6-2024

The Myth of Slavery Abolition

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In many countries today, slavery and the slave trade continue with impunity. International human rights law prohibits both abuses, but states are rarely held accountable and people who are enslaved or slave traded rarely receive redress. This Article offers a novel account of why international human rights law advocacy neglects slavery and the slave trade. Specifically, this Article demonstrates that the abolition of the Transatlantic and East African slave trades was achieved through a legal framework that marginalized the human rights of enslaved persons while consolidating empire. In the wake of World War II, prohibitions on slavery and the slave trade were codified in human rights law, but advocates turned to enforcement under international criminal law, which focuses on individual perpetrators and can paradoxically entrench the structures that perpetuate slavery and the slave trade.

In recent decades, the United States has doubled down on these imperial interventionist strategies, using global power and influence to rebrand human trafficking as "modern slavery" and focusing enforcement on policing international borders while prosecuting individual perpetrators under domestic and transnational criminal law. This Article therefore argues that human rights advocates should press international legal institutions to go beyond combatting human trafficking crimes and to focus additionally on state accountability for wrongs done to the human beings still exploited, enslaved, and slave traded today. Only then can the prohibitions of slavery and the slave trade begin to unlock their emancipatory potential.

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INTRODUCTION

The successful legal abolition of slavery and the slave trade of the nineteenth and twentieth centuries is a central and dominant narrative of international human rights law, a framework that is based on fundamental ideals of liberty, equality, and human dignity. While international law did abolish de jure and de facto slavery and the slave trade, these crimes persist in practice globally.[1] As in some of the worst slave trades of the past—namely, the Trans-Atlantic and East African Slave trades in which millions of Africans were abducted and forcibly removed to the Americas, the Middle East, and Asia[2]—the global capitalist economy remains dependent upon slave trade and slavery institutions, systems, and practices in which perpetrators exercise ownership powers over human beings in order to extract labor or otherwise subjugate them.[3]

Slavery and the slave trade continue to fuel contemporary conflicts around the world. Beginning in 2014, for example, Islamic State of Iraq and the Levant (ISIL) fighters in Iraq and Syria have continued to enslave and slave trade Yazidi women and children.[4] The Committee for the Buying and Selling of Slaves

1. JEAN ALLAIN, SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING 109 (2012); *see also* Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L.J. 239, 258 (2009) (emphasizing that the definition of slavery contributed to the persistence of it). Additionally, abolition legitimized and permitted new labor regimes that reconstituted subjugation systems in abolition's wake, as demonstrated in continued indentured wage labor systems in the Indian Ocean empires or in the United States through incorporating labor into the criminal legal system. Vasuki Nesiah, *Slavery's Afterlives: Humanitarian Imperialism and Free Contract*, 117 AJIL UNBOUND 66, 66, 70 (2023) (citing Adelle Blackett & Alice Duquesnoy, *Slavery Is Not a Metaphor: U.S. Prison Labor and Racial Subordination Through the Lens of the ILO's Abolition of Forced Labor Convention*, 67 UCLA L. REV. 1504 (2021)).

2. LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 979 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 114–20 (1966); Seymour Drescher & Paul Finkelman, *Slavery*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 890, 890–97 (Bardo Fassbender & Anne Peters eds., 2012); U. O. Umozurike, *The African Slave Trade and the Attitudes of International Law Towards It*, 16 HOW. L.J. 334, 341 (1971).

3. *See, e.g.*, Hacienda Brasil Verde Workers v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶ 179 (Oct. 20, 2016) (alleging that Brazilians were forced into labor on farms for no pay and with no way to leave freely).

4. *See* YAZDA & FREE YEZIDI FOUNDATION, ISIL: NATIONALS OF ICC STATES PARTIES COMMITTING GENOCIDE AND OTHER CRIMES AGAINST THE YAZIDIS 10–12 (2015) (redacted), https://www.freeyezidi.org/wp-content/uploads/Corr-RED-ISIL-commiting-genocide-ag-the-Yazidis.pdf; Letter from Janet Benshoof, President, Glob. Just. Ctr., to Fatou Bensouda, Chief Prosecutor, Int'l Crim. Ct., Off. of the Prosecutor (Dec. 17, 2015). Notably, ISIS has enslaved Muslim and other women and girls as well. This article, however, focuses on the Yazidi experience. *See* Communication from HRGJ Clinic of CUNY Law School, MADRE & OWFI to Int'l Crim. Ct. Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of Iraq and the Levant (ISIL) in Iraq (Nov. 8, 2017) https://peacewomen.org/sites/default/files/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq%20PDF.pdf. For a discussion on how enslavement may constitute a form of gender persecution, see Lisa Davis, *Dusting off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 NW. J. HUM. RTS. 2 (2021). For information on German cases

organized slave markets to "distribute," or slave trade, captured Yazidis as property of the Caliphate.[5] ISIL policies have permitted fighters to "buy, sell, or give as a gift female captives" who were war spoils.[6] The policy intentionally reduced into slavery "non-believing" women and children of all genders.[7] This system of slavery and slave trading permitted sexualized violence in the course of enslavement[8] as individual ISIL fighters exerted various forms of ownership over Yazidi women and girls' sexual autonomy.[9] Yazidi boys, also enslaved, were forced to convert to Islam, to perform forced labor, and to train and fight with ISIL in military camps in Iraq and Syria.[10]

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convicting ISIS members of crimes against humanity, including aiding and abetting enslavement, see *German Court Convicts a Third ISIS Member of Crimes Against Humanity Committed Against Yazidis*, DOUGHTY ST. CHAMBERS (June 18, 2021), https://www.doughtystreet.co.uk/news/german-court-convicts-third-isis-member-crimes-against-humanity-committed-against-yazidis; *German Court Hands Down a Fourth Conviction for Crimes Against Humanity Committed by ISIS Against the Yazidis*, DOUGHTY ST. CHAMBERS (July 26, 2021), https://www.doughtystreet.co.uk/news/german-court-hands-down-fourth-conviction-crimes-against-humanity-committed-isis-against.

5. Patricia V. Sellers & Jocelyn G. Kestenbaum, *Missing in Action: The International Crime of the Slave Trade*, 18 J. INT'L CRIM. JUST. 517, 524 (2020); *see* Aymenn Jawad Al-Tamimi, *Archive of Islamic State Administrative Documents*: *Specimen 13Y: Notice on Buying Sex Slaves, Homs Province*, PUNDICITY: BLOG (Jan. 11, 2016, 8:46 AM), http://www.aymennjawad.org/2016/01/archive-of-islamic-state-administrative-documents-1 [hereinafter Homs Notice]; U.N. Hum. Rts. Council, *"They Came to Destroy": ISIS Crimes Against the Yazidis*, UN Doc. ¶ 58 A/HRC/32/CRP.2 (June 15, 2016) [hereinafter *They Came to Destroy*]; OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. (OHCHR) & U.N. ASSISTANCE MISSION FOR IRAQ (UNAMI), A CALL FOR ACCOUNTABILITY AND PROTECTION: YEZIDI SURVIVORS OF ATROCITIES COMMITTED BY ISIL 4 (Aug. 2016), http://www.ohchr.org/Documents/Countries/IQ/UNAMIReport12Aug2016_en.pdf [hereinafter UNAMI/OHCHR Report]. Yazidis reported that, prior to their enslavement, they were registered by officials at holding centers in Syria, loaded onto trucks, and moved to holding sites in Iraq. ISIS required fighters to pre-register for their slave purchases of females priced and sold according to their ages. ISIS fighters documented names, ages, and marital statuses, and photographed Yazidi women, girls, and boys at these holding sites. At times, ISIS auctioned Yazidi women and children online, replete with registration information, photos, and minimum purchase prices. Homs Notice, *supra*; *They Came to Destroy*, *supra*, at ¶ 43, 57, 58; UNAMI/OHCHR Report, *supra*, at 4. ISIS created the Islamic Caliphate and considered it a state ruled by Islamic Sharia law. Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980; *ISIS Fast Facts*, CNN (Jan. 5, 2024, 2:28 PM EST), https://www.cnn.com/2014/08/08/world/isis-fast-facts/index.html.

6. *See Islamic State (ISIS) Releases Pamphlet on Female Slaves*, MIDDLE E. MEDIA RES. INST. (Dec. 4, 2014), http://www.memrijttm.org/islamic-state-isis-releases-pamphlet-on-female-slaves.html.

7. The Revival of Slavery Before the Hour, 4 DABIQ 15, IS. D.013, IS D.014; *They Came to Destroy*, *supra* note 5, at ¶ 55, 154. ISIS often presented Yazidi women and girls "as a package" until girls reached the age of nine and, thereafter, sold them separately. *Id.* at ¶ 81, 82.

8. *See* Patricia V. Sellers & Jocelyn G. Kestenbaum, *'Sexualized Slavery' and Customary International Law*, *in* THE PRESIDENT ON TRIAL: PROSECUTING HISSÈNE HABRÉ 366, 367 (Sharon Weill, Kim Thuy Seelinger & Carlson Kerstin Bree eds., 2020).

9. Géraldine Boezio, *Escaping from ISIL, a Yazidi Sexual Violence Survivor Rebuilds Her Life*, OFF. OF THE SPEC. REP. OF THE U.N. SEC'Y-GEN. ON SEXUAL VIOLENCE IN CONFLICT (July 10, 2018), https://www.un.org/sexualviolenceinconflict/escaping-from-isil-a-yazidi-sexual-violence-survivor-rebuilds-her-life.

10. *They Came to Destroy*, *supra* note 5, at ¶ 40, 82, 93; *see also* Johanna Groß, *9th Day of Trial – Main Hearing Against Taha Al-J (June 9, 2020)*, INT'L CRIM. L. THEMATIC COORDINATION GRP. (Feb. 2, 2022), https://amnesty-voelkerstrafrecht.de/9-verhandlungstag-hauptverhandlung-gegen-taha-al-j-09-juni-2020. As

Outside of conflict-related enslavement, a recent domestic criminal case in Lebanon alleges that sponsors under the *kafala* system[11] subjected Meseret, an Ethiopian migrant domestic worker, to, among other crimes, slavery and the slave trade.[12] Meseret's *kafeel* recruited and then held her captive in an apartment for more than seven years without pay; her captor subjected her to physical and verbal abuse and did not permit her to contact her family.[13] This case is not an isolated one; the *kafala* system's reliance on private sponsors and lack of labor protections make the system particularly susceptible to slavery and the slave trade.[14]

Corporations continue to be complicit in slavery and slave trade perpetration in their supply chains.[15] Recently, eight Malian children who were forced to stay and work on cocoa plantations without pay sued Nestlé, Mars, and Hershey, alleging related crimes of human trafficking and forced labor under the Trafficking Victims Protection Rights Act ("TVPRA").[16] Such acts, while not characterized legally by advocates as slavery and slave trade,[17] constitute the slave trade when perpetrators intend to bring individuals into or maintain them

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demonstrated by the International Criminal Court (ICC) appellate judgment in *Prosecutor v. Ongwen*, the Lord's Resistance Army in Uganda relied on de jure and de facto systems of slavery and the slave trade. Prosecutor v. Ongwen, ICC-02/04-01/15, Judgment of the Appeals Chamber, ¶ 6 (Dec. 15, 2022).

11. The kafala system is a monitoring and regulatory system in several Middle Eastern states that gives private individuals and corporations near total control over migrant domestic and other workers' immigration and employment status.

12. *LAW Files Groundbreaking Case on Behalf of Migrant Domestic Worker in Lebanon*, LEGAL ACTION WORLDWIDE (Oct. 8, 2020), https://www.legalactionworldwide.org/accountability-rule-of-law/law-files-groundbreaking-case-on-behalf-of-migrant-domestic-worker-in-lebanon/ [hereinafter Press Release, LAW]; *see also* POLICY BRIEF: THE KAFALA SYSTEM IN LEBANON: HOW CAN WE OBTAIN DIGNITY AND RIGHTS FOR DOMESTIC MIGRANT WORKERS?, LAW (Oct. 2020), https://www.legalactionworldwide.org/wp-content/uploads/MDWs-Policy-Brief.pdf (arguing that the kafala system amounts to slavery and slave trading under international law).

13. Press Release, LAW, *supra* note 12.

14. *See, e.g.*, *Lebanon: Abolish Kafala (Sponsorship) System*, HUM. RTS. WATCH (July 27, 2020, 12:01 AM EDT), https://www.hrw.org/news/2020/07/27/lebanon-abolish-kafala-sponsorship-system; Patrick Rak, *Modern Day Slavery: the Kafala System in Lebanon*, HARV. INT'L REV. (Dec. 21, 2020), https://hir.harvard.edu/modern-day-slavery-the-kafala-system-in-lebanon.

15. *See, e.g.*, Samuel Mawuter, *It's Juneteenth, but These American Companies Are Still Profiting from Slavery (Commentary)*, MONGABAY (June 18, 2021), https://news.mongabay.com/2021/06/its-juneteenth-but-these-american-companies-are-still-profiting-from-slavery-commentary (discussing *inter alia* the child slave labor practices rampant in American agribusiness company Cargill's supply chains, largely involving enslaved Black children on farms in Africa).

16. Oliver Balch, *Mars, Nestlé and Hershey to Face Child Slavery Lawsuit in US*, GUARDIAN (Feb. 12, 2021, 5:31 PM EST), https://www.theguardian.com/global-development/2021/feb/12/mars-nestle-and-hershey-to-face-landmark-child-slavery-lawsuit-in-us. Similar cases have failed in the US that were filed under the Alien Tort Statute (ATS). *US Supreme Court Blocks Child Slavery Lawsuit Against Chocolate Firms*, BBC NEWS (June 17, 2021), https://www.bbc.com/news/world-us-canada-57522186.

17. Complaint at 5–6, Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173 (D.D.C. 2021) (No. 1:21-cv-00386), https://static1.squarespace.com/static/608276df0e35bd790e38eff3/t/617079be40977360a4dfb73e/1634761152315/2.12.21+TVPRA+Cocoa+Complaint+File+stamped.pdf.

in a situation of slavery and slavery when perpetrators exercise powers attaching to the rights of ownership over them.[18]

As troubling as the continuation of slavery and the slave trade is today, states have yet to prioritize protection of and redress for human beings enslaved and slave traded. Despite slavery and slave trade prohibitions' *jus cogens* normative status[19] and attendant *erga omnes* obligations of states,[20] human rights law has remained underutilized,[21] hindering the emancipation of human beings and the eradication of the structures and systems that perpetuate human subjugation and ownership—including slavery and the slave trade.

While some scholars claim that slave trade abolition was one of the most important international law advances of the nineteenth century,[22] historians and other experts suggest that suppressing the slave trade through international law

18. Another recent example includes allegations of slavery in wineries in Brazil. Thiago Alves, *Brazil: Well-Known Wineries Involved in Alleged Modern Slavery Scandal*, BUS. & HUM. RTS. RES. CTR. (Mar. 7, 2023), https://www.business-humanrights.org/en/latest-news/brazil-well-known-wineries-involved-in-slave-labor-scandal.

19. *Jus Cogens*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted.").

20. *Erga Omnes*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Toward all.").

21. *But see, e.g.*, Siliadin v. France, App. No. 73316/01 (July 26, 2005), https://hudoc.echr.coe.int/eng?i=001-69891; Hacienda Brasil Verde Workers v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 318 (Oct. 20, 2016); López Soto v. Venezuela, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 362 (Sept. 26, 2018). Two recent slavery cases adjudicated before the Inter-American Court of Human Rights against Brazil and Venezuela provide examples of the potential—and the challenges—in achieving full accountability for states' failures to ensure respect for prohibitions of slavery and the slave trade. In the 2016 case of *Hacienda Brasil Verde v. Brazil*, for example, the Inter-American Court of Human Rights (IACtHR) found Brazil responsible for the human rights violations of, inter alia*,* slavery and the slave trade. The IACtHR ordered the state to provide reparations in the form of investigation, prosecution, punishment, compensation to victims, and domestic law reform to ensure that the statute of limitations would not apply to slavery crimes in future cases in Brazil. In 2018, in the case of *López Soto v. Venezuela*, the IACtHR found Venezuela responsible for violations of, inter alia*,* (sexual) slavery prohibitions under the American Convention. Caso López Soto v. Venezuela, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 362 (Sept. 26, 2018). Even in the few regional human rights slavery cases adjudicated, there is a need to advocate for state responsibility for violations of slave trade prohibitions. In each of these cases, slave trade conduct was described, but never legally characterized as such, even when Brazil and Venezuela criminalized the slave trade as "reduction into slavery" in domestic law. Instead, the Inter-American Commission regarded the phrase "slave trade and traffic in women" as "human trafficking" as defined under the Palermo Protocol. The court also overlooked abductions and kidnapping (*actus reus* of the slave trade) as part of the slavery crimes perpetrated. Enforcement of slave trade prohibitions will better ensure that all violations are redressed, at least regarding state responsibility, under regional human rights law and domestic criminal law. For a detailed analysis of the reasons why international human rights law slavery and slave trade prohibitions are an important complement for accountability and redress for victims enslaved and slave traded, see Jocelyn G. Kestenbaum, *Prohibiting Slavery and the Slave Trade*, 63 VA. J. INT'L L. 1, 34 (2022).

