

Transformations In The Law Concerning Slavery; Legacies Of The 19th Century Anti-Slavery Movement.

Andrea Nicholson*

For those involved in the study of slavery it will be unsurprising to read the estimated statistics of slavery as it exists in the world today. Whilst it is impossible to gauge accurately the numbers of people currently held in the condition of slavery, the figure of 27 million is often quoted and is probably a conservative estimate.¹ The breadth of practices potentially falling within the ambit of slavery and of which the international community is now aware is immense. International law has rushed to keep up with a growing consciousness of ‘modern’ slavery and in so doing a number of issues have arisen and are potentially a significant hindrance to the success of modern anti-slavery strategies. Of particular concern is the reluctance to review the 19th century abolitionist movement when constructing a modern legal framework. In many ways, the 19th century can be viewed as an attempt to distinguish the past and to create new futures. In some way this discarding of the past has continued and results in a form of abstraction with which current anti-slavery discourse is infused, maintaining (perhaps inadvertently) a false distinction between ‘old’ and ‘new’ slavery.² Modern anti-slavery laws have their roots in the 19th century campaign against slavery, thus a reflection on that period serves not only as a comparator, but also as a means by which we may understand how best to progress. The 19th century also demonstrates a momentous period of change in international law that coincided with, was affected by, and contributed to the anti-slavery agenda that marked that century. An examination of the social and legal endeavours that led to the gradual abolition of the transatlantic slave-trade, and eventually the international prohibition of the institution of slavery in the twentieth century, can be a valuable tool when determining progression in the anti-slavery campaign today.

This chapter examines the legacy of 19th century legal conventions for the development of international law concerning anti-slavery in the twentieth century. The startling number of legal instruments that have expanded upon the original slavery conventions indicates that the nature and emphasis of the law has shifted; to some extent this is necessary and has brought renewed vigour to the obligation on states to recognise and effectively prohibit slavery both within and without their borders. However, international anti-slavery laws have become somewhat fragmented and the whole has consequently lost some cohesiveness. The indications are that the rate and means of progression will compound an existing lack of clarity and permanence in the law, which suggests that we should be wary of viewing the development of global norms concerning human rights in a *purely* teleological and progressive fashion.

¹ see Bales, K. ‘Disposable People: New Slavery in the Global Economy’. (1999). Berkeley. University of California Press, at p.8. For a more thorough analysis see Quirk, J. The Wilberforce Institute for the Study of Slavery and Emancipation. ‘Unfinished Business: A Comparative Survey of Historical and Contemporary Slavery’. (2008). UNESCO.

² For an excellent analysis of this distinction see Quirk, J. ‘The Anti-Slavery Project: Linking the Historical and the Contemporary’ *Human Rights Quarterly* 28 (2006), 565-598.

It is a particularly difficult enterprise to sum up progress towards abolition of the Atlantic slave-trade during the 19th century. Not only is this century saturated in, and deeply affected by slavery, but scholars continue to research and debate the myriad factors that contributed to such an exceptional and sustained campaign.³ Despite the slow progress, given the political agendas and fears of the world powers at a time of expansion and industrialisation, and the comparative lack of state intercourse, the accomplishments of the anti-slavery cohort were remarkable nonetheless.

The expansion of anti-slavery law during this period is often viewed in terms of British effort, but a wider analysis raises other interesting causative features, which collectively *enabled* the suppression and eventual abolition of the slave-trade. For the lawyer, three predominant themes repeatedly emerge from studies of the anti-slavery agenda. First, a shift in legal philosophy from a co-existence of positive and natural law in the preceding century, to the prevalence of positive law during the 19th, which would impact on the means by which slavery was tackled internationally.⁴ Second, a reluctant easing in the defence of state sovereignty in international law, particularly with regard to the law of the sea. Third, the merging of previously distinct concepts of state (an abstract institution) and nation (peoples), which was somewhat bound up with the distinction between ‘civilised’ and ‘non-civilised’ states. This would prove significant in terms of rights to engage in, and exercise powers of negotiation over bilateral treaties concerning trade as manifested through state sovereignty (and exercised on behalf of the nation).⁵

Given the difficulty in achieving a practical semblance even of national consensus, it is unsurprising that at the start of the 19th century little had been achieved by way of concerted international action. As the institution of slavery itself was not under attack, but rather the slave-trade, the solution had to extend beyond the borders of the state and to the high seas. As a result of British anti-slavery sentiment and British maritime power (and therefore political influence), the development of the law of the sea was the logical and possibly the only means of achieving real progress. Whether viewed from a cynical or humanitarian perspective, British maritime power was such that increasing control of the high seas to police the waters for slave-trading would constitute the ‘objective equivalent to severing the aorta of new world slavery’.⁶ However, state sovereignty was all, and as such no state enjoyed rights to patrol and visit ships in the territorial waters of another without the relevant state’s consent. Two key notions in international jurisprudence are highlighted by this position: state sovereignty, and by consequence, consent. Treaties were a formal means of providing said consent, but were carefully negotiated and the

³ See in particular Drescher, S. ‘The Mighty Experiment: Free Labour versus Slavery in British Emancipation’ (2004). Oxford. Oxford University Press.

⁴ See Ago, R. ‘Positive Law and International Law.’ *The American Journal of International Law*. 51 (1957), 691-732.

⁵ Brown, C., Nardin, T., & Rengger, N. (eds) ‘International Relations in Political Thought: Texts from the Ancient Greeks to the First World War.’ (2002). Cambridge. Cambridge University Press, at 458.

⁶ Brion Davis, D. ‘Slavery and Human Progress’. (1986). Oxford. Oxford University Press, at 172. Note: Although national sentiment was gradually shifting in both Europe and the Americas, the parliamentary records prove that even British sentiment was not as strong as might be suggested. The introduction of the Slave-trade Abolition bill, which sought to abolish the importation of slaves by British traders and was eventually passed by both Houses in 1806, but had failed eleven times over a period of fifteen years, in part due to resistance from those with West Indian interests. An influx of a number of liberal MP’s saw the Foreign Slave-trade Abolition bill eventually passed by both Houses of Parliament by an unexpected majority in 1806, and it received royal assent in 1807. The Parliamentary Archives are particularly illuminating in this respect.

early treaties (often non-European) did little to address the slave-trade, being instead primarily concerned with trade in general. Several of these treaties do recognise the municipal laws of states and make reference to the right of the slave to be considered free should he escape onto an English man of war; this might sound progressive, but merely reasserts British sovereignty - had a slave escaped onto another state's vessel, he would have remained a slave.⁷ Thus the provisions concerning slaves tended to simply confirm his existing legal position.⁸

The need for the development of the law of the sea is clear from the early case law which evidences a key obstacle to suppression; the right to visit and search on the high seas only existed *in times of war*. In the *Louis* case (1817)⁹ the Judge, Sir William Scott, sets out the position clearly:

*“...whether the right of search exists in time of peace, I have to observe, that two principles of public law are generally recognised as fundamental. One is, the perfect equality and entire independence of all distinct states...This is the great foundation of public law...The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals.”*¹⁰

Thus, a right of visitation could only legitimately be exercised on the high seas in times of war on the basis of self-defence or against pirates (viewed as ‘enemies of every country’¹¹). Exceptionally, maritime practice was such that warships were allowed to approach but only to determine the nationality of a ship. Visitation and search could of course also be granted by consent, in other words by treaty.

