

Political Versus Legal Strategies for the African Slavery Reparations Movement

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In 1992 Chief Moshood K. O. Abiola instigated the creation of the Organization of African Unity (OAU) Group of Eminent Persons for Reparations. The original members of this group included Ali Mazrui, Jacob Ade Ajayi, and Ambassador Dudley Thompson. The OAU charged this group with pressing the political agenda for reparations for the African slave trade. In 1993 the OAU Group of Eminent Persons convened the First Pan-African Conference on Reparations in Abuja, Nigeria where it adopted the Abuja Declaration that officially committed the OAU to obtain reparations for slavery.

I fully believe that there are legitimate moral reasons for the payment of reparations to African peoples by those who were responsible for the instigation of the trans-Atlantic slave trade. During the barbarous period of the slave trade, at least thirteen million Africans were illegally transported from the shores of West Africa to the Western Hemisphere. Of those thirteen million, approximately 11,328,000 were delivered to the New World, amounting to the trans-shipment murder of approximately 1,672,000 persons or 13% of the cargo¹. These are extremely conservative figures that do not truly account for the murders entailed.

I want to go beyond moral arguments for reparations to the discussion of legal and political strategies for the reparations movement. I believe that we need to move from the discussion of legitimate claims to the development of strategies to satisfy those claims. In my discussion, I will reflect upon the successful reparations movement undertaken by Japanese Americans in the United States.

I do not dispute that harm has been inflicted upon Africans both in Africa and in the Americas because of the slave trade. When harm has been inflicted, a cause of action can be created in the law for the satisfaction of that claim of harm. Reparations have been paid for the harm inflicted on a class or race of people. For example, since World War II, Germany has paid at least 88 billion Deutsche Marks in reparations to the state of Israel and will pay another 20 billion² Deutsche Marks by the year 2005. The United States Government has paid \$1.2 billion or \$20,000 per person for each Japanese American illegally imprisoned in American concentration camps during World War II. Further, the American government has issued an apology for the illegal imprisonment of the Japanese in America. Presently, the Chinese have discussed the possibility of suing the government of Japan for the atrocities committed during the capture of the city of Nanking, which resulted in the systematic murder of more than 300,000 Chinese by Japanese soldiers during World War II. "Comfort women" from Korea who were forced into prostitution during World War II by the Japanese have similarly organized to sue the government of Japan for reparations. A legal suit for reparations to a race of peoples has been

<http://www.africa.ufl.edu/asq/v2/v2i4a3.pdf>

recognized in international, German, and American law. States may be held liable for damages caused to a class or race of peoples. The case of reparations paid to Japanese Americans by the American government and the case of reparations paid to Israel by Germany establish those precedents.

The question before us is whether the African slavery reparations movement should pursue legal paths or political paths for the satisfaction of their claims. Perhaps both paths may be pursued. Among the questions to be addressed are the advantages and disadvantages of both approaches.

If the reparations movement were to pursue its claim in a court of international law, the movement could try to obtain a day in court by claiming that the states that participated in the slave trade were guilty of conscious genocide against a race of peoples. As mentioned earlier, the traders who participated in the slave trade conservatively lost at least 13 per cent of their cargo or 1.67 million souls during their transshipment of slaves. The numbers involved, their inhumane handling during transshipment, and their resultant deaths would establish a *prima facie* case of genocide on these facts alone. The colonial powers responsible for the slave trade (the British, French, Dutch, and Portuguese) would be responsible for African deaths that occurred during transshipment. Payment would, therefore, have to be made to those West African states that lost its kidnapped nationals at sea during the illegal slave trade. This is a narrowly constructed argument that claims damages for this narrow class of persons. It does not begin to address the larger issues of reparations for damages to Africans in Africa and the Americas emerging from the slave trade.

Reparations for damages done to a race of people have precedents in international, German, and American law. The question then becomes how the African reparations movement can pursue this claim.

Genocide has been defined by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. This convention became enforceable in 1951. The Convention defines "genocide" as the "intent to destroy, in whole or in part, a national, ethnic, racial, or religious group by (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group c) deliberately inflicting on the group the conditions of life calculated to bring about its destruction in whole or in part; (d) imposing measures to prevent births within the group; or (e) forcibly transferring children of the group to another group"³. Although this Convention defining genocide exists, the critical question for the reparations movement is whether the states that have suffered because of the slave trade can sue in a court of justice to satisfy their claim for reparations.

It would seem that the interested parties in reparations would have a claim that needs satisfaction. The next set of questions then involve the venue of the suit and the question of whether a statute of limitations applies. If the reparations movement were to sue in a court of international law, there may be several advantages. First, it would obviate the necessity and costs of suing in the separate courts of England, France, Spain, Portugal, and the Netherlands. Second, fixing the venue of the lawsuit in an international court (like the International Court of Justice) would give it maximum international media exposure. The next question then becomes whether the International Court of Justice would have the jurisdiction to hear and order the satisfaction of such a complaint.

If the reparations movement were to sue the colonial powers for damages resultant from the slave trade in the International Court of Justice (ICJ), the ICJ would have the authority to review and adjudicate such a complaint. The ICJ has the jurisdiction to resolve disputes between states. Its only proviso is that litigants in its court must consent to the jurisdiction of the court. If the defendants in the reparations case (England, France, Spain, Portugal, and the Netherlands) were not to consent to the jurisdiction of the court, the case could not proceed. The ICJ also has no apparent statute of limitations. So, the fact that the original harm created by the slave trade occurred in previous centuries does not provide an obstacle to litigation.

