
Georges Scelle's Study of the Slave Trade: French Solidarism Revisited

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Abstract

In 1906, Georges Scelle defended his state thesis in the Faculty of Law at the University of Paris. The young scholar had taken upon himself to study the history of the transatlantic slave trade from a legal and political perspective. The result is a monumental work, in which Scelle traces the evolution of the 'asientos de negros' – that is, the agreements that the Spanish crown signed with an individual, a company or another sovereign by which the latter was granted the privilege (and often the monopoly) to supply African slaves to the Spanish colonies in the Americas. Scelle's thesis offers us an opportunity to explore the meaning and ambivalences of a certain left sensibility in our discipline. How did a radical left international lawyer respond to slavery and human exploitation at the turn of the 20th century? In particular, how did the vocabulary of solidarity and freedom play out when analysing the commercial enterprise that epitomized the most exploitative form of globalization?

In 1906, at the age of 28, Georges Scelle defended both his doctoral thesis and his state (or *habilitation*)¹ thesis in the Faculty of Law at the University of Paris. To defend both theses at the same time and so early on in his career shows how ambitious and talented the young scholar already was.² Whereas his doctoral thesis dealt with the

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¹ Up until 1981, the French system was similar to the German one: to become a professor, one had to produce a substantive doctorate, taking up to 10 years (*thèse d'état*). This was usually done after the completion of a short postgraduate thesis (*thèse de doctorat*). In 1981, the system was reformed to the one that exists today.

² Scelle studied both in the Faculty of Law at the University of Paris and in the *École des sciences politiques*. He was thus well versed in both disciplines and trained as a 'public lawyer in the finest French *publiciste* tradition'. Kasirer, 'A Reading of Georges Scelle's *Précis de droit des gens*', 24 *Canadian Yearbook of International Law* (1986) 372, at 374.

notion of ‘public utility’ in French administrative law,³ it is in the field of public international law that Scelle wrote his state thesis – *l’oeuvre d’une vie*, as it was then called. Supervised by Antoine Pillet, Scelle took it upon himself to study the history of the slave trade in Spanish America through the lens of the *asientos de negros*. His state thesis was published the same year under the name *Histoire politique de la traite négrière aux Indes de Castille: Contrats et traités d’Assiento*.⁴

Why did Antoine Pillet suggest this topic to his doctoral student?⁵ As a professor of treaty history in the Faculty of Law at the University of Paris, Pillet thought that the evolution of the ‘*asiento de negros*’ – that is, the contractual instrument on the basis of which Spain organized the transatlantic slave trade from the 16th century onwards – was worth an in-depth study.⁶ Scelle delved into the subject matter with great curiosity and diligence. He spent months retrieving unpublished documents from various French, Spanish, Portuguese and English archives.⁷ Thanks to this archive work and a broad interdisciplinary perspective, Scelle tells a comprehensive story about the life and death of the *asientos de negros* in life and death of the *asientos de negros* in the Spanish Empire.

Scelle’s thesis is intriguing in many ways. Even though historians do refer to it when writing about slavery, it seems that very few scholars, especially legal scholars, have actually read it in full.⁸ I am willing to concede that the bulkiness of his work – the two volumes encompass more than 1,610 pages – may trigger some discouragement. I find it nonetheless puzzling that in the countless appraisals, essays, and *Festschriften* that international lawyers have devoted to Scelle’s writings and life achievements, his state thesis is systematically ignored or, at best, mentioned in passing.⁹ Do they consider it to be irrelevant or disturbing – that is, a regrettable youthful mistake? Or was it Scelle himself who refrained

³ G. Scelle, *De l’influence des considérations d’utilité publique sur le contrat* (1906).

⁴ G. Scelle, *Histoire politique de la traite négrière aux Indes de Castille: Contrats et traités d’Assiento* (1906), vol. 1: *Les contrats (XVIe et XVIIe siècles)*; vol. 2: *L’Assiento et la guerre de Succession d’Espagne*.