22. *See* J.P. Van Niekerk, *British, Portuguese, and American Judges in Adderley Street: The International Legal Background to and Some Judicial Aspects of the Cape Town Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century*, 37 COMP. & INT'L L.J. S. AF. 1, 6 (2004).

mainly reinforced the legal authority of empire,[23] furthering, inter alia, forced labor, servitude, and sharecropping economies while also perpetuating mythologies of successful abolition.[24] By examining legal liberalism's historical racialization and protection of capital accumulation over human dignity and rights, a non-dominant narrative as to why international human rights prohibitions of slavery and the slave trade have never taken hold moves to the foreground.[25] Indeed, dominant progress narratives of successful eradication of the slave trade and slavery do not hold water in light of facts that support narratives of complicity and continuing racial subordination and exclusion for the benefit of empire in international law.[26]

Abolition of the slave trade and suppression of slavery through international law may have contributed to the end of de jure slavery institutions and practices of state-sanctioned ownership of persons; however, colonial expansion and the desire to turn colonial subjects into a "tax-paying workforce producing for the market"[27] continued slavery and slave trade harms while also furthering other forms of exploitation as brutal and oppressive as slavery and slave trade practices.[28] While not displacing slavery and the slave trade, exploitation practices of forced labor and human trafficking became more prevalent given colonialists' need to separate land from labor in a way that created wage laborers out of farmers and herders.[29]

At the turn of the twentieth century, states and private businesses continued to exploit labor in unimaginable ways to produce raw goods, such as cocoa and

23. *See* Lauren Benton, *Abolition and Imperial Law, 1790-1820*, 39 J. IMPERIAL & COMMONWEALTH HIST. 355, 357 (2011).

24. *See* Christopher Gevers, *Refiguring Slavery Through International Law: The 1926 Slavery Convention, the "Native Labor Code" and Racial Capitalism*, 25 J. INT'L ECON. L. 312, 312–33 (2022). *See also* LYNDSEY P. BEUTIN, TRAFFICKING IN ANTI-BLACKNESS: MODERN-DAY SLAVERY, WHITE INDEMNITY, AND RACIAL JUSTICE 7 (2023) ("European global expansion and conquest, beginning in the fifteenth century, created new political and social hierarchies that taxonomized difference into a hierarchy of rationality and proximity to humanness, which was signified by the invention of race. Economic relations and political arrangements informed each other. Mercantile capitalism fueled the rise of the entity of the state; the systems of settler colonialism and transatlantic slavery fueled capital accumulation and the development of global markets; and the doctrines of race, rights, reason, and rule of law created the political and legal apparatus that justified the violence of slavery, conquest, and colonialism.").

25. *See* Christine Schwöbel-Patel, *The Precarious Agency of Racialised Recaptives*, 10 LONDON REV. INT'L L. 151, 154 (2022); Eviatar Zerubavel, *Foregrounding and Backgrounding: The Logic and Mechanics of Semiotic Subversion*, *in* THE OXFORD HANDBOOK ON COGNITIVE SOCIOLOGY 569–74 (Wayne H. Brekhus & Gabe Ignatow eds., 2019) (explaining that the act of naming helps to foreground the conventionally unmarked, which is often seen as normal or universal, i.e. naming "whiteness" or "heteronormativity").

26. *See* Schwöbel-Patel, *supra* note 25, at 154. Empire is defined as a political construct in which one state dominates over one or more other states or peoples. *See* PETER DAVIDSON, ATLAS OF EMPIRES: THE WORLD'S GREAT POWERS FROM ANCIENT TIMES TO TODAY 8 (2018).

27. SUZANNE MIERS, SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM 47 (2003).

28. Nesiah, *supra* note 1, at 70–74.

29. MIERS, *supra* note 27.

rubber, to meet market demands.[30] And despite the narrative of successful abolition of slavery and the slave trade, practices of trading in and exercising powers of ownership over persons continue largely unaddressed as such in international law today. In this way, the actual story of anti-slavery and slave trade abolition in international law is one of "continuity and responsibility": International law continues to reproduce racialized institutions of international economic hierarchy through slavery, the slave trade, and other related practices.[31] Indeed, states have not only ignored the human dignity of enslaved and slave-traded persons generally, but also have actively disregarded the plight of individuals whose racial designation serves a colonial or neocolonial function in the global economy—an economy that would be deeply threatened if the humanity of those racialized groups were fully respected.[32]

Despite the widespread continuation of slavery and slave trade practices across the globe, international law's prohibition of slavery and the slave trade—which has made its way into present-day human rights treaties and customs as a *jus cogens*, non-derogable norm—has the potential to be transformative in the struggle for global emancipation of individuals enslaved and slave traded today. As a step toward that goal, this Article reckons with some of the myths of international human rights law and the canon itself, attempting to identify underlying structures that international law supports by design so as to reimagine and possibly unlock the transformative, emancipatory potential of the human rights law prohibitions of slavery and the slave trade.

This Article builds upon and contributes to scholarship by challenging the Eurocentric historical narrative of slavery and the slave trade abolition that dominates the legal historical landscape, offering a critical analysis and aligning with decolonial and Third World Approaches to International Law ("TWAIL")[33]

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30. *Id.* at 48–55.

31. *See* Nesiah, *supra* note 1, at 70–74; Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. REV. 1860, 1863 (2021).

32. *See* E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1568 (2019).

33. *See* James T. Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 26 (2011); Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Nation*, 12 AM. U. J. INT'L L. & POL'Y 903, 971 (1997) (questioning the supremacy of Western views in international law); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 666–67 (1990) (using critical race perspectives to examine Indigenous peoples' human rights); ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 105 (1986) (describing unifying factors of TWAIL research); *see generally* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003) (examining the changing patterns and evolution of Third World resistance by analyzing international institutions and human rights); ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005) (arguing that colonialism led to the formation of international law and its sovereignty by examining colonialism from the sixteenth century to the war on terror); James T. Gathii, *Africa and the History of International Law*, *in* OXFORD HANDBOOK OF THE HISTORY OF INT'L LAW (2012) (examining two historical perspectives that analyze Africa's engagement with international law); THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW: AN INTRODUCTION (F. Snyder & S. Sathirathai

and Critical Race Theory ("CRT") scholarship.[34] It adds to the growing scholarly pursuit of understanding the impact of historical erasure[35] and dominant narratives on the legal profession and practice today, including in the field of international human rights law.[36] This inquiry takes as a starting point the need to reconceptualize international human rights law narratives, doctrines, and

eds., 1987) (collecting articles written within the past twenty-five years that evaluate the contributions of Third World Nations to international law). TWAIL is both anti-racist and anti-imperial, defining the Third World as a "counter-hegemonic discursive tool that allows us to interrogate and contest the various ways in which [geopolitical] power is used." *See* Balakrishnan Rajagopal, *Locating the Third World in Cultural Geography*, 15 THIRD WORLD LEGAL STUD. 1, 19 (1999); JOHN REYNOLDS, EMPIRE, EMERGENCY, AND INTERNATIONAL LAW 21 (2017). For a discussion around the need for renewed momentum and TWAIL scholarship, see E. Tendayi Achiume & Aslı Bâli, *Race and Empire: Legal Theory Within, Through, and Across National Borders*, 67 UCLA L. REV. 1386 (2021). For a primer on postcolonial subaltern studies, see generally CAN THE SUBALTERN SPEAK? REFLECTIONS ON THE HISTORY OF AN IDEA (Rosalind C. Morris ed., 2010).

34. Critical Race Theory (CRT), for instance, is a scholarly movement arguing that the law serves the interests of those who create it—largely wealthy people, property owners, and those with political power and control—and an unjust social order. *See, e.g.*, KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 24–30 (2018); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 4–5 (3d ed. 2017); *see also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (reflecting on the ways in which race influences property rights and explaining the legal effect of whiteness in social context as carrying with it property rights and privileges). CRT is an international legal project as well. *See, e.g.*, Debito Arudou, *Japan's Under-Researched Visible Minorities: Applying Critical Race Theory to Racialization Dynamics in a Non-White Society*, 14 WASH. U. GLOB. STUD. L. REV. 695, 696 (2015); Adelle Blackett, *Follow the Drinking Gourd: Our Road to Teaching Critical Race Theory and Slavery and the Law, Contemplatively, at McGill*, 62 MCGILL L.J. 1251, 1251 (2017) (discussing the important connections between teaching CRT and slavery along with its persisting legacies in U.S. law schools); Tanya Katerí Hernández, *The Value of Intersectional Comparative Analysis to the "Post-Racial" Future of Critical Race Theory: A Brazil-U.S. Comparative Case Study*, 43 CONN. L. REV. 1407, 1410 (2011); Joel Modiri, *The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa*, 28 S. AFR. J. HUM. RTS. 405, 406 (2012); Esther Ojulari, *The Social Construction of Afro-Descendant Rights in Colombia*, *in* CONTEMPORARY CHALLENGES IN SECURING HUMAN RIGHTS 19 (Corinne Lennox ed., 2015).

35. *See, e.g.*, K. Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022) (discussing the foundational role that conquest and slavery play in understanding property law); Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 CHI.-KENT. L. REV. 1087, 1087 (1993); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1793–95 (2019); *cf.* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 14–15 (2010) (arguing that concepts of political and economic freedom in early America were inextricably tied to the subjugation of slaves, Native Americans, and women); Antony Anghie, *"The Heart at My Home": Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445, 499 (1993) (describing failure and collapse of mainstream theory).

36. *See* Ediberto Román, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?*, 33 U.C. DAVIS L. REV. 1519, 1522 (2000); Isabelle R. Gunning, *Arrogant Perception, World Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, *in* CRITICAL RACE FEMINISM: A READER 352, 353–54 (Adrien K. Wing ed., 1997) (stating negative impacts of ethnocentrism); Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 OR. L. REV. 567, 575–76 (1997) (combining critical race theory with international human rights); Henry J. Richardson, III, *"Failed States," Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT'L & COMP L.J. 1, 7 (1996) (arguing that "failed states" should not pass into international law); Natsu Taylor Saito, *Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387, 404–05 (1997) (using critical race perspective to examine human rights issues).

institutions in light of suppressed or erased histories.[37] Many international lawyers and scholars of antislavery, abolition, and related law overlook the links between racial subordination, global economic structures, and the international law that perpetuates the harms of slavery and the slave trade through settler colonialism and racialized capitalism.[38]

This Article applies a critical lens to offer a narrative as to why—historically and until today—the prohibitions of slavery and the slave trade have been underutilized in international human rights law implementation and enforcement. Part I discusses the international law of abolition, first to suppress the slave trade and later to prohibit slavery and the slave trade, finding that international law enforcement did not prioritize the protection or redress of enslaved individuals and, thus, did not provide a foundation on which to support an antislavery human rights law movement. Instead, abolition served to "other" the non-Western, "uncivilized" countries that permitted slavery while policing slavery and slave trading through interventionist policies that consolidated European empire.

Part II interrogates two post–World War II realities: as international human rights law developed, the use of international criminal law to punish large-scale human rights abuses gained momentum. Part III examines a trend to ignore slavery and slave trade prohibitions under international human rights law. I analyze the pivot at the end of the Cold War toward a transnational criminal law framework using "modern slavery" rhetoric to suppress human trafficking—what began as the "white slave traffic" to suppress sexualized exploitation of white women and girls—and other exploitation in international migration. Part IV discusses structures of racialized subordination, capitalism, and empire when evaluating advocacy strategy in accountability for slavery and slave-trade harms. This Part also focuses on human rights law enforcement toward advocacy priorities for the human rights and dignity of enslaved and slave traded individuals globally. Although imperfect in design—possibly intentionally so—and selective in implementation, the human rights framework has the potential to transform domestic legal structures toward eradicating slavery and slave-trade

37. *See, e.g.*, Park, *supra* note 35, at 1067 (discussing the foundational role that conquest and slavery play in understanding U.S. domestic property law); Elizabeth Iglesias, *Out of the Shadow: Making Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Theory*, 19 B.C. THIRD WORLD L.J. 349, 358–64 (1998) (calling for an expansion of the anti-subordination agenda of critical theory, finding various ways in which white supremacy is found within structures of privilege).

38. *See, e.g.*, JEAN ALLAIN, *What We Know Today: A Contemporary Understanding of the Atlantic Slave Trade*, *in* THE LAW AND SLAVERY: PROHIBITING HUMAN EXPLOITATION 45 (2015). *But see* Adelle Blackett & Alice Duquesnoy, *Slavery Is Not a Metaphor: U.S. Prison Labor and Racial Subordination Through the Lens of the ILO's Abolition of Forced Labor Convention*, 67 UCLA L. REV. 1504, 1506 (2021) (discussing the way that slavery largely has been ignored in discussions of "modern slavery" today); Thomas, *supra* note 31; Achiume, *supra* note 32, at 1530–31. For an excellent accounting of these failures among current international law scholars, see Gevers, *supra* note 24, at 312–33.

systems, institutions, and practices, and toward providing redress to enslaved and slave-traded persons.

I. ABOLITION LAW: FROM SUPPRESSION TO PROHIBITION OF THE SLAVE TRADE AND SLAVERY

This Part traces a brief legal history of international abolition to show the way that enforcement against the slave trade did not prioritize the emancipation of human beings or otherwise focus on providing redress to enslaved persons.[39] Anti-slavery law generally did not compensate enslaved persons for their harms. Rather, international anti-slavery law implementation concentrated on suppression first through the international law of armed conflict and "prize law," the law that regulated the capture and detention of enemy property during international armed conflict.[40] International law enforcement intervened generally to protect property rights and to consolidate empire and Western hegemony.

Later, Western states engaged in bilateral and multilateral treaty enforcement by way of Mixed Commissions, again mainly concerned about rights of intervention and seizures of property, including enslaved persons, in peacetime.[41] Efforts to equate the slave trade to the international crime of piracy were of limited success,[42] but this legal strategy still targeted slave traders for individual criminal liability, plucking out "bad actors" while doing little to eradicate slave trade systems and entrenching the structures that support such systems. Freeing enslaved individuals and providing redress was secondary to, or not at all a part of, the legal project of abolition under international law.

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39. While the focus of this Part is on the abolition of the Transatlantic and East African slave trades, this Article acknowledges what scholar Vasuki Nesiah and others call the "tyranny of the Atlantic" and recognizes that abolition law had a distinct effect on the Indian Ocean World, not least by moving millions into indentured servitude. *See* Nesiah, *supra* note 1, at 67.

40. *See* James Kraska, *Prize Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2011).

41. *See, e.g.*, JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 6, 8–9 (2012) (discussing Mixed Commissions and arguing that they were the first courts addressing international human rights law issues).

42. The attempt at equating slave traders to pirates draws upon the historical success of labeling the Barbary slave traders as "pirates" or "Barbary Corsairs." From the 16th to 18th centuries, the Barbary slave trade and slavery was directed by the Ottoman and coastal sultanates of northern Africa against Europeans. Barbary corsairs slave traded and enslaved white presumably non-Muslim European Christians and captured crews of United States' vessels. Europe and the United States. sought to end Barbary enslavement by maintaining access to commercial routes in the Mediterranean. *See, e.g.*, ROBERT C. DAVIS, CHRISTIAN SLAVES, MUSLIM MASTERS: WHITE SLAVERY IN THE MEDITERRANEAN, THE BARBARY COAST, AND ITALY, 1500-1800 26 (2003). Military operations to liberate and halt white enslavement were cognitively, legally, and politically disassociated with the juridically enforced Black slavery and internal slave trading contemporaneously sanctioned in the British empire and the United States. *See* Patricia V. Sellers & Jocelyn G. Kestenbaum, *The Rome Statute and Crimes Against Humanity Draft Treaty as Sites of Reparation and Guarantees of Non-Repetition for Slavery and the Slave Trade* (manuscript on file with author).

Indeed, antislavery revolts and *marronage* (independent communities of runaway enslaved people) did more to call into question the morality and legality of enslavement and to build resistance against international slavery and slave-trading systems of the time than did abolition efforts.[43] Thus, it makes sense from a historical legal perspective that little attention is paid to enforcing human rights prohibitions of slavery and the slave trade today. As the following Subparts demonstrate through prize law, treaty law, piracy law, Mixed Commissions, and then the adoption of the multilateral 1926 Slavery Convention, contrary to international anti-slavery law's dominant narrative, human beings enslaved and subjugated were never a priority in international abolition law.