Recognising that the particular facts of *Le Louis* had occurred during times of peace on the high seas, the only possible avenue left was to attempt to extend jurisdiction by trying to establish slave-trading as piracy. However, this interpretation of the law was swiftly denied by the Judge who rejected the moral arguments, and asked instead what the *law* considered the position to be, concluding that slave-trading did not fulfil the criteria for piracy.¹² Thus, slave ships could not be

⁷ Unless of course some treaty to the contrary had been agreed or similar municipal laws existed.

⁸ Keene, E. ‘A Case Study of the Construction of International Hierarchy: British treaty-Making Against the Slave-trade in the Early 19th Century’. *International Organization*. 61, (Spring 2007), pp.311-339, at 323. Prior to this movement, slaves were legally considered mere chattels. In *R v Knowles, ex parte Somersett* (1772) 20 State Tr 1 whilst finding the transportation of a slave illegal in British waters, noted that had the case concerned a contract for the sale of the same slave it would have been valid. This approach to the slave as property also confirmed in hence in the *Zong* case (*Grayson v Gilbert* (1783) 3 Dougl 232) where it transpired it was more profitable for a British slave ship captain to throw sick slaves overboard to their deaths than it was to try to look after them with the possibility of their dying onshore. If the captain lost his ‘cargo’ en route, he would be paid compensation.

⁹ *Le Louis* (1817) 2 Dodds. 210; 165 E.R.

¹⁰ *Ibid.* at 243-244

¹¹ *Op cit.* n.9

¹² *Le Louis* (1817) 2 Dodds. 210; 165 E.R., at 247.

boarded without the permission of the nation state. It is interesting that this did not prevent an attempt to create a bilateral treaty between Britain and the US in 1824 who agreed between them that the slave trade was to be recognised as slavery. This perspective would only have been valid between the two states, and so would not affect the law as it related to other states, but would have allowed for the right of visitation on British and US ships by these two states, and prosecution for piracy. However, the treaty was never signed by the British following a number of amendments by the US undermining its force. The position in *Le Louis*, was subsequently supported in a number of cases spanning several decades and the position remained that the slave trade was not piracy for the purposes of the law.¹³

Thus, the concept of state sovereignty, and the rights associated with it ensured that during peacetime no state, no matter how powerful, had the right to visit and search the ship of another state without explicit agreement. It should be noted that the number of cases challenging the British for breach of this rule would indicate their disregard for the law where it served their purpose; as one of the only states with the maritime power to patrol the Atlantic in this way, it is perhaps unsurprising that the British did not consider breach of much consequence when confronted with the inhumanity of slavery. Nevertheless, despite British disregard, the legal position posed a serious hindrance to the eradication of the African slave-trade.

During this period, it was typical for allied powers to meet in congress, a form of political summit, to discuss matters of international concern. In 1814 the British met with Austria, France, Russia, Prussia, Sweden, and Spain at the Congress of Vienna (1814-1815) with, inter alia, a clear intention to abolish the slave-trade over the following three years. It was hoped that this would be bolstered by agreeing a reciprocal right of visit and the creation of a permanent supervisory body to ensure adherence to the resultant treaty.¹⁴ The result was disappointing, particularly because the suggestion for an international league with the power to search and seize slave ships failed when put to the French statesman.¹⁵ Having come together to hammer out a strategy to eradicate the slave-trade within a defined period, the eventual measure achieved was a formal Declaration annexed to the Treaty recognising the 'duty and necessity' of abolishing the slave-trade and urging all the attending powers to renew efforts to suppress this 'traffic'.¹⁶ No specific time frame was determined and no right of visit was agreed. Further, the vague commitment made in no way attempted to tackle the institution of slavery, but was instead concerned only with the African slave-trade.

Nevertheless, the Declaration is important as the first international agreement establishing a commitment to the anti-slavery cause; the Congress of Vienna placed the slave-trade on the

¹³ See e.g. *Madrazo v Willes* (1820) 3 B. & A. 353; *Buron v Denmand* (1848) 2 Ex. 167; 154 E.R. For an excellent and thorough discussion of cases on this matter, see Fischer, H. 'The Suppression of Slavery in International Law'. *The International Law Quarterly*. 3(1). (1950), 28-51. It is interesting to note that 20th century attempts to introduce legal recognition of the slave trade as piracy during negotiations for the 1926 Slavery Convention were also unsuccessful. See Allain, J. 'The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Conventions and the 1956 United Nations Convention'. (2008). The Netherlands. Martinus Nijhoff Publishers, at p.6.

¹⁴ See Miers, S. 'Britain and the Ending of the Slave-trade.' (1975). London. Longman, at p.10.

¹⁵ See Rodriquez, J. 'the Historical Encyclopaedia of World Slavery.' (1997).ABC-CLIO Ltd. at 673.

¹⁶ Declaration Relative to the Universal Abolition of the Slave-trade, 8 February 1815, Consolidated Treaty Series, vol. 63, No. 47.

international agenda, and in so doing elevated it as a matter of international concern. The Netherlands abolished the slave-trade in 1814 and France in 1815, with Portugal and Spain attempting limited abolition in the same year (albeit applicable only to the North coasts of Spain and Portugal at the time).¹⁷

The Vienna declaration was followed in later years by the Aix la Chappelle Congress in 1818 and the Congress of Verona in 1822. Letters in support of the Congress of Aix la Chappelle appeared in a London newspaper calling on the sovereigns for ‘*un pacte grand et perpétuel*’ to suppress the slave-trade and to declare it piracy.¹⁸ However, British parliamentary records indicate frustration as to the meaning of the resultant Treaty, which provided the signatory states were

*‘...firmly resolved never to depart, neither in their mutual relations nor in those which bind them to other states, from the principle of intimate union which has hitherto presided over all their common relations and interests – a union rendered more strong and indissoluble by the bonds of Christian fraternity which the sovereigns have formed among themselves.’*¹⁹

The meaning of such a ‘union’ of sovereigns and of this ‘Christian fraternity’ were far from clear. One interpretation was that these terms referred to the Holy Alliance comprising Austria, Russia and Prussia and created at the Congress of Vienna. As Great Britain was not party to the Holy Alliance, it was instead suggested in an equally indistinct manner that the paragraph alluded only to those principles ‘which the allied powers had all along publicly acted.’²⁰ Little more was achieved at the Congress of Verona some four years later, where another Declaration was made indicating states’ ongoing moral commitment to ending the African slave-trade, but having failed to agree any formidable anti-slavery provisions.

The nature of these Congresses becomes clear. These were attended less as a means of realising humanitarian ideals, and more as a means of political manoeuvring, state collaboration serving their collective and individual interests, and clarification or reaffirmation as to the nature of their relationships. Yet, despite this, the Congresses enabled a level of international interaction and communication on a number of important issues, and so were intrinsic to the progression of an international anti-slavery campaign.

After such a halting (and disappointing) start to the process of suppression, Britain instead turned to the treaty mechanism to continue its cause. Momentum was therefore carried by an impressive number of bilateral treaties agreed between Britain and other countries. It was here that concessions were granted between states so as to allow a right between those states to visit, and in many cases search and seize ships of either nationality. Amongst these Britain entered into

¹⁷ Britain and the United States declared the slave-trade illegal in 1807, the Netherlands, in 1814, France 1815, Spain and Portugal for trade north of the border in 1815, eventually extending to all of Spain in 1820. See also Coupland, R. ‘The British Anti-Slavery Movement.’ (1964), 2nd ed. London. Frank Cass Publishers.

¹⁸ see Hogg, P.C. ‘The African Slave-trade and its Suppression: A Classified and Annotated Bibliography of Books, Pamphlets and Periodical Articles.’ (1973). Abingdon and NY. Frank Cass and Company Ltd. at 209.

