions between African and European actors within the trans-Atlantic slave trade is not as incontrovertible as some reparationists decree.

The relevance of the contention that historical evidence positions African political entities as complicit in the global permissibility of slavery as a general practice is not in the conclusion that Africans occupied the same boat as European slave traders, but rather in reflecting the inchoate character of universal opinion at the time. It is not the practices of individual African slavers that are relevant to this dialogue – African masters would be just as capable of contravening international law as individual Europeans – but the actions of official entities who could reinforce a conception of international law which by definition involves the *opinio juris* of states.

The trans-Saharan slave trade, though not functioning on the same level as the trans-Atlantic trade, employed slavery in the course of African political life, undermining the requisite consistent and universal practice and perspective necessary to found a customary international prohibition.⁷⁵ Arguments that intra-African slaves were not subjected to the total and systematic dehumanisation that characterised the trans-Atlantic slave trade carry some force and it remains important to recognise that the scope of the trans-Atlantic trade, in its systematic deprivation of the human identity of an

⁷³See generally Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008)

⁷⁴See Wittmann, above n 70.

⁷⁵See generally Paul Lovejoy *Transformations in Slavery: A History of Slavery in Africa* (3rd ed, Cambridge University Press, New York, 2011); and Ralph Austen *Trans-Saharan Africa in World History* (Oxford University Press, New York, 2010).

entire race of people, made it distinguishable from other instances of human trafficking.⁷⁶ In a world with limited universal perspective and at best highly unstable consensus however, the complicity of official actors within Africa in slave practices, including the trans-Atlantic trade, severely undermines the claim to unified African opposition.

Although there were some African rulers who fought against slavery, the collective perspectives of African states were far from consistent in a stance against the practice. Oppositional postulations also failed to evidence the universal moral underpinning necessary to found customary international law in this context. The king of Congo's letter to John III in Portugal in 1526, for instance, phrased the objection to slave practices as an expression of internal will and interests rather than a moral denunciation of the trade as a whole, stating:⁷⁷

The merchants abduct our subjects, children of this country, sons of nobles and vassals, even people of our family... This corruption and this deprivation are so common that our land is entirely depopulated... It is our volition that this kingdom shall not be a territory neither of the trade nor of the transit of slaves.

Although this reserved condemnation could be the result of diplomatic necessities, the fact that the 'depopulation' problem identified was a fundamentally practical concern, and the specific reference to 'this kingdom', forestalls the conclusion that it supports a claim of a fundamental and universal prohibition with moral dimensions.

The positions of African states during the period of the trans-Atlantic slave trade were far from being catalysed against the practice, and global opposition from the continent against European practices was therefore insufficient to create a binding international prohibition. Reference must therefore be made to both European and African practices throughout the era in which the trans-Atlantic slave trade operated, and the growth of the abolitionist movement internationally in order to establish the state of international customs in relation to slavery.

Identifying the moment at which an international prohibition against slavery can be identified as having materialised poses significant challenges to lawyers, historians and reparationists, requiring meticulous scrutiny of the progression of events through history. This endeavour demands analysis of both social and legal history, with sensitivity towards the points at which the two overlap to create customary international law. In the case of the prohibition against slavery, the gradual nature of historical abolition poses a significant challenge to identifying the exact point in time at which an

⁷⁶Ibid.

⁷⁷Wittmann, above n 70, at 26.

international legal norm was crystallised. Multilateral treaties decrying slavery and the slave trade universally and expressly prohibiting the practice did not proliferate until the abolitionist movement had already reached critical mass and achieved legal emancipation in the European nations who helped to found the practice.

As was recognised by Geoffrey Robertson:⁷⁸

...there was no defining moment like the Nuremberg judgement, but rather an accumulation of treaties throughout the nineteenth century and a gradual abandonment by the Great Powers of their toleration of the practice, marked in turn by military offensives against traders ...and by domestic court declarations that freed any slave brought within the jurisdiction.

Robertson identifies the Treaty of Berlin forbidding slave-trading in 1885 and the Slavery Convention in 1926 – confirming that states had jurisdiction to punish slavers wherever they were apprehended – as framing the period in which the international prohibition was manifested. The 1926 Slavery Convention was the first international convention of its kind to focus on slavery and the African slave trade, and within which the international community fully agreed to abolition.⁷⁹ As a date which has attained a degree of certainty, it is an appropriate end point for discussion of correlative customary international law and the crystallisation of the prohibition against slavery.