A. PRIZE LAW IN ARMED CONFLICT

After centuries of justification of slavery and the slave trade as a humanitarian alternative to killing captors in war, abolition took hold as a social and political movement in Great Britain under the guise of national security.[44] In the early 1800s, suppression of the slave trade found its legal roots in international admiralty law and the law of armed conflict. Specifically, enforcement against the slave trade during abolition originated in "prize law,"[45] the same law that had been used to enslave free Black sailors at the height of the Transatlantic slave trade.[46] As a result, international humanitarian law enabled abolition through legal intervention.[47]

Prior to British abolition, states operated under the well-established international legal principle that, on the high seas, countries could only exercise authority over their own ships and nationals; thus, slave traders sailing under foreign flags engaged in the trade without fear of British interference.[48] The slave trading nations of the time—principally Spain, Portugal, Brazil, France, and the United States—took advantage of these international norms until Britain

43. *See* R.K. Kent, *Palmares: An African State in Brazil*, 6 J. AFR. HIST. 161, 162 (1965); *see generally* MAROON SOCIETIES: REBEL SLAVE COMMUNITIES IN THE AMERICAS (Richard Price ed., 3d ed. 1996) (analyzing maroon societies through eyewitness accounts of escaped slaves).

44. Act for the Abolition of the Slave Trade (Abolition Act 1807) Pub. L. No. 9-22; *see* MARTINEZ, *supra* note 41, at 22. *Cf.* ERIC WILLIAMS, CAPITALISM AND SLAVERY (1964) (arguing that British economic interests favored international action against the slave trade). For an in-depth look at the connections between race and national security toward analyzing and reimagining the security state, see RACE AND NATIONAL SECURITY (Matiangai V.S. Sirleaf ed., 2023).

45. *See* Kraska, *supra* note 40.

46. Charles R. Foy, *Eighteenth Century 'Prize Negroes': From Britain to America*, 31 SLAVERY & ABOLITION 379, 383 (2010).

47. EMILY HASLAM, THE SLAVE TRADE, ABOLITION AND THE LONG HISTORY OF INTERNATIONAL CRIMINAL LAW: THE RECAPTIVE AND THE VICTIM 36 (2020).

48. Holger Lutz Kern, *Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade*, 6 J. HIST. INT'L L. 233, 233–34 (2004).

modified domestic law[49] and the law of nations through the enforcement of prize law.[50]

In just under two centuries, Great Britain went from being one of the most prominent slave states to abolishing the slave trade. A major factor for this shift was an increasing governance risk to colonial powers due to revolts led by enslaved and slave-traded persons on slave ships[51] and in the colonies themselves.[52] In Saint Domingue, one of the wealthiest sugar plantation colonies, for example, enslaved persons led a revolution at the turn of the nineteenth century to institute an independent and emancipated Haiti, inspiring human rights movements and emancipatory struggles globally.[53]

Consequently, the institutions of slavery and the slave trade—integral to the interplay among colonialism, imperialism, and capitalism—reflected deep tensions in Western culture and the narrative of America during the eighteenth and nineteenth centuries.[54] The United States played an ambivalent and, at times, counterproductive role as a reluctant outsider to the anti-slavery regime,[55] continuing slavery and the slave trade— international and domestic alike—all the while likening being under British colonial oppressive rule to being enslaved. Antislavery arguments during the American Revolutionary period centered on the contradictory beliefs in America as a liberating and regenerating force for the hope of the world.[56]

After the United States gained independence from external colonization,[57] Britain no longer supported the New World's slave-based economy.[58] At the same time, the move from mercantilism to capitalism encouraged British support

49. *Id.* at 334 (discussing "An Act for the Abolition for the Slave Trade" passed by Great Britain in 1807).

50. Kern, *supra* note 48, at 234.

51. *See* Stephen D. Behrendt, David Eltis & David Richardson, *The Costs of Coercion: African Agency in the Pre-Modern Atlantic World*, 54 ECON. HIST. REV. 454, 473–75 (2001).

52. *See* ROBIN BLACKBURN, THE AMERICAN CRUCIBLE: SLAVERY, EMANCIPATION, AND HUMAN RIGHTS 173–219 (Verso 2011).

53. *Id.* at 173; *see also* C.L.R. JAMES, THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION 283 (New York: Vintage ed., 2nd ed. 1989) (affirming that "[t]he race question is subsidiary to the class question in politics").

54. DAVIS, *supra* note 2, at 28.

55. *See* MARTINEZ, *supra* note 41, at 154–55.

56. DAVIS, *supra* note 2, at 4. *But see, e.g.*, HOWARD MUMFORD JONES, O STRANGE NEW WORLD! AMERICAN CULTURE: THE FORMATIVE YEARS 35–70 (Greenwood Press 1982) (arguing that America was conceived as both idyllic and as a land of brutality, greed, and terrors of wilderness).

57. Historical arguments posit that, particularly the Southern colonies of the United States, fought the American Revolution as much to preserve the African slavery systems as they fought to free the Colonies from Great Britain. *See* HENRY J. RICHARDSON III, THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW xviii (2008). Aziz Rana provides important insight into the U.S. settler population's belief that the preservation of democracy centered around access to property and resources extraction, which necessitated continued subjugation of peoples through, inter alia, dispossession of Native Americans and exploitation of enslaved Black people. *See* RANA, *supra* note 35, at 3.

58. Jean Allain, *The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, 78 BRIT. Y.B. INT'L L. 342, 346–47 (2008).

for free trade and international control enforced through the supremacy of the country's Royal Navy.[59] An interest convergence[60] among Western imperial states and abolitionists occurred to propel the suppression of the slave trade and slavery forward through international law enforcement—and a particular enforcement of prize law.

Then, starting with the Napoleonic Wars, Britain intercepted foreign slave ships under the rights at sea of belligerents in wartime to search and detain enemy ships and to visit and search neutral ships for contraband.[61] Once seized, prize courts determined the legality of the seizure and the legality of the trade in slaves, based on treaties in force at the time.[62]

In the early 1800s, a state's national survival depended more than ever on economic survival, and overseas colonial trade was at the center of that struggle.[63] Western warring factions saw neutral parties' support of belligerents as prolonging conflict; thus, trade, including in enslaved persons, became synonymous with aiding the enemy and prize law enforcement the mechanism for national security.[64]

The 1810 case, *The Amedie*, affirmed the legality of seizure of slave ships and questioned the legality of the slave trade.[65] The court found that even when the ship was not trading with an enemy, the capture was "good prize" because the British prohibition of the slave trade made the slave trade prima facie

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59. *See* DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823 351 (Cornell Univ. Press ed. 1975); CHRISTOPHER LLOYD, THE NAVY AND THE SLAVE TRADE: SUPPRESSION OF THE AFRICAN SLAVE TRADE IN THE NINETEENTH CENTURY xi (Frank Cass & Co. Ltd., 1st ed. 1968) ("Throughout the nineteenth century the Navy was the chief instrument of preserving the Pax Britannica.").

60. Derek Bell first coined the term "interest convergence" as a theory to explain advancement of racial equality in the United States. Specifically, Bell posited that the interest of Black people achieving racial equality must converge with interests of Whites. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("[T]his principle of 'interest convergence' provides: The interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of [W]hites . . . . [T]he fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for [B]lacks where the remedy sought threatens the superior societal status of middle and upper class [W]hites.").

61. Allain, *supra* note 58, at 348; Ann M. Burton, *British Evangelicals, Economic Warfare and the Abolition of the Atlantic Slave Trade 1794-1810*, 65 ANGLICAN & EPISCOPAL HIST., no. 2, June 1996, at 197, 202 ("During the wars, admiralty and prize law were undergoing extraordinary growth. These were the years in which Great Britain was establishing her maritime supremacy, and an evolution of maritime law—particularly prize law—accompanied that rise to dominance. The High Court of Admiralty administered the law of nations derived from treatises on civil law, from custom, from international treaties, and from orders in council issued by the British crown in wartime."). Many Brits accumulated small fortunes from Prize Courts, and prize money motivated Royal Navy officials to patrol the seas. *See* J. M. Fewster, *Prize Money and the British Expedition to the West Indies of 1793-4*, 12 J. IMPERIAL & COMMONWEALTH HIST. 1, 4 (1983).

62. *See* HASLAM, *supra* note 47, at 38–39; Benton, *supra* note 23.

63. Burton, *supra* note 61, at 204–05.

64. *Id.* at 205–11 (describing the main argument in the published work of James Stephen, *War in Disguise, or the Frauds of Neutral Flags* (1805) as Britain winning the maritime war but losing the economic war).

65. Amedie, 12 Eng. Rep. 92 (C.A. 1810).

unlawful, stating that the trade was against the law of nations and "abstractly speaking, [could not] be said to have a legitimate existence."[66] The prize courts, through creative interpretation of prize law and the rights of belligerents, seized human cargo unless claimants could prove that their country's laws permitted slave trading.[67] As a result of quick prize sales, appeal restrictions and financial burdens on claimants,[68] prize courts became extremely effective at suppressing the slave trade.[69]

Britain took full advantage of these international humanitarian law norms and continued to operate under these rules to suppress the slave trade outside of the laws of armed conflict in contravention of international law.[70] Scholar Christopher Gevers speaks to this Western imperialist refiguration of slavery and the slave trade as performing a "double move" for the White mythology of abolition: the first move was to universalize slavery and the slave trade prohibitions and detach their perpetration from the West, while the second was to demonstrate that non-Europeans were the last "uncivilized" peoples to permit de jure slavery and the slave trade.[71] While a creative use of existing international law to distance the West from its complicity in slavery and the slave trade,[72] these enforcement mechanisms were more of a "re-branding"[73] and hardly a break from the norms of the time and set structural limitations for the possibilities to successfully eradicate slavery and the slave trade through international law, including international human rights law. Thus, prize law assisted in suppression of the slave trade and consolidated British empire but did very little to emancipate enslaved persons.

66. *Id.* at 93. *See* Kern, *supra* note 48, at 236; *Id.* at 334 (discussing "An Act for the Abolition of the Slave Trade" passed by Great Britain in 1807).

67. *Amedie,* 12 Eng. Rep. 92.

68. Kern, *supra* note 48, at 238.

69. In addition to the rights to visit and search neutral ships for contraband, belligerents during armed conflict also could declare blockades over enemy ports and prevent trade—including trade in slaves—with enemy states while capturing and condemning ships circumventing a blockade. *Id.* at 235.

70. *See id.* at 239.

71. Christopher Gevers, *Slavery and International Law*, 117 AJIL UNBOUND 71, 74 (2023); Gevers, *supra* note 24, at 318 (arguing that the West converted itself to become the "'International Empire of Antislavery' (making 'antislavery' a defining—or *constitutive*—attribute of 'progressive', 'white', Western 'civilisation') [while] it simultaneously condemned ostensibly 'uncivilised' or 'stationary' societies as *necessarily* slave societies, stuck as they were in the West's past, and therefore ripe for Western intervention").

72. FRANTZ FANON, THE WRETCHED OF THE EARTH 102 (Constance Farrington trans., 1963) ("Europe is literally the creation of the Third World. The wealth which smothers her is that which was stolen from the underdeveloped peoples. The ports of Holland, the docks of Bordeaux and Liverpool were specialized in the Negro slave trade, and owe their renown to millions of deported [enslaved persons].").

73. *See* W.E.B. DUBOIS, THE WORLD AND AFRICA 42 (1976) (discussing the rebranding of empire as emancipatory).

B. ABOLITION ATTEMPTS THROUGH TREATY AND PIRACY LAW

Britain emerged from the Napoleonic Wars without a maritime rival.[74] When admiralty courts began to adjudicate cases involving suppression of the slave trade outside of armed conflict, however, judges called out Britain's illegal practices as contrary to the law of nations,[75] even when domestic and natural law theories supported the right to search in the case of slave trade suppression.[76] Generally, the positivist law interpretation was gaining traction at this time as the dominant legal theory of international law.

On appeal in the *Le Louis* case of 1817, for example, Lord Stowell found that the Napoleonic Wars' end terminated the Royal Navy's right to visit and search ships in times of peace absent a treaty.[77] Although morally admirable, these actions were unlawful, citing two fundamental principles of international law: the equal and independent sovereignty of all states and, flowing from such sovereignty, the equal rights to navigate the oceans uninterrupted without interference from one state exercising authority over another.[78]

At the time, the only exceptions to these prohibitions of the right to visit and search were (1) the rights of belligerents against neutrals in times of conflict under international humanitarian law; and (2) in cases of piracy in peacetime under customary international law. Thus, the British abolitionists had to find new international legal justifications to suppress the slave trade vis-à-vis other nations.[79]

British strategy to suppress the slave trade then turned away from common law to concrete legal steps toward abolition. First, Britain engaged in bilateral treaties with several Western states, including Sweden,[80] the Netherlands,[81]

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74. Allain, *supra* note 58, at 348.

75. LESLIE BETHELL, THE ABOLITION OF THE BRAZILIAN SLAVE TRADE 15–16 (David Joslin & John Street eds., 1970); LLOYD, *supra* note 59, at 44 (citing to the judgment in the *Le Louis* case, in which the Sierra Leone court called the ship's resistance to capture piratical).

76. *See* ALFRED RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW xii (1997).

77. Le Louis, 165 Eng. Rep. 1464 (High Ct. of Adm.). *See* Kern, *supra* note 48, at 239–40.

78. *Le Louis*, 165 E.R. 1464; *see* Kern, *supra* note 48, at 239–40. In the United States, legal positivism ultimately won out over natural law reasoning. In the *Antelope* case, Justice Marshall pronounced that:

> Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part . . . . No principle of general law is more universally acknowledged, that the perfect equality of nations . . . . A right, then, which is vested in all by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it.

The Antelope, 23 U.S. 66, 121–22 (1825).

79. *See* Kern*, supra* note 48, at 240.

80. Treaty of Concert and Subsidy Between His Britannic Majesty and the King of Sweden, Mar. 3, 1813, Gr. Brit.-Swed., 1 BSP 296, 302 (1812–1814).

81. Treaty Between His Britannic Majesty and His Majesty the King of the Netherlands, for Preventing Their Subjects from Engaging in Any Traffic in Slaves, May 4, 1818, Gr. Brit.–Neth., 5 BSP 125, 132–33 (1817–1818).

Portugal,[82] Spain,[83] and France,[84] to enforce against the slave trade on the high seas. At the same time, abolitionists pushed for bilateral and multilateral treatymaking[85] to equate the slave trade with piracy under international law.[86] Such a designation would label slave traders *hostes humani generis*, or "enemy of all mankind." Similar to piracy, slave traders would be beyond legal protection, and any country could capture traders and bring them to justice. In other words, the slave traders—but not the systems perpetuating slave trade—would be subject to universal jurisdiction and laws enforceable by any state.[87]

Despite progress, states such as the United States, France, Spain, and Portugal distrusted British motives for abolition, suspecting that Britain was "shar[ing] with her rivals the injury she had inflicted on herself by abolition"[88] and appropriating international police powers to control maritime trade.[89] These states' leaders also believed that their colonial prosperity and security depended

82. Treaty Between Great Britain and Portugal, Jan. 22, 1815, Gr. Brit.–Port., 3 BSP 1, 937 (1815–1816).

83. Treaty Between Great Britain and Spain, for the Abolition of the Slave Trade, Sept. 23, 1817, Gr. Brit.–Spain, 4 BSP 33, 34 (1816–1817).

84. Convention Between Great Britain and France, for the More Effectual Suppression of the Traffic in Slaves, Nov. 30, 1831, Gr. Brit.–Fr., 18 BSP 641, 644 (1830–1831).

85. *See, e.g.*, Declaration of the Eight Courts, Relative to the Universal Abolition of the Slave Trade ('Congress of Vienna, Act XV') 2 Martens 432 (Feb. 8, 1815), *reprinted in* 63 Consol. T.S. 473; Treaty Between Great Britain, Austria, France, Prussia, and Russia, for the Suppression of the African Slave Trade, Dec. 20, 1841, 30 BSP 269, 269 [hereinafter Treaty of London]; Declaration Respecting the Abolition of the Slave Trade ('Congress of Verona'), Nov. 28, 1822, 73 Consol. T.S. 31; General Act of the Conference of Berlin Concerning the Congo ('General Act of Berlin') 10 Martens (2d) 414 (Feb. 26, 1885), *reprinted in* 3 AJIL 7, 7–10 (1909); Treaty Between Her Majesty and the Sultan of Zanzibar for the Suppression of the Slave Trade, June 5, 1873, 63 BSP 173; Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors ('General Act of Brussels'), July 2, 1890, 1 Bevans 134 (1890); Treaty Between Great Britain and Spain for the Suppression of the African Slave Trade, July 2, 1890, Gr. Brit.–Spain, 82 BSP 83 (1889–1890); Convention of Saint-Germain-En-Laye Revising the General Act of Berlin, Feb. 26, 1885, and the General Act and Declaration of Brussels, July 2, 1890 (relating to Congo River Basin) ('Treaty of Saint-Germain-en-Laye'), 8 L.N.T.S. 25, 49 Stat. 3027, T.S. 877 (Sept. 10, 1919), *reprinted in* 14 Martens (3d) 12. *See also* MARTINEZ, *supra* note 41, at 28; Allain, *supra* note 58, at 354–55; Sellers & Kestenbaum, *supra* note 5, at 518; M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL'Y 445, 454 (1991) ("In making the trade an international crime, the treaties allowed states to search and detain vessels if the ships were thought to be carrying slaves.").