⁵ Pillet, ‘Préface’, in Scelle, *Histoire politique de la traite négrière*, *supra* note 4, vol. 1, at viii.

⁶ An *asiento* is a ‘term in Spanish public law’, explains Scelle, ‘which designates every contract made for ... the administration of a public service between the Spanish Government and private individuals’. Scelle, ‘The Slave-Trade in the Spanish Colonies of America: The Assiento’, 4 *American Journal of International Law* (1910) 612, at 614. Of the various contracts the Spanish government concluded this way, *asientos de negros* are the most famous ones or the best remembered ones: they refer to the agreements the Spanish crown signed with an individual, a company or another sovereign, and by which the latter was granted the privilege (and often the monopoly) to supply African slaves to the Spanish colonies in the Americas. Accordingly, as Johannes Postma notes, ‘the term *asiento* [in itself] became a well-known historical expression connected with the slave trade’. J. Postma, *The Dutch in the Atlantic Slave Trade, 1600–1815* (1990), at 30.

⁷ Scelle, *supra* note 4, vol. 1, at xiv–xxii.

⁸ Among historians, see Vila Vilar, *Hispanoamérica y el comercio de esclavos* (1977) and Tardieu, ‘Les principales structures administratives espagnoles de la traite des Noirs vers les Indes occidentales’, 37 *Cahiers du monde hispanique et luso-brésilien* (1931) 51. One notable exception in the field of international law is Weindl, ‘The Asiento de Negros and International Law’, 10 *Journal of the History of International Law* (2008) 229, which includes specific references to Scelle’s thesis.

⁹ See C. Rousseau (ed.), *La technique et les principes du droit public: Études en l’honneur de Georges Scelle*, 2 vols (1950); Kopelmanas, ‘La pensée de Georges Scelle et ses possibilités d’application à quelques problèmes récents de droit international’, 88 *Journal droit international* (1960) 350; Rousseau, ‘Georges Scelle (1878–1961)’, *Revue générale de droit international public* (RGDIP) 5 (1961). Berlia, ‘La doctrine de Georges Scelle: Étude de quelques thèmes’, in *Droit public interne et international* (1980) 350; Tanca, ‘Georges Scelle (1878–1961): Biographical note with bibliography’, 1 *European Journal of International Law (EJIL)* (1990) 240; Dupuy, ‘Images de Georges Scelle’, 1 *EJIL* (1990) 235; Ch. Apostolidis and H. Tourard (eds), *Actualité de Georges Scelle* (2013).

from talking about his early interest in black slavery? In any case, the fact that one of the most renowned international lawyers of the 20th century spent years researching and writing about the slave trade is, in and of itself, too interesting to be sidelined. To the best of my knowledge, Scelle's work is also the last treatise written by a French international lawyer on black slavery and early colonial practices.

Scelle's forgotten thesis is a wonderful 'speculative archive'.¹⁰ It allows us to see how a radical left scholar grappled with black slavery and dealt with its legacies. Scelle would later be associated with 'French solidarism', presenting law as the product of socio-economic forces in the real world – the basic force being 'solidarity'.¹¹ In Section 1 of this review essay, I show that the young Scelle defended an alternative – and more radical – sociological conception of law, according to which all legal systems rest on a natural law of exploitation. Given that law allocates resources and regulates human relations based on the survival of the fittest, slavery is only the top of the iceberg, i.e., the most visible means for securing the advantage of others. In Section 2, I suggest that this conception of law allowed Scelle to formulate a critique *avant la lettre* of international humanitarianism. That is, by lodging an attack on slavery exclusively, humanitarians are inclined to feel good about themselves, while they have, in fact, achieved very little. Other exploitative practices take place lawfully, says Scelle, such as the use of child labour and the everyday exploitation of women in domestic work, despite the fact they are tantamount to slavery.¹² Notwithstanding this powerful critique, Scelle's position did not lead to a full denunciation of 'exploitation of man by man': in the end, he thought that black slavery had been a necessary evil for history. Equally disturbing is the fact that Scelle was so engrained in showing that the evolution of the slave trade's legal regime was the result of a progressive force – namely, free trade – that he came very close to equating freedom with the possibility to trade. I formulate these concerns in the third and fourth sections of the essay.

