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## Contested Histories: Revisiting the Relationship Between International Law and Slavery

Anne-Charlotte Martineau

► **To cite this version:**

Anne-Charlotte Martineau. Contested Histories: Revisiting the Relationship Between International Law and Slavery. Shane Chalmers; Sundhya Pahuja. Routledge Handbook of International Law and the Humanities, Routledge, pp.279-289, 2021, 9780367420741. 10.4324/9781003170914-26 . hal-03325609

**HAL Id: hal-03325609**

**<https://hal.science/hal-03325609>**

Submitted on 25 Aug 2021

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# Contested histories

## Revisiting the relationship between international law and slavery

Anne-Charlotte Martineau

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### Introduction

For the last couple of years, I have been revisiting the historical relationship between slavery and international law. In so doing, I often read and draw inspiration from the research carried out by members of the Institute for International Law and the Humanities. Many of them study the history, theory and practice of international law with a focus on inequalities and the lived realities of peoples of the Global South.<sup>1</sup> Because they want to grasp the role of international law in global governance, they are attentive to – and attempt to destabilise – existing narratives that portray the role of international law in an ‘excessively positive light. In this chapter, I want to show that one such narrative pertains to slavery.

Slavery is one of the very few issues that are indisputably and unanimously condemned by modern international lawyers. The prohibition against slavery is regularly cited as a *ius cogens* norm while the long campaign to abolish the transatlantic slave trade has been presented as ‘the most successful episode ever’<sup>2</sup> in the history of our discipline. In fact, as Frederic Mégret rightly observed, ‘few causes have marked the modern development of international law as much as the abolition of slavery’.<sup>3</sup> The work produced by the first generation of ‘gentle civilizers’<sup>4</sup> is a case at point: many of them celebrated the role of international law in abolishing the slave trade and slavery. They did not hesitate to condemn the conduct of Spain and other European powers after the arrival of Columbus at Hispanola in 1492.<sup>5</sup> They made sure, however, to contrast these

1 See for example Sundhya Pahuja, *Decolonizing International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

2 Jennifer Martineau, *The Slave Trade and the Origins of International Human Rights Law* (New York: Oxford University Press, 2012), 13.

3 Frédéric Mégret, “Droit international et esclavage: pour une réévaluation,” *African Yearbook of International Law* 121 (2013): 122.

4 Martti Koskenniemi, *The Gentle Civilizers of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).

5 See for example Edouard Couvê, *La traite au point de vue du droit des gens* (Paris: Rousseau, 1889); Henri Lévy, *La traite des noirs et les Puissances* (Nancy: Crépin-Leblond, 1894); Henri Quéneuil, *De la traite des noirs et de l’esclavage. La conférence de Bruxelles et ses résultats* (Paris: Larose & Tenin, 1907); Michel-Louis-Ferdinand Sarrien, *La traite des*

practices with nineteenth-century colonialism and the on-going civilising mission of Africa. They insisted on the long march undertaken towards the abolition of slavery, and the need for further civilisation of ‘barbaric’ peoples (i.e., those who had sold their own people). Their celebratory tone called for more international law and for more intervention in the Global South.<sup>6</sup>

More than a century later, there is a renewed interest in the history of international law with regard to slavery. Often, the story that is told of the relationship between international law and slavery continues to be a generous one; it strengthens the thinking about slavery as a persistent phenomenon that exists in spite of international law and the good work done by international lawyers. What is characteristic of this narrative is the tendency to simplify and celebrate international law’s involvement in ending the slave trade and slavery before redeploing that role in the present in order to promote some kind of humanitarian project (Part I). This is not the end of the matter, however. Over the last couple of years, a number of international lawyers have been looking at the history of international law and slavery in a more critical vein. They have shed light on the intricate relationship between the legal abolition of slavery and European imperialism. These historical studies are particularly instructive insofar as they destabilise the discipline’s self-conception as an anti-slavery champion. What will need to be explained, however, is why the counterpoint ceases to be enlightening when speaking about the present and debating which institutional arrangements should address modern forms of slavery (Part II).

