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## International Law and Contemporary Slavery: The Long View

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**SPECIAL FEATURE  
CONTEMPORARY SLAVERY**

**INTERNATIONAL LAW AND  
CONTEMPORARY SLAVERY:  
THE LONG VIEW**

*Rebecca J. Scott\**

The idea of reasoning about contemporary labor conditions by analogy with an earlier regime of slavery is not new. Even before chattel slavery had been abolished in the French and British Caribbean in the first half of the nineteenth century, activists had introduced the idea of conditions analogous to slavery. The British anti-slavery movement denounced the trade in Chinese “coolie” laborers as morally comparable to the trade in African captives, for the contracts under which the Chinese were engaged lacked the elements of true consent.<sup>1</sup>

Such analogies were particularly salient in societies where chattel slavery had once flourished. In the aftermath of the abolition of slavery in the United States in 1865, for example, unrepentant former slaveholders and opportunistic employers sought to reimpose many of the elements of slave labor. Congress responded by interpreting the Thirteenth Amendment to the United States Constitution as providing the necessary warrant for federal statutes that assured former slaves of the right to choose their employer and prohibited state criminal prosecution of workers for leaving a place of work.<sup>2</sup> These measures were only unevenly effective in combating labor abuse at the time,<sup>3</sup> but they created a statutory framework that was mobilized in subsequent campaigns against practices of coercion.<sup>4</sup>

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1. See Elliott Young, *Chinese Coolies, Universal Rights and the Limits of Liberalism in an Age of Empire*, PAST AND PRESENT 121 (2015).

2. A key first step was the Civil Rights Bill of 1866, 14 Stat. 50. This was followed by the 1867 Peonage Act [March 2, 1867, Thirty-Ninth Congress, Sess. II, Ch. 187]. For an overview, see Risa Goluboff, *Peonage*, in ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (David S. Tanenhaus, ed., 2008).

3. 2 *Land and Labor, 1866–1867*, in 3 FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861–1867 21–60 (René Hayden et al. eds., 2013).

4. On the re-activation of anti-peonage statutes during World War II, in response to coercive conditions on sugar plantations in Florida, see Risa Goluboff, “*Won’t You Please Help Me Get My Son Home?*”: *Peonage, Patronage, and Protest in the World War II Urban South*, 24 L. AND SOC. INQUIRY 777 (1999).

International law, too, was already implicated in the nineteenth century, as Great Britain initiated bilateral treaties against the transatlantic slave trade with various slave-holding and slave-trading nations.<sup>5</sup> These treaties in turn yielded innovative binational courts for adjudicating cases of the unlawful transport of African captives for sale into slavery. The resulting Mixed Courts were flawed mechanisms and generally dependent on the seizures of ships by the British navy, but they helped to move the international consensus toward formal disavowal of the transatlantic trade in African captives.<sup>6</sup>

By the early decades of the twentieth century, with chattel slavery finally legally abolished in the last American redoubts of Cuba and Brazil, international initiatives against practices of slavery shifted from bilateral treaties to multilateral agreements. A commission constituted by the League of Nations denounced the continued exercise of what it discerned as slavery, with a focus outside of Europe and the Americas, but sought to avoid scrutiny of practices in the colonies of the participating European powers.<sup>7</sup> Out of the commission's recommendations emerged the Slavery Convention of 1926, later supplemented in 1956, whose definition of slavery remains the most widely-recognized one in international law: "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."<sup>8</sup> That language importantly points to the exercise over a person of the "powers attaching to" the right of ownership, rather than limiting the prohibition to legally-recognized ownership as such. It has nonetheless at times been interpreted to prohibit only what is taken to be "classic" slavery—that is, to cases of formal ownership and/or direct control over physical movement.<sup>9</sup>

Once states had signed the 1926 Convention, they were formally obliged to take steps to suppress such practices within their jurisdictions. As with the earlier efforts against the transatlantic trade in African captives, however, many regimes resisted what they saw as encroachments on

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5. This subject has been addressed in detail for Cuba by DAVID MURRAY, *ODIOUS COMMERCE: BRITAIN, SPAIN AND THE ABOLITION OF THE CUBAN SLAVE TRADE* (1980); on Brazil, see BEATRIZ MAMIGONIAN, *AFRICANOS LIVRES: A ABOLIÇÃO DO TRÁFICO DE ESCRAVOS NO BRASIL* (2017); for a recent analytic overview see JENNY MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012).