¹⁹ Hansard, ‘Parliamentary debates from the year 1803 to the present time, volume XXXVX, comprising the period fourteenth January to the thirtieth day of April 1819’, London. Hansard. House of Lords, Feb 11th 1819, at 422-433.

²⁰ Ibid. Viz. the Earl of Liverpool at 424.

bilateral treaties with Portugal, Spain and the Netherlands between 1817 and 1818 to allow for a reciprocal right of visit and search by their ships of war where there was reasonable suspicion a vessel was engaged in the slave-trade.²¹ This also included a right to detain the vessel if suspicions were founded, and to bring it before one of the mixed commissions that had been established to deal with slave-traders so discovered.²²

The establishment of a number of mixed commissions, a form of international tribunal, would prove vital to the application and exercise of the right of visit and search agreed in these treaties. The extent of the problem of enforcement had been highlighted in British parliament in 1819:

*“The house must be aware that there were many difficulties to impede the execution of conventions of this kind. Hitherto no instructions had been issued under these conventions to our cruisers to catch ships engaged in the slave-trade, and the reason was, that there was no tribunal before which such prizes could be brought, and it would be contrary to the laws of nations to make such captures before a tribunal was appointed.”*²³

Thus, between 1819 and 1871 mixed commissions were established under various treaties and founded in a number of locations, including Freetown, Surinam, Lunanda, Spanish Town, the Cape of Good Hope, Boa Vista, Rio de Janeiro, Havana and New York.²⁴ The capability to bring traders before a court or tribunal was fundamental, if only because many of the bilateral treaties in place lacked institutions and procedures to ensure enforcement.

The network of bilateral treaties, underpinned by the existence of a number of mixed commissions proved instrumental in manoeuvring many states away from a defensive stance, to concede to inspection by other (although in reality often British) ships. Depending on the particulars of the agreement in place, these treaties meant that vessels of states party to any such agreement that were found to be trading in slaves were in some cases able to be seized and brought before a mixed commission, or before national tribunal. Often this resulted in the distribution of their goods and the ‘emancipation’ of the slaves.²⁵ This bilateral network grew over several decades to include approximately one hundred treaties. However, the right of visit and search only extended to the parties agreed; there was no international law allowing these rights outside of formal consent.

A turning point was reached in 1841 with the Treaty of London for the suppression of the slave-trade, also known as the ‘Quintuple Treaty’, and which was agreed between Austria, Great

²¹ These were agreed in 1817 (Portugal and Spain) and 1818 (the Netherlands). See n.16.

²² Unfortunately, there was ongoing opposition from France; a legacy of the Napoleonic war and recognition that the negotiation of these treaties also served to fortify and expand British naval strength. Equally, the United States were reluctant to allow a right of visit and search, and as such were un-cooperative.

²³ Hansard, ‘Parliamentary debates from the year 1803 to the present time, volume XXXVX, comprising the period fourteenth January to the thirtieth day of April 1819’, London. Hansard. House of Lords, Feb 19th 1819, per Smyth, J.H. at 541.

²⁴ See Bethell, L. ‘The Mixed Commissions for the Suppression of the Transatlantic Slave-trade in the 19th Century.’ *Journal of African History*, VII, I (1966), 79-93.

²⁵ Although this too often transpired to mean indentured labour. See further below in this chapter.

Britain, Prussia and Russia, later joined by Belgium²⁶ and eventually Germany²⁷. Article 1 of the Treaty not only included an undertaking to prohibit the slave-trade by their subjects, under their flags, or by means of capital support from their subjects, but also provided that 'the mere attempt to carry on the slave-trade should have as a consequence the loss of any right to the protection of their respective flags'. This was an important watershed. If the Treaties agreed with France in 1931 and 1833 are used by way of comparison, the right of visit and search was granted, but jurisdiction for any slave ships remained with the flag state.²⁸

By the mid 19th century the anti-slavery movement was flagging. America was recognised as a world power and together with France they confronted the British abuse of the principle of freedom of the high seas. Compensation was paid at a loss to the British public purse, and worse, there seemed to be no reduction in the slave trade despite British efforts, so Britain capitulated on rights to visit and search in 1858. However, with the British no longer posing a problem, America was able to take control and it started to comply with the terms of the treaty previously agreed in 1942 between the USA and Britain for co-operation in the suppression of the slave-trade.²⁹ A treaty similar in terms to the Quintuple Treaty was later agreed with the United States in 1862, and the abolition of slavery in the United States occurred in 1865 under the Thirteenth Amendment to the Constitution.³⁰

As anti-slavery efforts reached a lull, the campaign was taken up by catholic and protestant missionaries whose recounting of slavery in Africa engaged public sympathies and started to draw the *institution* of slavery into the national consciousness.³¹ With the focus on the slave-trade for so many decades, the shift to the condition of slavery was welcome, but much harder to address. The African slave-trade was more easily tackled and came with a clear solution - police the sea and disrupt its routes, something that despite the hindrances of international law was both possible and to some degree successful given the unique position of Great Britain at this time. Not only was she the pre-eminent maritime power with a large fleet at her disposal, but as one of the largest original slavers, she was also ideally placed to destabilize the trade. By contrast, the institution of slavery extended well beyond the parameters of West Africa and into countries where Britain had little influence. The institution of slavery existed in myriad forms - it was pervasive and would continue to present a challenge to human rights into the next century and beyond.

The final and strongest movements occurred at the end of the 19th century. Represented by fourteen powers³² the Berlin Conference is notoriously described as the 'scramble for Africa'. In amongst the provisions for the division of Africa in the General Act of the Berlin Conference, the Act addresses slavery in two articles. Article 6 provides for '*All powers exercising rights of*

²⁶ In 1848.

²⁷ Rather late, in 1879.

²⁸ France subsequently withdrew from these altogether in 1845.

²⁹ The Webster-Ashburton Treaty 1842 delimited navigational rights and established a joint naval system for suppressing the slave trade off the African coast.

³⁰ Although voting rights to all races took a little longer and were granted following adoption of the Fifteenth Amendment to the Constitution in 1870.

³¹ See Miers, S. & Roberts, R. (eds), 'The End of Slavery in Africa.' (1989) University of Wisconsin Press, at.16.

³² Germany, Austria-Hungary, Belgium, Denmark, Spain, the United States, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden-Norway, and Turkey.

sovereignty or influence to...strive for the suppression of slavery and especially the Negro-slave-trade'. The Act also includes a Declaration Relative to the Slave-trade under article 9, which provides

*'Seeing that trading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers, and seeing also that the operations, which, by sea or land, furnish slaves to trade, ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin of the Congo declare that these territories may not serve as a market or means of transit for the trade in slaves, of whatever race they may be. Each of the Powers binds itself to employ all the means at its disposal for putting an end to this trade and for punishing those who engage in it.'*³³

The focus of the Berlin Conference was not slavery; the Conference was a means by which the fourteen powers could negotiate the political partitioning of West Africa and agree navigational and trade rights.³⁴ The tone of the articles is in places a little paternalistic and continues to pursue the notion of civilised and non-civilised peoples. Thus the preamble to the Act refers to the 'development of trade and civilisation in certain regions of Africa', and Article 6 also provides for the aim of 'instructing the natives and bringing home to them the blessings of civilisation'. However, it did have the consequence of reminding states of continuing slavery in the Congo. This tied in with the crusade launched several years later against the slave-trade by white missionaries in Africa such as Cardinal Lavigerie, who travelled Europe exposing slave experiences and galvanising public outrage. These provisions in the General Act of Berlin indicate a move away from the more demonstrative, and in some cases concessionary declarations that marked the earlier part of the 19th century to the model of multilateral treaties that became the norm in the 20th century after the decline of European world power.

