The Most Salient Legal Hurdle

Countering the Refusal to Legally Recognise Colonial Slavery as a Crime against Humanity*

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On 1 July 2023, the Dutch king of the Netherlands, in his capacity as head of state, apologised for the Dutch involvement in the slave trade and the system of slavery in the former Dutch colonies. In his speech in Amsterdam, commemorating 160 years abolishment of slavery in Suriname[1] and the Caribbean part of the Netherlands, the king used the following words: '[For] the obvious lack of [Dutch royal] action against this crime against humanity, I beg for forgiveness today [...]'.[2] The unequivocal retroactive use of the legal qualification crime against humanity in relation to colonial slavery by a head of state of a former colonial power is still a rarity.[3] The king's phrasing also moves beyond the carefully crafted words pronounced by the Dutch prime minister Mark Rutte on 19 December 2022 in The Hague, in which he also apologised for the slave trade and the system of slavery within the Dutch colonial past. In his speech in The Hague, Rutte said: 'We, *living in the here and now*, can only recognize and condemn slavery in the clearest terms as a crime against humanity'.[4] The insertion 'living in the here and now' casts doubt on the scope of the qualification crime against humanity, both spatially and temporally. Rutte's words belong to a long European tradition of placing colonial injustice outside the spatial and temporal boundaries of international law. The king's words, on the other hand, appear to open the possibility of a different legal perspective on the colonial past, one that pushes the traditional boundaries of international law.

In this article I will offer a closer look at the legal-theoretical background of both approaches to colonial slavery. I will start with an analysis of the traditional approach which is still dominant within former colonising countries. In this traditional approach, the recognition of colonial slavery as a crime against humanity is muted and deprived of its legal meaning. In the second part, a different approach will be discussed, which is based on an immanent critique of the traditional approach. This alternative approach departs from the same set of legal values which inform the traditional approach and can be traced back to the Age of

* In the long run-up to this article, I received valuable suggestions and comments from Guno Jones, Martijn Stronks, Elsbeth Dekker, Arend Smilde, Rose Mary Allen and Laura Henderson.

1 In Suriname, formerly enslaved people were required to work under state supervision for another ten years.

2 Speech King Willem-Alexander, Oosterpark Amsterdam, 1 July 2023, at www.koninklijkhuis.nl.

3 Only in France colonial slavery and the slave trade are retroactively recognised as a crime against humanity. See Act no. 2001-434 of 21 May 2001 on the recognition of the slave trade and slavery as a crime against humanity ('Loi Taubira'), at www.legifrance.gouv.fr.

4 Speech Dutch prime minister Mark Rutte, National Archives The Hague, 19 December 2022, at www.rijksoverheid.nl. Emphasis WV.

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Enlightenment, the ideals of liberty, equality and fraternity, in which legal subjectivity, equality before the law and human dignity are inextricably linked.[5] In addition, both approaches endorse the principle of intertemporality: the idea that facts can only be judged on the basis of legal norms that are contemporaneous with it.[6] However, where the first approach denies that colonial slavery can be legally disqualified in light of 'the law at the time', the second approach reaches the opposite conclusion, by bringing legal principles as *lex lata* of the time into the equation. I will argue that only the second approach is able to account for the legal crime of colonial slavery and the slave trade in a way that not only honours the personhood of the enslaved, but also creates room for reparation and addresses a persistent contradiction within both international and national law.

Finally, it is important to point out the limitations of this article. The approaches discussed here both move *within* the (globalised) legal orders of the former colonisers. The article's modest aim is to criticise a traditional Western-European legal approach to the injustice of colonial slavery by uncovering its internal inconsistencies. However, a decolonial approach to the injustice of slavery will also have to be based on external forms of criticism and resistance drawn from non-European legal and non-legal traditions and sources, which is beyond the scope of this article.[7] This article, therefore, addresses only one piece of the puzzle regarding the issue of how the legal injustice of colonial slavery past should be recognised.

1 The Traditional Approach: 'Hard to Believe' but Legal at the Time

One of the most telling formulations expressing the traditional view comes from Tony Blair, who, as prime minister of the United Kingdom, declared in a written statement on the occasion of the bicentenary of the British abolition of the slave trade on 28 November 2006: 'It is hard to believe that what would now be a crime against humanity was legal at the time'. In this statement Blair also expressed 'our deep sorrow that [the transatlantic slave trade] ever happened and that it ever could have happened, and [rejoiced] at the different and better times we live in

5 See Jean-François Niort, 'Homo servilis. Un être humain sans personnalité juridique. Réflexions sur le statut de l'esclave dans le Code noir', in *Esclavage et droit. Du Code noir à nos jours*, eds. Manuel Carius and Tanguy Le Marc'hadour (Arras: Artois Presses Université, 2011), 11-18.

6 See *Island of Palmas* (Netherlands/United States of America), 4 April 1928, *UN Reports of International Arbitral Awards*, vol. II (2006), 845: '[…] a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled'. For the profoundly colonial legal context of the *Island of Palmas* case (which is usually overlooked), see Sookyeon Huh, 'Title to Territory in the Post-Colonial Era. Original Title and Terra Nullius in the ICJ Judgments on Cases Concerning Ligitan/Sipadan (2002) and Pedra Branca (2008)', *EJIL* 26/3 (2015): 724.