1 A 'Realist' Sociological Concept of Law

The value of Scelle's thesis has been recognized in the field of history.¹³ This is because Scelle departs from what was the classical understanding of *asientos de negros* as diplomatic instruments, typified by the Asiento Treaty signed in 1713 between Spain and Britain, which granted the latter exclusive rights to supply slaves

¹⁰ I owe this term to Sundhya Pahuja.

¹¹ Martti Koskenniemi famously associated Scelle with 'French Solidarism'. M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), ch. 4.

¹² These examples are given by Scelle himself in Scelle, *supra* note 4, vol. 1, at 78.

¹³ Soon after its publication, Scelle's state thesis received very good reviews by historians. They were particularly impressed by the 'excellent sources' and 'rigorous methodology' on which Scelle had based his analysis. As I will later explain, the warm reception historians gave to Scelle's work contrasts with the indifference of international lawyers. Out of the five reviews I found of Scelle's work, four were written by historians. See Muret, 'Compte rendu: Georges Scelle: La traite négrière aux Indes de Castille. Contrats et traités d'Asiento', 8(9) *Revue d'histoire moderne et contemporaine* (1906–1907) 715; De Altolaguirre,

to the former's colonies. To say it in historiographic terms whereas historians had previously studied the history of *asientos de negros* using the bilateral treaty concluded in Utrecht as their starting point, Scelle takes this treaty as the endpoint of his analysis. He uncovers the *asientos*' hidden past, so to speak, or their pre-history as domestic contracts. For his main argument is that the *asientos de negros* have a much longer history than was first thought – they have a 200-year-old history.¹⁴ While such a statement may seem uncontroversial today, it was certainly not the case when Scelle carried out his research. One only needs to glance at his bibliography, which lists only two monographs, to realize that *asientos de negros* had been severely understudied.¹⁵ Scelle's historical contribution is therefore significant: he shows that *asientos de negros* were administrative law contracts concluded by the Spanish crown with private individuals, before they evolved, little by little, into international law treaties concluded between two states.

This historical narrative explains the thesis's basic structure: the first volume looks at the ways in which the Spanish crown resorted to *asientos de negros* to set up the slave trade. Initially, *asientos de negros* qualified as domestic contracts falling under Spanish public law, and they remained so even when the contractors became foreigners (1518–1695). The second and third volumes are meant to trace the transformation of *asientos de negros* as they moved from the national to the international sphere (1696–1800). This legal transformation happened when the Spanish government handed over the slave trade monopoly to its 'dangerous rivals' and was thus no longer the 'absolute master'.¹⁶ 'How' and 'why' did *asientos de negros* evolve from contracts to treaties are the two overarching questions that steer Scelle's analysis. To elucidate what propelled the evolution from contracts to treaties, he carefully looks at the political and socio-economic context in which the various *asientos* were concluded and implemented. The point I want to make is that from the very beginning of his career, Scelle followed a direction different from the voluntarist doctrine then prevailing in France. In his state thesis, we can find premises – albeit surprising ones – of his social conception of law.

