Slavery: room for reparations?

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Is there potential for a legal claim for reparations for the slave trade? Thomas Roe KC examines the possibilities & limitations under public international law

IN BRIEF

- Examines whether states could have a claim in public international law against states complicit in the transatlantic slave trade.
- Covers some historical context, including written works of Olaudah Equiano from 1789, and international treaties.
- Refers to the *Island of Palmas* case.

In 2013, the Caribbean Community set up the CARICOM Reparations Commission to 'prepare the case [for] reparatory justice for the Caribbean region's indigenous and African descendant communities who are the victims of Crimes Against Humanity in the form of genocide, slavery, slave trading and racial apartheid'. A decade on, the issue is rarely far from the headlines.

CARICOM's proposal encompasses a variety of approaches. This article focuses on the issue of law: do states have a tenable claim in public international law against states complicit in the transatlantic slave trade? (See generally Buser, *Colonial Injustices and the Law of State Responsibility*, KFG Working Paper Series, No 4, August 2016.)

Historical accounts

It is said to be a basic principle that, with limited exceptions, every wrong should have a legal remedy. As wrongs go, the transatlantic slave trade ranks high in the catalogue of man's inhumanity to man. One of the best-known accounts we have comes from a book published in London in 1789: *The Interesting Narrative of the True Life of Olaudah Equiano, or Gustavus Vassa, The African, Written by Himself*. The author was born, he writes, in 1745, in what is nowadays Nigeria. We will come back to one striking fact he reveals about his childhood, but for present purposes can pick up the narrative when Equiano is about 11:

> 'One day, when all our people were gone out to their works as usual, and only I and my dear sister were left to mind the house, two men and a woman got over our walls, and in a moment seized us both and, without giving us time to cry out, or make resistance, they stopped our mouths, and ran off with us into the nearest wood' (Norton Critical Edition, ed Sollors, (2001), p32).

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Equiano and his sister had been taken as slaves. They were soon parted, never to meet again. It is a deeply affecting narrative. Equiano was sold and sold on again, each time getting closer to the coast. There, a vessel from Liverpool was waiting. He and hundreds of others, like so much cargo, were loaded on board. Equiano's account of crossing the Atlantic—the notorious 'Middle Passage'—is a catalogue of horrors:

> '[C]ould I have got over the nettings, I would have jumped over the side, but I could not; And, besides, the crew used to watch us very closely who were not chained down to the decks, lest we should leap into the water' (at p39).

Equiano was in some ways lucky. He did not succumb to disease, as many did. He was not abused as terribly as he witnessed many others being abused. He managed to buy his own freedom, moving to London and eventually to life as a devout Christian who devoted the rest of his days to persuading the British, with considerable success, of the evils of slavery. Equiano died in 1797, ten years before the trade was abolished in the British Empire, although the abolition of the institution of slavery itself took another 26 years.

This documented example is, of course, of only one of millions of lives taken or altered by the transatlantic slave trade. Is there a claim in international law?

Making a case

There is, of course, no standing body to whom claims between states may generally be brought. The jurisdiction of an international court or tribunal is dependent on prior agreement. There is no basis, certainly as against the UK, on which it can plausibly be said that the jurisdiction of any court or tribunal has been established such as might enable any state to bring proceedings. But public international law depends at least as much on states' voluntary compliance with what are generally understood as their international obligations—being seen to be acting lawfully—as it does on states' ability to coerce other states through legal action. Of course, there are instances of states disregarding international law, but it is relatively rare to come across a state avowedly breaching international law. One would expect that the mere making of a convincing case that, in public international law, states such as the UK are liable to states such as the CARICOM members would have at least a persuasive effect.

Can such a case be made? As regards Britain, slave trading was not carried out by the government itself. But the government was heavily involved as licensor (in the

early days to the Royal African Company (see Davies, *The Royal African Company,* Longmans (1957), p41), and it is not much of a stretch to invoke the principle nowadays contained in Art 8 of the UN's articles on Responsibility of States for Internationally Wrongful Acts:

> 'The conduct of a… group of persons shall be considered an act of a State… if the person or group of persons is in fact acting… under the… control of, that State in carrying out the conduct.'

But there are other difficulties. The notion of a modern state bringing a claim in respect of a period long before its existence as an independent state presents some difficult issues of state succession. A more fundamental difficulty is the so-called intertemporal rule. As it was put in the *Island of Palmas* case in 1928:

> 'A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.' (*Re Island of Palmas Arbitration* (1930) 22 AJIL 867).

