Examining the (Il)legality of Transatlantic Chattel slavery under international law: Transatlantic Chattel slavery 1450–1550

Hébié, M.; Stefanelli, J.N.; Lovall, E.

Reparations under International Law for Enslavement of African Persons in the Americas and the Caribbean

Proceedings of the Symposium

May 20-21, 2021

American Society of International Law

THE UNIVERSITY OF THE WEST INDIES

Reparations under International Law for Enslavement of African Persons in the Americas and the Caribbean

ASIL

Reparations Under International Law for Enslavement of African Persons in the Americas and the Caribbean

Proceedings of the Symposium
May 20–21, 2021

Co-Sponsored By:

The American Society of International Law
The University of the West Indies, Office of the Vice Chancellor

In Cooperation With:

Centre for Reparation Research at the University of the West Indies
Blacks of the American Society of International Law Task Force (BASIL)

Editors

Justine N. Stefanelli
Director of Publications and Research
American Society of International Law

Erin Lovall
Senior Editor
American Society of International Law

This publication was made possible with support from the Cornell Center for Global Economic Justice.

Published by The American Society of International Law
2223 Massachusetts Avenue, NW
Washington, DC 20008
USA
www.asil.org
Phone: +1 (202) 939-6000
Fax: +1 (202) 797-7133

ISBN: 978-0-9792329-4-7

The American Society of International Law

The American Society of International Law (ASIL) is a nonprofit, nonpartisan, educational membership organization founded in 1906 and chartered by Congress in 1950. Headquartered in Washington, D.C., its mission is "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice." ASIL holds Special Consultative Status with the Economic and Social Council of the United Nations and is a constituent society of the American Council of Learned Societies.

ASIL's 3,500 members come from more than one hundred nations with nearly 40 percent residing outside the United States. Its members include scholars, jurists, practitioners, government officials, leaders in international and nongovernmental organizations, students, and others interested in international law. Through its many publications, conferences, briefings, and educational events, ASIL seeks to serve the needs of its diverse membership and to advance understanding of international law among policymakers and the public.

ASIL is a volunteer-led organization governed by an elected Executive Council and administered by an executive director and professional staff.

Become a Member
asil.org/membership

Follow the Society on Twitter
@asilorg

Follow the Society on LinkedIn
linkedin.com/company/american-society-of-international-law/

Table of Contents

Foreword

Remarks by Mamadou Hébié*

Thank you very much, Professor Shepherd, for giving me the floor. I would like to thank the organizers for this opportunity to share my views on the lawfulness of slavery or unlawfulness of slavery between 1450 and 1550.

I believe the first question that I need to address is why I decided to focus on this early stage of colonial expansion. I decided to focus on this early stage of colonial expansion because the doctrines that are involved during that period in order to justify colonial expansion and slavery are completely different from those that are invoked later.

I will leave the period after 1550 to my colleague and friend, Parvathi, who will be talking about it later, and just focus on the period between 1450 to 1550.

A key problem in investigating the question of the unlawfulness of slavery during that time is that of determining the methodology. How do we establish it in a way that would be convincing and clear for everyone? And that difficulty is due to two main issues. The first one is the applicable law, and I am very happy that Nora already touched upon it by clearly stating that European law cannot be considered as or assimilated to international law. This might come as a shock to some of you because we all heard that international law is a European creation. Whenever they ask what was the status of the early international law on a given issue, people usually cite Grotius, Vattel, and so forth.

But I believe that there is a clear distinction between the theory and the conceptualization of the norm and the norm itself. International law cannot be reduced just to the writings of Grotius, Suarez, and the others. It has to be taken as the norm that derived

---

* Associate Professor of International Law at the Grotius Centre for International Legal Studies.

from social relations between political entities. And when we define it that way, we can take into account the practice of all the entities involved. What I mean by that is the colonial powers and the local political entities, in this case, the African political entities. It is, however, clear that the law determining the lawfulness of theory cannot be contemporary international law. It has to be the law as it existed at the moment when this practice was taking place.

