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

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Remarks by Michel Erpelding*

Thank you very much, Professor McDougall. A great many thanks to the organizers, especially to Judge Robinson for inviting me to this great Symposium that I already found very stimulating.

I am going to talk about the period between 1815, which saw the Vienna Declaration by which the main Western powers recognized that they had to abolish the African slave trade, and 1888, which saw the abolition of slavery in Brazil and therefore ended, formally at least, the practice of transatlantic chattel slavery.

Now, why this period? As Nora Wittmann already said, transatlantic chattel slavery was largely never legal in the first place under universal international law, thus examining post-1815 international law does not really add anything to that question. However, an interesting thing in that period is the fact that states changed their discourse and got tied up in entanglements and contradictions. I would, therefore, adopt a Eurocentric perspective in order to show the contradictions of Western states during that time.

From a methodological point of view, I am going to adopt a positivist approach and provide an account of what Western powers thought were the international legal statutes of transatlantic chattel slavery during that time. I will also show the reasons behind the state practice and highlight its insufficiencies and also possibly some of its unexpected legal consequences. I will do so by first examining the object and purpose of the 1815 Vienna Declaration; second, identifying the practices by treaties resulting from the declaration; and third, analyzing the impact of this practice on the legal statutes of chattel slavery according to Western powers.

The Declaration of the Eight Courts Relative to the Universal Abolition of the Slave Trade signed by eight major Western powers at the Congress of Vienna on February 8, 1815, was unquestionably

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a watershed in international law. For several centuries, Western international law had served as a crucial tool in supporting this practice of transatlantic chattel slavery, either by organizing the trade or by enforcing and protecting the rights of slave holders in the colonies. Breaking with the centuries of practice, the Vienna Declaration proclaimed the universal and definitive abolition of the trading in Africans as slaves as the common binding goal of all civilized nations.

However, the short-term implications of the 1815 Vienna Declaration were limited, far from creating an immediate obligation to renounce the slave trade, its signatories had only agreed to engage in negotiations that would fix a date for the general abolition of that trade. Moreover and even more crucially, the absolution of slavery itself was neither mentioned nor envisaged by the signatories of the declaration. What the Vienna Declaration did was artificially splitting up one global phenomenon, as Mamadou Hébié already mentioned this splitting up, and splitting it up into two distinct phenomena, namely the slave trade, i.e., enslavement and chattelization, and deportation of Africans as slaves and secondly the colonial slavery itself, i.e., the statutes and treatment of previous enslaved and deported Africans or their descendants as slaves.

The rationale behind this distinction was both practical and legal. From a practical perspective, British abolitionists simply thought it was easier to first go after the slave trade and then maybe go after slavery. From a legal perspective as well, in that time, the Europeans thought that the slave trade was deemed an easier target than the institution of slavery since it was clearly international, because you have to move people from one country overseas to another, to colonies overseas. Also, it was very much in line with the idea of civilization because what somebody like Wilberforce said is that we are going after the slave trade because it prevents Africa from civilizing because it causes wars between the African kings and also we don't want Africa to be depopulated. This was even mentioned in the Vienna Declaration because it said that slavery

was desolating and depopulating Africa, therefore preventing it from civilizing, from joining the great movement of progress initiated by the West, according to their views.

The Vienna Declaration quickly materialized in dozens of treaties targeting various practices related to the slave trade. These treaties had farther-reaching consequences than what initially was contemplated. For instance, they were soon applied beyond the Atlantic world. As soon as 1816, the Western powers intervened in the Maghreb states, in Northern Africa, to have them stop the enslavement of Europeans, and they said that henceforth they considered that the enslavement of people was illegal. This meant that chattelization had become illegal as such.

The provision of the slave trade also had direct consequences. The provision of enslavement had direct consequences on the definition of the slave trade itself. It quickly became clear that chattelization was not limited to former changes in the legal status of an individual but could result from the treatment imposed on such an individual, because in order to identify illegal acts of slave trading, anti-slave treaties and anti-slave trade courts relied not so much on statutes, but on the concrete treatment of the Africans found aboard the slave ships.

Moreover, treaties for the suppression of the slave trade were based on the premise that states had the obligation to guarantee the effective freedom of all liberated slaves—liberated as part of the repression of the illegal slave trade, of course.

Despite an ever-expanding definition of what constituted the international illegal acts of slave trading for most of the nineteenth century, however, Western states had the view that they had no right to fight for slavery or slavery-related practices; that they deemed to be of a purely domestic nature. You can find this in the 1814 treaty at Ghent where the United States agreed to join Britain's fight against the slave trade, but also where Britain agreed to hand back slaves to the United States, at least in theory. They paid reparations; they did not hand back the slaves.

Similarly, even in the 1850s, after many Western countries had already abolished slavery domestically in their colonies, several arbitral awards held that fugitive slaves who had not been victims of acts of slave trading that were illegal under international law had to be returned to their foreign owners. The first international treaty that formally excluded any such restitution of fugitive slaves was only concluded in the 1860s.

It was only after several major Western powers had abolished slavery domestically that one witnesses the conclusion of treaties targeting slavery practices without a reference to their international dimension, and this would eventually open up the way for treaties that would target slavery domestically, such as in the 1885 Final Act of the Conference of Berlin where Western powers agreed to end slavery in Africa. Does this mean that the behavior of slave-holding Western states before the 1880s was legal under international law? My view is not at all.

First, even under Western international law, many Western states waited decades before actually enforcing the legislation and treaties against illegal slave trading. In that case, they were already acting wrongfully under international law, and moreover, the legal situation of many Western states is even more precarious if one takes into account the question of de facto chattelization. So, for instance, states hiring Africans and other non-Westerners under dubious conditions before shipping them overseas and having them work under extreme conditions with high mortality rates can be seen as an act of enslavement and chattelization, even though these people were not, legally speaking, slaves under Western formal law.

The same is true for states that subjected freed slaves or even prisoners of war or the inhabitants of conquered territories, including colonies in Africa in the late nineteenth century to slave-like forced labor. The Western transatlantic chattel slavery was never legal in the first place, and if one adopts this view, one would then say that actually the European abolition movement of 1815 was not a big watershed but actually the end of an exception. I agree with

Mamadou Hébié that one needs to delve deeper into state practice and the practice of local polities to examine this. Thank you.

Gay McDougall

Thank you very much. I am coming back to you with questions as well, but I want to first move to the final speaker on this panel, Dr. Patricia Viseur Sellers, who is the Special Advisor for Gender of the Office of the Prosecutor of the International Criminal Court. She was legal advisor for gender and senior trial attorney for the Yugoslav Tribunal and the Tribunal on Rwanda. She has had quite a storied career. She is the recipient of the Prominent Women in International Law Award by the American Society of International Law. She is going to talk about sexualized practices and institutions of the slave trade and slavery. Patricia Sellers, take it away.

Remarks by Patricia Viseur Sellers*

Thank you very much, Gay, and thank you very much to the organizers, and to Justice Robinson. This has been a fantastic conference.

In this presentation, my gaze is directed particularly toward sexualized practices that were integral to the enslavement of Africans and their African descendants. A multitude of sexual practices, if not institutions, must be countenanced when contemplating slavery breaches and when attempting to calculate the immeasurable toll that reparations will redress.

First, studiously identifying the actual breach and then accurately uncovering the ensuing harm is the exercise that we must undertake. Even in the modern determination of reparations,

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