The slow-building sustained campaign against the slave-trade was reaching its apex and came to fruition just five years after the Berlin Conference. The Declarations, bilateral and multilateral treaties, religious and political campaigns, slave uprisings and rebellions, were brought to bear in a purposive manner at the Brussels Conference of 1890 convened solely to tackle the African slave-trade. However, as a marker in the anti-slavery campaign the Berlin Conference was minor compared to the consequences of the Brussels Conference not long after. This sudden development would seem strange had it not also been of political and economic interest to the parties. For example, France had a vested interest in the conference and sought to utilise it to suppress the traffic in arms, to control the trade in liquor, and to levy import duties, and the British, having borne much of the responsibility for, and the economic brunt of policing the seas, saw the conference as an opportunity to finally bring France fully on board. It is not insignificant that the Brussels conference also corresponded with the international peace movement, resulting

³³ The General Act of the Berlin Conference on West Africa, February 26, 1885, (76 British and Foreign Estate Papers 4, English Translation A.J.I.L. 3 (1909). Chapter II, Art.9. The Act was signed by all the attending powers, but was not ratified by the United States.

³⁴ The intentions of the signatories are noted at the beginning of the General Act of the Brussels Conference, July 2, 1890 which provides that the purpose of the Berlin conference was primarily to '*guide [States'] commercial and civilising action in the little-known or inadequately organised regions of a continent.*'

in the International Peace Conference of 1899 which was held with the intention of expanding instruments for settling crises peacefully, preventing wars and codifying rules of warfare.³⁵

In comparison to the earlier international treaties, the Brussels Conference was an unparalleled success. The resulting Treaty, The Convention Relative to the Slave-trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors 1890 (hereafter the Brussels Act 1890) was signed and ratified by seventeen states and contained an extensive number of articles providing for military and economic measures to combat slavery and the slave-trade. Chapter III of the Convention focuses entirely on the slave-trade within defined maritime zones of the Indian Ocean and the Red Sea and agreed rights of visit, search and seizure within these zones.³⁶ Under Article 28 any slave who had taken refuge on board a ship of war bearing the flag of one of the signatory powers was immediately and definitively to be set free. This meant that any state that had not already implemented this measure into its laws was now bound to do so.³⁷ A large section of the treaty (Articles 30-61) set out the rules allowing rights of visit, search and seizure. The parties bound themselves to enact criminal laws against slave-traders and associated persons *within a year*.³⁸ Further, this Treaty was the first to expressly recognise domestic slavery and to *require* the prohibition of 'all forms of slavery'. Not only did the Treaty attempt to decisively tackle the slave-trade, but the international community had finally begun to face other forms of slavery, albeit limited to domestic servitude. The result was a commanding treaty that not only produced a concrete and concerted strategy, but which consequence was the creation of municipal legislation prohibiting the slave-trade where this had not already existed, and which applied to the largest number of states yet to sign on the matter. However, the provisions for rights of visit, search and seizure were limited to the maritime zones outlined in articles 22 and 23, and to vessels under 500 tons.³⁹ It has also been argued that the Brussels Act 'cloaked the entire conquest of Africa in a humanitarian guise by presenting European rule and capitalist enterprise, including the employment of freed slaves, as anti-slavery measures.'⁴⁰ Further, beyond mention of domestic slavery there was no explicit recognition of other forms of slavery, simply a requirement to abolish 'all forms'. This last point would prove problematic in the expansion of international treaties on slavery in the 20th century.

There is no doubt that the giving of rights to visit and search was instrumental in the suppression of the African slave-trade. It is clear, therefore, that the development of the international law of the sea was critical to the suppression of the slave-trade. However, the issue of sovereignty upon which this rested was also tightly bound together with the notion of 'civilisation'. Further, the value of law as a means of effective action was deeply concerned with the shift to positivism in

³⁵ Adopting the first Hague Convention 1899, soon followed by the second Hague Convention in 1907.

³⁶ See Articles XXII and XXIII. The zone is specified under Article XXI as extending '*On the one hand, between the coasts of the Indian Ocean (those of the Persian Gulf and of the Red Sea included), from Beloochistan to Cape Tangalane (Quilimane and, on the other hand, a conventional line which first follows the meridian from Tangalane till it intersects the 26th degree of South latitude ; it is then merged in this parallel, then passes round the Island of Madagascar by the east, keeping twenty miles off the east and north shore, till it intersects the meridian at Cape Ambre. From this point the limit of the zone is determined by an oblique line, which extends to the coast of Beloochistan, passing twenty miles off Cape Ras-el-Had.*'

³⁷ This was further supported by Article Art. XXIX which provided that any slave detained on a native vessel had the right to demand his liberty.

³⁸ Articles 5-19.

³⁹ Op cit. n.36.

⁴⁰ Op cit. n.31, at p.17.

legal philosophy. The move towards positive law is evident in *Somerset's Case* (1772)⁴¹ in which the Judge, Lord Mansfield, stated

*'The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.'*⁴²

Natural law had previously continued to hold its own against the tide of positive thought, but lost ground to positivism in the 18th and 19th centuries. Its position that morality and the law are intrinsically concomitant, that man's capability to exercise rational thought renders him particularly suited to determine human law (a capability that is somehow inherent or organic) was believed to give rise to the realisation of universally applicable laws. It would be thought that a philosophy that identified law with morality would abhor the state of slavery, but the defence of slavery had been justified by some traditional natural law theorists, whether on the basis of the 'natural born' state of a man,⁴³ or on the basis that slavery was the natural condition of the fallen man. By contrast positive law attempted to divorce law from morality and posited that law was legitimate where it reflected socially accepted views. As John Austin famously argued

*'The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.'*⁴⁴

Thus, the law need not necessarily be just to be regarded as law. Further, some theories falling within the ambit of positivism conceived that law was a phenomenon of large societies requiring a sovereign; someone or some entity with the power to command and which will be obeyed.

The idea that law is a mere social construct and can legitimately be unjust seems to leave little room for compassionate moralising. However, the positivist emphasis on the importance of tangible law and of consent⁴⁵ became a vital element in the legitimisation of international prohibition in the minds of states. Sovereignty was the cornerstone of positivism and from this was derived the fundamental requirement of consent; as sovereignty was all, freedom from interference was a corollary of this.⁴⁶

⁴¹*Somerset v Stewart* (1772) 98 E.R. 499.

⁴²*Ibid*, at 19.

⁴³ For example Aristotle's famous defence of 'natural born' slavery can be found in *Politics Book 1, chs iii to vii, and Nicomachean Ethics, Book VII*. See also St Thoma Aquinas *Summa Theologica*.

⁴⁴ Rumble, W. (ed.); Austin, J. 'The Province of Jurisprudence Determined'. (1995). Cambridge. Cambridge University Press. (First published 1832), at 157.

⁴⁵ as law was limited by what people would tolerate.

⁴⁶ For an excellent analysis of the progression of natural and positivist law in the context of international law see: Anghie, A. 'Finding the Peripheries: Sovereignty and Colonialism in 19th Century International Law'. *Harvard International Law Journal*.40(1). Winter 1999.1-80.