86. At the conferences of Aix-la-Chapelle and Verona, Lord Castlereagh asked Russia, Prussia, Austria, and France to make the slave trade a crime against the law of nations and to equate it to piracy through bilateral treaties. That is, he proposed to be found "upon the aggregate of such separate Engagements between State and State, a general Engagement to be incorporated into the publick Law of the Civilized World." Canning to the Duke of Wellington, 1 October 1822, PP (1823) XIX: 95–98.

87. Allain, *supra* note 58, at 363; WILHELM G. GREWE, *'Quasi-Piracy': The Fight Against the Slave Trade*, *in* THE EPOCHS OF INTERNATIONAL LAW 554, 562 (2000).

88. FRANK JOSEPH KLINGBERG, THE ANTI-SLAVERY MOVEMENT IN ENGLAND: A STUDY IN ENGLISH HUMANITARIANISM 167 (1968); *see* Allain, *supra* note 58, at 357; Serge Daget, *France, Suppression of the Illegal Trade, and England, 1870-1850*, *in* THE ABOLITION OF THE ATLANTIC SLAVE TRADE: ORIGINS AND EFFECTS IN EUROPE, AFRICA, AND THE AMERICAS 194 (David Eltis & James Walvin eds.,1981) (noting at the time the idea that the "envied rival [Great Britain] was using ostensibly humanitarian means to further its ambitions for political, commercial, and indeed military hegemony").

89. Allain, *supra* note 58, at 357.

on the continuation of the slave trade and would not risk colonial rule to appease British abolitionists.[90] France and the United States were most insistent on an absolute right to free trade on the high seas and most skeptical toward expanding British maritime supremacy.[91] In the end, keeping Great Britain's power in check and their own relative power strong was more important to nation-states than the human rights of African individuals enslaved and slave traded.

In 1820, the United States equated slavery to piracy in its domestic law and, in 1826, Great Britain included such language in a bilateral treaty with Brazil.[92] In 1841, Austria, France, Great Britain, Prussia, and Russia entered into an international treaty equating the slave trade with piracy.[93] Despite these efforts, the slave trade was not recognized universally as piracy[94] nor as a stand-alone international crime at the time.[95]

Recognizing states' interest in exercising and protecting their sovereignty, Britain turned toward advocating for the separation of the right to search from a more limited right to visit. Britain argued the right to visit expanded naval officers' peacetime maritime powers to police the high seas by boarding foreign ships and inspecting papers when suspecting that a ship was sailing under a false flag.[96] Britain's quest to suppress the slave trade through interventionist measures continued, but the focus still did not center on protecting enslaved persons' rights.

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90. Kern, *supra* note 48, at 244.

91. *Id.*

92. Allain, *supra* note 58, at 363.

93. Treaty for the Suppression of the African Slave Trade, *supra* note 85, art. 9.

94. This is not to say, however, that slave trading and piracy were not related. *See* HASLAM, *supra* note 47, at 55 (stating that pirates and former pirates often formed the crews of slave ships); *Van Niekerk*, *supra* note 22, at 8. *But see* Filartiga v. Peña Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("[T]he torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of mankind."). Additionally, previous slave trades, such as Barbary Corsairs slavery, were identified as piracy to condemn slavery against white Europeans while continuing to justify enslavement and slave trading of Africans. *See* Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Rome Statute Amendments as Sites of Reparations and Guarantees of Non-Repetition for Slavery and the Slave Trade* (manuscript on file with author).

95. *But see* World Conference Against Racial Discrimination, Xenophobia, and Related Intolerance, *Declaration and Programme of Action*, ¶ 13, U.N. Doc. A/CONF.189/12 (Aug. 31 – Sept. 8, 2001) (recognizing that the slave trade should have been considered an international crime at the time of slave trade repression). For an exhaustive legal analysis as to whether the slave trade constituted piracy, see MARTINEZ, *supra* note 41, at 114–39. By the 1840s, the slave trade began to be referred to as a crime, including a crime against humanity. *Id.* Today, international declarations condemn slavery and the slave trade as crimes against humanity. *See* Declaration of the EU-CELAC Summit 2023, ¶ 10 (July 18, 2023).

96. Allain, *supra* note 58, at 372 (citing to The Earl of Aberdeen to Mr. Fox [United States Ambassador to the Court of St. James], 18 January 1843, 32 BSP 444).

C. MIXED COMMISSIONS

Mixed Commissions were courts set up by treaty law to adjudicate the legality of slave ship captures.[97] Slave trade repression treaties laid out the agreed-upon conditions for lawful slave ship detentions between contracting state parties.[98] Judges from different countries sat permanently and continually on these slave trade tribunals and applied international law in over six hundred cases toward the emancipation of nearly eighty thousand enslaved persons aboard ships engaged in illegal slave trading.[99]

Mixed Commissions provided redress through emancipation of persons found on legally detained slave ships. Enslaved individuals found on illegally detained slave ships, however, were returned to slave owners who were paid damages for the illegal capture.[100] Enslaved persons found on ships had no standing or procedural rights before Mixed Commissions.[101] As third parties to the litigation, enslaved persons could only intervene by providing witness testimony.[102] Individuals freed by Mixed Commissions often became part of colonial labor forces or conscripted as colonial military forces in conditions similar to or even worse than their enslavement conditions.[103]

While considered by some scholars to be the first international human rights courts,[104] Mixed Commissions generally prioritized individual property rights and states' policing powers over the human rights of enslaved individuals.[105] Though emancipatory at the margins, these legal mechanisms generally served to expand British imperial intervention and police powers on

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97. MARTINEZ, *supra* note 41, at 8–9; Emily Haslam, *International Criminal Law and Legal Memories of Abolition: Intervention, Mixed Commission Courts and 'Emancipation'*, 18 J. HIST. INT'L L. 420, 426 (2016). For a more in-depth understanding of these Commissions, see for example, DAVID ELTIS, ECONOMIC GROWTH AND THE ENDING OF THE TRANSATLANTIC SLAVE TRADE 83–86 (1987); WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW, *supra* note 87 (Michael Byers trans., Walter de Gruyter rev. ed. 2000); Allain, *supra* note 58; Tara Helfman, *The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade*, 115 YALE L.J. 1122, 1125 (2006); Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT'L L. REV. 883, 947 (2004).

98. HASLAM, *supra* note 47, at 73.

99. MARTINEZ, *supra* note 41, at 6. Others estimate slightly higher numbers likely counting enslaved individuals who escaped or disembarked before the ship was apprehended. *See, e.g.*, Samuël Coghe, *The Problem of Freedom in a Mid Nineteenth-Century Atlantic Slave Society: The Liberated Africans of the Anglo-Portuguese Mixed Commission in Luanda (1844-1870)*, 33 SLAVERY & ABOLITION 479, 481 (2012) (citing 66,000 freed persons in Freetown, 6700 freed persons in Rio, 13,000 freed persons in Havana, 137 freed persons in Luanda, and 54 freed persons in Suriname).

100. HASLAM, *supra* note 47, at 66.

101. *Id.* at 65–66, 69.

102. *Id.*

103. Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. REV. 2043, 2054–55 (2013) (citing Walter Hawthorne, *Gorge: An African Seaman and His Flights from 'Freedom' back to 'Slavery' in the Early Nineteenth Century*, 31 SLAVERY & ABOLITION 411, 413 (2010)).

104. MARTINEZ, *supra* note 41, at 9.

105. Haslam, *supra* note 97, at 439.

the high seas and to protect captors' rights as much or more than assisting in emancipating enslaved and slave-traded individuals.[106]

D. 1926 SLAVERY CONVENTION

The movement to abolish the slave trade in the nineteenth and early twentieth centuries contributed to an antislavery agenda in international law, leading to the international proscription of slavery and the slave trade in the 1926 Convention for the Suppression of Slavery and the Slave Trade (1926 Slavery Convention).[107] The legal abolition movement, however, also marked the beginning of an uncertain and nonlinear path of enforcement against slavery and the slave trade under international law that continues today, especially with regard to international human rights law and the slave trade in both international human rights and international criminal law.[108]

In 1924, in response to de jure slave trading in Ethiopia and de facto slavery practices throughout Africa,[109] the Council of the League of Nations, largely Western states, constituted the Temporary Slavery Commission ("TSC") to develop recommendations to eradicate the systems, institutions, and practices of slavery and the slave trade[110] in largely non-Western states. In its 1925 final report, the Commission urged states to abolish the legal status of slavery while separating forced labor as potentially still acceptable through international

106. HASLAM, *supra* note 47, at 66; *see* GREWE, *supra* note 87, at 566–67.

107. Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253 [hereinafter 1926 Slavery Convention]. Although slave-raiding and large-scale dealing had all but ended in the African colonies by World War I, labor exploitation (i.e., forced labor) was extremely prominent and necessary for the colonial economy. VLADISLAVA STOYANOVA, HUMAN TRAFFICKING AND SLAVERY RECONSIDERED: CONCEPTUAL LIMITS AND STATES' POSITIVE OBLIGATIONS IN INTERNATIONAL LAW 192–93 (2017); Suzanne Miers & Richard Roberts, *Introduction*, *in* THE END OF SLAVERY IN AFRICA 3, 21 (Suzanne Miers & Richard Roberts ed., 1988).

108. *See* Alston, *supra* note 103, at 2056. *But see* MARTINEZ, *supra* note 41, at 13–14.

109. Jean Allain, *Slavery and the League of Nations: Ethiopia as a Civilised Nation*, 8 J. HIST. INT'L L. 213, 224 (2006). The Temporary Slavery Commission (TSC) excised and recharacterized inconvenient manifestations of subjugation practices that Western states had an interest to continue—or at least had no interest in abolishing—including forced marriage, debt-bondage, forced labor, and indigenous or domestic slavery. Generally, these exploitative practices were justified and upheld, usually with racist tropes of "civilizing" populations, so long as they were not disguised as slavery, given that such practices continued to further racialized capitalism, patriarchy, and colonial empire. *See* MIERS, *supra* note 27, at 111–15. Excluding forced labor, especially indigenous forced labor, led to the drafting and passage of the ILO Convention on Forced Labor in 1930.

110. Allain, *supra* note 109. *See also* MIERS, *supra* note 27, at 100–16 (discussing the purpose and mandate of the Temporary Slavery Commission); *Temporary Slavery Commission, Slavery and Other Systems Restrictive of Liberty*, Memorandum by F. D. Lugard, Annex 3, "Conditions in Abyssinia," May 1925, League of Nations Doc. CTE 36, 1–2. While the mandate was an antislavery one, the TSC still operated in a racist, colonial, and patriarchal manner. For example, the TSC excluded women entirely and the member-delegate from Haiti, Louis Dante Bellegrade, seen to be a "sound" choice because he was a moderate "although a Negro," was the closest to representing voices of enslaved persons. *See* MIERS, *supra* note 27, at 105.

treaty[111] given Western states' continued exploitative labor practices in the colonies.

The 1926 Slavery Convention enumerates the elements of slavery and the slave trade while defining the prohibition broadly to govern all acts that slave owners and slave traders perpetrated and all harms that enslaved persons experienced,[112] including future enslavement and slave trading acts.[113] The 1926 Slavery Convention calls on states "to prevent and suppress the slave trade"[114] and "to bring about . . . the complete abolition of slavery in all its forms."[115] It defines 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"[116] and defines the slave trade as:

> 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.[117]

The drafter's ambitions to advance broad legal definitions of slavery and the slave trade are clear in its preparatory works,[118] the 1925 and 1926

111. Temporary Slavery Commission, Rep. of the Temporary Slavery Commission Adopted in the Course of its Second Session, League of Nations Doc. A.19 1925 VI, 3 (July 25, 1925) [hereinafter Temporary Slavery Commission 1925 Report]. *See* MIERS, *supra* note 27, at 115.

112. For an in-depth analysis of the gendered dimensions of slavery and the slave trade, see Patricia V. Sellers & Jocelyn G. Kestenbaum, *The International Crimes of Slavery and the Slave Trade: A Feminist Critique in* GENDER AND INTERNATIONAL CRIMINAL LAW 157 (Indira Rosenthal, Valerie Oosterveld & Susana SáCouto eds., 2022).

113. *But see The Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, RSCH. NETWORK ON THE LEGAL PARAMETERS OF SLAVERY (Mar. 3, 2012), https://glc.yale.edu/sites/default/files/pdf/the_bellagio-_harvard_guidelines_on_the_legal_parameters_of_slavery.pdf (developing guidance on the legal definition and scope of slavery).

114. 1926 Slavery Convention, *supra* note 107, art. 2.

115. *Id.*

116. *Id.* at art. 1(1).

117. *Id.* at art. 1(2). The 1956 Supplementary Convention broadens this definition by including "all acts of disposal by sale or exchange of a *person* acquired with a view to being sold or exchanged" as well as "by whatever means of conveyance." Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 7(c), Sept. 7, 1956, 266 U.N.T.S. 3 (1957) [hereinafter 1956 Supplementary Slavery Convention] (emphasis added); JEAN ALLAIN, *supra* note 1, at 95.

118. *See* Sellers & Kestenbaum, *supra* note 112, at 170; Sellers & Kestenbaum, *supra* note 8, at 372; JEAN ALLAIN, 1 THE SLAVERY CONVENTIONS, THE TRAVAUX PRÉPARATOIRES OF THE 1926 LEAGUE OF NATIONS CONVENTION AND THE 1956 UNITED NATIONS CONVENTION 6 (2008); JEAN ALLAIN, *A Legal Consideration 'Slavery' in Light of the* Travaux Préparatoires *of the 1926 Convention*, *in* THE LAW AND SLAVERY: PROHIBITING HUMAN EXPLOITATION, *supra* note 38, at 402. *But see* MIERS, *supra* note 27, at 123, 130 (arguing that the definition is weak and vague because specific types of slavery are not enumerated).

Temporary Slavery Commission Reports,[119] and in the final treaty language.[120] The slavery definition's emphasis on "status" or "condition" served to extend the prohibition to both de jure slavery, evidenced by legal title or status, and de facto slavery, evidenced by customary practice or condition.[121] The broad array of means and modes of transport to reduce or maintain a person in a situation of slavery, as well as the exclusion of any requirement of exercise of powers attaching to ownership over a person, similarly defined the slave trade in a way that contemplated current and future perpetration in broad terms.

The independent expert-members of the TSC endorsed a comprehensive definition of slavery that encompassed de jure and de facto situations wherever exercise of powers attaching to the rights of ownership over a person was met.[122] For example, the 1925 TSC's report affirmed that "debt slavery," the enslaving of persons disguised as child adoption, and the acquisition of girls by purchase disguised as dowry payment, constituted slavery whenever the intent plus the acts in question met the legal definition of slavery.[123] Thus, while the political

119. Temporary Slavery Commission 1925 Report, *supra* note 111; Slavery Convention, Report Presented to the Assembly by the Sixth Committee, League of Nations Doc. A.104 1926 VI (Sept. 24, 1926) [hereinafter Temporary Slavery Commission 1926 Report].

120. Sellers & Kestenbaum, *supra* note 8, at 375. *But see* Ramona Vijeyarasa & Jose Miguel Bello y Villarino, *Modern-Day Slavery – a Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of* Tang *and* Rantsev, 9 J. INT'L L. & INT'L REL. 38, 56 (2013) (analyzing the conflation of trafficking, slavery, and exploitation under the "modern-day slavery" rhetoric).

121. Brief for Helen Duffy as Amicus Curiae Supporting Petitioners at 4, Trabalhadores Fazenda Brazil Verde v. Brazil, Inter-Am. Ct. H.R., No. 12.066 (Oct. 20, 2016). *See also The Queen v Tang* [2008] HCA 39, ¶ 25 (Austl.) (examining the application of the 1926 Slavery Convention to both de jure and de facto slavery). In 1926, although slavery and the slave trade had been abolished in North and South America, Zanzibar and other tributaries of the Arab East African slave trade, members of the League of Nations remained concerned, mainly, with ending de jure, chattel slavery and vestiges of the slave trade. Concerns that limited the scope of some discussions arose mainly from member states' own practices as colonizing powers who engaged in slavery ownership and exploitative labor practices. Temporary Slavery Commission 1926 Report, *supra* note 119. The initial objective was to banish de jure slavery and distinguish the practice of forced labor from slavery. Allain, *supra* note 1, at 244 (citing Viscount Cecil: "I do not think that there is any nation, civilised or uncivilised, which does not possess powers enabling the Government, for certain purposes and under certain restrictions, to require forced or compulsory labour on the part of its citizens." *Report Presented by the Sixth Comm. on the Question of Slavery: Resolution,* 19th mtg. at 156, *in* LEAGUE OF NATIONS OFFICIAL JOURNAL (Special Supplement 33) (Sept. 26, 1925)). Human trafficking, at the time, was pursued separately under the "white slave traffic" of women and girls into sexual exploitation and forced prostitution. *See* Jocelyn G. Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. REV. 515, 531 (2022).