7 See e.g. Rose Mary Allen, 'A multi-voiced perspective on Curaçao's colonial history through traditional songs', in *Masking as quintessential authenticity. Healing, intersectionality and interstices in the languages, literatures and cultures of the Dutch Caribbean and beyond*, eds. Nicholas Faraclas et al. (Willemstad: University of Curaçao, 2021), 139-152; Malcom Ferdinand, *Decolonial Ecology. Thinking from the Caribbean World* (Cambridge-Boston: Polity Press, 2001).

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today'.[8] The juxtaposition of past and present is dominant in the statement. Where in the past a different moral-legal framework prevailed in which the transatlantic slave trade became possible, today's normative framework enables us, in retrospect, to understand its awful nature. In contrast to the moral-legal blindness of the past, the present moral-legal framework guarantees a better life for all.

A similar distinction between past and present in a legal sense was made in the Declaration of the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which took place from 31 August to 8 September 2001, in Durban, South Africa. Article 13 of this Declaration reads as follows:

> We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge *that slavery and the slave trade are a crime against humanity and should always have been so*, especially the transatlantic slave trade, and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences.[9]

Article 13 states that slavery and the slave trade both 'are' a crime against humanity (in the present) and 'should always have been so' (in the past). Today, slavery and the slave trade unquestionably qualify as a crime against humanity, but not in the colonial past, although they 'should have'. Through this deliberate distinction, the past legality of the colonial system of slavery and the slave trade is still maintained. The insertion 'and should always have been so' had been the result of a compromise after pressure from the US and different European countries, fearing the risk of legal liability if the qualification 'crime against humanity' had been applied retroactively.[10] In response, Barbados, Jamaica and seven other Caribbean countries made a formal reservation with regard to this article and declared '[…] that the transatlantic slave trade and the related system of racialized chattel slavery of Africans and people of African descent *constitute* crimes against humanity'.[11]

8 Written ministerial statement Prime Minister Tony Blair on the occasion of the Bicentenary of the Abolition, at https://hansard.parliament.uk.

9 Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August-8 September 2001, A/CONF.189/12, at www.oas.org/dil/afrodescendants_durban_declaration.pdf, 11-12 (emphasis WV).

10 See Hillary Beckles, *Britain's Black Debt. Reparations for Caribbean Slavery and Native Genocide* (Kingston: University of the West Indies Press, 2013), 258-259; Ulrika Sundberg, 'Durban: The Third World Conference against Racism, Racial Discrimination, Xenofobia and Related Intolerance', *International Review of Penal Law* 73/1 (2001): 304.

11 Report World Conference Durban, p. 128 (emphasis WV); Beckles, *Britain's Black Debt*, 259-261.

To date, the temporal distinction still dominates the discourse on colonial slavery, the slave trade and their repercussions in the present time. For example, the Dutch historian and colonial slavery expert Gert Oostindie considers the use of the term crime against humanity in a colonial context to be 'anachronistic'. According to Oostindie, 'specific misdeeds' committed during the colonial period are 'difficult to qualify as international crimes because the concept of human rights did not yet exist so clearly [before the Second World War] and international humanitarian law only covered wars between recognized states'.[12] Therefore, using the legal concept crime against humanity in relation to colonial slavery would be inconvenient in a double sense: its application would be both out of time and out of place. Oostindie's hesitation is widely shared by international law scholars.[13]

More importantly, this approach still pervades the world of international politics. For example, in a Joint Declaration of Germany and Namibia of May 2021 regarding the deliberate destruction, between 1904 and 1908, by the German colonial powers of the Ovaherero and Nama peoples in Southwest Africa (present-day Namibia), Article 10 states the following:

> The German Government acknowledges that the abominable atrocities committed during periods of the colonial war culminated in *events that, from today's perspective, would be called genocide*.[14]

With this formulation, the German government aims to convey that it considers the qualification genocide only applicable in a moral sense, 'from today's perspective', but refrains from offering recognition in a legal sense. Also in the Netherlands, current policies addressing colonial injustice still suffer from the inability to qualify the harm done in a legal sense. For example, according to the Dutch advisory report 'Colonial Collections and the Recognition of Injustice', the return of cultural objects which were forcefully taken from the territories of the former colonies 'is not so much a legal as an ethical issue'.[15] And, notwithstanding the recent recognition that the Dutch military routinely used 'extreme violence' during Indonesia's war of independence between 1945 and 1949, the Dutch government is still reluctant to admit that any war crimes were committed, denying the applicability of international humanitarian law at that specific time and place.[16]

12 Gert Oostindie, 'Geschiedenis en herstelrecht: geen vanzelfsprekend koppel', in *Herstelrecht door de ogen van…*, eds. Jacques Claessen and Anneke van Hoek (Den Haag: Boom criminologie, 2022), 281.

13 With regard to the Netherlands, see e.g. Commissie van advies inzake volkenrechtelijke vraagstukken, 'Internationaalrechtelijke vraagstukken rond de kwalificatie van de Holodomor als genocide', *Advise* 42, 28 June 2023, 7.

14 Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, 'United in Remembrance of Our Colonial Past, United in Our Will to Reconcile, United in Our Vision of the Future', May 2021, at www.parliament.na/wp-content/uploads/2021/09/Joint-Declaration-Document-Genocide-rt.pdf.

15 Adviescommissie Nationaal Beleidskader Koloniale Collecties, *Koloniale collecties en de erkenning van onrecht* (Den Haag: Raad voor Cultuur, 2020), 5.

