doi:10.1017/aju.2023.8

SYMPOSIUM ON RACE, RACISM, AND INTERNATIONAL LAW

SLAVERY AND INTERNATIONAL LAW

*Christopher Gevers**

The history of slavery and international law remains largely unwritten. Aside from Henry Richardson III's magisterial monograph, *The Origins of African-American Interests in International Law*, and a handful of shorter pieces (many of them recent),[1] few accounts of "slavery [as] a global *legal* institution"[2] have emerged from within the discipline, in stark and telling contrast to international law's ongoing reckoning with colonialism. What have been produced in increasing abundance—both inside and outside the discipline—are histories of *anti*-slavery and international law, stories of "valiant battles waged by enlightened and humane Europeans and Americans—usually white men—to liberate the slaves."[3] The silencing of slavery in accounts of international law's past, and its afterlives in the present, is overdetermined. It has something to do with the prevailing history-making practices of international lawyers and historians; their choices of events, subjects, and structures,[4] which, as Toni Morrison insisted and Richardson illustrated, remain *choices*.[5] As Michel-Rolph Trouillot has shown, it has a lot to do with the kind of stories that "the West" and its international lawyers, want (and need) to tell (and hear) about themselves.[6] Like slavery itself, these silences have everything to do with race, and the whiteness of the international legal academy. This essay will consider what a history of slavery and international law *might* look like (or at least what it *must* take account of) and what the ongoing "impossibility of its telling"[7] reveals about race, racism, and international law.

There are number of ways to (re)tell the history of slavery and international law. Rather than Westphalia, one could choose to begin an account of international law's past with Palmares—a republic established by formerly enslaved people that would last for nearly a hundred years (1605–1694), and the "first self-governing entity in the modern world that did not admit ethnic, racial, religious, and gender particularism or

* *Lecturer, School of Law, University of KwaZulu-Natal, Durban, South Africa.*

[1] See, for example, the work of Adelle Blackett, Antony Anghie, Chantal Thomas, Vasuki Nesiah, Tendayi Achiume, Robert Knox, Sarah Mason-Case, and Ariela Gross. For an earlier account, see UMO UMOZURIKE, INTERNATIONAL LAW AND COLONIALISM IN AFRICA (1979).

[2] 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, 1268–69 (2017).

[3] Antony Anghie, *Slavery and International Law: The Jurisprudence of Henry Richardson*, 31 TEMPLE INT'L & COMP. L.J. 11, 15 (2017).

[4] *See* Christopher Gevers, *Refiguring Slavery Through International Law: The 1926 Slavery Convention, the "Native Labour Code" and Racial Capitalism*, 25 J. INT'L ECON. L. (2022).

[5] Toni Morrison, *Unspeakable Things Unspoken: The Afro-American Presence in American Literature*, 28 MICH. Q. REV. 1, 9 (1989) ("We are the subjects of our own narrative, witnesses to and participants in our own experience, and, in no way coincidentally, in the experience of those with whom we have come in contact. We are not, in fact, 'other.' We are choices.").

[6] *See* MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY (1995).

[7] Saidiya Hartman, *Venus in Two Acts*, 26 SMALL AXE 1, 11 (2008).

exclusion."[8] The Quilombolas might seed a narrative where international law is called upon to resist, as well as restore and refigure, slavery; one that includes the Haitian Revolution, the U.S. Civil War, and nineteenth and twentieth century anti-colonial internationalisms. Rather than rendering enslaved people "present absences" in stories about white abolitionists and judges[9] as "redemptive heroes of the 'international,'"[10] or white "middling" officials and settlers,[11] one could choose to present "the story of slavery and international law . . . in a different language, one that makes the slave the center of her own history,"[12] and its telling.[13] Finally, one could refuse, as Third World scholars and states have consistently done,[14] to disconnect slavery from other structures "heavily inflected by racialization, like apartheid and colonialism."[15] Instead of defining them as "'other' than slavery," one could emphasize their concatenations in the past and explore their entwined "afterlives" in the present.[16]