The second issue that we have to address is that of the sources of this applicable law. Because I dismissed doctrinal sources as the relevant source, I focused on practice. You have to look at the practice of the colonial powers. You have to look at the practice of the slave trade companies. You have to look at the practice of the African polities. You have to look at every type of practice that you can find, which may help you to unveil the legal perceptions of the actors at that time.

And then the third issue that you need to consider is probably what is the conduct which is to be characterized as lawful or unlawful. Judge Robinson was saying that chattel slavery is a continuing process, which started from capture to enslavement and forced labor, and that is true. But, I have chosen just to focus on one aspect—not the transfer, but just the capture, the deprivation of liberty. If you take the case of forced labor and the transfer of slaves to the Americas, you have enough practice there, which may tend to suggest that at least those colonial powers, those slave trade companies and countries that were participating in slave trade did not see any strong legal difficulty against their business. Since they distinguished between slavery at home and slavery abroad, it was not inconsistent to have the *Somerset* case prohibiting slavery in Great Britain when Great Britain was supporting slave trade elsewhere.

For me, I would focus on the deprivation of liberty, the capture of the slave. I believe that this is where investigation is the most promising, and there are three main reasons why I believe that chattel slavery was unlawful at that time. The first one concerns the "limits of the doctrine of natural slavery." There were two main grounds

in order to enslave people and extract from them forced labor during that period. The first one was the doctrine of natural slavery in Europe. The first limit of that doctrine is the fact that it was a purely European doctrine. Between 1415 and 1550, European powers thought that there were some peoples who were so backward on the scale of human civilization that they had to be placed under the supervision of a European master for their education and civilization. That does not mean anything for polities that existed outside Europe and had never heard about this doctrine, nor adopted it.

This doctrine is limited. It is a European doctrine, but even within Europe, the doctrine of natural slavery was harshly criticized. It was strongly contested because it was not a doctrine that was in line with Canon law. It was a doctrine which had been borrowed from the Greek philosopher Aristotle and was applied in a few instances with respect to the Canary Islands. It was also invoked in order to justify the papal bull of 1493, but it never went beyond that. However, the conformity of the doctrine with canon law was not obvious, and this prompted Spain to organize *juntas* over and over again in order to reassure itself of the lawfulness of its title to the Americas because no one understood why you could deprive a free man just because you think that they are a slave by nature. The doctrine of slavery by nature was rejected in 1538 by the pope himself, who had brought it into Canon law in 1493 in the papal bull Inter Caetera. So that doctrine could not really serve as a basis. When you read Grotius, Vitoria, Suarez, and all the other scholars who will come later, you will see that no one gives strong support to that doctrine, and even Spain at the end of the day started denouncing it. The limits of the doctrine of natural slavery are one of the main reasons why I believe slavery was not legal.

The second ground that was invoked for enslaving was the just war doctrine, which Nora already referred to. Under the just war doctrine, if you wage a just war, you will be allowed to enslave in order to exact reparation and to preserve yourself from further

attacks, but this doctrine was subject to very strict conditions. The causes of just war were limited, and they were very difficult to satisfy.

Now, was it purely a European doctrine? I believe that there may have been some aspects of the just war doctrine that would be found in other societies because I believe that the idea that when someone attacks you, you have the right to defend yourself and defend your property was something that also existed in the African context. Thus this would be considered as one general rule of international law common to Africa and Europe and therefore would apply to all the actors involved in slave trade.

But the just war doctrine did not extend only to self-defense, which was a lawful cause of war. There were other grounds that were involved as a lawful cause of war, including the obligation to facilitate evangelization. This is the kind of rule that were purely European in character and could not be construed as automatically applicable to the African polities.