'La traite négrière aux Indes de Castille: Contrats et traités par Georges Scelle, docteur en droit, ancien élève de l'école des sciences politiques. Paris, 1906', *Boletín de la Real Academia de la historia* (1907) 341; Marvaud, 'La traite négrière aux Indes de Castille, contrats et traités d'asiento, par M. Georges Scelle, docteur en droit, préface de M. le professeur Pillet. 3 volumes, dont 2 parus chez Larose et Tenin, 1906', 8 *Bulletin de la législation comparée* (1906) 572; Desdebes du Dezert, 'Georges Scelle. La traite négrière aux Indes de Castille. Contrats et traités d'Asiento. Paris, libr. de la Soc. du Recueil J.-B. Sirey, 1906. 2 vol.', 12 *Revue historique* (1907) 163; 'La traite négrière aux Indes de Castille: Contrats et traités d'Asiento, par Georges Scelle. Paris, librairie de la Société du recueil J.-B. Sirey et du *Journal du Palais*, 1906', 7 *Revue des questions historiques* (1907) 653.

¹⁴ 'L'histoire [des] premiers Assientos est inconnue, on n'en parle guère avant Utrecht. C'est de deux siècles plus avant que nous avons fait partir nos recherches.' Scelle, *supra* note 4, vol. 1, at x.

¹⁵ *Ibid.*, at xxi–xxii. At the end of each chapter, Scelle lists additional archive sources and books. The pioneering work on the evolution of the supply system of slave labour to the Spanish colonies was published in the 1970s. See, e.g., L. Rout, *The African Experience in Spanish America* (1976); E. Vilar, *Hispanoamerica y el comercio de esclavos* (1977). In the 1990s, John H. Elliott became a leading reference. J.H. Elliott, *Spain and Its World 1500–1700* (1989).

¹⁶ Scelle, *supra* note 11, at 614.

To start with, what stands out immediately upon reading Scelle's state thesis is the breadth of his interest in both the history and political economy of public law.¹⁷ He informs the reader in his introduction that he wishes to contribute to 'the economic interpretation of history'.¹⁸ By this, he means that the history of black slavery as a legal institution is closely related to the economic history of Spanish imperialism. He will not carry out an economic analysis of slavery, he says, but, rather, explain the transformation of *asientos de negros* from a political and socio-economic perspective. These preliminary remarks suggest that Scelle endorsed a sociological conception of law from very early on. His thesis rests on the assumption that one can properly grasp the legal evolution of *asientos de negros* only if one studies the socio-economic and political context in which they were negotiated and implemented. This implies that the legal scholar must move beyond formal law and carry on an anti-formalist assessment.¹⁹ It also implies that the legal evolution of *asientos de negros* – the move from contracts to treaties – did not happen in one big quantitative jump but, rather, through a number of small qualitative steps. The legal scholar's task consists precisely in identifying and in analysing these steps. On several occasions, the young Scelle – who has not yet elaborated his monist theory of law – stresses 'how much domestic public law and public international law penetrate and influence each other'.²⁰

As is known, Scelle would eventually write that legal science is simply an offshoot of political and historical sociology.²¹ In his *Précis de droit des gens* (1933), Scelle would expound and theorize his social conception of (international) law. Building on sociological theories emerging at the time, especially those of Émile Durkheim and Léon Duguit, Scelle would claim that objective law does not derive from the authority of the state. He would describe a sort of biological imperative, the *fait social*, as a force that brings individuals together in society because of their communality of origins and needs and also because of the necessary division of labour. The *fait social* leads to solidarity among men. The phenomenon of solidarity, in turn, gives rise spontaneously to law and to a legal order that regulates the members of the community. In short, law is rooted in 'solidarity'.²²

This framework is already palatable in Scelle's state thesis. However, what kind of social solidarity does he consider to be the source of *asientos de negros*? It has little to do with specialization, integration or interdependence – that is, with what is generally understood to be his leftist conception of solidarity. For the 28-year-old Scelle, solidarity takes on a different meaning.²³ All social relations operate according to one single

¹⁷ Kasirer, *supra* note 2, at 374.

¹⁸ Scelle, *supra* note 4, vol. 1, at viii.

¹⁹ Though still through a conventional language. See, e.g., Scelle, *supra* note 4, vol. 2, at xi–xii.

²⁰ *Ibid.*, at 138.