A more conventional (and less ambitious for present purposes) starting point for reconsidering the history of slavery and international law is the 1876 Royal Commission on Fugitive Slaves, on which sat the leading British international lawyers of the day,[17] who concluded that granting "fugitive slaves" refuge would likely run contrary to "the strict theory of international law."[18] The Commission, established after the British Admiralty instructed its ships that "fugitive slaves" seeking refuge in foreign ports and waters should be returned to their "masters," had been tasked with determining "the nature and extent of [applicable] international obligations."[19]

The Commission is a generative starting point in three respects. First, it illustrates how celebrating the efforts of white men to abolish slavery and the slave trade distracts from the ways in which both were sustained by international law for much of the nineteenth century. Second, debates on the Commission illustrate how international law's late and partial turn against slavery was not a rejection of its white supremacist and racial capitalist underpinnings, but their *refiguration* through the White mythology of modern international law. Third, the *raison d'être* for the Commission—namely, what to do with enslaved peoples who sought freedom on their own terms—brings to the fore how "slavery transform[ed] and extend[ed] itself in the limits and subjection of freedom."[20] In addition to disrupting the geopolitically circumscribed imperatives of "antislavery," the fugitive slaves contested the terms upon which the enslaved were to be granted their "freedom" by white men—as grateful, peaceful, indebted

[8] *Quilombolas and the Black Butterfly: An Interview with Siba N'Zatioula Grovogui*, TWAILR: Dialogues (Nov. 3, 2021); Henry Richardson III, The Origins of African-American Interests in International Law 77–86 (2008).

[9] Jenny Martinez, The Slave Trade and the Origins of International Human Rights (2011); *see also* Vasuki Nesiah, *Crimes Against Humanity: Racialized Subjects and Deracialized Histories*, *in* The New Histories of International Criminal Law: Retrials 169 (Immi Tallgren & Thomas Skouteris eds., 2019).

[10] Nesiah, *supra* note 9, at 169.

[11] Lauren Benton & Lisa Ford, Rage for Order: The British Empire and the Origins of International Law, 1800–1850 (2016). On present absences, see Morrison, *supra* note 5.

[12] Anghie, *supra* note 3, at 15.

[13] *See further* Peter James Hudson, *The Racist Dawn of Capitalism*, Boston Rev. (Mar. 14, 2016).

[14] *See* Umozurike, *supra* note 1; Adelle Blackett, *Theorizing Emancipatory Transnational Futures of International Labor Law*, 113 AJIL Unbound 390 (2019); Gevers, *supra* note 4.

[15] Adelle Blackett with Alice Duquesnoy, *Slavery is Not a Metaphor: US Prison Labor and Racial Subordination Through the Lens of the ILO's Abolition of Forced Labor Conventions*, 67 UCLA L. Rev. 1504 (2021).

[16] *See* Special Issue of the *Journal of International Economic Law* on "Racial Capitalism and International Economic Law," Volume 22 (2022).

[17] Including T.E. Holland, Henry Sumner Maine, and Robert Phillimore.

[18] *Royal Commission on Fugitive Slaves: Report of The Commissioners, Minutes of the Evidence, and Appendix*, xxiii (1876) [hereinafter 1876 Commission].

[19] *Id.*

[20] Saidiya Hartman, Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America (1997).

https://doi.org/10.1017/aju.2023.8 Published online by Cambridge University Press

apprentices—literal and figurative—for (white) "juridical freedom" and "humanity."[21] In doing so, they continue to disrupt contemporary deracialized, and deracinated accounts of "antislavery" as human rights and international criminal law *avant la lettre*.[22]

The Dead Letter of International Law[23]