### Standard narrative: a history of abolition

The involvement of international law on matters pertaining to slavery is generally presented through a specific historical narrative – namely, one of humanitarian progress. 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 Great Britain in the mid-nineteenth century and that triumphs with the adoption in institutional  *fora*  of the 1926 Slavery Convention, the 1930 Forced Labour Convention and the 1956 Supplementary Convention.<sup>7</sup> 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).<sup>8</sup> What is certainly most disturbing about this narrative is its teleological and European-driven nature, as if abolition had been a process of expansion

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*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); Karl Gareis, *Der Sklavenhandel, das Völkerrecht und das deutsche Recht* (Berlin: Deutsche Zeit- und Streit-Fragen, 1885).

- 6 One example among many is the doctorate thesis on the transatlantic slave trade that Henri de Montardy defended in 1906 at the Law Faculty of the University of Paris. After revisiting the carrier of African captives across the Atlantic, and after celebrating the abolition of slavery through international treaties by European states, Montardy posited that it would be a terrible mistake to grant Africans absolute freedom. Time and education were needed for the emancipation of those who had sold their own people during the barbarous slave trade. ‘Only civilisation can, thanks to its slow but firm penetration, be a solution to problem of slavery’: Henri de Montardy, *La traite et le droit international* (Paris: Girard & Brière, 1906), 203.
- 7 Ved Nanda and Mahmoud Cherif Bassiouni, “Slavery and Slave Trade: Steps Toward Eradication,” *Santa Clara Law Review* 12, no. 2 (1979). The same narrative can be found in international legal textbooks. See also Seymour Drescher and Paul Finkelman, “Slavery,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 890–916; Dominique Gaurier, *Histoire du droit international. De l'Antiquité à la création de l'ONU* (Rennes: PUR, 2014), 1058–70.
- 8 For a survey of UN mechanisms such as the Special Rapporteur on Contemporary Forms of Slavery and the Human Rights Committee, see Vladislava Stoyanova, “United Nations Against Slavery: Unravelling Concepts, Institutions and Obligations,” *Michigan Journal of International Law* 38, no. 3 (2017).

from ('enlightened') core to ('backward') periphery. But I also want to stress the heroic image it portrays of our discipline. By focussing on abolition exclusively, the standard narrative suggests that international rules and institutions stepped in only in the nineteenth century to combat, with great success, the slave trade and slavery. The ideology that is conveyed is powerful and remains pervasive still today: 'slavery', observes Anthony Anghie, 'is an abhorrence against which international law can demonstrate its commitment to protecting human dignity and furthering the cause of international law.'<sup>9</sup>

This narrative is not only found in general textbooks and online encyclopaedias.<sup>10</sup> It is also put forth in scholarly articles, especially in the fields of human rights and international criminal law. It can take the form of an introduction or shortened version of the legal history of abolition before international lawyers turn to examine contemporary case law on slavery – thereby suggesting a continuity between nineteenth-century legal developments and today's international human rights courts, the latter constituting the endpoint of a long process of humanitarian dedication and legal efforts.<sup>11</sup> A stronger claim can also be made whereby the legal history of abolition serves not the purpose of continuity but that of origins. One example is the special issue on slavery that was published in the *International Journal for Criminal Justice* in 2016. Although the issue was titled 'Slavery and the Limits of International Criminal Justice', the whole point was to promote the role of international criminal law in the ongoing fight against slavery. For this, the three organisers of the special issue – all of them 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.'<sup>12</sup> To support this argument about their field's origins, they relied on Jenny Martinez's book, *The Slave Trade and The Origins of International Human Rights Law*.<sup>13</sup> They asserted that mixed commissions (renamed 'courts') established by Great Britain through bilateral treaties in the nineteenth century played a catalysing role in the emergence of international criminal law. Granted, they say, 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'.<sup>14</sup>

A number of critiques have already been formulated against Martinez's book after its publication in 2012. Renowned historians and international lawyers such as Samuel Moyn, Lauren

9 Antony Anghie, "Slavery and International Law: The Jurisprudence of Henry Richardson," *Temple International and Contemporary Law Journal* 31, no. 1 (2017): 13.

10 See for example Patrick Daillier and Alain Pellet, *Droit International Public*, 7th ed. (Paris: IGDJ, 2002), 707–8; Malcom Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 270; Silvia Scarpa, "Slavery," *Oxford Bibliography on International Law*, [www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0097.xml](http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0097.xml); David Weissbrodt, "Slavery," *Max Planck Encyclopaedia of Public International Law*, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e874>. See also Randall Lesaffer, "Vienna and the Abolition of the Slave Trade," *Oxford Public International Law*, <http://opil.ouplaw.com/page/vienna-slave-trade-abolition>.