Beyond the strict conditions, we also have to look at the practice of the just war doctrine. When I looked at it from 1450 to 1550, I hardly found any instance where the conditions were deemed satisfied by European themselves. In 1436, for the conquest of Tangiers, the just war doctrine conditions were not considered as satisfied. For the conquest of the Canary Islands that took place at the same time, the conditions for a just war were again not considered as satisfied. In 1452, when Portugal started to navigate around the African coast, the conditions of the just war doctrine were again not considered as satisfied, to the point that the pope passed another papal bull, retroactively validating all of the conquests that were conducted by Portugal between 1452 and 1455.

The very nature of chattel slavery, which we are discussing, is incompatible with enslavement following a just war, because you had to wait to be attacked first in order to be able to wage war lawfully and enslave subsequently, and this is not how the slave trade developed during that period.

I have to be clear on that point. I am not excluding that there might have been some just wars during that period. I am just saying that just wars could not provide a rational basis to chattelization. It is just impossible that the systematic capture of Africans throughout the continent were the result of just wars. Some might say that there might have been wars between African polities and European came in support of their allies, but even there, again, more evidence should be provided to prove it.

To conclude, the main doctrines that were invoked in order to justify slavery between 1415 and 1550 were not relevant to justify the enslavement of Africans and their transfer to the Americas. But while preparing this presentation, I could not stop wondering why so much focus is placed on the question of the legality of slavery. Why are we focusing so much on the existence of a prior rule which would be prohibiting enslavement and slave trade before discussing whether or not reparations should be paid? I am saying this for two reasons.

The first one is that when you look at the matter purely from a torts law perspective, at least in civil law traditions, the general rule is that every conduct of a person that causes a tort to another person, obliges the author of the tort to provide reparation. It is a basic torts law rule that you find in every legal system. You do not need to breach a specific obligation or specific prohibition in order to be responsible for the torts that you cause to another person.

The second reason is the following. If I decide to shoot an animal in the forest, and it turns out to be a human being, I will not escape civil (and perhaps criminal) liability just because of my mistake. So, even if Europeans believed in the fifteenth century that enslaving Africans was lawful, just, or moral, it is today clear that it was at the very least a mistake. If you made a mistake of fact and that mistake caused prejudice toward a third party, you have to provide reparation.

I believe therefore that there are many more avenues to providing reparations for slavery than just the question of lawfulness under international law, and I will stop here before exceeding my time.

Verene Shepherd

Thank you so much, Dr. Hébié. Dr. Hébié's presentation clarifies the prevailing legal views and conceptions that existed at the time or at the beginning of transatlantic chattel slavery between 1450 and 1550. It has addressed the methodological question of how to establish the existence and content of international law during the relevant period, and analyzes the different frameworks governing the institution of slavery at that time, distinguishing between the doctrine of slavery by nature and the institution of slavery under the just war doctrine. It concludes that none of these established doctrines or the law could justify, in a general manner, chattel slavery, that started typically after 1520 and became subsequently a large business.

Nora Wittmann has argued that transatlantic chattel slavery was unlawful, that many of the African countries impacted by transatlantic chattel slavery were states, even by European standards, and that transatlantic chattel slavery was different from African servile labor by virtue of its total disregard for the humanity of the people captured from those States. She has referred to the European claim of African collaboration by citing the many acts of African resistance, which she maintains signify that transatlantic chattel slavery was not accepted by Africans as normal and legal.

I will start off by posing a question to Dr. Hébié: did the prevailing legal views and conceptions, at least during the late 1400s, frame the context for transatlantic slavery?

Mamadou Hébié

I think that these were concepts that they had in mind. For instance, the concept of just war was something that Europeans probably had in mind when they were fighting the King of Congo and others in that region. These conceptions existed, but I don't think that the doctrine of just war provided a legal basis for chattel slavery in light of its very nature and scale.

As far as the doctrine of natural slavery is concerned, I have to point out that it was applied to the American Indians. The papal bull of 1493 decided that if certain populations were so low on the scale of human civilization, viewed from the European perspective, they could be placed under the sovereignty of Spain for their education and civilization. So that idea also existed, but it was so controversial that no one actually would dare advocating it, especially after 1538 when the Pope rejected it. Therefore, the doctrine of natural slavery could also not provide a relevant legal basis for natural slavery.