16 Parliamentary Proceedings House of Representatives, 14 June 2023, TK 93-6-1-TK 93-6-5.

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A recent UN report on reparatory justice for people of African descent, issued by the UN Secretary-General, advocates 'a human-rights based approach' to the issue of reparations for slavery and other forms of colonial injustice and proposes a plurality of measures, such as restitution, rehabilitation, satisfaction and guarantees of non-repetition. However, this approach is doomed to fail if colonial crimes are not legally recognised as human rights violations, as the report also admits.[17] In the same vein, an earlier report from the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and intolerance identified the intertemporal principle in international law as 'one of the most salient legal hurdles' to 'the pursuit of claims for reparations for slavery and colonialism'. According to the Special Rapporteur, the appeal to the 'non-retroactivity of international law' is a strategy used by numerous states to deny 'that they have a legal obligation to provide reparations'.[18]

The traditional view on the legality of colonial injustices perpetuates a legal taboo, the idea that within the colonial space fundamental legal principles are not supposed to apply. The non-applicability of law in the colonial space did not arise in the aftermath of the colonial era, but is intimately linked to the European colonial project itself and co-existed simultaneously with it. Within social contract theories of the seventeenth and eighteenth centuries, the colonial space is often understood to be a war zone, or a state of nature. In this uninhibited, exceptional area, the colonists are not believed to be bound by civilisation's legal values.[19] For Thomas Hobbes, whose state of nature and ensuing war of all against all is closely related to his view on seventeenth century America and the colonial project overseas,[20] this is a key question: Is it even possible to commit a crime in a such a space? Hobbes did not believe so. In the famous thirteenth chapter of *Leviathan*, Hobbes formulates it this way:

> To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice.[21]

Where there is no law, there is no injustice. Reflecting on Hobbes' state of nature, constitutional law scholar Carl Schmitt – controversial because of his ideological support of National Socialism – described in his post-war work *The Nomos of the*

17 UN Report of the Secretary-General, Implementation of the International Decade for People of African Descent, 18 August 2023, A/78/317, 7.

18 UN Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, Comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action, 21 August 2019, A/74/321, 19.

19 Charles Mills, *The Racial Contract* (Ithaca-London: Cornell University Press, 1997), 64-66; Achille Mbembe, *Critique of Black Reason* (Durham NC: Duke University Press, 2017), 59-61.

20 Philip Manow, *Politische Ursprungsfantasien. Der Leviathan und sein Erbe* (Konstanz: Konstanz University Press, 2011), 55-79; O. Eberl, *Naturzustand und Barbarei. Begründung und Kritik staatlicher Ordnung im Zeichen des Kolonialismus* (Hamburg: Hamburger Edition, 2021), 171-200.

21 Thomas Hobbes, *Leviathan* (London: J.M. Dent & Sons, 1914), 66.

Earth (1950) the colonial space as a 'free battle zone' in which the European powers fought over the division of the world. In that zone, according to Schmitt, there exists a legal state of exception, in which only the law of the strongest prevails. Discussing the 'lines of amity', demarcation lines drawn by European powers between Europe and overseas in the Western Hemisphere, Schmitt explains that:

> [...] everything that happens 'beyond the line' remains outside the legal, moral and political judgments recognized on this side of the line. This represents a tremendous relief from intra-European problems, and in this relief lies the international-legal significance of the famous and infamous beyond the line.[22]

According to Schmitt, the exclusion (*Ausgrenzung*) of an extra-European combat zone served to contain intra-European wars, which would be its 'international law purpose and justification'.[23] Schmitt's interpretation of the exceptional legal status of the colonial space corresponds with the fact that where slavery was prohibited within most of Western Europe, including France and the Dutch Republic, it was legally permitted in the colonies. In constitutional terms, the overseas territories were separated from the Dutch Republic's European territories and, accordingly, they formed a separate legal order. The sharp legal divide between the Dutch Republic and its colonies meant that there was no pursuit of concordance. Instead, slavery was regulated in the colonies under Roman law, while slavery was not permitted in the European territory of the Republic.[24] Similarly, the French overseas territories formed their own legal orders in relation to the 'motherland' in Europe. As in the Dutch Republic, slavery was prohibited in European France. In an effort to equalise the regulation of slavery in the colonies, in 1685 the French king promulgated the *Code noir*, an ordinance that applied exclusively in the overseas territories.[25]

Justification for the existence of slavery beyond the line which separates Western Europe from the colonial territories overseas can also be found in John Locke's social contract theory. Locke's defence of slavery in his *Second Treatise of Government* (1690) does not refer directly to the transatlantic slave trade, nor to the system of plantation slavery in the colonies, in which Locke, as an administrator and investor, was deeply involved.[26] Nevertheless, Locke makes his theory appropriate for enslaving 'dangerous and noxious Creatures'[27] captured by rational people in the state of nature or the state of war; and Locke explicitly associates the state of

22 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker & Humblot, 1997), 62 (trans. WV).
23 Schmitt, *Der Nomos der Erde*, 66.
24 Peter van den Bergh, *Kolonialisme en codificatie. Hoofdstukken uit de Caribische en Amerikaanse rechtsgeschiedenis* (Den Haag: Boom juridisch, 2020), 104-106.
25 Van den Bergh, *Kolonialisme en codificatie*, 186-190.
26 See David Armitage, 'John Locke, Carolina, and the "Two Treatises of Government"', *Political Theory* 32/5 (2004): 602-627.
27 John Locke, *Two Treatises of Government. Edited with an Introduction and Notes by Peter Laslett* (Cambridge: Cambridge University Press, 2005), 279.