If the defendant states were not to accept the jurisdiction of the ICJ, all is not lost. The reparations movement could still press the General Assembly of the United Nations to adopt two alternate courses of action. First, using the Nuremberg and Tokyo Tribunals as models, the reparations movement could press the General Assembly to create a Tribunal to charge England, France, Spain, Portugal, and the Netherlands for "crimes against humanity" for the creation and perpetuation of the African slave trade. This course of action would be profitable because the Nuremberg Tribunal defined "crimes against humanity" as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

This definition precisely applies to the African slave trade. Second, the invocation of the Nuremberg Tribunal as precedent is profitable because the definition of "crimes against humanity" was applied retroactively to the Germans involved in the genocide. The acceptability of this retroactive application of the definition is very important because, if the General Assembly were to create an African Slave Trade Tribunal it could apply the very definition of "crimes against humanity" used at the Nuremberg Tribunal and the retroactive application of that definition.

Besides the creation of a Tribunal to hear charges of crimes against humanity conducted during the African slave trade, the reparations movement could also consider the creation of an ad hoc international criminal tribunal to try persons or states responsible for serious breaches of international humanitarian law. This approach was used to create the International Criminal Tribunal for the Former Yugoslavia and of the creation of the Rwanda tribunal. This approach, while available on a purely theoretical basis, would be more difficult to implement because these proceedings imagine the prosecution of criminals as individuals rather than criminal activities undertaken by states qua states. For these reasons, the creation of a Nuremberg-style or Tokyo style Tribunal would seem more appropriate for the African slavery reparations movement.

Besides these legal approaches, one must ask oneself whether political versus legal approaches must also be considered. For example, in the United States, Congressman John Conyers of the State of Michigan introduced H.R. 40 in 1997 which, if enacted, would establish a commission to examine the possibility of payment of reparations to persons of African ancestry in the United States. Reparations payments would be made for damages resultant from the creation of the slave trade. This legislative course of action has already begun in the United States. To my knowledge, another legislative course of action has also been discussed in the

House of Lords in Great Britain. As far as I know, similar legislation has not been considered in France, Spain, Portugal, or the Netherlands.

The use of a legislative instead of a legal course of action for reparations has precedent in the United States. On August 10, 1988, President Ronald Reagan signed H. R. 442 that authorized the payment of reparations to Japanese Americans who were illegally imprisoned in American concentration camps during World War II. During World War II, the United States government imprisoned nearly all Japanese and Japanese Americans residing in the United States (nearly 120,000 of them) simply because they were Japanese. The Department of War decided to jail the Japanese en masse because they considered them as a community a threat to the security of the United States. The money that was authorized for reparations was accompanied by a formal apology by the United States President to the Japanese Americans who were imprisoned during that period of time. Because of the enactment of H.R. 442, the Japanese and Japanese American survivors of the concentration camps became eligible for monetary reparations of \$20,000 each. They also received a formal letter of apology from the President of the United States.

Although the Japanese Reparations Movement began pressing its claims legally and politically with vigor in 1978, it had to wait ten years for the satisfactory legislative resolution of their claims. The courts initially dismissed the initial claims for reparations. These decisions denying reparations were eventually appealed to the Supreme Court. After ten years of litigation the Supreme Court in *United States v. Hohri* ultimately remanded the reparations case back to the original court for retrial. Ten years of trials had garnered almost nothing. Litigation had proved costly and, ultimately, fruitless. For the Japanese, some bitter satisfaction would be obtained from the political process rather than the legal one.

In the final analysis, Japanese Americans obtained reparations from the political process rather than the legal process. Ten years of litigation did not yield results. Ten years of coordinated political action, however, did eventually result in legislation that provided reparations to the survivors of the concentration camps. By consistently agitating and operating in solidarity as a lobbying group, Japanese Americans pressured Congress to enact reparations. They waged their battle in the arenas of public relations and lobbying rather than litigation. The Japanese engaged in informational and political programs that successfully vindicated their claims. Their efforts in the courts, while diligent, were ineffective.

The question for us in the African Slavery Reparations movement is whether our efforts to obtain reparations should involve political or legal tactics to obtain our objectives. We also need to examine whether the venues for our political and legal efforts should take place in international or national arenas. What is clear from the Japanese American Reparations movement in the United States is that litigation in the American courts can be very costly and bear little results. It is not clear at all that any person or entity would have legal standing to sue in American courts for reparations for slavery.

If the legal avenue may prove fruitless, the question then becomes whether Americans should support Congressman Conyers' H.R. 40. His bill would require the creation of a Commission to study the question of reparations; it is not a demand for reparations. Is it in our interests to support a bill that merely studies the question of reparations rather than demanding reparations? The Japanese American experience proves that the legislative process may bear

fruit for the reparations movement. Our pursuit of this alternative will be full of challenges, however. If reparations are to be paid to African Americans for the damages of slavery, who will actually be paid? Who is an African American? Is the multi-racial golfer Tiger Woods, for example, an African American or an Asian American? Would he be eligible for reparations? How about Caribbean Americans? Would they be eligible or excluded? The advantage that the Japanese Americans had was that they had a specific number of persons who were eligible for reparations. Calculations of the persons to receive benefits and the amounts to be paid could be definitely fixed. For African Americans, the number of beneficiaries and the amounts to be calculated will be quite a challenge.

On the other hand, if litigation is pursued in an international venue, the Nuremburg or Tokyo Tribunal model for "crimes against humanity" may be promising. The definition of that crime specifically applies to the case of African slavery and its aftermath. The retrospective application of that definition of the crime would also be useful in an international forum for justice.

Notes

1. Hugh Thomas, *The Slave Trade: The Story of the Atlantic Slave Trade, 1440-1870* (New York: Simon & Schuster, 1997), 804-805.
2. Iris Chang, *The Rape of Nanking The Forgotten Holocaust of World War II* (New York Basic Books. 1997). 222.
3. Article II