

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

Proceedings of the Symposium

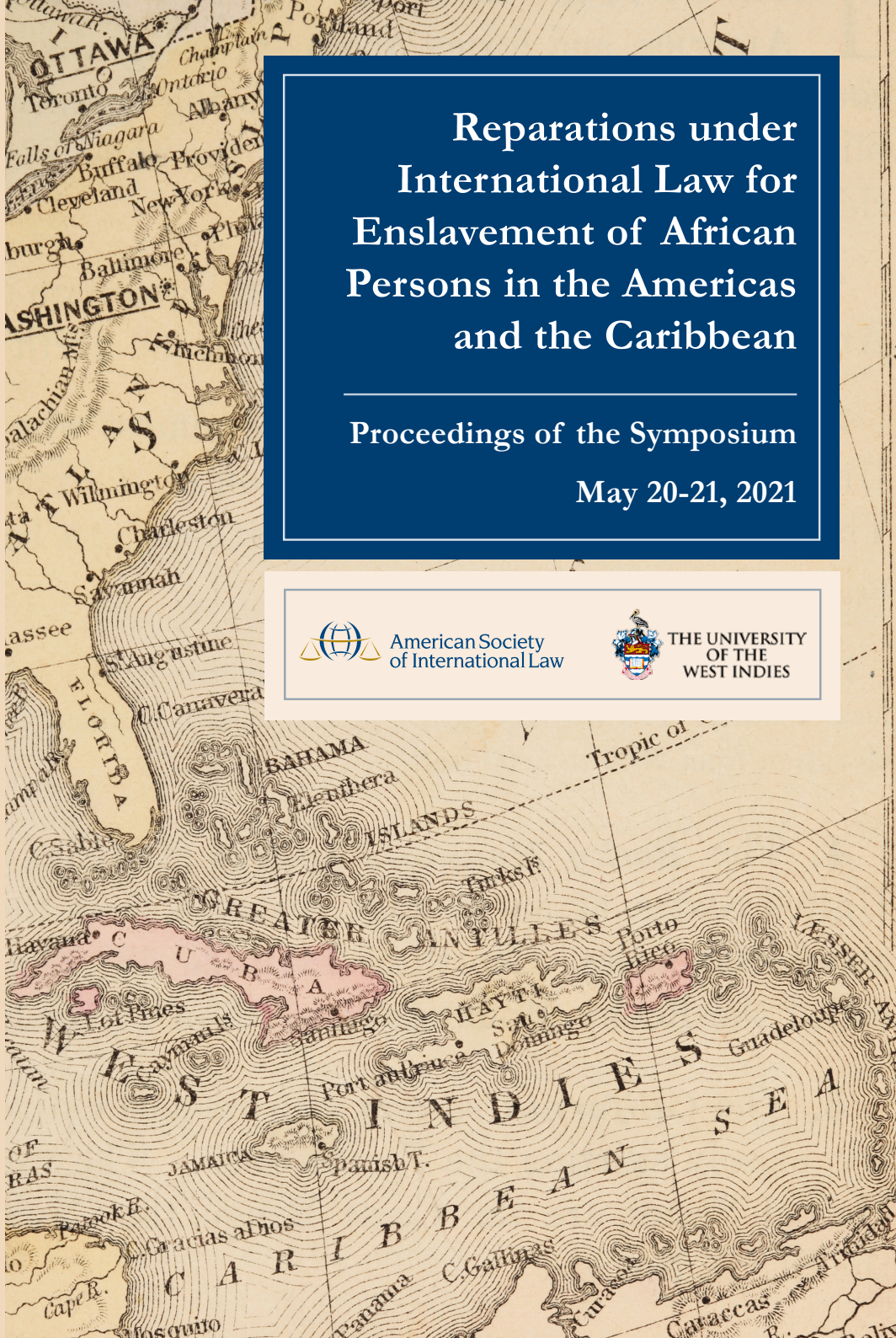
May 20-21, 2021



American Society of International Law



THE UNIVERSITY OF THE WEST INDIES





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

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Co-Sponsored By:

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Table of Contents

FOREWORD

Catherine Amirfar and Mark David Agrast 3

DAY ONE: THURSDAY, MAY 20

Welcome & Opening Remarks

Catherine Amirfar 9

Patrick Robinson 10

Opening Address: The Historical Context of the Business of Transatlantic Chattel Slavery

Sir Hilary Beckles 17

Moderated by:

Patrick Robinson

Examining (IL)legality of Transatlantic Chattel Slavery Under International Law – Part I

Global Assessment of the Legality of Transatlantic Chattel Slavery

Nora Wittmann 32

Transatlantic Chattel Slavery 1450–1550

Mamadou Hébié 39

Moderated by:

Verene Shepherd

Examining (IL)legality of Transatlantic Chattel Slavery Under International Law – Part II

Transatlantic Chattel Slavery, 1550–1815

Parvathi Meon 55

Transatlantic Chattel Slavery, 1815–1888

Michel Erpelding 59

Sexualized Practices and Institutions of the Slave Trade and Slavery

Patricia Viseur Sellrs 63

Moderated by:

Gay McDougall

Global Quantification of Reparations for Transatlantic Chattel Slavery	
<i>Sir Hilary Beckles</i>	80
Moderated by:	
<i>Adrien Wing</i>	

DAY TWO: FRIDAY, MAY 21

Global and Comparative Perspectives on Reparations	
Reparations for Transatlantic Chattel Slavery in Brazil	
<i>Humberto Adami</i>	100
Remedies for Gross Breaches of International Law, with Particular Attention to Transatlantic Chattel Slavery	
<i>Claudio Grossman</i>	103
Moderated by:	
<i>Charles Jalloh</i>	

The Legacy of Enslavement—Contemporary Dimensions and Remedies	
Reparations for Racial Discrimination Rooted in Colonialism and Slavery	
<i>E. Tendayi Achiume</i>	118
Racial Discrimination, Xenophobia and Related Intolerance: The Claim for Reparations for the Tulsa Massacre of 1921	
<i>Eric Miller</i>	125
Moderated by:	
<i>Jeremy Levitt</i>	

Concluding Address	
Contemporary Institutionalized Racism as a Breach of International Human Rights Norms	
<i>Philippe Sands</i>	146

The Ascertainment of a Rule of International Law Condemning Transatlantic Chattel Slavery	
Final Observations & Concluding Remarks	
<i>Patrick Robinson</i>	172

APPENDICES

I. Biographies of the Speakers	191
II. Symposium Program	205

FOREWORD

Foreword

On behalf of the American Society of International Law and our partners at the University of the West Indies, we are delighted to introduce this publication. It serves as a written record of the May 20-21, 2021, *Symposium on Reparations Under International Law for Enslavement of African Persons in the Americas and the Caribbean*, an initiative proposed to the Society by Judge Patrick Robinson and convened during his service as Honorary President of the Society in 2020. The proceedings also were recorded and are available at asil.org/2021Reparations.

The symposium comprised two days of addresses and panel discussions featuring prominent experts from around the world. Panelists discussed critical questions related to reparations for the descendants of Africans who were enslaved in the Americas and the Caribbean, including the historical and social context of transatlantic chattel slavery; its legality or illegality under international law at the time it took place; contemporary perspectives on transatlantic chattel slavery and institutional racism as gross breaches of international law; the economic basis for the assessment of reparations; and what form remedial measures should take.

Reparation begins with an acknowledgment of the truth. In an era of denialism, falsification, and historical amnesia, it is our hope that this symposium and the work that follows from it will contribute to an honest reckoning with the facts, and that it will encourage people of good will to consider with fresh eyes what is owed to those whose lives have been blighted by the horrors of past centuries, and our own.

We would like to express our deep appreciation to the convener of these Proceedings, Judge Patrick Robinson, a member of the International Court of Justice and Honorary President of the American Society of International Law from 2020-2022; Sir Hilary Beckles, Vice-Chancellor of the University of the West Indies; the

members of the organizing committee—co-chairs Natalie Reid and Chantal Thomas, Claudio Grossman, Michael Peay, Patricia Sellers, and Verene Shepherd; the UWI Centre for Reparation Research; and the staff of the Society. We also wish to thank the Cornell Center for Global Economic Justice for its generous support for the publication of these proceedings.

Catherine Amirfar
President 2020-2022

Mark David Agrast
Executive Director

**REPARATIONS UNDER INTERNATIONAL LAW
FOR ENSLAVEMENT OF AFRICAN PERSONS
IN THE AMERICAS AND THE CARIBBEAN**

MAY 20–21, 2021

DAY ONE:
THURSDAY, MAY 20, 2021

WELCOME AND OPENING REMARKS

REMARKS BY CATHERINE AMIRFAR*

Good day, everyone. I know you are joining us from many different time zones across the globe. I am Catherine Amirfar, president of the American Society of International Law (ASIL), and it is my great privilege to help welcome you today.

The Society is absolutely thrilled to be cosponsoring this remarkable event with the University of the West Indies (UWI), home to the Centre for Reparation Research, which has played a key role in facilitating this Symposium, together with the Blacks of the American Society of International Law task force.

I want to take a moment to also especially thank the Symposium organizing committee responsible for helping us put this together, comprised of Natalie Reid and Chantal Thomas as co-chairs and members Claudio Grossman, Patricia Sellers, T. Michael Peay, Verene Shepherd, Gabrielle Hemmings, and Floyd Williams. Thank you all for the hard work in putting together this important program.

It goes without saying that the current moment has brought into stark relief issues of racial inequality that have deep historical roots and which continue to plague contemporary society all over the world. That larger conversation has brought renewed focus to the question of reparations for the enslavement of Africans, including the transatlantic trade in enslaved Africans.

ASIL and the UWI are uniquely positioned to convene eminent scholars and practitioners from across the globe to illuminate these issues through rigorous examination and discussion of international law, economic and social history, and the current debate and efforts regarding reparations.

Over the course of these two half-days, we will hear from more than two dozen leading experts on a range of topics, including

* Partner, Debevoise & Plimpton LLP; President, American Society of International Law.

the legal status of enslavement during and prior to the nineteenth century, the legacy of enslaved men in contemporary society, and the challenges related to obtaining reparations of international law.

The Symposium as convened is really the brainchild of Judge Patrick Robinson, who I am so proud to work with as the honorary president of ASIL, and I am privileged to introduce him today. Judge Robinson, of course, will be well known to all of you. He is an eminent judge of the International Court of Justice. He previously served as a judge and then president of the International Criminal Tribunal for the former Yugoslavia as well as a member of the Inter-American Commission on Human Rights and the International Law Commission.

While unfortunately we could not all be in Jamaica together in person for this special event, this program has special meaning and roots in Jamaica. Judge Robinson was educated at Jamaica College, University of West Indies, and later the University of London and Kings College London. Following his call to the bar in 1968, Judge Robinson had a long and distinguished career in public service, working for the Jamaican government for over three decades. He is the recipient of the National Award, Order of Jamaica, awarded by the government of Jamaica for services to international law, and holds several honorary doctorate degrees, including the University of the West Indies.

Judge Robinson, you are an inspiration. He is also known for his wonderfully wicked sense of humor, and he is a personal hero. Judge, over to you.

REMARKS BY JUDGE PATRICK ROBINSON*

Thank you very much, Catherine, and may I say good afternoon, good evening, good night, and good morning. Ladies and Gentlemen,

* Judge, International Court of Justice; Honorary President, American Society of International Law

I do not wish any participant to feel abandoned, and I assure you I am not in the employment of the Jamaica Tourist Board, but I cannot help but tell you that I am speaking from bright and sunny Jamaica.

Our topic this afternoon and tomorrow afternoon is the reparations that are due for transatlantic chattel slavery. Ladies and Gentlemen, one does not have to be a devotee of the Olympics of the oppressed to be able to agree that transatlantic chattel slavery as an atrocity exemplifying man's inhumanity to man has never been surpassed. No doubt, it is the extent of the severity of this crime and its consequences that explain why the two political parties in Jamaica, notorious for never agreeing on anything, were able to set aside their differences and in 2015 unanimously adopted a parliamentary resolution that the government of Jamaica was entitled on behalf of the former enslaved, in accordance with the basic tenets of labor law and human rights, to receive payment from Great Britain equivalent to the sum paid to the British slave owners as compensation for the loss of slave labor.

Ladies and Gentlemen, as an atrocity, transatlantic chattel slavery was:

- Striking for its duration of over four hundred years;
- Unmatched for its barbarity, demonstrated in the eighteenth century by the Englishman Thomas Thistlewood, whose favorite punishment for a runaway slave from his Jamaican plantation was to coerce one of the enslaved to defecate in the mouth of the runaway, whose mouth was then gagged for about three hours – a more cruel and sadistic punishment has never been devised;
- Unmatched for its sheer scale and magnitude, demonstrated first, by the length of the pernicious triangular voyage that covered a distance of over 12,000 miles, second, by the number of persons enslaved, over 15 million, and third, by the number of those killed, over 6 million, a figure based on those who died on abduction, on the trek to, and during

internment in, the slave castles, and then those who died in the Middle Passage and from toiling on the plantations;

- Unmatched for its modern-day consequences, all too evident in every country with descendants of the enslaved;
- Unmatched for its profitability, manifested in the fact that in 1754, the average white person in Jamaica was fifty-two times wealthier than the average person in England and Wales, and that the compensation money paid to the planters by Britain for the loss of their property on emancipation, twenty million pounds, started a second Industrial Revolution in Britain after 1835; and in effect, as we know, this sum was provided by an additional four years of unpaid labor by the enslaved in the so-called “period of apprenticeship” following emancipation in 1834.

Ladies and Gentlemen, this Symposium concerns the question of the reparations that may be due for transatlantic chattel slavery. There were many forms of servile labor in Europe and in Africa, but the Symposium focuses on the kind of enslavement to which West Africans were subjected for over four hundred years in the Americas and the Caribbean. That is transatlantic chattel slavery, and as you well know—and if you do not know, you will learn from the Symposium—transatlantic chattel slavery was wholly different from other kinds of servile labor, whether in Europe or in Africa.

While the Jamaican Parliament seeks reparations in respect of those who were enslaved in Jamaica, the scope of this Symposium is global. The global examination of transatlantic chattel slavery sets the stage for an examination of reparations at a global level. Over the past years, several institutions in the United States of America and elsewhere have paid reparations for transatlantic chattel slavery to compensate for benefits they derived from the free and forced labor of the enslaved centuries ago. One welcomes these initiatives. I certainly welcome them, but in my view, it would be better to have reparations organized on a more systematic basis to replace

the occasional payment of reparations, and my hope is that this Symposium, organized by the American Society of International Law and the University of the West Indies, will lead to such an approach.

Although this Symposium primarily adopts a period-by-period, century-by-century approach in its examination of the wrongfulness of transatlantic chattel slavery, one speaker, Dr. Nora Wittmann, will offer a more global analysis, and she is well set to make such a presentation. She is a scholar who has devoted much attention to this question.

We will also hear in that regard from Dr. Mamadou Hébié, who is a Lecturer at Leiden University in international law, Parvathi Menon of the University of Helsinki, and Dr. Michel Erpelding of the Max Planck Institute.

There will also be a discourse on Sexualized Practices of the Slave Trade and Slavery by Dr. Patricia Sellers as well as a presentation about reparations in Brazil by Dr. Humberto Adami, the Special Rapporteur in his country on that subject. And I am very pleased to inform you that Professor Claudio Grossman, my former colleague at the Inter-American Commission of Human Rights and now a member of the International Law Commission, will speak on remedies for gross breaches of international law, such as transatlantic chattel slavery. Since the consequences of transatlantic chattel slavery are very much present today, we will have two presentations on contemporary racism as the legacy of enslavement. We are very fortunate to have two very distinguished international lawyers presenting to us on this subject. Professor E. Tendayi Achiume is the United Nations Special Rapporteur on Racism and Professor Philippe Sands of the University College London is a well-known international lawyer and litigator in various international dispute settlement bodies, including the International Court of Justice.

The 1921 Tulsa Massacre is a notorious example of racism in the United States of America. Professor Eric Miller, who is part of the legal team that has instituted proceedings in the United States courts seeking reparations for the Massacre, will make a

presentation on this subject. Now, ladies and gentlemen, coincidence of coincidences, by an amazing stroke of serendipity, where do you think Professor Miller was yesterday? Professor Miller, who is my cousin, testified yesterday before the U.S. House Judiciary Committee's hearing on the centennial of the Massacre, and he took with him two persons, ages 107 and 100 years, who are survivors of the Massacre. We look forward to what is going to be a very interesting presentation by Professor Miller.

Sir Hilary Beckles, a distinguished economic historian, will make a presentation on the historical context in which the business of transatlantic chattel slavery was carried out. He will also present a global quantification of the reparations that are due for transatlantic slavery.

Ladies and Gentlemen, you may well ask about the reparations that are due in international law for transatlantic chattel slavery. Please wait and see. I will make the last presentation, and my topic will be, The Ascertainment of a Rule of International Law Condemning Transatlantic Chattel Slavery.

Ladies and Gentlemen, it is perfectly feasible to seek reparations for transatlantic chattel slavery on moral grounds, because it is beyond dispute that it constituted a wholly immoral act. However, this Symposium adopts a different approach. It examines whether transatlantic chattel slavery was wrongful conduct under international law. In carrying out that examination, one has to bear in mind the intertemporal rule which requires that the wrongfulness of transatlantic chattel slavery be determined on the basis of the law at the time it was carried out. It is the wrongfulness of transatlantic chattel slavery that provides the legal basis for reparations.

Ladies and Gentlemen, the consequences of chattelization of West Africans for over a period of some 450 years are very evident in every single country in the world that has descendants of the enslaved, and to illustrate this, we need look no further than the United States of America. On many occasions, when a Black male or female driver of a motor vehicle is pulled over by the police, the

chattelization to which his or her forebears were subjected comes immediately into play, and that person is treated as a chattel, no longer saleable but still a thing, less than human and not warranting respect for his or her inherent dignity, the basis for all human rights.

Ladies and Gentlemen, the first speaker on the first topic needs no introduction, but a word or two is still in order. Sir Hilary Beckles is the Vice-Chancellor of the University of the West Indies, a university that is in the top 5 percent of universities in the world. He has had a distinguished career as an academic and has written several books. For our purposes, if you have not already done so, you should read *Britain's Black Debt* as well as a book he co-authored with Professor Verene Shepherd, *Saving Souls: The Struggle to End the Transatlantic Trade in Africa*.

In 2013, Sir Hilary was invited to coordinate the Caribbean governments' policy positions on the global reparatory justice conversation, and in this capacity, he was appointed chair of the CARICOM Reparations Commission, and under his guidance, the University of the West Indies established the Centre for Reparation Research.

Sir Hilary, you have the floor.

OPENING ADDRESS: THE HISTORICAL CONTEXT OF THE BUSINESS OF TRANSATLANTIC CHATTEL SLAVERY

REMARKS BY SIR HILARY BECKLES*

Thank you very much, and allow me to say at the outset what a tremendous honor it is to be a part of this seminal Symposium and to express my gratitude to Judge Robinson for this invitation to join you in conversation.

Many years ago, I chose to submit as a Ph.D. proposal the issues surrounding the economics of the rise of chattel slavery. I was twenty-one years old at the time and did not know what I was getting into in terms of the broader implications, but I understood even then from reading the literature that there were several competing options available to Western colonial adventurers entering a new world, and those options had relative merits.

The Western European complex expanded across the Atlantic into the Americas in search of labor in order to carry out major projects in agriculture and in mining and other forms of economic development extraction. These labor options included the transportation of the European working class across the Atlantic in the form of indentured labor contracts, mobilizing, by various forms of coercion, the use of Indigenous Native American labor, and accessing West Africa in order to extract or press coerced labor into production.

My task as a doctoral student was to account for the ultimate choice after a hundred years of experimentation by various European countries, initially Spain in the Caribbean and parts of Latin America, then Portugal in Brazil, followed by the English, Dutch, French, Danish, and Nordic nations. But there were mixed and commingled forms of labor. Within an ideological pedagogy, that was at once consistent with their own national systems of labor and innovating and initiating new systems of legal labor relations

* Vice-Chancellor, the University of the West Indies.

within their colonies that were departures of systems of labor which were indigenous to their own European context.

The issue around the genocide that followed the use of Indigenous, American labor is well known. The Spanish and the Portuguese developed various forms of contract systems because they felt that given their own labor history in Spain and Portugal chattel slavery would have been resisted domestically by the Catholic Church and prominent individuals in civil society. There was ambivalence, and to some extent reticence, regarding whether the Indigenous-dominated, oppressed, conquered populations of the Americas could be driven to chattel slavery, and in the end, it was the established norm that this should not be the case. Of course, there were always individuals who pushed beyond that prescription and did participate in developing a property chattel relationship to the Indigenous people, but by and large, this was not initially the norm.

When the Protestant nations, the English, Dutch, French, and Danish primarily, entered the new world—the Caribbean especially—they too began with an experiment around the use of their own domestic labor from Europe transported across the Atlantic in the forms of indentured servitude. My own Ph.D. dissertation dealt with the extensive use of white indentured labor from Britain in the Caribbean and the Americas in the formative years of colonization, in Barbados, Jamaica, the Leeward Islands, Virginia, the Carolinas, Pennsylvania, and New York. I explored the economics of that choice—that it was cheaper and more productive and sustainable to import working-class labor to initiate production on the plantations—and as a result of that, hundreds of thousands of workers from Britain were transported to work on the sugar plantations under contracts of indenture. A typical contract of indenture was that the investor in your labor would pay for your transportation across the Atlantic and provide housing for you on the plantation, while you were under contract to provide between seven to ten years of labor on that plantation, and at the end of your contract of indenture, you were given a small sum of money to

launch you into your freedom or a piece of land to launch you as an independent person. That was a model that was chosen to lay the foundation because Protestant nations did not possess the economic resources to make a massive investment in the African transatlantic slave trade. That was how you got a trade in white labor—convicts, political prisoners, and the dependent-upon-the-state working-class poor. Local cities were given authority to round them up and ship them out to work on the plantation.

But that system proved to be unsustainable given the enormity of this project, which was the rise of Plantation America, whether in the form of sugar production in the Caribbean, cotton production in the U.S. South, or rice or other agricultural products. The magnitude of what was conceptualized, the enormity of the project of plantation expansion as the basis of sustaining and growing wealth in Europe, required a massive pool of labor that was sustainable over hundreds of years. That is when Western Europe looked at the future of the enterprise of colonization and determined that it must generate an economic return of great magnitude in order to be worth it. In other words, Europe was not going to undertake this project unless it was going to be profitable and unless the profitability was going to be sustainable—meaning it would lead to an enormous increase in wealth, economic growth, and economic development in Europe itself. Thus, the macroeconomics of this project were determined, and it was agreed upon that the only way this was going to work was to have access to another pool of labor from Africa outside of their own traditions of labor that could be justified and enabled to be sustainable.

This was an enormously significant decision and it first took place in the Caribbean in a highly organized way. It had emerged in Brazil and had spread across the northeast part of that colony. But where it reached its full maturation as an economic model and system was in the Caribbean, specifically in Barbados because Barbados was the center of the British Empire in the Americas in the

early part of the seventeenth century. Barbados was an empty island, a place where England could begin with no Indigenous resistance.

In 1636, just ten years after colonization, the Barbados Assembly passed a proclamation that stated for the first time, anywhere in the Americas, from today and henceforth, any person of Africa or African descent who arrives in this colony shall be deemed a slave forever and their ownership shall be defined as the ownership of property, and that property right shall be passed on from generation to generation. And there shall be no constraints or restraints with respect to the use of that person who is now defined as property. That was seismic because the English in Barbados were making these massive investments in sugar plantations and the technology of plantation production. Investors were making huge investments in land and technology and labor. A harvest plantation of five hundred acres, for example, required at least three hundred enslaved Africans to make it work efficiently. The average price of an enslaved African at that time was thirty to forty pounds, male and female. The value of enslaved labor was more than the value of the land, and therefore, investors and entrepreneurs wanted to ensure that their investment in African labor was associated with property, real estate, and chattel, and they demanded that from the government. The government gave it to them as security for their entrepreneurial effort in massive capital investment and profitability.

Twenty years later, the Barbados legislature set this all out in an Act for the Good Governance of Negroes. In this Act, which was the first of its kind, the English enslavers in Barbados made it clear that they were framing a piece of legislation not just for domestic management but for the region, and it worked. It began with the usual preamble: “And whereas the Africans are seen as a barbarous and humane people, a brutish people not fit to be governed under the laws of Christians, which sets them apart, but a special set of laws required for the governance, be it therefore ordained . . .” etc. The preamble to the act made it clear that Africans were not human, at best subhuman. The laws that were going to be used to govern

them were precise because African peoples could not be governed under the same laws as Christians because Christians were deemed as white, and therefore, the Africans were subhuman and nonhuman and therefore required special forms of laws. The so-called “slave laws” were about the management of chattel, and thus Africans were defined as property, with all of the normal rights of property that were expected. What were the property rights? You could buy it. You could sell it. You could mortgage it. You could use it as currency. You could use it as collateral. You could pass it on in wills. You could use it to pay taxes, and you were taxed for owning it. All of these normal expressions of what is property and chattel were applied to the Africans. That is the meaning of chattelization. You could be bought, sold, mortgaged, bequeathed, all of those functions, and of course, you had no human identity.

The Barbados model was then exported across the Caribbean by the British, and those laws were eventually taken to South Carolina. South Carolina was the first American colony to implement the Caribbean model, and this is why South Carolina became the first colony in English America with a Black majority, and why South Carolina is seen as the heart of slavery in the U.S. South. This also explains why South Carolina is considered by some people to be one of the most racist states in the U.S. South, because of the legacy of being the first state to embrace chattel slavery, to implement chattel slavery, and to develop African enslaved people as the social majority in the colony.

While this was being done, it was necessary to remove other forms of competing labor, and to that end, a very important development took place in the British Parliament. Two white indentured servants were able to spirit a letter out of Barbados into England that was taken before the House of Commons, which was under Cromwellian rule. It was called a petition of two indentured servants. Mr. Foyle and Mr. Rivers were asking for justice against their white enslavement in the Caribbean, and the English House of Commons met to hear this petition. They determined that what they

had heard about white people being treated like slaves in Barbados and in the Caribbean was unacceptable, and Cromwell made a great speech in which he said the history of the English people is the history of the gradual freeing of the lower orders, and if we are going to reverse our history by enslaving white people in the colonies, then that has to be stopped because it would make us men most miserable. Thus, the parliamentary process of uprooting any evidence of white slavery began and set forth that white workers must never be treated like African workers. It was determined that the system of white oppression must end and white indentured servitude was eradicated in the Caribbean and replaced completely by African chattel slavery. We have the evidence in the English Parliament of a direct political instruction to eradicate white servitude and replace it with Black chattel slavery as the model for the modern world, and to this end, they succeeded.

Chattel slavery then became the standard model of colonization that Africans can be bought and sold on the market. However, at the time of the implementation of chattel slavery, its regionalization, and its application across the Americas and the wider world, there were many organizations and many people in Europe who were fighting against this activity. There was a strong civil society movement that said the chattelization of the African people is morally wrong, sinful, and un-Christian. Thus, there were movements within civil society that were pointing to the criminal nature of chattel slavery—that it was criminal, sinful, and immoral.

It is interesting that when the Emancipation Act was being passed in Britain, those same groups of people, two hundred years later, were making the same argument that the time has come to stop chattel slavery because it is criminal, sinful, immoral, un-Christian. The same arguments were used at the beginning, and the same arguments were used at the end. The question is why were these arguments not effective at the beginning and why they were effective at the end.

They were not effective at the beginning because the British state, having listened to the competing arguments, took the decision that chattel slavery was in the national interest, and all of those persons and groups who opposed it were opposed to the national interest of England seeking to become the richest nation in Europe, raising its capital, raising its funds to build an army, to build a powerful state so it could complete and threaten France and the Netherlands and other competing countries. The only way England was going to transcend militarily above other European countries is if it had access to a form of wealth that would give it that capacity, and the only way they could get that wealth was chattel slavery and plantation development. Therefore, it was in the national interest, and all of those voices were brushed aside.

Even when William Wilberforce sought to use those arguments, King William, the king of England, threatened him, “Mr. Wilberforce, be careful with what you are saying about slavery. Be careful. This institution is needed to promote England as a globally competitive economic nation. Be careful what you are saying”—a veiled threat to anyone who stood up against it on grounds that it was criminal, sinful, immoral, un-Christian.

At the end of this process was the Emancipation Act, which embraced all of those arguments. Yes, it was sinful. It was criminal. It was immoral. Therefore, we have to end it and end it now, primarily because the nation no longer needed it. It served its purpose. It made England into the wealthiest country in Europe, if not in the world. England became the first industrial country because it had the inflow of investments coming from the colonies and slavery to build the factories, cities, and towns. The process had reached a terminal moment. England had won and emerged as the most powerful country in Europe.

The enslaved people did ask for reparations. When the act was being passed, they said, “How about us? Our labor was stolen from us for centuries. We should receive compensation. We want reparations.” The British government told them to be silent,

saying “You have no voice, and you should be grateful that we are freeing you. Whatever reparations you think you should have, you are getting it in the form of the freedom that we are giving you.” The enslaved then responded, “You take our labor by military conquest. You enslave us against our will. We fought against you to demonstrate that we have not accepted your imposition. Every generation of enslaved people revolted. The Caribbean became a military theater. Rebellions after rebellions of Black revolutionary movement against slavery, proof that there was no acceptance of it. We want reparations and are told to be silent.”

The movement is now here again. Between the emancipation legislation of the 1830s and today, there were at least six or seven major spikes in the demand for reparations. The enslaved demanded it. The first generation of free Africans demanded reparations, and from then until today, every generation has been asking for reparations. Reparations is one of the oldest political movements in the Caribbean that began slavery, continued after emancipation, and is now back on the agenda once again. Two hundred years of demand for this all the way into the present moment. There have been two approaches to the demand for what is called “reparations.” There are those calculations that are based upon wealth extraction from enforced labor. For example, in the case of Britain, which is a case I know well, the British enslaved six million Africans, both imported and those Creole who were born on their plantations. What if you take each adult and pay them the wage that you would have paid the lowest-paid worker in Britain? How much backpay would you have to deal with? Let us say you are paying the workers back in England on the agricultural estates three pence a day. Make that calculation for the millions of Africans who were enslaved—free labor from six million people for two hundred years. If you had to do a calculation, what would it come to? The figure was staggering when the calculation was done by a group of economists in the city of London. The figure they came up with was larger than the gross domestic income of England. It was larger than the

gross national product of England. It was somewhere in the area of six trillion pounds, just as an indicator of how much value you had extracted from enslaving six million people against their will for two hundred years without paying them a wage.