6. On the frameworks for adjudication, see MARTINEZ, *supra* note 5, 67-98. On the widespread undercutting and open violation of these treaties, and the violation of parallel domestic legislation against the transatlantic trade in captives, see Randy J. Sparks, *Blind Justice: The United States's Failure to Curb the Illegal Slave Trade*, 35 *L. AND HIST. REV.*, 53 (2017); and ERNEST OBADELE-STARKS, *FREEBOOTERS AND SMUGGLERS: THE FOREIGN SLAVE TRADE IN THE UNITED STATES AFTER 1808* (2007). For Cuba see MICHAEL ZEUSKE, *Amistad: A Hidden Network of Slavers and Merchants* (2015); and for Brazil, MAMIGONIAN, *supra* note 5.

7. See SUZANNE MIERS, *SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM* (2003), especially chs. 8, 9, and 19.

8. Slavery Convention art. 5, Sept. 25, 1926, 212 U.N.T.S. 17.

9. Challenging such an interpretation both historically and analytically is one of the central goals of many of the authors in *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* (Jean Allain ed., 2012).

sovereignty. Multiple exemptions, moreover, were granted to colonial powers (including Britain).<sup>10</sup> The 1956 Supplemental Convention attained wide formal adherence but still lacked an enforcement mechanism and was undercut by considerations of colonial policy.<sup>11</sup>

Against this historical background, the three essays in the present special issue explore the interactions between different regimes of international law and domestic regulation concerning practices that have come to be named “contemporary slavery,” “conditions analogous to slavery,” or simply “slavery.” Vladislava Stoyanova provides a comprehensive exploration of the complex framing of slavery within international law, examining the key decisions in recent decades and the multiple problems of interpretation that they have raised. Bénédicte Bourgeois focuses on the (reluctant) reworking of enforcement in France in light of the European Convention on Human Rights and recent decisions by the European Court of Human Rights. Carlos H. B. Haddad traces the interplay of modern campaigns against domestic slave labor with Brazil’s longstanding criminal prohibition of the imposition of a condition of labor “analogous to that of a slave.”<sup>12</sup>

Together, these essays bring rigor and a broadened scope to debates over the definition of modern slavery. In an overview that is a complement to her recent book and to the prior work of Jean Allain, Stoyanova provides a close reading of the relevant conventions, protocols, and decisions, setting a high standard for future analysis in cases that invoke the various prohibitions on slavery in international law.<sup>13</sup> She grapples in particular with the uncertain conceptual triad of forced labor, servitude, and slavery. It becomes clear how difficult it is to create bright-line distinctions between these three categories, which are sometimes construed as an ascending sequence of coercion: Is forced labor something temporary, while servitude is imposed for an indefinite period, and slavery is a condition the victim experiences as likely to last for life?

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10. MIERS, *supra* note 7, 128-130. For close study of Portugal’s African colonies in these years, see Catarina Madeira Santos, *Defining slavery and forced labor, creating a colonial fiction on labour in Angola: Portugal, the League of Nations and the International Labor Office (1919-1946)*, in *NEW PERSPECTIVES ON ANGOLA: FROM SLAVING COLONY TO NATION STATE* (Maryann Buri & José C. Curto eds., forthcoming 2018).