11 See Andrea Nicholson, "Reflections on *Siliadin v. France*: Slavery and Legal Definition," *The International Journal of Human Rights* 14, no. 5 (2010).

12 James Cockayne, Nick Grono and Kari Panaccione, "Introduction," *Journal of International Criminal Justice* 14, no. 2 (2016): 258.

13 Martinez, *Slave Trade*, 6.

14 Cockayne, Grono and Panaccione, "Introduction," 258.

Benton and Philip Alston considered Martinez's thesis to be over-simplistic (if not utterly utopian) because she neglected to situate legal developments in the larger socio-economic and political context.<sup>15</sup> Her story of the abolition of the slave trade is essentially one of moral values becoming enshrined in international law that triumphed over economic and other 'great power' considerations.<sup>16</sup> They also criticised Martinez for having failed to bridge the past and the present in any convincing fashion.<sup>17</sup> According to Moyn, 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 nineteenth and twenty-first centuries in any meaningful way.<sup>18</sup> This proved to be particularly dangerous as Martinez did not hesitate to draw lessons from what she considered to be a successful episode.<sup>19</sup> Among others, she called upon the world's leading power, United States, to take inspiration from the British Empire and 'foster democracy and human rights both through the use of force and through legal institutions'.<sup>20</sup> 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.'<sup>21</sup>

In light of this, one would think that international lawyers would have been more careful in reclaiming the (supposedly) valiant role international law played in the abolition process for the sake of today's agenda. But, as the special issue of the *International Journal for Criminal Justice* shows, this is not the case.<sup>22</sup> The three organisers did not attempt to provide a richer or finer contextual reading of international law's involvement in the abolition of the slave trade. In fact, their objective was not to study the past; their objective was to use history in order to advance the cause of international criminal justice today. Since international criminal courts already dealt with slavery successfully in the nineteenth century, there is no reason why they shouldn't be involved today and be successful again, right? This blunt superposition is the reason why their argument cannot be regarded as a serious historical engagement. History is merely there to support or vindicate global criminal justice – it is a noble project we should all embrace. The problem, to borrow Moyn's words, is that conjuring up the abolition process to buck up the project of international criminal justice turns into a political and intellectual trap: the special

15 Lauren Benton, "Abolition and Imperial Law, 1790–1820," *The Journal of Imperial and Commonwealth History* 39, no. 3 (2011). Martinez also failed to mention the important historical work done by international lawyers on the slave trade, such as Jean Allain, "The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade," *British Yearbook of International Law* 78, no. 1 (2008); Holger Lutz Kern, "Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade," *Journal of the History of International Law* 6 (2004).

16 In her response to Alston, Martinez rejected this critique, claiming that she did acknowledge that other (meaning, non-humanitarian) interests were at stake in the process: Jennifer Martinez, "Human Rights and History," *Harvard Law Review Forum* 126 (2012).

17 Lauren Benton, "The Slave Trade and the Origins of International Human Rights Law," *Victorian Studies* 56, no. 1 (2013).

18 Samuel Moyn, "Of Deserts and Promised Lands: The Dream of Global Justice," *The Nation*, February 20, 2012, [www.thenation.com/article/deserts-and-promised-lands-dream-global-justice/](http://www.thenation.com/article/deserts-and-promised-lands-dream-global-justice/).

19 Martinez, *Slave Trade*, 15.

20 *Ibid.*, 15. 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.

21 Philip Alston, "Does the Past Matter? On the Origins of Human Rights," *Harvard Law Review* 26 (2013): 2061.

22 For a more thoughtful approach, see Ariela Gross, "Introduction: 'A Crime Against Humanity': Slavery and The Boundaries of Legality, Past and Present," *Law and History Review* 35, no. 1 (2017).

issue obscures ‘the conditions under which the cause of international criminal justice suddenly became so appealing and international courts currently operate’.<sup>23</sup>

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 privileged discursive strategy in the context of competing knowledge communities and international legal regimes (i.e., complexes of norms and institutions) 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.<sup>24</sup> References to the slave trade have been commonly used. Take the speech the then US President George W Bush gave to the UN General Assembly on 23 September 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.<sup>25</sup>

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 palpable.<sup>26</sup> 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)?<sup>27</sup> In any case, Bush glided over the reality that the United States’ internal slavery did not end until the Civil War and the adoption

23 Moyn, *Deserts and Promised Lands*, 17.

24 See Boaventura de Sousa Santos, *The Fight Against Trafficking in Human Beings in EU: Promoting Legal Cooperation and Victims’ Protection*, European Commission, [www.transcrime.it/wp-content/uploads/2016/01/THB\\_CoopToFight.pdf](http://www.transcrime.it/wp-content/uploads/2016/01/THB_CoopToFight.pdf).