Another viewpoint is that that period of enslavement of wealth extraction and colonization left the people of the Caribbean who are the descendants of that process in the depths of poverty. This poverty has translated into mass illiteracy and extreme public ill health. When you look at the Black population today in the Caribbean, if you use the marker of chronic diseases—hypertension, diabetes—and apply it across the world, the Black people in the Caribbean are the sickest people in the world because the descendants of the enslaved people in the Caribbean have the highest per capita expression of diabetes and hypertension. This is why today the first two major slave societies, Barbados and Jamaica, are now competing for the title “Amputation Capital of the World” because there is no place in the world with the same kind of expression of diabetic amputation challenges. Barbados and Jamaica have the highest percentage of amputations per capita in the world because the correlation between that medical fact and the fact that Barbados and Jamaica were the first two significant chattelization economies in the world.

When these countries became independent in the 1960s, 70 to 80 percent of the people of African descent could not read or write. The Europeans walked away. Britain walked away and said, “You want independence. Well, have it.” But they wanted independence because they wanted to get away from the brutalization of the colonial imperial exploiter. Grasping that freedom left them abandoned with circumstances of public ill health, massive illiteracy, and quite frankly, an inability to pursue economic development in an orderly fashion. But they pursued it, and through their efforts, they were able to convert the crudity and barbarity of a colony into a democratic nation. They have done very well to build a democratic sensibility out of the crudity of a colony. They did it, but the question remains: What if they were paid reparations?

Jamaica and Barbados and all of these other colonies would be further ahead in their economic growth and poverty eradication. But they were left to struggle on their own to build out the basic infrastructure for democracy from the crudity of a colony. This is why the reparations movement is not just looking at how much is required to compensate labor, but what is required to promote the development of democratic society and economy today out of the rubble of an abandoned colony.

The movement from this criminal chattel culture that became the basis of American colonization, has cascaded today into Black communities, whether in Alabama, Mississippi, Barbados, Jamaica, and the Bahamas. Wherever Black people were chattelized, those societies and communities have remained impoverished, richly oppressed, dominated by white minorities and the economy and the society. The legacy of chattelization is palpable today all around us, and every person of African descent who has been a part of the rise of democracy, civil rights, and human rights has been fighting against the headwind of the legacy of slavery.

The reparations movement is going to be the greatest political movement of the twenty-first century. There is nothing that can stop it because it is embedded in the search for justice, equality, and democracy in the twenty-first century. It took our ancestors all of the nineteenth century to uproot chattel slavery, from the Haitians who first took that step all the way through to Brazil and Cuba. The Spanish and the Portuguese who started it were the last to end it. Between Haiti in 1804 and Brazil and Cuba in the 1880s, that was almost one hundred years of effort to uproot chattel slavery.

Then it took us all of the twentieth century to convert those legal freedoms into social and political freedoms, human rights, and civil rights. We lost all of our greatest advocates—Martin Luther King, Malcom X, Medgar Evers. We can go all the way through to Nelson Mandela. We lost our finest and brightest intellectual leaders of democracy. We lost them because of this twentieth century struggle for human rights and civil rights. Every Black community

in the world paid a very dear price for civil rights and human rights. But here we are now in the twenty-first century, and the next stage is a reparatory justice rights. Generation after generation are going to fight for reparatory justice rights in all of the twenty-first century if we have to, much the same way we fought all of the twentieth century for the right to vote, civil rights, and human rights. This is endemic to our journey to justice, and it is not going to end until that justice is attained.

I thank you.

JUDGE PATRICK ROBINSON

Ladies and Gentlemen, on your behalf, I want to thank Sir Hilary for that stirring address. Among the many things that impressed me in the address was his comment on the search for justice because, essentially, this is what reparations are about. It is a search for justice.

But, secondly, I wanted to raise with you, Sir Hilary, a few matters. The first has to do with chattelization. In law, a chattel is movable property, and we certainly saw elements of that movement in transatlantic slavery. The West Africans were moved from their homes to the Americas and the Caribbean, over 5,000 miles away, and it is because they were treated as chattels in law and in fact why they were subject to that kind of movement.

I see chattelization as the central element of transatlantic slavery. It had several phases. Chattelization started with capture and enslavement in West Africa, followed by the trek to the slave castles on the coasts, and the internment of the West Africans in those castles. Then there was the Middle Passage, notorious for its barbarities. The next phase was the sale of West Africans on the auction block once they arrived in the Americas and the Caribbean. The final stage, which is the sixth stage, is the forced unpaid labor on the plantations. Every phase, in my submission, constituted wrongful conduct. You do not have to confine yourself to the phases

that occurred in West Africa. It is perfectly legitimate to look at all the other phases and to see what they exhibited. In my view, West Africans were chattelized in West Africa. Enslavement did not begin on their sale on the auction block in the Americas and the Caribbean. They had already been enslaved, and all six phases constitute chattelization, the central element of transatlantic slavery.

I wanted your views on that approach.

SIR HILARY BECKLES

The evidence is quite clear that the military process of conquests leading to capture, ultimately to dehumanization and anti-humanization, were the underpinnings of the chattel outcome. The chattel outcome was a legal and judicial product, but before the legal and judicial came the military, political, and sociological—in other words, conquests, violent conquering, capturing, and in that process of capturing, kidnapping warfare, creating a pool of portable humans where the market economics had already said yes to this pool of conquered, captured, dehumanized labor, stripped of rights and identity in military conquests. In Western Europe the notion was quite established by then that you do not enslave your own kind. You might oppress them. You might extract labor from them. You might brutalize them in the labor process. But you do not enslave your own kind. That point was established in labor history and constitutional and political history in Western Europe well into the thirteenth and fourteenth centuries.

One of the great novels, you may recall, by Thomas Hardy, *The Mayor of Casterbridge*, considered the issue of what would happen to an English person if they were stripped of their political, social, and cultural rights and put into a slave-like environment. Western Europe had turned its back upon the notion of enslaving your own kind, and therefore, the paradigm was fully matured by the time the Western Europeans arrived in West Africa that Africans were the “other,” and that with military conquests, violent

control, and domination, they could be stripped of their human rights, chattelized, and dehumanized.

By the time those Africans were transported across the Atlantic, the politics and the constitutional aspects were already quite mature and the market economy was quite good. If you could ship them across the Atlantic, you could lose 20 to 30 percent of them in the shipment—that was considered collateral damage. You could lose a quarter of them in shipment, eight weeks of voyage in locks and chains, but if you could still get ten years of labor out of most of them, you could still make a large profit. That was what this was about—how to make a very handsome profit out of human beings who had been stripped of all human rights and identity, and that was enforced by the laws of the conqueror.

When we speak about what was legal and what was not legal, we are not talking about an international dialogue. We are talking about Western European nations going to their parliament and using their judicial systems to create the context of a series of laws that enabled the system to work even though the people who were subject to those laws were violently opposed to them. The massive set of rebellions and revolutions across the Caribbean and across the slave societies represented the African people saying that they rejected and did not accept these laws—that they were going to overthrow these systems of dehumanization.

The first description we have in the written records by an African describing enslavement was a description of Barbados in the seventeenth century “as a place worse than hell,” because the Africans could not imagine chattelization of that kind. They could not imagine it—for them, it was a hellish place beyond their comprehension. They had never seen or experienced anything like chattelization. Thus, the first record we have of a place worse than hell was their description of what a chattelized society actually looked like. That, I think, speaks for itself. The voice of the Africans, the actions of the Africans, they speak for themselves.

JUDGE PATRICK ROBINSON

Thank you very much, Sir Hilary. I am advised that we are out of time, and so once again, on behalf of the Symposium, I want to express my gratitude to you for the address. Very, very enlightening and very, very informative and uplifting. Thank you very much.

SIR HILARY BECKLES

Thank you. Thank you.

EXAMINING (IL)LEGALITY OF TRANSATLANTIC CHATTEL SLAVERY UNDER INTERNATIONAL LAW – PART I

REMARKS BY VERENE SHEPHERD*

Good afternoon, everyone. My name is Verene Shepherd, Director of the University of the West Indies' (UWI) Centre for Reparation Research and the moderator of this panel. Welcome to Panel I of this international Symposium on Reparations Under International Law for Enslavement of African Persons in the Americas and the Caribbean. We started the Symposium with stimulating addresses by the convenor, His Excellency Patrick Robinson, Honorary President of the American Society of International Law, the co-sponsor, along with The UWI; as well as by the Vice-Chancellor of the University of the West Indies, Professor Sir Hilary Beckles.

We will now hear from our two panelists, Dr. Nora Wittmann and Dr. Mamadou Hébié, who will explore the theme of “‘examining (il)legality’—legality and illegality—of transatlantic chattel enslavement under international law.” This is Part I.

Let me introduce Dr. Wittmann to you. She is an independent scholar holding a doctorate in international law and a master's in social and cultural anthropology from the University of Vienna. Her Ph.D. thesis was on international legal responsibility and reparations for transatlantic slavery. She served as a member of the Scientific Council of MIR (which in English is the International Movement for Reparations) that operates out of Martinique. MIR is part of the first court procedure for reparations against a European state that is currently being examined by the European Court of Human Rights. She is the author of two books. The first one that everybody will know is *Slavery Reparations Time is Now: Exposing Lies, Claiming Justice for Global Survival—An International Legal Assessment*.

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Our second panelist is Dr. Mamadou Hébié, who will present on transatlantic chattel slavery from 1450 to 1550. Dr. Hébié is Associate Professor of International Law at Leiden University, Grotius Centre for International Legal Studies. He holds a Ph.D. with high commendations and a diploma in advanced studies, with a specialization in international law from the Graduate Institute of International and Development Studies. He also graduated from Harvard Law School, LLM Class of 2012, and the Geneva Academy of International Humanitarian Law and Human Rights, LLM Class of 2005, and is a recipient of the diplomas of The Hague Academy of International Law and the International Institute of Human Rights. I give the floor now to Dr. Nora Wittmann for her fifteen-minute presentation on “Global Assessment of the Legality of Transatlantic Chattel Slavery.” Dr. Wittmann, you have the floor.

REMARKS BY NORA WITTMANN*

Greetings and good day to everyone. Thank you, Professor Shepherd. Thank you, Professor Beckles, Judge Robinson, and all of the organizers. Thank you for making this possible and for having me.

In my presentation, I will attempt a global assessment of the legal status of transatlantic chattel slavery. As we know, the dominant opinion that alleges that transatlantic slavery would have been legal informs the reparation debate fundamentally, and as we also know, this dominant denial of the right to reparations for slavery relies fundamentally on two premises. One, the important and ancient principle of non-retroactivity in international law holds that facts must be judged by the law in force at the time that a conduct happened. The second premise, and connected to the first, is that it is asserted that transatlantic slavery would have been legal. So, it is

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because of the principle of non-retroactivity that the clarification of the legal status is so important.

To begin with, I want to make it clear that we cannot rely on a perpetrator's assessment to define the legal status of a crime or a violation of law. We have to look further and seek to research pertinently and from a perspective in this case that is consciously non-Eurocentric but rather committed to science and the search for truth.

International law at that time, of course, was not European law—to recognize that and draw the consequences is in itself very small, but still a part of reparations. Although the European laws have to be taken into account, they cannot be the main determinative factor of the international regulation on this question.

Africans participated in the formation and development of international law up to the disruption of transatlantic slavery, at least as much as the global minority of Europeans. This is something that goes far back; the treaty concluded between Ramses II of Egypt and King Hattusili III, which was legally binding and accepted that any breach of that treaty involved a duty to make reparations. Thus, in African legal traditions, generally speaking, reparations had an important place, and the focus of that was on restoring harmony.

I want to briefly look into the state of African laws at the time concerned and before regarding the issue of slavery and servile labor. Fundamentally, at no time did so-called "African slaves" have their ears cut off. The name of their master was not iron-branded on them. They were not cruelly tortured for minor so-called "infractions" or roasted alive, facial/body-spiked gibbet cages were not used. All of that was totally unknown in Africa, as were all of the other barbarities that were really constitutive of the system of terror that was transatlantic slavery.

African masters did not have the right over life and death. The so-called "African slaves" were recognized to have certain human rights, such as the right to life and the right to fair treatment. In fact, multiple scholars, such as Professor Joseph Inikori, have retraced that servile institutions approximating chattel slavery in

tropical Africa, and found that their development was linked to the growth of transatlantic enslavement and the associated chaos and violence brought upon the continent.

As in China and India, the legally permissible means of enslavement were restricted to captivity, self-bondage, punishment for certain crimes, and, in some societies, inheritance of servile status. The people who are sometimes legally qualified by some as so-called “African slaves” were not submitted to the dehumanization that was intrinsic to the transatlantic slavery system.

What was common and legal in Africa was the exchange between sovereigns of small quantities of criminals or captives from so-called “just wars.” This was common in both Africa and Europe. That is also what African rulers were consenting to when the first Europeans came to Africa to acquire slaves. However, the Europeans did not honor these agreements with Congolese authorities. Thus, King Afonso I of Congo sent a letter of protest to his Portuguese homologue John III in 1526 and complained that “thieves and men of evil conscience” were taking his people away to the point where the “country [was] utterly depopulated.” And even prior to this, King Afonso had established courts of inquiry designated to investigate the illegal enslavement that was happening. But still through all of this, the Portuguese did not desist from the illicit conduct. After King Afonso died, they even enslaved his family, and then instigated succession wars by arming insurgents.

All of the available evidence suggests that, especially in the first decades and centuries, African rulers actively resisted slavery, whereas with the advancement of time it was the collaborators who gained an upper hand with the use of European firearms. As Professor Sylviane Diouf demonstrated in her book, *Fighting the Slave Trade: West African Strategies*, and as Professor Shepherd and Professor Beckles showed in their book, *Saving Souls*, chattel enslavement was an unfamiliar system of social oppression to African people, as testified by the many documented instances of resistance against it, which also, for example, were documented in

the records of the English Royal African Company. As one example, it is documented that ships belonging to an African fraternity patrolled in the Gulf of Guinea and that they attacked European slave vessels to free the people that were to be taken away. As another example, Queen Nzinga of Angola maintained resistance against enslavers for thirty; but sadly, this too was defeated through the European strategy of identifying and arming collaborators.

It is because of this well-documented resistance that the contributors to the UNESCO's General History of Africa agreed that transatlantic slavery, that the deprivation of sovereignty through transatlantic enslavement was a crime that was perpetrated against the expressed will of the masses of African people and their rulers throughout the continent and the diaspora.

All of this needs to be viewed in the context that in the eighteenth century alone, between 283,000 and 394,000 guns were imported into Africa each year by European enslavers and traders. In the whole period of transatlantic enslavement, it is estimated that twenty million guns were brought into Africa for the purpose of enslavement.

In summary, historical evidence clearly shows that both the modes of transatlantic enslavement—kidnapping, instigation of wars with the aim to produce slaves—constituted a recurring or continued violation of African sovereignty; and also the treatment of the thereby illegally enslaved people that was constitutive to the running of the terror system of transatlantic slavery were clearly illegal by the laws of African people.

In Europe, chattel slavery was also not legal. Either slavery had come under restrictions to where the practices that were constitutive of transatlantic slavery were clearly illegal, or slavery as such had been outlawed.

In Spain and Portugal, the *Siete Partidas* regulated slavery, and they included measures that protected slaves from abuse by their masters, permitted marriages, allowed the slaves ownership of property within certain limits, and provided for manumission. Also,

the Spanish and Portuguese laws limited the permissible grounds for enslavement to what we have already heard—capture in “just wars,” inheritance or self-bondage. The fact that the provisions of the *Siete Partidas* were not enforced in the Spanish and Portuguese colonies does not change the fact that they were still the applicable legal basis in force at that time.

In England, slavery had become illegal by the fifteenth century. That is why Queen Elizabeth I summoned Captain John Hawkins in 1562 concerning his voyage to Africa and expressed her concern “lest any of the Africans should be carried off without their free consent.” The British Queen’s concern reflected not only that she recognized the essential dignity of Africans as human beings, which is really irrelevant, it is legally irrelevant whether perpetrators accept reality or not, since it is a general precept of law that legislative acts that are factually absurd are null and void. Thus, even when European rulers tried to pass laws declaring Africans as not fully human, these laws were factually absurd and, thus, null and void. But beyond that, Queen Elizabeth I, with this utterance to Hawkins, expressed a principle by which capture of people for enslavement was considered illicit. For these reasons, it was also ruled in 1596 that chattel slavery was incompatible with English law.

Later, in 1667, however, motivated by the great economic gains expected from transatlantic slavery, a Crown legal position was issued that declared Africans as goods. But for the reasons just given, that such laws were factually absurd and in contradiction to the legal and constitutional principles, most English courts still ruled in favor of freedom for those Africans who were able to seize the courts when they were brought to England with the enslavers, such as in the famous *Somerset* case, where it was assessed that English law only recognized slavish servitude, a status that was deemed different from chattel slavery.

In France, a royal proclamation of 1517 declared that France, the “mother of liberty,” permitted no slaves, and another legal dictum of 1607 confirmed this. It is because of this that most of the

parliaments in France refused to register their royal slavery edicts, the *Code Noirs*. These *Code Noirs* therefore never entered into legal force, but they were illegally carried out throughout the centuries of transatlantic slavery. It is for that reason that the French courts in those few cases when enslaved Africans were able to reach them, set them free and in some cases even awarded them reparations.

As Professor Shepherd mentioned in my introduction, it is on these grounds that MIR, the International Movement for Reparations put in the claim against France that has now been judged as admissible by the European Court of Human Rights—that what was done was without legal basis, and even then, the courts had recognized that enslavement was illegal.

To summarize, we need to see that general principles of law recognized by civilized nations are one of the primary sources of international law and are derived from the vast majority of national legal systems. If a type of conduct is permissible in the vast majority of national legal systems, it is also permissible by international law. If a conduct is illegal in the vast majority of legal systems, it is violating a general principle of international law and is, thus, illegal.

I hope that from this short presentation it is clear that the conducts that were constitutive of transatlantic enslavement and slavery were illegal in the vast majority of legal systems of that time, whether European or African. In India and China, the legal regulations followed the same lines. The reasons for enslavement were limited to self-bondage, “just war” captivity, or punishment for crimes, and there were also legal safeguards to protect the servant people or slaves against torture and mistreatment. Historically, in European law doctrine and practice, the recognition of general principles of law went hand-in-hand with that of *jus cogens*, which is traced to the period when the natural law doctrine was developed. *Jus cogens* is law that cannot be changed.

The natural law doctrine was developed well before the fifteenth century and was recognized as applicable law well into the nineteenth century. Hugo Grotius, one of the founding fathers of

European international law doctrine, maintained that there existed certain principles which amounted to a *jus naturale necessarium*, necessary natural law, which is natural to all states and that all treaties and customs that contravened this necessary law were illegal; that was at a time when transatlantic slavery had started already. In European law doctrine of that time, by the sixteenth century, slavery was in fact a much discussed subject, and none of the renowned scholars deemed it legal without any restrictions. The majority rejected it or recognized serious boundaries imposed by natural law. That is why, according to Francisco Suarez, also one of the founding fathers of international law doctrine in Europe, slavery was only admissible as part of positive penal law, whereas liberty was part of natural law. Francisco de Vitoria, another founding father, stated that according to divine and natural law, all men and people were equal partners and he was also specific in stating that the sovereignty of indigenous rulers had to be respected in the same manner as that of Europeans.

The evidence is unambiguous that the conducts that were constituted of transatlantic enslavement and slavery were illegal by general principles of law recognized by civilized nations.

VERENE SHEPHERD

Thank you so much, Nora. I give the floor now to Dr. Mamadou Hébié for his presentation on Transatlantic Chattel Slavery from 1450 to 1550. You heard Judge Robinson say that there is periodization and a rationale to the dates in people's presentation. Dr. Hébié, you have the floor.

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

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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.

EXAMINING (IL)LEGALITY OF TRANSATLANTIC CHATTEL SLAVERY UNDER INTERNATIONAL LAW – PART II

REMARKS BY GAY McDOUGALL*

Welcome to this Part II of these extraordinary discussions that we are having on reparations. Over these two days, we are engaged in perhaps the broadest and deepest ever examination of the legitimacy of demands for reparations for the crimes of colonialism, transatlantic slave trade, and chattel slavery. These calls have intensified in recent years and moved from the margins to the mainstream of discourse.

Let's speak plainly, though. These demands for reparations are for the long history of colonialism, genocide, land theft, enslavement, anti-Black racial terror, racial capitalism, structural discrimination, and exclusion. All these crimes and practices have been foundational to the establishment of the economic power of countries like the United States, the United Kingdom (England), Germany, France, Spain, and others. And the harms committed are not just historical injustices. Their impacts are ongoing. They have been passed along from generation to generation, from decade to decade, and they are quite alive in ways that I think we will talk about later in the current life of all of our communities.

Now, when we start talking reparations, there are a number of arguments used to counter the cause for reparations: The actions were not illegal at the time. Africans did it (enslaved people), too. The victims, those who suffered the harms, are all dead now. Those who committed the deeds and benefitted from them (in the first instance) are also dead now. So, there is no way to determine who should rightly be the recipients and who or what entities should pay what is owed. In any event, it is impossible to calculate or monetize the harms. How can the economic basis be assessed?

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Further: Since migration patterns have been significant, isn't it impossible to identify precisely who should receive the reparations? Who are, after all, the descendants of those enslaved or colonized?

These and many other questions and arguments are thrown out as an obstacle course meant to deter those seeking the payment of reparations that are due based on these gross crimes against humanity. And so, one is led to ask, well, what colossal societal rupture would be potent enough to birth the transformation, to create the change necessary, to alter this discourse?

I think that what we have all gone through in the last thirteen to fourteen months; the pandemic and the gross inequalities that have been uncovered by it, and the sense that has been highlighted by the Black Lives Matter movement that this time we have to move this forward, its now or never; these among many other reasons, make this the moment at which we must talk about reparations. I think that Sir Hilary Beckles gave us all a charge that this should be the point at which we begin to really have discussions about what it takes to make reparations a reality. No more generations should have to deal with the legacies of these crimes without justice being found.

We have three very interesting speakers who have the highest accolades in the study of international law. I will introduce them to you as they speak, and then we will have question-and-answer opportunities at the end, after all have spoken.

The first speaker is Parvathi Menon, who teaches international criminal law at the University of Helsinki and has previously taught at the University of Gambia and the National Law School of India in Bangalore. She is an alumna of Harvard Law School and the London School of Economics. She is going to finish the conversation, if you will, about the transatlantic slave trade and questions of legality around the chattel slavery, and the time period that she is going to discuss is 1500 to 1815. I turn it over to you.

REMARKS BY PARVATHI MENON*

Thank you so much, Professor McDougall, and a big thank you to all the organizers for putting together such an important event that I am truly honored to be a part of, so thank you very much.

In my presentation, I will focus, as Professor McDougall pointed out, on the period between the early 1500s and 1815, which is marked by the Congress of Vienna, which is where Michel will pick up from.

Now, carrying on such a large historical study becomes quite imperative in this case. For one, my purpose is to expose the limits of universality of the laws under which slave trade and chattel slavery gained legitimacy, the details of which I will return to in a moment, but it is also important to engage in historical study to expose the paradoxical practices among and within European imperial nations.

Many past practices that were developed by these European nations gave credibility to the legal ingenuities while disregarding non-Western customs and laws. In carrying out this historical research, my purpose was to destabilize European interpretations of evidence of non-Western resistances and confrontations, to steer the argument towards examining the conflicting legal basis for slave trade and chattel slavery as already existing in the past. The point that I make is that contrary to European claims of past legality of slavery, there were contradictions in these interpretations.

Now, much of this stems from Tendayi Achiume's point in her report as the Special Rapporteur, where she contests the doctrine of intertemporality to wrongfulness in the present. However, as Achiume herself notes, contesting it through wrongfulness in the present alone fails to suffice. So, what I put before you are a few moments of breakdown in the past that challenge the legitimacy of the European imperial state and the universality of its legal order. What I am really taking aim at is the foundation of the economic and

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political systems that have long since been fortified through sustained measures of injustice and the dispossession of African people.

The first point that I raise is that the foundation upon which the chattelization of men, women, and children acquired a legality was not universally recognized, as is often the claim. It was not recognized in the territory from where Africans were captured and sold into slavery, but it was also not recognized among the so-called civilized nations either.

Now, here, I give you the example of the Portuguese slave trade, which Nora Wittmann has discussed in her presentation. The Portuguese kings entered into negotiations with African kings based on their rights to trade under what is called “*ius gentium*,” or “law of nations.” As Anne-Charlotte Martineau’s work on this topic has demonstrated, the attempt to ban the slave trade by the Congolese King Afonso was rejected by a Portuguese court, which argued that the trade was enshrined in the *ius gentium*. But *ius gentium* was not a code. It was a set of customary practices that supposedly was recognized by all nations. However, what is unique and quite important to remember is that it was only Portugal that was directly trading in slaves with West Africa and selling them to São Tomé and Cape Verde at the time.

Francisco Cuenca Boy argues in his work on the School of Salamanca in the sixteenth and seventeenth centuries that slavery was an institution tied to the *ius civile* and not the *ius gentium* of Portugal. Portuguese laws, he claims, permitted slavery and regulated its practice according to different laws and norms. The Portuguese spread a legal model of slavery supposedly based on *ius gentium* and gave the law of nations and Europe in slavery a universal validity and a normative character that it did not possess.

Equally, people like Ian Hunter also make the point that early model users of *ius gentium* were actually particularistic and Eurocentric in the dual sense that it was regional to and within Europe. Any suggestions of the permissibility of the slave trade

must confront the limits of the universal—the so-called universal—legal language of *ius gentium*.

The second point that I make deals with the paradox of European practices—expressing moral superiority from standing against slavery while at the same time reaping the monetary advantages of slave trade—and here, I focus on the English slave trade and their laws and practices.

Colonialism was not just about acquiring things as property; it was also about turning things into property. Trading those who were captured from West Africa as property was an inherent part of the colonial strategy of tying people to land and tying the labor to the land. What it did introduce was the meaning of chattelization as a process rather than focusing on chattel as a legal category. Chattelization was, as we all know, a process of dehumanization, but it was also a process to maximize the value of slaves to their owners.

Many scholars claim that chattelization was contrary to English common laws. They state that it was impossible for English law to be the source of such an abomination. But none of the same scholars account for the Slave Compensation Commission, which was set up in 1834 to compensate British slave proprietors, and not just in the colony but also in the metropole for lost property in slaves, according to English common laws.

In the case of *Chamberlain v. Harvey*, which was a 1696 case, Chief Justice Holt of England found that there could not be an action for trover. A trover was an action at law to recover the value of property taken from its owner. Holt said that there could be no action for trover in relation to Black slaves because common law did not recognize Black people as having a different status to others. However, the plurality of English laws was separated between the prerogative laws and common law. This allowed England to balance the right to property in slaves with the rights of the enslaved when they reach England. While England's air may have been too pure for enslavement, it was never clarified how that same air allowed the beneficiaries of slavery to thrive.

The point that I am making toward concluding this presentation is to say that while we portray the wrongfulness of chattel slavery as already evident in the past, even if imperial laws asserted otherwise, I urge international lawyers to find a common temporal disposition that can link the past to the present, and here, what we must remember to do is to explicate the ambiguities of what lawfulness itself means alongside explicating the certainties of what we know injustice means.

Now, whether such an inherently unjust and exploitative practice can satisfy international law's requirements of lawfulness must be discerned on its own merits, as Dr. Hébié mentioned, without a formalistic assertion of the legality of the trade, because any assertion of the legality of the trade can only give credence to European imperialistic practices that European customary law allowed.

I want to end with some strong words from Frantz Fanon who said that reparations must be considered the final stage of a dual consciousness—the consciousness of the colonized that it is their due and the consciousness of the capitalist powers, that effectively, they must pay up. Thank you.

GAY McDOUGALL

Thank you very much. I like that quote from Fanon. I think we have to spend a lot of time putting our heads around that at this conference and what kind of duty that puts on us as current-day international lawyers and how we must use our talents and our education to help create the circumstances under which reparations and the demand for reparations become real and realized. Thank you. We will come back to you with some questions later, but I want to go to Michel Erpelding. He holds a doctorate in international law from Sorbonne School of Law and is currently at the Max Planck Institute in Luxembourg for International, European, and Regulatory Procedural Law, and he is going to pick it up in terms of historical review here at 1815 and look at the period going through 1888.

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 abolition 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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these are the steps that are taken for international human rights law and international criminal law.

Now, the very erudite and highly competent intervenors who preceded me—and I congratulate you in your presentations—have readily and critically reasoned and have presented compelling legal analyses about the breach and actually about the illegality of the practice of slavery. If the legality of slavery was circumscribed or seemed to be provincial in its legality, that very European perspective is the opposite of any form of legal universality. Their presentations underscored that even with the flourishing of bilateral accords to halt the transatlantic slave trade, there was very little legal responsibility that flowed to the abolition of slavery itself. With the notable heroic exception of Haiti, early decolonization in the Americas officially subsumed enslavement into their new political structures, into their new constitutional governments. “Slavocracy” is the appropriation appellation for those nations, such as the United States, Brazil, or the governing apparatuses of colonies like Cuba or Guadalupe who were still tethered to the European metropolis. They were slavocracies. Their reliance on the slave economy and domination of the enslaved was buttressed by a Westphalian notion of state sovereignty that Michel has referred to and a Westphalian notion of the sovereignty of states that still maintained colonies.

The breaches of the transatlantic slave trade and the ensuing slavery should be further nuanced. Paradoxically, with legal hindsight provided by the 1926 Slavery Convention and the 1956 Supplemental Convention to Slavery—yes, I will now use the perpetrator’s definition of slavery, their own criminal conduct, but please note in the positivist view—it is the criminal conduct that they decided to stop when they were no longer interested in enslaving Africans, but rather, in colonizing Africans. They set forth beautiful conventions that outlawed slavery and the slave trade.

Chattel slavery is rooted in the *de jure* exercise of ownership that was sanctioned under municipal law of the emerging nations in the Americas. As verified by the 1926 Slavery Convention, the

ownership of chattel slavery was comprehensive. It extended over each miniscule aspect of the enslaved lives, including their physical sexual integrity and their psychological sexual autonomy. I will return to this insight momentarily. It is this legal hindsight of the 1926 Slavery Convention and the 1956 Supplemental Slavery Convention, moreover, that defined and outlawed the other breach, the slave trade. Today the somewhat elusive crime bears closer examination. Have you noticed that there is not a provision for the slave trade in any of the statutes of the current international courts or tribunals? It is as if the slave trade has disappeared. Poof! We no longer need it. We are now—and I say these words not lightly—reduced to thinking of the slave trade in its modern form of trafficking. We are whitewashing the Black slave trading with treaties that really derive from the White Slave Trade instruments that dealt with commercial prostitution of children and women.

