The Politics of Writing on the History of Slavery in International Law

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Introduction

This chapter addresses the question of the role of politics and ideology in the historiographies of international law through a case-study: that of slavery, and more specifically the transatlantic slave trade. This choice is motivated by the fact that slavery is one of the very few issues that is indisputably and unanimously condemned by modern international lawyers. In fact, as Frederic Mégret rightly observed, 'few causes have marked the modern development of international law as much as the abolition of slavery.'1 The prohibition against slavery is regularly cited as a ius cogens norm while and the long campaign to abolish the transatlantic slave trade has been presented as 'the most successful episode ever' in the history of our discipline.2 It has become common to present the involvement of international law on matters pertaining to slavery through a specific historical narrative –namely, one of humanitarian progress.3 It is a 200-year long story of abolition that starts with the 1815 Declaration made at the Congress of Vienna by European powers, that continues with the anti-slavery commissions set up by the United Kingdom in the mid-19th

[1] Mégret, Frédéric. 'Droit International et Esclavage: Pour une Réévaluation'. *African Yearbook of International Law* 18(1) (2010), 121–183, 122.
[2] Martinez, Jenny. *The Slave Trade and the Origins of International Human Rights Law* (Oxford: Oxford University Press, 2012), 13.
[3] This is a tendency on which international still operates. See Altwicker, Tilmann and Diggelmann, Oliver. 'How is Progress Constructed in International Legal Scholarship?'. *European Journal of International Law* 25(2) (2014), 425–444.

century, and that triumphs with the adoption of the 1926 Slavery Convention, the 1930 Forced Labour Convention, and the 1956 Supplementary Convention.4 Mention is then usually made of the progress achieved thanks to human rights mechanisms and the criminalisation of slavery through the Palermo Protocol and the Statute of the International Criminal Court (ICC).[5]

At the same time, however, a number of problems have emerged that have both challenged this narrative of progress and triggered a renewed interest in the history of slavery in international law. The first issue that international lawyers have been concerned about is the paradox that slavery has survived its own abolition and perhaps even thrived. Around 20 to 30 million people are estimated to be trapped in situations of modern slavery, forced labour, and human trafficking.[6] How do international lawyers explain the tension between the legal prohibition of slavery and the reality of its existence? One way is to look at it as a

[4] Nanda, Ved and Bassiouni, M. Cherif. 'Slavery and Slave Trade: Steps toward Eradication'. *Santa Clara Law Review* 12(2) (1972) 424-442. The same narrative can be found in international legal textbooks. See also Drescher, Seymour and Finkelman, Paul. 'Slavery', in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 890-916; Gaurier, Dominique. *Histoire du Droit International. De l'Antiquité à la Création de l'ONU* (Rennes: Presses Universitaires de Rennes, 2014), 1058-1070; Daillier, Patrick and Pellet, Alain. *Droit International Public* (Paris: Libraire Générale de Droit et de Jurisprudence, 7th ed. 2002), 707-708 ; Shaw, Malcolm N. *International Law* (Cambridge: Cambridge University Press, 2008), 270. Online encyclopedias tend to endorse the same narrative. See Scarpa, Silvia. 'Slavery'. *Oxford Bibliography on International Law*, available at: http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0097.xml (last accessed on 28 November 2020); Weissbrodt, David. 'Slavery'. *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2014), available at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e874 (last accessed on 28 November 2020).

[5] For a survey of UN mechanisms such as the Special Rapporteur on Contemporary Forms of Slavery and the Human Rights Committee, see Stoyanova, Vladislava. 'United Nations against Slavery: Unravelling Concepts, Institutions and Obligations'. *Michigan Journal of International Law* 38(3) (2017), 359-454.

[6] See Batstone, David. *Not for Sale: The Return of the Global Slave Trade – and How We Can Fight It* (New York: Harper Collins, 2007); Bales, Kevin, Trodd, Zoe and Williamson, Alex Ken. *Modern Slavery: The Secret of 27 Million People* (Oxford: One World, 2009); Kara, Siddharth. *Sex Trafficking: Inside the Business of Modern Slavery* (New York: Columbia University Press, 2009). Some go as far as suggesting that 40 million people are enslaved today. See Nicholson, Andrea, Dang, Minh and Trodd, Zoe. 'A Full Freedom: Contemporary Survivors Definitions of Slavery'. *Human Rights Law Review* 18(4) (2018), 689-704. On the politics of such data, see Gallagher, Anne. 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway'. *Virginia Journal of International Law* 49(4) (2009), 789-848, 797.

problem of effectiveness.[7] That is to say, if slavery still exists, it is because international law can only do so much to enforce its rules. More recently, though, some scholars have attempted to deal with this problem by turning to history: perhaps there is a lesson to be learned that we have missed? This is how I understand Jenny Martinez's approach in her book *The Slave Trade and The Origins of International Human Rights Law* (Section I).

The progressive narrative has suffered from a second critique. A number of scholars have shed light on the intricate relationship between the legal abolition of slavery and European imperialism. They have shown that the progressive narrative is problematic in both its teleological and European-driven nature, insofar as it suggests that abolition has been a process of expansion from ('enlightened') core to ('backward') periphery.[8] These historical studies have been particularly instructive and they have destabilised the discipline's self-conception as an anti-slavery champion. What will need to be explained, however, is why these studies cease to be enlightening when speaking about the present and debating which institutional arrangement should address modern forms of slavery (Section II).

At the end of my chapter, for reasons I hope will have become clear, I will suggest a number of directions so as to move forward. One important step is to (re)introduce the history of political economy. Another is to understand that the slave trade was a legal system – thus, abolition did not arise as an effect of law but as a critique of law (Section III).

I- History as Lesson: International Law's Role in the Slave Trade Abolition

[7] 'The gap […] between the theoretical protection offered by international law, and the reality of non-enforcement […] is wide and shocking.' Cockayne, James, Grono, Nick and Panaccione, Kari. 'Introduction'. *Journal of International Criminal Justice* 14(2) (2016), 253-267, 255.
[8] Anghie, Anthony. 'Slavery and International Law: The Jurisprudence of Henry Richardson'. *Temple International and Comparative Law Journal* 31(1) (2017), 11-23.