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nature with colonial territories.[28] According to Locke, holding people in bondage is permissible if they forfeit their natural right to life by acts of aggression, by committing offences in the state of nature – which, in Locke's vision of the state of nature which is clearly different from Hobbes, constitute violations of natural law – or by unjustly starting or fighting a war. Such 'noxious brutes' deserve death, Locke believes, but the ones who overpower them may also choose to enslave them; for that is a lesser sanction than the death penalty.[29] On the basis of this abstract theory, individual members of indigenous peoples in the Americas or Africa, for example, could be killed or enslaved by anyone as soon as they engage in aggressive ('violent', 'brutish') behaviour that allegedly would violate natural law. It does not matter whether this behaviour is specifically directed against European settlers.[30]

Locke defines the relationship between master and enslaved as a despotic power relationship, 'an Absolute, Arbitrary Power one Man has over another, to take away his Life, whenever he pleases'[31] – which must be understood as 'the state of War continued' between a victor and his captive.[32] In this violent private relationship, the despotic right that can be exercised by way of exception is simultaneously law and non-law. On the one hand, the enslaved is turned into a thing, placed outside the normal legal order and prey to the whims of his proprietor. On the other hand, there are still certain regulations which may be in place. Legally, enslaved people were classified as chattels, movable property, although they could still commit crimes and – at least theoretically – enjoy some legal protection against displays of extreme cruelty from their owners.[33] According to Locke, the moment master and enslaved would come to any mutual agreement, the state of slavery is ended, because one who makes binding agreements must also be master of his own life – and who is master of his own life possesses the natural right to self-preservation, and ceases to be enslaved.[34] The condition of slavery, by Locke's own definition, is deeply demeaning:

> This Freedom from Absolute, Arbitrary Power, is so necessary to, and closely joyned with a Man's Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together.[35]

The almost hidden, dehumanising figure of the slave in Locke's *Second Treatise of Government* is reminiscent of Agamben's *homo sacer*, bare human life that, in a state of exception, can be killed but not sacrificed and is abandoned to a sovereign

28 Locke, *Two Treatises of Government*, 301: 'Thus in the beginning all the World was America, and more so than that is now […]'.
29 Locke, *Two Treatises of Government*, 383, 393.
30 Locke, *Two Treatises of Government*, 272: '[In the State of Nature] every Man hath a Right to punish the Offender, and be Executioner of the Law of Nature'.
31 Locke, *Two Treatises of Government*, 382.
32 Locke, *Two Treatises of Government*, 383.
33 For examples of this paradoxical nature of the slave as both a legal object and a subject of regulations, see Niort, 'Homo servilis', 15-41.
34 Locke, *Two Treatises of Government*, 383.
35 Locke, *Two Treatises of Government*, 284.

power.[36] However, the exceptional nature of the legal regime which enabled slavery to flourish in the colonial territories, must not obscure the fact that, to paraphrase Walter Benjamin, this 'state of exception was the rule' for millions of people over many generations,[37] and that, as Anton de Kom has remarked, 'the atrocities committed against slaves were so much *part of the customs of the time* that it had to take very particular forms before it was recorded in colonial chronicles.'[38]

2 Breaking the Legal Taboo: The Recognition of a Legal Wrong

The traditional approach to colonial slavery is founded on a sharp distinction between an enlightened 'now', in which slavery is prohibited as a crime against humanity, and an evil 'then', in which slavery was legally permitted. This distinction replaces the earlier spatial distinction in which slavery was prohibited 'here' (in Western Europe) but permitted 'there' (overseas). In the first case the application of the norm is deemed to be 'out of time' (anachronistic or time-barred), in the second case it is judged to be 'out of place' (spatially bounded). Therefore, in the traditional approach there is never a 'right time' or a 'right place' to acknowledge the legal injustice of colonial slavery.

Understanding the temporal distinction as a continuation of the earlier spatial distinction opens a way to challenge the traditional approach to colonial slavery, with its strong reliance on the principle of intertemporality. If it can be shown that the legality of colonial slavery was already in violation of fundamental legal principles *at the time*, the past-present dichotomy starts to crumble. In other words, the argument based on the principle of intertemporality is weakened, if the enlightened 'present' turns out to be a phenomenon of *longue durée*, which has been *contemporaneous* to the era of colonial slavery, at least since the late eighteenth century.

Under the influence of the renewed interest in cases of historic injustice, different scholars have argued for a relaxation of the intertemporality principle regarding crimes against humanity. The criminologist Willem de Haan has pointed out that already at the Nuremberg trials, the crime against humanity was given retroactive application, outweighing considerations of legal certainty.[39] In the same vein,

36 Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 83. Interestingly, Agamben does not mention slavery in this regard; the legacy of European colonialism is notoriously absent in his work: see also Ype de Boer, 'The Figure of the Slave as an Ethical Paradigm in the Work of Agamben', 227-241 in this volume.

37 Walter Benjamin, 'Über den Begriff der Geschichte' [1940], in Walter Benjamin, *Illuminationen* (Frankfurt am Main: Suhrkamp, 1977), 254.

38 Anton de Kom, *Wij slaven van Suriname* (Amsterdam: Atlas Contact, 2017), 36 (trans. and emphasis WV). On the work of Anton de Kom, see Guno Jones, 'Plantation Logics, Citizenship Violence and the Necessity of Slowing Down', 167-182 in this volume.