What is slave trading and when it did apply to the Africans? Slave trading prohibited the reduction of the un-enslaved into the status of being enslaved. It also prohibited the transfer or transport of, or transmission or conveyance of, enslaved people to other situations of slavery. Accordingly, the breach of the slave trade was encompassed by the transatlantic Middle Passage as well as—and here I underscore—the internal sale or transfer of enslaved persons further into slavery in the Americas or the Caribbean. Internal slave trading occurred in nations such as the United States and Brazil and other slavocracies. It merits our scrutiny. It must be foregrounded because, in terms of reparations, it is not just the Transatlantic Slave Trade that we should turn our gaze upon. We should condemn domestic slavery, as it was euphemistically called, as well as the domestic slave trade.

The moral objection to slave trading only applied to the international commercial pathways of the high seas. Even today, when we examine the succession of transatlantic slave trade, we fail to grasp that you cannot speak about slavery without talking about slave trading. You cannot speak about slave trading

without talking about the continued domestic slave trading in the Americas and in the Caribbean.

Ironically, it is the halting of the transatlantic slave trade—the 1815 declaration that Michel just referred to—that actually entrenched the lucrative internal domestic slave trading. We have imageries of the transatlantic trade with scenarios of abductions, of capture, of kidnap, and then transport on ships and the sale of persons once they arrive in the Americas. Yes, this has resonance. However, there remains a less complete imagined scenario of the fervency of the internal slave trade which continued and dealt generational hardship to the now New World born or “homegrown” African descendant slaves. They were not captured from Africa, now, having been born of three, four, or five generations of the enslaved.

In the United States, the domestic slave trade was anchored in notorious slave markets located in places like New York City; Montgomery, Alabama; Charleston, South Carolina; and New Orleans. However, the transfer of this human property or chattel could also be seen as a very banal transaction in other places. Educational, scientific, and religious institutions engaged in the domestic slave trade. Slave trading was concluded by commercial contracts, redemption for debts, by barter, by exchange, or as collateral for defaulted loans. Less recognized was the very common practice of the trade in slaves among family members—by inheritance. The internal slave trade also occurred in the form of wedding presents or birthday presents, graduation gifts, or by conveyance to individuals or organizations by way of donations—“We will donate you some Blacks”—or bequests upon deaths. The internal slave trade was so ubiquitous. We cannot forget it now.

Reparation discussions must grapple with the breadth of the external or international and the internal slave trade. The slave trade is not a secondary, lesser included offense to slavery. As evidenced in twentieth century international criminal law and human rights law, slavery and slave trading embody separate and distinct criminal conduct. Even though the slave trade and slavery occur sequentially

and in tandem with each other, they are distinct. Over the life of an enslaved person, there might have been the initial reduction from being free, to, now, being enslaved, therefore, traded into slavery, then maintained in slavery, only to be conveyed or traded into another situation of slavery. Possibly, it is only the child who is born into slavery who avoids the first instance of having been free and then reduced to slavery. Children, on the other hand, were doomed and enslaved from the womb. Hence, identification of and a studious characterization of the breach of the transatlantic slave trade, the internal slave trade, and slavery are prerequisite steps when configuring “what” is the bases of reparations.

Next, I will turn to the harms brought by the breaches of slavery and the slave trade that must figure into the calculation of a just basis for reparations. As Professor Ruth Rubio-Marín cautions, reparations require that we identify the harm and those harmed. Here, my gaze is directed to a germane facet of harms. I reiterate that the terminology I am using is “harms,” and that does not mean that we cannot set aside that word and possibly hold a later discussion and seek better terminology. What word would better encompass a broad span of the damages that were inured—social, political, cultural, as well as economic?

Inflicted over centuries, throughout the lives of the enslaved, was the harm to the intrinsic sexual being of enslaved human beings. It was intentional. It was utterly abjured—horrendous acts that were committed, not only during slavery, but as acts of the slave trade. Each crime was gendered and sexualized. Slaves drowned in an omnipresence of sexual abuses.

During the transatlantic trade, European sailors regularly raped African female captives. Once enslaved in the New World, in the Americas, in the Caribbean or Brazil, the rapes continued and served many purposes. Male slave owners raped to terrorize, to punish, to just exercise their power of ownership. As historian Peter Kolchin recounted, sex between white men and Black women was a routine feature of life on many, perhaps on most, slave holdings. As

masters, their teenage sons, and on larger holdings, their overseers took advantage of the enslaved to engage in the kind of casual emotionless sex on demand that was unavailable from white women.

In the United States, the sexual practice of so-called “fancy girls” existed. These were female slaves of mixed race with European facial features. They were kept in brothels or in individual homes. Certain enslaved girls were specifically raised or groomed to become fancy girls. Fancy girls as slaves were traded internally, often bought for high prices at the slave markets that catered to wealthy gentlemen. In a closely related slave practice called “plaçage,” which is concubinage, masters kept slave women in sexual relationships, raping them over periods of years. Sally Hemings, the concubine of the former U.S. president, Thomas Jefferson, is perhaps the most renowned concubine in American slavery history. Fancy girls, plaçage, and concubinage, signified that who was sexually harmed and how they were sexually harmed was integral to their enslavement.

Lesser acknowledged but common sexual slavery practices were committed by upper-class, white, female U.S. slave holders who bought, loaned, and exchanged female slaves as wet nurses to breastfeed white infants. Wet nurses created another sector of the internal slave trade that profited from the enslaved woman’s commodified breast milk. In Brazil, the practice of wet nursing was called “mercenary nursing.” It was commonplace.

Sexualized and reproductive violence against male slaves was also an essential aspect of slavery and the slave trade. Enslaved males were traded as “bucks,” while females were specifically traded as “breeding wenches.” The institution of breeding slaves was persistent—the enslaved had to procreate slaves for their masters. This increased the slave owner’s wealth, goods, and equity, and it increased the anguish of the enslaved. As Professor Berry assessed, forced procreation of slaves became associated with animal husbandry.

Thomas Foster documents that for both males and female slaves, their owners exacted sexual abuse such as rape, forced rape of other slaves, castration, genital mutilations, forced separations, and again, the constant, insistent breeding.

Enslaved men and boys, enslaved girls and women experienced these harms. Therefore, undoubtedly, sexual violence is germane as a component to the reparations that must be addressed. How do we calculate reparations for four hundred years of sexual terror, for a lifetime of sexual abuse, per slave? What is the cost for the embodied memory of a sexualized trade and sexualized enslavement of ancestors? The title of my presentation might have led you to assume that I possessed a formula, an algorithm, a suggested tidy sum to redress the sexualized enslavement. I do not. My intent was to ensure that we undertake this difficult, grueling, painful task of understanding the depth of our soul wound.

As Gil Scott-Heron pleaded in his blues song, “Who will pay reparations on my soul?” Thank you.

GAY MCDUGALL

Wow! Thank you. Thank you very much. Just to ask you, why do you think that there has not been very much discussion of the gender, the sexual dimensions of slavery and slave trade as part of the reparations discussion?

PATRICIA VISEUR SELLERS

I personally think that sexualized enslavement is a very difficult issue to thoroughly grasp. Yet, I believe that we are at the place where we can begin to understand. Female slaves being raped is often more readily discussed. It is true, partly, however, to fathom how much sexual terrorization and physical and psychological abuse occurred throughout that period, to say in a very trite manner, it is more than mind blowing. Your mind would want to reject the realization

because it is too difficult to actually sit with, to stay with and then to calculate the harm. It will be similar for those who will have to pay reparations. They would not want to see themselves in the depths of that narrative and contemplate their centuries of participation.

GAY MCDUGALL

Thank you. I want to turn now to the other panelists just to start off the discussion and then open the Q&A for the audience to participate. Parvathi, let me ask you. You were discussing reparations, the historical case, and I want to ask you, do you think it is important or relevant to contest the claims that West African kingdoms recognized slavery for many years centuries ago? Do you think that this is an issue that we should actually grapple with in arguing for reparations, and if so, how would you contest it?

PARVATHI MENON

Yes. I think that it is perhaps one of the most oft-repeated points by European nations—that Africans and Arabs had long since practiced slavery. I do not disagree that enslavement did happen, especially in the case of just war prisoners of war. Enslaving prisoners of war was a common practice. However, this whole process of, “congealing money in their bodies” of the enslaved, that is what chattelization stood for, and that was an entirely different practice, which granted owners absolute dominion over the bodies of the enslaved and whom they were compensated against after slavery was prohibited.

There are no real examples of similar kinds of absolute ownership of people in West African practices. I suppose there are different types of slavery that were involved, and that is what makes chattelization perhaps much more brutal because the legal implication of chattelization was not restricted to the meaning of dehumanization, because later on, in fact, after 1807 when slave

trade was abolished, there were a lot of measures that were in place to humanize slavery, but the slavery was still very much in practice. And slave trade was abolished in the British Empire.

But these accounts of humanization did not absolve the profitability that chattelization continued to provide. When we think of chattelization, it has an important dimension, legally speaking, which was largely constructed by Europeans and especially people like John Locke who was very much involved in his own colonial enterprises and had a big role in creating these legal normative categories to understand how slavery is pursued.

I think a lot of the defenses that are used by European, former imperial nations, is largely problematic and perhaps more to deflect the blame than anything else.

GAY MCDUGALL

Right. Michel, let me follow up with this question for you. You said that nineteenth century anti-slave trade treaties as well as the courts often relied on arguments about the treatment of the slaves, as opposed to the legal status per se, to identify internationally wrongful acts of slave trading. Can you talk a little bit more about that and maybe provide some examples?

MICHEL ERPELDING

Yes, of course. Usually, slave traders knew very well that the slave trade had become illegal, and they tried to shirk these obligations and to make their slave trade legal. For instance, what some slave traders did was to issue certificates of manumission to Africans, having them sign fake contracts, and embarking them on ships bound for the West Indies, for instance. In that case, it would have been too easy to get away with that. In the treaties already, for instance, if a ship had certain equipment, you could convict it as a slave ship, even if there were no slaves on board, because before that,

what some slave traders also did was when they saw a British patrol boat or French patrol boat, they would throw their human cargo overboard because that was easier for them. It also shows the total dehumanization of the victims of the slave trade.

If shackles were found on board, et cetera, then the ships could be condemned as a slave trader, and also, if Africans who were found on board were clad like slaves—with very little clothes—or got very bad food or were shackled or were ill-treated, they could not, for instance, pass as sailors or as servants or free laborers. This was even used afterward. For instance, France, even in the 1850s, when it had abolished slavery, it was still continuing and East Africans were still shipped off, mostly to La Réunion and to the Indian Ocean, and they were also doing this in the West but mostly with Indian workers to Martinique and other places.

Often these Africans would have been put on board these ships without their consent. They did not know where they were going or what they were going to do and for how long it was going to be. An incident in Mozambique actually almost started a war between Portugal and France because Portugal actually interned the ship and condemned it as a slave trader, and then the ship was towed to Lisbon. The French threatened the bombardment of Lisbon. Then the Portuguese released the ship. But then, afterward, the French abolished this practice because they realized that it was not in line with the anti-slave trade obligations, even though they were an abolitionist country. It shows you that these practices actually went further than just addressing the “legal” slaved trade.

GAY MCDUGALL

I have another question for Dr. Sellers. Within the community of international lawyers, there is a discussion or discourse about slavery, sexual slavery during wartime, modern slavery, contemporary forms of slavery, et cetera. How do you see the similarities or contrast between what you are talking about, both the treatment and the legal

framework, in terms of the transatlantic slave trade, chattel slavery, et cetera, and this modern discourse on slavery?

PATRICIA VISEUR SELLERS

Right. This modern discourse on slavery, in some ways, is looking at issues of slavery for instance that occurred in wars in Sierra Leone. However, many international lawyers and international feminist lawyers have a very ahistorical point of view on slavery. In particular, the sexualized nature of most enslaved populations, lacks a historical point of view in the contemporary conversation. As a matter of fact, the weaving in of sexual slavery, as a separate provision, as opposed to reinserting the fuller sexual abuse under the provision of enslavement or slavery, has really not been as thoroughly discussed as it should. Many feminist lawyers consider that separating out sexual slavery is a great victory, assuming that now the conduct will be able to be confronted. However, when you recognize how many forms of sexualized harm occurred during slavery, it is not—this sounds ridiculous to say—just about rapes as many imagine that the sexual slavery provisions govern. How drafters constructed sexual slavery under most of our international statutes consist of being held out for a sexual act.

When understanding the sexualized nature of enslavement, it is obvious that the enslaved did not have to be held out for act. Young girls who had their menstruation cycles checked by their enslavers were not held out for an act. Notwithstanding, their enslavement, was sexualized.

The possibility offered by the reparations discussion, is to better understand the historical forms of sexual abuse under enslavement to enrich the discourse.

In addition, as I stated before, the current discussion, in particular, ignores the slave trade. International lawyers readily will substitute or confound the transnational crime of trafficking for the slave trade. However, trafficking is not an international crime. It is

not a *jus cogens* crime. There is a fair amount of, I would intone, ignorance in the legal conflation. Hopefully, it is not willful. Now, opportunities to really address the omission of the slave trade as an international crime exist.

GAY MCDUGALL

Okay. Here is a follow-up question. How should the historical reality of sexual violence against enslaved persons change the discussion around reparations? Does it lend to greater compensation, non-monetary compensation, or some other response, maybe focused on improving current conditions?

PATRICIA VISEUR SELLERS

One of the ways to change our reparations discussion is by not always talking about physical labor on plantations. We should know that what was reaped out of enslavement was broader. Maybe as I hinted, we do not have adequate terminology to discuss what I do not want to call the “sexual work of enslavement,” but rather the “sexual harms and damages of enslavement.”

Pecuniary damages, moral damages, the ability to set up memorials, to learn in history books, is how we can understand that human being possess their sexuality integrity. Aspects of sexual integrity can be destroyed when someone is exercising powers of ownership over a human being. That observation should inform our reparations discussion.

GAY MCDUGALL

Okay. Here is another question from the audience. Britain, during the nineteenth and twentieth centuries, characterized itself as antislavery at the same time that it expanded its colonial holdings.

How did prevailing views of the time reconcile the relationship between colonialism and slavery? Anybody?

MICHEL ERPELDING

I could answer this question. In my view, the key concept in this regard is civilization, the idea of the notion of civilization, which can be first found in international law, in the Vienna Declaration of 1815.

Now, what did this idea of civilization entail? First, it was an idea that the human societies were generally going through several stages of progress, and second, that some societies were further advanced in their progress than others. The West was further advanced, and the others were lagging behind. And, thirdly, that the civilized societies have the obligation, the moral duty to civilize the others and could use force to do so. This meant that the British and the other Westerners fixed the conditions for dividing up Africa in the 1885 Berlin Conference. They would say that slavery is actually against civilization because it prevents us from developing capitalism, to make it simple, in Africa.

However, forced labor is necessary because it means you educate the Africans to labor. Otherwise, they will not understand capitalism because when we want to hire them to work in our mines and to die by the hundreds, they do not want to, so we have to force them to come and work for us and die by the hundreds and thousands and millions.

The key was civilization. In my view, this is very interesting because the colonization of Africa took place under the guise of antislavery, and it resulted in forced labor, which resulted in the deaths of millions of Africans, another reparations issue.

GAY McDOUGALL

Yes. Parvathi, do you want to jump in here?

PARVATHI MENON

Yes. Thanks. I wanted to quickly just add to what Michel just said. In fact, the 1926 convention which was largely lobbied by the antislavery society was also lobbied against by people like Frederick Lugard who, in fact, managed to ensure that the slavery convention allowed, as Michel said, forced labor in the case of public work. There was a need exception that was added into even how forced labor could be used, and it was only in territories that were controlled by the British where there was some assemblance of slavery still continuing. So, there was a way in which they absolutely balance their antislavery attitudes.

GAY McDOUGALL

Thank you. Here is a question directed to Dr. Sellers. On this very sad and long list, would you also add forced pregnancy and forcible pregnancy? How, if possible, would we be able to connect sexual crimes during enslavement to modern-day harms still experienced by former colleagues?

PATRICIA VISEUR SELLERS

I certainly would add forced pregnancy. As a matter of fact, the terminology that I was using, "breeding," means not only, in essence, pregnancies but to emphasize that males did not own their own semen when made to breed. Women did not own their own ovaries. The child that came out of the womb immediately was property. So yes, that is forced pregnancy. It is forced procreation. However, it is something much more soul-damaging than just those biological acts. Understanding this historical bases allows us to better contemplate instances of girls who are impregnated by militias and give birth. We have not even talked about whether it is forced birth control or sometimes the forced abortions. To place these acts

under forced marriages, from my point of view is a *de minimis* nomenclature. I return to the harms and to the soul that these sexual disintegrations of our integrity wreck.

GAY McDOUGALL

Yes. Pain and suffering.

PATRICIA VISEUR SELLERS

Yes.

GAY McDOUGALL

A concept that is quite known in many legal communities is evaluating the magnitude, if you will, of the other reparations.

I am wondering whether the panelists have questions for each other or comments that they would like to share with each other.

PATRICIA VISEUR SELLERS

I want to know when will my co-panelists publish their papers. I would like to start citing to them.

GAY McDOUGALL

All right. You get to make a plug for your publications here. Go ahead.

PARVATHI MENON

Thank you so much, Professor Sellers. That means a lot coming from you.

GAY McDUGALL

Yes. I think that, certainly, this is the time for your works to be published to enter this really critical discourse that we are having that is crossing national borders and regions of the globe and trying to find a way to pull this together in a discourse that can talk about, develop terminology for discussing the harms done by these crimes of colonialism and slavery and the slave trade. And also to find a way to, if you will, make an assessment that would be not just a monetization of these harms but really an assessment of a broad scope of the harms that have been done and begin to find a way to have a discussion that is positive with those states, those entities that are responsible, let's say, for those harms, and that to this day benefit from them.

And with that, I would say thank you to these three panelists that have done a very excellent job, and I want to thank the organizers of this Symposium for giving us the opportunity to discuss these questions and maybe to move the debate to another level.

So, at this point, we will take a break and then go into a discussion on the global quantification of reparations for transatlantic chattel slavery. Thank you. Thank you to the panelists.

PARVATHI MENON

Thank you.

MICHEL ERPELDING

Thank you.

PATRICIA VISEUR SELLERS

Thank you.

GLOBAL QUANTIFICATION OF REPARATIONS FOR TRANSATLANTIC CHATTEL SLAVERY

REMARKS BY ADRIEN WING*

Good afternoon, everyone. My name is Dean Adrien K. Wing. I am Associate Dean of International and Comparative Law Programs at the University of Iowa College of Law, and I have been at that institution for thirty-four years. I have been an ASIL member since 1982. It is my pleasure to be involved in this historic conference. I attended the last session, and it was very inspiring. I am also delighted that ASIL has been involved in helping to put together this event. I have also just finished a number of years as the cofounder of BASIL, Blacks of ASIL, and of course, I am very proud of BASIL's role and its new leadership in helping to put together this conference.

I hope everyone has been enjoying themselves. It is my pleasure to introduce our speaker for today's last session. Of course, most of you know who he is since I assume most of you attended the entire afternoon session. Assuming, perhaps, some of you did not, I am going to give a brief introduction before turning over the floor to him.

Sir Hilary Beckles is the eighth Vice Chancellor of the University of the West Indies, and he is a leading economic and social historian. Before starting his term in 2015, he served a number of roles at the university, including professor of economic history, pro-vice chancellor for undergraduate studies, and principal of the Cave Hill Campus in Barbados, which I have visited. He has had numerous appointments and honors, with many of them being mentioned earlier. He has written over one hundred essays and books, including *Britain's Black Debt: Reparations for Slavery and Native Genocide in the Caribbean*. He holds a Bachelor's degree with honors in economic and social history from the University of Hull, and he earned his Ph.D. from the same university in 1980.

* Associate Dean of International and Comparative Law Programs, University of Iowa College of Law.

Of course, we all wish we could be together in Jamaica to hear this talk and to commune with each other for this wonderful conference, but we cannot. In the Zoom world, we will just have to make due, and I am sure we are in for a treat as we hear our topic, which will be “Global Quantification of Reparations for Transatlantic Chattel Slavery.” I turn it over to our distinguished speaker, the Vice Chancellor Sir Hilary Beckles.

SIR HILARY BECKLES

Thank you, Madam Chair, for the very generous introduction. I much appreciate it. Thank you for being so kind.

The concept of quantifying the reparations discourse is, indeed, complex. It is complicated, but I will work through the best I can in twenty minutes how to look at this and how scholars have gone about it in recent decades.

Of course we all know that there are multiple theories of reparatory justice and movement from the preliminary step of the apology and the atonement, in multiple forms that apologies and atonements can actually take through to a more aggressive activist position, which requires quantitative interventions and respect of repairing the harm that has been done. We are entering the realm of intellectual creativity because to quantify harm is a challenge for all disciplines, including the legal professions and so on. But we are humans living in very complex human creative environments, and the application of intellect to practical solutions to issues that are not simply practical because some of these issues are practical, they are philosophical, they evoke emotion and passion, yet we are called upon to bring a superstructure not only of a corresponding philosophical nature, moral, ethical, but also to impact the circumstances that materialize of people who have been victims to these kinds of specific crimes. The literature is very diverse, and the politics of reparation logically, therefore, is inevitably also very discursive.

Even the very concept of the debt and the very concept of who are the victims of crimes, crimes in a historical context, are subject to very interesting conversations. Just this morning, I was watching the CNN report on the Tulsa Massacre of 1921, which people who were alive then were speaking so clearly and perceptively about having to live through that crime and to be a victim of that crime over several generations.

Then we asked the question about the slavery period in the sense that the slave enterprise was uprooted just over a hundred years ago, and there are many people in the Caribbean and the Americas, generally, whose parents and grandparents were the victims directly of these crimes, and the households in which several generations grew up that were characterized by life and direct victims speaking to their children and grandchildren about these crimes and how to perpetrate it, how to sustain, systematize, and so on.

The crimes of slavery are within living memory, and one of the arguments that has been used to seek to discredit the reparatory justice conversation is those things happened a very long time ago. They could not have happened a very long time ago if they are within living memory. We are speaking about crimes that took place two to three generations ago in living memory and where the scars and the pain and the suffering have remained palpable within households, within communities, and within nations.

Then you have on the quantitative side the issue that says the intellect cannot possibly compute a reparatory methodology. I remember sitting in the British House of Parliament in 2007–2008, when Britain was making the bicentenary of the abolition of its slave trade, and I remember one of the arguments that was used in both the Lower House, the Commons, and the Upper House, the Lords, was that the crime of slavery and all the elements of it, the slave trading and the plantation slavery, the urban slavery, that it was on such a large scale that it would be impossible to construct a reasonable, attractive, logical, acceptable methodology that says let us repair, let us repair and repair also at the material financial

level. The human mind could not wrap itself around allocating numbers, allocating quantitative measurements to the enormity of the crime and its consequences, and therefore, since we cannot imagine the quantitative dimensions in reasonable terms to begin the process of repairing, let us move on.

But there was also the issue of who should pay. Those of us in the reparations movement have heard in recent years from commercial cities like the City of London that there is no need to discuss if reparations should be paid. That argument has been won. The discourse has been won. Yes, a crime was committed. Yes, there were victims. Yes, there is a legacy. Yes, there is continuing harm. Yes, there is continuing disenfranchisement. Yes, there is continuing impoverishment resulting from structures, ideas, legislation. Yes, all of that can be demonstrated. The only issue is how to pay and who should pay, and since it has taken us a hundred years to reach the moment where governments especially and corporations are now overwhelmed by the evidence of the crime and are overwhelmed by their role in criminal enrichment from the apparatus of slavery. The government provided judicial processes to allow it to thrive. The judicial system created the jurisprudence and also the practice judgments in courts of law to allow this system to go on and on. All of the elements of governments, the executive, the judiciary, the legislature, all of them were participants to enable the origins and reproduction of the system, and the corporations, families, and institutions of civil society, including the church and the universities, all participated in this criminal enrichment because it was all made legal by the governmental structures, the judiciary, and legislation. How then do they comment upon how to proceed?

The City of London took a decision a decade ago to look at the numbers. The Central Bank of England was involved. All the commercial banks on the high streets of London today—Barclays Bank, Royal Bank of Scotland, National Westminster Bank, the Midland Bank, Lloyds of London—occupy the money markets in the City of London, for example, either they are ancestral banks,

their earlier formations were part of this journey, and the balance sheet of government, institutions, and property families reflects this investment and its legacy and the enrichment.

Over the last three months or so, there has been a tremendous amount of conversation about a gentleman in England, Richard Drax, who is a member of the British Parliament and is arguably the richest politician in the House of Commons. But when his father died a few years ago and passed on the wealth to him, a critical part of that was a sugar plantation in Barbados—a plantation that was built by his ancestors in the 1640s. A sugar plantation with over three hundred enslaved Africans was built by his ancestors in the 1640s, and on that plantation was built the first plantation mansion, or what they called the “Great House,” in the 1650s. It is the oldest plantation mansion in the hemisphere, and all of this he has now inherited because his ancestors were the architects of chattel slavery, the ones who went to the House of Parliament to legislate the African people’s property. The architects of the notion that African peoples are not humans, his ancestors framed this, built the plantation, built the Grand House, and all of that world passed through generation to generation to him today, and his response to all of that? “Well, I have inherited all of this wealth, but it has nothing to do with me. I committed no crimes. I am a multi-multimillionaire, but I have committed no crimes. I have just inherited all of these plantations and slavery houses and so on. Nothing to do with me. Why should I pay reparations? It has nothing to do with me. I was not there when the crimes were committed. Yes, I have benefitted from all the wealth because I own it,” but he distanced himself from the conversation.

All of this is very important because when the City of London did their calculations, they used an interesting methodology. The methodology was as if we imagined an enslaved worker as a wage worker and we had to pay backpay—how do we pay reparatory justice as a backpay to the descendants of the enslaved. In the first instance, we needed a methodology, and the methodology used by the City of London was to pay the enslaved worker the same wage

that you would have paid a worker in Britain at the corresponding moment. Who was the lowest-paid worker in the British community in the seventeenth, eighteenth, and nineteenth centuries? An agricultural field worker. Pay the enslaved worker the minimum wage that you would have paid a worker in Britain in the corresponding historical period that did the calculation, and as I said, the figure came in out to trillions of pounds. But the trillions of pounds was larger than the gross national expenditure of Britain. The purpose of that calculation was not to bankrupt the British government, but to let the British people know the enormity of the wealth they had extracted criminally from these people. This was the calculation from enslaving six million people for over two hundred years and extracting eighteen hours of work from them on an average per day every day and with the enslaved worker expected to live no more than ten years on average upon enslavement (the enslaved Africans who were purchased as adults were not expected to live more than ten years on the estates and plantations, given the brutal nature of the work regime and since the economics of the situation and the financial model was built on the theory that it was cheaper to buy new Africans than to sustain the lives of existing people). The business model, therefore, was predicated on the assumption that we have purchased an enslaved African as property for X amount of dollars, and then we had to give them some food. We had to consider an eighteen to twenty hours regime. Is it more profitable to work them to death and replace them at the market than to extend their lives into old age? And old age in a plantation complex was forty. If you lived to your forties and fifties on these plantations, then you were classified as old. Most of them were either sick with diseases—malnutrition-related diseases, poverty-related diseases—overworked, ate nutritionally inadequate diets, and were forced into a labor regime that was brutal.

When you go through the slave plantation accounts, you see a large number of people classified as old and infirm, and these were people generally in the forty to fifty year old age bracket. You run

the market analysis, and you say, “Should we be allowing these people to live, a drain on the plantation resources, or do we work them to death and just replace them with fresh Africans from the market?” And for two hundred years, the dominant financial and business model was to purchase, work to death, and replace. It was only at the end of slavery in the last thirty or so years when the price of slaves began to skyrocket that slave owners began to say, “Well, maybe it is now more profitable to reduce the work regime, improve the nutrition, extend the lives of these enslaved people, so that we will be less dependent on the auction market,” and the model then shifted. The model shifted from buying to breeding, that it would be better now, more economical, more financial to start breeding locally your labor supply so as to free your enterprise from the dependence on the labor market.

We saw a lot of literature, and believe me, we have the literature where slave owners were writing business models working through the extent to which Black lives began to matter at the end of the eighteenth century, simply because it was now cheaper to breed a domestic labor supply and to disconnect from the international slave trade market. All of this analysis is there in the contemporary documents. The slave owners wrote this down. We can study the models that are shifted in order to maximize their profits.

Now we have this calculation that says use the backpay concept to work through what reparations will look like as compensation of payment to the descendants of those who were linked directly to these labor regimes. And when Richard Drax of England, Member of Parliament, made the statement that it had nothing to do with him, the workers who are working today on his sugar plantation are the descendants of the people he had enslaved, and you can measure that through the baptism and birth records and all of the other genealogical records. We can show these workers were a part of that labor force that was enslaved. These are the offspring. When he says, “It has nothing to do with me,” the workers who he is underpaying today, who claim that he is underpaying them, these are the great-

great-grandchildren of the people who his ancestors had enslaved, and thus there is continuity of the slave ecosystem to the present.

There is another model in which some traction has taken place, the notion that you add to the calculation not just the enslavement and the extraction of the number of enslaved people, but you take that into the emancipation period to demonstrate that following the enslavement as a legal enterprise, there was another one hundred years of extraction based on police and government and state brutality. In the United States, they called that “Jim Crow.” In the Caribbean, we call it “apartheid,” as we do in Africa, that following emancipation in the Caribbean was another hundred years of racialized apartheid, where Africans could not own property. The government prevented them from owning property. There was an orchestrated attempt between the judiciary, the legislature, and the market to prevent Africans from acquiring property, on the basis of their political franchise. Africans could not walk into this community. This is a white-only community. Africans were not allowed to live in these places because these are white-only places, and all of that apartheid culture followed emancipation for another century. You have to calculate the impact of that, and in the context of the United States, this is how the Tulsa Massacre occurred in the aftermath of emancipation, that Black people should not be allowed to accumulate wealth, the basis of democracy, of social justice, and therefore, with the support of the government, both the local and federal government, communities supported by the police and the judiciary orchestrated to enable these massacres to happen.

Caribbean history is filled with that. It is not just the burning of churches. It is any enterprises that offered upliftment were destroyed systematically by the racism that was in force by the state.

Thus, my colleague, Professor Darity, has emerged with an individualistic approach to this, that every African person who went through the enslavement journey, that their children and their offspring are entitled to monetary compensation for the brutality, and every African American whose ancestors suffered slavery, Jim

Crow, apartheid, should receive that compensation as the only way to pay reparations. It is an individualized approach.

But there is also next to that another model that says let not the focus be on the individual. Let the focus be on community development. Our communities, Black communities, they need churches. They need hospitals. They need universities. They need high schools. They need infrastructures to build community centers. They need facilities for libraries and for places of learning and upliftment and enlightenment, that these Black communities have been stripped bare of the infrastructures that are a part of the white communities, and therefore, the reparatory justice methodology should focus upon community empowerment with institutions and with value systems. Banks, insurance companies ought to be encouraged by legislation to bring appropriate facilities, with appropriate products into these communities with a view to intergenerational upliftment, and therefore, the massive investment that the state is required to pay in reparations should be an investment in community development and the upliftment of large numbers of people as opposed to a smaller community.