The promulgation of domestic law within Europe supported the growing body of jurisprudence condemning the slave trade and contributed to an international prohibition, however, this was frequently only municipal in character and did not extend to the Caribbean region. Care must therefore be taken in recognising the growth of the abolitionist movement within Western nations, whilst maintaining an international perspective which cannot be concluded solely on the basis of internal legislation and case law. As recognised by Stinchcombe:⁸⁰

...all Caribbean islands had slavery in in 1790, and none of them did in 1900... in 1790 there were no substantial movements in any of the islands in the direction they were all going to go in the 19th century, while there were substantial democratic and emancipatory movements at that time in the United States, England, France, the Netherlands, Denmark, and perhaps even Spain.

⁷⁸Geoffrey Robertson *Crimes against Humanity: The Struggle for Global Justice* (Penguin, London, 1999) at 209.

⁷⁹Slavery Convention, above n 15.

⁸⁰Stinchcombe, above n 27, at 13.

The widely celebrated decisions of *Smith v Gould* in 1706,⁸¹ and *Somerset v Stewart* in 1772,⁸² frequently used as support for the contention that an international prohibition came into effect much earlier than is commonly assumed, are framed expressly in terms of the laws of England and domestic obligations. Later decisions continued to reinforce this perspective that internal law was leading the abolitionist movement significantly before international norms and customs were concretised.

The 1807 decision of the United States Court in *The Amedie* held that the international slave trade at the time was solely outlawed in the United States while Great Britain had no such legal prohibition.⁸³ The laws of the United States in this case were classified as municipal and incapable of extra-territorial application, emphasising a view that the prohibition had not yet attained international status. When the case reached the British courts (after the slave trade had been formally abolished in English law) they too recognised the conduct as illegal because of the operation of domestic law and not because other nations or the international community generally opposed the trade.⁸⁴ This decision buttressed the argument that international law had not crystallised in 1807, although the court did recognise that slavery was an “inhuman traffic”, thus beginning to recognise a principle of universal morality.

The United States Federal Court explicitly grappled with the potential for the prohibition against slavery to have an international dimension in *Fortuna*, and recognised that a state may be bound to global norms despite the absence of an official international instrument.⁸⁵ The final holding concluded, however, that the international community neither forbid nor sanctioned any of the transactions which comprised the trans-Atlantic slave trade at that time, stating:⁸⁶

It is perfectly consistent with reason, common sense, the principles on which national law rests, and with the practice of all nations, that neither the acquisition, the manner of holding, using, abusing, transferring, or transporting slaves, is either forbidden, commanded, permitted, or recognized by the law of nations.

The ship in question was therefore released to French authority for final adjudication under the

⁸¹*Smith v Gould* 2 Ld Raym 1274 (1706).

⁸²*Somerset v Stewart* (1772) 98 ER 499.

⁸³*The Amedie* 12 ER 92 (1810).

⁸⁴*Ibid*, at 96, stating “It appeared to us therefore difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign state of which this Court could not take any cognizance”.

⁸⁵*The Fortuna* 1 Dods 81 (1811), where the court recognised that although there was no official treaty in force explicating France’s position on slavery, the French state at a conference in Vienna had undertaken to fight towards abolition of slavery which was prohibited by municipal law.

⁸⁶*Ibid*, at 837.

domestic jurisdiction to which vessel was subject. Echoing this position in 1815, the Congress of Vienna annexed a Declaration of the Eight Courts (Austria, France, Great Britain, Portugal, Prussia, Russia, Spain and Sweden) relative to the Universal Abolition of the Slave Trade, once again, stopping short of declaring a legal ban.⁸⁷ This document did, however, articulate a solemn condemnation of the slave trade in principle which began to provide traction for the universal moral claim.

The 1825 *Antelope* case began the oscillation between conclusions that slavery was, and was not, an internationally unlawful act.⁸⁸ This decision was once again decided on the basis of domestic law, thereby avoiding discussion of customary international laws. The concession that the Spanish claimants could assert ownership of the slaves if they were able to show that they had been acquired pursuant to Spain's municipal laws, however, demonstrated an assumption that international law did not expressly permit or prohibit the trans-Atlantic slave trade. The court went even further in suggesting that a case claiming Africans as property would be a more legitimate claim before a court of the law of nations than it was under the domestic jurisprudence of the United States at the time, explicating the extant assumption that although domestic laws throughout the world were developing towards abolition, these developments had not yet transferred through to international law.

Despite this seemingly incontrovertible position on the non-status of the prohibition in international law at the time, the *Antelope* decision also enunciated a belief that public international law, as determined by international norms and custom, had summarily abolished the trans-Atlantic slave trade, declaring that:⁸⁹

...regardless of what the laws on slave trade were in the past, the international community's current position was to publicly and solemnly consent to the prohibition of slave trade and to declare it unjust, inhuman, and illegal.