11. Miers, *supra* note 7, 331-332.

12. See the essays that follow: Vladislava Stoyanova, *United Nations against Slavery: Unravelling Concepts, Institutions and Obligations* 38 MICH. J. INT’L L. 359 (2017), Bénédicte Bourgeois, *Statutory Progress and Obstacles to Achieving an Effective Criminal Legislation against the Modern-Day Forms of Slavery: The Case of France* 38 MICH. J. INT’L L. 455 (2017), and Carlos H. B. Haddad, *The Definition of Slave Labor for Criminal Enforcement and the Experience of Adjudication: The Case of Brazil* 38 MICH. J. INT’L L. 407 (2017). (The descriptions of the situation in France and in Brazil that are not otherwise footnoted are based on the essays of Bourgeois and Haddad).

13. VLADISLAVA STOYANOVA, *HUMAN TRAFFICKING AND SLAVERY RECONSIDERED: CONCEPTUAL LIMITS AND STATES’ POSITIVE OBLIGATIONS IN EUROPEAN LAW* (2017); Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L. J. 239 (2008-2009); and ALLAIN, *SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING* (2012).

Given that those who impose coerced labor may have varied sources of power and divergent intentions, while the victims vary in the source of their vulnerability and in their potential access to protection, no simple temporal distinction seems to work. Unavoidable ambiguities, moreover, have been compounded by the existence of overlapping international monitoring bodies, depending on how the abuse is categorized—as a prohibited form of labor (hence largely under the purview of the International Labor Organization), a war crime (to be adjudicated by a special tribunal or denounced by a United Nations body), or a violation of the 1926/1956 conventions against slavery (hence squarely in the realm of a longstanding area of international law). Stoyanova concludes that despite broad consensus on the existence of a human right not to be held in slavery, there is surprisingly little international case law clarifying states' obligations to protect such a right.

The two essays that follow Stoyanova's, by Bénédicte Bourgeois and Carlos Haddad, move the analysis into specific national frames, providing rich evidence and reasoning for future forays into what is sometimes called "comparative international law," the exploration of the relationship between specific dimensions of international law and the different domestic enforcement regimes that emerge alongside or in dialogue with such law.<sup>14</sup> Each of the two authors uncovers some unexpected perils attendant upon the importation into domestic criminal law of language derived from documents initially crafted at the level of international declarations concerning human rights. Haddad is particularly emphatic on the value of retaining the existing and detailed Article 149 of the Brazilian Penal Code, as amended in 2003, which offers as indicia of slave labor the imposition of "degrading conditions" and "debilitating work days." He cautions against attempts to replace these with language drawn from the 1926/1956 documents.

For France, the relationship between international law and domestic enforcement is shaped by France's adherence to the European Convention on Human Rights. In this context, the distinctions between forced labor, servitude, and slavery might seem moot, given that all three are prohibited by Article Four of the Convention.<sup>15</sup> In practice, however, as Bénédicte Bourgeois shows in her essay, the French legislature has had great difficulty in bringing to bear an effective regime of penalties for almost any variant of what is publicly denominated *esclavage moderne* (modern slavery).

Bourgeois, who has long worked as a practitioner in this area, shows that in the pre-2013 French statutory regime, almost the only tools availa-

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14. For discussions of this method, as applied to human rights law, see Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW*, 109 AM. J. OF INT'L L., 534 (2015).

15. On the language and interpretation of Article 4, see EUR. CT. H.R., GUIDE ON ARTICLE 4 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: PROHIBITION OF SLAVERY AND FORCED LABOUR (August 31, 2017), [http://www.echr.coe.int/Documents/Guide\\_Art\\_4\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf).

ble in the criminal code rested either on the broad concept of “human dignity” or the narrow one of “inadequate remuneration.” The core affront to dignity that inheres in slavery and domestic servitude was discerned by some prosecutors and trial court judges, while other judges relied on their own concepts of human dignity and were reluctant to find such an abuse absent evidence of sexual violence, racist humiliation, or appalling living conditions. It has also at times been easier for prosecutors to achieve a conviction by shifting the focus to the immigration status of the victim, rather than confronting the totality of the abuse.