'There is something especially baffling about the fact that slavery, outlawed since the nineteenth century and one of the first human rights violations to become the subject of an international convention, is still continuing to this day.'[9] That modern-day slavery exists despite the important legal apparatus set up to prohibit it is a puzzle ('baffling') that is often raised by those involved in current international law and policies against slavery. Many of them call for more international institutional involvement to get around national obstacles as well as social, political or economic power. 'Slavery is […] an extreme form of inequality. And while this may be recognized by the international community, state sovereignty limits both the bargaining power of states in the face of international capital, and the reach of international supervisory mechanisms (such as [the] ILO).'[10] This plea emanates from members of institutional mechanisms as well. Take the statement that David Weissbrodt and Anti-Slavery International made in 2002 on behalf of the UN Working Group on Contemporary Forms of Slavery: 'The right of all individuals to be free from slavery is a basic human right; yet this lack of an adequate implementation procedure does little to encourage States to establish safeguards against all contemporary forms of slavery. The mandate of the Working Group on Contemporary Forms of Slavery could be extended in incorporate such a function to provide for a systematic review procedure.'[11]

More recently, this well-rehearsed argument (opposing international mechanisms to sovereign will, law against social, political or economic power, public institutions against

[9] Anker, Christien van den, ed. *The Political Economy of New Slavery* (London: Palgrave Macmillan, 2004), 1-12, 2. A similar statement can be found in Bales, Kevin and Robbins, Peter T. 'No One Shall Be Held in Slavery or Servitude: A Critical Analysis of International Slavery Conventions'. *Human Rights Review* 2(2) (2001), 18-45.
[10] Cockayne/Grono/Panaccione, 'Introduction' 2016 (n. 7), 256.
[11] Weissbrodt, David and Dottridge, Michael. *Abolishing Slavery and Its Contemporary Forms* (Geneva: Office of the UN High Commissioner for Human Rights, HR/PUB/02/4, 2002), para. 188, available at: https://www.ohchr.org/Documents/Publications/slaveryen.pdf (last accessed on 28 November 2020).

private actors, etc.) has been supported by an historical claim.[12] To have recourse to history is understandable: given the 'evils of global slavery' today,[13] it may be tempting to look back and enquire what happened in the 19th century when the transatlantic slave trade was actually abolished. The most famous example of this endeavour is Jenny Martinez's book, *The Slave Trade and The Origins of International Human Rights Law* published in 2012. Her starting point is that chattel slavery – i.e., a legal institution that had been commonplace worldwide– disappeared by the end of the 19th century. 'How did such a dramatic shift occur in disparate societies around the world in less than a century?'[14] To answer this question, Martinez examined in great details the workings of mixed commissions (or 'courts', as she generally refers to them) that Great Britain established with various treaty partners to hear cases involving slave ships. Most of the sized ships were captured by the British navy and the overwhelming majority of these were duly condemned, often at the end of summary proceedings. In light of this, Martinez argues that the abolition of the slave trade was made possible thanks to the establishment of institutional mechanisms that are still used today to enforce human rights –namely, a combination of treaties and courts supported by a civil-society movement.

Martinez's book rests on solid historical research into the mixed commissions established to determine the fate of ships seized that were suspected of involvement in the slave trade. As Philip Alston pointed out, 'Martinez does an excellent job of bringing alive the story of the mixed commissions, primarily through archival research that provides a real feel for the ways in which the commissions functioned. She offers fascinating vignettes of the lives of those involved, including the slaves themselves, the ships' captains and crews, the

[12] On such dichotomies, see Kennedy, David. 'When Renewal Repeats: Thinking Against the Box'. *New York University Journal of International Law and Politics* 32(2) (1999), 335-500.
[13] Němcová, Tereza. 'Book Review: The Political Economy of New Slavery by Christien van den Anker'. *Perspectives* 26 (2006), 91-110, 93.
[14] Martinez, 'Slave Trade' 2012 (n. 2).

judicial officers, the slave owners and plantation managers, and the imperial bureaucrats.'[15] But Martinez did not limit herself to retrieving the number of cases (500), ships seized (225), and persons freed (more than 80,000). She wanted to make a stronger and bolder claim, namely that 19th century international efforts to end the slave trade formed 'the origins of our contemporary system of international legal protection for human rights.'[16] This claim was found to be problematic.[17] Renowned historian Samuel Moyn, for instance, criticised Martinez for having failed to bridge the past and the present in any convincing fashion. While it may be true that today's normative instruments and institutions look like those of yesterday, Martinez did not connect the dots between the 19th and 21st centuries in any meaningful way.[18] This proved to be particularly dangerous as Martinez did not hesitate to draw lessons from what she considered to be a successful episode.[19] Among others, she called upon the world's leading power, the United States, to get inspiration from the British Empire and 'foster democracy and human rights both through the use of force and through legal institutions.'[20] Alston's response to this imperial nostalgia is unequivocal: 'to the extent that major elements of the British approach were imperialistic, albeit partly in the pursuit of an admirable goal, it becomes all the more important to exercise caution and discernment in drawing lessons for the future.'[21]

[15] Alston, Philip. 'Does the Past Matter? On the Origins of Human Rights'. *Harvard Law Review* 126(7) (2013), 2043-2081, 2047.
[16] Martinez, 'Slave Trade' 2012 (n. 2), 6.
[17] Martinez left out conflicting interpretations of the abolition process, such as Lauren Benton's, for instance, who has argued that the British government shouldered the (costly) antislavery effort not out of a concern for humanity, but in order to cement its imperial control of the oceans. Benton, Lauren. 'Abolition and Imperial Law, 1790-1820'. *The Journal of Imperial and Commonwealth History* 39(3) (2011), 355-374. See also Benton, Lauren. 'The Slave Trade and the Origins of International Human Rights Law'. *Victorian Studies* 56(1) (2013), 127-129.
[18] Moyn, Samuel. 'Of Deserts and Promised Lands: The Dream of Global Justice'. The Nation (20 February 2012), available at: https://www.thenation.com/article/deserts-and-promised-lands-dream-global-justice/.
[19] Martinez, 'Slave Trade' 2012 (n. 2), 15.
[20] Ibid. While the United States could still do so, it should also project its 'economic and military power' into the future by supporting the International Criminal Court. Ibid., 170-171.
[21] Alston, 'Origins of Human Rights' 2013 (n. 17), 2061.