Subsequent to this expression, the court continued with the former position, however, emphasising that there was no consensus, codified prohibition, or law against the slave trade within the international community, whilst simultaneously claiming that based on the current actions of the international community one would reasonably conclude that trafficking in Africans was illegal based on customary international law.

⁸⁷Declaration Relative to the Universal Abolition of the Slave-Trade annexed as Act XV to the 1815 General Treaty of the Vienna Congress (signed 08 February 1815) 63 CTS 473.

⁸⁸*The Antelope* 23 US 66 (1825).

⁸⁹*Ibid* at 76-77.

An appealing way to resolve these inconsistencies, from the reparationists' perspective, is to conclude that the court had rightly identified that there were no codified treaty documents or conventions at the time, but failed to recognise the possibility of a customary prohibition which could be found to bind states where no such formal instrument had been ratified. An alternative reading, however, would conclude that although the court acknowledged 'solemn consent' to global prohibition, this had not in fact developed into a binding legal obligation at the time. This reading is consistent with the final determination, which concluded that some of the Africans in questions were Spanish property to be dealt with in the Spanish jurisdiction, as well as being the ratio decidendi identified by Sirs Robert Jennings and Arthur Watts in a leading English text on public international law.⁹⁰

Internal movements towards abolition continued throughout the 1800s, with domestic legislation, bilateral and multilateral treaties promulgated abrogating the trade to various degrees. These developments elaborated on global trends towards emancipation, but did so within the specific jurisdictions of States, and through formal international undertakings. The conclusion that, although the slave trade was at that point illegal in some states, this was not universal or premised on international law was enunciated in 1841 in *United States v Libellants and Claimants of the Schooner Amistad*, reinforcing the distinction between internal and international abolition.⁹¹ Four decades later the Brussels Act was signed with the intention of terminating the trade in African lives, closely followed by the 1890 General Act for the Repression of the African Slave Trade.⁹² These agreements provided for cooperation between states to suppress the slave trade, whilst still acknowledging that slavery remained legal under the domestic law of some states.

The tracing of the history of slavery therefore leads to the conclusion that the triumphs of abolitionists throughout this period were predominantly limited to internal and explicit limitations, failing to attain the status of customary international law. The period identified by Geoffrey Robertson as containing the crystallisation of the global prohibition in the transitional period from the 19th to the 20th century thus proves accurate. By this period, all European states had officially stricken slavery from permissive laws, ceased direct engagement in the trade and at least commenced taking steps towards enforcing the prohibition outside their own borders.⁹³ Although this leaves room for arguments that particular actions of European governments contravened domestic laws, and their continuing

⁹⁰Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (9th ed, Oxford University Press, Oxford, 1996) vol 1 at 979

⁹¹*United States v Libellants and Claimants of the Schooner Amistad* 40 US 518 (1841).

⁹²*General Act for the Repression of the African Slave Trade* (opened for signature 2 July 1890) between Austria, Hungary, Belgium, Denmark, France, Germany, Italy, Congo, the Netherlands, Persia, Portugal, the Ottoman Empire, the US, Zanzibar, Russia, Sweden, Norway and Great Britain.

⁹³See generally Maurice Bric and William Mulligan *A Global History of Anti-Slavery Politics in the Nineteenth Century* (Palgrave Macmillan, Basingstoke, 2013).

complicity in the slave trade and slave practices after abrogating steps had been taken internally could be characterised as illegal within the internal jurisdiction, these do not occur within the international arena. Such potential claims are therefore outside the scope of this paper, which is left with the conclusion that slavery, during the period in which European governments participated in the trans-Atlantic slave trade, was not prohibited by customary international law. This illation thereby affirms the uncomfortable truth that justice and the law are not always synonymous. What remains for the Caribbean community subsequent to this finding, is a compelling moral claim which may still be amenable to inclusion within legal processes but which requires further measures in order to rectify the injustice through the courts.

Part IV: Shooting Backwards to Move Forward

Inter-Temporality and Retroactive Application of International Obligations

Regardless of the state of positive law at the time, the trans-Atlantic slave trade exhibited in unadulterated candour half a millennium of principally and practically opprobrious conduct transacted by individuals, communities, and state entities. The extent to which this practice contravenes fundamental contemporary understandings of the rights accruing to human actors is monumental, and the systematic denial not only of the rights of enslaved people, but of their very humanity is barely comprehensible to the majority of modern European citizens. As Gifford elaborates:⁹⁴

The transatlantic slave trade and the institution of slavery in the Americas were the ultimate crimes against humanity, for they involved not only cruelty on a massive scale, but the denial of the very humanity of the victims.