The 19th century also gave rise to a traditional separation between the notions of ‘nations’ (meaning ‘peoples’), and ‘states’ (meaning governments) which had fused giving rise to the concept of the ‘nation state’.⁴⁷ This term was neatly appropriated by ‘civilised’ European states to indicate their progression and to distinguish themselves from the less progressive ‘uncivilised’ and ‘unchristian’ states. These notions are intrinsically bound together so that the rise of positivism and of the nation state closely parallels claims of legal and political supremacy during the 19th century.⁴⁸ The concepts of state recognition, and therefore autonomy and sovereign rights were connected to the distinction between civilised nation states, and non-civilised ‘barbaric’ states. Indeed, the 19th century jurist Wheaton argued that international law was exclusive to civilised societies.⁴⁹ Lorimer also argued as late as 1883 that ‘[e]ven now the same rights and duties do not belong to savages and civilised man’⁵⁰ and this view was supported by others such as Westlake, and Oppenheim who wrote that it was ‘doubtful’ that full sovereignty could be exercised by non-Christian States.⁵¹

There is little doubt that this notion of the uncivilised ‘other’ contributed to the slow pace of abolition. The belief that only civilised nations held, and were capable of exercising true sovereignty (almost all of them European) limited the number of states party to the Congresses, and also dictated the balance of reciprocal duties and obligations agreed via bilateral treaties. For example, treaties with African chiefs were largely commercial leading to accusations the British were trying to secure a monopoly in African markets.⁵² Thus non-European societies that did not share some homogeneity of culture, language and economic development were considered in some sense *sans* law or ‘extra-legal’⁵³ and were treated as subordinate; consequently they possessed little bargaining power.

The positivist influence prevalent during the 19th century was in one respect vital to the anti-slavery movement by enhancing the move towards formal creation of international laws and propelling international organisation. However, it is clear that whilst anti-slavery *campaigners* may have relied on positivist progress to achieve their ends, their language was couched in moral terms based on the humanity of man. *States*, however, were less concerned with morals and more concerned with power and economies. Positivism served to strengthen the nation state, raising questions as to the idea that human rights, dignity and humanity were the impetus for state action, particularly where the corresponding concept of ‘civilisation’ and its consequences

⁴⁷ On this issue, see Anghie, *ibid.* and Becker Lorca, A. ‘Universal international law: Nineteenth-Century Histories of Imposition and Appropriation.’ *Harvard International Law Journal*. 51(2), Summer 2010. 475-552.

⁴⁸ Henkin, L. et al, ‘International Law: Cases and Materials: American Casebook.’ London. West Pub. Co. (1993). 3rd ed. at xxv.

⁴⁹ Wheaton. L. ‘Elements of International Law, with a Sketch of the History of the Science.’ (1836). Philadelphia. Carey, Lea & Blanchard. at 17–18

⁵⁰ Lorimer, J.’ *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities.* (1883). Edinburgh. William Blackwood & Sons, at p.4.

⁵¹ See Orakhelashvili, A. ‘The idea of European International Law.’ *The European Journal of International Law*. 17 (2006), 315–34. at 320-321.

⁵² Landry, H.C. ‘Slavery and the Slave-Trade in Atlantic Diplomacy, 1850-1861.’ *Journal of Southern History*. 27(2). (1961). 184-207, at 195.

⁵³ See Hoffmann, S-L. ‘Genealogies of Human Rights’, 1-28, in Hoffmann, S-L (ed) ‘Human Rights of the Twentieth Century’. (2011). Cambridge. Cambridge University Press.

further indicate a perception that non-homogenous societies were considered ‘other’ and ‘savage’ (above).⁵⁴

The 20th Century

Tackling only the slave-trade during the 19th century was tactically shrewd. Britain had a large enough fleet and the political authority to engage in a huge number of bilateral treaties that incrementally and collectively established an international scheme to suppress the slave-trade. This transformed the abolitionist movement into an international campaign, which was to be eventually realised at the Brussels Convention of 1890. A natural consequence of this was the emancipation of a particular ‘category’ of slaves. Unfortunately, the reality of emancipation often meant indentured servitude, which in many cases simply constituted another form of slavery. This form of servitude was masked as ‘employment’ and slavery continued to exist in other forms, and in other regions⁵⁵, but had not explicitly been recognised in the preceding treaties, let alone targeted. 19th century anti-slavery international law was therefore created in the context of black chattel slavery. Thus, it was in the 20th century that the international community would attempt to address this omission.

The International Convention for the Suppression of White Slave Traffic at Final Protocol (1910) was the first international instrument to address the existence of ‘white slavery’⁵⁶ and was followed by a supplementary Convention in 1919 signed at St. Germain-en-Laye.⁵⁷ Here

‘[the] signatory powers exercising sovereign rights or authority over African territories [promised to]...in particular, endeavour to secure the complete suppression of slavery in all its forms⁵⁸ and of the slave-trade by land and sea.’⁵⁹

However, at the outbreak of the First World War, the General Act of Brussels 1890 remained the most detailed and comprehensive international treaty regarding slavery and the slave-trade in force.⁶⁰ At this time the League of Nations was formed under the Treaty of Versailles 1919 ‘to promote international cooperation and to achieve peace and security’, in part to replace the pre-war international system so as to allow for independent nation states, free of outside interference,

⁵⁴ For further analysis see Henkin, L. et al, ‘International Law: Cases and Materials: American Casebook.’ London. West Pub. Co. (1993). 3rd ed. ; Wheaton. L. ‘Elements of International Law, with a Sketch of the History of the Science.’ (1836). Philadelphia. Carey, Lea & Blanchard; Lorimer, J.’ The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities.’ (1883). Edinburgh. William Blackwood & Sons; See Orakhelashvili, A. ‘The idea of European International Law.’ *The European Journal of International Law*. 17 (2006), 315–34.at 320-321; and Mazower, M. ‘ The End of Civilisation and the Rise of Human Rights: The Mid-Twentieth Century Disjuncture’ in Hoffmann, S-L (ed) ‘Human Rights of the Twentieth Century’. (2011). Cambridge. Cambridge University Press.

⁵⁵ Often entrenched as a result of centuries of cultural practice.

⁵⁶ Int Conv for the Suppression of the White Slave Traffic at Final Protocol , UN Sale No. 1450.IV.2 (1910); Int Conv to Suppress the Slave-trade and Slavery, 1926; the International Agreement for the Suppression of the White Slave Traffic, UN Sales No.1950 IV.I.

⁵⁷ Convention revising the General Act of Berlin, February 26, 1885, and of the General Act and the Declaration of Brussels, July 2, 1890, signed at Saint-Germain-en-Laye, September 10, 1919 [1922] LNTSer 19; 8 LNTS 27. Signed by the USA, Belgium, British Empire, France, Italy, Japan and Portugal .

⁵⁸ author’s emphasis.

⁵⁹ Op cit. n.58. Article II, Para I.