Nonetheless, other international lawyers have picked up on Martinez's tendency to simplify and celebrate international law's involvement in ending the slave trade before redeploying that role in the present in order to promote some kind of humanitarian project.[22] One example is the special issue on slavery that was published in the *International Journal for Criminal Justice* in 2016. Although the issue was entitled 'Slavery and the Limits of International Criminal Justice', the whole point was to promote the role international criminal law could play in the fight against slavery. For this, the three organizers of the special issue – all of them being involved in international policy-making on slavery– argued that the origins of their field lay in the slave trade abolition process. In the words of James Cockayne, Nick Grono, and Kari Panaccione, 'slavery was arguably the spur that set the international criminal justice train in motion, 200 years ago.'[23] To support this argument about their field's origins, they relied explicitly on Martinez's thesis. They asserted that mixed commissions established by Great Britain through bilateral treaties in the 19th century played a catalysing role in the emergence of international criminal law. Granted, they said, these courts could not exact penalties against crews or owners of slave ships. But they had a deterrent effect insofar as they were authorised to confiscate vessels, equipment and merchandise, and also to release captives. In addition, because courts had jurisdiction to arrest nationals of the States backing the courts, who were then obliged to try them in their own courts, mixed commissions could – and should– be seen as a 'precursor to the modern system of complementarity'.[24]

International lawyers working in the field of human rights and criminal justice are not the only ones invoking international law's heroic role in the 'fight against slavery' to assert their field's authority. References to the past, and especially the slave trade, constitute a

[22] As Anthony Anghie observed, slavery has become 'an abhorrence against which international law can demonstrate its commitment to protecting human dignity and furthering the cause of international law.' Anghie, 'Jurisprudence of Henry Richardson' 2017 (n. 8), 13.
[23] Cockayne/Grono/Panaccione, 'Introduction' 2016 (n. 7), 258.
[24] Ibid.

privileged discursive strategy in the context of competing knowledge communities and international legal regimes dealing with slavery. Over the last two decades, the fight against modern slavery has come to be chiefly understood in terms of 'fighting human trafficking'. This was triggered, in part, by the adoption of the UN Protocol to Prevent, Suppress and Publish Trafficking in Persons, Especially Women and Children in 2000 –otherwise known as the Palermo or Trafficking Protocol– which supplemented the UN Convention Against Transnational Organized Crimes. The fight against human trafficking has experienced a remarkable degree of success in terms of popular awareness, institutional leverage, and resource allocation. In 2005, the Council of Europe adopted its own Convention on Action against Trafficking in Human Beings.[25] References to the slave trade have been commonly used to frame the discourse on modern trafficking. Take the speech the then US President George W. Bush gave to the UN General Assembly on 23 September 23 2003:

> There's another humanitarian crisis spreading [beside famine], yet hidden from view. Each year, an estimated 800,000 to 900,000 human beings are bought, sold or forced across the world's borders. Among them are hundreds of thousands of teenage girls, and others as young as five, who fall victim to the sex trade. This commerce in human life generates billions of dollars each year -- much of which is used to finance organized crime. […] We must show new energy in fighting back an old evil. Nearly two centuries after the abolition of the transatlantic slave trade, and more than a century after slavery was officially ended in its last strongholds, the trade in human beings for any purpose must not be allowed to thrive in our time.[26]

[25] For a survey of the, see Sousa Santos, Boaventura de. 'European Commission: The Fight against Trafficking in Human Beings in EU: Promoting Legal Cooperation and Victims' Protection', available at: http://www.transcrime.it/wp-content/uploads/2016/01/THB_CoopToFight.pdf (last accessed on 28 November 2020).

[26] 'Statement by His Excellency Mr George W. Bush, President of the United States of America. Address to the United Nations General Assembly, 23 September 2003', available at: http://www.un.org/webcast/ga/58/statements/usaeng030923.htm (last accessed on 28 November 2020).

In comparison to Martinez's book or the special issue of the *International Journal of Criminal Justice*, the narrative here is meant to be realistic. Bush's tone is grave and the dangers are palatable. Did Bush, by presenting himself to the UN as the leader of a large-scale campaign to end human trafficking, seek to gain support for the rather intrusive monitoring measures that the United States had put in place (and are still in place today)?[27] In any case, Bush glided over the reality that United States' internal slavery did not end until the Civil War and the adoption of the Thirteenth Amendment to the American Constitution. He also made no mention of the slave-like conditions endured by former slaves and their descendants.[28] My point is that the so-called realism that characterises the anti-trafficking discourse depicts a highly selective 'reality' of the slave trade abolition and, in so doing, indicates the kind of law that will be privileged. The focus is no longer on the role played by courts and civil society, but on the punishment of deviant criminal behaviour and protection of 'vulnerable' people[29].

II- History as Caution: The Prohibition of Slavery and European Imperialism

Over the last decade, a number of international lawyers have attempted to provide a more meticulous picture of the abolition of the slave trade and the role of international law

[27] The US has established an Office to Monitor and Combat Trafficking in Persons. The State Department also issues a 'Trafficking in Persons (TIP) Report' annually, one that monitors how countries are addressing the challenges of human trafficking. See https://www.state.gov/j/tip/rls/tiprpt/ (last accessed on 28 November 2020).
[28] Bravo, Karen. 'The Role of the Transatlantic Slave Trade in Contemporary Anti-Human Trafficking Discourse'. *Seattle Journal for Social Justice* 9(2) (2011), 555-598, 562.
[29] To say it differently, the anti-trafficking discourse presents a very narrow interpretation of the slave trade abolition, seeks to project that interpretation onto the present, and extrapolates an extremely limited set of legal lessons. Critical voices have pointed out that references in the passive voice to one's own country's abolition of slavery, followed by mention of the return of slavery today, reinforces the 'denial of any complicity […] in the slavery's re-emergence' while condemning developing countries to be responsible for modern slavery. Bravo, Karen. 'Exploring the Analogy between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade'. *Boston University International Law Journal* 25(2) (2007), 207-295, 221. See also Soderlund, Gretchen. 'Running from the Rescuers: New U.S. Crusades against Sex Trafficking and the Rhetoric of Abolition'. *The National Women's Studies Association Journal* 17(3) (2005), 64-87.

therein. I am particularly appreciative of the work of Jean Allain,[30] Joel Quirk,[31] Karen Bravo[32], and Michel Erpelding,[33] who have offered a sophisticated and nuanced reading.