Now, this is very important. These are just different ways. There is no reason why you cannot have multiple methodologies to determine how justice is meted out to those who are the descendants of these crimes and who continue to feel the suffering of these crimes.

In the CARICOM argument, we have focused upon the European states as the custodians of this model, the owners of this model, the enforcers of this model. We have called upon them to be at the center of a reparation strategy as well as the institutions and families that they empowered—the banks, the insurance companies, the aristocratic elite families, the Church of England—all of these institutions that drank from the well of slavery, including the universities that received all of these large endowments and grants from the slave owners and those institutions that also own enslaved African peoples. That these institutions and the state that empowered them ought to be the target of a reparatory justice model,

and a model has to be a development model for those societies and nations that are struggling to emerge from this legacy, that there needs to be the equivalent of what has been called “invest and discourse a Marshall Plan,” and we know what the Marshall Plan is. After the Nazis of Germany bombed the life out of many European countries, the Americans sat down with the Europeans and said, “We have to rebuild Europe. We have to rebuild the cities, and we have to rebuild the hospitals, and we have to rebuild the factories and the infrastructures, the trim lines and so on,” and the Marshall Plan was this huge public investment to put Europe back on its feet after the devastation of the Nazis.

In the Caribbean, there is a version of this that has been placed on the table, and the European nations have been asked to come to a summit in order to discuss a Marshall Development Plan for the Caribbean and a quantification of the wealth that has been extracted from the Caribbean, extracted through slavery, slave trading, colonization by the state, the British and European states, their families, the institutions, a sense of the enormity of that extraction and the call for a return of a part of that extracted wealth, criminal enrichment, to the place of its extraction to facilitate economic and social development. The governments of the Caribbean have written to the governments of Europe for an international summit to sit down to discuss this process as part of reparatory strategy.

This is where it has reached. It is no longer a question of “if.” The question now is about how do we find a consensus about “how.” Historically, reparatory justice has been a relationship between states, where states enter into negotiations with respect to liability and compensation. Of course, there is access to institutions, tribunals, and courts that are willing to look at the evidence and make rulings. There are these parallel tracks of inter-government negotiation for settlement or the use of the facilities of courts of law to adjudicate and offer remedies.

In the Caribbean, the diplomatic option has been put first on the table. Global summit. Let’s talk about it. But in the background,

there are lawyers who are providing significant legal opinion on how to move such claims into international tribunals and to international courts in order to have justice, and this has been the context.

We are mindful, then, of the two tracks on which we are seeking to travel in the journey to justice. The Caribbean governments have said, “First of all, let’s try the diplomacy and the negotiation,” but in the background is the analysis of the other options that have been studied very carefully. But the issue of the enormity of the quantitative dimensions of this are so beyond most people’s imaginations that settlements and adjudications descend into the realm of what is practical, because what is practical might just be a fraction of what actually took place in terms of the enormity of the crime, and thus, the quantitative parameters are far beyond what has been considered as practical solutions in the everyday development of jurisprudence and of legal adjudication.

That is where we are, colleagues, and I thank you for your attention. Thank you.

ADRIEN WING

Thank you so much, Sir Hilary. I have a question for you, if that is okay.

SIR HILARY BECKLES

Please.

ADRIEN WING

In all of the research that is being conducted, I was wondering if there has been research done on the psychological damage over the centuries. There are people who have looked at actual mutations in the DNA of Holocaust survivors. I was wondering if anybody is focusing on this tremendous multigenerational, psychological

impact in the case of slavery. In my own work, I call such damage “spirit injury” or “spirit murder.”

SIR HILARY BECKLES

Yes, indeed. The reparatory justice research agenda is very multidisciplinary. There are colleagues who are looking at this from a medical perspective through the absolute pandemic of hypertension diabetes. You have people literally imprisoned on plantations for ten generations being fed salt every day. The stress levels of death and destruction and the prominence of mortality all around you, every day you see people being buried. Every day you see five, six people. Half of the babies that are born die within the first month, and you are surrounded by the notion of your community as a cemetery because this is what you are finding. Dozens of people have been buried every week all around you, and the psychological impact of that, the consequences of salt and sugar and the inability of our bodies to manage salt and sugar, and then, of course, the psychological dimensions, because on these plantations of slavery. There was this notion of madness. When you listen to what comes out of the oral history, you find that a significant percentage of the Black people on these plantations are being described in the records as insane, mad, that the experience of being enslaved is so maddening that people were losing their minds. So they were not only losing their bodies. They were losing their minds, and the records speak to all of these mad people. That legacy has continued today, where we have not been able to adjust to the notion of mental illness and mental health.

Black people are still struggling to embrace the notion of mental illness because it was so commonplace for people to melt down mentally in these societies. We have not yet resolved that, and of course, there is a legacy too in our societies where you would make jokes and you would laugh at people who have been defined as mad. “Here goes John. He is a mad person,” and you would make jokes about him and so on because you could not even think

about the idea of mental illness and people not managing stress and degradation, so all of these dimensions.

Then, of course, there is the issue of not knowing who you are, not knowing the connections of your family. There are people around you who might look like you, and you become suspicious. “The people in this family look like us. I wonder if they are our cousins.” You do not know because the movement and the selling of people from town to town, village to village, families being ripped and then sold, babies being sold away from their mothers, and then the baby grows to maturity, and the baby looks like the uncle. And the baby meets the uncle and does not know this is their uncle. That whole world of not knowing who your family really is. That legacy is still around us today, and we have these names, and we do not know how we got them, or we know how we got them, but the other persons who carry those names, you do not know if it is your own family that is carrying the same name.

And, of course, the impact of not knowing ancestry, the impact of not knowing family and genealogy and living in that biological void, and the vast majority of Black people live from day to day in absolute doubt and ignorance about who their family really is—where, who, and how. Yes, those dimensions have been there, and what that does is to stretch the parameters of the crime even to a higher and deeper level. Ironically, this is why there is a strong argument in the Black community. I have heard it here in the Caribbean. I’ve heard it in the United States. I have heard it in Brazil. Nobody can put a commercial value on the hurt. You cannot because when all of these issues which you have described are put into the model, the model becomes absurd because you cannot imagine that pain, that sense of loss, that sense of being broken, and the energy to restructure, to reenergize, to be sustainable, to be resilient, to keep going, what is required for you to dig into your soul and your spirit to keep going? You cannot value those kind of things, and this is why the quantitative discourses might be necessary politically, but in

reality, in our consciousness, they are way off target in terms of what actually happened to our people.

ADRIEN WING

Thank you so much, Sir Hilary. You have been very generous with your time today.

In closing this session, I wanted to say I have fifteen grandchildren so far from my seven children. Several of them are in college and have grown up with Granny Adrien telling them about many of these topics. Of course, with this knowledge, it can also be incredibly depressing and they may wonder if all the harms are capable of being remedied.

At sixty-five years old, I know that I draw strength from the dialogue that we are having together now, and from this conference, as well as from the wonderful work that you and many others have done and are doing. Because of this strength, it is easier for me to tell my students, my children and my grandchildren to not give up hope. We must keep fighting, no matter how long it takes. It may not end even when my youngest grandchild is a grandparent. The skills everyone is getting are critical to our future.

So, thank you Sir Hilary for giving us these wonderful thoughts.

SIR HILARY BECKLES

Thank you.

ADRIEN WING

It has been my pleasure to be with you on this session, and now I believe I will turn it over to Natalie Reid to close everything off for this afternoon.

SIR HILARY BECKLES

Thank you so very kindly. Thank you.

REMARKS BY NATALIE REID*

Thank you very much for allowing me to add my thanks, Professor Beckles, Sir Hilary, for the two discussions that you gave us today. Thank you to Dean Wing for introducing you, for engaging and for letting us end on a note of hope and looking toward the future.

For those who do not know me or have not yet met me, my name is Natalie Reid. I have the pleasure and privilege of being the co-chair of the organizing committee for this Symposium, along with Professor Chantal Thomas. I will be brief after an intense, packed day of debate and discussion around this issue, to thank those who have followed along live, and to those who are watching this recording afterward because, of course, this is a debate that is ongoing and one that we are recording for posterity, and to encourage those who are watching live to join us tomorrow for the second half of this incredible discussion.

We will have four sessions tomorrow, one on “Global and Comparative Perspectives on Reparations,” the second on “The Legacy of Enslavement”—about which we have heard so much already today—and “Contemporary Dimensions and Remedies.” The third, concluding address by Philippe Sands on “Contemporary Institutionalized Racism as a Breach of International Human Rights Norms,” and then a closing address with final observations, concluding remarks, and a substantive discussion from Judge Patrick Robinson, the chair of the Symposium.

Again, my thanks to Sir Hillary, to all of our presenters, speakers, and moderators, to the ASIL staff who have done such a

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superb job in facilitating today's session and in keeping us on the narrow path and on time. I wish everybody a wonderful evening, afternoon, morning, and day and hope that many of you come back to join us again tomorrow. Thank you all.

DAY TWO:
FRIDAY, MAY 21, 2021

GLOBAL AND COMPARATIVE PERSPECTIVES ON REPARATIONS

REMARKS BY CHANTAL THOMAS*

Greetings, and thank you so much to all of you for being with us today. Welcome to Day Two of the Symposium on Reparations Under International Law for Enslavement of African Persons in the Americas and the Caribbean sponsored by the University of the West Indies and the American Society of International Law and facilitated by the UWI Center for Reparation Research and BASIL, the Blacks of the American Society of International Law. I am Chantal Thomas. I am the co-chair of the Symposium organizing committee, alongside my co-chair Natalie Reid, and I wish to thank once again the sponsors for this event and especially Judge Patrick Robinson, ASIL President Catherine Amirfar, and Vice Chancellor Professor Sir Hilary Beckles of the UWI for making this event possible.

We look forward to a wonderful set of discussions today beginning with the current panel on “Global and Comparative Perspectives on Reparations.” It is my pleasure to introduce Professor Charles Jalloh of Florida International University College of Law who will moderate the panel and introduce our highly distinguished speakers. Professor Jalloh, I turn it over to you.

REMARKS BY CHARLES JALLOH**

Thank you so much, Professor Thomas. Excellencies, distinguished colleagues, ladies and gentlemen, good afternoon, good evening, and perhaps even good morning, depending on where you are. My name is Charles Jalloh, and as

* Radice Family Professor of Law Cornell University School of Law.

** Professor of Law, Florida International University.

Professor Thomas just said, I am a professor of law at Florida International University in Miami.

I am deeply honored to have been invited by the University of the West Indies and the American Society of International Law as well as all the facilitators of this event to moderate this important panel discussion on “Global and Comparative Perspectives on Reparations.”

The overarching theme of what was yesterday rightly described as a historic Symposium, “Reparations Under International Law for Enslavement of African Persons in the Americas and the Caribbean” is an important and timely one. It is to me quite significant that this topic, which like the twin evils of slavery and colonialism that languished in the peripheries of international law discussions and debate, is increasingly being moved from the periphery to the center of international law discussions. While there has been much scholarship on reparations over the years, this Symposium should help enrich that body of work and to shine a well-deserved spotlight on it. It is without a doubt worth noting that the Centre for Reparation Research at the University of the West Indies together with the Blacks of the American Society of International Law, one of the most well-known and respected professional bodies with international law, have joined forces to put together what has so far been a truly fantastic and thoughtful Symposium.

Needless to say, without the leadership and support of Judge Patrick Robinson, Honorary ASIL President and Judge of the International Court of Justice, and the President of the American Society, Ms. Catherine Amirfar, this Symposium would simply not have been possible. I wish to, therefore, take this opportunity to extend our collective gratitude to them for putting together a really stimulating conversation which I followed very closely, like many of you yesterday.

Allow me to now turn to the business at hand. The panel that I have been asked to moderate is “Global and Comparative

Perspectives on Reparations.” We have two very distinguished speakers who will address the topic from two complementary perspectives. The first of them is Mr. Humberto Adami, who will be followed by Mr. Claudio Grossman. I will introduce them to you as they speak. Later on, we will get a chance to engage in a Q&A. I invite you to start thinking about and writing down your questions. I have strict marching orders that the speakers are to get fifteen minutes each for their remarks and to reserve the second half of the panel for exchange of views including with the audience.

Allow me to now start with an introduction of the first of our distinguished speakers, Mr. Humberto Adami. Mr. Adami has a long list of impressive professional accomplishments. I am not able to do justice to it since I will limit myself to highlighting a select set of things from his professional background. He is currently the President of the National Truth Commission of Black Slavery of the Federal Council of the Brazilian Bar Association and President of the State Commission for the Truth of Black Slavery of the Section of OAB. He has chaired the IAB Racial Equality Commission and is the former Vice President of the National Commission of Racial Equality of the Federal Council of the Brazilian Bar Association since January 2014 and a member of the National Commission of Environmental Law of the Federal Council. He is a lawyer specializing in actions to combat racism before the Supreme Court of Brazil and is a partner at Adami Advogados Associates. He is also a member of the Board of Superior Council and professor at Zumbi dos Palmares University since 2011. In terms of education, he holds a bachelor’s degree in law from the University of Brasilia and a master’s degree in law from the State University of Rio de Janeiro. Mr. Adami will speak to the topic “Reparations for Transatlantic Chattel Slavery in Brazil.

Mr. Adami, you have the floor and the next fifteen minutes for your remarks, sir.

REMARKS BY HUMBERTO ADAMI*

Thank you, Professor Charles Jalloh. It is a pleasure to be in this meeting with Professor Claudio Grossman. I would like to thank the American Society of International Law and the University of the West Indies.

I saw Judge Robinson yesterday. He looks like a hero of the Brazilian reparation. I was very happy to see my very good friend, Gay McDougall, who came to Brazil in 2005, after having a connection with the *amicus curiae* of Michigan University lawsuits. She came here with Ted Shaw from the Ford Foundation. We have many connections here, and it was very important just to see her yesterday.

I want to say that in Brazil, there is no meaning for the chattel slavery that you discussed. We talk about Black slavery, and we cannot understand everything about slavery and Black slavery. I want to talk about the meaning of chattel slavery. We have the Black Slavery Truth Commission of the Brazilian Bar Association and also of the Brazilian Lawyers Association with the Racial Equality Commission. We have eighteen state chapters and a lot of municipality commissions, which has a lot of reparation fights around Brazil. In Brazil, we have twenty-seven states; it is so large. The Brazilian Black heroes and what they did for this country and the Brazilian Black people is often forgotten. To talk about reparation is to talk about how those heroes were forgotten.

* Partner, Adami Advogados Associates; President, National Truth Commission of Black Slavery of the Federal Council of the Brazilian Bar Association; President, State Commission for the Truth of Black Slavery of the Section of OAB; Professor, Zumbi dos Palmares University.

I also watched Dr. Hilary Beckles yesterday who made some very similar comments with Professor Hélio Santos in Brazil. Many times, I saw Professor Hélio Santos, and Professor Hilary Beckles talking about reparation, The fight is the same thing, different places, different languages, but it is the same thing that is being said.

It may be the first time that many people who are watching will have heard of the heroes that the Black Truth Commission and their good results. Sir Luiz Gama, who was a lawyer who fought for the liberation of Black people in Brazil. Esperanza Garcia, a woman who wrote a very important letter talking about freedom in the POE. And also nowadays, we talk about Manuel Congo and Maria Crioula. It is the first time that many of you have heard about those heroes of the fights of the freedom in Brazil, but it is important to remember and talk about them.

Recently, the Brazilian Supreme Court was dealing with police lethality. The police in Brazil have killed many people, especially the young Black Brazilians. The Brazilian Supreme Court has also examined the regulation of affirmative action with quota systems. Last November, the Federal Council of the Bar Association determined that in their next elections, there will be a 50 percent quota for women and 30 percent for Black people, male and female. It is a real revolution.

I would like to talk about reparation and transitional justice. Two weeks ago we made a very important webinar with the media, and we talked about the importance of slavery reparation with the Federal Bar Association. One year ago at the University of Pennsylvania we had a very important seminar talking about reparations in Brazil and the United States and talking about the lawsuits of the media against Germany, which happened in a court of New York. It is very interesting, and we are watching all of it closely.

The Brazilian Lawyers Institute created an important document that discusses the judicial aspects of the reparations

of the slavery. It is available on their website. It is all about slavery reparation in Brazil and also the world. Lots of people are talking about reparation, but when you actually ask for reparation, it is still difficult and a very hard subject.

I always finish by saying what I say in Brazil. First in English: Let's make the ground of this Earth tremble. In Brazil, we say: *Vamos fazer o chão desta terra*. That is what I invite everybody to do. Thank you very much.

CHARLES JALLOH

Thank you so much, Mr. Adami, for your very thought-provoking remarks on the situation of reparations for transatlantic chattel slavery in Brazil. I took careful note of your point about the language that we used yesterday in the panels. It was a very interesting comparative point. I will be coming back to you in due course with some questions.

I now have the pleasure of moving to the second distinguished speaker for our panel today. Although Claudio Grossman does not, in some respects, need an introduction, I do wish to say a few things about him, even though, like the case for the previous speaker, I will not be able to do justice to his extensive professional accomplishments.

Professor Claudio Grossman is a professor of law and Dean Emeritus and the Raymond Geraldson Scholar for International and Humanitarian Law at the AU Washington College of Law, where he served as dean from 1995 to 2016. Claudio—I say “Claudio” as a colleague of mine—is a member of the United Nations International Law Commission (ILC) and was chair of its drafting committee in 2019. In 2019, he was also elected to the L'Institut de Droit International and appointed to its commission on Epidemics and International Law. Since 2014, Professor Grossman had served as a president of the Inter-American Institute of Human Rights, and he served

as a member and chairperson of the UN Committee Against Torture and as the chair of the UN Human Rights Treaty Bodies. From 1993 to 2001, he served on the Inter-American Commission for Human Rights and was twice elected as that body's president. He also served as the Commission Special Rapporteur on the Rights of Women and Special Rapporteur on the Rights of Indigenous Populations. He has participated in landmark human rights cases, more or less all the universal and Inter-American and regional systems. He is the author of numerous publications concerning international law, the law of international organizations, human rights, and international education. He is the 2020 recipient of the Goler T. Butcher Medal, awarded by the American Society of International Law to a distinguished person for outstanding contributions to the development or effective realization of international human rights law. His proposal on reparations to individuals for violations of human rights of humanitarian law was approved by the International Law Commission for addition to its Long-Term Work Program in 2018. With that background in mind and keeping his scholarly contributions on the subject also in mind, I do not think we can have a better speaker for his intervention on the topic, "Remedies for Gross Breaches of International Law with Particular Attention to Transatlantic Chattel Slavery."

I now give the floor to Claudio, my friend and colleague. You have fifteen minutes, sir.

REMARKS BY CLAUDIO GROSSMAN*

Many thanks for your introduction. I am honored to have been invited to talk at this important conference of the American

* Professor of Law, Dean Emeritus, and Raymond Geraldson Scholar for International and Humanitarian Law, AU Washington College of Law; President, Inter-American Institute of Human Rights.

Society, co-sponsored by the American Society of International Law and the University of the West Indies. I am also honored to be on this panel with Humberto Adami and with you, Professor Charles Jalloh. I recognize also and value tremendously the intellectual and model leadership of Judge Patrick Robinson. We would not be here without him.

I will analyze first the developments of the law of reparations concerning obligations to individuals under international law. Then I will turn to current mechanisms and practices for implementing reparations owed to individuals, and I will mention obligations to states. I will consider whether international law provides a framework for addressing the harms of enslavement and the slave trade.

Traditionally, international law was exclusively the law applicable to relations between states. Individuals increasingly gained the ability to bring international claims in national courts. In 1928, the Permanent Court of International Justice, in the case concerning *Jurisdiction of the Courts of Danzig*, declared that individuals may have the right to bring international claims to national courts.

As a result of the horrors of World War II, a common framework began to develop regarding the concepts of human dignity and individual rights, creating rights at an international level, including the right to reparations. It is important to know, however, that even in 1926, the international community had reacted against slavery with the adoption of the Slavery Convention, and after World War II, the international community again decried enslavement and condemned it through the proclamation of the Universal Declaration of Human Rights and then the adoption of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery in 1956. The Rome Statute also incorporated slavery as an element of the definition of crimes against humanity.

One of the most relevant developments to the concept of reparation is the adoption by the General Assembly of the UN of the basic principles and guidelines on the right to a remedy and

reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law—the basic principle adopted in 2005. Almost all of the universal and regional conventions established the right to reparation and the ability of individuals to act when states have accepted that possibility. Reparation under international law also has been studied through the work of the International Law Commission. The International Court of Justice in the *Ahmadou Sadio Diallo* case stressed the interconnection between the rights of the individual and the concept of diplomatic protection providing reparation and that it was important to consider the reparation for the injury suffered by Mr. Diallo in breach of international law.

The ILC in its work on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, recognized the importance of reparation and established the need to continue its work regarding reparations for individuals. The Draft Articles regulate the consequences of wrongful acts to other states and identify measures of restitution, compensation, and satisfaction, either individually or in combination. Following its work on the Draft Articles in 2019, the ILC incorporated in its long program of work the topic of reparations to individuals for gross violations of human rights and serious breaches of humanitarian law.

At the international level, we have a plethora of norms at the universal and regional levels established—for example, in the United Human Rights Treaty bodies or in regional courts, such as the Inter-American Court of Human Rights, the European Court, and the African Court of Human and People’s Rights. What has emerged is a law on reparation that includes obligations to redress. That redress includes effective remedy and access to justice. Full reparation is achieved through restitution, compensation, satisfaction, and measures of non-repetition. For those who are interested, I recommend reviewing General Comment 3 of the Committee Against Torture adopted by this Committee that details the content of the right of reparation.

An essential component of reparation is the provision against discrimination. Also important for the topic at hand is the separation of reparations from penal liability. Perpetrators do not need to be apprehended or convicted to generate the obligation of full reparation. This also alleviates some of the criticism regarding reparations in case of chattel enslavement, for example, since reparations can be awarded even though the direct perpetrators are now deceased.

Through the law of reparation, the concept of victims includes both individual and collective victims, family members, and dependents or those who suffered harm. “Harm” is broadly defined as physical or mental. Further, in the law of reparations, victims are not simply the object of reparations. With the development of international law, the law of reparations established that this is a victim-centered system, and accordingly, reparations require the participation of the victims.

It is important to mention that many societies have used transitional justice principles to promote peace and justice in the aftermath of mass atrocities. Four common characteristics of transitional justice have been identified: seeking the truth, pursuing justice, providing reparations for victims, and reforming institutions. These developments in the context of transitional justice promote broader goals that are relevant in this case, including reconciliation and economic development. Repairing past harms demonstrates that the international community recognizes the suffering of victims and contributes to healing, which promotes reintegration in transitional societies where there have been great violations of human rights.

Chattel enslavement is recognized as a crime against humanity. The massive and industrial organization of slavery that chattel enslavement produced resulted in the generation of immense wealth as a result of unspeakable brutality. The inhumanity of making the enslaved person a piece of property, whose descendants inherited a slave status with little hope for freedom is just one of the demonstrations of the brutality of this horrendous crime. The scope of this crime is tremendous. An estimated 11,320,000

Africans were delivered to nations across the Atlantic, with around 13 million having left African ports. The abuses perpetrated involve the entire cycle. From the moment of capture and sale, before being forced on slave ships, slave traders often branded the slaves with hot irons. The transportation across the ocean led to death in numerous occasions and additional physical and psychological harm, including separation from family, culture, overcrowded conditions, constant exposure to poor ventilation. Patricia Sellers talked yesterday about the sexual crimes committed during enslavement that by themselves are crimes against humanity, of course.

It is no wonder that the shockwave from this horrendous crime of enslavement and the transatlantic slave trade continues to be felt today. The global trade of enslaved Africans and slave-made products was important for the development of modern finance and led to the creation of new industries. National economies, however, were not alone in reaping the benefits from the slave trade. Businesses and corporations, including banks and shipping companies, individually benefitted from this trade. Reckoning with the harms of enslavement is, however, not just a question of the past. Slavery still exists today around the world. The International Labor Organization estimated that in 2016, 40.3 million people were victims of modern-day slavery. Formal slavery and practices similar to slavery include human trafficking, forced labor, debt bondage, and servitude. There is an estimate of 24.9 million victims of human trafficking around the world. It is legitimate to ask to what extent the failure to deal properly with the scourge of enslavement resulted in these inhumane practices we continue to witness today.

In 2017, the Inter-American Court delivered its first decision concerning slavery and human trafficking in the case of *Hacienda Brasil Verde Workers v. Brazil*. As mentioned at the Symposium yesterday, the ramifications of the slave trade and enslavement can be also felt through racial societal structures that continue to be maintained. As stated earlier, it is difficult to deny that racial structures and different forms of slavery are, at a minimum,

facilitated today because there was not a reckoning with the past that is very much present today.

Scholars have proposed several theories concerning the applicability of international law to reparations. The first denies the applicability of international law to remedy the harms of enslavement resorting to the principles of non-retroactivity and intertemporal law. However, it should be known that while new preemptory norms do not generate a retroactive generation of legal responsibility, it is not clear that there were no principles at the time of chattel enslavement that did not consider that form of enslavement illegal, as it has already been mentioned at this symposium. Also, a state might agree to compensate for damages, and the agreements could be a source of the creation of a practice with international legal significance. Some have argued that there is no longer a causal connection between the harm that occurred and those presently seeking reparation. Yesterday, Gay McDougall listed all of the objections to this, and I refer everyone to the excellent panel that she conducted.

A second legal theory contends that the international legal framework is racist and colonialist, and that when states insist on applying intertemporal principles, they are insisting on the application of colonial law. This theory shares with the prior one that it does not see a relevance for international law to address the matter of reparation for enslavement providing satisfaction for the damages inflicted. In responding to the proponents of this position that argue *inter alia* that classic international law bars reparation for slavery because of principle of non-retroactivity, it's possible to resort to the notion of continuous violation, a notion developed in international human rights law.

For the sake of time, I am now going to give all of the arguments regarding the application of the notion of continuous crime. As stated earlier, we cannot ignore the slave trade's impact in the development of financial institutions and the creation of new industries. In the Belgian context, King Leopold II appropriated an estimated \$1.1 billion in today's money from Congo. The

impact of that wealth continues to be seen today. Additionally, it's possible to argue that the obligation to pay reparation is rooted in the common law principles of restitution and unjust enrichment. Further arguments that were presented yesterday by, among others, Nora Wittman and Mamadou Hébié, include that transatlantic chattel enslavement violated international law at the time it started, and different grounds are invoked in that line. One, international law is not equal to European law writ large. On the basis of comparative studies, the notion of just war and penal law are different in societies outside of Europe. Other societies justified slavery to a certain extent in the cases of a just war or criminal law as a penalty but not with the dimensions and characteristics of chattel enslavement.

The argument that the law at that time did not accept chattel enslavement is grounded in the universal character of international law, not exclusively its European character. Also, as Judge Robinson stated, even in European law we can find evidence of rejection of chattel slavery. For example, Queen Elizabeth's statement to Captain Hawkins in 1526 and the 1815 Vienna Declaration and the abolition of the slave trade, with direct reference to humanity and morality to interpret the Treaty of Paris of 1814 determining that we were in presence of principles that have existed for ages, rejecting the legality of transatlantic slave trade on the basis of general principles of law.

It is necessary to engage in further comparative analysis involving the recognition of the humanity of all persons and its relevance in the origin of this brutal form of enslavement. But, already it is important to note the statements and doctrines of Father Las Casas recognizing the humanity of the Indigenous populations of the Americas, signaling that those populations had a soul. The Siete Partidas equally and unequivocally set forth a basis for the recognition of the common humanity of all individuals. Even in the sixteenth century, additional arguments were made showing that there were contemporary notions of imperative norms that related to our common humanity and existence of *jus cogens*, in the sense that certain things could not be done. The Nuremberg principles built

on this idea that there are basic notions that lead to consequences in international law, based in our common humanity.

International law is a living instrument that it is not frozen in time. As such, through interpretation, in numerous occasions has been able to address issues facing humankind, such as is the case concerning the content of the principle of non-discrimination, the principles of Nuremburg, and so forth. It is very essential to understand that what is before us is not only the topic of reparation for enslavement in the case of chattel slavery, but also the relevance of international law to address key issues facing the international community. In that respect, we see already an evolving practice. In Belgium and England, there have been significant developments acknowledging the consequences of slavery. In the United States, the Pentagon has begun the process of changing the names of Army bases that are currently named after the leaders of the Confederates. More recently, Evanston, Illinois, became the first U.S. city to enact a reparation scheme for African American victims of the historic racist housing policy. Germany provides example of reparations that could have legal significance. The United Nations special rapporteur on the topic has also identified examples of domestic efforts to establish reparation programs, including the monetized settlement of the government of Canada with Indigenous people.

Let me finish my comments by reiterating that what is at stake here is the relevance of international law to face key issues of humankind. The need for reparations for enslavement is one of the worst examples of inhumanity and should not be left without consequences. Thank you very much.

CHARLES JALLOH

Thank you so much, Claudio, for your excellent remarks. I will, of course, be picking up on a number the themes that you highlighted so well. Let me go back and make one point and actually start the conversation with Humberto,

and I will come back to you, Claudio, on a number of critical points that you raised.

To Humberto, I found quite thought-provoking your comments and comparative perspective, especially looking at the issues of systemic racism and the movement and call for reparations in Brazil, compared to developments in the United States. You highlighted a number of things that are quite common in the conversation; for example, the issue of police brutality against, especially, young Black men. Obviously, that is an issue that is quite relevant for the debate in the United States, especially given recent cases. These are not exclusive cases, but the cases that got a lot of attention, not just in the United States but also around the world. You also highlighted the issue of affirmative action and measures that have been taken to ensure that Brazilian society is more reflective of the aspiration of the principle of equality. Can you point out if you see any synergies between what is happening in addressing these issues now, for example, in the United States, but also globally?

HUMBERTO ADAMI

Yes. George Floyd's death started an explosion of protests all around the world. In Brazil, the Brazilian Black movement was making a lot of noise, but sometimes people listened and sometimes they did not. A lot of activists in the Brazilian Black movement were very prepared for the discussion that has become a more specialized discussion, with many lawsuits in supreme courts. For instance, the affirmative action rules, like the examination of public admissions. A lot of courts started to discuss and rule on this issue, so we, as lawyers, have to be prepared.

It is always the same thing, but especially because of the federal government nowadays, we get some pushback.

People start to discuss affirmative action and the court system, “Oh, I do not agree.” It does not matter if you agree or not. Now it is the law.

People supporting affirmative action sometimes get angry, because affirmative action sometimes feels a bit small in comparison to the slavery that happened in Brazil 150 years ago. It is small, but it is very important.

Talking about slavery reparation is so large that you find more space, although it is difficult. But you have some permanent subjects of the Brazilian Black movements, like the Colombo fights, the Black churches that burned down. I call them “Black churches” because I do not have another way to translate the religious fights, Umbanda and Candomblé.