⁶⁰ See the United Nations Conference on the Law of the Sea, Geneva, Switzerland 24 February to 27 April 1958. Doc:- A/Conf.13/7.

and to provide an open forum for the discussion and resolution of disputes. The International Labour Organization was also created under the Treaty of Versailles as an affiliated agency of the League and would go on to produce several Conventions relating to forced and child labour.⁶¹ However, it was the League of Nations that appointed the Temporary Slavery Commission in 1925 which embarked on an inquiry into slavery as a result of lobbying by the Anti-Slavery and Aborigines Protection Society.⁶² The Commission exposed the continuing existence of slavery and analogous practices, many of which did not correspond with traditional notions of chattel slavery, but nevertheless constituted a serious breach of the dignity and freedom of man.⁶³ The result was the 1926 Slavery Convention. This was the first international treaty in which signatory states promised to bring about ‘progressively and as soon as possible, the complete abolition of slavery in all its forms’,⁶⁴ and in which the condition of slavery was given legal definition as ‘*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised*’.⁶⁵ Further, the 1926 Convention identifies with practices similar to slavery, noting in its preamble that it is necessary to prevent forced labour from developing into ‘conditions analogous to slavery’.⁶⁶ The preamble to the Convention explicitly mentions the Acts of Berlin and Brussels but attempts something very different. Where the aforementioned Acts concerned the slave trade (and therefore also tended towards expression of navigational and trade rights), the 1926 Convention uses these as foundation for provisions concerning the institution of slavery itself. The Slavery Convention was designed to complete and extend the work of the Brussels Act and to give practical effect to the expressed intentions of the parties, however, the *travaux préparatoires* reveal the Convention also comprised an attempt to continue the civilising mission of the 19th century.⁶⁷

Unfortunately, the League of Nations did not survive the Second World War, but its aims were transmitted to the United Nations, created in 1945. Today, the United Nations is essentially the nucleus of the international world order, and in 1945 it was the most important development for the co-operation and collaboration of states. The principle aims of the UN were to save succeeding generations from the ‘scourge of war’, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.⁶⁸ With twenty six original signatories, the UN signalled a new era of international cooperation, and in particular of human rights. The explicit reference to human rights in the objectives of the UN, and the subsequent Universal Declaration of Human Rights

⁶¹ Forced Labour Convention 1930 (C29); Minimum Age Convention 1973 (C138); the Worst Forms of Child Labour Convention 1999 (C182).

⁶² now Anti-Slavery International

⁶³ See generally Gallagher, A. ‘The international Law of Human Trafficking.’ (2010). Cambridge. Cambridge University Press.

⁶⁴ Article 2.

⁶⁵ Article 1(1) the Slavery Convention 1926. Article 1 (2) provides “*The slave-trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.*”

⁶⁶ Reinforced by article 5 which requires states to take all necessary measures to prevent forced labour and sets out legitimate circumstances of compulsory labour.

⁶⁷ Allain, J. ‘The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Conventions and the 1956 United Nations Convention’. (2008). The Netherlands. Martinus Nijhoff Publishers, at p.6.

⁶⁸ See the Preamble to the United Nations Charter 1945.

1948 which was intended to be read as a common standard of achievement for all peoples and all nations⁶⁹ marked the start of the modern human rights movement.

There is a distinct shift during this period from the Conferences of the 19th Century to a more global order in the 20th. The 19th century did not see the global concert that occurred in the 20th. Rather, in terms of state action, anti-slavery efforts were effected by a few powerful states meeting in concert; whose actions were often borne of economic and political motivation and agreed in privileged summits. By contrast, the creation of the League of Nations and then the United Nations meant a much greater number of states were engaged in international relations. Coupled with the decline in European power, states were able to assert themselves to greater effect, particularly as the notion of the ‘civilised other’ no longer held sway. In the light of the horrors of the two World Wars, in compliance with the Charter of the United Nations, and as a result of incredible work by the UN Commission on Human Rights, the acknowledgment of a number of human rights was embodied in the Universal Declaration of Human Rights in 1948: a treaty which included, but extended far beyond the institution of slavery to provide a comprehensive account of human rights, giving human rights international legal status.

Whilst human rights are not ‘new’⁷⁰, it should be recognised that *global* human rights and ‘human rights speak’ are really a feature of the 20th century. By this it is meant that *international* human rights were formed as a result of the consequences of the two World Wars and following the United Nations Universal Declaration of Human Rights. Prior to this, the purpose of the League of Nations, and later the United Nations, was primarily to attempt global cohesion, peace and security, which are explicitly declared in the respective bodies’ founding treaties. Thus one should first distinguish between the two distinct, although not necessarily unconnected efforts during the 19th and 20th centuries on the basis of motivation and impetus. One should also distinguish perceptions of rights so that the post 1945 language of *universal* human rights is contrasted with the anti-slavery efforts during the 19th and early 20th centuries. During the 19th century ‘rights’ talk by campaigners was couched in terms of dignity and humanity, but for states, and for many individuals, notions of ‘civilisation’ and ‘nation’ were far more dominant. Thus, human rights talk as we know it today was not a feature of earlier anti-slavery efforts, which were distinct in a number of ways. Nevertheless, it is important to recognise that human rights today are a legacy of prior rights awareness and of targeted action by powerful states. This is not to say that state efforts post 1945 were purely altruistic, but certainly there is a shift motivation behind legal protection of rights, and in the language and reach of rights at this time. Thus it can be argued that both slavery and human rights agendas ran in tandem but were in fact quite distinct efforts, which were in turn bolstered by the existence of the other, eventually merging in the mid-20th century. The 19th century efforts of the anti-slavery movement therefore may have provided ongoing momentum (not cause) to establish the international human rights framework, with the 20th century human rights movement ensuring that slavery remained part of human rights discourse.⁷¹

⁶⁹ See the Preamble to the Universal Declaration of Human Rights 1948.

⁷⁰ Human rights can be found throughout man’s history and in the most basic of societies, although they may have manifested in a different incarnation than the individual rights which are largely the feature of international human rights today. See e.g. Ishay, M.R. ‘The History of Human Rights: From Ancient Times to the Globalisation Era’. (2004). Berkeley. University of California Press; Arendt, H. ‘The Origins of Totalitarianism’. (1951). New York. Harcourt, Brace, Jovanovich Publishers.

⁷¹ See e.g. Articles 4 of the Universal Declaration of Human Rights 1948.

Whilst the Slavery Convention still provides the accepted definition of slavery and recognised forms of servitude and forced labour,⁷² the realisation that many practices may not fall within its definition of slavery led to the implementation of the Supplementary Convention on the Abolition of Slavery, the Slave-trade and Institutions and Practices Similar to Slavery in 1956 and which provided for the abolition of a variety of practices similar to slavery under article 1. These include debt bondage, serfdom, the inheritance of a woman, and extreme forms of child labour.⁷³ Numerous subsequent related treaties have served to crystallise the prohibition of slavery and enhance the view that it has achieved *jus cogens* status, the International Court of Justice defining the prohibition of slavery as an obligation “*erga omnes* arising out of human rights law”⁷⁴ - an obligation owed to the international community as a whole. The human rights agenda has since taken hold and has resulted in the unremitting propagation of international human rights related treaties, over the last half century. Many of these are specifically created to tackle human rights, and some, such as the Palermo protocol,⁷⁵ deal with human rights as an extension of a wider problem, in this case transnational organised crime.⁷⁶ Importantly, state reporting systems are now in place, and some of these treaties create committees with monitoring powers. In some cases these bodies have the capability to consider communications from individuals against a state.⁷⁷

The large number of treaties created which concern more specific practices that fall somewhere within the labels of slavery, servitude and forced or compulsory labour has further confused the issue. These address, inter alia, trafficking of persons, prostitution, pornography, forced labour, children’s rights, and gender discrimination. The current legal complexity is not assisted by conflicting regional interpretations of the meaning and extent of slavery under the accepted definition from the 1926 Convention.⁷⁸ The consequence is that our understanding, and therefore the application of the original slavery laws has been muddied by the proliferation of subsequent legal instruments on a variety of analogous practices. In our haste to confront ‘contemporary’ forms of slavery, a conflation of legal analysis and application has arisen internationally, regionally and domestically. As a result, practices similar to slavery are now often analysed in terms of exploitation (a potentially problematic term for the lawyer) in order to encapsulate the various recognised forms of slavery today. The problem with the concept of exploitation is where to draw the line; the term exploitation includes some comparatively innocuous acts. Thus

⁷² See Nicholson, A. ‘Reflections on *Siliadin v France*: Slavery and Legal Definition.’ *The International Journal of Human Rights*. 14(5), September 2010. 705-720; Buck, T. & Nicholson, A. Constructing the Legal Framework’ in Craig, G. ‘Child Slavery Now: A Contemporary Reader.’ (2010). Bristol. Policy Press; Cullen, H. ‘*Siliadin v France*: Positive Obligations under Article 4 of the European Convention of Human Rights.’ *Human Rights Law Review*. 6(3). (2006). 585-592.