122. *See* Sellers & Kestenbaum, *supra* note 8, at 372; JEAN ALLAIN, *The Definition of 'Slavery' in General International Law and the Crime of Enslavement Within the Rome Statute*, *in* THE LAW AND SLAVERY: PROHIBITING HUMAN EXPLOITATION, *supra* note 38, at 423–24. Despite this fact, in the 1980s there was a perception that the definition of slavery was too narrow, leading to efforts to expand advocacy into slavery-like practices and human trafficking. *See* Michael Dottridge, *Trafficked and Exploited: The Urgent Need for Coherence in International Law*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR, AND MODERN SLAVERY 68 (Prabha Kotiswaran ed., 2017).

123. Temporary Slavery Commission 1926 Report, *supra* note 119; *see* Temporary Slavery Commission's Second Session Minutes, League of Nations C.426.M.157 1925 VI, 54–56 (1925) [hereinafter Temporary Slavery Commission Second Session Minutes].

and racist realities of twentieth-century colonialism forced a legal delineation of slavery from "slavery-like practices," lesser servitudes, and forced labor,[124] the legal definition of slavery nonetheless remained inclusive of practices by other names, such as concubinage, when the elements constituted exercise of powers attaching to the rights of ownership over a person. Further, neither the 1926 Slavery Convention nor subsequent treaties prohibits these harms from occurring simultaneously.

Although the 1926 Slavery Convention was monumental, colonial powers—representing most states at the table[125]—watered down the treaty for widespread (colonial) state acceptance and ratification. For instance, the instrument permits states to secure the "progressive" eradication of slavery.[126] Drafters defended this position on the discriminatory, white supremacist notion that immediate freedom for enslaved persons would cause "hardships" for freed individuals and "grave social upheavals" for societies.[127] Indeed, this international law treaty did not intend to transform racialized capitalist and imperialist structures that depend on slavery and slave trade systems' perpetuation, or to eradicate slavery and slave trade practices.

Additionally, the treaty did not explicitly equate the slave trade with piracy, as this would have given Britain more supremacy on the high seas to intervene in all trade,[128] nor did it establish mechanisms for monitoring or enforcement, instead relying on governments' good faith implementation of the treaty provisions at the domestic levels.[129] In the end, unsurprisingly, the 1926 Slavery Convention did not prioritize the human rights of enslaved persons or provide for specific redress for harms that enslaved individuals endured.

Despite these limitations in the text and the treaty's weak enforcement mechanisms, the 1926 Slavery Convention's slavery and slave trade definitions, as updated by the 1956 Supplementary Slavery Convention, are widely accepted

124. For a more in-depth look at the confusion in international law between slavery and forced labor, see Vladislava Stoyanova, *United Nations Against Slavery: Unravelling Concepts, Institutions and Obligations*, 38 MICH. J. INT'L L. 359, 370–72 (2017).

125. Negotiating states parties to the 1926 Slavery Convention included: Albania, Germany, Austria, Belgium, Great Britain, Canada, Australia, South Africa, New Zealand, India, Bulgaria, China, Colombia, Cuba, Denmark, Spain, Estonia, Abyssinia, Finland, France, Greece, Italy, Latvia, Liberia, Lithuania, Norway, Panama, the Netherlands, Persia, Poland, Portugal, Romania, Serbia, Croatia, Slovenia, Sweden, Czechoslovakia, and Uruguay. *See* 1926 Slavery Convention, *supra* note 107.

126. 1926 Slavery Convention, *supra* note 107, art. 2(b); *see* MIERS, *supra* note 27, at 130 (finding that state sovereignty arguments won the day over the inclusion of robust enforcement mechanisms).

127. Temporary Slavery Commission 1926 Report, *supra* note 119. Professor Vasuki Nesiah points out that the British Parliament abolished slavery in 1833 but excepted the Indian subcontinent for an additional decade to acclimate elites to abolition. Nesiah, *supra* note 1, at 68.

128. The French and the Italians were convinced of British ulterior motives, finding the analogy of the slave trade to piracy a pretext for permission to search and seize ships in peacetime. MIERS, *supra* note 27, at 128.

129. 1926 Slavery Convention, *supra* note 107; MIERS, *supra* note 27, at 130.

prohibitions under international custom and treaty law.[130] Multiple subsequent international instruments that include slavery crimes definitions mirror, with slight deviations, the Slavery Convention definitions of slavery.[131] Later human rights treaties adopt in the drafting and interpretation of their slavery and slave trade prohibitions definitions of the 1926 and 1956 Slavery Conventions.[132] The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (the "1956 Supplementary Slavery Convention")[133] reinforces the international prohibitions that "slavery and the slave trade in all their forms" must "are and shall remain prohibited at any time and in any place whatsoever."[134]

The *ad hoc* Committee on Slavery drafted the 1956 Supplementary Slavery Convention, recommending that slavery and the slave trade definitions "should continue to be accepted as accurate and adequate international definitions of these terms,"[135] while further broadening the prohibitions to forms of servitude—later enumerated as "practices analogous to slavery."[136] Moreover, in 1953, the UN Secretary General reiterated that these and other servitudes could constitute slavery when factually "any or all of the powers attaching to the right of ownership [over a person] are exercised."[137] Thus, the law maintained the slavery definition as exercising powers attaching to the rights of

130. Allain, *supra* note 1, at 240; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 328 (2005). Rule 94 states that, "[t]he military manuals and the legislation of many States prohibit slavery and the slave trade, or 'enslavement.'" *Id.* at 328.

131. *See, e.g.*, 1956 Supplementary Slavery Convention, *supra* note 117, art. 7(a); Rome Statute of the International Criminal Court art 7(2)(c), July 17, 1998, 2187 U.N.T.S. 90, 93.

132. *See, e.g.*, G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 8 (Dec. 19, 1966) [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms, European Convention on Human Rights art. 4 (Nov. 4, 1950) [hereinafter ECHR].

133. 1956 Supplementary Slavery Convention, *supra* note 117.

134. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

135. U.N. Econ. & Soc. Council, Rep. of the Ad Hoc Comm. on Slavery, 2d Sess., at 19, U.N. Doc. E/1988 (May 4, 1951).

136. *Id.* at 6, 10. The Committee listed debt bondage, serfdom, servile marriages, and child exploitation. *Id.* at 6–11.

137. U.N. Secretary-General, *Slavery, the Slave Trade, and Other Forms of Servitude*, ¶¶ 36–37, U.N. Doc. E/2357 (Jan. 27, 1953) [hereinafter U.N. Secretary-General Report on Slavery]. Jean Allain argues that the intent of the 1956 Supplementary Convention was to expand international law prohibitions to servitude. *See* Jean Allain, *On the Curious Disappearance of Human Servitude from General International Law*, 11 J. HIST. INT'L L. 303, 303–04 (2009). The Secretary-General further enumerated evidence, or indicia, of the exercise of powers attaching to ownership rights, including: making an individual of servile status the object of a purchase; using the individual of servile status in an absolute manner without restriction unless expressly provided by law; appropriating products of labor without compensation; transferring ownership from one person to another; prohibiting the individual of servile status to terminate the status at will; and permitting the transmission of servile status to descendants of the individual having such status. U.N. Secretary-General Report on Slavery, *supra*.

ownership—as opposed to exploitation or compulsory labor, which may indicate such exercise of ownership and coincide with slavery harms.

Aside from the 1926 Slavery Convention and 1956 Supplementary Slavery Convention, slavery and the slave trade are prohibited in several international instruments, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples Rights (ACHPR).[138] The European Convention on Human Rights (ECHR) prohibits slavery, but not the slave trade.[139] Generally, the preparatory works of the regional instruments drew upon the UDHR and ICCPR drafting, which reflected the prohibitions defined under the 1926 Slavery Convention and 1956 Supplementary Slavery Convention and remain authoritative in international law today.[140]

This brief historical legal analysis suggests that, prior to the post–World War II drafting of the international bill of rights, international law generally—and international abolition law specifically—was not designed to address human dignity or rights of individuals enslaved and slave traded. Consequently, international law to abolish the slave trade provided a limited framework on which to build the human rights law prohibitions of slavery and the slave trade that exist in multilateral human rights treaties today. At the same time, the backgrounding of race and racialized hierarchical subjugation of peoples in

138. G.A. Res 217 (III) A, Universal Declaration of Human Rights art. 4 (Dec. 10, 1948) [hereinafter UDHR]; ICCPR, *supra* note 132, art. 8(1); African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights: "Pact of San José, Costa Rica" art. 6, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]. For an in-depth look at the development of the prohibitions under the UDHR and ICCPR, see Kestenbaum, *supra* note 121, at 554, 557 (2022).

139. ECHR, *supra* note 132. The ECHR prohibits slavery, servitude, and forced labor, but not the slave trade (Art. 4). The preparatory works of the ECHR demonstrate that the exclusion of the slave trade prohibition was not debated and its omission, although intentional, was not understood as one limiting the scope of protection of Article 4. The replication of the debate over the ICCPR drafting suggests that the "traffic in human beings" and not the "slave trade as such" was the violation still occurring in the eyes of the ECHR drafters, but that the ICCPR explicitly excluded "traffic in human beings," thereby relegating the slave trade prohibition as no longer necessary or relevant. *See* Eur. Consult. Ass., European Comm'n on Hum. Rts., *Preparatory Work on Article 4 of the Convention*, at 15–16, Doc. No. DH-62-10 (Nov. 15, 1962). In the preparatory works of the ACHR, the representative from Guatemala suggested replacing the "slave trade" with "traffic in women." In the end, both prohibitions were included in Article 6, along with slavery and servitude. Conferencia Especializada Interamericana Sobre Derechos Humanos [Inter-American Special Conference on Human Rights], OEA/Ser.K/XVI/1.2 (Nov. 7–15, 1969), https://www.oas.org/es/cidh/mandato/Basicos/Actas-Conferencia-Interamericana-Derechos-Humanos-1969.pdf. The African Charter has incomplete and cursory travaux preparatoires. *See, e.g.*, Frans Viljoen, *The African Charter on Human and Peoples' Rights: The travaux préparatoires in the light of subsequent practice*, 25 HUM. RTS. L.J. 315–16, 325 (2004). Viljoen compiles and compares the few available records on the substantive provisions as research complementary to B.G. Ramcharan, *The travaux préparatoires of the African Commission on Human and Peoples' Rights*, 13 HUM. RTS. L.J. 307 (1992).

140. For an in-depth examination of the treaty drafting process of the ICCPR regarding slavery and the slave trade, see Kestenbaum, *supra* note 121, at 554.

antislavery law permitted the continuation of such systems and hierarchies.[141] In other words, part of the reason that there exists limited enforcement of slavery and the slave trade prohibitions today is because very little historical precedent exists in international law enforcement that prioritizes the human rights and full redress—including structural harms—of individuals enslaved and slave traded.

II. INDIVIDUAL RIGHTS & WRONGS: POST–WWII ENFORCEMENT OF INTERNATIONAL CRIMES OVER HUMAN RIGHTS VIOLATIONS

This analysis now turns to explain the reasons why, in the wake of the Holocaust, in which slavery and the slave trade continued to be perpetrated, the human rights prohibitions of slavery and the slave trade were inscribed into the canon of international human rights law but remain underutilized today. Specifically, this Part examines the post–World War II era in which states enumerated slavery and slave trade prohibitions in international treaties as one of few high-water marks of prioritizing the rights of human beings enslaved for state accountability and redress in international law.

As this Part will demonstrate, even when human beings became subjects and rights holders in international law, drafters of the international bill of rights confused and conflated slavery and the slave trade, and deemphasized their import for emancipatory potential, while focusing on human trafficking and exploitation harms. Simultaneously, states, led by powerful Western nations, turned toward international criminal law to hold individual perpetrators to account, which also ensured structural continuity of racial subordination and Western empire by diverting resources and attention away from state responsibility and structural change toward individual criminal liability for slavery crimes.[142] The slave trade is completely ignored as an international crime.

As a result, conflict-related enslavement, defined as slavery but omitting the slave trade, takes center stage in the post–World War II context over state responsibility for slavery and the perpetuation of the slave trade. International criminal law enforcement, however, does very little to upend international structures that depend on slavery and the slave trade and, in fact, may serve to entrench further Anglo-European empire through international intervention and global policing. Moreover, as part of international criminal law, enslavement

141. *See* Sellers & Kestenbaum, *supra* note 42; Adelle Blackett, *Racial Capitalism and the Contemporary International Law on Slavery: (Re)membering* Hacienda Brasil Verde, 25 J. INT'L ECON. L. 334, 347 (2022). As Joel Quirk has found, images of backward, self-enslaving Africans "proved to be a useful cloak for policies that were chiefly driven by other considerations." JOEL QUIRK, THE ANTI-SLAVERY PROJECT: FROM THE SLAVE TRADE TO HUMAN TRAFFICKING 92–93 (2011).

142. *But see* Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331, 333 (2009) ("For the wealthy, stable, democratic countries of the world, international criminal law is mostly an exercise in altruism.").

crimes similarly do not center on the individuals enslaved and completely ignore slave trade perpetration. Furthermore, racialized subjugation is erased in the historical narratives of the genocide *and* enslavement perpetrated against Jews and racialized and sexualized enslavement of so-called "comfort women" during World War II.[143]

Subpart A first looks at the post–World War II development of slavery and the slave trade prohibitions under international human rights law. Subpart B then examines the global shift toward international criminal law to provide accountability for international crimes, including some but not all slavery crimes.

A. POST–WORLD WAR II RISE OF U.S. HEGEMONY & CONTINUING RACIAL SUBORDINATION, EMPIRE, AND SYSTEMS OF SLAVERY AND THE SLAVE TRADE

The 1926 Slavery Convention marked an important diplomatic and legal step toward eradicating slavery and the slave trade globally. In the decades leading up to World War II, the Transatlantic and East African Slave Trades had diminished greatly, and de jure (that is, formal legal) chattel slavery had been outlawed nearly everywhere.[144]

Accounts of widespread enslavement and slave labor to fuel the war efforts of World War II, however, necessitated continuing discussions about prohibiting slavery and the slave trade (as well as forced labor) through the development of the international bill of human rights at the United Nations.[145] On the Western front, concentration camps, enslavement and "deportation to slave labor" (that is, slave trading) defined the experience of racialized victims of Nazi German oppression and genocidal violence.[146] On the Eastern front, the Japanese and other militaries enslaved and slave traded for sexualized violence tens of thousands of so-called "comfort women" to fuel war efforts and boost troop morale.[147]

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143. *See* Sellers & Kestenbaum, *supra* note 42.

144. MIERS, *supra* note 27, at 448 (discussing that, in parts of Arabia, chattel slavery was still legal).

145. *See* James Walvin, *Reckoning with the Slave Empires of WWII: James Walvin on the Forced Labor of Concentration Camps and the Gulag*, LITERARY HUB (Sept. 20, 2019), https://lithub.com/reckoning-with-the-slave-empires-of-wwii.

146. *See, e.g.*, DANIEL DROOZ, AMERICAN PRISONERS OF WAR IN GERMAN DEATH, CONCENTRATION, AND SLAVE LABOR CAMPS: GERMANY'S LETHAL POLICY IN THE SECOND WORLD WAR (2004) (detailing the accounts of American and other prisoners of war who were forced to labor in slave labor camps during World War II).

147. *See* Patricia V. Sellers, *Wartime Female Slavery: Enslavement?* 44 CORNELL INT'L L.J. 115, 115 (2011); YUKI TANAKA, JAPAN'S COMFORT WOMEN: SEXUAL SLAVERY AND PROSTITUTION DURING WORLD WAR II AND THE US OCCUPATION 6–7 (2002); *see also* KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 73–75 (1997) (highlighting that gender-specific crimes have been prevalent, despite historical laws and customs prohibiting rape crimes). The term "comfort women" is a degrading term used in colloquial language to refer to the females, women and girls who were enslaved for the purpose of providing sexual services to Japanese and other soldiers during World War II.