Regarding the slavery reparations subject, it is to be connected with Africa. Be connected with Jamaica. Be connected with the United States. Be connected with Black Lives Matter and other movements.

We are very happy to be part of this huge movement. Young people especially are fighting very hard. I think we are in a good movement. We have a lot of problems with the lethality of the police. Every day when you open the newspaper, you have cases of police brutality, police killing people. But, at the same time, you have these movements that keep moving forward, and now I think it is time to move forward with slavery reparations, which is very difficult.

One thing that was very important that is fading into memory, all the places of the country, all the municipalities, and the fighting for reparations. I remember that I went to the United States for the International Visitor Leadership Program, and I went to the Tulsa Memorial in Tulsa, Oklahoma, which is part of this discussion. A lot of times, the Tulsa fight, the Tulsa killings stayed very hidden in the United States. But now, the reparations movement is active in the United States and also in Brazil. We have to keep moving forward.

CHARLES JALLOH

Thank you so much. I think you make a number of important observations, especially highlighting the broader perspective. We can move from the individual cases, cases of affirmative action and so on, and then move on to the Black Lives Matter movement. But there is an interesting connection to the bigger issue that is more systemic in nature. Yesterday we had some very interesting discussions, starting with the opening panel by Sir Hilary Beckles, essentially trying to explicate on the place of slavery as an institution, but not just an institution, but as an economic institution and on top of that clarifying that it did not just end there. We then had the subsequent policies, and this came out throughout the rest of the panels in terms of what is called “Jim Crow” in the United States—systemic oppression and keeping down particular communities. Thus, you are making important connections to the wider issue that was covered in the discourse yesterday.

Claudio, if I may come to you. I love the way you connected the discussion today with the discussion yesterday, especially keeping in mind some people may not have had the opportunity to follow everything. Luckily, everything is recorded, and it is really worth the watch.

Now I will turn to the central questions around the legal aspects that you covered so well, Claudio, especially this notion about the place of international law, which one could argue was part of the system of oppression, but you also gave us a more hopeful side about the place of international law essentially as a side of redemption. In your view, Claudio, what are the implications for international law if it remains silent on the impact and legacy of the transatlantic slave trade and its consequences?

CLAUDIO GROSSMAN

Thanks for your question, and also thanks to Humberto for his excellent contribution and comments.

The consequences of not addressing key issues facing humankind cannot be ignored. It is very important to channel those issues through the legal principles because otherwise we will be confronted with possible rejections of the validity of international law. Let me reiterate also what I said during my intervention that international law has been shaped by multiple contributions. There are general principles of law accepted by all cultures. Everyone recognizes the value of the principle of sovereign equality, the common humanity of all human beings, and the principle of good faith. It is difficult to deny the validity of the concept of self-determination or the existence of a law concerning basic notions on reparations.

Humberto talked that all over the world there is an aspiration of people of the need to address topics that are essential and continue to have a fundamental impact in society. In my view this is not just a political issue, but also have legal connotations.

HUMBERTO ADAMI

I think we must do many events like this because we have a lot of things to talk about, a lot of things to change. We have to find the heroes that were forgotten, bring them to this place to say we made this country, we made the world, and we have to have the recognition. A lot of people have made a lot of money from slavery, and they have to pay because slavery was a historic crime.

CHARLES JALLOH

Indeed. Thank you so very much, Humberto.

CLAUDIO GROSSMAN

Let me state that in my practice in the Committee Against Torture or in the Inter-American Commission on Human Rights, I heard on occasions why are we addressing this issue and not other issues. If we address an issue or start with it, where does something end? In the practice and development of human rights law, the idea that in order to advance in one topic, you need to advance in all the topics, it has just not been the practice of international law. Why are certain topics the object of international committees and action, but not others? Is it true that unless you do not deal with everything, you should not advance in anything? Perhaps the relevance of the situations provides some modicum of explanation as well as the impact of leaving the law outside the realm of possible action to address fundamental issues.

Let me finally thank you and Humberto Adami and all the cosponsors for this panel and for having invited me. Thank you again.

CHARLES JALLOH

Thank you so much, Claudio, and thank you to Humberto. I am grateful to you for your excellent presentations and your insights. It is clear that we have just started the conversation, but I hope that we will be able to continue this conversation. Luckily, we have another panel coming up. Yesterday was fantastic. I am sure the rest of the day will be fantastic. So please join me in giving a huge virtual round of applause to our two distinguished speakers. The next

panel is on “The Legacy of Enslavement—Contemporary Dimensions and Remedies.” I thank you.

HUMBERTO ADAMI

My pleasure. Thank you.

**THE LEGACY OF ENSLAVEMENT—
CONTEMPORARY DIMENSIONS AND REMEDIES**

REMARKS BY JEREMY LEVITT*

Welcome, everybody. My name is Jeremy Levitt, professor of law, Florida A&M University College of Law, which is significant because it is the country's largest Historically Black University, one of five in the nation. For a topic on the legacy of enslavement, contemporary dimensions, and remedies, we have two absolutely wonderful speakers, one from UCLA and the other from Loyola, Los Angeles, and myself as moderator, and native of Los Angeles. We are connected but not connected here at the same time.

Please let me introduce the first speaker, Tendayi Achiume, a star in the profession who has made quite a large splash. In fact, I might say it is a tidal wave in just a short number of years, a professor of law at UCLA, former faculty director at the UCLA Promise Institute for Human Rights, and research associate with the African Center for Migration and Society at the University of Witwatersrand. But most importantly, I think now her work is really having an impact in terms of the law, doctrine, norms and so forth in her role as the Special Rapporteur on contemporary forms of racism and racial discrimination, xenophobia, and related intolerance appointed by the United Nations Human Rights Council. She should be celebrated for being the first woman to serve in this role since 1993.

Then we have my brother, Eric Miller, of Scottish and Jamaican descent, which means he has very hot blood, so we know that he will adequately provoke us, professor of law,

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and the Leo J. O'Brien Fellow at Loyola Law School, Los Angeles, and a former law clerk to Judge Stephen Reinhardt on the Ninth Circuit. He focuses on the intersection of criminal justice with sociology, criminology, and the study of problem-solving courts, and legal theory.

We are in a great space for an informative lecture. We are going to keep to the time the best we can to allow for a Q&A session, which should be about thirty minutes, and without further ado, I humbly pass the table to Tendayi, and she is going to provide us with an education that is needed not just in the legal academy, but I would say in the United States writ large. Thank you.

REMARKS BY E. TENDAYI ACHIUME*

Thank you very much for that kind introduction, Jeremy, and I want to start off by saying that the work that I do would not be possible without the really important work that you and others within BASIL have done to chart the way for people such as myself to be able to be in the roles that we are in the way that we are, and as you say, I am joining you all from Los Angeles and want to acknowledge my presence and UCLA's existence on the traditional, ancestral, and ceded territory of the Gabrielino/Tongva peoples.

To the organizers of this conference as well, I want to say thank you very much for including me in this timely and really pressing Symposium. I want to also thank the other participants who I think so far have provided a wealth of valuable insight regarding reparations under international law for enslavement of Africans, and it is really a powerful and humbling experience to be a part of an event involving some truly pioneering forces in the field of reparations.

* Professor of Law, UCLA Law.

My remarks today are based on a report that I submitted to the UN General Assembly in 2019 in my capacity as Special Rapporteur on contemporary forms of racism, and the report was entitled “Reparations for Racial Discrimination Rooted in Colonialism and Slavery.” For those of you who have not had an opportunity to take a look at it, I recommend it because it goes into far more detail than I am going to be able to go into in the next fifteen minutes.

What I thought I would do in the time that I have is give some background for the motivations of the report that I produced and then also speak directly to some important ways that we should understand international legal obligations borne by States to provide reparations and to think about remedies, and in many ways, my comments build on comments that have been made by prior speakers as well.

We are currently just past the midpoint of the United Nations Decade for People of African Descent, and 2021 also marks the twentieth anniversary of the Durban Declaration and Programme of Action. As many of you will know, the World Conference Against Racism, which took place in Durban in 2001, and the regional conferences that led up to the Durban Conference involved among the most, if not the most, powerful transnational mobilizations for the global human rights system that is adequately equipped to address racial discrimination and the contemporary moment. The issue of reparations was very high on the agenda of those who were involved in Durban, as I am sure Gay McDougall, who was on a panel yesterday, could tell us.

In the regional conferences leading up to Durban, activists, scholars, and many others made a very powerful case for reparations for colonialism and slavery to take center stage and for the responsible nations finally to be held accountable for reparations for slavery and colonialism. But they faced

serious opposition from Canada, from the United States, and from European nations for reasons that should be obvious.

In the time after Durban, thus in the period after 2001, the issue of reparations has seemingly been a marginal one within the United Nations, a third rail, so to speak, among its Member State bodies and especially among the former colonial powers within the UN. I think it is important to highlight that these former colonial powers, or the First World, however you want to refer to them—the Western liberal democratic bloc within the United Nations self-conceptualized, I would say, as the guardians of the human rights framework—has been the most resistant to reparations for slavery and colonialism and to addressing racism and racial discrimination, including within the global human rights framework.

In my work as Special Rapporteur, I would say that the marginalization of reparations, whether we are talking about a one-on-one conversation with UN Member States or within the UN framework as a whole, is typically achieved not through an outright denial of the responsibility for colonialism or the utter horrors that it entailed, even though I think there are definitely many who are in denial. I would say that in my experience, the marginalization of discussions around reparations for slavery are typically achieved by saying reparations are not possible or they are not available under existing legal frameworks: “Yes, we can concede that slavery and colonialism were bad, and yes, we can concede that there are certain powers that were responsible for them, but the project of reparations is just one that is entirely impossible under the legal framework that we have, given questions around feasibility.” Sometimes you also hear arguments around the idea that these are problems that are of the past: “Slavery and colonialism happened in the past, we have moved on and should be focusing on more contemporary challenges.” Nothing could be further from the truth, and this is not a case that I have to make to participants in this

Symposium. We are all gathered here because we understand that colonialism and slavery and the ramifications and legacies of them are not in the past. They are very much a contemporary issue, but I would say that among the many arguments I am having to make in my capacity as Special Rapporteur is the claim that, indeed, there is a contemporary relevance here.

As I imagine it or as I experience it, the battle for reparations within the UN system is a political battle, and it is often one that is articulated in legal terms. My report, and events such as this Symposium, are vital for pushing back against a status quo that has been hostile to an international movement for reparations, and that background is the background into which I published the 2019 Report on Reparations that my remarks are based on.

In the time that is remaining, I want to make a few points that I elaborate upon in my report, and many of them were actually made very eloquently by Professor Grossman in the previous panel, but I think they bear repetition because of their importance to the conversation that we are having.

The first is that reparations generally are a fundamental and established remedy under prevailing international law and principles, and too often, as I have mentioned, debates about reparations for racial injustice begin from the premise that reparations are inherently exceptional or an unusual remedy. Yet reparations as a holistic and effective remedy for those who have suffered a wrongful act are far from novel, and rather, States routinely provide reparations for wrongful acts and violations to one another and even to their own citizens. Further, reparations are a fundamental aspect of both international law and international human rights law, international practices, tribunal decisions, and other sources of international law that have long held that State breaches for legal obligations entail responsibility to provide for reparations.

The Draft Articles on Responsibility of States for Internationally Wrongful Acts, which Professor Grossman also discussed, happened to be silent on reparations for harm caused by legal acts, and a lot of the debate when it comes to reparations for slavery revolve around whether slavery was legal at the time. As many of the panelists who have spoken have highlighted, that kind of approach, which is based on concerns about the intertemporal principle in addition to questions around whether slavery was wrongful at the time, can be addressed within a public international law framework as well. We have heard persuasive rebuttals to these kinds of arguments being an absolute bar to reparations for slavery, and it is important to highlight that even under the current doctrine of the intertemporal principle, direct and ongoing consequences of wrongful acts that extend to when the act is considered internationally wrongful, as is the case right now, do incur liability for reparations.

We should be understanding reparations as encompassing two dimensions: (1) historic racial injustices of slavery and colonialism that remain largely unaccounted for today but which nonetheless require restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition; and (2) just as urgently, a means to address contemporary racially discriminatory effects of structures of inequality and subordination that have resulted from the failure to redress racism from slavery and colonialism. I think many of the speakers who have spoken already have articulated this sort of understanding, which is one I push for in the report. When we think about entrenched structures of racial subordination, whether we are talking about the United States or Brazil—and I know my co-panelist will give some examples specifically from the United States—these structures are direct products of regimes of enslavement, and the *de facto* cost systems that remain firmly in place right now.

These structures of racial injustice are part and parcel of a comprehensive approach to reparations.

I should note, as I did in the report, that the obligations to provide reparations are fully entrenched in the international human rights law, including Article 6 of the International Convention for the Elimination of Racial Discrimination, which requires reparations for racially discriminatory human rights violations.

The point that I am trying to make here is not that there are no legal barriers under existing doctrines of international law when it comes to thinking about achieving reparations. My point is that those barriers are typically overstated, and that existing laws could sustain far more than we are led to believe. But instead, what we encounter is a legal formalism that obscures the full potential of existing international law to support reparations for the injustices of colonialism and slavery.

It is worth pointing out, as I do in the report, that the international legal doctrine has had a longer history of justifying and enabling colonial domination and even, in some cases, justifying the acts of enslavement and the slave trade, than it does a history of guaranteeing equal rights to all human beings. To the extent that legal barriers exist, we should not treat those barriers as insurmountable. In fact, we should treat those barriers with suspicion and target them as subjects for a decolonialization project for those of us who are invested in the decolonialization of international law. I agree with Professor Grossman regarding the idea that the international legal project can be a decolonialization project, one that very much centers the project of reparations for slavery as achievable and as urgent.

I think it is important to highlight that reparations for slavery were paid to certain groups, but typically, they have been achieved on a racially discriminatory basis as well. Reparations have gone to enslavers and their descendants rather than to the formerly enslaved. Britain, for example, paid the

equivalent of today about 65 billion pounds in contemporary terms to compensate enslavers. We might think about the expenditure that is represented by that figure for reparations, but not to the formerly enslaved, to the enslavers instead.

I will point out, as sociologist Gurminder Bhambra has, that when we think about the reparations that Britain paid to former enslavers, it turns out that the UK did not finish paying off the bond that it had taken out to pay former enslavers until 2015. If you think about that, it means that you have people in Britain who up until 2015, as taxpayers, were contributing to the payment of that bond to enslavers when we are still here having conversations about whether reparations for the formerly enslaved are viable.

I want to conclude by saying that if even a fraction of the same commitment and ingenuity that transformed entire peoples into property and implemented a global structure of domination, which we refer to now as the system of slavery, was applied to the issue of reparations, I do not think we would be living in the current reality. We would have a very different reality, and I think this kind of Symposium is the kind of intervention that is required to shift our reality to one where conversations around reparations begin from a starting point which recognizes them as being achievable but just requiring commitment at the international level as well.

JEREMY LEVITT

Thank you, Tendayi. Brilliant, and a great stage has been set for Eric to come in now with some specifics about what some have called a “genocide here in America,” certainly massive human rights violations and displacement, and so I want to hand the microphone to Eric. We are going to hold questions until the end, and hopefully, both panelists will be able to engage the questions that you have.

Eric, please proceed.

REMARKS BY ERIC MILLER*

Thank you, and it is a hard act to follow, such a powerful presentation. As a descendant of enslaved people myself, it is powerful to think of myself and my British Jamaican family literally paying our enslavers by paying that bond. The descendants of slaves are paying their enslavers reparations. That is really powerful.

I want to take a parochial turn but, in other ways, quite a universal one, to think about reparations for the Tulsa Race Massacre of 1921. Tulsa, Oklahoma is in the front line of the battle for reparations in the United States, and to understand why, I will give you a little bit of history to help you see what is going on.

In the early morning of June 1, 1921, white Tulsans, including the state national guard, as well as people deputized by the county sheriff and the city police, murdered as many as three hundred Black American residents of the Greenwood District of the City of Tulsa. They razed thirty-five city blocks to the ground and looted the homes of ten thousand Black residents. The massacre was all the more shocking, given the thriving nature of Greenwood, a cultural and business center. The district was segregated by race, but in Tulsa, the Black neighborhood was thriving at the same rate or perhaps even outstripping the white district. Black pioneers in medicine, in the hotel industry, in film and theater, in music, whose innovations in Tulsa made an impact around the world, lived and thrived there. So impactful was the massacre on Black business and entrepreneurialism that a recent Harvard study found that

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it accounted for a national pause on Black patent filings around the United States in the year following the massacre.

Black people flocked to Oklahoma in part because it only became a state in 1907, and before that, it was territory run by various Indigenous nations who treated Black people very differently in the segregated South and North. Throughout the United States, for the fifty years prior to the massacre, states like Louisiana, Alabama, and Mississippi had been waging a violent campaign to enforce a form of segregation that looked and felt like slavery. For Black people, Oklahoma was, in the words of novelist Ralph Ellison, the “promised land.” For Black Americans, Tulsa was called the “Black Wall Street.”

The massacre was an attempt at ethnic cleansing. The white citizens of Tulsa who had arrived more recently than many of the Black citizens, backed by their state, their county, and the municipal government, sought to grab the lands and the property of the Black Tulsans living in Greenwood.

The massacre, as I mentioned, began the night of May 30, 1921, and continued into the morning of June 1. White citizens deputized by the police and county sheriff burned down thirty-six to thirty-eight city blocks. Three thousand terrorized people fled the city. The rest were rounded up and held under armed guard for days in internment camps at a local baseball park and convention center and hospital. Children were separated from parents. Overnight, five thousand African Americans became homeless. The Red Cross mobilized to provide tents for the thousands who remained in Tulsa, and they lived in Red Cross tents over that winter.

The hot spot for the battle for reparations in America is over who gets to determine the remedies for the survivors, for the diaspora, and for the still-remaining Black Tulsa community. The last two issues addressing the claims of the diaspora and rebuilding community institutions are ones that are shared by reparations efforts everywhere. That is

where I come in because I am part of a litigation team that is currently pursuing a public nuisance claim against the county and city of Tulsa and some other entities. I want to talk a little bit about this litigation.

What is a public nuisance? Oklahoma law defines a nuisance as unlawfully doing an act or omitting to perform a duty, which act or omission annoys, injures, or endangers the comfort, repose, health, or safety of others or in any way renders other persons insecure in life or in the use of property, and a nuisance is public if it affects an entire community or neighborhood. The claim is essentially that the positive acts of some person, in this case, the county, the city, and the chamber of commerce, through their involvement in the massacre and its aftermath and indeed through continuing acts of racism and intimidation lasting until this day created conditions that did and still undermine the health and safety of the Black community in Tulsa.

Because a public nuisance is, in effect, a continuing harm, it does not face the statute of limitations problems that other lawsuits face and, in particular, lawsuits that go under the Equal Protection Clause of the United States Constitution through the enabling statute, 42 United States Code Section 1983. I was part of a litigation team that brought a federal lawsuit in 2003, and we failed on statute of limitations grounds. I want to echo again Professor Achiume's insight that it is a mixture of formalism and exceptionalism that prevented that litigation because we modeled that litigation on a number of other lawsuits, including the Holocaust survivors litigation, and the statute of limitations was tolled in the Holocaust litigation but not in Tulsa. We can perhaps in the questions and answers think about why that might be, but I think one hint is that to the extent that the statute of limitations is lifted, the result is too transformational for judges to contemplate.

The concept of a public nuisance claim is someone opening a pig farm next door to you, and the smell and sanitation undermines the safety of you and your community. Another version is citing a chemical manufacturing plant in a poor community that has a similar impact on health and safety. Here, the pollutant was and continues to be white racist violence along with the continuing underdevelopment of the Black community in Greenwood and North Tulsa through the white community's attempt to take its land. The plaintiffs in our lawsuit are three living survivors. We have someone who is 100, Hughes Van Ellis, 106-year-old Lessie Randle, and 107-year-old Viola Fletcher, as well as three descendants of individuals, one killed in the massacre, two rendered homeless, a church, Mount Vernon AME that was burned to the ground, and the African American Ancestral Society of Tulsa. The lawsuit identifies seven defendants who have contributed to the public nuisance or unjustly enriched themselves at the expense of the Black citizens of Tulsa. In addition to the city of Tulsa, the county, and the chamber of commerce, we are also suing in their official capacity, the sheriff, the state national guard for the continuing harms of segregation and blighting the living conditions of the Black Greenwood and North Tulsa communities. We are suing the Tulsa Metropolitan Planning Commission and the Tulsa Development Authority because they acted, along with the city and county, to isolate the Black community from the rest of Tulsa and fragment the Black community itself through city planning initiatives that ran a freeway through the middle of the city, and of course, they built it in the Black part of town.

Now, here is where things get interesting, I think. The principal remedy for the public nuisance lawsuit is abatement, which essentially eschews direct money to repayments to individuals—the federal solution—and instead focuses on remediating the damage caused. It would involve, in the case

of the pig farm or the chemical plant, some kind of superfund-style abatement to move the farm somewhere less populated or to take the chemicals out of the soil.

Since the harm to the community in Tulsa was to undermine its business in political leadership, preclude economic and social development through restrictive zoning, substandard infrastructure, and the creation of food and health deserts as well as redevelopment that ran highways through the community to both split it apart and split it off from the white community, abatement is going to have to redress these wrongs. Simply put, when the assault is on the human, social, and political capital of a distinctive community, then the remedy must be to recreate that capital, perhaps through direct payments, but in this case by empowering the community to determine for itself the sort of institutions that it wants and needs to create a safe and healthy neighborhood.

This aspect of the litigation, self-determination, is at the heart of reparations. Reparations is, in my view, best defined as a significant, ongoing, intergenerational wrong that continues to oppress a discrete group or community. I happen to think this definition fits reasonably well with historical and international notions of reparations. It also focuses not just on slavery, what I would call reparations back then, but it applies to what I would call reparations right now, which would include both the Tulsa experience but perhaps things like violent policing targeted at discrete groups. We have seen that in Chicago.

The difference between reparations and distributive justice is that we can identify a wrongdoer and a victim. Even if the wrongdoer is no longer around, the victim is. Part of what it means to be a victim is to have a duty to live one's self out of victimhood, if one can, by resisting the wrong or the wrongdoing, but part of being a member of a community in which there are victims is having a duty to help out in that process, not by dictating a remedy, but by empowering the

victims to determine for themselves what that remedy should be, and if that remedy is reasonable, to help them put it into effect. Reparations in this view is a bottom-up process of group empowerment. It is a form of transformational justice grounded in the classic transformational ideas of truth, justice, and institutional reform, but most of all, it is grounded in the people who still suffer from wrongs that though perhaps historical in their origin are present and felt in their everyday life right now.

I hope that what we are doing in Tulsa has more than a domestic application, that whatever the legal justification for reparations, which is the usual focus of discussions of reparations, remedying intergenerational injuries needs more than simply a payment, a monument, or a scholarship. We need to transform not just our reparations with those who have wronged us to put us on equal footing with them. We need to transform our relationship with ourselves to lift all of us up, the direct victims, the diaspora, and particularly those at the bottom. That for me is the lesson of reparations, and that is why I am so excited about the public nuisance model and why I think it fits reparations so well. Thank you.

JEREMY LEVITT

Wonderful. I wanted to thank you for that Eric. I will be looking at the chat for questions, but I want to start out with one to throw out to the two of you. As I listened to you, Eric, I never look at Tulsa in exclusive terms. I look at Tulsa. I look at Colfax, Louisiana. I look at Rosewood. I look at the Ocoee massacre here in central Florida. I am wondering if there is a theory of liability that one might conceive when you begin to aggregate all of these various massacres and what we would call, even under modern international law terms, “genocides of Black populations,” their displacement, their systematic denial of land that was owned, the land that was never returned, and

we have some scholars that have worked on the questions of land. But I am wondering whether there is a collective theory of liability that might be looked at perhaps at the federal level.

Then, as well, we are seeing more efforts taken at the local level with reparations. For example, the Florida legislature passed reparations legislation for the victims of Rosewood. A lot of people do not know that, but they did. There has been recent legislation here which involved reparations for the Ocoee massacre, but it ended up being a watered-down bill on education for victims. I am wondering whether working locally through legislatures is one way and whether we need an expanded theory of liability, meaning that where you have perhaps a more progressive legislature in another state, perhaps a free state, could that free state decide to pass legislation that would give reparations to persons in other states who were affected by enslavement itself? Almost looking at a collective responsibility theory, as opposed to a collective liability theory, and having a more progressive state wanting to support those victims of enslavement that were in a neighboring state. Thinking outside the box a bit, I want to throw that at you as questions come in and let you guys chew on that a bit. Go ahead.

ERIC MILLER

That is really interesting. Newsflash, Representative Jackson from Georgia was planning to introduce reparations legislation to Congress to provide remedies for essentially waiving the statute of limitations and redefining the cause of actions that descendants can file lawsuits to essentially resuscitate the federal claims against the Oklahoma, and the city and county of Tulsa. There is something the federal government can do.

A big question is whether the federal government bears some responsibility for these local outbreaks, and so

I suppose if we were thinking in terms of something like *Cooper v. Aaron*, a 1950s case in which essentially the federal government failed to adequately protect the integration of the high school in Little Rock, Arkansas. If we want a legal loop to pin it on that might work.

I actually think the thinking about the wrongs and the different wrongdoers is important. I want to, to some extent, resist a homogenous understanding of reparations because it is addressing wrongdoing, and we need to hold the wrongdoers accountable and at least identify who they are, because part of the toxic legacy of oppression is, as we are experiencing in the United States, to deny that the oppression happened and to prevent people from talking about it.

In Tulsa, the state acknowledged that it engaged in a seventy-year conspiracy of silence to hush up the massacre, but we are seeing the Republican Party engage in a concerted effort to hush up a similar white supremacist insurrection on January 6, 2021, one that is not unlike an attempt by white supremacists to reverse the result of a hotly contested election in 1871 in Louisiana, the Colfax massacre.

I do think that it is important to take both an international but also a parochial lens to reparations in part so that we can start the truth process of transformational justice by calling out and holding accountable the right people but also so that we can uplift the right victims. I do think reparations are, certainly in this U.S. model, a bottom-up process, and I think that this is what is really so powerful about it.

JEREMY LEVITT

Tendayi?

E. TENDAYI ACHIUME

I would add two things. On the question of whether you could build out to broader charges or broader theories of collective liability using, say, the framework of genocide, I cannot speak to the federal level. That is not where my expertise lies, and I think Eric has dealt with that pretty eloquently.

But at the international level, we might think about the movements that have been driven by Black Americans in the past to charge genocide at the level of the United Nations and to say that we have to reframe the ways that we understand exactly how racial subordination and the human rights violations that result from racial subordination are understood and talked about within the international framework, where there can be a tendency to remove things like genocide that was conducted under the rubric of slavery and its legacy from the genocide framework. I would say that even though you did not ask about the international level, you are asking about the federal level, I think there is value and pressure to be put on international lawyers, among others, to really think about how frames that have been deployed at the international level for other groups might also fit some of the charges that have been leveled against formerly enslaving powers as well. So, yes, I think that there is space for that kind of an approach.

Then to speak to the question of local interventions, I think they are absolutely vital. In the international context, when we think about how international obligations are fulfilled, we focus on national entities taking steps to fulfill those international obligations when international obligations apply across the board, and if you can have energy and dynamism and movements at the local level that can fulfill international obligations, I think that is often where the energy is the strongest. I think those are really vital, and we have to think about how in the international discourse, we do not lose sight of

the local and the regional and all of these other microlevels that are urgent for the push for reparations as well.

ERIC MILLER

To build on that point, too often, I think, in the international context, we get a payment from one institution to another institution, and that is where it stops. That money needs to trickle down to the people who are at the bottom, who are the real still-ongoing victims. As I said before, it is nice when one university gives another university money for scholarships. That is great, but that is not going to undo the ongoing history of reparations or legacy of slavery. That is why we need to reform ourselves as well as demanding that others transform themselves.

JEREMY LEVITT

That is wonderful. There is a question from those participating, Gabrielle Hemings. She says, “Ms. Achiume says international law can bear more than we have given to it to deal with, reparations for chattel enslavement,” and she asked the question, “Are there any areas left to build out to make those reparations a reality?”

E. TENDAYI ACHIUME

Yes, I think there definitely are areas that require additional attention, and I think even at the level of doctrine, so many of the interventions that we had from panelists yesterday were really fleshing out the kind of refined understanding of international obligations to provide reparations for chattel slavery that need to become more mainstream within international law.

When I was producing my reparations report, one of the things I did was actually just do a survey of international legal scholarship that gets to the doctrine of how we understand legal liability, and I would say that the scholarship that makes the affirmative case for reparations under international law has been marginalized. I think there is work to be done, including by institutions such as ASIL, to help make these kinds of accounts more mainstream, and I see this sort of engagement, like the one we are having, as absolutely vital for that kind of an approach.

Now speaking in my capacity as Special Rapporteur, one thing that I think remains deeply troubling is how some of the barriers to achieving reparations come from deeply held sensibilities within First World nations especially about exactly what slavery entailed in the first place. I know we are lawyers here. We are used to having conversations about sophisticated legal theory, but there are fundamental misconceptions that I think dominate the way that most people in the United States, Canada, and the UK understand slavery and its centrality to the nation and what it might mean to even begin to repair. Public education is one thing that would go a long way to unlocking the potential of existing international doctrine to provide reparations. The battle has to be fought in multiple arenas, and one of them is just retelling the history so that people are fully aware.

I might point to something that I have not discussed: the ongoing debates in the U.S. Congress right now, where there is a bill before Congress that has been there for many years that involves creating a commission that would study the case for reparations in the United States. I think the congressional hearings that happened this year suggested that there may be momentum here. One of the things that arose in the context of those discussions is the urgency in places like the United States to have a full and official reckoning that would pave the

way for pursuing liability. Shifting sensibilities is part of the work that is required for us to move closer to a world where we can do more with the doctrine that exists, and then where the doctrine is a barrier, it is important to think about how that kind of resensitization might also help shift the doctrine.

The final thing that I will say on this question is last year's racial justice uprisings that we saw after the murder of George Floyd, which began in the United States and then went viral, to me should be connected to this conversation around reparations in a number of ways, one of them being: how do we decide what reparations will look like?

I agree with Eric that in thinking about what reparations entail, we should have a comprehensive conception, but that conception is most powerful when it is rooted in social movements, when it is rooted in everyday experiences of ongoing racial subordination that are tied to slavery and colonialism. If we are thinking about what we as international lawyers can do to unlock the potential for achieving reparations, part of it is being better connected to some of the movements that are most active right now in giving voice to what it would mean to transform existing structures of racial subordination.