There were nonetheless some notable prosecutions, thanks to aggressive work by victims’ advocates and attorneys. In the case that would eventually be taken to the European Court of Human Rights as *Siliadin v. France*, an initial conviction by the trial court had been reasoned away by a court of appeals in Versailles, which made inferences about implied consent and invoked the normalcy of relentless domestic labor for women. (The adolescent victim’s long hours of unremunerated work in childcare and household labor were said to be unremarkable, because they were akin to “the fate of many mothers.”)

The European Court of Human Rights chose in its decision in *Siliadin v. France* to invoke the language of servitude, rather than the term “slavery,” but still deemed France to indeed be in violation of Article Four of the European Convention on Human Rights. The Court thus called upon the French legislature to modify its criminal code to ensure penalties for abusers and better protection for victims.<sup>16</sup>

Substantial modifications of that code were not forthcoming from the legislature, however, and convictions remained difficult to obtain. Activists proceeded to lodge an appeal to the European Court of Human Rights in the case of *C. N. & V. v. France* and were again largely successful.<sup>17</sup> After this second firm rebuke from the European Court, French legislators finally modified the penal code in 2013 to encompass the crimes of enslavement and imposition of forced labor or servitude.

In the process of making those modifications, French legislators imported wholesale the relevant language of the 1926/1956 Conventions, transplanting sentences directly into the code. Bourgeois views this more explicit recognition of the underlying crime as a victory, but is apprehensive about the challenges that lie ahead in using human rights language in the context of criminal law, absent further precision on the component practices that are to be penalized. A great deal will now depend on the interpretations that emerge from an evolving domestic jurisprudence, in which courts will have to grapple with the fact that the terms used in the 1926/1956 Conventions were not themselves designed to convey the specificity expected for domestic criminal prosecution.<sup>18</sup>

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16. *Siliadin v. France*, 2005-VII Eur. Ct. H.R.

17. *C.N. & V. v. France*, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/fre?i=001-114032>.

18. The “Harvard-Bellagio Guidelines” that accompany the volume *THE LEGAL UNDERSTANDING OF SLAVERY*, published by Oxford University Press in 2012, represented an

On this point, the example of Brazil's domestic campaign against slave labor is particularly illuminating—and its recent fate alarming. Carlos Haddad brings a distinctive perspective to the debate. As a federal judge in the Amazonian district of Marabá, he heard dozens of criminal cases of alleged *trabalho escravo* (slave labor), described under the Brazilian Penal Code as the imposition of a condition “analogous to that of a slave” and detailed through the inclusion of multiple specific circumstances that characterize the offense.<sup>19</sup> As founding co-director of the first law school clinic in Brazil on slave labor and human trafficking, Haddad and his colleagues have explored the potential for civil advocacy within Brazil's labor courts on behalf of individual victims.<sup>20</sup> He thus has a clear empirical understanding of the existing domestic enforcement regime—both its stark weaknesses (criminal convictions for these offenses are almost never upheld upon final appeal) and its remarkable strengths (the inspection teams and civil prosecutions for the imposition of “slave labor” have liberated and compensated tens of thousands of victims, imposed settlements and convictions in the labor courts on hundreds of perpetrators, and developed a remarkable set of protocols for worksite inspections).<sup>21</sup>

In this light, Haddad expresses concern that under certain circumstances the international law “floor,” defined by the prohibition of the exercise of the “powers attaching to the right of ownership,” could become a “ceiling” that inhibits the overall existing domestic campaign against the imposition of slave labor. The national campaign has relied heavily on the key concept of the imposition of “degrading conditions,” drawn directly from the criminal code, and its parameters have emerged from dialogue among inspectors, workers, civil society activists, and labor prosecutors.<sup>22</sup> The 1926/1956 language from international law that so closely associates slavery with ownership, by contrast, could—if adopted as a replacement—be used by the enemies of enforcement to undermine the longstanding domestic definitions. Haddad's concern is not at all far-fetched: legislative initiatives that are aimed at halting almost all enforcement have been introduced in the Brazilian Congress by the allies of large landowners, and urban construction firms have sought to use the Supreme Federal Tribunal