39 Willem de Haan, 'Knowing What We Know Now. International Crimes in Historical Perspective', *Journal of International Criminal Justice* 13/4 (2015): 793-794. See also Devin O. Pendas, 'Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945-1950', *Central European History* 43/3 (2010): 428-463.

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according to the international law scholar William Schabas, the definition of crimes against humanity in the Charter of the International Military Tribunal in 1945 (Nuremberg definition) 'was conceived so as to apply to acts perpetrated to the Nazis even prior to the outbreak of the war [...]'.[40] Another expert in international law, Andreas von Arnauld, calls for a 'reinterpretation' of the rules of intertemporality, 'by relying on ethical principles enshrined in the *lex lata* of the time'.[41]

The retroactive application already at the inception of the concept of crimes against humanity is not accidental. The concept of crimes against humanity is not an ordinary criminal legal concept, but one designed to criminalise and legally disqualify precisely those acts which, although they were obviously violating fundamental legal principles such as the freedom and legal equality of every human being, could nevertheless be committed under (or at the instigation of) regimes that had made the commission of such acts both factually and legally possible. The Nuremberg definition defines 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.

The definition of the Control Council Law No 10, of 20 December 1945, providing for the punishment of war criminals within the occupied zones of post-war Germany (other than those dealt with by the International Military Tribunal) is even more succinct:

> (a) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

The addendum 'whether or not in violation of the domestic laws of the country where [the atrocities and offenses] were perpetrated' shows that the 1945 concept of crimes against humanity is specifically designed to retroactively *counter* the 'domestic' legalities at a particular time and place which may have allowed the crimes to happen. However, this does not make it into a natural law concept. The retroactive application of the concept of crimes against humanity still depends on

40 William A. Schabas, 'Crimes Against Humanity as a Paradigm for International Atrocity Crimes', *Middle East Critique* 20/3 (2011): 259.

41 Andreas von Arnauld, 'How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality', *The European Journal of International Law* 32/2 (2021): 402.

the extent to which the violated legal principles were already part of existing law (*lex lata*) at the time the atrocities were committed.[42]

Schabas has emphasised that a retroactive application of crimes against humanity to acts perpetrated in, for example, 1915, does not allow for criminal prosecutions in the present time, 'because human longevity now makes it impossible to try anyone for a crime against humanity committed in 1915'.[43] Therefore, for these and older crimes, the tension with the principle *nulla poena sine lege praevia*, prohibiting retroactive criminalisation and punishment, is practically without relevance. What *is* legally at stake, is the possibility of state responsibility for these crimes in the present time. This does not only involve the question whether a belated legal recognition of colonial slavery and the transatlantic slave trade as crimes against humanity may facilitate civil reparation claims for colonial slavery in national or international courts, a matter which cannot be discussed further in the scope of this article.[44] What is also, and more fundamentally, at stake is how this legal recognition would symbolically restore the formerly enslaved in their dignity as equal and free human beings, how it could contribute to undo or redress persistent colonial remains within both the doctrine of international law and the current legal systems of the former colonising powers, and, finally, how these legal forms of redress could provide an equal setting for negotiations on reparations between formerly colonised and formerly colonising countries and other stakeholders.

Under any known definition of crimes against humanity, understood as an attack against a civilian population (see e.g. Art. 7 of the Rome Statute of the International Criminal Court), enslavement is mentioned as a possible element. Given the fact that the concept of crimes against humanity has been developed within the context of international humanitarian law and human rights, this is not hard to understand. The act of enslavement is precisely aimed at depriving a person's capacity to act freely, destroying legal subjectivity and disintegrating moral agency, as already

42 Schabas, 'Crimes Against Humanity as a Paradigm', 259; Von Arnauld, 'How to Illegalize Past Injustice', 408; see also Steven Wheatley, 'Revisiting the Doctrine of Intertemporal Law', *Oxford Journal of Legal Studies* 41/2 (2021): 501.

43 Schabas, 'Crimes Against Humanity as a Paradigm', 259.

44 For a plurality of legal reasons (specifically pertaining to tort law and related law), these chances appear to remain slim. See Kaimipono D. Wenger, 'Forty Acres and a Lawsuit: Legal Claims for Reparations', in *Race, Ethnicity and Law. Sociology of Crime, Law and Deviance*, ed. M. Deflem (Bingley: Emerald Publishing, 2017), 79-91; Marc Loth, 'How does Tort Law deal with Historical Injustice? On Slavery Reparations, Post-Colonial Redress, and the Legitimations of Tort Law', *Journal of European Tort Law* 11/3 (2020): 181-207. In France, where colonial slavery and the slave trade are retroactively recognised as crimes against humanity, the French Supreme Court (*Cour de Cassation*) has rejected slavery reparation claims: see *Cour de Cassation, Chambre civile* (17 April 2019), ECLI:FR:CCASS:2019:C100376; *Cour de cassation, Chambre civile* (5 July 2023), ECLI:FR:CCASS:2023:C100466. For more background, see also Niké Wentholt and Nicole Immler, 'How Tort Can Address Historical Injustice', 189-210 in this volume.