The rhetorical persuasiveness of arguments over the extent to which the slave trade crippled an entire race of people, and constructed entire societies within the Caribbean region defined by histories of oppression and voicelessness, can be brought to bear within the international legal arena, despite a finding that the practices were technically lawful in international law at the time of their commission. Modern international law, despite the absence of a prescriptive legal foundation in place during the period of the trans-Atlantic slave trade, has the capacity to meet the moral obligation outlined at the United Nations World Conference on Racism to “take appropriate and effective measures to halt the lasting consequences of those practices”.⁹⁵ It is therefore incumbent upon the contemporary international community as a whole to acknowledge the injustice of the past and to take steps to remedy wrongdoing, even where such falls outside the black-letter definition of 'international wrongdoing'.

In a 1975 resolution addressing inter-temporality in international public law, the Institut de Droit International confirmed that States, as the subjects of international law, have the capacity to define the extent of temporal limitations in the application of norms.⁹⁶ This declaration thus confirmed the power of States to retroactively apply international legal standards, particularly where the basic

⁹⁴Gifford, above n 8, at 91.

⁹⁵Durban Conference, above n 7.

⁹⁶*The Inter-Temporal Problem in Public International Law*, Resolution adopted by the Institut de Droit International at its Wiesbaden Session, 56 Ann. De l'Institut de Droit Int'l (1975) at 537

requirements of justice mandate that a remedy be provided for a technically lawful act. The freedom of states to determine the nature, content and scope of international laws is even broader than the equivalent powers within domestic jurisdictions; they engage in a communal process of defining responsibilities and accountability within a forum that allows consistent practices and beliefs to crystallise into international law.⁹⁷

The principle against retroactivity is premised on ideals of fundamental fairness, and the notion that individual actors should be able to rely, with certainty, on the articulated legal norms in force.⁹⁸ This principle was articulated by the United States Supreme Court in *Langraf v USI Film Prods.*, recognising that:⁹⁹

Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.

In the context of state action, this call for certainty and reliance on settled rules of law becomes much less persuasive, particularly when accommodating for the fact that it is the state itself which promulgates and determines the laws upon which it must be said to rely. The objection to retroactive application of the law on the basis of certitude should not, therefore, be considered determinative in the state context. There is also inherent appeal in retaining the capacity to hold a state to account for laws which it enacts and practices it affirms when such actions contravene fundamental conceptions of justice. As Meltzer acknowledges, reliance may not be legitimate in the event of rules that are in transition, openly contested or patently unjust.¹⁰⁰ The Supreme Court of the United States has further recognised the permissibility of retroactively applying rules when the rules formulated are “absolute prerequisites to fundamental fairness”.¹⁰¹

States in the contemporary context therefore have the capacity to fill lacuna in historical international law, and declare acts initially considered to be within the bounds of the law to be outside those boundaries according to a more enlightened conception of the requirements of justice. Shelton

⁹⁷See generally Brownlie, above n 73.

⁹⁸See R. H. Fallon, Jr. and D. J. Meltzer, 'New Law, Non-Retroactivity, and Constitutional Remedies', 104 *Harvard Law Review*. (1991) p. 1733.

⁹⁹*Landgraf v USI Film Prods.*, 511 US 244, 265 (1994).

¹⁰⁰See D.J. Meltzer, 'Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General', 88 *Colum. Law Rev.* (1988) p. 247

¹⁰¹*Teague v Lane*, 489 US 288 (1989) at pp. 314-315; *Stovall v Denno*, 388 US 293 (1967) at p. 297

identifies this possibility in relation to a claim for reparations.¹⁰²

International and national legal doctrine thus suggests that historical claims may warrant reparations in two circumstances. First, when the acts were illegal at the time committed and no reparations have been afforded. Second, retroactive remedies may be justified where reliance on earlier law was not reasonable and expectations were not settled because the law patently conflicted with fundamental principles then in force.

The fact that slavery may not have been contrary to the international laws of the time does not therefore need to be considered an inevitable bar to recovery.

Two distinct approaches to imposing liability for acts not considered unlawful at their inception arise in relation to the Caribbean claim for reparations for slavery. The first of these involves the severance of the continuously accumulating harms to the Caribbean community from the initially lawful acts. This program would involve recognition of an independent obligation upon European nations to provide redress for the present wrongs which were instigated by historical practices. This approach was adopted in *The Inter-temporal Problem in Public International Law*, a resolution adopted by the Instituted Droit International at its Wiesbaden Session.¹⁰³ The procedure is not contingent upon retroactivity, having its foundation instead in the characterisation of the present harms accruing within the Caribbean region as independent causes of action which can be seen to arise in the present. In an international climate which already struggles to recognise the existence of state responsibility for the modern harms of slave practices perpetrated by predecessor governments when that connection between the present damage and historical state conduct is undisturbed, this proposition is likely to stretch Caribbean claims beyond their breaking point. Severing the connection between present and historical harms in order to found a neoteric cause of action based on the current state of international law ineludibly involves a coetaneous dialysis of the European state entity from the accumulating harms. It is therefore eminently problematic to claim that liability can be enforced upon modern states when the connection of the harms which form the basis of the claim to that state has been bisected.