25 George Bush, “Statement by His Excellency Mr George W. Bush, President of the United States of America. Address to the United Nations General Assembly,” *UN*, September 23, 2003, [www.un.org/webcast/ga/58/statements/usaeng030923.htm](http://www.un.org/webcast/ga/58/statements/usaeng030923.htm).

26 Imperial nostalgia also impregnates the anti-trafficking discourse. ‘[J]ust as the British government . . . once used the Royal Navy to stamp out the problem, today’s great powers must bring their economic and military might to bear on this most crucial of undertakings’: Ethan Kapstein, “The New Global Slave Trade,” *Foreign Affairs* 85 (2006): 104.

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 [www.state.gov/j/tip/rls/tiprpt/](http://www.state.gov/j/tip/rls/tiprpt/).

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.<sup>28</sup> 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.

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’<sup>29</sup> while condemning developing countries to be responsible for modern slavery. They have also warned that the contemporary fight should not be allowed to distract or deflect attention from the lasting effects of the original slavery itself. Instead of referring to the slave trade abolition as ‘an emotional and historic touchstone – the blueprint against which [today’s] traffic is measured’,<sup>30</sup> the United States should address the legacies of slavery at home. Focus should be placed on the ongoing challenges confronting African-Americans, including ‘the ways in which racial subordination persists in a supposedly post-racial world’.<sup>31</sup>

### Counterpoint: a history of fragmentation

It would be reductive to relegate the entire international legal scholarship on the relationship between international law and slavery to one single narrative. Over the last decade, a number of international lawyers have studied that relationship more meticulously and thoughtfully. I am particularly appreciative of the work of Jean Allain,<sup>32</sup> Joel Quirk,<sup>33</sup> Karen Bravo<sup>34</sup> and Michel Erpelding,<sup>35</sup> who have offered a more sophisticated and nuanced understanding of the history of that relationship. Their work constitutes a counterpoint insofar as they destabilise, discredit or otherwise challenge the standard narrative. Let me give two examples.

Against Martinez et al., Quirk and Erpelding have shown that imperialism and colonialism were not side-issues in the nineteenth 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.<sup>36</sup> These issues had become closely linked to European powers’ colonial

28 Karen Bravo, “The Role of the Transatlantic Slave Trade in Contemporary Anti-Human Trafficking Discourse,” *Seattle Journal for Social Justice* 9, no. 2 (2011): 562.

29 Karen Bravo, “Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade,” *Boston University International Law Journal* 25, no. 2 (2007): 221. See also Gretchen Soderlund, “Running from the Rescuers: New U.S. Crusades Against Sex Trafficking and the Rhetoric of Abolition,” *National Women’s Studies Association Journal* 17, no. 3 (2005).

30 Bravo, “Exploring the Analogy.”

31 Anghie, *Slavery and International Law*, 21.

32 Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Leiden: Brill, 2012).

33 Joel Quirk, *The Anti-Slavery Project: From the Slave Trade to Human Trafficking* (Philadelphia: University of Pennsylvania Press, 2011).

34 Bravo, “Exploring the Analogy.”

35 Michel Erpelding, *Le droit international antiesclavagiste des “nations civilisées” (1815–1945)* (Paris: Institut Universitaire Varenne, 2017).

36 To give one example, the French maintained forced labour for public works (*prestations en nature*) in their colonies until 1946: Jean Frimigacci, “L’Etat colonial français, du discours mythique aux réalités (1880–1940),” *Matériaux pour l’histoire de notre temps* 32–33 (1993).

policies: how should they condemn slavery – after all, this had been one of the justifications for colonising Africa in the first place – without jeopardising the need for a slavery-like labour force in their colonies?<sup>37</sup> 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’.<sup>38</sup> From that moment onwards, the powers attached to the individual right of ownership as attributed by law became the *sine qua non* of slavery.<sup>39</sup> 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 considered either as ‘soft or benevolent slavery’<sup>40</sup> or as falling outside the formal definition of slavery.<sup>41</sup> 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.<sup>42</sup> 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’.<sup>43</sup> 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’.<sup>44</sup>

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 the language used to define it’.<sup>45</sup> The white slave traffic arose in relation to the issue of venereal

37 Michel Erpelding, “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 (2015).

38 International Slavery Convention, 1926, Article 1(1).

39 This concerned effort to restrict the definition of slavery so that it did not apply in cases where a non-European government was the subject of inquiry (that is, Liberia): see Erpelding, *Le droit international antiesclavagiste*, 508–17.