JEREMY LEVITT

Let me ask both of you a question. I am sorry, Eric, you can just build in your answer to this because I want to provoke you a little bit with this question. We tend to speak about reparations in very binary ways, with victims and victimizers. I want to broaden that just a little bit. We know that there was a massive slave trade from the eastern portions of Africa into the Middle East and Asia, perhaps more prolific and more brutal than what we saw with the transatlantic slave trade.

We know that there was African participation in West and Central Africa, particularly many of the larger coastal kings

that participated. What they knew, how they knew, whether they were aware it was chattel slavery and the way that it developed is a different question, but I often wonder, do we lose credibility in the conversation about reparations when we do not take a holistic view and look at all the potential violators, even if that means looking at ourselves?

ERIC MILLER

I do believe that we should not run away from asking hard questions about reparations. I was at one of the H.R. 40 congressional hearings, and one of the other witnesses—this is in 2019—was trying to say, “Hey, look, in America’s past, it was the Democrats that were the oppressors, not the Republicans, and so it is hypocritical for the Democrats to support reparations.” No, it is not. The Democrats should say, “We did it, and we need to atone, and H.R. 40 is the first step to doing that, so that we can engage in the truth part of truth, justice, reparations, and institutional reform.” I think that is really important.

I think it also ties in with a point that Professor Achiume made about storytelling. The interesting thing about Tulsa—and we might think about how this applies more broadly—is that in Tulsa, it has always been white folks that tell the history of the Tulsa Race Massacre. They did it by silencing the story in 1921, but now they want to tell it by finding a historical site and encouraging essentially massacre tourism where the money goes to the chamber of the commerce and the city and not to Black folks.

But I was rereading just the other day our lawsuit and some of the documents associated with it, and our lead plaintiff from 2003, a guy named John Alexander, served as a domestic worker in a white household. I was contacted by the son of that household just the other day, and he said, “I cannot understand

why Mr. Alexander filed that lawsuit.” Well, it turned out that John Melvin Alexander had been angry about the massacre at least since his service in the war in 1942 when he was ashamed to tell his boatmates that he was rendered homeless by the massacre, and he was one of the first people that met us when we went down to Tulsa. The story that someone tells when they are the victim of a genocide, working in the house of the people who did the genocide to them, is different than the story that they tell their families because what are you going to tell the person who burned your house down? That you are the bad guy? No. You have got to lie. Resistance takes many forms, and who gets to tell the story allows us to avoid accountability and responsibility, and so freeing us to tell the truth is the first step of transformational justice.

It is so very important because I am from Glasgow and we still tell ourselves a fairy tale in Glasgow about the tobacco trade. We are still in denial about racism, and that changes how we speak to each other, and part of it, who gets to tell the story is a major aspect of a racial part.

JEREMY LEVITT

Tendayi?

E. TENDAYI ACHIUME

I would maybe just add that when we think about regimes of racial subordination and when we think about the regime of the enslavement of Africans and the slave trade in Africa, which was a very complex one, really unpacking the complexities of how those regimes are possible and able to succeed is urgent work. You are right to hint that any attempt to mask the complexity of that, including complicity of nations in West Africa or wherever it might be, undercuts the underlying

project, Fully grappling with the regimes requires an honesty and engaging with exactly how they worked and exactly who contributed to what. I do not think any of that work can ever undercut the claims for reparations that those who suffered those violations ever experienced. I do not think there is any mapping of the complexity of responsibility that can undercut the underlying claims for reparations.

When you think about reparations as being about transforming structures, there too I do not think any attempts to be comprehensive and understanding the way the systems work and how different groups participated will ever mean that the work does not remain the same, which is providing compensation to those who suffered the injustices and then also undoing the structures that persist to this day.

I would say we must be comprehensive, absolutely, and that kind of comprehensiveness will not undercut the fundamental claims that are made by those who seek reparations.

JEREMY LEVITT

I think you are right, but what I would say is that it is not so much about undercutting claims. I think it is getting a comprehensive historical picture. It is telling an honest historical narrative, but there is something else, and I will just use Senegal as an example. Senegal is where the Gorée Island is. They have invested enormously in diaspora return with the African Renaissance Monument, the Museum of Black Civilization, which features largely Blacks from a diaspora—I am actually the ambassador for that museum—the Gorée Memorial, and other infrastructure they have invested in heavily. I see that as an investment back into the diaspora and the greater call for African unity, et cetera.

But then there are other questions that I think are worthy of asking, which is out of fifty-four African states, has one offered

diasporans, African Americans, and others dual citizenship, and what might that look like?

E. TENDAYI ACHIUME

Right.

JEREMY LEVITT

There are tangible and intangible ways to look at this question that actually help solve the greater enterprise that we are in, which is the reparations enterprise. There is something unique about states with sovereignty and the power that they have to forward an agenda with the diaspora. We have not reached that place of unification. The work of Du Bois is incomplete. The work of Kwame Ture is incomplete, and so forth. I am thinking about it in that way as we think about liability and responsibility and the kinds of conversations we need to be having in the diaspora and inside the continent.

Let me ask you this. Both of you are in Los Angeles, attuned to the various issues of reparations. We know that in the last presidential election for the first time in the history of the country, reparations was a subject of presidential conversation, and there were commitments made by the candidates and the administration. There were progressive claims and statements, yet H.R. 40 is still not the subject of a conversation in the way that it should be. Do you think that there is some hope with the current administration—and we are looking at this both domestically and globally—to maybe address the issue of reparations in a more comprehensive way, whether it is passing John Conyers H.R. 40 or whether it is something else that might lead the nation to a greater sense of its moral responsibility?

E. TENDAYI ACHIUME

I will jump in this time first, and then, Eric, you can go after me. To just speak to your previous comments before getting into answering this question, Jeremy, I think you are absolutely right, and this is something we do not talk enough about when we are talking about reparations for slavery and also for colonialism, which is when we think about people of African descent and people in the African continent, when we think about African nation states and the ways in which they should be a part of repairing structures and transforming structures such as citizenship in ways that would be responsive to the harms of slavery and colonialism. I think there is a lot of work to be done along the lines that you are describing, and maybe that is an idea for another ASIL conference, one that would specifically center some of those dynamics, because there is amazing potential there, and as you are describing, some of it is already under way.

When it comes to questions about this administration, I will tell you what I think honestly. I think there is an opening, and this opening is one that is represented in the fact that you can have a presidential discourse around reparations. I think that there is an opportunity for the federal government in this country and for the Biden administration to really take concrete steps in the direction of moving us toward reparations in this country.

What I fear will happen, though, is that there will be some kind of tokenistic intervention that pays lip service to a move toward reparations but then misses an opportunity to go as deep as we really need to be going. That is my pessimistic read, but it is conceivable that the kind of political mobilization that made it a presidential priority to even speak to reparations might work to hold the Biden administration accountable. But I am not especially hopeful because I think too often it can

be easy to create commissions, to have interventions that pay lip service to the issue without fully going in the way that we need the administration to go in.

ERIC MILLER

I will quickly say a couple of things. One, the issue of reparations and sovereignty is a deep one, and often, the demand for reparations is a demand that goes along with sovereignty for land, for control, various things that are associated with sovereignty, and so it would be great to have a longer conversation about that. I think it is really important.

The second thing I will say, in terms of commissions, California has just set up a reparations task force, and we need to hold that accountable to do the work of not just paying lip service, but actually doing the hard work. Even if H.R. 40 does not pass, we can pressure President Biden to form a task force—he has done it to look at expanding the Supreme Court—that can do the work of H.R. 40 if he wants. The fact that the Democrats currently hold all three departments of government and may not after 2022 should not stop us. As Tendayi says, we have got to keep pushing for accountability. Now is definitely the time. The Democrats in Congress are definitely interested in pushing reparations domestically. So let's keep fighting.

JEREMY LEVITT

Wonderful. We have got about thirty seconds left. Tendayi, did you want to have any closing thoughts?

E. TENDAYI ACHIUME

My closing thought would be that the goals that we have been discussing across this entire conference are really

important ones, and interventions are not separate from the achievement of those goals. This is a thank-you to the organizers for creating this space and then also a plea that we continue to keep this space open, not just because of the moment that we are in but going forward that there will be mainstream avenues to continue to have these really important conversations.

JEREMY LEVITT

Wonderful. Thank you to the both of you. I think those who are participating have had the issues illuminated in a way that perhaps they have not been in this conference or in the past. And to the audience, thank you for joining us in this conversation about “The Legacy of Enslavement—Contemporary Dimensions and Remedies.” You will be able to purchase or review from ASIL the audio recording of this tape, and we thank you for joining us.

**CONCLUDING ADDRESS:
CONTEMPORARY INSTITUTIONALIZED RACISM AS A
BREACH OF INTERNATIONAL HUMAN RIGHTS NORMS**

CHANTAL THOMAS

Greetings, and hello again to those of you who joined us for the day's first session. I am Chantal Thomas, co-chair of the Symposium organizing committee, along with my co-chair, Natalie Reid, and I hope that you have been enjoying the day of brilliant, intense, vigorous, important conversations, and it is my great pleasure to introduce to your our keynote speaker, Professor Philippe Sands, who will deliver an address on reparations for contemporary systemic racism as the legacy for enslavement.

Professor Philippe Sands, QC is Professor of Laws and Director of the Centre on International Courts and Tribunals at University College London as well as the Samuel and Judith Pizar Visiting Professor of Law at Harvard Law School. He is also a barrister and a founding member at Matrix Chambers and the president of the English chapter of the organization PEN which works to defend and celebrate free expression. In addition to his academic work and publications, Professor Sands maintains an extensive and accomplished practice in general international law and has appeared before many international courts, including the International Court of Justice, the European Court of Justice, the World Trade organization dispute settlement system, the International Tribunal for the Law of the Sea, the International Criminal Court, and the Special Court for Sierra Leone, among others. I could say much more about Professor Sands, but I do not want to keep you any longer from this very special address. Professor Sands, thank you so much.

PHILIPPE SANDS*

Thank you, Chantal, and thank you, Judge Robinson, and thank you to the American Society and all the organizers of this really important conference, which I am happy and very privileged to be a part of.

I have been asked to address contemporary systemic racism as a legacy of historic enslavement and the extent to which it breaches international law and gives rise to a right to reparations. We all know these are complex and painful matters. They touch each and every one of us and they give rise to a personal responsibility to engage. I have been, as Chantal mentioned, very privileged to be involved in matters of international law across four decades now, but I have to say on the basis of my own observations and experience, I have come to the view that racism against Black people has been and continues to be endemic in the current international order.

I see that, for example, on the website of the International Criminal Court, all thirty cases of indictments involve Black men from Africa, a group of human beings who do not have a monopoly on international crime. I see it amongst my colleagues in legal practice. So few of my co-counsel in international litigation are Black. Across fifteen years as an arbitrator in dozens of investor-state disputes involving different countries, I have to say I say this with a deep sense of embarrassment, I have never once sat with a co-arbitrator who is Black. While I am not in a position to say with any degree of certainty how this situation has come to be, intuitively,

* Professor of the Public Understanding of Law and Director of the Centre on International Courts and Tribunals, University College London; Samuel and Judith Pizar Visiting Professor of Law, Harvard Law School; Barrister, Matrix Chambers. In preparing this lecture, I have been assisted by Ashrutha Rai, PhD candidate at the University of Cambridge, to whom I express my appreciation.

it seems to me that it cannot be entirely disconnected from the legacy of enslavement.

Let me go even further. It is really only relatively recently that I have truly started to reflect on all these matters. I grew up in a country, Britain, in which my education bypassed matters of slavery, colonialism, and race, more or less, entirely. As a schoolboy, I remained unaware of such matters. Classes at school offered a particular account of British colonialism. Preparing this lecture in our attic, I found my old school history book from 1973 and read once again the chapter which was wistfully entitled “Sunset on the Empires.” On India, for example, we were taught about Britain’s last viceroy, “a remarkable man,” the book told us, a man who compared favorably to the new leadership of Mahatma Gandhi, and I kid you not, “wizened, bony, almost monkey-like,” a leader with “cheap spectacles, a vegetarian, a pacifist.” On the end of empire, we were taught that the relationship between colonizer and colonized could be understood as being akin to the relationship of “parent and child,” one with “the parent never admitting that the child is quite grown up, the child rebelliously insisting that it is. The child usually gets its way in the end, and learns, sometimes painfully, by its own mistakes.” That is a quotation, not me speaking.

Matters did not improve markedly at university. I now realize with the benefit of hindsight. My teachers of international law were very marvelous in many ways, but they were all white men. Some had been retained to give advice to newly independent countries of Africa, somehow leaving the suggestion that this might be an aspect of our social function going forward if we entered the world of international law.

When did the scales really start to fall from my eyes? It was a gradual process, but it is only relatively recently that I think I have come fully to see the world as it really is. In 2010, I was retained to advise the government of Mauritius on litigation

to recover a part of its territory, the Chagos Archipelago, that it considered to have been unlawfully dismembered by the British government in violation of the principles of self-determination and territorial integrity.

In the course of that engagement, I learned firsthand the fate of a community known as the Chagossians, the two thousand or so inhabitants of the islands, many of whom were descendants of enslaved people brought in from Mozambique and other parts of Africa. Every single one of them was removed from their homes and their islands between 1968 and 1973, and they were transported to Mauritius, the Seychelles, or Crawley, a town on the southern outskirts of London. The matter reached the International Court of Justice a couple of years ago following a request for an advisory opinion from the General Assembly on whether the decolonization of Mauritius had been completed in accordance with international law. In preparing our arguments for the court, the oral hearings, we did think it was of the utmost importance that the judges must hear directly from the Chagossians, and so witness testimony was provided by Madame Lisby Elysé. She was twenty years old when she was forcibly removed from her home and island in the spring of 1973. She recalled in a statement to the court being told to leave at short notice, boarding a ship in the dark in terrible conditions. “We were like animals and slaves in that ship,” she told the judges of the International Court just a couple of years ago. How terrible, I am sure everyone felt that a descendant of enslaved people was describing her own treatment as though she too was enslaved.

The British government defended itself. It offered words of apology for its shameful actions but nothing more. The British arguments failed. The court determined the separation of Chagos was unlawful, that Chagos was and had always been a part of Mauritius and still is today.

In May 2019, the General Assembly adopted the opinion and ordered the United Kingdom to leave Chagos by November 2019. It recognized the right of the Chagossians to return. After the vote at the General Assembly, which Britain lost, as the *New York Times* put it, in embarrassing fashion, the British ambassador took the floor, and she dissembled. Britain remained committed to self-determination, she said, if not for Mauritius or the Chagossians, then most certainly for the inhabitants of another distant colonial possession. In her words, as she said, “No dialogue on sovereignty until the Falkland Islanders so wish.”

And, as I listened to her, I thought, what is the difference between the two thousand Falkland Islanders, the Islands of the Malvinas, entitled to the right of self-determination and the two thousand Chagossians who are not? There is no escape from the one obvious distinguishing feature of the two communities. One community is white; the other community is Black.

Having just watched the last wonderful panel in this conference, I have to say, listening to what the Biden administration is doing and what it might yet do, the Biden administration has the power to allow the Chagossians to return, and I hope each of you will take up this point—and the American Society too—and put it on its agenda. Linda Thomas-Greenfield, the Ambassador at the UN, Antony Blinken, Secretary of State, Jake Sullivan, National Security Advisor, Kamala Harris, they can all make it happen if they want to make it happen.

Over the years, I have come to know Lisby Elysé. We have become friends. Sometimes I ask her about the compensation that she was paid, the reparation for being forcibly removed, and she mentions embarrassingly small amounts. 7,590 rupees in 1978, 10,000 more in 1982, 3,000 more in 1983, 36,000 more in 1984. That is it. What is the sum in British pound sterling? £3,600, about \$5,000, the compensation for the loss of a home,

a livelihood, a life, and no compensation was ever paid to any member of her family for the enslavement of her ancestors.

But compensation was paid to those who owned her enslaved forebears when slavery was prohibited on the Islands of Chagos by the British. Sometime around 1830, about 865 pounds, 6 shillings, and 9 pence—that is about 60,000 pounds, nearly \$100,000 in today’s currency—was paid to Louis Jean Baptiste Bayeax for the loss of twenty-eight enslaved persons he owned on Diego Garcia, the largest Chagossian island. Many of you will know it today as the location of a major U.S. military base. On the same island in 1937, 46 pounds, 19 shillings, and 9 pence, about 3,000 pounds today, was paid to Adele Garraud for the liberation of a single enslaved person, and 1,584 pounds—that is over 100,000 pounds, \$150,000 today—was paid to an Ozille Majastre for the loss of fifty-two enslaved persons.

Many thousands of others were paid compensation for the loss of enslaved persons, and the benefits of those payments continue to accrue to this day. One such person is Richard Drax, a Conservative member of the Westminster Parliament for the constituency of South Dorset in England. He is a multimillionaire. He has inherited various properties, including the 250-hectare Drax Hall sugar plantation in Barbados. The CARICOM Reparations Commission has described the plantation as a killing field and a crime scene, a place where tens of thousands of enslaved African persons died in terrible conditions between 1640 and 1836. The commission has made demands for reparations, so far without success. This plantation made the Drax family’s fortune and no doubt has assisted successive generations of the Drax family to be able to represent Dorset in the British Parliament.

Curiously, Mr. Drax’s voting record does not appear to reflect a particular inclination to take account of his own past or to promote laws on equality and human rights. Just a few years ago, he voted to end the obligation of the United Kingdom

Commission for Equality and Human Rights to develop a society in which people's ability to achieve their potential is not limited by discrimination. In 1998, he voted to repeal the Human Rights Act. In the wake of the Black Lives Matter protests last year, he published an editorial in his local newspaper, the *Dorset Echo*, deploring the "wave of intolerance" that supposedly swept Britain following the "abhorrent killing of George Floyd." The need to "respect issues of discrimination," he wrote, must not "undermine our way of life."

Madame Elysé of Chagos and Mr. Drax of Dorset have rather different ways of life. She has not benefitted from any reparation in relation to her forebears' enslavement. Meanwhile, he benefits not only from the accrued wealth through slave labor but also from the substantial sum, nearly 300,000 pounds in today's values, that his family was paid as reparation for the loss of 189 enslaved persons back in 1836.

This reality reflects the lives of many others. In Britain, where I live and from where I am speaking this evening, nearly half of all Afro-Caribbean families live in poverty compared with one in five white households. Young Black men in Britain are twice as likely as other people to die from the use of force by police officers, yet as recently as March 2021, just a few weeks ago, the report of the United Kingdom government's Commission on Race and Ethnic Disparities commissioned by this Conservative government simply glossed over these disparities. The preface written by its chair asserted that the British experience—and I say this with deep embarrassment, "speaks to the slave period not only being about profit and suffering but how culturally African people transformed themselves into a re-modelled African/Britain." In a way, the history of the Drax family mirrors a larger narrative of how enslavement led to an intergenerational transmission of unjust enrichment and unjust impoverishment, one that has lasted over

two centuries and has been facilitated by consensus in some parts of society to accept inequity as a given.

Unsurprisingly, such factors have perpetuated social hierarchies along racial lines. In the United States, data from historical census records indicates that white populations in places that relied more heavily on slave labor experience better social and economic outcomes than white populations in places that relied less on slave labor. Another study combining census data with sociological surveys reports that whites who live in counties which had high concentrations of slaves in 1860 tend to be more conservative and express colder feelings toward African Americans than whites who live elsewhere in the American South still today. It may be reasonable to conclude that dismantling the legal apparatus of slavery has not eliminated the racial attitudes that accompany, justify, and solidify what one academic has called the “unjust, deeply institutionalized, ongoing, intergenerational reproduction of whites’ wealth, power, and privilege.” As many of you will know, these matters are addressed in the literature, books like *The New Jim Crow*, Michelle Alexander’s remarkable work on racial discrimination’s impact on mass incarceration.

With increasing recognition of the extent to which such systemic racism is rooted in historic enslavement, calls for redress understandably grow louder. There have been attempts at reparation, whether monetary or symbolic, in many countries over the years but with only limited success. In 1865 during the American Civil War, a wartime order indicated that all freed slaves would be compensated with forty acres and a mule, but that was later reversed. The idea of reparations was raised at the 2001 UN World Conference Against Racism in Durban, but it was left out of the final declaration. That merely noted that: “The transatlantic slave trade [...was] among the major sources and manifestations of racism, racial discrimination,” but no remedy was broached. Mauritius itself constituted a

Truth and Justice Commission in 2009 to “make an assessment of the consequences of slavery and indentured labor during the colonial period up to the present.” That government’s commission recommended the government seek funding from historical slave-trading nations, such as the United Kingdom and France for the rehabilitation and reconstruction of communities and settlements where slave descendants are in the majority, but those recommendations are yet to be acted upon.

Historic injustices on this scale across continents, affecting hundreds of millions of human beings are too complex to be dealt with by the institutions of any single country. The UN Special Rapporteur on Contemporary Forms of Racism, Professor Tendayi Achiume—and what a pleasure it has been to just listen to you just now, Professor—observed in her 2019 report that slavery and colonialism were global projects and reparations for both require global intervention, but UN member states should create a platform devoted to the serious consideration of reparations.

Such an international platform would serve the useful function of offering historic record, clarifying what happened and what had been the consequences, and it could also reach factual and then legal conclusions as to how those consequences might best be addressed. A global truth and reconciliation commission could be one way to address this need. Such commissions are grounded in law but, unlike adjudicatory bodies, may walk the intersecting lines of law, justice, and reconciliation.

Another alternative mechanism could be an international fact-finding mission like the recent UN investigative mechanism in Myanmar, which could offer assistance to bodies like the International Court of Justice or the Permanent Court of Arbitration. I am counsel for The Gambia in the case against Myanmar involving the mistreatment of the Rohingya, and but

for the reports of the UN investigative mechanism, it would have been much more difficult to mount a case.

Whatever path is taken, it seems to me that three factors at least are going to have to be addressed. I suppose I am speaking here in part as an international litigator. First, it will be necessary to establish a causal link between historic enslavement and contemporary racism. Second, it will be necessary to tie such a causal connection to a violation of international law, giving rise to an obligation to make reparation, irrespective of whether the original act, enslavement, was internationally unlawful when it occurred. And third, to the extent that a legal obligation arises, it will be necessary to determine to whom, from whom, and in what manner reparations might be paid.

Some will say that existing international legal principles are inadequate to deal with the challenges; the law is insufficiently decolonized, imaginative, or robust. I disagree. The law does offer a route. The question is more one of a political will, and it is to these points that I now turn.

So let us begin with the question, the key question of causality. Is there a link between historic enslavement and contemporary racism? The Committee on the Elimination of Racial Discrimination, which oversees the implementation of the 1965 convention, considers that there is. Its General Recommendation 34 noted that racism and structural discrimination against people of African descent rooted in the infamous regime of slavery are evident in the situations of inequality affecting them. The committee's conclusion is consistent with the view of the Working Group of Experts on people of African descent, which has made annual visits to many multiracial countries that were involved in enslavement or the transatlantic slave trade. In the report from its most recent country visit, for example, to Peru, the working group has noted the significant decline in the socioeconomic status

of Afro-Peruvians, despite broader economic developments in that country. Such conclusions indicate a connection between historic enslavement and contemporary racism.

Let us reflect on various aspects of that connection. How does one begin to identify the indicia of causality? Let us start with money and wealth. One noticeable disparity between the descendants of the enslaved and those of slave owners is, of course, in relation to wealth. The Drax family's current wealth is constructed on the foundations of the unpaid and later on underpaid labor of persons of African descent. The intergenerational wealth benefits to white communities can also be indirect. In the United States, demographic productions indicate that millions of white Americans are descendants of those whites who received millions of acres of public lands allocated by the government during the era of slavery. Even after the abolition of slavery, extensive racial exclusion and violence directed to African Americans meant almost all who gained access to the wealth-generating resource which is land, were white. Numerous studies suggest that nearly fifty million white Americans may be descendants of families who benefitted in this way. Relatedly, racially restrictive covenants of the early twentieth century barred the sale of property to African Americans. This, coupled with predatory lending practices and redlining, effectively denied property ownership to Black communities.

There are other ways too in which white communities limited the ability of Black communities to retain property and pass it on to future generations. Just a few weeks ago, I listened to a remarkable episode of "Unfinished: Deep South," a very affecting podcast, I have to say, that tells the story of Isadore Banks, a wealthy African American famer who was lynched in 1954. Mr. Banks had owned more than a thousand acres of land along the Arkansas Delta until his rights disappeared immediately in the period following his

death. Similarly, this evidence is in other countries such as Brazil and Peru. The inability to obtain official titles to land has resulted in generational losses of property owned by Black communities. Far from being ameliorated, there is ample academic research to suggest that these and other historic financial disadvantages have been entrenched and deepened by current economy policies. As one writer has put it, in relation to matters monetary, the real legacy of slavery is not Black deficits but white racism.

I turn to slavery and health. Access to health care is another indicator of racial disparities. Access to preventative health care has long been shown to be linked to social class, leading to high morbidity rates among Black populations. Even independent of income, race can have a devastating impact on the quality of diagnosis and treatment. Studies show that a slavery-era stereotype of Black people's supposed higher pain threshold is associated with undertreatment for pain, and this may be one of the causes of higher Black maternal mortality rates in the United States. Incredibly, as recently as 2016, a study by the U.S. National Academy of Sciences reported that 29 percent of white first-year American medical students thought that Black people's blood coagulates more quickly than white people, and 21 percent believed that Black people have stronger immune systems. The Academy found a link between such misperceptions and inadequate preventive care and inferior treatment.

And, of course, not surprisingly, in these difficult times, the current COVID-19 crisis appears to have had a disproportionately negative impact on Black communities. In its 2020 report, the UN Working Group of Experts notes that measures have not been taken to counteract the foreseeable risk to persons of African descent despite existing inequalities in health.

At this point, the data remains limited, but where available, it is deeply troubling. In the United States, African Americans have experienced triple the rate of infection and nearly five times the rate of hospitalization and twice the rate of death compared with white Americans. In the United Kingdom, people of African descent were at least four times more likely to die of COVID-19 than white people. In both countries, triaging and do-not-resuscitate orders are said to have been inappropriately used in the case of people of African descent.

I turn to slavery and trauma. In addition to physical health, there is growing evidence as to the psychological and mental health impacts of living through racism. Intergenerational trauma is a subject I am keenly interested in. I opened my book *East West Street* with a quote from two Hungarian psychoanalysts, Maria Torok and Nicolas Abraham. “What haunts,” they wrote, “are not the dead but the gaps left within us by the secrets of others,” and I think these words are equally pertinent for the subject of this important conference. Psychological studies have confirmed that experiencing or witnessing racial discrimination or violence causes trauma and anxiety disorders. Recent research is showing that such trauma can also affect descendants of those who experienced the event firsthand at a psychobiological level. Domestic violence victims, Holocaust survivors, and descendants of the enslaved are groups in which transgenerational effects are beginning to be understood. Epigenetics, the study of how behavior and environment can cause changes that affect the way our genes work is also a growing field, and there is scientific evidence to suggest that poor conditions and stress, especially prenatal stress endured by enslaved people, may have had an impact on their bodies and those of their children, inherited in turn by their descendants today. To avoid engagement with the consequences of trauma is to risk generations of Black

people paying the physical and mental health price for the ill treatment of their forbears.

I turn to slavery and justice. In recent years, much attention has been given to the evidence that Black people face significantly harsher outcomes in the criminal justice system of most multiracial countries. This is described, as I have already mentioned, in Alexander's *The New Jim Crow*. Despite a justice system that is supposed to be colorblind, African Americans disproportionately find themselves in prison and later as ex-offenders with restricted access to social welfare and even the right to vote. In Alexander's words, mass incarceration in the United States acts as a "comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow." Slavery-era stereotypes of criminality and aggression often lurk behind profiling and custodial violence suffered by Black individuals at the hands of law enforcement—one need only think of George Floyd—and inform heightened degrees of guilt and harsher sentences. The situation recalls the state-sponsored violence and unfair judicial practices that controlled enslaved populations and in due course victimized Black communities after enslavement's formal end. The legacy of slavery appears also to have influenced education. As in the case of my own schooling, it is plain that the educational curriculum in many modern multiracial nations fails adequately to address these countries' role in colonization, enslavement, and the slave trade or the impacts on persons of African descent. Equally, textbooks fail to mention Black achievements and contribution to the modern nation. This is, in some cases, made worse by the perpetuation of certain racial stereotypes. In some countries, schools still recapitulate colonial propaganda such as, for instance, the suggestion in Belgian school textbooks that: "Economic development came to Africa as a result of colonialization." Such discourse undoubtedly plays a part in encouraging notions of white superiority.

The UN Working Group of Experts on People of African descent has noted that explicit racial discrimination and the use of colonial-era slurs continue to traumatize young Black students at schools, with serious implications on learning. Stereotypes about Black students' scholastic ability leads to discriminatory assessments and poor-quality career and higher education guidance. The Working Group notes that their consequent underperformance in tests is not scrutinized in the same way as if a test eliminated most or all White students from consideration.

By way of conclusion, this brief review underscores some of the myriad ways in which a truth and reconciliation commission or process or maybe a judicial body could assess the legacies of slavery as a matter of fact finding, as reflected in the systemic racism of contemporary institutions. Establishing this causal link is a necessary prerequisite to allowing inquiry to progress to the next question, and that is, to what extent it's arguable that contemporary racism rooted in historic enslavement might be said to give rise to a violation of international law.

The prohibition of racial discrimination is deeply etched into international law today. Article 1(3) of the UN Charter calls for respect for human rights and fundamental freedoms for all, without distinction as to race. Articles 4 and 7 of the Universal Declaration of Human Rights reinforce the prohibition of slavery and discrimination. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) affirm that human rights obligations must be undertaken without discrimination on the basis of race, and of course, we have the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD).

Arguably, the conditions of life created and perpetuated by systemic racism would violate other human rights.

Disproportionate rates of detention and custodial injury of Black people and countless instances of excessive force used by law enforcement may be said to violate the right to life and prohibitions on torture or arbitrary detention as well as the right to equality before courts, all rights guaranteed by the ICCPR and, in my view, by general international law.

Systemic racism has resulted in deep-rooted social inequalities that violate other rights, including the right to work, adequate standards of living, physical and mental health, and education, all guaranteed by the ICESCR. Two centuries nearly have passed since the abolition of slavery, yet there remains a persistent gap in the degree to which these social and economic rights have been realized for so many of African descent.

But in trying to bring contemporary racism within the scope of international law, we have to recognize that certain challenges exist. To ensure commensurate reparations for the gravity and scale of these offenses it is necessary to see them in their transgenerational context, as the legacy of historic enslavement. The intertemporality of such a claim to reparation does give rise to challenges. Can today's consequences of historic acts in relation to enslavement engage a liability for reparation, irrespective of whether the original act was unlawful at the time of its occurrence? The conventional view holds that the international consensus against slavery emerged only in the nineteenth century, leading to a rule of customary law by about 1885. In the twentieth century, the prohibitions come to be recognized as *jus cogens*, and thus, for a large part of the period during which transatlantic slavery took place, it was not explicitly unlawful at national or international levels, and judges faced with the issue will have to address the later consequences of enslavement in the form of systemic racism and whether or not it can be considered to violate international law.