The second route to establishing present liability for historically lawful acts is through the recognition of a moral obligation to impose retrospective application of norms in relation to slavery, now characterised as having been a 'crime against humanity' throughout the period of the trans-Atlantic slave trade, and potentially from the inception of the practice globally, despite technical international legality. As previously recognised, the general presumption against retroactivity in international law

¹⁰² Shelton, above n 20, at 315.

¹⁰³ 'The Inter-Temporal Problem in Public International Law', above n 95.

is not absolute; there are a number of instances in which the demands of international justice have been seen to overcome temporal barriers.¹⁰⁴

The International Criminal Tribunal for the Former Yugoslavia (ICTY) established by the United Nations in 1993 provides a model for such a course of action, having been created in response to the extensive and devastating atrocities committed against citizens of the region in the early 1990s.¹⁰⁵ The ICTY reinforced the notion retrospectively formulating procedures by which to hold wrongdoers to account may at times be the only way to achieve just outcomes, and created jurisdiction to try the perpetrators of crimes against humanity in the region. The International Criminal Tribunal for Rwanda (ICTR) established by the United Nations Security Council in 1994 also conformed to this paradigm, maintaining jurisdiction over specified violations of international humanitarian law committed during 1994.¹⁰⁶ Both the ICTY and the ICTR were limited by their criminal nature, however, to jurisdiction over natural persons, and could not attempt to hold States or government entities to account for their part in the atrocities.

Although these tribunals were set up in order to try individuals for their specific and individual roles in the systematic atrocities committed within these nations, the rhetoric and purposes of the tribunals is not inconsistent with the present claim to reparations for the Caribbean region. Concerns with fundamental justice and the provision of recognition for the victims of wrongdoing permeate the discourse, creating an understanding of international law which is responsive to evolving global morality. On a practical level, however, the Yugoslavian and Rwandan situations are distanced from claims relating to the trans-Atlantic slave trade through the temporal proximity of the conduct challenged and the causes of action. Holding the individuals who perpetrated the inhumane acts within the criminal context was thus a viable option for the ICTY and ICTR.

Being able to hold the directly responsible individuals to account for their part in atrocities committed, as occurred in the contexts of the aforementioned international criminal tribunals, is a relatively straightforward option for the imposition of retroactively formulated liability. Those seeking to fulfil similar objectives in the context of Caribbean slavery are not however, are not drawn inevitable to

¹⁰⁴See for instance the *Convention on the Prevention and Punishment of the Crime of Genocide* (opened for signature 9 December 1948, entered into force 12 January 1951).

¹⁰⁵*Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* S Res 827, S/Res/827 (1993).

¹⁰⁶*Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994* S Res 955, S/Res/955 (1994).

the conclusion that a similar form of liability in the Caribbean case is absolutely prohibited by the passage of time. The principles underpinning the creation of the ICTY and the ICTR could be extended to support present day liability on successor governments for the actions committed by their predecessors, as outlined in part 2. The interests of fairness and fundamental human dignity demand that injustices be redressed; given that present day citizens still shoulder the burden of historical slavery, it remains consistent with these principles that the successive governments which continue to benefit from the residues of enslavement are required to share in the remaining burdens.

The change in context from criminal liability to a claim for compensation also makes the present claims of the Caribbean more amenable to the expansion of current conceptions of international law. Reparations in the present claim are more consistent with a collective, institutionalised form of liability than criminal sanctions; seeking to apply retrospective obligations to state entities rather than natural persons results in a more appropriate extension of jurisdiction beyond the traditional paradigm of a direct victim and wrongdoer. There is also a further distinction to be drawn between criminal jurisdiction and the Caribbean claim, in that reparations are premised on restorative rather than punitive measures and thus do not invoke concerns over perpetrating injustices upon the proposed defendant to the same degree as retrospective criminal sanctions would entail.

The especial importance of the principle of non-retroactivity in relation to punitive measures is recognised in the Universal Declaration of Human Rights, which provides in article 11(2) that:¹⁰⁷

No one shall be guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one applicable when the act was committed.