40 Henri Queuneuil, “Conférence anti-esclavagiste de Bruxelles. Acte général du 2 juillet 1890: Application et résultats,” *Revue Générale de Droit International* 15 (1908): 136.

41 See for example Fritz Weidner, *Die Haussklaverei in Ostafrika: Geschichtlich und Politisch Dargestellt* (Jena: Gustav Fischer, 1915).

42 See Suzanne Miers, *Slavery in the Twentieth Century. The Evolution of a Global Problem* (Walnut Creek: Altamira Press, 2003), 121–30.

43 *Forced Labour Convention* 1930 (no. 29), Article 2(1).

44 League of Nations, Note Submitted to the First Sub-Committee of the Six Committee by the Portuguese Delegate, General Freire d’Andrade, AVI/S.C.1/2.1925, September 11, 1925, quoted by Jean Allain, *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford: Oxford University Press, 2012), 202.

45 Jean Allain, “White Slave Traffic in International Law,” *Journal of Trafficking and Human Exploitation* 1, no. 1 (2017): 1. See also Jean Allain, “Genealogies of Human Trafficking and Slavery,” in *Routledge Handbook of Human Trafficking*, eds. Ryszard Piotrowicz and Conny Rijken (London: Routledge, 2018).



disease in the late nineteenth century and is grounded in Victorian paternalism.<sup>46</sup> 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 organised 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.<sup>47</sup> An important point of disagreement during the negotiation had been the nature of the offence for women over the age of majority versus 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?<sup>48</sup> 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, European and American (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 nineteenth-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 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.'<sup>49</sup> 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'<sup>50</sup> 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.<sup>51</sup>

As these two examples show, the counterpoint takes history seriously and explores the long-rooted relationship between law, economy and power. That said, I find the counterpoint less convincing when integrating studies of the past to discuss today's challenges. What are the latter? Much of the discussion revolves around the 'fragmentation'<sup>52</sup> of the law on human exploitation.

46 Judith Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (Cambridge: Cambridge University Press, 1980).

47 On the racial component of the treaty, see Eileen Scully, "Pre-Cold War Traffic in Sexual Labour and Its Foes: Some Contemporary Lessons," in *Global Human Smuggling*, eds. David Kyle and Koslowski Rey, 2nd ed. (Baltimore: The Johns Hopkins University Press, 2011).

48 Allain, *White Slave Traffic in International Law*, 16.

49 Bravo, "Exploring the Analogy," 575.

50 Ibid.

51 Annie Bunting and Joel Quirk, eds., *Contemporary Slavery. Popular Rhetoric and Political Practice* (Vancouver: UBC Press, 2017). On the genesis of today's US anti-trafficking debate, see Jennifer Lobasz, *Constructing Human Trafficking. Evangelicals, Feminists, and an Unexpected Alliance* (Cham: Palgrave Macmillan, 2018). On the previous scandal, see Jean-Michel Chaumont, *Le mythe de la traite des blanches. Enquête sur la fabrication d'un fléau* (Paris: La Découverte, 2009).

52 Anne-Charlotte Martineau, *Une analyse critique du débat sur la fragmentation du droit international* (Bruxelles: Bruylant, Collection de droit international, 2015).

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 and international refugee law) raises a number of concerns. To what extent does this state of affairs give rise to conflicting interpretations of slavery?<sup>53</sup> In the counterpoint narrative, fragmentation is often depicted as a problem that could be resolved if we were to identify more clearly what is slavery versus lesser forms of exploitation, such as forced labour. This explains why so much ink has been spilt 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, or should we prefer an expansive definition which would focus on the degree of control and coercion? What I want to highlight is how both sides (referred to as ‘restrictivists’ and ‘expansionists’) use history to support their positions.