While also present during World War II—indeed, unless a person is born into slavery and never traded or moved from one situation of slavery to another, perpetrators of enslavement also have engaged in the slave trade—the prohibition of the slave trade received much less attention in the human rights treaty drafting context and was almost omitted from the text of the UDHR and ICCPR.[148]

In the post–World War II context, the United States was emerging as a global hegemon, asserting international police power in the pursuit of stability, economic wealth, and peace.[149] Domestically, the United States shifted from what scholar Aziz Rana describes as settler colonial expansionist policies under a narrative of liberty and freedom as self-rule toward liberty as New Deal constitutionalism.[150] Here, the language of economic and national security revised any previous emancipatory visions taking hold in the United States as a national project.[151] As a superpower, the United States government began to preoccupy itself with foreign instability as ongoing justification for intervention, including military intervention.[152] The Anglo-American empire thus shifted from expanding settler colonialism toward international police power and global primacy, first in the service of international peace and liberty, but later in pursuit of national security and consolidation of power.[153]

During this time, the domestic U.S. civil rights movement represented the most concerted effort to revive a vision of liberty as self-rule,[154] influencing the development of international human rights law and the push for global racial equality. Focusing on ending racial segregation and formal legal discrimination domestically as a means of increasing social mobility for Black Americans assisted in legitimizing corporate and political power and entrenching international American hegemony and national security.[155] Rearticulating inequality as a matter of individualism and meritocracy effectively served to preserve rather than dismantle racial hierarchy and white supremacy in the United States.[156]

In the 1960s, the United States ended formal Jim Crow racial segregation, protecting national economic and political stability while improving the

148. Kestenbaum, *supra* note 121, at 559.
149. RANA, *supra* note 35, at 321.
150. *Id.* at 320–21.
151. *Id.* at 239.
152. *Id.* at 327.
153. *Id.* at 329.
154. *Id.*
155. *Id.* at 330.
156. *See generally* KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARY PELLER & KENDAL THOMAS, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995) (exploring through a collection of essays how this rearticulation of inequality maintained white supremacy in the United States).

country's moral reputation abroad.[157] While a step forward for some Black Americans, the civil rights movement's focus on integration deemphasized Black collective emancipation and international political and economic subordination, especially in its manifestations as global empire based in corporate and state power.[158]

The U.S. government was also determined to ensure that the protection of racial equality not be defined as a global legal issue and that racism against *inter alia* Black Americans not be linked to any global movements.[159] Notably, Nazi race laws, including the Nuremberg Laws, were modeled after the U.S. laws of the Jim Crow South,[160] which were still in effect at the time the Allied powers prosecuted Nazis at the Nuremberg trials. In December 1951, the Civil Rights Congress presented *We Charge Genocide*, a paper accusing the U.S. government of genocide against Black Americans as per the Genocide Convention, to the United Nations.[161] Acknowledging and centering race and structural racism in and through law would have rendered visible global white supremacy and Anglo-European domination of economic, political, and cultural power that continue to dominate the international legal order today.[162]

One of the defining international law movements of the time was the end of "salt water" decolonization and liberation of peoples subjected to colonial domination.[163] Issues of decolonization, sovereignty, self-determination, and racial equality featured on the international legal agenda.[164] This period of decolonization was largely performative, presenting a narrative break from formal empire and signaling the beginning of sovereign equality among nation-

157. RANA, *supra* note 35, at 330.

158. *Id.* at 331. *But see* W.E.B. Du Bois, *Whither Now and Why*, *in* THE EDUCATION OF BLACK PEOPLE: TEN CRITIQUES, 1906-1960, 149–158 (Herbert Aptheker ed., Monthly Review Press 2001) (1973); DR. MARTIN LUTHER KING, WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 112, 133 (1st ed. 1967) (understanding the connection between Black subordination and the United States expanding military supremacy abroad).

159. RICHARDSON III, *supra* note 57, at xl ("[T]o do so, other policy objectives will be brought forward in neutral language and advocated as superseding all current progress and movement towards racial equality, here, U.S. foreign policy objectives to undercut the Soviet Union.").

160. *See* JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 3–4 (2nd. ed. 2018).

161. CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE xi (William Patterson ed., 2nd ed. 1951) [hereinafter WE CHARGE GENOCIDE].

162. *See* CHARLES W. MILLS, *Revisionist Ontologies: Theorizing White Supremacy*, *in* BLACKNESS VISIBLE 97–98, 118 (1998).

163. *See* Ediberto Román, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?*, 33 U.C. DAVIS L. REV. 1519, 1543 (2000). The "salt water" or "blue water" thesis—the accepted norm at the United Nations—finds that full self-determination rights are reserved for external, as opposed to internal or settler, colonized peoples. *See* BENYAMIN NEUBERGER, NATIONAL SELF-DETERMINATION IN POSTCOLONIAL AFRICA 83–84 (1986).

164. *See* CASSESE, *supra* note 33, at 72.

states[165] in a way resembling international abolition law presented as a formal break from slavery and the slave trade. Sovereignty doctrine, however, is central to international law's colonial origins and to preserving hierarchies of domination and subordination among Western and non-Western states.[166] Thus, although framed as the pursuit of equality and self-determination for colonized peoples through independence, nation-statehood did very little to disrupt structures of capitalist and colonial exploitation,[167] permitting a continuity of racialized subordination in service of empire. International law enforcement responses to global crises have demonstrated time and again that First World geopolitical interests (and the preservation of the white global order) trump state sovereignty in the name of humanitarianism, democracy, national security, or other interests.[168]

B. THE GLOBAL SHIFT TO INTERNATIONAL CRIMINAL LAW

Professor Jenny Martinez writes that creating a human rights system and, specifically, drafting the UDHR, required a detachment from European legal history.[169] European countries had used human rights and humanitarian intervention—and the need to abolish the slave trade—as a pretext for European conquest and colonization.[170] Dwelling extensively on slavery and the slave trade, she argues, would have hindered more than helped the development of an international human rights regime.[171] This historical renunciation is critical to an understanding of slavery and slave trade prohibitions in international human

165. ROBERT JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 16–18 (1990).

166. ANGHIE, *supra* note 33, at 3 (examining colonialism as constitutive of sovereignty doctrine in international law).

167. *See* Achiume, *supra* note 32, at 1518.

168. For a compelling account of recent international military intervention in the name of humanitarian necessity in Libya, see Achiume & Bâli, *supra* note 33, at 1398–1407.

169. *See generally* MARTINEZ, *supra* note 41 (examining the origins of international human rights law through the lens of slavery and the slave trade).

170. *Id.* at 155. The former Special Rapporteur on Contemporary Forms of Slavery Urmila Bhoola and co-author Kari Panaccione argue that:

> One of the reasons that the complex legal framework around slavery is comparatively poorly understood may be the absence, in the 1926 and 1956 Conventions, of any provision for a formal treaty body charged with interpreting the Conventions or even receiving reports from states parties on their efforts to discharge their Convention obligations.

Urmila Bhoola & Kari Panaccione, *Slavery Crimes and the Mandate of the United Nations Special Rapporteur on Contemporary Forms of Slavery*, 14 J. INT'L CRIM. JUST. 363, 368 (2016). This reasoning is flawed, however, given that the Human Rights Committee (HRC), a treaty monitoring body charged with interpreting the International Covenant on Civil and Political Rights (ICCPR), which prohibits slavery and the slave trade, has done very little to advance the understanding of the legal framework around slavery, and nothing to advance the understanding of that of the slave trade.

171. MARTINEZ, *supra* note 41, at 155.

rights law,[172] as well as of their relative dormancy in human rights legal advocacy toward accountability and redress for individuals enslaved and slave traded, today. I also contend that historical amnesia for short-term gains may also have entrenched further systems of white supremacy, subjugation, ownership, and exploitation in the long-term service of empire to the detriment of human beings that continue to be subjugated, owned, and exploited today.

The international bill of human rights, which includes the UDHR and the ICCPR, prohibits slavery and the slave trade.[173] Article 4 of the UDHR declares that "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."[174] Article 8 of the ICCPR obligates states similarly by pronouncing that "[n]o one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited."[175] These provisions were not easily agreed upon, however, given problematic past and present de facto conditions of slavery and slave trade practices among Anglo-American imperial states.

The UDHR Drafting Committee worked through several iterations—including in either its draft text or interpretive meaning: servitudes, inhuman exploitation, and forced labor.[176] When Soviet Union representative Alexei Pavlov raised the idea of including the slave trade in the drafting process, Chairperson Eleanor Roosevelt dismissed the suggestion, conflating slavery with the separate act of the slave trade, suggesting that "reference to the slave trade would be unnecessary if slavery as a whole were outlawed."[177] At this meeting, French representative René Cassin seemed to agree with Pavlov that the slave trade existed, but incorrectly categorized the slave trade as a "form" or example of slavery.[178] The inclusion of slave trade in the draft UDHR language was rejected at this stage.[179] The United Nations Commission on Human Rights thus focused primarily on slavery when drafting the UDHR provision.[180]

172. Kestenbaum, *supra* note 121, at 526–28.

173. Some commentators have noted that the International Covenant on Economic, Social and Cultural Rights (ICESCR) also prohibits slavery and slavery-like practices through articles 6, 7, and 10(3); however, this inquiry is concerned with clearly delineating slavery and the slave trade from other practices that are exploitative as defined under law, recognizing that "powers attaching to the rights of ownership" is related, but distinct from, "exploitation." *See, e.g.*, Berta E. Hernández-Truyol & Jane E. Larson, *Sexual Labor and Human Rights*, 37 COLUM. HUM. RTS. L. REV. 391, 406 (2006).

174. UDHR, *supra* note 138.

175. ICCPR, *supra* note 132, art. 8(1). For an in-depth account of the prohibition of "servitudes," or "practices similar to slavery," in international law, see Allain, *supra* note 137.

176. U.N. Econ & Soc. Council, Rep. of the Drafting Comm. to the Comm'n on Hum. Rts., 1st Sess., at 33, 75, 88, U.N. Doc E/CN.4/21 (July 1, 1947). *See* WILLIAM SCHABAS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES VOL. I 1493 (3rd ed. 2013).

177. SCHABAS, *supra* note 176, at 1540 (referencing U.N. Doc. E/CN.4/AC.1/SR.36).

178. *Id*. at 1695 (referencing U.N. Doc E/CN.4/SR.53).

179. *Id*. at 1696.

180. *Id.*

Representatives voted to include the slave trade as a separate prohibition late in the deliberation process. On October 22, 1948, during the Third Committee meeting, the Soviet Union proposed to prohibit explicitly the practice of slavery and to add the slave trade as an enumerated prohibition to the text.[181] The Third Committee debates demonstrate that, throughout the UDHR drafting and deliberation processes, representatives failed to consult the 1926 Slavery Convention definitions of slavery and the slave trade while conflating and confusing slavery, the slave trade, and human trafficking ("white slave traffic") in international law.[182]

Drafters of the ICCPR similarly did not attempt to ground the prohibition of slavery and the slave trade in established treaty law. Examining the ICCPR preparatory works reveals that drafters also failed to refer to the 1926 Slavery Convention and its definitions of slavery and the slave trade, which continue to be the accepted legal definitions under international law today.[183]

When debating definitions of slavery and servitude, drafters of the ICCPR argued that "[s]lavery was a relatively limited and technical notion, whereas servitude was a more general idea covering all possible forms of man's domination by man."[184] While the French representative pointed out that "although servitude and slavery were frequently confused, there was a clear distinction in law: slavery implied the destruction of the juridical personality, whereas servitude, in the strict meaning of the word, implied only a state of complete personal dependence."[185]

This statement demonstrates that drafters lacked a clear understanding of the definition of slavery, grounded in the status or condition of a person over whom powers attaching to ownership rights are exercised, in international law. The destruction of the juridical personality, or the violation of the right to "recognition as a person before the law,"[186] covers indicia, or evidence, of one

181. U.N. GAOR, 3d Sess., 110th mtg. at 214–15, U.N. Doc. A/C.3/SR.110 (Oct. 22, 1948). For a detailed discussion on these debates, in which representatives failed to consider historical and legal origins of slavery and slave trade prohibition under international law, see Kestenbaum, *supra* note 121, at 556–59.

182. U.N. Econ & Soc. Council, Comm'n on Hum. Rts., Rep. of the Working Grp. on the Declaration on Human Rights, 2d Sess., at 8, U.N. Doc. E/CN.4/57 (Dec. 10, 1947); U.N. GAOR, 3d. Sess., 109th mtg., U.N. Doc. A/C.3/SR.109 (Oct. 21, 1948); U.N. GAOR, 3d. Sess., 110th mtg., U.N. Doc. A/C.3/SR.110 (Oct. 22, 1948).

183. *See* Kestenbaum, *supra* note 121, at 528–36, 528 nn.51–102.

184. U.N. ESCOR, Comm'n on Hum. Rts., 6th Sess., 142d mtg. at ¶ 79, U.N. Doc. E/CN.4/SR.142 (Apr. 10, 1950) [hereinafter U.N. ESCOR April].

185. *Id.* at ¶ 74.

186. Article 16 of the ICCPR obligates states parties to ensure that "[e]veryone shall have the right to recognition everywhere as a person before the law." ICCPR, *supra* note 132, art. 16. This provision has been equated with the right to "juridical personality." *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 284 (1st ed. 1993).

form of slavery: de jure slavery.[187] Thus, the ICCPR drafters' understanding of the slavery definition was much more limited than what had been accepted previously in international treaty law.

Further, while some ICCPR drafters recognized distinctions in law among slavery, servitude, and forced labor, the slave trade was not similarly distinguished and overlooked as a separate prohibition.[188] Other drafters—while understanding that human trafficking differed from the slave trade—misunderstood the slave trade definition and prohibition in international law and advocated for prohibiting human trafficking instead, proposing to replace "'the slave trade' . . . [with] the words 'the trade in human beings' so that the paragraph could cover traffic in women, who were not slaves in law."[189]

The drafters rightly rejected this proposal;[190] including the slave trade as a prohibition permitted the continued protection of a separate, non-derogable, *jus cogens* norm under general international law and human rights treaty law. Moreover, the emphasis on human trafficking tends to further background the historic Black African-related slavery and slave trade practices, while imbuing the clichéd retentions of various practices of "white slavery," such as the Barbary corsairs' slave trade original protections of human trafficking as the prohibition of the "white slave traffic."[191]

Although both slavery and the slave trade made their way into the UDHR and ICCPR, the post–World War II world had shifted. To some, the slave trade seemed to pale in comparison to the millions killed in battle,[192] and European

187. Even if violations of the right to juridical personality includes the condition (that is, de facto situations) of slavery, it is still limited in that the destruction of juridical personality is one indicia of the exercise of the powers attaching to ownership and not the *sine qua non* of the prohibition of slavery under international law. *C.f.* Anzualdo Castro v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶¶ 90, 101 (Sept. 22, 2009) (finding that Article 3 of the American Convention on Human Rights implies "placing the person outside the protection of the law" and preventing them from exercising their rights).

188. *See* U.N. ESCOR April, *supra* note 184.

189. U.N. ESCOR, Comm'n on Hum. Rts., 6th Sess., 199th mtg. at ¶ 101, U.N. Doc E/CN.4/SR.199 (May 31, 1950).

190. *Id.* at ¶ 102.

191. Sellers & Kestenbaum, *supra* note 42. As Jean Allain notes, "much like the phrase 'general principles of international law recognized by civilized nations', 'White Slave Traffic' is a window onto a very different world of the early twentieth century, one dominated by a Euro-centrism of overt racism, at the height of its colonial conquest." Jean Allain, *White Slave Traffic in International Law*, 1 J. HUM. TRAFFICKING IN INT'L L. 1, 1 n.1 (2017). What Allain misunderstands, however, is the way in which structural racism is the thread that connects past to present empire. By "overparticularlizing" individualized, overt acts of racism, the structures are overlooked. *See* Christopher Gevers, *"Unwhitening the World": Rethinking Race and International Law*, 67 UCLA L. REV. 1652, 1659 (2021).

192. Slave policy programs and deportation to slave labor, however, were included and prosecuted at Nuremburg (and Tokyo) as crimes against humanity and as war crimes. Possibly, the concentration on non-armed conflict slavery and slave trade (colonial) distorted the drafters' view, which wanted to look away from the (black) slave trade and concentrate on the (white) trafficking legal route. *See, e.g.*, *United States of America vs. Oswald Pohl et al.*, U.S. Military Tribunal Nuremberg (Nov. 3, 1947).

countries conveniently buried recent histories of conquest and colonization in the wake of African decolonization.[193] The prohibition of the slave trade—and to some extent that of slavery—would remain dormant and rarely applied in international law. Acts that could constitute acts of the slave trade reported to international treaty monitoring bodies or human rights experts are treated as trafficking in persons, or as abductions, kidnappings, and sales occurring alongside slavery.[194]

At the same time, the atrocities of World War II turned global attention to prosecuting individuals for international crimes, and the focus turned toward aggressive war-making, terrorism, and genocide as government-initiated political crimes that are "the most important type of crime against the law of nations."[195] Here, the Western gaze[196] turned abruptly to suppress territorial expansion and the intentional destruction of peoples precisely at a shift in Western imperialist tactics away from expansion and destruction of native populations toward liberal democracy-making and neo-colonialism.[197] In the same way international abolition law self-absolved Western colonial powers for constructing, perpetrating, and profiting off of the slave trade and slavery systems of the seventeenth through nineteenth centuries, so too the Western states of the newly constructed United Nations began to create the legal architecture to intervene selectively in cases of non-Western territorial expansion and genocide.

From Nuremberg forward, international law's criminal justice project has been distinctly Western and imperial in nature.[198] A critical read of the Nuremberg and Tokyo war tribunals' prosecutions of Nazis and condemning Nazism's brand of racial supremacy finds it inconsistent with the Allied powers' official legal policies, or at least acceptance, of racialized subordination[199] and imperial aggression.[200] Since the inception of international criminal law, the

193. MARTINEZ, *supra* note 41, at 157.

194. *See* Kestenbaum, *supra* note 121, at 41–46.