⁷³ Article 1.

⁷⁴ See *Barcelona Traction, Light and Power Co., Ltd (Belgium v Spain)*, 5 Feb 1971, ICJ Reports 1970, p.32.

⁷⁵The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000. the protocol came into force in 2003.

⁷⁶The Convention against Transnational Organized Crime 2000.

⁷⁷ See the Human Rights Committee of the International Covenant on Civil and Political Rights 1966.

⁷⁸ See *Siliadin v France* (2006) 43 EHRR 16; *Kunarac et als.* (IT-96-23-T &-IT-96-23/1-T) Judgment, 22 February 2001; *R v Tang* [2008] HCA 39; *Hadijatou Mani Koraou v The Republic of Niger* (2008) Judgment No. ECW/CCJ/JUD/06/08. 27 October 2008; *Rantsev v Cyprus* (25965/04) (2010) 51 EHRR 1 (ECHR).

one might perceive a sliding scale of gravity with slavery at the top, then servitude, and progressing down to milder forms of forced labour.

Moreover, current slavery discourse has a tendency to revolve around people trafficking, and more often sexual trafficking is highlighted in particular. Trafficking in persons has been widely recognised as a possible form of slavery,⁷⁹ and its prohibition is more universally implemented. One reason for this may be because trafficking is often concomitant with drugs trafficking, organised crime, asylum, immigration, prostitution, and efforts to control borders and crime generally. These matters are of particular importance to states both economically and politically and therefore are more likely to draw the state's attention. States are able to exercise greater control in terms of immigration and border control; a task the state is already required to exercise and which reinforces state sovereignty. This is reflected in the discourse on trafficking which is also dominated by consideration of immigration and asylum policy: for example trafficking laws have often been accused of facilitating border restrictions and of leading to criminalisation of sex work. Approaches to asylum are also to construct systems that treat women as asylum seekers first and victims second. Where trafficking is claimed, it becomes a matter for immigration or criminal law.⁸⁰ Interestingly, there is also a perception that cross-border trafficking is linked to a notion of the 'other' – so there is a capability to abstract the victim in much the same way that African slaves were abstracted, albeit through the separate concept of the nature of 'uncivilised' peoples.

Over the last century we have therefore seen a move from the more general overarching rights introduced in the early 20th century, to more rights specific treaties in the latter half. Rather than engaging in an exercise of clarification of existing slavery Conventions, the international community has sought to expand through the addition of Protocols and practice specific conventions. The continual re-defining of the ILO in its forced labour conventions has also contributed to this effort. On the one hand, this approach has renewed efforts to combat slavery, has ensured that slavery has remained on the human rights agenda, and has undertaken an impressive study of slavery in the world today. In contrast to the 19th century with international efforts directed solely at the African slave-trade, today, *world* practices similar to slavery are known, and the existing prohibitions are being reinforced via a number of international agreements, promulgated by the United Nations (thereby representing the majority of world states), and bolstered by a number of treaty bodies. However, the fragmented and somewhat self-perfecting approach to international law on slavery can produce undesirable consequences. For example, approaches to asylum are to construct systems that treat victims of trafficking as asylum seekers first and victims second, thus victims become a matter for immigration or criminal law. Far more worryingly, with the increased recognition of the number of practices associated with slavery may result in the dilution of the meaning of slavery, and the interest in

⁷⁹ This is reflected in the definition of trafficking and recognises that the movement of an individual for exploitative purposes, within or across borders, may not in itself amount to slavery.

⁸⁰ Second World Congress (2001a) Trafficking in Children for Sexual Purposes: An Analytical Review, Paper for the Second World Congress against Commercial Sexual Exploitation of Children, ECPAT; Integration Of The Human Rights Of Women And The Gender Perspective violence Against Women. Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with United Nations Commission on Human Rights resolution 1997/44. E/CN.4/2000/68, 29 February 2000.

trafficking may pervert perceptions of the extent of slavery worldwide, resulting in a possible marginalisation of slavery.⁸¹

Temporality has changed, and we must look to the position today, but increasingly it is being argued that a failure to look back may have hindered the formulation of modern anti-slavery law. Once established, international law focused on new models and new law, avoiding a historical approach and concerned that history would simply reveal the fragility and contingency of human action, which could prove debilitating to the new international order.⁸² The international community set itself to the task of formulating a stronger and peaceful world order via the United Nations. A product of this movement was the drive to advance human rights, which has given rise to a consistent self-perfecting legislative endeavour, and a move towards providing ‘solutions’, as opposed to standard setting alone.

However, the resulting abstraction of certain practices from the original slavery conventions, such as human trafficking which is now embodied in a distinct Optional Protocol⁸³, and the linguistic distinction between slavery and servitude that has arisen via regional case law⁸⁴, whilst raising awareness and renewing anti-slavery efforts, has resulted in a conflation of provisions and terminology that dilutes the meaning of slavery, and has consequences for fair labelling and victim satisfaction. Further, the persistent reference to ‘modern’ forms of slavery denies the historical bases of many of these practices, somehow restricting the problem and leading to trite statements attributing the ‘rise of modern slavery’ to ‘globalisation’.⁸⁵ If the international community does not reflect the historical bases of these practices in its laws and policies, fundamental understandings as to its underlying causes cannot be fully understood, and the most constructive and effective means of tackling the practice neglected. However, it could also be argued that in some respects the modern position is a reflection of the past. Certainly the creation of monitoring bodies, and the recognition of various practices analogous to slavery would indicate recognition of past problems and omissions.

However, it is also clear that whilst those reading this book may be immersed in the analysis of slavery, and despite perhaps perceptions to the alternative, slavery is not on the international agenda as it was in the 19th century, meaning it is not a state priority. The particular circumstances and factors that came together in the 19th century are not emulated today where other political and economic concerns, and issues of state security, have taken precedence and do not naturally coincide with anti-slavery efforts.

During the 19th Century, ending the slave-trade was the objective. With the victim in mind the end was to facilitate the freedom of slaves, not to tackle the institution of slavery per se. Further, there was a clear lacuna in international law, which had not attempted to deal with the various other forms of slavery existing at the time. Today, the campaign to end slavery continues, but the more recent treaties indicate two trends: (i) a move toward victim assistance to manage the

⁸¹ See Hathaway, J.C. ‘The Human Rights Quagmire of “Human Trafficking”’. 49 VA. J. INT’L L. 1 (2008). 1-59. at p.6.

⁸² See Anghie, A. Op cit. n.46, at p.20.

⁸³The Convention against Transnational Organized Crime 2000, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

⁸⁴ Op cit. n.74.