Against Martinez *et al*, Quirk and Erpelding have shown that imperialism and colonialism were not side-issues in the 19th century but central to the law-making process on slavery. This also applies to the definitions of slavery and forced labour that were elaborated under the League of Nations.[34] These issues had become closely linked to European powers' colonial policies: how should they condemn slavery –after all, this had been one of the justifications for colonising Africa in the first place– without jeopardizing the need for a slavery-like labour force in their colonies?[35] This intricate balance was achieved by separating, in legal terms, the issue of slavery from that of forced labour, and by defining both terms narrowly. To start with, the drafters of the 1926 Slavery Convention agreed upon a formal definition of slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'[36] From that moment onwards, the powers attached to the individual right of ownership as attributed by law became the *sine qua non* of slavery.[37] This definition made it easier for colonial authorities to close their eyes on African social mores such as domestic serfdom and servile marriage; these practices were

[30] Allain, Jean. *Slavery in International Law: Of Human Exploitation and Trafficking* (Leiden: Brill, 2012).
[31] Quirk, Joel. *The Anti-Slavery Project: From the Slave Trade to Human Trafficking* (Philadelphia: University of Pennsylvania Press, 2011).
[32] Bravo, 'Analogy' 2007 (n. 31).
[33] Erpelding, Michel. *Le Droit International Antiesclavagiste des "Nations Civilisées" (1815-1945)* (Paris: Institut Universitaire Varenne, 2017).
[34] To give one example, the French maintained forced labour for public works (*prestations en nature*) in their colonies until 1946. Frimigacci, Jeam. 'L'Etat Colonial Français, du Discours Mythique aux Réalités (1880-1940)'. *Matériaux pour l'Histoire de Notre Temps* 27 (1993), 27-35, 32-33
[35] In other words, European powers sought to abolish slavery (in the strict sense of chattel slavery) while ensuring the continuance of forced labour for public purposes in their colonies. Erpelding, Michel. 'L'Esclavage en Droit International: Aux Origines de la Relecture Actuelle de la Définition Conventionnelle de 1926'. *Journal of the History of International Law* 17(2) (2015), 170-220.
[36] International Slavery Convention (1926), article 1(1).
[37] This concerned effort to restrict the definition of slavery did not apply in case a non-European government was the subject of inquiry (that is, Liberia). See Erpelding, *Le Droit International Antiesclavagiste* 2017 (n. 33), 508-517.

considered either as 'soft or benevolent slavery'[38] or as falling outside the formal definition of slavery.[39] What is more, all major colonial Powers opposed the inclusion of forced labour in the Slavery Convention on grounds of an infringement of their national sovereignty. This led the drafters to transfer that 'problem' to the International Labour Organization (ILO). A specific treaty was concluded in 1930 under the auspices of the ILO; it was largely the work of a committee which included four former colonial governors and the official adviser on African mine labour in the Transvaal.[40] Parties to the Forced Labour Convention agreed to progressively abolish 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'[41] Otherwise, the convention required little more than the restriction of forced labour to a limited range of public works. This, again, was not incidental: forced labour was deemed necessary to colonial Powers so that they could develop 'in the interests of humanity', no less, 'the riches and resources of those African countries placed under their sovereignty.'[42]

Likewise, against Bush *et al*, Bravo and Allain have shown that the genesis of the anti-trafficking project lies not in the transatlantic slave trade but in the white slave traffic. 'The regime of white slave traffic', argues Allain, is 'fundamental to understanding the evolution of what is today understood as human trafficking generally, and more specifically, trafficking related to sexual exploitation; and the dynamics which shaped its contemporary contours and

[38] Queuneuil, Henry. 'Conférence Anti-Esclavagiste de Bruxelles. Acte Général du 2 Juillet 1890: Application et Résultats'. *Revue Générale de Droit International Public* 15 (1908), 131-146, 136.
[39] See, for instance, Weidner, Fritz. *Die Haussklaverei in Ostafrica: Geschichtlich und politisch dargestellt* (Jena: Gustav Fischer, 1915).
[40] See Miers, Suzanne. *Slavery in the Twentieth Century. The Evolution of a Global Problem* (Walnut Creek: Altamira Press, 2003), 121-130.
[41] Forced Labour Convention (1930) (n. 29), art. 2(1).
[42] League of Nations, Note Submitted to the First Sub-Committee of the Six Committee by the Portuguese Delegate, General Freire d'Andrade, 11 September 1925, AVI/S.C.1/2.1925, quoted by Allain, Jean. 'The Legal Definition of Slavery into the 21st Century', in *The Legal Understanding of Slavery. From the Historical to the Contemporary*, ed. Jean Allain (Oxford: Oxford University Press, 2012), 199 – 219, 202.

the language used to define it.'[43] The white slave traffic arose in relation to the issue of venereal disease in the late 19th century and is grounded in Victorian paternalism.[44] The question was how to control women in the face of communicable diseases which were playing havoc on troops destined to engage in Europe's colonial projects. Rumours had arisen of organized networks that procured and sent women abroad for prostitution. One of the fears was that white women were being sold into slavery to non-white males. In response, a number of international instruments were adopted by European countries and the United States. The first one was the 1904 International Agreement for the Suppression of the White Slave Trade.[45] An important point of disagreement during the negotiation had been the nature of the offence for women over the age of majority *vs.* women under the age of majority. Which offence should be given priority? Did it matter if women gave their consent? But at what age was a woman able to consent to sex?[46] These questions only found partial answers in the 1904 Agreement, and the latter proved ineffective due to the high number of reservations. In 1910, the same governments negotiated the International Convention for the Suppression of White Slave Traffic. This time, Europeans and Americans (male) diplomats agreed to criminalise, on the one side, the exploitation of the prostitution of women over the age of majority and, on the other side, the prostitution of those underage. Implementation was left to State Parties.