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John Locke had noticed (see *supra*).[45] For Jean-Jacques Rousseau in the second half of the eighteenth century, this irreconcilability with 'human nature' implied that slavery and law were mutually exclusive:

> To renounce liberty is to renounce being a human being, to surrender the rights of humanity and even its duties. [...] Such a renunciation is incompatible with human nature; to remove all liberty from one's will amounts to remove all morality from one's acts. [...] [T]he law of slavery is null and void, not only by being illegitimate, but also because it is absurd and meaningless. These words, *slave* and *law*, contradict each other, and are mutually exclusive.[46]

In this fragment, unlike Hobbes and Locke, Rousseau appears to leave no room for a world in which the prohibition of slavery in Western Europe can co-exist with colonial territories overseas in which slavery is legally permitted.[47] More generally, over the course of the eighteenth century, there was a growing awareness that colonial slavery simply did not comport well with the idea of the human subject as a naturally free and equal person. Especially in the turbulent years following the French Revolution (1789), in which freedom, equality and fraternity had been proclaimed as universal ideals, the realisation dawned that slavery and the slave trade in the overseas colonies were clearly incompatible with them.

This realisation would soon have unforeseen consequences. In the French colony of Saint-Domingue, present-day Haiti, an ultimately successful slave revolt broke out in 1791 which was at least partially inspired by the Declaration of the Rights of Man and of the Citizen of 1789.[48] In response, in 1794, revolutionary France hastily abolished slavery in the French colonies. In 1801, a constitution was promulgated in Haiti in which Article 3 directly linked the abolition of slavery and freedom: 'There cannot exist slaves on this territory, servitude is therein forever abolished. All men are born, live and die free and French'. Moreover, its Article 4 contained a clause against racial discrimination: 'All men, regardless of color, are eligible to all employment'. This constitution, defiantly drafted by the Haitian Revolution leader Toussaint Louverture, was against the wishes of Metropolitan France. But an attempt by Napoleon to regain control of the colony by military force failed. In 1802, a French decree reversed the earlier abolition of slavery in the French colonies; colonial slavery was reinstated, to be finally abolished only in

45 Orlando Patterson defines slavery as 'social death', enslavement as a deprivation 'of all claims of community', see Orlando Patterson, *Slavery and Social Death. A Comparative Study* (Cambridge Mass.-London: Harvard University Press, 1982), 44.

46 Jean-Jacques Rousseau, *Du Contrat Social ou Principes du droit politique* (Paris: Garnier Frères, 1962 [1762]), 239-240, 242 (trans. WV).

47 However, nowhere in his work does Rousseau mention the existence of enslaved persons in European colonies, a silence which still leaves doubt about their inclusion in this universal condemnation. See Susan Buck-Morss, 'Hegel and Haiti', *Critical Inquiry* 26/4 (2000): 830: 'And yet even Rousseau, patron saint of the French Revolution, represses from consciousness the millions of really existing, European-owned slaves, as he relentlessly condemns the institution [of slavery].'

48 Laurent Dubois, *Avengers of the New World. The Story of the Haitian Revolution* (Cambridge, Mass.-London: Harvard University Press, 2004), 105.

1848. However, in Haiti, where after more war and violence independence was declared on 1 January 1804, the formerly enslaved remained free, albeit under extremely hard conditions.

The historian Laurent Dubois is clear about the normative meaning of the highly complex events which together are known as the Haitian Revolution. These events, Dubois writes:

> [...] represented the most radical political transformation of the 'Age of Revolution' that stretched from the 1770s to the 1830s. They were also the most concrete expression of the idea that the rights proclaimed in France's 1789 Declaration of the Rights of Man and Citizen were indeed universal. *They could not be quarantined in Europe or prevented from landing in the ports of the colonies, as many had argued they should be*. The slave insurrection of Saint-Domingue led to the expansion of citizenship beyond racial barriers despite the massive political and economic investment in the slave system at the time. If we live in a world in which democracy is meant to exclude no one, it is in no small part because of the actions of those slaves in Saint-Domingue who insisted that human rights were theirs too.[49]

As Dubois aptly notes, during the Age of Revolution the extension of the scope of application of the proclaimed 'Rights of Man' to the enslaved populations in the colonial territories overseas could not be prevented any longer, despite desperate attempts to keep them, quite literally, 'quarantined' within Europe. In Saint-Domingue, the colonial authorities initially tried to quench the revolt by prohibiting 'the sale, impression, or distribution of any pieces relative to the politics and revolution of France'.[50]

A further dissemination of this knowledge could not be prevented either. Exemplary is the following reported statement by the rebellion leader Tula, during the slave revolt in the Dutch colony of Curaçao in 1795: 'We have been mistreated too much. We do not seek to harm anyone, but seek our freedom. The French Blacks have gained their freedom, Holland has been taken by the French, then we must be free here too.'[51] Like the leaders of the Haitian Revolution – Tula named himself Rigaud, after one of them – Tula appealed to the Rights of Man proclaimed in France in 1789. He also referred to the French abolition of slavery in 1794 and to the Batavian Revolution in 1795, during which the Netherlands was under French influence. The rebellion led by Tula failed. Tula and other leaders were captured and put to death after a speedy trial on 3 October 1795.

49 Dubois, *Avengers of the New World*, 3 (emphasis WV).

50 Dubois, *Avengers of the New World*, 103.

51 'Relaas van Pater Jacobus Schinck d.d. 7 september 1795', National Archives The Hague, Archive Curaçao, Bonaire en Aruba, 1707-1828 (1859), 1.05.12.01, inv. nr. 105: '[..] wij zijn al te zeer mishandelt, wij zoeken niemand kwaad te doen, maar zoeken onze vrijheid; de fransche negers hebben hunne vrijdom bekoomen, holland is ingenomen door de franschen, vervolgens moeten wij ook hier vrij zijn' (trans. WV).