195. MARTINEZ, *supra* note 41, at 157; Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60, 71 (1952); T.B. Murray, *The Present Position of International Criminal Justice*, 36 TRANSACTIONS OF THE GROTIUS SOC'Y 191, 200–01 (1950).

196. "Western gaze" is a term to describe the perspective of anyone who describes non-Western people and cultures based on Western cultural standards. *Western Gaze*, A DICTIONARY OF CULTURAL ANTHROPOLOGY (1st ed. 2018).

197. *See generally* RANDLE C. DEFALCO, INVISIBLE ATROCITIES: THE AESTHETIC BIASES OF INTERNATIONAL CRIMINAL JUSTICE (2022) (examining international crimes, and how their conceptualization has perpetuated violence, creating a flaw in the current international criminal justice system).

198. John Reynolds & Sujith Xavier, *'The Dark Corners of the World': TWAIL and International Criminal Justice*, 14 J. INT'L CRIM. J. 959, 962 (2016).

199. *See* Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 171 (1997).

200. *See* INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST: DISSENTIENT JUDGMENT OF JUSTICE PAL xxi, 23–24 (Kokusho-Kankokai ed., 1999), https://www.sdh-fact.com/CL02_1/65_S4.pdf (calling the trial

critique has been one of structure and implementation: Unequal power relations are baked into the law, the law criminalizes certain harms over others, and the implementation is selective and largely a Western colonialist project.[201] These power dynamics of colonial legacies and imperial interests continue to play out in the international law justice project today.[202]

Furthermore, the international lawmaking during this period failed to connect the international crimes of genocide, slavery, and the slave trade; indeed, slavery and the slave trade systems were integral to fueling the war efforts of states that enabled the perpetration of the destruction of peoples along identity lines. While U.S. civil rights advocates engaging in international law of the time did make these connections, linking the harms of slavery and slave trades past to present violence and racial subjugation of Jim Crow segregation,[203] such connections were suppressed and discredited.[204]

The human rights of enslaved and slave-traded individuals have been at best incidental beneficiaries of slavery and slave trade suppression under international law; at worst, slavery and slave trade suppression has been the pretext for consolidating hegemonic power and Western global (white) supremacy while entrenching enslavement practices globally. States (and elites in power within those states) interested in the status quo do not prioritize human rights over their interests in sustaining systems of colonialism, racialized capitalism, and state-sponsored violence through policing. The difficulties in naming and defining slavery and the slave trade prohibitions reflected Western states' inabilities to reckon with slavery pasts and present continuation of systems of anti-Black racism, exploitation, subjugation, and ownership over human beings.

"vindictive retaliation" when it would not scrutinize Allied powers' atomic bombing of Japan and criticizing the project's violation of principles of legality).

201. *See, e.g.*, DEFALCO, *supra* note 197; Reynolds & Xavier, *supra* note 198, at 965–67. For a look at international criminal law's rendering invisible slavery and the slave trade crimes, see Jocelyn Getgen Kestenbaum, *Aesthetics of Slavery and Slave Trade Crimes*, 37 TEMP. INT'L & COMP. L.J. (forthcoming).

202. Reynolds & Xavier, *supra* note 198, at 970–76 (analyzing the relative power of the Security Council and the selective referral of cases and accused persons to the Court). *See also* Achiume & Bâli, *supra* note 33, at 1396–97 (offering a TWAIL critique of the military intervention in Libya under U.N. Security Council referral).

203. *See generally* WE CHARGE GENOCIDE, *supra* note 161 (arguing that the U.N. is complicit in genocide by linking the harms of slavery to present racial violence).

204. *See* Alex Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously.*, POLITICO (Dec. 26, 2021), https://www.politico.com/news/magazine/2021/12/26/black-activists-charge-genocide-united-states-systemic-racism-526045 (finding that national news sources buried or discredited the story).

III. ABOLITION REDUX? THE SUPPRESSION OF HUMAN TRAFFICKING AS "MODERN SLAVERY" UNDER TRANSNATIONAL CRIMINAL LAW

The Anglo-American abolitionist, interventionist turn toward suppressing human trafficking as "modern slavery" may help to explain this continued underutilization of slavery and slave trade prohibitions under international human rights law frameworks today. The end of the Cold War and the rise of U.S. international hegemony led to an emphasis on combating human trafficking and related exploitation as "modern slavery" through transnational criminal law as a way of strengthening U.S. global policing powers and securing international borders without disrupting racialized capitalist economies on which global powers continue to depend.

At the turn of the twentieth century, a separate but related international legal framework on human trafficking emerged, beginning with a set of international law treaties to address "white slavery" or the "white slave traffic."[205] State party motivations for outlawing "white slavery," however, were not to expand or change the legal prohibitions of slavery or the slave trade;[206] these treaties initially intended to suppress prostitution and the exploitation of sex work transnationally toward preserving the "sexual 'purity' of 'white women.'"[207] Likening trafficking to slavery rhetorically was a way "to promote the vision of women held in bondage against their will . . . [who were] forced into lives of prostitution . . . ."[208]

These gendered and racialized roots of human trafficking (and of slavery and the slave trade)—in addition to human trafficking's differential treatment as a transnational crime and migration/border control issue—help to explain the uneven treatment of these human rights norms.[209] Currently, human trafficking is at the forefront of transnational crime response, especially after the adoption

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205. Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479, 513–15 (1990).

206. The 1926 Slavery Convention had already erased the racialized nature of the prohibitions of slavery and the slave trade. *See* 1926 Slavery Convention, *supra* note 107.

207. Stoyanova, *supra* note 124, at 374; *see* Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1666 (2010); Karen E. Bravo, *The Role of the Transatlantic Slave Trade in Contemporary Anti-Human Trafficking Discourse*, 9 SEATTLE J. SOC. JUST. 555, 556–60 (2011); ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 55 (2010).

208. Marlene D. Beckman, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L.J. 1111, 1111 (1984); *see* Stoyanova, *supra* note 124, at 374.

209. Kestenbaum, *supra* note 121, at 522. As scholar Lyndsey P. Beutin has argued, anti-trafficking's "modern slavery" rhetoric is not an afterlife of slavery but an afterlife of—and a perpetuation of—the myth of White abolition and about broadcasting White morality. BEUTIN, *supra* note 24, at 19. *See also* Kamala Kempadoo, *The Modern-Day White (Wo)Man's Burden: Trends in Anti-Trafficking and Anti-Slavery Campaigns*, 1 J. HUM. TRAFFICKING 8 (2015) (finding that anti-trafficking advocacy is interconnected with and driven by race and racism as another iteration of the "white-savior industrial complex" or British colonial "civilizing" mission of slavery and slave trade abolition's past).

of the 2001 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the "Palermo Protocol").[210] In this framework, slavery (but not the slave trade) is relegated to one of the exploitative purposes of human trafficking.[211]

The legal conflation between and among slavery, the slave trade, and trafficking that began with rhetoric at the genesis of the prohibition of human trafficking largely continues today with the term "modern slavery" equated with human trafficking (and still, mainly trafficking in women and girls for the purpose of sexual exploitation). Scholar Karen Bravo finds that the rhetorical use of slavery and the slave trade to describe human trafficking exploitation is problematic, mainly because equating the slave trade to trafficking is inherently contradictory, historically dishonest, and allows international abolitionist legal and policy interventions to human trafficking that enhance states' police powers to continue unquestioned.[212] The human trafficking feminist movements also have highlighted some perpetrators and victims of violence while erasing others.

What emerges is the perpetuation of a mythical narrative of successful abolition of the slave trade and slavery when state-sponsored slavery and slave trading continue in other manifestations in the United States and elsewhere today.[213] The U.S.-led human trafficking interventionist policies permit the global superpower and other Western states to deny complicity in, and reparations for, slavery and the slave trade historically and as they persist in present times.[214] Instead, the United States and other Western powers engage in interventionist policing of other countries to combat "modern slavery" and "modern slave trading" while permitting the same structures of racialized capitalism and colonialism to remain intact, perpetuating slavery and slave trade harms largely with impunity.

While international law to suppress human trafficking spans more than a century, states' promulgation and enforcement of international norms to combat human trafficking increased significantly beginning in the 1990s. Professors Paulette Lloyd and Beth Simmons posit that these extensive state agreements resulted from economic and geopolitical shifts at the end of the Cold War that

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210. *Id.*; *see also* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *adopted* Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

211. *Id.*

212. Bravo, *supra* note 207, at 566. *See also* Elena Shih & Janie Chuang, *How has Philanthrocapitalism Helped or Hurt the Anti-Trafficking Movement?*, OPENDEMOCRACY (Feb. 1, 2021), www.opendemocracy.net/en/beyond-trafficking-and-slavery/how-has-philanthrocapitalism-helped-or-hurt-anti-trafficking-movement.

213. *Id.* at 567.

214. *Id.* at 569; BEUTIN, *supra* note 24, at 9, 24, 33 (finding anti-trafficking's political utility in its "ability to recast historical justifications for white supremacy as today's abolition of slavery. Doing so discursively absolves state and nonstate actors of historical responsibility for racial wrongs.").

placed transnational organized crime and migration control at the top of the international legal agenda.[215] Further, the framing of human trafficking as a transnational crime issue rather than an international human rights issue served to strengthen domestic criminal law systems and internalize the neo-colonial Anglo-European interventions that continue today.[216] At the same time, this framing diverted international attention away from prioritizing structural changes to eradicate racialized exploitation and subjugation of human beings and deterred advocacy on accountability and redress for individuals exploited, trafficked, enslaved, and slave traded globally.

Borders opened after the collapse of the Soviet Union and the end of the Cold War, allowing for unmitigated licit and illicit flows of humans and goods globally.[217] As many developing countries sought to establish democracy and rule of law, transnational organized crime challenged sovereignty and threatened domestic legal orders in ways that consolidated international consensus toward combating human trafficking and other transnational harms.[218] Similar to international abolition to suppress the slave trade, states converged around human trafficking as a transnational and migratory crime crisis, even though some South Asian states viewed anti-human trafficking efforts as "antimigration propaganda,"[219] given the emphasis on crime and migration control. Additionally, the accompanying "moral panics" centering on prostitution of (white) women and girls, which mirrored the same concerns at the turn of the twentieth century, helped mobilize support for a strong international response to perceived social threats amidst high levels of social change.[220] As with abolition law, the rhetoric that equates human trafficking with slavery, then and now, serves to consolidate police powers of powerful Western states without questioning whether international law is serving the human rights and humanitarian aims used to justify such interventionist policies.

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215. Paulette Lloyd & Beth Simmons, *Framing for a New Transnational Legal Order: The Case of Human Trafficking*, *in* TRANSNATIONAL LEGAL ORDERS 400, 416 (Terence C. Halliday & Gregory Shaffer eds., 2015) *See also* JULIA O'CONNELL DAVIDSON, MODERN SLAVERY: THE MARGINS OF FREEDOM (2015) (outlining dominant anti-trafficking discourses as attractive to states seeking border security, corporate actors, inter-governmental organizations, and wealthy donors).

216. *Id.*

217. *Id.* at 403.

218. *See* Carol Harrington, *Resolution 1325 and Post-Cold War Feminist Politics*, 13 INT'L FEM. J. POL. 557, 569 (2011) (discussing the global security reframing of gender violence in the new world order); U.N. Asia & Far East Inst., Ann. Rep. for 2000 and Resource Material Series, Global Situation of Transnational Organized Crime, the Decision of the International Community to Develop an International Convention and the Negotiation Process, at 479. Series No. 59 (2002); Lloyd & Simmons, *supra* note 215, at 418; Bravo, *supra* note 207, at 560.

219. *See* SIDDHARTH KARA, SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY 67 (1st ed. 2009).

220. Ariella Gross & Chantal Thomas, *The New Abolitionism, International Law, and the Memory of Slavery*, 35 L. & HIST. REV. 99, 105 (2017).

States purposefully moved away from a human rights framework for international law implementation and enforcement, choosing a highly feminized, racialized frame centering on transnational crime and migration control that prioritized national security interests and consolidated sovereign policing powers.[221] Such a turn empowered states rather than creating robust human rights legal obligations toward individuals trafficked and exploited within their borders,[222] all the while maintaining and possibly entrenching the international economic and political structures of racialized capitalism and neocolonialism that perpetuate systems of trafficking and exploitation, and trade and ownership, of human beings who may be trafficked, slave traded, and enslaved.[223]

The transnational law enforcement response to human trafficking crimes is embodied most clearly in the 2000 U.N. Convention Against Transnational Organized Crime and its Human Trafficking Protocol ("Palermo Protocol").[224] All criminal justice provisions in the 2000 Palermo Protocol are obligatory for all states parties, while the human rights articles are relatively weak and optional.[225]

U.S. foreign policy has led this human-trafficking-as-transnational-organized-crime framework in an "Americanization" of international policing.[226] Indeed, little evidence exists to demonstrate that the expenditure on human trafficking leads to preventing or mitigating human trafficking harms.[227] Critics have demonstrated that the construct of this "global threat" justifies funding and increased policing for U.S. military, security, and intelligence agencies to reinvent their roles in a post–Cold War new world order.[228] Importantly, the transnational crime control approach to human trafficking has suppressed questioning and silenced critics about the U.S. role in morally

221. Lloyd & Simmons, *supra* note 215, at 429.

222. *Id.* at 430.

223. *See* BEUTIN, *supra* note 24 (asserting that anti-trafficking policy affirms the legitimacy of the governing structures of racialized liberalism and racialized capitalism that Black slavery reparations claims organizing often indicts). Indeed, the global movement to combat gender-based violence of which human trafficking movements are part can be complicit in imperial projects, producing and reinscribing the very violence that feminists purport to prevent, mitigate, or eradicate. Lila Abu-Lughod, Rema Hammami & Nadera Shalhoub-Kevorkian, *Circuits of Power in GBVAW Governance*, *in* THE CUNNING OF GENDER VIOLENCE: GEOPOLITICS & FEMINISM 9 (2023).

224. MAGGY LEE, TRAFFICKING AND GLOBAL CRIME CONTROL 83 (2011).

225. *Id.*

226. *Id.* at 91.

227. Bravo, *supra* note 207, at 556–57 (citing to TIP reports).

228. Peter Andreas & Richard A. Price, *From War Fighting to Crime Fighting: Transforming the American National Security State*, INT'L STUD. REV., Autumn 2001, at 31, 41; Dick Hobbs & Colin Dunninghan, *Glocal Organised Crime: Context and Pretext*, *in* THE NEW EUROPEAN CRIMINOLOGY 289–303 (Vincenzo Ruggiero, Nigel South & Ian Taylor eds., 1998).

policing the globe,[229] enforcing global hierarchies of subordination, or increasing criminalization of migration. Transnational and international criminal law frameworks also are limited in addressing the state, corporate, and larger structural issues that are root causes of human trafficking, slavery, and slave trade perpetuation globally.[230]

The rhetoric of "modern slavery" proves useful in American empire and global hegemony by distancing and disaggregating the United States from its own legacy of—and complicity in—Transatlantic slave trade and domestic slavery systems, institutions, and practices against Black and Indigenous people.[231] The term "modern slavery" diverts attention away from the conditions that manifest as exercising powers of ownership toward White exploitation as the harm to combat. Additionally, associating "modern slavery" rhetoric with human trafficking crimes focuses intervention on criminal legal responses to individual perpetration and away from systemic and structural root causes, while selectively implementing interventions in cases of sexual exploitation of (White) women and girls. At the same time, the fight against "modern slavery" equates, at least rhetorically, human trafficking and other harms, like forced labor, with slavery and the slave trade, attaching a moral weight to U.S. leadership of the "free world"[232] and actions to police transnational organized crime and other related harms. The fight against "modern slavery" tends to permit slavery and the slave trade, as well as the structures and institutions that perpetuate such harms, to continue unabated, especially in cases that do not resemble the archetypal human trafficking cases of sexual exploitation of (white) women and girls.

Thus, today's "modern slavery" movement mobilizes states mainly to suppress human trafficking and migrant smuggling, not slavery and the slave trade. Although the trade in and exploitation of human beings continues in many forms, and though factually human trafficking, slave trading, and slavery may coincide, these harms have distinct legal definitions and origins.[233] Human trafficking prohibitions do not have the "super normative" *jus cogens* status under international law that the prohibitions of slavery and the slave trade enjoy. States do not have *erga omnes* obligations toward other states to prevent and redress human trafficking within their borders. Human trafficking is a transnational crime, not an international crime; thus, statutes of limitation apply, while universal jurisdiction does not apply in cases of human trafficking.

229. LEE, *supra* note 224, at 93.
230. Bravo, *supra* note 207, at 581.
231. *See* Blackett & Duquesnoy, *supra* note 38, at 1519.
232. *Id.* (discussing the use of this rhetorical shift in the context of forced labor).
233. For a detailed analysis on these historical and legal distinctions, see Kestenbaum, *supra* note 121.