International law was central to the establishment, expansion, and consolidation of the racialized institutions of slavery and the slave trade on which the West was built, materially and ideologically. It also enabled both well into the nineteenth century, a fact elided juridically and temporally by the focus on British "post"-abolition suppression efforts. Twelve years after enslaved British subjects obtained their "juridical freedom," and four decades after both the United States and Britain formally prohibited the *international* slave trade, Henry Wheaton declared *racial* slavery (i.e., the enslavement of African people) and the transatlantic slave trade permissible under "general international law."[24] Wheaton defended slavery on positivist, historicist, and social Darwinist grounds. The first defense was that the right to trade in human beings "was vested in all by the consent of all, could be divested only by consent; and . . . must remain lawful to those who could not be induced to relinquish it."[25] The second was that, "[t]hroughout Christendom this harsh rule had been exploded," but "parties to the modern law of nations do not propagate their principles by force; and Africa had not *yet* adopted them." This meant European slave traders could lawfully continue "purchasing the human beings" that were the victims of this "harsh rule," a specious argument, even on its own terms.[26] The third was that "African slaves" were "better fitted by their physical constitutions to endure the toil of cultivating, under a burning sun, the rich soil" than their white counterparts; so planters "were naturally tempted . . . to substitute for white servants the labour of African slaves."[27]

Wheaton's first, positivist defense of slavery and the slave trade was the most common—empowering the European powers (Britain included) to continue to enforce enslavement under cover of "[international] legal phrase and chicanery"[28]—but his other two defenses proved the most enduring. The British had, in the name of "antislavery," been violently intervening in African polities, whose formal sovereignty they oftentimes simultaneously recognized, for the past four decades. However, in 1876, international lawyers remained convinced that their discipline compelled them to (re)turn (some) human beings into chattel rather than violate the sovereignty of (certain) states.[29] As W.E.B. Du Bois illustrated at its close, for much of the nineteenth century the slave trade persisted not in spite of the *letter* of international law, but because of it.[30]

[21] *See further* Vasuki Nesiah, *Freedom at Sea*, 7 London Rev. Int'l L. 149 (2019).

[22] *Id.*

[23] With apologies to Saidiya Hartman, *Introduction: The Dead Letter of the Law*, *in* W.E.B. Du Bois, The Suppression of the African Slave Trade (2007).

[24] Henry Wheaton, Elements of International Law 178 (1846); *see further* Henry Wheaton, Elements of International Law: With a Sketch of the History of Science 171 (1836).

[25] Wheaton, *supra* note 24, at 187 (paraphrasing *The Antelope*, 23 U.S. 66 (1825)).

[26] *Id.* at 186–87.

[27] Henry Wheaton, History of the Law of Nations in Europe and America: From the Earliest Times to the Treaty of Washington, 1842 587 (1845); *see also* Johan Kaspar Bluntschli, The Theory of the State 151 (2000 [1875]); James Lorimer, The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities 32 (1883).

[28] W.E.B. Du Bois, *Inter-racial Implications of the Ethiopian Crisis: A Negro View*, For. Aff., 92 (Oct. 1, 1935).

[29] *See* 1876 Commission, *supra* note 18, at xxiii–xxiv.

[30] Du Bois, *supra* note 23, at 99 (noting: "Without doubt, the contention of the United States as to England's pretensions to a Right to Visit was *technically correct*").

https://doi.org/10.1017/aju.2023.8 Published online by Cambridge University Press

"Antislavery" and the White Mythology of International Law

In 1876, three international lawyers dissented, concluding that if Britain instructed naval officers not to surrender "fugitive slaves" it would *not* be a violation of international law.[31] The significance of the Phillimore, Bernard, and Maine dissent lies not in their conclusion but *how* they reached it: by embracing the evolutionary—or, plainly, social Darwinist—"White Mythology" underpinning Wheaton's second and third defenses,[32] noting:

> International law, it is to be observed, is not stationary; it admits of progressive improvement, though the improvement is more difficult and slower than that of municipal law, and though the agencies by which change is effected are different. It varies with the progress of opinion and the growth of usage; and *there is no subject on which so great a change of opinion has taken place as slavery and the slave trade.*[33]

There remained some differences between "the laws of civilized States" concerning slavery and the slave trade, "which the progress of civilization, tending though it does continually to produce a general uniformity, has not yet entirely effaced."[34] However, these would be effaced in and through the progressive evolution of international law among the "the fully sovereign states of . . . white society[,]" as John Westlake described it a few years later.[35] This was an argument concerning slavery, raised by both James Lorimer[36] and Westlake[37] in the decades that followed.