A number of considerations may be pertinent. There continues to be discussion as to whether the norm against

slavery might have emerged in international law even before its formal establishment in all countries. One view posits that although not yet a rule of custom, transatlantic slavery violated general principles of international law as derived from the vast majority of national, regional, and communitarian legal systems of the period, but that view is not widely shared. Nevertheless, I do not believe that international law entirely discounts the possibility of legal accountability for the illegal consequences today of long-ago acts that may have been lawful.

A truth commission or court facing the issue of reparations may view enslavement and consequent systemic racism as a continuing violation of international law. The key fact to distinguishing this claim for reparations is that neither the wrongful act itself nor its harmful consequences are discrete events that occurred or were completed at some moment in the past. If contemporary racism is, indeed, a direct legacy of enslavement, the wrong itself may be said to continue long beyond the date of its formal abolition. If its impact on the lives of Black people is, indeed, reinforced with every passing generation, it appears that the consequences continue to be felt to this day.

Article 14 of the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts is recognized by the General Assembly to be reflective of custom and states that "[t]he breach of an international obligation requiring a state to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues, and remains not in conformity with that obligation." An example of such continuing wrong is stated as being the "maintenance in effect of legislation incompatible with a State's international obligations." While these ILC articles do not directly address the implication of when the event commences prior to the

coming to force of the rule against it, national and international courts have considered the matter.

In 1999, for example, in the case of Senator Pinochet, I was involved in proceedings before the English courts premised on the continuing consequences of acts originally occurring before they had been internationally criminalized or in respect of which the court's jurisdiction only arose at a much later date, such as disappearance as an act of torture.

The Special Court for Sierra Leone prosecuted crimes of forced marriage, despite the incidents having initially occurred prior to the time period covered by the court's statute as they were continuing crimes, ongoing during the indictment period. That court similarly prosecuted the recruitment and training of child soldiers that had commenced in 1991, even though it considered this prohibition to have definitively crystallized into an international crime only by 1996 due to the fact that the crimes had continued into the relevant and current period.

The Extraordinary Chambers in the Courts of Cambodia too, in prosecuting a joint criminal enterprise considered certain acts of planning and devising that occurred prior to the beginning of its jurisdiction since it concluded it will be unnatural to break up such a protracted and complex transaction as it is only intelligible if all of its component are considered together, and of course, having written *East West Street*, I often think about Hans Frank who was Adolf Hitler's personal lawyer from 1928 to 1933 as he sat in the dark seventy-five years ago and was presented with his indictment for crimes against humanity and genocide in relation to acts in which he was involved between 1933 and 1945. Those two crimes were only invented in 1945.

In a similar vein, an adjudicating body could address systemic racism rooted in enslavement, irrespective of having originated prior to formal legal prohibitions against enslavement, in my view.

Moreover, I think there may exist a moral imperative compelling states to agree upon the retroactive application of contemporary international law to cover the present-day consequences of an act such as this, which irrespective of its legality at the time shocks the conscience today. That is the Nuremberg principle.

In international law, the rule against retroactivity cannot be said to have been applied with absolute consistency in the face of acts considered to be of serious scale and gravity. Nuremberg and the tribunals for the ex-Yugoslavia and Rwanda were all created after the fact and prosecuted mass atrocities on the basis of statutes codified after the occurrence of these crimes.

Slavery has been perceived as a crime of similar gravity, at least from the twentieth century onward. In 1933, for instance, Raphael Lemkin, a remarkable Polish lawyer who coined the term “genocide,” sought to establish its gravity by likening it to slavery as an offense universally punishable due to humane principles, and of course, more recently, slavery has been characterized as a crime against humanity.

The emphasis in adjudicating such crimes has been as much upon a doctrinal basis in law as upon a growing moral consensus against the acts that occurred and possibly also their continuing effects. As Henry Stimson, the then-U.S. Secretary of War, put it, the Nuremberg Tribunals coming into being “was not a trick of the law. ... It was the massed, angered forces of common humanity.”

The 1975 resolution of the Institut de Droit International on intertemporality confirmed that states have the power to determine by common consent the temporal sphere of application of norms. If there is a political will to mobilize the law to address the transgenerational consequences of enslavement in the form of contemporary systemic racism, there should also be a way to do it.

Even if a court or truth commission were to find the intertemporal issue difficult to surmount, there is always, of course, the doctrine of unjust enrichment, *Mr. Drax*, which exists in many domestic legal systems and is considered by some to be a general principle of international law. This too can offer another avenue. The principle applies where conduct may not be internationally wrongful as such but, nevertheless, leads to one entity being enriched at another's expense in a way that the law regards as unjust. Restoring a part of the continuing unjust gains of the beneficiaries of slavery and systemic racism as quantified by reference, for example, to contemporary racial wage gaps or historical profits may restore some disadvantages, even if more comprehensive moral reparations remain lacking. This is, however, an incomplete solution, and there is the danger, as some have noted, that it would reduce the grossest of human rights violations to an outstanding bill for services. For this reason, perhaps, the approach ought only to be entertained in conjunction with the other approaches to the resolution of historic and continuing injustices.

I turn to the third part of my analysis. If a truth commission or court were to find that a breach of international law had occurred, it would have to address this third element, namely the nature of reparations owed. Under customary international law, it is long established that where an illegal act occurs, a right to reparations follows. In 1928, the Permanent Court of International Justice made clear that reparations must as far as possible wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.

The codification of the law of state responsibility adopts this approach, allowing reparation to encompass restitution, compensation, and satisfaction in the form of an acknowledgement of the breach, an expression of regret, a formal apology. To this, the UN Basic Principles and Guidelines

on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law adds as a best practice some form of rehabilitation.

Insofar as restitution is concerned, the long-running and continuing nature of the harms makes it difficult to envisage the situation that would have existed but for the practice of enslavement and consequent systemic racism. The first step may involve institutional reform within multiracial nations to account for the needs of African-descent populations, with specific attention to issues like social welfare and reform of laws to make them fit for purpose by undoing the legacies of historical racial discrimination. In Britain, in the discussions of Windrush, this is a very real issue right now, and it may also be necessary for the states to actively counteract racial stereotyping and ensure that public discourse regarding the history of enslavement and colonization is more complete and accurate. Allocating funds for research, bias training and awareness programs, could go some way toward achieving these ends.

I have read with interest the CARICOM Ten-Point Plan for Reparatory Justice, which sets out a number of ideas for the steps that former slave trading nations may be required to take. It calls for European governments whose nations were responsible for enslavement and a further one hundred years of racial apartheid to invest in health, education, technology, and cultural institutions of the Caribbean countries to which they forcibly transported the enslaved.

In addition, states may find themselves in the position of having to pay compensation to their African-descent populations for the extent of injuries that restitution cannot repair. This could be proportionate to the current wage gap between white and Black populations, a gap that was estimated at \$154,000 per year between median Black and white families in the United States in 2016, and it may also be necessary to compensate black people for the costs attached to being the

targets of racial oppression, including the dramatic loss of time and energy from having to cope with discrimination, damage to health, and harm to families and communities over the course of generations.

Institutional reform and monetary compensation can never fully account for the lived experience of racism and disadvantage. States will also surely be called upon to consider principles of rehabilitation for the descendants of enslaved communities; for instance, the provision of medical and psychological care as well as legal and social services to help combat the extensive mental health impacts of racial discrimination.

And, finally, it will surely be necessary to offer some formal manner of recognition or apology for the continuing scourge of contemporary racism and the fact of its being linked to historic enslavement.

Now I will turn to some brief conclusions. The path to reparations is long, and it undulates. Most countries have done little to engage with their own historic wrongs or their continuing effects in our times. External prompting is needed, including by international efforts, to place a spotlight on past wrongdoings. I think in this way international law can and does have an important role to play. This is particularly the case in my own country, Britain, as its colonial past continues to haunt with greater focus placed on the country's role in the abolition of slavery than in its application over centuries. The toppling last year in June of a statue of Edward Colston – merchant, philanthropist, Tory parliamentarian, owner of the enslaved – and its dumping into the harbor of the city of Bristol is seen by many as marking a possible turning point.

But, of course, the event has given rise to a backlash, including in the recent report on racism commissioned by the British government and published in March 2021, which I mentioned at the beginning. The report seeks to

highlight the immigrant optimism, as it puts it, of some new African communities in contrast to their Caribbean peers who are said to sit in the same classrooms, offering proof, it is said, that it is “difficult to blame racism in education for the latter’s underachievement.”

For the writers of this report, it is anathema to suggest that modern racism is somehow connected to the legacy of enslavement. Instead, this recent report opts to focus on geography, family influence, socioeconomic background, culture, and religion as having more significant impacts on life chances than the existence of racism, and it might be said anything but a reference to enslavement.

This stands in stock contrast to data from international bodies and the lived experiences of generations of Black people. In relation to the subject I am addressing, it is striking that slavery gets just one mention in the report, and that is only in the preface. That is the terrible line by Dr. Tony Sewell that I mentioned at the beginning. His line has drawn in recent weeks, since it was published, extensive critical comment, and it has unleashed in Britain a backlash against the backlash, forcing Dr. Sewell to offer a clarification, a footnote in which he explains that his intention was simply to indicate that in the face of the inhumanity of slavery, African people preserved their humanity and culture.

But the report is totally silent on slavery’s impact on life today, and that silence, as I read it, caused me to reflect once more on the life of my friend, Lisby Elysé and her fellow Chagossians. As they wait to return to their homes on the Chagos Archipelago, a matter of when rather than if, in my view, as the British government refuses to recognize decisions by international courts and the UN, they may not be immediately aware of these distant tales of past wrong. They have, after all, more recent and continuing injustices to contend with.

Seen in a broader perspective, however, their treatment informed by the gross mistreatment of their forebears is surely inseparable from the long chain of events that led up to it. That is my clear view. Ancestors were forcibly transported to Chagos as slaves. None received reparation for their enslavement, even as their white slave owners were compensated for the loss of their properties. The symmetry is a bleak one, a Chagossian community that was forcibly removed from homes followed by the payment of meager compensation as their lands were repurposed for Western defense purposes, and yet, as ever more thought is given to the subject of this conference, which seems to me so very timely, new possibilities do emerge with international law potentially playing a pivotal role.

Ten years ago, when I first started to work on the Chagos case, I remember a meeting at the U.S. Department of State when I was told by decent folk that the legal arguments that I and Mauritius were hoping to make were hopeless. It turned out that they were not hopeless. They were right, and they succeeded with the judges of the International Court, including Judge Robinson. Nor are they hopeless in relation to the identification of a causal link between the conditions of today and the crimes of the past or the capacity of international law to find a means to build a bridge between the two and to offer a new, a more just path forward. I don't think international law is hopeless. We just have to keep plowing on.

I finish by thanking my young colleague, Ashrutha Rai, for her fantastic assistance to me in writing this paper and to thank you all for your very kind attention. It is late on a Friday night in London, although I know it is only midafternoon in Jamaica, and, boy, do I wish I was with you in Jamaica. Thank you so much for listening.

CHANTAL THOMAS

Thank you so much, Professor Sands, for that thought-provoking address. It is truly wonderful, and thank you so much. We will hear concluding remarks and final observations from Judge Patrick Robinson. Thank you again for that address, and thank all of you as well for being here with us.

**THE ASCERTAINMENT OF A RULE
OF INTERNATIONAL LAW CONDEMNING
TRANSATLANTIC CHATTEL SLAVERY: FINAL
OBSERVATIONS AND CONCLUDING REMARKS**

REMARKS BY NATALIE REID

Greetings once again to everyone joining us for the final session in our two-day Symposium on the “Reparations Under International Law for the Enslavement of African Persons in the Americas and the Caribbean.” It is my great pleasure to introduce once again Judge Patrick Robinson, an extremely distinguished international jurist by any measure. He is a pioneer, a model, and a mentor for generations of international lawyers from the Caribbean, like me, and lawyers of African descent around the world.

Judge Robinson is currently serving his second consecutive term as Honorary President of the American Society of International Law. It is in this capacity that he has conceived of and convened and driven the Symposium, drawing together scholars and practitioners from practically every continent to join in these two days of analysis, debate, and discussion. It is, therefore, only fitting that our final presenter will be Judge Robinson himself. First, we will hear Judge Robinson’s substantive presentation entitled “The Ascertainment of a Rule of International Law Condemning Transatlantic Chattel Slavery” in which he will set out his reaction to the statement in *Oppenheim’s International Law* that at the beginning of the nineteenth century, customary international law did not condemn slavery and the slave trade. In his view, on the contrary, there was in fact a rule of international law condemning transatlantic chattel slavery throughout the entire period preceding and into the nineteenth century. Judge Robinson will then close the Symposium with final remarks.

With pleasure and recognition of the privilege of having played a role in organizing this Symposium that, as ASIL President Catherine Amirfar said at the outset, has been the brainchild of Judge Robinson. I pass the microphone to you, Judge Robinson, and give you the floor.

REMARKS BY JUDGE PATRICK ROBINSON

Thank you very much, Natalie. Ladies and gentlemen, the well-known eighth and ninth editions of *Oppenheim's International Law*, Volume 1, addressed the question whether customary international law condemned slavery. The ninth edition corrects the omission in the eighth of a reference to the historical period to which its conclusion relates, and this is what the eighth edition said: "It was difficult to say that customary international law condemned the institution of slavery and the traffic in slaves." The time dimension is of the greatest importance in an analysis of the wrongfulness of transatlantic chattel slavery. Notwithstanding the correction, *Oppenheim's* analysis in the ninth edition is cursory and lacking in depth.

The ninth edition simply states: "At the beginning of the nineteenth century, customary international law did not condemn the institution of slavery and the traffic in slave." It arrives at this conclusion without carrying out any examination of state practice prior to the beginning of the nineteenth century. Such an examination is necessary if one is to determine whether customary international law condemned slavery, whether at the beginning of the nineteenth century or indeed at any other time.

Ladies and gentlemen, the first task in examining whether customary international law condemned slavery at the beginning of the nineteenth century is to isolate precisely the subject matter of the inquiry. The concern is not with slavery, *simpliciter*, but rather, with transatlantic chattel

slavery. It is the chattelization of West Africans through transatlantic slavery that is the subject matter of the inquiry. The failure to distinguish transatlantic chattel slavery from other forms of slavery undermines the conclusion arrived at by the ninth edition.

The incidents of transatlantic chattel slavery, which stripped West Africans of their personhood, were as unknown to West Africa as they were to England. Indeed, it is very likely that they did not exist in Europe. There were many forms of servile labor in Europe and in West Africa, but they did not rise to the level of transatlantic chattel slavery, which was different not only in degree but in kind. In the early days of chattel slavery and even before that time, there existed the practice that a person captured in battle became a slave of the victor, and for this, you can see the submission of the lawyer, Mr. Wallace, in the *Somerset* judgement that I will refer to later. He said, "The right of a conqueror was absolute in England and in Africa." That kind of slavery was totally different from transatlantic chattel slavery. Although the view has been expressed that the Ottoman Empire had a system of chattel slavery, state slaves often occupied positions of great eminence. Thus, the Turkish Sultan, Suleiman the Magnificent, the legislator, made Ibrahim Pasha, who had been captured and was a state slave, the Grand Vizier, rather like a prime minister, of the Ottoman Empire after he had converted from Christianity to Islam. Other slaves in the Ottoman Empire worked in several areas of national life, such as trade and agriculture, and were treated more like serfs. And as Dr. Nora Wittmann has stated in her Paper, servile labor in Africa was also akin to serfdom in Europe.

I cannot resist telling you this little story from Nora's paper, which illustrates the difference between African slave society and transatlantic chattel slavery. A master requested the Banamba in Mali to provide him with millet. The eldest spokesman of the Banamba slaves told the master that the

millet belonged to them, saying, "We will not sell it today. We have given you the part that belongs to you because you are our master, but you shall not get more until the next harvest." Ladies and gentlemen, I cannot imagine any enslaved person in the Americas or the Caribbean daring to address a slave owner in that way.

The ninth edition would have to be clear as to what constituted the international wrong of transatlantic chattel slavery. The essential feature of a chattel is that it is movable property in contradistinction to land or other forms of real property. The movability of West Africans was very evident in the process of their chattelization that had six phases. They were transported or moved from West Africa against their will to the Americas and the Caribbean, a distance of some five thousand miles. It is their treatment as property or things that explains why they could be moved about so readily and over such long distances. The chattelization of West Africans through enslavement commenced in West Africa on their capture and sale, followed by their forced trek to and detention in slave castles, their transportation packed like sardines in the hulls of ships for a voyage of thousands of miles to the Americas, their sale as slaves there, and finally, their unpaid labor on plantations for years. It may have been a blessing in disguise that the average life of a West African after being sent to work on the plantations was no more than seven years. Ladies and gentlemen, every phase of transatlantic chattel slavery was wrongful conduct. It was not the sale of West Africans in the Americas and the Caribbean that made them chattel slaves. They were chattelized into enslavement upon their capture and sale in West Africa and continued to be chattelized through every phase leading to their brutal treatment on the plantations in the Americas and the Caribbean. Additionally, chattelization was supported by the trade in slaves.

Had the ninth edition examined state practice, it would have found material on the basis of which it could conclude that chattel slavery was not permitted in England and quite likely also in France and other European countries. Permit me a comment, ladies and gentlemen, on the famous *Somerset* case decided in 1772 in Britain. Mr. Somerset was enslaved in Virginia to Mr. Stewart. Mr. Stewart took him to England. He escaped. Mr. Somerset was recaptured, and Mr. Stewart had him detained on a ship to be transported to Jamaica to be sold as a slave. With the help of Mr. Granville Sharp and other abolitionists, an application for a writ of *habeas corpus* was filed on behalf of Mr. Somerset. Although it is generally accepted that Chief Justice Mansfield's decision in the *Somerset* case is difficult to understand, it is at least clear on one matter. The kind of dominion that Mr. Somerset's master sought to exercise over him by detaining him on a ship to be transported to Jamaica for sale as a slave was not permitted in England.

Chief Justice Mansfield's decision must, of course, be confined to the two relatively narrow issues that he faced. Did Mr. Stewart have the right to detain Mr. Somerset on the ship, and secondly, did he have the right to have him forcibly transported to Jamaica to be sold as a slave? The Chief Justice's decision that he did not have that right did not abolish slavery in the British Empire, and although Mr. Somerset was discharged from detention on the basis of the writ of *habeas corpus*, he remained in the service of Mr. Stewart. But notwithstanding the limited scope of the decision, it is clear from the Chief Justice's reasoning that he was addressing the kind of dominion of a master over slave that only comes with transatlantic chattel slavery. The Chief Justice acknowledged that a contract for the sale of a slave was recognized under English law, but he held that such a contract was not the issue in the case. Rather, he reasoned that the person of the slave himself is immediately the object of inquiry, and that made a material difference.

Mr. Stewart, he said, advances “no claim on contracts; he rests his whole demand on a right to the negro as slave.” The Chief Justice paid particular attention to the return on the writ which included the statement that the laws of Jamaica and Virginia authorized the sale of slaves on the basis that they were chattels. So that for the chief justice, the only question was whether the cause on the return was sufficient, whether it provided a sufficient basis in English law for the action taken by Mr. Stewart. So, in light of the foregoing, it is beyond doubt that when the Chief Justice held that the detention of Mr. Somerset for the purpose of transporting him to Jamaica for sale as a slave constituted an act of dominion not recognized in England, he was talking about the features of transatlantic chattel slavery, and in my view, Somerset’s case is also good law for the distinction between slavish servitude that was permitted on English soil by English law and transatlantic chattel slavery that was not permitted.

That the wrongfulness of chattel slavery is determined by the law of the place where enslavement occurred finds support in the Chief Justice’s holding that “so high an act of dominion must be recognized by the law of the country where it is used.” Had the ninth edition examined state practice in West Africa, it would have found that there was no such law in that region. To borrow the well-known mantra from the earlier English case of *Cartwright* in which Mr. Cartwright scourged his Russian slave, it may be asserted that just as the English air was too pure for slaves to breathe, so was the West African air in relation to transatlantic chattel slavery. In other words, the West African air was as intolerant of transatlantic chattel slavery as the English air.

It is agreed by scholars that *Somerset*’s case was an early conflict of laws case. Thus, the court was principally concerned with a choice between the law that England applied to Virginia or to Jamaica as colonies and the law that it applied in the

metropole, and admittedly, it was not a public international law case. But one cannot help but notice the total absence in the case of any reference to the place where the transaction leading to Mr. Somerset's enslavement took place; that is, West Africa.

Ladies and gentlemen, given that England, and more than likely other European states, did not permit chattel slavery on their soil, the ninth edition should have examined state practice not only in Africa but also in other parts of the world, such as Asia where transatlantic chattel slavery was also unknown and determine whether it was permitted. European practice alone cannot provide a basis for the conclusion that transatlantic chattel slavery was not permitted by customary international law at the beginning of the nineteenth century. A determination as to whether transatlantic chattel slavery was wrongful under customary international law at the time it was carried out is, therefore, flawed if it is confined to an examination of European practice.

The ninth edition would also have to consider what constitutes evidence of the absence of a law permitting chattel slavery in West Africa. The report of *Somerset's* case shows that the lawyers devoted a lot of attention to the question whether trover, that is, an action to recover property taken from its owner, would lie for taking a "Negro slave." Now, one cannot be certain whether there was in West Africa a law, custom, or practice that would be equivalent to trover, but of course, the absence of such a law or custom prohibiting transatlantic chattel slavery in West Africa does not mean that West African law permitted chattel slavery. In the same way that Chief Justice Mansfield established that there was no law in England permitting the kind of dominion through transatlantic chattel slavery that Mr. Stewart sought to exercise over Mr. Somerset, it can equally be established that there was no law in West Africa permitting the kind of dominion exercised by Europeans over West Africans through transatlantic chattel slavery, and if

it is contended that there should be some evidence that in West Africa those persons involved in the transatlantic slave trade were punished, it should be noted that an international wrong may or may not be a crime. The essence of the wrong is the breach of an international obligation owed to a claimant state.

Now, the need to take into account practice other than that of European states in considering the wrongfulness of transatlantic chattel slavery is addressed by Dr. Erpelding in his paper. Noting that African countries did take measures to stop or restrict the slave trade, he argues that such African negative attitudes toward transatlantic chattel slavery might cast doubt on the legality of mass deportations resulting in the depopulation of whole regions. He concludes that a broader examination of state practice might show that European regional practice was at variance with the universal law of nations. He believes that this question requires further analysis.

Ladies and gentlemen, in West Africa, there was strong antipathy and resistance to transatlantic chattel slavery. Yes, there was complicity by West Africans, but the resistance in West Africa to the practice of transatlantic chattel slavery contradicted the argument about complicity. The phenomenon of resistance has a special significance. Europeans and others argue that West Africans were complicit in transatlantic chattel slavery, apparently, to suggest that that complicity wiped out any international wrong that was committed by that practice, but as a matter of fact, the resistance, the very opposite of complicity, was intense and unrelenting. The Oba, the king of Benin, 1504 to 1550, actively opposed the capture and enslavement of his people and seized slave ships. One may also refer to the letter of King Alfonso of the Kongo in 1526 to his Portuguese counterpart stating that "It is our will that in the kingdoms of Kongo, there should not be any trade in slaves nor market for slaves." This resistance to transatlantic chattel slavery became even more pronounced in the reign of

King Alvaro of the Kongo, 1567 to 1587. He sent his officials to Lisbon in 1568 to conduct an inquest into illegal Portuguese trading in the ports, and we also can refer to Queen Nzinga of Angola, 1583 to 1663. During her reign of thirty-seven years, she became famous for fighting Portuguese enslavement of her people. A statue now stands in her honor in her country. In 1720, the king of Guinea obstructed European traders and killed the middlemen who were captured. Evidence can be provided not only of resistance in West Africa, but also in the Middle Passage in which there were numerous revolts, as well as in the Americas and the Caribbean. There were more slave revolts in Jamaica than in any other British colony, including the thirteen in what is now the United States of America, and as we know, resistance in Haiti was so strong that in 1804, the French colonial government was overthrown, and Haiti became the first Black republic.

And as Nora Wittman has pointed out in her article, from the early sixteenth century on, an African militia patrolled the Gulf of Guinea and attacked European slave vessels. She states that there was also resistance by various chiefs and kings, and that up to the mid-eighteenth century, not a single year passed without groups of Africans, in permanent rebellion, attacking some slave vessel.

Now, ladies and gentlemen, it is appropriate to cite resistance in countries outside Africa because transatlantic chattel slavery, as I stated, had several stages, including the Middle Passage and forced and free labor in the Americas and the Caribbean. Quite apart from the evidence showing resistance from contemporaneous African rulers opposed to transatlantic chattel slavery, resistance from individual West Africans, whether inside or outside Africa, serves to inform understandings of the practice of the states involved. In sum, the resistance of African rulers and their West African people may be seen as a West African resistance to transatlantic

chattel slavery, sufficient not only to rebut the argument about African collaboration, but also to show that this kind of slavery was not permitted in the region. We have already seen that the practice in the Ottoman Empire, described by some as chattel slavery, bears absolutely no comparison with transatlantic chattel slavery, and so it is safe to assert that the incidents of transatlantic chattel slavery were not only unknown outside the countries of Western Europe and their colonies, but also that they would not have been permitted. It is therefore reasonable to conclude that customary international law did not condone transatlantic chattel slavery, and this conclusion is buttressed by the acknowledgment of the signatories of the 1815 Vienna Declaration “that the commerce known by the name of ‘slave trade,’ has been considered by just and enlightened men of all ages, as repugnant to the principles of humanity and universal morality.”

Ladies and gentlemen, there was in my view, running throughout the entire period of transatlantic chattel slavery, a strong undercurrent of a normative principle calling for respect of the inherent dignity and worth of the human person. Seven years after the Vienna Declaration, Justice Story, in a case before him in the United States’ Circuit Court for the District of Massachusetts said, “The slave trade was founded in violation of some of the first principles which ought to govern nations. It is repugnant to the great principles of Christian duty, the dictates of natural religion and the obligations of good faith and morality, and the eternal maxims of social justice.”

Ladies and gentlemen, the breach of that law by transatlantic chattel slavery does not mean that it did not have a binding character. It may even be that the West African practice could be considered alongside the European regional practice, but the ninth edition never bothered to examine the practice in Europe, in Africa, or elsewhere. It simply proceeds to a more categorical statement than the eighth edition without providing

any basis for its more confident posture. The ninth edition, ladies and gentlemen, would have to confront the dichotomous approach of European slaveholding countries to transatlantic chattel slavery. Its features or incidents were not permitted in the metropolitan countries but were allowed in the colonies, but if the practice of chattel slavery was as a matter of international law wrongful conduct, a slaveholding state could not invoke its domestic law as justification for its breach of international law.

Article 3 of the International Law Commission (ILC) Articles on State Responsibility states: “The characterization of state conduct as wrongful is governed by international law, and that characterization is not affected by the characterization of the same conduct as lawful by domestic law.” Now, the question arises whether this rule would have been applicable in the period of transatlantic chattel slavery. If that rule is applicable, then the domestic laws of England and other European states that permitted chattel slavery in their colonies in the Americas and the Caribbean could not be invoked as justification for breaching what I have argued was a rule of the law of nations condemning chattel slavery. I hold the view that the rule in Article 3 would have been applicable in the period of transatlantic chattel slavery, and I give this as an example. If, in 1600, a state had laws that allowed for or condoned the mistreatment of ambassadors in its country and an Ambassador was mistreated, that state could not invoke its domestic law as justification for what would be a breach of one of the oldest rules of customary international law; that is, the inviolability of the person of an ambassador.

Transatlantic chattel slavery commenced about 1450 when the first West African was transported to the Americas and ended in 1888 when the enslaved in Brazil were emancipated, a period of almost four and a half centuries. The global sweep that is involved in the ninth edition’s brief analysis is inappropriate for a consideration of the wrongfulness of

transatlantic chattel slavery under customary international law, and it seems to me that the contention that that law did not condemn slavery at the beginning of the nineteenth century must surely require an examination of customary law at various periods; for example, 1450 to 1550, 1550 to 1650, 1650 to 1750, and 1750 to 1888. So, although this Symposium does include a presentation that is global in scope, it does have other presentations devoted to an analysis of international law at various periods in transatlantic chattel slavery.

In conclusion, ladies and gentleman, there is evidence that at the beginning of the nineteenth century, customary international law did condemn the institution of transatlantic chattel slavery. In fact, as the Symposium has shown, customary international law condemned the institution of transatlantic chattel slavery from its very beginning.

CHATTEL SLAVERY: FINAL OBSERVATIONS AND CONCLUDING REMARKS

That concludes my presentation on that subject, ladies and gentlemen, and since the organizers have been kind to me, I have been presented with a double role, and I must now move with your permission and patience to my closing remarks. I want to begin by saying how grateful I am for all of the presentations. Every presentation was interesting and helpful in understanding transatlantic chattel slavery and explaining why it was conduct that was not permitted by international law at the time it was carried out. The presentations and the discussion were of a very high caliber.

My thanks to Professor Hilary Beckles for his two presentations. His global assessment of the reparations that are due for transatlantic chattel slavery will be critically important in the work of the next symposium that will be devoted to an assessment of the reparations due under international law. The date of that symposium will be announced shortly. So

you now know that I have formally told you that there will be another symposium specifically devoted to the assessment of reparations that are due under international law for transatlantic chattel slavery. Sir Hilary's presentation on the quantification of reparations shows precisely how difficult it will be to determine reparations that are due under international law, and by the way, his presentation should have been worded, in my view, "assessment" rather than "quantification" of reparations. The assessment of reparations will include quantifications, but it will also include, as you just heard from Professor Sands, satisfaction addressed in Article 37 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts, and satisfaction, as you heard, includes an acknowledgement of the breach, an expression of regret, a formal apology, or any other appropriate modality. The former slave-holding countries are to be required to make an apology.

Sir Hilary pointed to one methodology for quantifying reparations that showed that trillions of pounds would be due in excess of the gross domestic product of the United Kingdom. The extent of the sums due is no doubt mind-boggling. Determining the methodology for reparations will be exceedingly difficult, and Sir Hilary's comments confirm the wisdom of the decision to devote another symposium to the assessment of reparations.

The question has been raised whether reparation will result in the payment of sums of money to individuals as descendants of the enslaved, and I have been asked here in Jamaica when Jamaicans can expect to see money in their bank accounts. Perhaps the question was a bit sarcastic.