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In the debates leading up to the drafting of the first Dutch Constitution, the *Staatsregeling voor het Bataafsche Volk* of 1798, the incompatibility between colonial slavery and the new constitution was also discussed. The following passage from a speech of the Dutch politician Pieter Vreede delivered on 22 April 1797 at the National Convention is a case in point:

> We must keep in mind the interests of the mother country, the interests of the colonies. But we must equally show that we have an abhorrence of establishing a Constitution, which must have as its foundation the Rights of Man, which has Liberty, Equality and Fraternity as its caption, and whereby we would legitimize and establish *a business, against which humanity cries out and which violates and uproots all the rights of mankind*. The wicked use of slaves and the associated slave trade must cease. The ground for this must be found in the Constitution, which we are drafting.[52]

Interestingly, Vreede's characterisation of colonial slavery – the 'wicked use of slaves and the associated slave trade' – as a business 'against which humanity cries out and which violates and uproots all the rights of mankind' appears to prelude on the legal concept of crimes against humanity of the twentieth century. His plea, however, was to no avail. After much debate and procedural maneuvers, the National Convention decided to keep silent on colonial slavery in the *Staatsregeling* of 1798, implying its continuation. In Suriname and the Dutch Antilles, the formal abolition of slavery only followed in 1863.[53]

There are different explanations why, during the Age of Revolution, colonial empires such as France and the Netherlands failed to draw the ultimate consequences from the Declaration of the Rights of Man and of the Citizen and did not even offer a perspective on a gradual end to colonial slavery, as many abolitionists had propagated.[54] It was a time of political and military turmoil, both in Europe and in the colonial territories overseas; there were huge economic interests at stake, and worries about the financial compensation of the plantation owners.[55]

52 L. de Gou, *Het Ontwerp van Constitutie van 1797: Deel II* (Den Haag: Martinus Nijhoff, 1984), 122-123 (trans. WV).

53 A.H. Huussen, 'De staatsregeling van 1798 en het slavernijvraagstuk', in *De Staatsregeling voor het Bataafsche Volk van 1798*, eds. O. Moorman van Kappen and E.C. Koppens (Nijmegen: Gerard Noodt Instituut, 2001), 231.

54 An analogous development, regarding the continuation of slavery within the United States after the Declaration of Independence, cannot be elaborated here. In the exhibition 'Created Equal: Slavery and the Declaration of Independence' (2022) of the Washington University of Saint Louis, the theme was introduced as follows: 'Though the Declaration of Independence states all men are created equal, one-fifth of the population were enslaved people, and one-third of the Declaration's signers were personally enslavers. *The final document does not mention slavery and, through its silence, condones enslavement, but the first draft includes a condemnation of slavery*. These words, removed before it was finalized, underscored the contradiction between the founding fathers' beliefs and actions' (emphasis WV). See https://library.wustl.edu/exhibitions/created-equal/ (last accessed January 2024).

55 Huussen, 'De staatsregeling van 1798 en het slavernijvraagstuk', 231.

However, as the historian René Koekkoek has noted, 'the invoked logic of the rights of man and citizen' also needed to be theoretically countered by those who aimed to preserve slavery in the colonies – at least for an indefinite time. This counter-discourse invoked racist arguments of civilisational backwardness of the enslaved of whom, in the Western Hemisphere, the large majority was African – who were considered to be (still) lacking the capacities for freedom. As part of this counter-discourse, the Haitian Revolution was routinely invoked as an iconic image of traumatic terror, in which the insurgent enslaved people were successfully portrayed as barbaric and violent animals, reminiscent of the 'dangerous and noxious Creatures' of Locke's *Second Treatise* (see *supra*).[56]

In short, to prevent the applicability of the Rights of Man to the enslaved, two strands of arguments were developed, both rooted in a theory of race and aimed at excluding the enslaved, temporarily or permanently, from the enlightened present: one which considered the enslaved as human beings, albeit racially and culturally backward, that is, as *not yet civilised enough* to enjoy equal rights and freedoms. This approach allowed for the continuation of 'temporary regimes of exclusion' and the indefinite postponement of emancipation to a time in the distant future. Another, more virulent strand which gained momentum in the nineteenth century, aimed to prove through the development of a 'scientific' theory on race that certain races such as the 'black race' were *entirely unfit to be civilised and free* and, therefore, not truly human.[57] In this light, the critical legal scholar Peter Fitzpatrick was right to observe that '[t]he all-too-obvious contradiction between Enlightenment thought and practice is mythically resolved by the invention of racism'.[58]

What does this analysis yield? As noted earlier, the crime against humanity has from its inception been a concept designed to criminalise and disqualify precisely those acts, even if of a legal nature and perpetrated in accordance with domestic legalities, which are committed against a civilian population and violate fundamental legal principles, such as the freedom and equality before the law of every human being. A retroactive application of the crime against humanity does not yet make it into a natural law concept, if it can be shown that the violated legal principles were already part of existing law (*lex lata*) at the time the atrocities were committed.

At least since 1789, both in French and Dutch constitutions universal legal values and principles have been proclaimed, which *already at that time* seriously put in doubt the legal permissibility of the spatial distinction between Western Europe and the colonies on which the continued existence of colonial slavery was based. Importantly, in Saint-Domingue and in Curaçao, those principles were also invoked by the leaders of slave revolts, such as Toussaint Louverture and Tula. The 1801

56 René Koekkoek, 'The Citizenship Experiment. Contesting the Limits of Civic Equality and Participation in the Age of Revolutions', (PhD diss. Utrecht University, 2016), 240.