This White Mythology was "founded in an opposition to certain myth-ridden 'others'",[38] peoples who were simultaneously constituted as non-White and uncivilized. As Antony Anghie has shown, in this "linear, evolutionary scheme . . . the non-European world is the past and the European world the future," and "by examining the primitive… the [white, "European"] modern acquires a better, clearer sense of itself."[39] This heterology or "dynamic of difference" structures international law generally, and its late nineteenth century variant—inflected by biological race-thinking—enabled Sumner Maine, Westlake, and their colleagues to re-invent the discipline through this evolutionary, historical jurisprudence, while co-constituting themselves, their "European-by-blood" states, and international society as *white*.[40]

By extending this White Mythology to the question of slavery, as Wheaton had done in outline, the dissenting international lawyers performed a double move: the first was to universalize (and trivialize)[41] the institution of slavery and de-link it from the West in particular; such that—as Jean Allain puts it—in "the universal history of the world, it is free labour and not slavery which is the rather 'peculiar' institution, the norm having been slave labour."[42] The second was to insist that the backward "non-West," and Africa in particular, was simply the last to eradicate it. Crucially, this double move (ironically) refigured the West—which, paraphrasing Frantz

[31] 1876 Commission, *supra* note 18, at xxv–xxvii.

[32] *See* Peter Fitzpatrick, The Mythology of Modern Law (2002); Christopher Gevers, *"Unwhitening the World": Rethinking Race and International Law*, 67 UCLA L. Rev. 1652 (2021).

[33] 1876 Commission, *supra* note 18, at xxv.

[34] *Id.* at xxiv.

[35] John Westlake, Chapters on the Principles of International Law 190 (1894); 1876 Commission, *supra* note 18, at xxiv.

[36] *See* Lorimer, *supra* note 27, at 257.

[37] *See* John Westlake, International Law: Peace 269 (1910).

[38] Fitzpatrick, *supra* note 32, at ix.

[39] Antony Anghie, Imperialism, Sovereignty and the Making of International Law 103, 106 (2005).

[40] *See* Gevers, *supra* note 32.

[41] Blackett & Duquesnoy, *supra* note 15, at 928.

[42] Jean Allain, The Law and Slavery: Prohibiting Human Exploitation 39 (2015).

https://doi.org/10.1017/aju.2023.8 Published online by Cambridge University Press

Fanon, was literally created by slavery and colonialism, and continued to benefit from both—as an "International Empire of Antislavery,"[43] making "antislavery" a defining or *constitutive* attribute of progressive, "white," Western civilization. Simultaneously, it condemned those deemed "uncivilized" as necessarily slave societies or states, stuck as they were in the West's past, and therefore ripe for imperial intervention in the name of "antislavery" (as Liberia and Ethiopia would soon discover).[44]

"Antislavery imperialism" had been gaining momentum over the course of the nineteenth century, in respect of control over the seas and the coastal enclaves in Africa, in particular. But the White Mythology of "antislavery" enabled abolitionists, European colonial officials, and international lawyers to develop "New International [Legal] Machinery"[45] necessary to refigure slavery as a problem outside the West and predominantly in Africa, and beseeching Western *colonial* intervention. This began with the Berlin and Brussels Acts of 1885 and 1890, which circumscribed the obligation to combat slavery and the slave trade to Africa, where "it *still* exist[ed]"[46] (a geographical limitation on the international legal obligation to abolish slavery and the slave trade that was carried through to the 1926 Slavery Convention).[47] Then, having legally confined slavery and the slave trade to the non-West (and confident the White Mythology would keep it there "historically") the opening lines of the Brussels Act declared that "the most effective means for *counteracting* the Slave Trade" was the "progressive" European occupation and colonization of "African territories," under cover of international law.[48] As Du Bois pointed out eighty years ago, and as Western historians and international lawyers are gradually beginning to recognize, "[at the] back of slave trade suppression lurked colonial imperialism."[49]