Or, as it is put in Art 13 of the Articles on State Responsibility:

> '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.'

Was it truly not a breach of international law to trade in human beings from the 16th to the early 19th centuries? The melancholy answer seems to be that it was not. Writers in the early 16th and 17th centuries opined that it was contrary to the law of nations for Christians to take fellow Christians as slaves, but the notion that the slave trade was generally a wrong in the law of nations came much later; in particular, by a declaration to that effect signed at the Congress of Vienna in 1815 and in the 1841 Treaty for the Suppression of the Slave Trade.

For the law earlier than that, we must look to state practice, which was not uniformly opposed to the slave trade. In March 1816, HMS Queen Charlotte, patrolling international waters in search of slave traders (Britain having by then become the world's most aggressive opponent of the trade), encountered the French vessel Le Louis. After an engagement in which 12 British sailors were killed, the ship was boarded, and it became apparent that it was sailing to Africa to pick up slaves for the Caribbean. So the Navy seized the vessel for possible forfeiture. Because the ship had been intercepted in international waters, the issue was whether slave trading could be regarded as akin to piracy, which had long been regarded as a crime against the law of nations and therefore as entitling any vessel to suppress it even in international waters. Sir William Scott concluded with obvious regret that it could not:

> 'Within these few years a considerable change of opinion has taken place, particularly in this country. Formal declarations have been made, and laws enacted, in reprobation of this practice; and pains, ably and zealously conducted, have been taken to induce other countries to follow the example; but at present with insufficient effect: for there are nations which adhere to the practice, under all the encouragement which their own laws can give it' (161 ER 1464 at 1467) (see also *The Antelope* 23 US 66, to the same effect in the US Supreme Court).

> ***"Was it really not a breach of international law to trade in human beings from the 16th to the early 19th centuries?"***

One is driven to conclude that a claim in international law, quite apart from the absence of a tribunal to bring it in, is highly problematic. It is notable in this context that the final declaration of the 2001 UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance stated that 'slavery and the slave trade are a crime against humanity and *should always have been so*' (emphasis added).

Brutal times

If this seems to some unsatisfactory, it becomes at least more understandable when we recall quite how different those times were from ours. While Adam Smith was railing in 1759 against slave traders: 'Wretches… whose… brutality, and baseness, so justly expose them to the contempt of the vanquished' (and he referred to their African victims as heroes) (*Theory of Moral Sentiments* (1759), quoted in Biggar, *Colonialism, A Reckoning* (2023), p54), there was no shortage of men willing to go into the trade, even though it was a dangerous one, in which, in the 22 years from 1785, some 10% to 15% of ships' captains died (Black, *Slavery, A New Global History* (2011), p127).

More broadly, this was in some respects a remarkably brutal society. More than 200 offences in England carried the death penalty, generally carried out in public and a popular spectacle (Mortimer, *The Time Traveller's Guide to Regency Britain* (2020), p98). In May 1787, the month that the Society for the Abolition of the Slave Trade held its inaugural meeting, a fleet set off with a total of 775 convicted criminals to whom the courts had given the choice between death or transportation for life to Botany Bay, where it was hoped to establish a new penal colony.

Moreover, as recently as 1928 it could be said, in the *Island of Palmas* case, that: 'titles of acquisition of territorial sovereignty in present-day international law [may be]… based on… occupation or conquest' (at p839).

It is perhaps unsurprising that in a world where exercising force over whole peoples could lead to the valid acquisition of legal sovereignty over their territory, it was considered legitimate to obtain property in individual human beings.

Finally, as part of the context for the apparent lawfulness of slavery and the slave trade in the law of nations, until positive law came to ban them, it is necessary to recall their ubiquity until modern times. The Romans systematised slavery, stipulating expressly that slaves were not legal persons at all. Perhaps a million Europeans were captured and sold into slavery from the coasts of Spain and Italy in the 16th and 17th centuries (Black, p73). And, to return to Africa, the striking fact in Equiano's narrative is that he explains that his own family had slaves, who had been captured in battle and put to work for them. He points out that they were never treated with the brutality he saw in the West Indies, and that their food, clothes and lodging were the same as non-slaves, but this benign picture is rather undermined by the next sentence (at p26): 'Some of these slaves even have slaves under them as their own property, and for their own use.'

As the novelist Chimamanda Ngozi Adichie has said, one should beware the dangers of the single story. **NLJ**

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