On the one hand, expansionists reject the 1926 definition of slavery on the ground that it was developed by the League of Nations – a European colonial club – which sought to end slavery beyond its membership while codifying forced labour in its colonies. There is no reason why we should continue to accept the colonialist argument according to which forced labour and slavery constitute substantively different practices.<sup>54</sup> Expansionists also argue that if we were to retain the 1926 definition, it would lead to a new form of double standard or blindness: when slavery is interpreted in such a manner as to provide for a minimalist understanding, it allows authorities to close their eyes (and support) a wide range of highly exploitative and coercive practices. ‘When slavery is approached as an historical relic, rather than a dynamic problem’, claims Quirk,

blindness to contemporary problems is to be expected. To overthrow this cultural inheritance, a deeper and broader vision is required. Rather than reducing slavery to a “peculiar” historical anomaly (to be explained away), we instead need to view slavery as a widespread and deeply rooted component of contemporary life.<sup>55</sup>

On the other hand, restrictivists do not deny the colonial origins of the 1926 definition. But, they say, the expansion of the notion of slavery to ‘practices similar to slavery’ in the 1956 Supplementary Convention and then to apartheid and colonialism in the 1960s by newly independent states was equally done for political motives.<sup>56</sup> The result of this expansion was a confusion which is most

53 Rebecca Scott, “International Law and Contemporary Slavery: The Long View,” *Michigan Journal of International Law* 38, no. 3 (2017): 352. See also Holly Cullen, “Contemporary International Legal Norms on Slavery. Problems of Judicial Interpretation and Application,” in *The Legal Understanding of Slavery: From the Historical to the Contemporary*, ed. Jean Allain (Oxford: Oxford University Press, 2012). On the clash between human rights law and anti-trafficking, see James Hathaway, “The Human Rights Quagmire of ‘Human Trafficking,’” *Virginia Journal of International Law* 49, no. 1 (2008).

54 Nicholas McGeehan, “Misunderstood and Neglected: The Marginalisation of Slavery in International Law,” *The International Journal of Human Rights* 16, no. 3 (2012).

55 Joel Quirk, *Unfinished Business: A Comparative Survey of Historical and Contemporary Forms of Slavery* (Joint Report of UNESCO and the Wilberforce Institute of Slavery, 2008), 120, <https://www.jrf.org.uk/report/between-decent-work-and-forced-labour-examining-continuum-exploitation>. See also A. Yasmine Rassam, “International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach,” *Penn State International Law Review* 23, no. 4 (2005).

56 See Jean Allain, “The International Definition of Slavery and Its Contemporary Application,” in *Esclavage, traite et autres formes d’asservissement et d’exploitation*, eds. Jean-François Niort and Olivier Pluen (Paris: Dalloz, 2018), 307–9.

evident in the work of the UN Working Group on Contemporary Forms of Slavery (1975–2006).<sup>57</sup> Under the heading of ‘contemporary forms of slavery’, the Working Group considered a number of social ills, including trafficking in persons, exploitation of prostitutes (1989); child pornography, children in armed conflict (1990); child soldiers (1991); removal of organs (1992); incest (1993); migrant workers, sex tourism (1994); illegal adoption (1996); early marriages and detained juveniles (1997). The problem is this: when slavery is interpreted in such a manner as to include all social injustices or human rights violations that may occur, it becomes so broad as to be meaningless.<sup>58</sup>

Because of their respective criticisms, both sides move on to search for a common ground. On the one hand, expansionists agree on the need to limit the issues that can be designated as species of slavery.<sup>59</sup> If all goes well, selected issues will acquire greater legal and political prominence, and will be addressed effectively. This is precisely what international human rights courts – with the European Court as the frontrunner – have been doing.<sup>60</sup> However, there remains an important downside to situating an issue within the specific historical and moral context of a human right not to be held in slavery: ‘invoking slavery can be [a] polarizing move, narrowing space for ameliorative strategies that rely on the goodwill of those involved.’<sup>61</sup> On the other hand, restrictivists revisit the 1926 definition to suggest that it does not only cover *de jure* situations of ownership (i.e., chattel slavery), but also *de facto* situations of ownership, when one human exercises a power attaching to ownership without actually owning the other human.<sup>62</sup> This definition is said to be suitable because it covers contemporary practices of slavery while fitting the ‘criminal law paradigm’.<sup>63</sup> Restrictivists believe that the ICC and the anti-trafficking regime have ‘already done more . . . to advance the jurisprudence and the agenda of anti-slavery and the fight against exploitation than anything seen under the auspice of international human rights law’.<sup>64</sup> But who can seriously believe that the criminalisation of slavery, with its focus almost exclusively on punishment of perpetrators, will be able to address the vastly complex issue of human exploitation?<sup>65</sup>