This genealogy is powerful in suggesting that today's anti-trafficking project has more to do with late 19th century European sexism and racism than with 'fighting an old evil'. 'Just as the spectre of involuntary sex and despoilment of innocent white maidens seized the

[43] Allain, Jean. 'White Slave Traffic in International Law'. *Journal of Trafficking and Human Exploitation* 1(1) (2017), 1-40, 1; see also Allain, Jean. 'Genealogies of Human Trafficking and Slavery', in *Routledge Handbook of Human Trafficking*, eds. Ryszard Piotrowicz and Conny Rijken (Abingdon: Routledge, 2018), 3-12.
[44] Walkowitz, Judith. *Prostitution and Victorian Society: Women, Class, and the State* (Cambridge: Cambridge University Press, 1980).
[45] On the racial component of the treaty, see Scully, Eileen. 'Pre-Cold War Traffic in Sexual Labour and Its Foes: Some Contemporary Lessons', in *Global Human Smuggling*, eds. David Kyle and Rey Koslowski (Baltimore: The Johns Hopkins University Press, 2nd ed. 2011), chapter 4.
[46] Allain, 'White Slave Traffic' 2017 (n. 45), 16.

Western world's attention in the late 1880s and early 1890s', comments Bravo, 'overtones of that appalled, fascinated, and condemnatory prurience continued to pervade public and institutional perceptions of the traffic in human beings into the early twenty-first century.'[47] The reminiscence of Victorian paternalism is not only politically conservative; it also has important distributional implications. Today's focus on 'innocent women and children and illicit sex foisted upon them'[48] draws both attention and resources away from other forms of human exploitation and structural inequalities. It has also been noted that not unlike yesterday's scandal, today's global cause has been consolidated through the deployment of a series of dubious 'facts and figures' regarding the dimensions of human trafficking.[49]

As these two examples show, these scholars take history seriously and explore the long-rooted relationship between law, economy, and power. That said, I find their writings less convincing when discussing today's challenges. What are the latter? Much of the discussion revolves around the 'fragmentation' of the law on human exploitation.[50] That slavery is now regulated by different subfields of international law (such as the law of the sea, human rights law, international criminal law, international humanitarian law, international labour law, international refugee law, etc.) raises a number of concerns. The major concern is this: to what extent this state of affairs is giving rise to conflicting interpretations of slavery?[51]

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[47] Bravo, 'The Role of the Transatlantic Slave Trade' 2011 (n. 30), 575.
[48] Ibid.
[49] Bunting, Annie and Quirk, Joel, eds. *Contemporary Slavery. Popular Rhetoric and Political Practice* (Vancouver: UBC Press, 2017). On the genesis of today's US anti-trafficking debate, see Lobasz, Jennifer. *Constructing Human Trafficking. Evangelicals, Feminists, and an Unexpected Alliance* (London: Palgrave Macmillan, 2018). On the previous scandal, see Chaumont, Jean-Michel. *Le Mythe de la Traite des Blanches. Enquête sur la Fabrication d'un Fléau* (Paris: La Découverte, 2009).
[50] Martineau, Anne-Charlotte. *Une Analyse Critique du Débat sur la Fragmentation du Droit International* (Bruxelles: Bruylant, 2015).
[51] See Scott, Rebecca. 'International Law and Contemporary Slavery: The Long View'. *Michigan Journal of International Law* 38(3) (2017), 349-357, 349; Cullen, Holly. 'Contemporary International Legal Norms on Slavery. Problems of Judicial Interpretation and Application', in *The Legal Understanding of Slavery: From Historical to the Contemporary*, ed. Jean Allain (Oxford: Oxford University Press, 2012); McGeehan, Nicholas Lawrence. 'Misunderstood and Neglected: The Marginalisation of Slavery in International Law'. *The International Journal of Human Rights* 16(3) (2012), 436-460, 436; Rassam, Yasmine. 'International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach'. *Penn State International*

Fragmentation is depicted as a problem that could be resolved only if we were to identify more clearly what amounts to slavery in contrast to lesser forms of exploitation, such as forced labour. This explains why so much ink has been spilled on the relevance of the 1926 definition: should we keep article 1 of the 1926 Slavery Convention, which defines slavery in relation to ownership exclusively (as endorsed by the ICC and the anti-trafficking regime), or should we prefer an expansive definition which focuses on the degree of control and coercion (as promoted by the European Court of Human Rights)? As I have shown elsewhere, the turn to history loses here its critical bite.[52] There is no more analysis of the ways in which, in different time and space, international law has allowed the exploitation of men by men in the name of liberal and humanistic values. There is no re-interpretation of the past in terms of discontinuous or unexpected genealogies. Let me be clear: the problem is not that the counterpoint uses the past for present purposes.[53] The problem is that in today's debate on the legal definition of slavery, references to history end up justifying the choice of the regime or institution allowed to rule on it. In short, history has become caught up in the fragmentation of international law.

III- Moving Forward?

Law Review 23(4) (2005), 809-855; Cavallo, Michele. 'Formes Contemporaines d'Esclavage, Servitude et Travail Forcé: Le TPIY et la CEDH entre Passé et Avenir'. *Droits Fondamentaux* 6 (2006), 1-16; Duffy, Helen. 'Litigating Modern Day Slavery in Regional Courts. A Nascent Contribution'. *Journal of International Criminal Justice* 14(2) (2016), 375-403, 375; Stoyanova, Vladislava. 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking'. *Cambridge Journal of International and Comparative Law* 3(2) (2014), 407-443, 407.

[52] Martineau, Anne-Charlotte. 'Contested Histories: Revisiting the Relationship between International Law and Slavery', in *International Law and the Humanities*, eds. Sundhya Pahuja and Shane Chalmers (Abingdon: Routledge, forthcoming 2021).