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interpretive step forward in the attempt to add specificity to the 1926/1956 language. They nonetheless still rest on the property law concept of “control tantamount to possession,” a phrase that does not itself answer the question of which forms of coercion shall be deemed to represent an impermissible level of control. See Allain, ed., *supra* note 9, at 375.

19. For a detailed discussion of the Brazilian legal framework, and of the enforcement regime that has emerged from inspections carried out by innovative “mobile teams” of prosecutors and labor inspectors, see Rebecca J. Scott, Leonardo Barbosa, and Carlos H. B. Haddad, *How Does the Law Put a Historical Analogy to Work?: Defining the imposition of “a condition analogous to that of a slave” in modern Brazil*, 13 *DUKE J. OF CONST. L. AND PUB. POL'Y* (2017).

20. On the clinic, see <https://www.clinicatrabalhoescravo.com/>.

21. See Scott, Barbosa, & Haddad, *How Does the Law Put a Historical Analogy to Work?*, *supra* note 19.

22. *Id.*

to block publication of the names of companies found in violation of domestic law in this area.<sup>23</sup>

Indeed, Haddad's essay may have been prescient: as this volume goes to press, Brazil's executive branch has issued on October 16, 2017, a *portaria* that redefines the term "slave labor," thus superseding the definitions that have evolved over the last two decades of enforcement. The executive order—after invoking multiple international treaties and declarations—lays out a new and much narrower set of definitions. The category of subjecting a worker to "degrading conditions" is demoted from its prior status as a sufficient condition for meeting the definition of the imposition of slave labor. Instead, the new definition requires that inspectors and prosecutors determine that there has been direct constraint on the worker's "freedom to come and go."<sup>24</sup> Such a requirement ignores the abundant evidence that deceit, intentionally-imposed debt, fear, and isolation—replacing the chains and armed guards of an earlier era—have continued to enable employers to impose "degrading conditions" that do indeed constitute an affront to personhood and human dignity.<sup>25</sup> Although the recent executive order formally deals with unemployment benefits, labor inspections, and inclusion on a government list of violators, and does not in itself alter the criminal code, this definitional shift—if sustained—is likely to have consequences in the labor courts and criminal courts, as well. It is perhaps an index of the current degree of institutional fracture in Brazil that within days prosecutors from the Public Ministry of Labor and the Federal Public Ministry had filed a legal challenge to the executive order.<sup>26</sup> Civil society organizations point out that attempts to narrow the definition of the offense, accompanied by the imposition of sharp budget cuts, threaten to bring a near-halt to decades of inspection, prosecution, and the provision of redress.<sup>27</sup>

The three essays in this special issue come together to confirm the value of exploring varying domestic expressions of and adaptations to international legal ideals. In each polity, lawmakers have viewed the terms "slavery" and "slave labor" in part through a domestic historical lens, and have drafted (or failed to draft) legislation accordingly. The United States

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23. *Id.*

24. Portaria MTB No. 1129, de 13 Outubro 2017, DIÁRIO OFICIAL [D.O] de 16.10.2017 (Brz.).

25. For ethnographic and sociological data, see RICARDO REZENDE FIGUEIRA, ADONIA ANTUNES PRADO & HORÁCIO ARUNTUNE DE SANT'ANA JÚNIOR, *TRABALHO ESCRAVO CONTEMPORÂNEO: UM DEBATE TRANSDISCIPLINAR* (2011); and RICARDO REZENDE FIGUEIRA, ADONIA ANTUNES PRADO & EDNA MARIA GALVÃO, *PRIVAÇÃO DE LIBERDADE OU ATENTADO À DIGNIDADE: ESCRAVIDÃO CONTEMPORÂNEA* (2013).