What is more, the transnational criminal legal order enforced to combat human trafficking, like the abolition enforcement of the past, is similarly not focused on prioritizing the protection of human beings trafficked and exploited. This post–Cold War turn toward human trafficking enforcement as a transnational crime, combined with the shift in the post World War II era toward enforcing international antislavery norms under an international criminal law frame, demonstrates that the rights of human beings enslaved, slave-traded, *and* trafficked have never been prioritized in the enforcement of international or transnational law. Indeed, a critical examination reveals the use of these abolition law frameworks to consolidate state sovereignty, and to further entrench racialized capitalism, colonialism, and Anglo-American empire—the very systems that depend on human exploitation and subjugation.

IV. EMANCIPATORY POTENTIAL OF INTERNATIONAL HUMAN RIGHTS LAW PROHIBITIONS OF SLAVERY AND THE SLAVE TRADE

International law, including human rights law, has been largely a Western, imperial project. Power imbalances and racialized hierarchies of subordination in the service of global capitalism and empire are baked into the legal architecture,[234] weakening the implementation and enforcement of human rights norms toward transformative change. That said, there exist emancipatory elements of the human rights framework that, while imperfect, are revolutionary resistance to structural discrimination and violence that have yet to reach their full potential. This Article demonstrates that, regarding slavery and slave trade prohibitions, human rights law has been underutilized and largely ignored to the detriment of the human beings enslaved and slave traded today.

To be clear, this Article's normative claims are in recognition that the world is an imperfect place, and that international law advocacy does not progress linearly. Unlocking the potential of human rights prohibitions of slavery and the slave trade toward transforming structural root causes of human subjugation will require at least several important shifts in present approaches to combatting these harms. First, advocates who care about human beings subjugated and exploited should proceed cautiously in the enforcement of international criminal justice for enslavement and sexual slavery crimes as a response to conflict-related violence and transnational criminal justice for human trafficking crimes as a response to migration. Such frames that serve the national security interest of states and promote interventionist policing of Western hegemonic powers have not prioritized the human rights and redress of enslaved, slave traded, and trafficked persons. Advocates who engage with these frames should proceed

234. *See* Blackett, *supra* note 141, at 347 (finding that racial subjugation sustains capitalist economic development and that the erasure of race in antislavery law hinders reparative justice toward racial equality).

with awareness of larger structural forces at play that they may be inadvertently legitimizing and further entrenching toward perpetuation of ownership and related exploitation harms.[235] Specifically, feminist movements intending to combat gender violence could malign with geopolitics of empire to solidify rather than challenge logics of power and exclusion.[236]

Societies' increasing turn to criminalization and criminal frameworks to govern emphasizes ideas of individual responsibility, external "others" as threats to society, and the elevated importance of law enforcement, even in the fields of transnational and international law.[237] Though human rights concerns motivate in part international and transnational cooperation on human trafficking issues, for instance, protecting state sovereignty and national security also drive much of the collective action behind such efforts.[238] Indeed, the framing of human trafficking as transnational organized crime and a national security or irregular migration problem dominates the global response efforts, which center on criminal justice and immigration control.[239] These frames oversimplify and narrow the range of harms and actors, especially state and corporate actors, complicit in—or at least benefiting from—the exploitation and trade of human beings while detracting from the emancipatory potential of slavery, slave trade, and even human trafficking prohibitions under international human rights law. In anti-slavery law, as well as anti-human trafficking law, state and corporate interests are still being served over the emancipation of individuals enslaved, slave traded, and trafficked through narrow national security and policing lenses.

Second, Western imperial states must fully reckon with their past and present complicity in slavery and slave trade harms. The continued peddling of false narratives of successful abolition of slavery and the slave trade through international law hinders the ability for a true accounting of slavery's—and *especially* of the slave trade's—perpetration, while distracting advocates and policymakers from tackling the root cause structures of racialized capitalism and colonialism that perpetuate slavery and slave trade harms globally. In

235. I am especially concerned with the way in which the Rome Statute does not include an enumeration of the slave trade as a crime against humanity nor as a war crime. Further, I am troubled by what I call the "slavery plus" understanding of "sexual slavery" under the ICC. Under this reading, enslaved persons who experience rape in the course of enslavement are not seen as enslaved, but rather, as sexually enslaved. I have argued that all slavery is sexualized in that it includes exercise of powers of ownership over a person, including complete control over sexual and reproductive autonomy, regardless of any "acts of a sexual nature." *See* Sellers & Kestenbaum, *supra* note 112, at 157–86.

236. *See* Abu-Lughod et al., *supra* note 223, at 6.

237. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME 3–5 (2007).

238. Anne T. Gallagher, *Human Rights and the New U.N. Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 976 (2001) (arguing that human rights concerns provide both impetus and cover for collective action).

239. LEE, *supra* note 224, at 36–37, 58 (finding that human trafficking is a social issue in addition to a crime issue and arguing for a sociologically informed understanding of human trafficking that puts the state back at the center of the "sociological gaze" of human trafficking).

international law, for example, the slave trade as an international crime and human rights prohibition has become "missing in action." Even though the slave trade is firmly established in customary international law[240] and enumerated in human rights treaty law, the slave trade has not been enumerated as a war crime nor as a crime against humanity in the ICC's Rome Statute,[241] nor has it been characterized as a separate violation in the few cases in international human rights litigation.[242] The conduct is named, but the prohibition is erased from the legal characterization of the harm. Further, reparations for slavery and the slave trade must be prioritized for a true accounting of harms suffered by subjugated peoples past and present.

Finally, advocates should, as I and others have suggested, stop equating slavery and the slave trade to human trafficking through the rhetoric of "modern slavery."[243] Such conflation of these often overlapping but legally distinct harms is problematic for several reasons. First, such rhetorical misuse of the legal terms may in some instances detract from the legacies of the Transatlantic and East African Slave Trades and from responsibilities for redress for those particular historical abuses and their legacies of racial injustice.[244] Second, the conflation between slavery and the slave trade with human trafficking suggests a sharp divide between "old" and "new" forms of human subjugation, ownership, and exploitation.[245] Consequently, slavery and the slave trade harms perpetrated today are erased or rendered invisible unless they coincide with human trafficking or other exploitation perpetration.[246] While there exists a rhetorical and structural "slavery-trafficking nexus,"[247] the historical and legal origins are distinct. And though these harms are legally distinct, their elements overlap with one another and can occur together, permitting all the various legal protections to be brought to bear for victim-survivor redress. International human rights law

240. Int'l Comm. of the Red Cross [ICRC], *Slavery and Slave Trade*, Rule 94, Vol. II, Ch. 32, Sec. H, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule94#:~:text=tradeSexual%20slavery-,Rule%2094.,all%20their%20forms%20are%20prohibited.

241. Sellers & Kestenbaum, *supra* note 5, at 532–33. Similarly, the slave trade has not been enumerated in the draft Crimes Against Humanity treaty. *Draft Articles on Prevention and Punishment of Crimes Against Humanity, With Commentaries*, *in* Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, ¶ 44-45, art. 2(1)(c) (2019) [hereinafter ILC Draft with Commentaries].

242. *See, e.g.*, Brazil Verde case, Inter-Am. Ct. of H.R, *supra* note 119.

243. *See, e.g.*, Gross & Thomas, *supra* note 220, at 101–02; Bravo, *supra* note 207, at 581.

244. Gross & Thomas, *supra* note 220, at 102.

245. *Id.* at 104; *see* Joel Quirk, *Uncomfortable Silences: Contemporary Slavery and the "Lessons" of History*, *in* FROM HUMAN TRAFFICKING TO HUMAN RIGHTS: REFRAMING CONTEMPORARY SLAVERY 37, 41 (Alison Brysk & Austin Choi-Fitzpatrick eds., 2012); JOEL QUIRK, THE ANTI-SLAVERY PROJECT: FROM THE SLAVE TRADE TO HUMAN TRAFFICKING 249–50 (2011).

246. Conflating exploitation harms with ownership harms erases certain experiences and makes certain enslaved individuals invisible (that is, children born into slavery). *See* Sellers & Kestenbaum, *supra* note 5, at 538; Sellers & Kestenbaum, *supra* note 8, at 379–80; Sellers & Kestenbaum, *supra* note 112, at 182, 186.

247. Chantal Thomas, *Immigration Controls and Modern-Day Slavery*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR, AND MODERN SLAVERY (Prabha Kotiswaran ed., 2017).

prohibitions on slavery and the slave trade enjoy super normative *jus cogens* status and should be employed toward victim-survivor redress, as well as state and corporate accountability, where possible.

CONCLUSION

In *Capitalism and Slavery*, Greg Grandin writes that:

> [E]ach generation—from W.E.B. Du Bois to Robin Blackburn, from Eric Williams to Walter Johnson—seems condemned to have to prove the obvious anew: Slavery created the modern world, and the modern world's divisions (both abstract and concrete) are the product of slavery. Slavery is both the thing that can't be transcended but also what can never be remembered.[248]

The same can be said even more emphatically of the slave trade. This Article attempts to contribute to retelling—and remembering—international antislavery law past and present through a critical race and decolonial lens to question and counter the dominant discourse of successful abolition. This retelling interrogates the reasons why slavery and the slave trade prohibitions always have been and continue to be underutilized—and even ignored in the case of the slave trade—in international human rights law advocacy today.

Beneath the surface, the dominant international law narrative of successful abolition is mythical and false. As Makau Mutua has demonstrated, international law has been instrumentalized to advance the interests of particular peoples, nations, and regions at the expense of others.[249] International law, for instance, has been intimately interconnected with, has been shaped by, and has furthered the projects of Western colonization, racialized capitalism,[250] and empire.[251] To

248. Greg Grandin, *Capitalism and Slavery*, NATION (May 1, 2015), https://www.thenation.com/article/archive/capitalism-and-slavery.

249. Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841, 845 (2000).

250. *See, e.g.*, CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION xii (Univ. North Carolina Press 2000) (explaining the forces of racism and nationalism in the development of global capitalism).

251. *See* Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 1–2 (1999). For analysis of the colonial providence of international law, see for example, ANGHIE, *supra* note 33, at 11 ("'Colonialism' refers . . . to the practice of settling territories, while 'imperialism' refers to the practices of an empire."); Matthew Craven, *Colonialism and Domination*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW, *supra* note 2, at 862, 863. For a discussion of colonial underpinnings of international criminal law, see Frédéric Mégret, *International Criminal Justice: A Critical Research Agenda*, *in* CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION 17, 36 (Christine Schwöbel ed., 1st ed. 2014); Christopher Gevers, *International Criminal Law and Individualism: An African Perspective*, *in* CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION, *supra* at 221–45. *But see, e.g.*, CHRISTOPHER WEERAMANTRY, UNIVERSALISING INTERNATIONAL LAW 4 (2004) (finding positive outcomes in advocating for universal norms under international law). Howard Winant argues that imperialism's creation of the nation-state, capitalism's formation of the international economy and the Western Enlightenment's creation of a universal world culture are deeply

say that racism and racialized subordination influenced the development of international law understates the centrality of these structures in the evolution of international legal norms and their enforcement.[252] Through positivist principles[253] of state sovereignty and norms of noninterference in the internal affairs of other nations, international law has facilitated—or has at least provided cover for—racial subjugation and human rights abuses, including slavery and the slave trade, on a massive scale.[254]

Interrogating international slavery and slave trade abolition legal histories permits a critique of dominant and contradictory narratives of successful abolition through international law. The reality that the perpetration of slavery and the slave trade continue with very little redress and near total impunity for individuals enslaved and slave traded confronts Western state narratives of successful eradication of these harms. The slave trade cannot continue to be ignored in fact or in law. The widespread perpetration and complicity of so many Western nation states in slavery and slave trade systems, institutions, and practices, as well as the continuation of colonialism and Western imperialism, may explain in part the underemphasis on these prohibitions and their abolition in the human rights framework today.[255] Even when these systems were legal, slavery and the slave trade were clearly amoral and destructive. Anglo-European states especially need to distance themselves from their own history of instrumentalizing human rights and humanitarian intervention to justify violent

racialized processes. HOWARD WINANT, THE WORLD IS A GHETTO: RACE AND DEMOCRACY SINCE WORLD WAR II 19 (2001).

252. *See, e.g.*, RICHARDSON III, *supra* note 57, at xxxvi–xxxvii; WINANT, *supra* note 251, at 19; Román, *supra* note 163, at 1520–21.

253. Traditional approaches to international law find two doctrines that shape international law discourse: natural law (fundamental rights doctrine) and positivist law. *See, e.g.*, JAMES LESLIE BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 43–44 (Humphrey Waldock ed., 6th ed. 1963) (outlining two rival doctrines that attempt to explain why states follow international law); Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 293 (1999); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1, 17–18 (1988) (describing the discipline and methodology of international law).

254. *See* Haslam, *supra* note 97, at 421–25; Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL. 513, 515 (2002) (stating that "positivist international law of the nineteenth century endorsed the conquest and exploitation of non-European peoples"); Anghie, *supra* note 251, at 2. Henkin et al. provides a useful analysis of legal positivism and international law: "The rise of positivism in Western political and legal theory, especially from the latter part of the 18th century to the early part of the 20th century, corresponds to the steady rise of the national state and its increasingly absolute claims to legal and political supremacy." LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS xxv (3d ed. 1993). But, as this Article demonstrates, interventionist policies in the name of humanitarianism and human rights also have furthered racialized capitalism and empire. *See supra* Parts I, II & III.

255. *See* MARTINEZ, *supra* note 41, at 154.

conquests and colonization of other peoples and lands,[256] as well as continuation of racialized economic systems.[257]

The international abolition law movements include racist discourses of empire and overtones of the "white man's burden" to "civilize" non-white "savages."[258] The suppression of the slave trade and slavery was part and parcel of Europe's "civilizing mission" that justified conquest and colonization of Africa.[259] Many slaves were freed only to end up in situations of forced labor or military service.[260] While scholars have criticized the international human rights legal distinctions between slavery, servitude, and forced labor as "flawed,"[261] this Article posits that such legal distinctions are baked into the legal framework by design, providing evidence of international law's complicity in continuing racial subjugation and exploitation in the service of capitalism, colonization, and empire.

This critical retelling suggests that international law has never prioritized the rights of human beings enslaved and slave-traded and that, to do so, advocates should shift focus to increase efforts for human rights law enforcement and redress. Such a focus would work more toward transforming structures, such as racialized capitalism and colonialism, that perpetuate these systems of violence, oppression, exploitation, and ownership.

Scholars, including feminists, have voiced concerns with the governing work of international criminal law in upholding hierarchical state-based order.[262] For some, criminal law is implicated in maintaining the status quo and perpetuating ongoing social inequalities: "The criminal justice apparatus is about order and its reproduction, and about maintaining the existing hierarchy of status and privilege, and only incidentally about crime or morality or the

256. *Id.* at 155.

257. *See* Umozurike, *supra* note 2, at 348–49.

258. MARTINEZ, *supra* note 41, at 154.

259. MIERS, *supra* note 27, at 23. Even when the government was reluctant to control a territory, obligations to suppress the slave trade were used to force Britain into taking over for corporate colonial rule. In the 1890s, for instance, when the Imperial British East Africa Company withdrew from Uganda, imperialists, missionaries, and humanitarians teamed up to pressure Britain into assuming control as per its duty under the Brussels Act. *Id.* at 24.

260. *Id.*

261. Nicholas Lawrence McGeehan, *Misunderstood and Neglected: The Marginalization of Slavery in International Law*, 16 INT'L J. HUM. RTS. 436, 437 (2012). This author would argue that there is an advantage in prohibiting slavery, servitude, and forced labor in that there exists the possibility of multiple rights violations at play, but the underutilization of the prohibition of slavery suggests that historical narratives have erased the recognition and responsibility of states to account for slavery harms pasts and present. Furthermore, the conflation of slavery with human trafficking, as discussed, has permitted current hegemonic powers to continue interventionist policies that serve empire in the name of human rights and national security. *See supra* Part III.

262. Doris Buss, *Performing Legal Order: Some Feminist Thoughts on International Criminal Law*, 11 INT'L CRIM. L. REV. 409, 412 (2011).

safety of individual citizens and their communities."[263] International criminal law aims at naming individual perpetrators of violence, but in doing so, may further entrench structural violence of both state and private actors.[264]

When problems of trade in—and ownership of—human beings is seen as a moral or criminal issue rather than a social, labor, or human rights issue, the tendency has become an opting for solutions that involve control and punishment of perpetrators, but not one prioritizing the human beings targeted for ownership or their rights.[265] Further, the outcome tends to absolve state and corporate complicity in perpetration of slavery and slave trade harms while maintaining the systems that support the exploitation and ownership of human beings. A cautious engagement with international criminal law toward opening avenues for redress and accountability while increasing commitments to human rights law may help to shift power toward real structural change.

263. Diane Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOODE HALL L.J. 151, 160 (1998).

264. *See* Buss, *supra* note 262, at 419.

265. *See* LEE, *supra* note 224, at 11 (discussing this turn in the human trafficking and migrant smuggling contexts).

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