

## The Ascertainment of a Rule of International Law Condemning Transatlantic Chattel Slavery

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The well-known 8<sup>th</sup> and 9<sup>th</sup> editions of Oppenheim's International Law Volume 1 (Peace) address the question whether customary international law condemned slavery. The 9<sup>th</sup> edition corrects the omission in the 8<sup>th</sup> of a reference to the historical period to which its conclusion relates: "it was difficult to say that customary international law condemns... the institution of slavery and the traffic in slaves."<sup>1</sup> 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 9<sup>th</sup> edition (**the Edition**) is cursory and lacking in depth.

The Edition simply states that "at the beginning of the nineteenth century customary international law did not condemn the institution of slavery and the traffic in slaves".<sup>2</sup> It arrives at this conclusion without carrying out any examination of state practice prior to the beginning of the 19th century. Such an examination is necessary if one is to determine whether customary international law condemned slavery.

The first task in examining whether customary international law condemned slavery at the beginning of the 19<sup>th</sup> century is to isolate precisely the subject matter of the enquiry. 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 enquiry. The failure to distinguish transatlantic chattel slavery from other forms of slavery undermines the conclusion arrived at by the 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 labour 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 (see submission of Mr. Wallace at page 503 of the Somerset Judgement (12 Geo.3 1772, KB, 499 to 510): "the right of a conqueror was absolute in England and in Africa"; also Mr. Dunning at page 505). That kind of slavery was totally different from transatlantic chattel slavery. Although there is a view 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 worked in several areas of national life, such as trade and agriculture, and were treated more like

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\* The views expressed in this article do not necessarily reflect those of the International Court of Justice.

<sup>1</sup> Oppenheim's International Law: Volume 1 Peace (8th edition) p. 733.

<sup>2</sup> Oppenheim's International Law: Volume 1 Peace (9th edition) p. 980.

serfs. And, as Nora Wittman has stated in her article, servile labour in Africa was also akin to serfdom in Europe.<sup>3</sup>

The 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 moveable property in contradistinction to land or other forms of real property. The moveability of West Africans was very evident in the process of their chattelization which had six phases. They were transported or moved from West Africa against their will to the Americas and the Caribbean, a distance of some 5,000 miles. Moreover, it is the treatment of West Africans 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 labour 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 7 years. Every phase of transatlantic chattel slavery was an international wrong. 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.

Had the Edition examined state practice, it would have found enough material/evidence 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 on the famous Somerset case decided in 1772 in Britain. Mr. Somerset was enslaved in Virginia to Mr. Stewart, who took him to England, where he escaped. Mr. Somerset was recaptured and Mr. Stewart had him placed on a ship to be transported to Jamaica to be sold as a slave. With the help of Granville Sharp and other abolitionists, an application for a writ of *habeus 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 did

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<sup>3</sup> In her article (at page 26), Nora Wittman relates a story that is an excellent example of the difference between 'African slave society' and transatlantic chattel slavery: a master requested the Banamba in Mali to provide him with millet. The elder 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..."(citing Klein, Martin and Richard Roberts. 1980 "The Banamba Slave Exodus of 1905" *Journal of African History* 21 (3): 375-94, p. 381). I cannot imagine any enslaved person in the Americas or the Caribbean daring to address a slaveowner in that way. See Wittman, Nora An International Law Deconstruction of the Hegemonic Denial of the Right to Reparations, *Social and Economic Studies* 68:3&4 (2019): 19-41.

he have the right to have him forcibly transported to Jamaica to be sold as a slave? The decision 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. However, 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 a 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 enquiry", and that made "a material difference". Mr. Stewart, he said, "advances no claim on contract; he rests his whole demand on a right to the negro as slave" (I pause to mention that the master's claim to a right to detain the person of Mr. Somerset made *habeas corpus*, described by Blackstone as that "efficacious" writ, precisely the most appropriate proceeding against him). Moreover, the Chief Justice in his Judgement 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 (page 510 of the Somerset decision). So that for the Chief Justice the only question was whether "the cause on the return was sufficient", that is, whether it provided a sufficient basis in English law for the action taken by Mr. Stewart. 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 that was not recognized in England, he was talking about the features of transatlantic chattel slavery. 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 Chief Justice Mansfield's holding that "so high an act of dominion must be recognized by the law of the country where it is used". Had the 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 Cartwright case 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. The West African air was as intolerant of transatlantic chattel slavery as the English air. Chief Justice Mansfield held that only positive law could provide a basis for the exercise of the kind of dominion Mr. Stewart had over Mr. Somerset. There was no such law in England, and for that matter, neither in France nor any other European country engaging in the practice of transatlantic chattel slavery.