Verene Shepherd

And to Nora: so if the illegality at the time is established, as you say—and you are very clear in your presentation about this—what legal consequences could be attached?

Nora Wittman

What we are dealing with is a continued violation of international law, continued from that time—violation of African sovereignty. This makes the context for the present day. The international mechanisms were applicable for that entire period of time. Britain, for example, signed the statutes to the International Court of Justice. Given that Jamaica still has the British queen as head of state, that could not work. Jamaica would have to get out of the commonwealth to be able to assist the International Court of Justice in law or something similar because Britain cannot be taken before the International Court of Justice or other institutions by countries that are part of the commonwealth.

But, generally speaking, we are really dealing with a continued violation of international law and African sovereignty, and also the fact that the people who were taken away, and their descendants, have not been given the opportunity to return. As long as the people

who are kidnapped have not been returned, it is a continued violation. More research would have to be done, but I see this as very relevant.

Verene Shepherd

That is very interesting, Nora, because you are giving more energy to the repatriation movement. That is very interesting.

I have two questions here. The first one, I think, either of you can answer: if state practice at the time contradicted stated principles against chattel slavery and enslavement, would this formalize a determination that the customary international law of the time prohibited these practices?

Here is another question directed to you, Dr. Hébié: the modern expressions of "enslavement" and "colonialism" have discharged former colonists today. It may have been a mistake. But will the "mistake doctrine" be enough to hold states accountable?

Mamadou Hébié

Just in one or two lines for the first question, I would say that the fact that a state practice is in contradiction with existing rules of international law is not a theoretically challenging issue. States have been breaching their obligations for quite a while. What can be very interesting in such context, as the International Court of Justice held in Nicaragua, is to look at the justifications that are provided in order to explain the contradictory practices and how they aligned with established rule.

Let me take now the question that is directly addressed to me. I am not framing torts law as being the sole ground for liability. I am just saying that alleging mistake can hardly be a defense against civil liability. Saying that you did not know that Africans were human beings and that they had equal rights at that time and that they should have been treated with dignity, I can hardly see this as a defense for all the ills of slavery. I can hardly see it as a defense

against reparations because you are the one who decided to act on the basis of uncertain knowledge and to enrich yourself. So, if you do that and later it appears that you were wrong, providing reparations is for me more than just a moral duty, and that was my point. This kind of defense cannot be heard nowadays. For a former enslaver saying that they did not know slavery was unlawful, that they did not know that Africans had equal rights and dignity—for me, this argument does not make sense because if you decide to act upon uncertain knowledge, you have to face the consequences.

Verene Shepherd

The Eurocentric view on the supposed legality of the transatlantic trade in Africans persists. What are some ways in which international law can be utilized to address the legacies or the afterlife of the transatlantic trade in enslaved Africans and slavery, particularly in the United States. Nora, would you like to take that one?

Nora Wittman

For me it is clear that it was illegal. I am sure that there are other ways to forward and progress the reparation claim in the United States as well, but I think of all of them as more weak than this firmly anchored claim that is based on this illegality.

Verene Shepherd

Dr. Hébié, do you want to comment on that one as well?

Mamadou Hébié

How can international law be used to address the legacies for the consequences of enslavement and slave trade? I think there

is a role for international law. This requires the different states to agree to a treaty, to agree first on the fact that slavery was a crime against humanity—and you have countries that are going into that direction—and also agree on what is needed in order to address the enduring consequences and implement them through a treaty.

The difficulty, though, would be, for instance, to try today to claim violation of international law when slavery was prevalent. That could be difficult, since you would need a lot of research into state practice with all these complex issues, such as what was international law at that time, whether each and every capture was contrary to international law, et cetera. I am very happy that Nora started this research. I read her book on the relevant state practice of that time with great pleasure.