[53] For theoretical reflexions on the relationship between past and present in international law, see Orford, Anne. 'The Past as Law or History? The Relevance of Imperialism for Modern International Law', in *Droit International et Nouvelles Approches sur le Tiers-Monde: Entre Répétition et Renouveau*, eds. Emmanuelle Jouannet, Mark Toufayan and Hélène Ruiz-Fabri (Paris: Société de Législation Comparée, 2013), 97-118; Koskenniemi, Martti. 'Why History of International Law Today?'. *Rechtsgeschichte – Legal History* 4 (2004), 61-66, 61; Craven, Matthew. 'Theorizing the Turn to History in International Law', in *The Oxford Handbook of the Theory of International Law*, eds. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 21-38.

In light of these shortcomings, one may wonder: how to move forward? How to study slavery? I do not pretend to have all the answers. But I would like to suggest three directions for a renewed critical engagement with the history of international law and slavery.

First, we should prevent ourselves from falling into the trap of international law's reformist mission. I have shown earlier that international lawyers in the field of human rights, criminal justice, and human trafficking do not hesitate to harness the vocabulary and iconography of slavery in order to draw popular attention and capital investment to their programmatic solutions. I have argued that this instrumentalisation of the past is politically dubious and intellectually regressive. What I now want to underscore is the historical nexus between slavery and intervention. It is striking that today's international lawyers, regardless of their fields of expertise, are resolute to intervene in the same regions and 'protect' the same people. They typically are: 'Mauritanians born into hereditary or 'chattel' slavery, Indian children labouring in debt bondage in brick kilns, Thai fishermen trapped in servitude, workers trafficked to construction projects in Qatar, girls abducted into sexual slavery by Boko Haram and Islamic State of Iraq and the Levant (ISIL), and political prisoners enslaved in Democratic People's Republic of Korea (DPRK).'[54] Notwithstanding these people's plight, one may wonder about the imperialist dimensions of the latest projects to end slavery. Hasn't international law always 'presented itself as improving the lives of conquered peoples',[55] developing far-reaching mechanisms to govern the decolonized world?

This postcolonial reading is strengthened by the fact that the fight against slavery is a powerful precedent in the international legal discourse. Indeed, the impetus to abolish slavery and the slave trade is precisely what was invoked at the end of the 19th century to promote

[54] Cockayne/Grono/Panaccione, 'Introduction' 2016 (n. 7), 255.
[55] Anghie, Anthony. 'On Critique and the Other', in *International Law and its Others*, eds. Anne Orford (Cambridge: Cambridge University Press, 2008), 389-400, 394.

international law's 'mission to civilise Africa'.[56] That imperial European powers justified the colonisation of Africa on the grounds that they were furthering civilisation and ending slavery was formalised in the Berlin Act of 1885.[57] It is well-known that during the conference that led to the adoption of that Act, the fate of the Independent State of the Congo was closely intertwined with the impetus to suppress slavery and the slave trade in the Congo basin.[58] There is a lesson to be learned: whenever the slave trade abolition is invoked, it should come with a warning sign –making us attuned to the dangers (i.e., imperialism at play) when current international legal projects claiming to address human vulnerability are legitimized by reference to the role international law played in the abolition of slavery.[59]

Second, we should work on providing a more complex and more credible assessment of the role international law played in the abolition of the slave trade and slavery. This would include, for instance, a close examination of the work carried out by 'Offices of the Protector' throughout the 19th century. They were set up in various locations in the French and British Empires following the abolition of the slave trade and were meant to guarantee the amelioration of slaves' (and then freemen's) status. But these Offices also allowed the sovereign to exert control over the slaves to prevent resistance to authority.[60] As this example suggests, a more realistic account of the legal history of abolition implies a departure from two traditional dichotomies: national / international and abolition / freedom. If what we want

[56] See, for instance, Montardy, Henry De. *La Traite et le Droit International* (Paris: Girard & Brière, 1906); Couvé, Edouard. *La Traite au Point de Vue du Droit des Gens* (Paris: Rousseau, 1889); Lévy, Henri. *La Traite des Noirs et les Puissances* (Nancy: Crépin-Leblond, 1894); Quéneuil, Henry. *De la Traite des Noirs et de l'Esclavage. La Conférence de Bruxelles et ses Résultats* (Paris: Larose & Tenin, 1907); Sarrien, Michel-Louis-Ferdinand. *La Traite des Nègres et le Droit de Visite au Cours du XIXe Siècle dans les Rapports de la France et de l'Angleterre* (Paris: Jouve et Cie, 1910); Gareis, Karl. *Der Sklavenhandel, das Völkerrecht und das deutsche Recht* (Berlin: Deutsche Zeit- und Streit-Fragen, 1885).

[57] Linden, Mieke van der. *The Acquisition of Africa (1870-1914). The Nature of International Law* (Leiden: Brill 2016).

[58] Anghie, 'Jurisprudence of Henry Richardson' 2017 (n. 8), 20.

[59] See Emmanuelle Tourme-Jouannet's insightful comments in her preface of Erpelding, *Le Droit International Antiesclavagiste* 2017 (n. 33).

[60] On the Office of the Protector in the British Colony of Trinidad, see Menon, Pavarthi. *Protecting Empire in Slave Colonies: The Politics of a Humanitarian Authoritarianism* (Helsinki: University of Helsinki, PhD Thesis, unpublished).

is to gain a better understanding of how imperial power operated through time and space, then we need to look more closely at the ways in which intersecting laws (and not only classical law of nations) prompted new versions of unfreedom. The reason is, European Empires constantly and violently moved people around to some places as slaves, indentures, labourers, etc., thanks to a variety of laws –the law of the sea, colonial laws, commercial laws, domestic laws, etc. What is more, the abolition of chattel slavery in the 19th century was accompanied by the maintenance and/or creation of other forms of exploitation and movement of peoples. 'Yet', observes Renisa Mawani, 'we write histories of slavery, indenture, and so-called free migration as though they are discrete, separated by time and space, and in ways that assume we can easily distinguish between the freedom and unfreedom of movement.'[61]

This research avenue, I admit, remains Eurocentric. Given the canons of legal research and the standards of evidence, it is difficult to tell the story 'in a different language, one that makes the slave the center of her own history rather than an ancillary and subordinated figure in the triumphant story'[62] of Western-led abolition. One fruitful road scholars have taken to write the history of international law and slavery 'from below' is to look at the ways in which Indigenous peoples, African captives, indentured labourers, and other colonial subjects mobilized laws to fight for their own freedoms and self-determination.[63] Sometimes these strategies were successful, other times they were not –what is also interesting is to think