This is not an absolute requirement of international law, but rather a formulation of the general requirements of justice which may, in unique and exceptional circumstances, be best met by abandoning its terms. The Nuremberg tribunal provides a model for such justifiable deviation, in condemning Nazi officials for the crime of 'genocide' – a term which had not been enunciated prior to Nuremberg.¹⁰⁸ Stimson links this evolution to the nature of international law, enunciated as

¹⁰⁷See *Convention for the Protection of Human Rights and Fundamental Freedoms* (opened for signature 4 November 1950, entered into force 3 September 1953), art 7. Paragraph 2 adds that the prohibition 'shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations'

¹⁰⁸The Nuremberg Charter did, however, reference customary international law and existing treaties binding on Germany in overcoming the allowances of domestic German law of the time. The Nuremberg trials were therefore controversial not so much in the imposition of liability for acts which did not contravene international law at the time, but for framing the crimes alleged in terms that had not been recognised

analogous to common law traditions arising through the gradual expression of moral judgements rather than strictly through the promulgation of authoritative codes and statutes.¹⁰⁹ Stimson diverts the focus from the strict administration of formally codified international law to accommodate for fundamental principles of morality, identifying that it “was not a trick of the law which brought [Nazi Leaders] to the bar; it was the massed angered forces of common humanity.”¹¹⁰

Operating from the premise of an essential recognition of fundamental justice, and the need to acknowledge suffering and provide redress, the international criminal tribunals may operate as an analogy for reparationists, rather than a model, from which the sought jurisdiction can be extrapolated. They provide support for the contention that international law may permit the retroactive application of rules and provide remedies for breaches of those rules where the interests of justice and humanity are thereby met. The tribunals could also operate as prototypes for a court designed to address the villainy of the trans-Atlantic slave trade, forming a stepping stone to the retroactive application of norms to governmental and corporate entities and paving the way for the imposition of liability on present institutions which participated in slavery.

The imposition of retroactive liability for the trans-Atlantic slave trade would almost certainly require express codification in order to overcome the general presumption against retrospective characterisations of wrongdoing.¹¹¹ Although some authors have attempted to rely on jus cogens to allow for the retroactive application of international norms, this endeavour would require formulating the concept of jus cogens itself retroactively as the introduction of the concept within the Vienna Convention on the Law of Treaties was not a codification of existing norms, but an ontogenesis in international law.¹¹² In order to move beyond the doctrine of inter-temporal law in the context of slavery, states would be required to coordinate in sufficient numbers as to possess international legitimacy. Within the consensual state context this would likely require the cooperation of at least a significant contingent of the European nations responsible for the injustices in order to create some form of compulsory jurisdiction. Achieving such collaboration could be problematic given the

previously in order to respond to the gravity of the atrocities at hand. *Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* (8 August 1945).

¹⁰⁹ Henry Stimson “The Nuremberg Trial: Landmark in Law” (1947) 25 *Foreign Affairs* 179 at 180.

¹¹⁰ *Ibid.*, at 179.

¹¹¹ See Antoine Buyse “A Lifeline in Time – Non-Retroactivity and Continuing Violations under the ECHR” (2006) 75 *Nordic J of Int'l L* 63.

¹¹² For an anachronistic analysis see Haunani-Kay Trask, 'Restitution as a precondition to Reconciliation: Native Hawaiians and Indigenous Human Rights', in Winbush, op. cit. n. 12, p. 32 at p. 41 in which the author alleges violations of the UDHR in 1893 and suggests that as a peremptory norm, 'the principle of self-determination is of sufficient importance to be applied retroactively to relationships among states and peoples before the adoption of the 1948 United Nations Charter'.

expressed positions of European states on their duty to compensate. As du Plessis identifies:¹¹³

...retrospective assumption of responsibility is rare in international law, and is unimaginable in the context of reparation for slavery. The position of Western states was made clear at the Durban Conference, and their delegates ensured that the wording of the final Declaration would form no basis for legal claims by African states for reparation from the West.

The codification of a retroactive prohibition without the participation of European nations could still provide political leverage for Caribbean nations, however, and could potentially contribute enough pressure to the calls to bring the former slave-trading nations to the negotiating table in order to facilitate a political settlement. The power of the international community goes beyond the legal frameworks which it has at its disposal, and the force of political compulsion and voluntary resolution should not be overlooked.

¹¹³ Du Plessis, above n 40.

Part V: Beyond Bars

Alternative Pathways to Recovery

Lord Wilberforce in 1996 felt obliged to query the ability of the claim to compensation for the damage inflicted by the slave trade to prosper within a positive legal framework, he recognised that “the case is basically a moral one based on the history of the Western powers and their development... of Africa and its resources in the past”.¹¹⁴ His conclusion that no court was capable of entertaining a claim for reparations, and that redress was a process which could last decades and which would take many different forms is likely to prove accurate in the modern international legal environment. Comprehensive political settlements, though consuming, can provide an alternative route to the rectification of historical wrongs where legal resolutions are precluded by the nature of the international justice system, the whims of sovereign states, and fears of enabling potentially infinite, or at least extensive, liability for past atrocities which saturate human history.