Sir Hilary referred to his colleague historian, Professor William Darity of Duke University in the United States, who has advocated the payment of specific sums of money to the descendants of the enslaved in the United States. I have read Professor Darity's article entitled "Forty Acres and a Mule

in the 21st Century.” I appreciate the article very much. However, I am personally not in favor of reparations taking that form, at any rate, not for the descendants of the enslaved in the Caribbean. Those enslaved and their descendants have suffered immensely from transatlantic chattel slavery in terms of their education, their health, their personal development, and more generally, their economic well-being. The sums resulting from reparations should, in my view, be applied to promote the development of the descendants of the enslaved and the countries in which they lived. They should be used to build schools, universities, hospitals, and used in any other way that would promote personal and national development. I do not, of course, rule out the payment of monies in countries where that would be more feasible, like the United States, though I would still believe that the preferred course would be to apply the reparation sums to the development of particular communities that have been adversely affected by the consequences of transatlantic chattel slavery. In Dr. Nora Wittman’s presentation, she stressed the difference between servile labor and transatlantic chattel slavery, and she pointed to the extent of the resistance to that kind of slavery, which she concluded was unlawful. I found quite interesting Nora’s view that transatlantic chattel slavery violated a general principle of law calling for respect of the dignity and humanity of West Africans. She was bold enough to say that this principle had the status of *jus cogens*, a preemptory norm of general international law from which no derogation is permitted. I believe there is merit in Nora’s argument, and if you recall, I commented on that issue in my presentation.

With the rise of positivism in modern international law, there is a tendency to criticize argumentation that has its basis in natural law. My own position, though, is that the fundamental requirement of international human rights law today, that is, respect for the inherent dignity and worth of the human person,

that is reflected in the 1948 Universal Declaration on Human Rights, and so many other instruments, can be traced to an era even before the commencement of transatlantic chattel slavery. It finds expression in the common law, in the law of European countries such as France, where in general the position that once a slave reached France, he became free because France was the model of freedom. That principle reflected in the law of Britain, France, and other slave-holding countries was breached by transatlantic chattel slavery. The breach identifies the existence of the principle and does not detract from its validity, and that is why I believe there is merit in Nora's argument.

In the period-by-period analysis, we heard from Dr. Mamadou Hébié who showed very clearly, in my view, that the just war doctrine did not provide a basis for transatlantic chattel slavery in the period between 1450 to 1550, and Parvathi Menon, who addressed the period between 1550 and 1815, stressed that European law was not universal, and she also adverted to the resistance to transatlantic chattel slavery.

Dr. Michel Erpelding provided an insightful and stimulating analysis of transatlantic chattel slavery in the period from the Vienna Congress of 1815 to 1888, and we all have to be grateful to Professor Patricia Sellers for her presentation on sexualized practices and institutions in the slave trade and slavery. And she is so right that reparations must take account of the harm to women and their families resulting from these practices. The significance of her presentation is that it showed that reparations must in no way be confined to the forced and free labor of West Africans on the plantation.

Ladies and gentlemen, the largest Black population in the world outside Africa is to be found in Brazil, and this Symposium would not have been complete without hearing from Mr. Adami. He highlighted the problems faced by Blacks in securing reparations, and he preferred to speak of Black slavery. And I understand. It shows how regionalized chattel

slavery was. I like very much his rousing call at the end, “Let’s make the ground tremble. So may I say to all of you, let’s make the ground tremble with the cry for reparations.”

Professor Claudio Grossman, my former colleague on the Inter-American Commission on Human Rights, also gave a stimulating presentation that will be helpful in crafting remedies for transatlantic chattel slavery.

I am especially grateful for the presentations on contemporary dimensions of transatlantic chattel slavery, the present-day consequences of which stare us daily in the face. Professor Achime addressed reparations for racial discrimination rooted in colonialism and slavery, and she also showed that transatlantic chattel slavery violated an existing rule of international law, and thus, did not breach the intertemporal rule, which requires that the breach be established on the basis of law applicable at the time of wrongful conduct. This Symposium is, indeed, very fortunate to have the UN’s Special Rapporteur on the subject of racism address us.

Professor Eric Miller’s presentation on the relatively recent Tulsa Massacre was thoughtful and informative. We will be following closely the court proceedings for reparations for an act that undoubtedly had its roots in the practice of transatlantic chattel slavery. Professor Miller referred to his Jamaican family. I am proud to tell you that I am part of that family and to tell him that his grand-aunt, my mother, would have been very proud of the activist role that he is now playing in reparations for the Tulsa Massacre.

And we have to be grateful for Professor Philippe Sands’s wide-ranging, illuminating, and absolutely brilliant presentation on contemporary institutionalized racism as a breach of international human rights norms. If you were not convinced before about the link between contemporary institutionalized racism and transatlantic chattel slavery, you would have been after his presentation. I express my gratitude to him.

May I tell you, ladies and gentlemen, that as a whole, in my view, the presentations show that at the time of transatlantic chattel slavery, there was a rule of customary international law that that practice was wrongful and entailed the international responsibility of the states that carried it out, and accordingly, reparations are due.

Reparations will provide healing, and to pick up on a point made by Professor Sands, may I say that, absent something like a Truth and Justice and Reconciliation Commission in the United States leading to a national reckoning, followed by reparations for the descendants of those who were enslaved, racial harmony in the United States will remain a far-off and distant dream never to be attained.

Further, ladies and gentlemen, may I suggest that we, whether descendants of the enslaved or not, have been handed a sacred trust that we must execute, and we will only execute by staying the course until the struggle for reparations for the grotesque crime of transatlantic chattel slavery has succeeded. Those of us living in countries where our ancestors are enslaved have a moral obligation to fight for reparations. It is a debt that we owe our ancestors.

Following the abolition of slavery in the Caribbean, the thirteen colonies of Britain in the Americas and in Brazil and other countries, those who were freed endured over one hundred years of apartheid, and so, in many respects. Although our ancestors, whether enslaved or freed, resisted transatlantic chattel slavery and apartheid, we are the first generation to be in a position to make a strong claim for reparations and to press for it with all our might. We must not be deterred by the naysayers. We must not be cajoled by the frivolous argument that transatlantic chattel slavery should be forgotten because it happened centuries ago. The powerful presentations on contemporary racism as a legacy of transatlantic chattel slavery by Professors Achiume and Sands flatly contradict that way of

thinking. In my view, a settlement is needed on the reparations that are due for transatlantic chattel slavery. That settlement must, however, proceed on the basis of an acknowledgement that transatlantic chattel slavery was wrongful conduct. The power and balance between Caribbean countries and former slave-holding countries should not be allowed to stand in the way of the quest for reparations. The power imbalance between slave owners and the enslaved did not prevent them from, as the great Jamaican singer Beres Hammond said, “putting up resistance.”

May I say thanks to all those who have worked so hard to make the Symposium the success it has been. May I extend my gratitude to the Victoria Mutual Building Society and the Gleaner RJR for their sponsorship and a special thanks to the American Society of International Law for agreeing to my proposal as its Honorary President to convene this Symposium, and in that regard, thanks to President Amirfar, Natalie Reid, and Professor Chantal Thomas. And thanks also to the University of the West Indies for collaborating with The American Society of International Law, and in that regard, a special thanks to the Vice Chancellor Sir Hilary Beckles and Professor Verene Shepherd for their role in support of the Symposium. And thanks to all of you who have joined, and finally, may I ask you to be on the lookout for the date of the follow-up Symposium that will address reparations under international law for transatlantic chattel slavery.

Thank you very much, ladies and gentlemen. Goodbye.

APPENDICES

APPENDIX I: BIOGRAPHIES OF THE SPEAKERS



E. Tendayi Achiume is the inaugural Alicia Miñana Professor of Law at the University of California, Los Angeles School of Law, and a Research Associate with the African Centre for Migration and Society at the University of Witwatersrand, and

the Refugee Studies Center at Oxford University. She currently serves as the fifth United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, the first woman to serve in this role since its creation in 1993. Her UN reports include a human rights analysis of reparations for racial discrimination rooted in colonialism and slavery. Professor Achiume's current research focuses on understanding international law's relationship to the problem of racism and xenophobia, and on studying the global and regional governance of these issues. In 2016, she co-chaired the Annual Meeting of the American Society of International Law, and is currently and editor on the board of the *American Journal of International Law*. She is also a recipient of the UCLA Distinguished Teaching Award—the highest university-wide honor for excellence in teaching. Her publications include: *Racial Borders*, *Georgetown Law Journal*; *Migration as Decolonization*, *Stanford Law Review*; *Governing Xenophobia*, *Vanderbilt Journal of Transnational Law*; *Syria, Cost-Sharing and the Responsibility to Protect Refugees*, *Minnesota Law Review*; and *Beyond Prejudice: Structural Xenophobic Discrimination Against Refugees*, *Georgetown Journal of International Law*.



Humberto Adami is President of the National Commission for the Truth of Black Slavery of the Federal Council of the Brazilian Bar Association. He is also a former Vice President of the Brazilian Bar Association's National Commission for Racial Equality. Mr. Adami holds a law degree from the University of Brasília and a master's degree in law from the State University of Rio de Janeiro. His practice has included work combating racism before the Federal Supreme Court of Brazil. Mr. Adami is a Partner at Adami Advogados Associates, and Member of the Superior Council, and Professor at the Zumbi dos Palmares University since 2001. He is a former President of ABAA Associação Brasileira de Advogados Environmentalists and Former President of IARA—Racial and Environmental Advocacy Institute, where he also currently serves as legal director.



Catherine Amirfar was President of the American Society of International Law (ASIL) from 2020 to 2022. She is also a litigation partner in the International Dispute Resolution Group and Co-Chair of the Public International Law Group at Debevoise & Plimpton LLP. Her practice focuses on international commercial and treaty arbitration, international and complex commercial litigation and public international law. Prior to rejoining Debevoise in 2016, Ms. Amirfar spent two years as the Counselor on International Law to the Legal Adviser at the U.S. Department of State. Ms. Amirfar received the State Department's Superior Honor Award in recognition of her contributions to the

Department. Ms. Amirfar was elected President of ASIL in 2020 and served as Vice President from 2016-2018. She is co-host of the ASIL podcast *International Law Behind the Headlines*, and currently is a member of the American Law Institute, the Council on Foreign Relations, the State Department's Advisory Council on International Law, and the Court of Arbitration of the Singapore International Arbitration Centre. She also serves as Co-Chair of the ICCA-ASIL Task Force on Damages in International Arbitration.

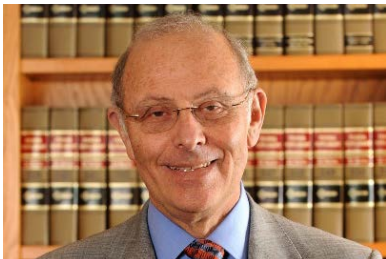


Professor Sir Hilary Beckles is the eighth Vice-Chancellor of the University of the West Indies, and a leading economic and social historian. Before assuming office as Vice-Chancellor in 2015, he served the university as Professor of Economic History, Pro-Vice Chancellor for Undergraduate Studies, and Principal of its Cave Hill Campus in Barbados for thirteen years. Among other appointments and honours, Sir Hilary has served as an advisor to UNESCO's Cities for Peace Global Program, an advisor to the UN World Culture Report, a consultant for the UNESCO Cities for Peace Global Programme, and an Editor of the ninth volume of UNESCO's *The General History of Africa*. In 2013, Sir Hilary was selected by the Heads of Government of the Caribbean Community (CARICOM) to be the inaugural Chair of the CARICOM Reparations Commission, which coordinates the Caribbean governments' policy positions on the global reparatory justice conversation, and globally promotes reparations for native genocide, African enslavement and colonization. Under his guidance, the Centre for Reparations Research at The UWI was established to lead the implementation of CARICOM's Reparatory Justice Programme. His many publications include *Britain's Black Debt: Reparations for Slavery and Native Genocide in the Caribbean* (UWI Press, 2015), *Centering Woman: Gender Discourses in Caribbean Slave Societies*

(James Currey Press/Ian Randle Publishers, 1999), *Natural Rebels: A Social History of Enslaved Black Women in Barbados and the Caribbean* (Rutgers University Press/Zed Book, 1989), and *White Servitude and Black Slavery: White Indentured Servitude in the Caribbean, 1627–1715* (Tennessee University Press, 1989).



Michel Erpelding is a guest researcher at the Max Planck Institute Luxembourg for Procedural Law, where he previously worked as a Research Fellow (2015–17) and a Senior Research Fellow (2017–20). He holds a PhD from Sorbonne Law School (Université Paris 1 Panthéon-Sorbonne). His doctoral thesis, which won several awards and was published in 2017, addresses the International Anti-Slavery Law of ‘Civilized Nations’ (1815–1945). Based on a systematic survey of 19th and early 20th century treaties and legislation (both domestic and colonial), it shows how Western powers tried to use the notion of ‘civilization’ and the public/private divide to condemn slavery while legitimising forced labour, but ultimately failed to uphold this distinction. Dr. Erpelding’s current research project focuses on historical international courts and tribunals, especially in the late 19th century and during the interwar period, and on their impact on the emergence of the international judge as a guarantor of individual rights in post- WWII international law.



Claudio Grossman is a Professor of Law, Dean Emeritus and R. Geraldson Scholar for International Humanitarian Law at American University Washington College of Law, where he served as Dean for over twenty years until 2016. He is a

Member of the United Nations International Law Commission (2017–2022), and was elected by the UN General Assembly for another five-year term (2022–2027). He is also President of the Inter-American Institute of Human Rights (2016–). In 2019, Grossman was elected as an Associate Member of L’Institut de Droit International. He was Member (2003–2015) and Chairperson (2008–2015) of the United Nations Committee against Torture (CAT), and a member of the Inter-American Commission on Human Rights from 1994–2001 where he served as its President for two terms. Grossman’s career includes extensive litigation experience presenting or deciding landmark cases in the Inter-American system and the UN Committee Against Torture, concerning disappearances, discrimination, rights of indigenous populations, scope of reparations owed to victims, and so forth. As the first Rapporteur on Women’s Rights and the only man who has occupied that position, Grossman issued the first reports on the status of women in the Americas. Additionally, he served as the Rapporteur on the rights of indigenous populations and acted as the Inter-American Commission’s Agent in the *Awás Tingni* case before the Inter-American Court of Human Rights, which established property rights for indigenous populations on ancestral lands. Before joining the Inter-American Commission, Grossman was one of the lawyers who represented victims of enforced disappearances in the foundational *Velázquez-Rodríguez v. Honduras* case, the first contentious case litigated before the Inter-American Court of Human Rights. In 2016, Grossman served as both Agent and Co-Agent for Chile in cases before the International Court of Justice. Grossman presented a proposal to the ILC on reparations for human rights violations that was incorporated in the Long-Term programme of that body and proposed and shared the working group of CAT that adopted its General Comment 3 on reparations. Professor Grossman has written extensively concerning international law, international human rights law and international legal education.



Mamadou Hébié is Associate Professor of International Law at the Grotius Centre for International Legal Studies, Leiden Law School. He holds a PhD (*summa cum laude, avec les félicitations du jury*), and a Diploma of Advanced Studies in International Relations - Specialization international law, from the Graduate Institute of International and Development Studies. He also graduated from Harvard Law School and the Geneva Academy of International Humanitarian Law and Human Rights, and is a recipient of the Diplomas of The Hague Academy of International Law and the International Institute of Human Rights. Mamadou's PhD thesis on '*Les accords conclus entre les puissances coloniales et les entités politiques locales comme moyens d'acquisition de la souveraineté territoriale* (Paris : PUF, 2015)' was awarded in 2016 the Paul Guggenheim Prize in International Law. From 2013 to 2016, he was Lecturer at the Graduate Institute of International and Development Studies (Geneva), in the Master's in International Dispute Settlement programme (MIDS), and from 2018 to 2021, Special Assistant to the President of the International Court of Justice.



Charles C. Jalloh is a Professor of Law at Florida International University and founding editor of the *African Journal of Legal Studies* and the *African Journal of International Criminal Justice*. A member of the United Nations International Law Commission, where he was Chair of the Drafting Committee (70th session) and Rapporteur (71st session), he has published widely on issues of international law. Jalloh has won several research awards, including the FIU Top Scholar Award (2015), the FIU Senate Faculty Award for Excellence in Research (2018) and the Fulbright Lund

University Distinguished Chair in Public International Law at Lund university and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Sweden. He holds a B.A. from the University of Guelph, LL.B and B.C.L degrees from McGill University, Canada, a Master's in International Human Rights Law from the University of Oxford, where he was a Chevening Scholar, and a Ph.D. in International Law, from the University of Amsterdam.



Jeremy Levitt is a Distinguished Professor of International Law at Florida Agricultural and Mechanical University, one of the leading public historically Black university (HBCU) in the United States. Dr. Levitt formerly served as associate dean for international programs and founding director of the Center for International Law and Justice. He is the author and editor of six books and numerous scholarly works. In 2012, he served as the Fulbright Visiting Research Chair in Human Rights and Social Justice at the Human Rights Research and Education Center (HRREC) at the University of Ottawa. In 2009–2010, Louise Arbour, former UN High Commission for Human Rights nominated Dr. Levitt to serve as Head of the International Technical Advisory Committee (ITAC) of the Truth and Reconciliation Commission of the Republic of Liberia (TRC), and he was appointed by Ellen Johnson-Sirleaf, President of the Republic of Liberia and Africa's first elected female president. In 2005, he was a visiting fellow at the Lauterpacht Center for International Law at Cambridge University. Dr. Levitt is an elected member of the American Law Institute and the Executive Council of the American Society of International Law.



Gay McDougall is Senior Fellow and Distinguished Scholar-in-Residence at the Leitner Center for International Law and Justice and the Center for Race, Law, and Justice at Fordham University School of Law. She was the first American to serve on the UN Committee on the Elimination of Racial Discrimination (Vice Chair 2018-2019) and President Biden nominated her to serve a third four-year term. She is a former United Nations Special Rapporteur on Minorities, UN Special Rapporteur on the issue of systematic rape and sexual slavery practices in armed conflict from 1995 to 1999 and in 2001 played a leadership role in the UN Third World Conference against Racism held in Durban. For decades, Professor McDougall's work has focused on the fault-lines of race, gender and economic exploitation in the American context and in countries around the world. Among other positions, she was executive director of Global Rights, which worked with human rights advocates in 10 countries around the world to develop their strategies for justice. Prior to that she played a special role in securing the release of thousands of political prisoners in South Africa and Namibia. She was then appointed to the electoral commission that in 1994 ran the first democratic elections in South Africa that ended apartheid and installed Nelson Mandela as president. Professor McDougall was a recipient of the MacArthur "Genius" Award for her work in pursuit of global human rights, and in 2015 the Government of South Africa bestowed on her their national medal of honor for non-citizens, the Order of O.R. Tambo Medal for her extraordinary contributions to ending apartheid.



Parvathi Menon is doctoral student at the Erik Castren Institute at the University of Helsinki, and is currently writing a thesis titled “Protective Empire of Law: A History of International Law’s Humanitarian-Authoritarian Alliance.” Her fields of study include public international law, history of international law, legal theory, and international criminal law, and her prior publications include “Edmund Burke and the Ambivalence of Protection for Slaves: Between Humanity and Control,” *Journal of the History of International Law* (Oct. 2020), and “The Procrustean Bed of Colonial Laws: A Case of the British Empire in India,” *International Law and Litigation: A Look into Procedure* (June 2019). Ms. Menon teaches international criminal law at the University of Helsinki and has previously taught international law and legal theory at the University of The Gambia and the National Law School of India University in Bangalore, India, and also worked as a researcher at the Max Planck Institute in Luxembourg. She is an alumna of Harvard Law School, the London School of Economics, and Symbiosis Law School, Pune.



Eric J. Miller is Professor and Leo J. O’Brien Fellow at Loyola Law School in Los Angeles, California. He has been involved in the legal battle to obtain reparations for African Americans for twenty years. In 2001, Professor Charles J. Ogletree, Jr. appointed Professor Miller to the Reparations Coordinating Committee, where he took a leading role in drafting the complaint in the pathbreaking federal reparations lawsuit on behalf of the survivors of the Tulsa Race Massacre of 1921, *Alexander v. State of Oklahoma*. Professor Miller is currently a member of

Lawyers for Justice for Greenwood, and again took a lead role in drafting a reparations public nuisance lawsuit, *Randle v. City of Tulsa*. He has written a number of articles and given multiple talks on reparations nationally and internationally. He has twice before testified before the House Judiciary Committee, in 2019 to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties Hearing on HR40 and the Path to Restorative Justice; and in 2007 to the Subcommittee on the Legacy of the Trans-Atlantic Slave Trade in America. He has also provided testimony before the Inter-American Commission on Human Rights on Reparations for Slavery and Other Forms of Structural Racial Discrimination in the United States in 2019.



The Honorable Patrick Lipton Robinson is Honorary President of the American Society of International Law and a member of the International Court of Justice for the term commencing February 2015. Following his call to the Bar in 1968, Judge Robinson began a long and distinguished career in public service, working for the Jamaican government for over three decades. From 1968 to 1971, he served as a Crown Counsel in the Office of the Director of the Public Prosecutions. Between 1972 and 1998, he served briefly as Legal Adviser to the Ministry of Foreign Affairs, subsequently in the Attorney General's Department as Crown Counsel, Senior Assistant Attorney-General, Director of the Division of International Law, and as Deputy Solicitor-General. Judge Robinson's long-standing experience in United Nations affairs dates back to 1972, when he became Jamaica's Representative to the Sixth Committee of the United Nations General Assembly, a position he held for 26 years. He played a leadership role on several issues in the Committee, including the definition of aggression and the draft statute for an international

criminal court. From 1981 to 1998, he led Jamaica's delegations for the negotiation of treaties on several subjects, including extradition, mutual legal assistance, maritime delimitation and investment promotion and protection. Judge Robinson also represented Jamaica on several other United Nations bodies, including the United Nations Commission on International Trade Law and the United Nations Commission on Transnational Corporations, serving as Chairman of that Commission's Twelfth Session in 1986. He represented Jamaica at all sessions of the Third United Nations Conference on the Law of the Sea and was accredited as an ambassador to that Conference in 1982. As a member of the Inter-American Commission on Human Rights from 1988 to 1995, and its Chairman in 1991, Judge Robinson contributed to the development of a corpus of human rights laws for the Inter-American System. As a member of the International Law Commission from 1991 to 1996, he served on the Working Group that elaborated the draft statute for an international criminal court. Judge Robinson also served as a member of the Haiti Truth and Justice Commission from 1995 to 1996, and was a member of the International Bio-ethics Committee of UNESCO from 1996 to 2005, serving as its Vice-Chairman from 2002 to 2005. Judge Robinson was elected a Judge of the International Criminal Tribunal for the former Yugoslavia in 1998 and served as the Tribunal's President from 2008 to 2011. Judge Robinson has also served as an arbitrator in disputes under the ICSID Convention. Judge Robinson is a Barrister of Law, Middle Temple, United Kingdom.



Professor Philippe Sands QC is Professor of Laws and Director of the Centre on International Courts and Tribunals at University College London, Samuel and Judith Pizar Visiting Professor of Law at Harvard Law School, and a barrister and founder member at

Matrix Chambers. He is President of English PEN and on the board of the Hay Festival of Arts and Literature. In addition to his academic work and publications, Professor Sands maintains a practice in general international law, covering a wide range of subjects, acting as counsel and arbitrator. He has appeared before many international courts, including the International Court of Justice, the European Court of Justice, the World Trade Organisation dispute settlement organs, the International Tribunal for the Law of the Sea, the International Criminal Court, and the Special Court for Sierra Leone. He also appears in arbitrations and before the English courts, and has accepted appointments as an arbitrator in several cases.



Patricia Viseur Sellers, an international criminal lawyer, is the Special Advisor for Slavery Crimes for the Office of the Prosecutor of the International Criminal Court. Ms. Sellers is a Visiting Fellow at Kellogg College of the University of Oxford, where she teaches international criminal law and human rights law. She is a Practicing Professor at London School of Economics and a Senior Research Fellow at the Human Rights Center of the University of California, Berkeley. Ms. Sellers was the Legal Advisor for Gender, Acting Head of the Legal Advisory Section and Acting Senior Trial Attorney at the Yugoslav (ICTY) Tribunal and the Legal Advisor for Gender at the Rwanda Tribunal (ICTR). She developed the legal strategies and was a member of the trial teams in the *Akayesu*, *Furundzija*, and *Kunarac* cases. Ms. Sellers is the recipient of the Prominent Women in International Law Award by the American Society of International Law, and holds an Honorary Doctorate in Law from the City University of New York, as well as an Honorary Fellow for Lifetime Achievement from the Law School of the University of Pennsylvania, her alma mater. Ms. Sellers has also been awarded the National Bar Association's Ron Brown International Lawyer Prize,

the Global Center for Justice's inaugural Janet Benshoof Global Justice Award, and the 2020 World Peace Through Law Award of the Washington University School of Law.



Verene A. Shepherd, graduate of the University of the West Indies (UWI) and the University of Cambridge, is Professor Emerita of Social History at UWI and Chair of the UN Committee on the Elimination of Racial Discrimination. She is Director of the Centre for Reparation Research at UWI, a published author of 7 books, a radio host and scholar activist, especially in the areas of women's rights, human rights and reparatory justice.

She is the immediate past Director of the Institute for Gender & Development Studies at UWI. As a UN expert she has played a role in helping to implement the UN International Year for People of African descent and overseeing the drafting of the programme of activities for the UN International Decade for people of African descent while she was Chair of the Working Group of Experts on People of African Descent. Among her awards are the Order of Distinction, Commander Class, from the Gov't of Jamaica; the Africana Studies distinguished Award from Florida International University and the 2017 UWI Vice Chancellor's award for excellence in Public Service. She was recently elected to an Honorary Fellowship at Jesus College, University of Cambridge. She was one of the 70+7 women honoured for service to the UWI during The UWI's 70th anniversary celebrations as well as one of the 60 Women of Distinction honoured by the Jamaica Gleaner in 2020. She recently won the President's award at the St Martin Book Fair. She is well-known for her scholar activism and for her lobby to establish monuments to historical figures and movement in Jamaica.



Adrien Wing is the Associate Dean for International and Comparative Law Programs and the Bessie Dutton Murray Professor at the University of Iowa College of Law, where she has taught since 1987. She also serves as the Director of the University of Iowa Center for Human Rights, and Director of the France Summer Abroad Program, and has previously served as the Associate Dean for Faculty Development and the on-site Director for the London Law Consortium semester abroad program. Professor Wing has also been a member of The University of Iowa's interdisciplinary African Studies faculty and North Africa/Middle East faculty groups. Author of more than 150 publications, Professor Wing is the editor of *Critical Race Feminism: A Reader* and *Global Critical Race Feminism: An International Reader*, both from NYU Press, as well as co-editor of the *Richard Delgado Reader*. Her US-oriented scholarship has focused on race and gender discrimination, and her international scholarship has emphasized Africa and the Middle East. International law and Feminism, International law and Race, and the Arab world and women's rights are among the topics of articles.



Dr. Nora Wittmann is an independent scholar, holding a doctorate in international law (J.D.) and a master in social and cultural anthropology. She has served as member of the scientific council of MIR (*Mouvement international pour les Réparations*) and is the author of "Slavery Reparations Time Is Now. Exposing Lies, Claiming Justice for Global Survival – An International Legal Assessment" and of the children's book "Little Afeni and the Cause for Reparations." Based in Austria and Jamaica, she publishes in scientific and popular journals, debunking fundamental legal distortions that serve to undermine the global African claim for reparations.

APPENDIX II: SYMPOSIUM PROGRAM

DAY ONE: THURSDAY, MAY 20

1:00 pm: Welcome & Opening Remarks

- **Catherine Amirfar**, President, American Society of International Law
- **Patrick Robinson**, Honorary President, American Society of International Law; Judge, International Court of Justice

1:15 pm: Opening Address: The Historical Context of the Business of Transatlantic Chattel Slavery

- Sir Hilary Beckles, Vice-Chancellor, the University of the West Indies
- Moderator: Patrick Robinson, Honorary President, American Society of International Law; Judge, International Court of Justice

2:15 pm: BREAK

2:25 pm: Examining (II)legality of Transatlantic Chattel Slavery under International Law – Part I

- Global Assessment of the Legality of Transatlantic Chattel Slavery: Nora Wittmann, Author, Slavery Reparations Time Is Now: Exposing Lies, Claiming Justice for Global Survival – An International Legal Assessment
- Transatlantic Chattel Slavery 1450–1550: Mamadou Hébié, Grotius Centre for International Legal Studies, Leiden University
- Discussion moderator: Verene Shepherd, Centre for Reparation Research, the University of the West Indies

3:25 pm: BREAK

3:35 pm: Examining (II)legality of Transatlantic Chattel Slavery under International Law – Part II

- Transatlantic Chattel Slavery, 1550-1815: Parvathi Menon, Erik Castren Institute of International Law and Human Rights, University of Helsinki
- Transatlantic Chattel Slavery, 1815-1888: Michel Erpelding, Max Planck Institute for International, European, and Regulatory Procedural Law
- Sexualized Practices and Institutions of the Slave Trade and Slavery: Patricia Viseur Sellers, Kellogg College, University of Oxford
- Discussion moderator: Gay McDougall, Leitner Center for International Law and Justice / Center for Race, Law and Justice, Fordham University Law School

4:50 pm: BREAK

5:00 pm: Global Quantification of Reparations for Transatlantic Chattel Slavery

- Sir Hilary Beckles, Vice-Chancellor, the University of the West Indies
- Discussion moderator: Adrien Wing, University of Iowa College of Law

DAY TWO: FRIDAY, MAY 21

1:00 pm: Global and Comparative Perspectives on Reparations

- Reparations for Transatlantic Chattel Slavery in Brazil: Humberto Adami, President, National Truth Commission on Slavery, Brazil

- Remedies for Gross Breaches of International Law, with Particular Attention to Transatlantic Chattel Slavery: Claudio Grossman, American University Washington College of Law; United Nations International Law Commission
- Discussion moderator: Charles Jalloh, Florida International University College of Law; United Nations International Law Commission

2:00 pm: BREAK

2:10 pm: The Legacy of Enslavement—Contemporary Dimensions and Remedies

- Reparations for Racial Discrimination Rooted in Colonialism and Slavery: E. Tendayi Achiume, UCLA School of Law; United Nations Special Rapporteur on Racism, Racial Discrimination, Xenophobia and Related Intolerance
- The Claim for Reparations for the Tulsa Massacre of 1921: Eric Miller, Loyola Law School
- Discussion moderator: Jeremy Levitt, Florida A&M University College of Law

3:10 pm: BREAK

3:20 pm: Concluding Address: Contemporary Institutionalized Racism as a Breach of International Human Rights Norms

- Philippe Sands, Centre on International Courts and Tribunals, University College London

4:05 pm: BREAK

**4:15 pm: The Ascertainment of a Rule of International
Law Condemning Transatlantic Chattel Slavery:
Final Observations & Concluding Remarks**

- Patrick Robinson, Honorary President, American Society of International Law; Judge, International Court of Justice