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 Jamaica as colonies and the law that it applied in the metropole. It was not, of course, a public international law case. However, 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.

Given that England, and more than likely, other European States did not permit chattel slavery on their soil, the 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 flawed if it is confined to an examination of European practice; there must also be an examination of the law, practice and customs of the place where the transaction of enslavement, that is, the capture and sale of West Africans, took place – West Africa; there must also be an examination of the law in other regions of the world.

The 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 – an action to recover property taken from its owner – would lie “for taking a negro slave”. One cannot be certain whether there was in West Africa a law, custom or practice that would be equivalent to trover. Of course, the absence of a law 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 chattel slavery. 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. The need to take into account practice other than that of European States in considering the wrongfulness of transatlantic chattel slavery is addressed by Professor Erpelding in his Paper.<sup>4</sup> Noting that African countries did take measures to stop or restrict the slave trade, he argues that “such African negative attitudes towards 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.

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 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 the practice of transatlantic chattel slavery. However, as a matter of fact, the resistance, the very opposite of complicity, was intense and unrelenting. The Oba [King] of Benin, 1504-1550, 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]

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<sup>4</sup> See the Conference Papers.

there should not be any trade in slaves nor market for slaves”.<sup>5</sup> This resistance to transatlantic chattel slavery was even more pronounced in the reign of King Alvaro of Kongo 1567-1587, who sent his officials to Lisbon in 1568 to conduct an inquest into illegal Portuguese trading in the ports. Reference may also be made to Queen Nzinga of Angola (1583-1663) who, during her reign of 37 years, became famous for fighting Portuguese enslavement of her people. A statue now stands in her honour 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 resistance in Haiti was so strong that in 1804 the French colonial government was overthrown and Haiti became the first Black Republic. As Nora Wittman points 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.”<sup>6</sup>

It is appropriate to cite resistance in countries outside Africa because transatlantic chattel slavery had several stages, including the Middle Passage and forced and free labour 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 that 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 no comparison with transatlantic chattel slavery. 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. 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

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<sup>5</sup> Davidson, Basil. 1961. *The African Slave Trade*. Boston/ New York: Back Bay Books de Frouville, Olivier. 2004. *L’Intangibilité des Droits de l’Homme en Droit* p.158-159.

<sup>6</sup> Wittman, Nora An International Law Deconstruction of the Hegemonic Denial of the Right to Reparations, *Social and Economic Studies* 68:3&4 (2019): 19-41, at p. 32, citing Lara, Oruno Denis 1997. *Résistances et Luttés*. In Diogène, No. 179 : 167-187 and Barry, Boubacar. 1998. *Senegambia and the Atlantic Slave Trade*. Cambridge: Cambridge University Press. For a discussion of resistance, see Chapter 1, *Saving Souls – The Struggle to End Transatlantic Trade in Africans* by Sir Hilary Beckles and Verene Shepherd (Ian Randle Publishers, Kingston, Jamaica, 2007), and Nora Wittman ‘African Collaboration and Resistance’ in *An International Law Deconstruction of the Hegemonic Denial of the Right to Reparations, Social and Economic Studies* 68:3&4 (2019): 19-41, p. 30-33.

considered, by just and enlightened men of all ages, as repugnant to the principles of humanity and universal morality” (my emphasis). 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, reference was made to this principle by Justice Story “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”.<sup>7</sup>

It may even be that the West African practice could be considered alongside the European regional practice. But the Edition never bothered to examine the practice in Europe, Africa or elsewhere. It simply proceeds to a more categorical statement than the eighth without providing any basis for its more confident posture.

The Edition would have to confront the dichotomous approach of European slaveholding countries to transatlantic chattel slavery: its features/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 ILC Draft Articles on State Responsibility states that “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.” 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. In my view, the rule in Article 3 would have been applicable in the period of transatlantic chattel slavery. For 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, 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 Edition’s brief analysis is inappropriate for a consideration of the legality of transatlantic chattel slavery under customary international law. 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; 1550-1650; 1650-1750; 1750 to 1888. 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, there is evidence that at the beginning of the 19<sup>th</sup> century customary international law did condemn the institution of transatlantic chattel slavery.

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<sup>7</sup> United States v. The Schooner “La Jeune Eugenie” (1822) 2 Mason’s Reports, 109.