26. Recomendação MPF No. 38/2017-AA, de 17 Outubro 2017, DIÁRIO OFICIAL [D.O] de 17.10.2017 (Braz.).

27. For critiques of the altered definition, particularly from civil society organizations, see coverage by one of the major independent blogs, including Leonardo Sakamoto, *Governo atende a pedido de ruralistas e dificulta libertação de escravos*, BLOG DO SAKAMOTO, <https://blogdosakamoto.blogosfera.uol.com.br/2017/10/16/governo-atende-a-pedido-de-ruralistas-e-dificulta-libertacao-de-escravos/>.



inherited core concepts dating back to the moment of abolition of chattel slavery, and thus initially built its prohibitions of modern slavery on nineteenth-century rights guarantees and anti-peonage statutes, later reinforced by modern concepts of human trafficking.<sup>28</sup> Having just emerged from a long dictatorship, Brazilian lawmakers in 1988 crafted a constitution containing ringing human rights guarantees, and gradually amended their mid-twentieth-century penal code and labor legislation to address contemporary working conditions. France, where consciousness about historical slavery has been relatively slow to develop, only very recently incorporated into domestic law explicit language referring to modern slavery, drawing nearly word-for-word from the 1926/1956 international conventions.

The appearance of variants of the word “slavery” in both international law and modern domestic statutes has also on occasion given rise to heated debate over whether modern conditions are in fact “analogous” in a meaningful way to the historical institution of chattel slavery.<sup>29</sup> Some scholars balk at the rhetorical overreach of non-profit groups whose publicity implies that modern slavery is in some sense “even worse than” historical slavery, thus seeming to diminish the significance of a massive historical wrong for which redress has never been granted.<sup>30</sup> The rich analysis in these three articles suggests that the analogy with historical slavery can nonetheless be sustained if it is employed to acknowledge the deep dignitary offenses that lay at the heart of chattel slavery and those that lie at the heart of contemporary coerced and degrading labor. Coerced labor today is generally extracted in quite different ways from the laws and whips of the nineteenth century. Some of the core features of such contemporary labor are nonetheless experienced as affronts to personhood, as well as risks to life and limb.<sup>31</sup>

The shared goal that emerges in each of these analyses is to respect the uniqueness and bitter legacy of the historical institution that is being invoked by analogy, while securing a framework for preventing or suppressing the reemergence of a particular set of devastating offenses against human dignity. Not all abuse of those whose vulnerability arises from structures of poverty, conditions of conflict, or regimes of immigration constitutes “slavery.” But it seems clear that an identifiable subset of labor conditions imposed through the intentional magnification of that vulnera-

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28. The relationship between the concept of “slavery” and the more recent concept of “human trafficking” is shifting and complex, both in international law and in domestic enforcement. For an exploration of the legislative framework for enforcement in the United States, see BRIDGETTE CARR, ANNE MILGRAM, KATHLEEN KIM & STEPHEN WARNATH, EDs., *HUMAN TRAFFICKING LAW AND POLICY* (2014).

29. For empirical evidence and continuing debate on the analogical use of the concepts of slavery and slave trade, see the articles in the Forum “*A Crime Against Humanity*”: *Slavery and the Boundaries of Legality, Past and Present*, 35 *L. AND HIST. REV.* (2017).

30. See Ariela J. Gross & Chantal Thomas, *The New Abolitionism, International Law, and the Memory of Slavery*, 35 *L. AND HIST. REV.* 99 (2017).

31. See Scott, Barbosa & Haddad, *supra* note 19.

bility can indeed be discerned within frameworks that use—cautiously and judiciously—an analogy with a prior regime openly designated as “slavery.”