The lasting socio-economic harms of the slave trade upon citizens of the Caribbean region have the potential to be addressed through political programs for the provision of development aid, specific funds and expressions of regret, which are generally understood to avoid the invocation of implications of legal liability which can be conjured by formal apologies. The benefit of political solutions of this nature from a European perspective is therefore that the nations in question would be able to maintain a modicum of control over their liability, one of the most frequently cited concerns of the opposition to reparations.

The political model has been adopted in many situations involving violations of fundamental conceptions of humanity and basic rights, frequently overtaking the legal paradigm in order to satisfy the interests of powerful states whilst still adhering to contemporary conceptions of a global moral economy.¹¹⁵ The Civil Liberties Act passed by the United States Congress in 1988, for instance, provided for restitution to be granted to Japanese Americans in relation to losses arising from “any discriminatory act of the US Government...based upon the individual's Japanese ancestry during the

¹¹⁴ (14 March 1996), above n 18.

¹¹⁵ Du Plessis, above n 40, at 638-641 recognises that reparations serve “to facilitate higher awareness of public morality through the use of market mechanisms, and in the process both parties' histories are given recognition, ultimately leading to a transfer of economic resources” at 639-640. According to du Plessis, the 'political armtwist' arises from the idea that “the West cannot endorse the notion of a just world while simultaneously avoiding the issue of reparation for past injustices. For if it does not commit to reparation for slavery with the same zeal it has demonstrated in advancing human rights abroad, it runs the risk of being labelled hypocritical” at 641.

wartime period when Japanese Americans were interned in great numbers.”¹¹⁶ The commission established in order to investigate claims under this legislation resulted in a total of 1.2 billion dollars being paid to victims.¹¹⁷ This evidences a willingness to engage in reparations discourse for historical injustices within the political legal sphere rather than within the courts, a distinction which was highlighted in the decision in *Cato v United States* in 1995 where the judges found no law enabling the courts to entertain a suit against the government for slavery and declared it an issue for congress.¹¹⁸

Political settlements have sometimes arisen in relation to wrongs committed generations ago, indicating that temporal limitations, though still invasive, have less decisive force within the political sphere than they retain in the internal legal arena. In 1995, for instance, Queen Elizabeth II personally signed the Royal Assent to the Waikato-Raupatu Claims Settlement Bill, which divested significant compensation in the form of both land and money from the New Zealand government for the appropriation of Maori land and genocidal actions committed by British settlers in 1863.¹¹⁹

In the context of slavery too, political movements have begun to gain traction in the quest for redress for the continuing problems afflicting descendant communities which emblemise the legacy of historical slave practices. Several cities in the United States of America have passed resolutions which support basic reparationist tenets based on the continuing harms which constitute the residues of slavery. Deburg recognises that:¹²⁰

...such payments are more than justified because slavery's cruel legacy can still be seen in the poverty, family disintegration, crime, and other problems plaguing modern-day black communities.

The city of Chicago in January 2005 also began moving towards the recognition of the need to acknowledge the effects of slavery by requiring all companies doing business with the city to declare their historical links to slavery.¹²¹ Although this measure did not involve inbuilt mechanisms for the provision of redress, the pressure of public revelation resulted in practical steps being taken to address commercial complicity in the unacceptable practices, including a formal apology and the creation of

¹¹⁶ Gifford, above n 38.

¹¹⁷ Gifford, above n 38.

¹¹⁸ *Cato v United States* 70 F 3d 1103 (9th Cir 1995).

¹¹⁹ Gifford, above n 7, at 91.

¹²⁰ William Deburg *Modern Black Nationalism: from Marcus Garvey to Louis Farrakhan* (New York University Press, New York, 1997) at 34. The cities identified as having made such movements include Detroit, Cleveland, and the District of Colombia.

¹²¹ Gifford, above n 8, at 95.

a scholarship fund for African American students by the bank JP Morgan Chase.¹²²

The conspicuous qualification to recognise in relation to purely political courses is the need for European governments to come to the table and willingly engage in the process of negotiating reparations. Although this characteristic provides for a form of recourse much more amenable to acceptance by European governments as it remains within their control, it also naturally limits the recognition of the injustices committed in the past as well as the scope of the remedies acknowledged as due. Culpability is thus constructed in terms of whatever European states are willing to concede to the Caribbean region. Questions therefore arise as to whether these settlements provide specific expression of an effective remedy, or if they further deny the history of Caribbean oppression and thus prevent the development of both the Caribbean nations themselves, and the global moral economy.