[61] Dhillon, Hardeep. 'Borderlines: Genealogies of Law Across Land, Peoples & Sea: In Conversation with Renisa Mawani' (14 February 2009), available at: https://www.borderlines-cssaame.org/ (last accessed on 28 November 2020). See more generally Mawani, Renisa. *Across Oceans of Law. The Komagata Maru and Jurisdiction in the Time of Empire* (Durham: Duke University Press, 2018).
[62] Anghie, 'Jurisprudence of Henry Richardson' 2017 (n.8), 15.
[63] Henry Richardson has provided a detailed narrative of African-American claims to, interests in and appeals to international law over approximately two centuries spanning from the landing of the first African slaves at Jamestown in 1619 to the 1815 Treaty of Ghent (ending the War of 1812 between Britain and the United States). See Richardson, Henry. *The Origins of African-American Interests in International Law* (Durham: Carolina Academic Press, 2008).

through is how these were absorbed into regimes of colonial power.[64] Another approach is to focus on the encounter between Europe and the 'New World' in order to complexify the (European-driven) abolitionist narrative. Non-European States did use anti-slavery in order to support their own particular projects –Brazilian responses to British interventions in the name of slave trade abolition, for instance, were not purely docile but also meant to assert Brazil's affinity with Europe and its distinctiveness from Africa.[65] A third way to deal with Eurocentrism would be to pay more attention to other slave trades (that is, other than the transatlantic one), which tend to appear in historiographies of international law only as justifications for European colonial intervention in the late 19th century. This is the case of the Arab slave trade, which Bismarck famously invoked during the 1884-1885 Berlin Conference to intervene in East Africa. The point of such studies would not be to show that 'they too had a slave trade', obviously, but rather 'to illuminate the diversity of human experience and to create critical distance towards the intuitive naturalness of stories we have learned.'[66]

This brings me to my third and last suggestion: we should move away from abolition altogether and pay more attention to questions of political economy.[67] I have shown that the overwhelming majority of international lawyers look at the field's involvement in slavery matters from the 19th century onwards. But international law was involved well before the 19th century, not in the abolition but in the actual establishment and upholding of various forms of human exploitation, including chattel slavery. This point was fundamental to the young Georges Scelle, whose post-doctoral work stands out from his later work. In his *thèse d'Etat* published in 1906, Scelle explored what he called 'the legal and political history of the

[64] Renard Painter, Geneviewe. 'A Letter from the Haudenosaunee Confederacy to King George V: Writing and Reading Jurisdictions in International Legal History'. *London Review of International Law* 5(1) (2017), 7-48, 7.
[65] This is the PhD topic of Adriane Sanctis at the University of Sao Paolo (unpublished chapter).
[66] Koskenniemi, Martti. 'Histories of International law: Dealing with Eurocentrism'. *Rechtsgeschichte – Legal History* 19 (2011), 152-176, 169.
[67] On the 'turn to political economy' in international law, see Haskell, John and Rasulov, Akbar. 'International Law and the Turn to Political Economy'. *Leiden Journal of International Law* 31(2) (2018), 243-250, 243.

slave trade to Spanish America'.[68] Instead of looking –like his peers did– at the relationship between international law and slavery through the abolition lens, he focused on what happened before the 19th century. He took it for granted that the enslavement of Africans was made possible, was commercialised, and was globalised through extensive legal work. This legal work is what constituted his object of inquiry. In short, Scelle's approach contrasts with the deep-seated tendency in our discipline to celebrate the role international law has played in ending slavery. On the backdrop of such ideological move, Scelle comes in to remind us that slavery was a global legal regime and that we have to deal with it as such.[69]

One way to think this through is to envisage slavery as a hybrid legal regime (public / private, national / international) that has varied greatly across contexts. International lawyers know little about the many different regimes that instituted slavery. Instead, the tendency in our discipline is to present slavery in a flat or sweeping manner as a socio-anthropological fact that has always existed until modern international law ought to have intervened.[70] Slavery may have been a practice deeply entrenched in most societies, but it was supported by various forms of authority and legal arguments, including natural law and *ius gentium*. For instance, what did 16th-century Spanish theologians and jurists –those we like to think of as 'founders of international law'[71] – say about black slavery?[72] In the 17th and 18th centuries, practically

[68] The final product is a 1610-page long comprehensive analysis of the life and death of *asientos de negros*, that is to say, contracts by which the Spanish Crown granted an individual, a company or another state the privilege – and often the monopoly– to supply African slaves to Spanish colonies. Scelle, Georges. *Histoire Politique de la Traite Négrière aux Indes de Castille. Contrats et Traités d'Assiento* (Paris: Sirey, 1906), Volume 1: *Les Contrats (XVIe et XVIIe siècles)*, Volume 2: *L'Assiento et la Guerre de Succession d'Espagne.*

[69] Martineau, Anne-Charlotte.'Georges Scelle's Study of the Slave Trade: French Solidarism Revisited'. *European Journal of International Law* 27(4) (2016), 1131-1151, 1131.

[70] To give one stirring example: 'With the exception of marriage, slavery may be humanity's oldest and must ubiquitous organized social institution. […] [S]lavery has existed in almost every place and culture in the world. Like the mythical vampire, it always seems to be there, ready to pounce on the innocent and vulnerable, sucking out their blood for the benefit of their masters and the larger culture.' Finkelman, Paul and Drescher, Seymour. 'The Eternal Problem of Slavery in International Law: Killing the Vampire of Human Culture'. *Michigan State Law Review* 87(1) (2017), 755-805, 756.