Verene Shepherd

Let's follow up. There is a question that I think continues what you said before, and it is about the just war doctrine. If the just war doctrine was the only legal framework that could justify enslavement in international law between the time-frame that you cover, 1450 and 1550, does it mean that we should check in each country, in each and every case, whether the conditions of the just war doctrine were met and tailor our findings accordingly? Does it also mean that it is impossible to make a finding as to the lawfulness of chattel slavery in international law in general?

Mamadou Hébié

I would say, yes, the just war doctrine was very contextual. You had to look at a specific war and determine whether there was a just cause of war and whether the person who was waging a just war satisfied all the relevant conditions. Due to the fact-intensive character of the doctrine, it is not easy to use the just war doctrine in order to make general statements. You will have

to determine whether in each and every case the conditions of the just war doctrine were fulfilled.

But the fact that chattel slavery occurred in such a large scale during that period, without any evidence that Africans were waging wars of aggression throughout the Continent at that time, seems to suggest that the just war doctrine could not offer a sufficient legal basis for enslavement.

Verene Shepherd

Okay. We have two questions from UWI-TV, and here is one. From the point of trans-civilizational international law, how might Islamic practice inform the assessment of what international law required or its relevance? I think you will have to take that based on what you covered, Dr. Hébié.

Mamadou Hébié

Islamic practice is part of the elements of practice that we will have to look at because I believe that there were some African polities at that time that were influenced by Islam. So, if you cannot have access to the practice because of, for instance, the fact that some did not record it, you can look through the Islamic doctrines to understand their views at that time. Islamic practice would be extremely relevant, but in the Islamic practice, even if you were enslaved during a just war, you were not deprived of your humanity. You were not deprived of your rights, and you could be free after a certain period of time. As a free man, enjoying fully all of your rights. Islamic practice is therefore in my view very relevant.

Verene Shepherd

Okay. Here is another question from UWI-TV. The late Dr. Frederick Hickling offers the view that you are against slavery based

on notions of primary and secondary delusion. Does such a view challenge any attempts to find legal frameworks for justifying chattel slavery? I will throw that one to Nora.

Nora Wittman

What has been based on notions of primary and secondary delusion?

Verene Shepherd

The late Dr. Frederick Hickling, was involved in studying mental illnesses—the mental delusion post-chattel enslavement-created; but maybe also he is asking about the delusion of Europeans.

Nora Wittman

I do not think that it can challenge attempts to find legal frameworks for reparations on justifying what happened because if you are going to into criminal cases and somebody claims that he was delusional and therefore he cannot be found guilty, that is something else. But here, we are dealing with states, and conduct was perpetrated over centuries.

I do not think that it can take away from the legal responsibilities.

Verene Shepherd

And so far, they have not claimed delusion, anyway.

I think this one will have to be the final one. Is it rational or moral to base an assessment of the legality of conduct on contemporary practice of states when that conduct is wrong based on commonly accepted standards of morality? Isn't natural law the answer to the reparations analysis?

Nora Wittman

They will try to argue that it was not binding, it was not strong, and things like that. All of that natural law seemed at that time part of the applicable law that is applicable. Everything that can be assessed legally should be taken and not just this and that.

Verene Shepherd

I think we have to leave it there because we just have a minute to the break. So it is just left for me to thank everyone for being such a great audience, asking your questions; as well as express thanks to the panelists—Nora Wittmann and Mamadou Hébié—for their well-thought-out and delivered presentations and to the ways in which they fielded the questions. Thanks again to the audience for engaging with our speakers with your questions and feedback. Please join us for the next panel to be moderated by my friend, Dr. Gay McDougall, on Part II of this same topic, tackling a later time period, of course, and you will hear from Parvathi Menon, Michel Erpelding, and Patricia Viseur Sellers. Thanks so much for joining.

Nora Wittman

Thank you so much.

Mamadou Hébié

Thank you.