Political solutions often engage in the rhetoric of regret, rather than apology, with the intention of avoiding the acceptance of formal legal liability but with the subsidiary consequence of denying full acknowledgement of the atrocities of the past. Even in the context of formal apologies, governments have been careful to qualify their sentiments in order to circumvent an implied acceptance of responsibility to provide direct redress, inviting criticism from reparationists that these expressions are merely platitudes. The 2006 expression of sorrow by the British Prime Minister, Tony Blair, for instance has been deemed hypocritical and expressive of no remorse or regret at all,¹²³ while a French law passed in 2001 recognises the trans-Atlantic slave trade as a crime against humanity but remains silent on reparations.¹²⁴ This law does go a step further than the British government was willing to allow, however, in requiring the school history curriculum to include courses on slavery, as well as establishing a 'Slavery Remembrance Day' so that the "memory of this crime lives forever in future generations".¹²⁵ An analogous United State Senate's 'apology' resolution passed in 2009 acknowledging the "fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow laws", was similarly careful to include a paragraph stating that "nothing in this resolution (a) authorises or supports any claim against the United States; or (b) serves as a settlement of any claim against the US".¹²⁶

In order to avoid the accusations of disingenuousness and provide real redress for the descendants of

¹²²The predecessor bank to JP Morgan Chase had allowed 13,000 slaves to be used as collateral on loans, 1,250 of whom were seized when the borrower defaulted. Gifford, above n 7, at 95.

¹²³See "Prime Minister Tony Blair Expresses Sorrow for Slave Trade" (2006) Jamaica Observer <www.jamaicaobserver.com>.

¹²⁴Taubira Law 2001 (Fr).

¹²⁵Ibid. arts 2, 4.

¹²⁶(18 June 2009) 26 US SCOT 1.

the slave trade living in the Caribbean region, settlements operating within this political framework would need to deviate from the disturbing tendencies of European governments to let politics override justice. This may be a herculean task in the contemporary political environment, but the moral onus upon European nations to accept responsibility for the continuously accruing harms to the Caribbean region born of the trans-Atlantic slave trade is equally colossal. The gathering momentum which reparationist movements are attaining within this modern environment should not be overlooked, and as maintaining conceptions of rights frameworks becomes increasingly important in the international arena, the claim to reparations based on the fundamental requirements of justice is concurrently strengthened. If European states expect to retain their positions within the growing global moral economy they cannot continue to ignore or deny the claims of the Caribbean community. The demand for political settlements where strict legal claims fail is increasingly persuasive, and the prevalence of human rights discourse in the modern century only affirms growing recognition of moral as well as legal duties.

Conclusion

The existence of the trans-Atlantic slave trade, and the practices which pervaded the market in human lives are, and should have always been, fundamentally unacceptable to the entire human population. The fact that these practices suffused the international system for centuries, and only achieved universal condemnation in recent times mars the history of human development, and leaves black stains on the hands of the authors of European history. Contemporary citizens should be disturbed by the characterisation of the widespread chattelisation and abuse of individuals and communities, and the denial of human identity for an entire race of people, as permitted by international law (and therefore implicitly consistent with justice) for they contravene basic conceptions of humanity and human rights. In a world where technical legality creates a space for the atrocities to go unanswered members of the international community, and European states built upon the proceeds of helotry in particular, have an undeniable responsibility to respond to the continually accruing harms of the actions of their predecessors. The Caribbean call for reparations changes a “plea for aid into a demand for justice”,¹²⁷ which may not be capable of surviving on the basis of an existing international prohibition in force at during the period of the trans-Atlantic trade but which can be met in the contemporary context by the retroactive recognition of illegitimacy either within the international legal sphere, or politically. Regardless of whether the current inclinations and political agendas of European government align with this perspective, the demands of the growing moral economy which they construct are clear; the claim to reparations for Caribbean slavery provides a voice to those previously denied speech, traditions, freedom and fundamental humanity, providing for a discourse previously quashed by global oppression.

It is in the spirit of justice that I write – not for a hand-out but a pay check, not for welfare but our fair share, not for crumbs that fall from the massa's table – but for the wealth represented by the houses built by the Africans. No, in the spirit of liberty we make our just demands. We require nothing that we did not create through our own devices. We will make our way, we will take what is only our due for services rendered, lives lost, and hopes deferred. It is our call for justice, and our own labour, that will therefore secure a future for ourselves and our prosperity. Again, it is not as beggars that we view our past, experience our present, and pursue our future. It is as survivors that we will guarantee our prosperity and social justice, 'by any means necessary'.¹²⁸

¹²⁷Gifford, above n 7, at 94.

¹²⁸Rodney D Coates above n 69, at 842.

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