⁸⁵See generally Quirke, J. Op. cit. n.2.

consequences of emancipation, and (ii) a potentially separate human rights agenda protecting children.⁸⁶ International treaties are becoming increasingly victim-oriented, and do not merely represent an exercise in cause and effect. The Palermo Protocol in particular calls for very specific measures, suggesting that psychological assistance be given to victims, and for states to consider re-patriation or regularisation of immigration status, and the provision of housing and health care.⁸⁷ In other words the protocol is more statutory in nature, and goes far beyond the usual call for ‘effective implementation’, which has often resulted in states merely setting minimum standards, rather than proactively leading the field. The implementation of more extensive and effective post-discovery measures must be the correct approach to new legislation. The very nature of slavery means that individuals are less able to make their condition known, and by the time they are discovered, the offence is likely to have already occurred. The forms of assistance suggested by the Palermo protocol are therefore vital to achieving justice. The focus today is also very much on women and children as the most vulnerable, and revolves around people trafficking, and more often sexual trafficking is highlighted in particular. This is perhaps because human trafficking is often concomitant with drugs trafficking, organised crime, asylum, immigration, prostitution, and as such relates to efforts to control borders and crime generally. In this respect, its prevalence is more important to states both economically and politically, and states are able to exercise greater controls in terms of immigration and border control, something they already do, which requires no significant changes to existing infrastructures or resources, and ultimately reinforces state sovereignty. This is reflected in the discourse on trafficking which can be dominated by consideration of immigration and asylum policy: for example trafficking laws have often been accused of facilitating border restrictions and of leading to criminalisation of sex work.⁸⁸ There is also a perception that cross-border trafficking is linked to a notion of the victim as the ‘other’, so there is a capability to abstract the victim, much as occurred in the 19th century where the distinction between civilised and uncivilised others led to similar abstraction.

Quirk (2006) argues skilfully for historical scholarship to be considered anew in the fight to implement effective strategies against ‘modern’ slavery. In particular the unfortunate terminology of ‘old’ and ‘new’ slavery ought to be discarded in order to avoid the abstraction of slavery from its ancestry.⁸⁹ Only by studying the social, cultural and economic roots of slavery in all its forms can we begin to understand how best to tackle it in the 21st century. Whilst some form of international state unity exists in both centuries, as did a number of anti-slavery treaties, there remains a feeling that the anti-slavery movement today is overwhelmingly different, and struggling to effect change at grass roots level. This is in part due to a lack of targeted action,

⁸⁶ For discussion of this see generally Craig, G. (ed). ‘Child Slavery Now: A Contemporary Reader.’ (2010). Bristol. Policy Press; Marshall, D. ‘The construction of children as an object of international relations: The Declaration of Children’s Rights and the Child Welfare Committee of League of Nations, 1900–1924’, *The International Journal of Children’s Rights* (1999). 7(2). 103–147; Buck, T. ‘International Child Law.’ (2011) Abingdon. Routledge-Cavendish. Smolin, D. (2000) ‘Strategic choices in the international campaign against child labour’, *Human Rights Quarterly*.’ (2000). 22(4). 942-987; Van Bueren, G. ‘International Law on the Rights of the Child.’(1995). Dordrecht, Boston, London: Martinus Nijhoff.

⁸⁷ Article 6.

⁸⁸ Howard, N & Lalani, M ‘The Politics of Human Trafficking.’ *The St Anthony’s International Review*, vol. 4(1) (2008) pp.5-15; International Organisation for Migration. ‘Combatting Trafficking in South-East Asia: A Review of Policy and Programme Responses.’(2000).UNESCO; Huda, S. ‘Report of the Special Rapporteur on the human rights aspects of victims of trafficking in persons, especially women and children.’ United Nations Commission on Human Rights, 20 February 2006, E/CN.4/2006/62.

⁸⁹ Quirk, J. Op. cit. n.2, at 580.

which is affected by a lack of drive from the most powerful states, and by a less localised, more dispersed slave problem. An awareness of the magnitude and variation of global slavery renders the international community somewhat physically incapable of striking at all practices with the same consequence, despite international co-operation. It should be noted that when identifying contributory factors, globalisation is often presented as facilitating ‘modern’ slavery. However, in theory, globalisation also facilitates cooperation and cohesiveness. The retreat to globalisation as an excuse for the continuing existence of slavery is therefore unsustainable, particularly in the light of 19th century achievements where cooperation was so difficult, and especially when confronted with rural and cultural slavery where its influence is limited.

The means by which slavery is managed has also changed. Historically, national efforts moved to international and filtered through to domestic law. In order for slavery to be tackled effectively today, international movement needs to move to the national agenda, and states should perhaps emulate the 19th century campaign by taking on greater responsibility in initiating effective domestic anti-slavery measures.

Conclusion

In the new laws on slavery we are seeing a means of embedding greater obligations to ensure more appropriate and effective methods with a focus on victim assistance. There are other advantages to these multiple specific treaties: New treaties have introduced monitoring and reporting processes, there is more clarity as to certain offences and the treaties are becoming exceptionally prescriptive. So it seems the distinction is that of a rights-based focus in the old treaties, to a focus on sentencing and victim assistance in the new.⁹⁰ The purpose of practice specific treaties is to move away from the definitional problems with the older Slavery Conventions and provide for a more specific and targeted approach by criminalising the most commonly recognised acts. Unfortunately this means international human rights law as it relates to slavery has become somewhat fragmented. The concern is that there will be a consequential loss of effect when transposed into municipal law. If that is the case, then protection will become dependent on grass-root organisations, rather than their being supported by and part of an effective network. In combating slavery it is important that the law does not just suit the doctrinal lawyers, but also non-governmental organisations and international bodies, so the question remains whether we need a more systematic approach to the law on slavery, or some form of consolidatory framework.

Part of the reason for this fragmentation is no doubt due to the appropriation of the term slavery to describe a number of practices so as to benefit from the stigma of slavery by association. However, it is also likely that this has been compounded by a failure to reflect on and acknowledge historical slavery which has led to the conceptualisation of practices existing today as ‘new’. This reluctance to engage with the history of the anti-slavery movement or a tendency

⁹⁰ Note e.g. The EU Group of Experts on Trafficking in Human Beings who have suggested a revision of the Council Framework Decision on Combating Trafficking in Human Beings (2002/629/JHA) to include unconditional assistance to the victim, followed by temporary residence permits, and compensation for both financial and non-material damages.

to view it as irrelevant is misplaced. Statements of ‘new’ slavery are not particularly helpful; awareness can only be enhanced by recognition of the historical nature of many practices analogous to slavery. An analysis of the social, moral, cultural, philosophical, economic and political factors intrinsic to the abolitionist movement must be relevant to understanding the measures needed today and could have avoided many of the issues arising in the filtering down of international law to the domestic level. Thus, one becomes persuaded by Philip Allott’s criticism that the world, having so thoroughly rejected natural law finds itself in a state of ‘frenzied progress’ and in constant need for improvement and self-perfection.⁹¹

The current rate of creation of international human rights law can, on the one hand, be regarded as a positive and proactive move towards eradication of slavery, distinct from the slow and politically laden steps of the 19th century. On the other hand the rate at which the law is moving today leaves little pause for reflection and modern anti-slavery laws have faltered when translated into real protection.

*Senior Lecturer in Law, Nottingham Law School. Reproduced with permission of PalgraveMacmillan.

This extract is taken from the original manuscript and has not been edited. The definitive, published, version of record is available here: [<http://www.palgrave.com/page/detail/a-global-history-of-antislavery-politics-in-the-nineteenth-century-william-mulligan/?isb=9781137032591> on www.palgrave.com and www.palgraveconnect.com].

⁹¹ See generally the Review Essay Symposium: ‘Philip Allott’s Eunomia and The Health of Nations Thinking Another World: “This Cannot Be How the World Was Meant to Be”.’ *The European Journal of International Law*.16(2).(2005). 255–297, per Allot, P. at 259.