What I want to convey here is that the turn to history has lost its critical bite. 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

57 Allain, “International Definition of Slavery,” 309.

58 Jean Allain has voiced the strongest criticism against the ‘conflation’ of various social ills with slavery. ‘In proportion to slavery’s growth in breadth, has been its diminishing legal worth’: Jean Allain, “The Definition of ‘Slavery’ in General International Law and the Crime of Enslavement within the Rome Statute,” in *Guest Lecture Series of the Office of the Prosecutor* (The Hague: International Criminal Court, April 26, 2007), 2.

59 Weissbrodt, *Abolishing Slavery*, 177.

60 Michele Cavallo, “Formes contemporaines d’esclavage, servitude et travail forcé: le TPIY et la CEDH entre passé et avenir,” *Droits fondamentaux* 6 (2006); Helen Duffy, “Litigating Modern Day Slavery in Regional Courts. A Nascent Contribution,” *Journal of International Criminal Justice* 14, no. 2 (2016); Vladislava Stoyanova, “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, no. 2 (2014).

61 Joel Quirk, “The Anti-Slavery Project: Linking the Historical and Contemporary,” *Human Rights Quarterly* 28, no. 3 (2006): 595.

62 Allain, “International Definition of Slavery,” 296.

63 Jean Allain, “The International Legal Regime of Slavery and Human Exploitation and Its Obfuscation by the Term of Art: ‘Slavery-like Practice’,” *Cahiers de la recherche sur les droits fondamentaux* 10 (2012): 28; Emmanuel Decaux, *Les formes contemporaines de l’esclavage* (Leiden: Martinus Nijhoff Publishers, 2009), 16–17.

64 Jean Allain, “A Response to Anne Gallagher by Jean Allain,” *OpinioJuris* (June 8, 2009), <http://opiniojuris.org/2009/06/08/a-response-to-anne-gallagher-by-jean-allain/>.

65 See Karen Bravo, “Interrogating Everyperson’s Roles in Today’s Slavery,” *Temple International and Comparative Law Journal* (2017): 25.

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.<sup>66</sup> 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.

## Conclusion

In light of these shortcomings, international lawyers may wonder how to move forward and approach slavery. I do not pretend to have all the answers. But it seems to me imperative to move away from abolition. To study the relationship between international law and slavery through the lenses of its abolition privileges a history in which Europe gets to play the hero. Yet we know that abolition was imposed for multiple reasons (economic, ideological, geopolitical, cultural . . .) and by incessant struggles of slaves (suicides, poisonings, maroons, revolts, insurrections . . .). As a matter of fact, the world's most significant abolition took place as a result of a revolution by black slaves and in Haiti – not by Europeans. If there is one blind spot in the historiography of international law and slavery, here it is.<sup>67</sup>

Another step forward is to extend the timeframe of research. As I have shown in this chapter, the majority of international lawyers look at the field's involvement in slavery matters from the nineteenth century onwards. But international law was involved well before the nineteenth 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 slave trade to Spanish America'.<sup>68</sup> 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 nineteenth century. He took it for granted that the enslavement of Africans was made possible, commercialised and 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 an ideological move, Scelle's work reminds us that slavery was a global legal regime and that we have to deal with it as such.<sup>69</sup>

66 For theoretical reflections on the relationship between past and present in international law, see Anne Orford, "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 Tourme-Jouannet, Mark Toufayan and Hélène Ruiz-Fabri (Paris: Pedone, 2013); Martti Koskeniemi, "Why History of International Law Today?" *Rechtsgeschichte* 4 (2004); Matthew Craven, "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).

67 For an historical analysis, see Bernard Gainot, *La Révolution des esclaves. Haïti, 1763–1803* (Paris: Vendémiaire, 2017). See also Liliana Obregón, "Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt," *Leiden Journal of International Law* 31 (2018).

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: Georges Scelle, *Histoire politique de la traite négrière aux Indes de Castille. Contrats et traités d'Assiento*, vol. II (Paris: Sirey, 1906).

69 Anne-Charlotte Martineau, "Georges Scelle's Study of the Slave Trade: French Solidarism Revisited," *European Journal of International Law* 27, no. 4 (2016).