57 Koekkoek, 'The Citizenship Experiment', 241-242. For more background, see Dienke Hondius, *Blackness in Western Europe. Racial Patterns of Paternalism and Exclusion* (New Brunswick & Londen: Transaction Publishers, 2014).

58 Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), 65.

Constitution of Haiti directly connected the abolition of slavery to freedom and already contained a provision prohibiting discrimination based on skin colour, which may be considered as the clearest constitutional expression at the time of, to quote once again Laurent Dubois, 'the idea that the rights proclaimed in France's 1789 Declaration of the Rights of Man and Citizen were indeed universal'.[59]

Although the Age of Revolution did not put an end to colonial slavery, the principles proclaimed back then are still the backbone of human rights and international humanitarian law and of liberal-democratic constitutions. The enlightened present did not start in the middle of the twentieth century, when the international criminal law concept of crimes against humanity was developed, but is a phenomenon of *longue durée*, at least since the late eighteenth century.

In that light, the statement that, at least since 1789, colonial slavery and slave trade can be qualified as crimes against humanity is not anachronistic or far-fetched. Neither does it run counter to the more sophisticated versions of the intertemporality principle. In one such version, carefully elaborated by the international law scholar Steven Wheatley, there is no problem with intertemporality if the 'benefit of hindsight' is needed to identify 'the defining moment in the crystallization' of a certain norm.[60] This means that if, during the Age of Revolution, there have been doubts about the crystallisation of a norm declaring 'slavery' a blatant violation of 'the rights of man', 'legal equality' and 'freedom' – given the fact that, except for Haiti, colonial slavery was not abolished but continued for almost a century – one could still, from a twenty-first-century vantage point, conclude that the events of the Haitian Revolution have been the defining moment in the crystallisation of a norm, the norm which forbids racism and declares slavery to be a blatant violation of everyone's equal right 'to be born, live and die free'.

3 Some Final Remarks

In this article, a specific argument has been made about how 'one of the most salient legal hurdles', the refusal to legally recognise colonial slavery as a crime against humanity, could be overcome. This argument is based on an internal criticism of the reference to 'the law at the time', distinguishing between an evil past, in which slavery was legally permitted, and an enlightened now, in which slavery is prohibited. The argument first showed how this temporal distinction is in fact a continuation of the earlier spatial distinction between a civilised 'here' (Western Europe) in which slavery was prohibited, and a colonial space overseas, where slavery was permitted. In a second step the argument has shown how the proclamation of universal legal values during the Age of Revolution can be considered, with the benefit of hindsight, as the *lex lata* of the time. In light of these core legal values, both the temporal and the spatial distinction start to

59 Dubois, *Avengers of the New World*, 3.

60 Wheatley, 'Revisiting the Doctrine of Intertemporal Law', 20-23.

crumble and the statement that, at least since 1789, colonial slavery and the slave trade can be qualified as crimes against humanity does not appear to be out of place or out of time.

As indicated in the introduction, one should be aware of the limitations of this line of criticism. First of all, it is impossible to fully recognise the injustice of colonial slavery without having due regard to extra-European sources, knowledge systems and spiritual, often oral, traditions which have fueled contestation and resistance against the colonial system of slavery, first of all among the enslaved themselves. To suggest or imply that the Enlightenment values would have been the only or even main source of inspiration for leaders of slave revolts in the late eighteenth century would be a serious error.[61] Secondly, the notion of a continuing enlightened present should be approached with much caution, as it risks to endlessly duplicate the temporal distinction between an enlightened present and a dark, feudal or barbaric past, which was the starting point of this article. Given the severity and extent of the colonial crimes committed *after* 1789 – in the nineteenth and twentieth centuries – one should be extremely careful to prevent the mechanism by which racialised 'others' and 'other' traditions are relegated to an 'uncivilised' or 'savage' past and remain acutely aware of the political nature of periodisation itself.[62]

Thirdly, what exactly is the meaning of a legal recognition of colonial slavery as a crime against humanity? Why would it be important? There are many possible answers to this question. For one, such a recognition ends the spatial and temporal exclusion of colonial slavery as a 'non-crime'. By legally recognising colonial slavery as a crime against humanity, the exceptional legal status of the colonial territory as a law-free area, a space in which civilised laws and principles do not and will never apply, is compromised. Moreover, the recognition will symbolically restore the equal human dignity of the formerly enslaved, and can contribute to repair a persistent racial bias within international law and the legal systems of the former colonising powers. In addition, the recognition could lead to a form of legal accountability of the former colonising powers. It may create more balance and equivalence in possible negotiations between formerly colonised and formerly colonising countries on reparations regarding the legacy of slavery and other forms of colonial injustice in the present time.

61 For the role played by African religious practices in the Haitian Revolution, see Dubois, *Avengers of the New World*, 99-102; C.L.R. James, *The Black Jacobins, Toussaint L'Ouverture and the San Domingo Revolution*, second revised edition (New York: Random House, 1989), 85-87.

62 See Kathleen Davis, *Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time* (Philadelphia: University of Pennsylvania Press, 2008); Mills, *The Racial Contract*, 33-34; Anna Blijdenstein, 'Liberalism's dangerous religions. Enlightenment legacies in political theory', (PhD diss. University of Amsterdam, 2021).

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