Fugitive Histories

These continuities between abolition, white supremacy, and colonial imperialism bring to the fore the third way in which the 1876 Commission is generative for (re)telling the history of slavery and international law: by foregrounding the role of fugitive subjects. Enslaved people who sought freedom on their own terms were, in the first instance, out of place in the strategic and stage-managed "emancipation" that happened to further imperial ambitions, maximize profits and profiteering, and secure and consolidate white supremacy globally.[50] Their histories remain out of place in the gentle, celebratory accounts of "80,000 people being freed" by international law, as nothing less than "the greatest success story in the history of human rights law."[51] As Vasuki Nesiah has shown, the enslaved people who chose resistance, maronnage, or death over the "*certain sort of* juridical freedom" granted by the white man are outliers of the neat story of the Mixed Commissions—as well as histories of "antislavery" and international law more generally—and their circumscribed juridical and ethical grammar of

[43] Seymour Drescher & Paul Finkelman, *Slavery, in* Oxford Handbook of the History of International Law 908 (Bardo Fassbender & Anne Peters eds., 2012).

[44] *See* Gevers, *supra* note 4.

[45] Suzanne Miers, Slavery in the Twentieth Century: The Evolution of a Global Problem 58 (2003).

[46] Brussels Convention, Art. XX (1890) (emphasis added).

[47] Convention to Suppress the Slave Trade and Slavery, Art. 2, Sept. 25, 1926, 60 LNTS 253; *see also* Treaty of Saint-Germain-en-Laye, Art. 11, Sept. 10, 1919. As a matter of positive law, this international legal architecture concerning slavery still does not apply outside of colonial territories.

[48] Brussels Convention, *supra* note 46, Art. X (emphasis added).

[49] W.E.B. Du Bois, Black Folk: Then and Now 165 (2007 [1939]).

[50] *See* Nesiah, *supra* note 9; Nesiah, *supra* note 21.

[51] Martinez, *supra* note 9, at 162.

https://doi.org/10.1017/aju.2023.8 Published online by Cambridge University Press

"humanity."[52] There are fugitives *within* that story as well: the "freed" who died *en route* to Mixed Commissions, the apprentices freed by these Commissions, whose "freedom" was indistinguishable from slavery, and at times worse as "the master had no further rights after the termination of the apprenticeship and therefore no interest in looking after his or her property properly."[53] As Hartman has shown, this "debt of emancipation" extended beyond apprenticeship, to the "tabulation of duty and responsibility [that] resulted in a burdened individuality in which one enjoyed the obligations of freedom without its prerogatives," and "recapitulated black servitude within the terms of an emancipatory narrative."[54]

Conclusion

Race was central to the introduction and expansion of slavery *as well as its "abolition*." Yet, there are those who seek to disarticulate race and slavery, both *legally* and *historically*. For example, by insisting on a narrow, legal (not "politicized") definition of slavery that "erases race" and eschews connections to other "systemic practices heavily inflected by racialization, like apartheid and colonialism,"[55] while deriding those who have done so for some time;[56] or by confining the concatenations of race and slavery to the past, cordoning them from their ideological and material effects in the present.[57] We are counseled not to talk about *present* redistribution or reparation, but *past* racism,[58] or warned that talking about reparations "divert[s] focus from the pressing challenges of tackling contemporary racism and global inequality."[59] These projects of deracialization and deracination not only do violence to "the past"[60] and undermine the claims for reparations; they obscure the manifold afterlives of slavery in the racial capitalist present.

[52] Nesiah, *supra* note 9, at 180 (emphasis added).

[53] 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. Africa 1 (2004).

[54] Hartman, *supra* note 20, at 132.

[55] Blackett & Duquesnoy, *supra* note 15, at 932.

[56] See especially the work of Jean Allain.

[57] Blackett & Duquesnoy, *supra* note 15, at 929.

[58] Allain, *supra* note 42, at 37–45.

[59] UN Human Rights Council 51: UK Explanation of Vote on Racism Resolution (Oct. 7, 2022).

[60] *See* Ariela J. Gross & Chantal Thomas, *The New Abolitionism, International Law, and the Memory of Slavery*, 35 L. & Hist. Rev. 99 (2017).

https://doi.org/10.1017/aju.2023.8 Published online by Cambridge University Press