[71] Shaw, Malcom. *International Law* (Cambridge: Cambridge University Press, 6th ed., 2008), 22. See also the contributions of Mechoulan, Henry and Haggenmacher, Peter. *Actualité de la Pensée Juridique de Francisco de Vitoria* (Bruxelles: Bruylant, 1988).

all European argumentation on slavery and the slave trade took place within the idiom of political economy. I think there is much to be learned by looking at these various arguments.[73]

Another issue that immediately comes to mind when thinking about slavery as a global legal regime is that of reparations. Ever since the Durban Conference, claims for reparations for slavery are in need of legal imagination. The inclusion in the 2001 Final Declaration of a clause stating that slavery is now a crime against humanity but that it was not in the past prevents, in the eyes of many commentators, the articulation of any legal claims for reparations.[74] How can international law be used to confront the enduring socio-political and economic legacies of slavery and racial discrimination? A good starting point may be Martha Biondi's suggestion that 'the philosophical and tactical brilliance of reparations lies in its synthesis of moral principles and political economy.'[75] The language of reparations brings to the fore the harsh reality that slave labour created modern states; it also changes the discursive image of slave descendants from victims to creditors. One does not need to be a fully-blown Marxist to see the paradox that emerges then between, on the one hand, the extreme reluctance of Western states to provide meaningful forms of redress for black slavery (including labour-as-property), and, on the other hand, previous measures taken by the same

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[72] While their views on the status and treatment of the 'Indians' are well-known, much less so are their reflections on the buying, transportation, and selling of the 'Ethiopians'. There are few exceptions among contemporary international lawyers. See Obregón, Lilliana. 'Criticas Tempranas a la Esclavización de los Africanos', in *Afrodescendientes en las Américas. Trayectorias Sociales e Identitarias*, eds. Claudia Mosquera, Mauricio Pardo and Odile Hoffmann (Bogotá: Universidad Nacional de Colombia, 2002), 2-45; Allain, *Slavery in International Law* 2012 (n. 32), 9-55.

[73] On the relationship between slavery and capitalism, see Benot, Yves. *La Modernité de l'Esclavage. Essai sur la Servitude au Cœur du Capitalisme* (Paris: Découverte, 2003).

[74] See for instance Van Bueren, Geraldine. 'Slavery as Piracy: The Legal Case for Reparations for the Slave Trade', in *The Political Economy of New Slavery*, eds. Christien van den Anker (London: Palgrave Macmillan, 2004), 235-247. Some have even argued that international lawyers should stay away from such complicated and sensitive matter and leave philosophers deal with it. See Tourme-Jouannet, Emmanuelle. 'Reparations for Historical Wrongs: The Lessons of Durban', in *What is a Fair International Society?*, eds. Emmanuelle Tourme-Jouannet (Oxford: Hart Publishing, 2013), 187-201. I am of the opinion that silence, especially in slavery matters, has too often been an act of complicity and that there is *a priori* no 'better' language to deal with them.

[75] Biondi, Martha. 'The Rise of the Reparations Movement', in *Redress for Historical Injustices in the United States: On Reparations for Slavery, Jim Crow, and Their Legacies*, eds. Michael T. Martin and Marilyn Yaquinto (Durham: Duke University Press, 2007), 255-275, 277.

Western states to preserve the value of captive labour to former slave-owners via direct financial compensation. This paradox is drawn most sharply in the case of France and Haiti: not only did France compensate its own slave owners in Saint-Domingue, but it also obtained from Haiti a huge financial 'compensation' in return for statehood recognition.[76] In fact, Haiti is the major blindspot in the historiography of international law and slavery. The story of the world's most significant abolition, which took place as a result of a revolution by black slaves – and not by Europeans –, has yet to be told by international lawyers.[77]

Conclusion

International lawyers interested in contemporary slavery issues often speak about the past. Mentioning the past usually serves the making of a point about the present, even if it is done metaphorically or in passing, as a way of opposing 'past' practices to 'present' ones.[78] This is not a problem *per se*. That the concern is a contemporary one is not in itself negative – on the contrary, the 'turn to history' is a move forward insofar as it helps us to understand the present.[79] What is problematic is when history turns into ideology and ends up legitimizing current (human rights, criminal law, and/or anti-trafficking) regimes or projects.

In light of this, I have made three suggestions –namely, to be attentive to humanitarian actions carried out in the name of ending slavery; to provide a more contextualised account of the legal abolition of slavery; and to bring political economy in and envisage slavery as a

[76] In Britain and in France, millions were paid to slave owners 'in compensation' for the loss of their slaves after emancipation. See Araujo, Ana Lucia. *Reparations for Slavery and the Slave Trade: A Transnational and Comparative History* (London: Bloomsbury Academic, 2017).
[77] Gainot, Bernard. *La Révolution des Esclaves. Haïti, 1763-1803* (Paris: Vendémiaire, 2017).
[78] The underlying argument is usually that 'new' and 'old' slavery display different characteristics and are driven by different dynamics so that 'old' slavery has little bearing upon ongoing problems that are now over a century removed from legal abolition. Gross, Ariela J. and Chantal Thomas. 'The New Abolitionism, International Law, and the Memory of Slavery'. *Law and History Review* 35(1) (2017), 99-119, 102.
[79] Koskenniemi, Martti. 'Histories of International Law: Significance and Problems for a Critical View'. *Temple International and Comparative Law Journal* 27(2) (2013), 215-241.

global legal regime that has evolved over time and space. These suggestions have an effect on the *problématique* with which I started this chapter. Indeed, the contradiction between law ('prohibition of slavery') and reality ('persistence of slavery') is no longer the cliffhanger when we conceive slavery to be a legal regime whose contours have varied greatly across contexts. There is a shift in perspective. We can start thinking about how oppression operates in the world through the legal experience of slavery.[80] Do not get me wrong: there is an earnest element when international lawyers concerned with the tremendous scale of exploitative practices around the world speak of a definitional deficiency in law. But whatever the intention, seeking to unveil what slavery 'really' means in international law obscures more than it explains the practices that the concept is being used to denounce.[81] The challenge for international lawyers interested in studying the history of slavery is to understand why freedom and wealth remain so unevenly distributed in the twenty-first century, and what international law and the legacies of imperialism have to do with that.

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[80] For the argument that 'legal arrangements offer a privileged window onto political economic dynamics', see Kennedy, David. 'Law and the Political Economy of the World'. *Leiden Journal of International Law* 26(1) (2013), 7-49, 8.

[81] I am inspired by Orford, Anne. 'In Praise of Description'. *Leiden Journal of International Law* 25(3) (2012), 609-627.

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