²¹ G. Scelle, *Précis de droit des gens* (1933), vol. 1, at 1.

²² Such sociological conception of law was said to be 'realist' (Léon Duguit) or 'scientific' (Auguste Comte), because it was based on observation alone – that is, on direct determination of facts perceived by the senses – instead of theological or metaphysical speculation. The pretention to build a legal theory based on sociology was criticized by other scholars such as François Gény. See Chazal, 'Léon Duguit et François Gény, controverse sur la rénovation de la science juridique', 65(2) *Revue interdisciplinaire d'études juridiques* (2010) 133.

²³ As Oliver Diggelmann reminds us, Scelle belonged to the state-sceptical camp over the Dreyfus affair, and his 'distrust of the powerful became the overarching theme of his intellectual and political life'.

law of economic production, which he calls the ‘path of least resistance’.²⁴ Social solidarity is such that hard work is always relegated to those located ‘at the bottom of the social ladder’.²⁵ Slavery in the traditional sense is merely the logical end-point of this ‘natural law of exploitation’.²⁶ What makes this operation possible, Scelle adds, is a psychological phenomenon by which those in power genuinely believe that it is natural – and, thus, providential – to exploit the others. Those in power become concerned only when their interests are at stake or when their tranquillity is threatened; ‘such is the secret of the ruling classes’ conservative mood’.²⁷

Should one infer from these statements that the young Scelle is a precursor of political realism?²⁸ No; if Scelle grounds his concept of law on the ‘solidarity between the lion and antelope, or the master and slave, which has been the strongest and longest form of social solidarity’ – that is to say, on the conception of solidarity that Louis Le Fur would later oppose to him – he does not intend to stay there.²⁹ His explanation takes on a radical left or a Proudhonian tone.³⁰ Scelle believes that slavery has not disappeared from modern societies, even though it has been officially prohibited by law. What has happened is that slavery has been made less readily apparent. In our modern capitalist societies, labour is paid for and regulated according to a contract negotiated between two seemingly free and equal parties. But when we look behind or beneath such a contract, we see a world where the poor are compelled to sell their labour to the ruling class. Scelle states this idea very clearly:

Modern societies have forged as a sacred principle the freedom of individuals to enter into an employment contract, while refusing to interfere in the law of supply and demand (which is nothing else but the survival of the fittest in economic terms); by doing so, they have long supported need-oriented slavery.³¹

This critique resonates with French ‘utopian socialists’³² of the early 19th century, such as Comte Henri de Saint-Simon (1760–1825), Charles Fourier (1772–1837)

Diggelmann, ‘Georges Scelle’, in B. Fassbender and A. Peters (eds), *Oxford Handbook of the History of International Law* (2012) 1162.

²⁴ In French, ‘*la loi du moindre effort*’. Scelle, *supra* note 4, vol. 1, at 76.

²⁵ *Ibid.*, at 77.

²⁶ In French, ‘*la loi naturelle d’exploitation*’. *Ibid.*

²⁷ *Ibid.*

²⁸ ‘All genuinely political theories presuppose man to be evil – i.e., by no means an unproblematic but a dangerous and dynamic being.’ C. Schmitt, *The Concept of the Political* (2007), at 61.

²⁹ It is with those words that Louis Le Fur would later criticize Scelle’s idea of a world government, pointing to the indeterminacy (and, thus, hidden normativity) of his concept of solidarity. Le Fur, ‘Règles générales du droit de la paix’, 54 *Recueil des cours* (1935 IV) 5, at 93, 97.

³⁰ Scelle had read Proudhon and would become a member of the Société des amis de Proudhon. In the 1920s, he would follow Bourgeois and other French socialists and take part in developing labour legislation and finding syndicalist solutions to the social problems of the day. See Herrera, ‘Un juriste aux prises du social: Sur le projet de Georges Scelle’, 21(1) *Revue française d’histoire des idées politiques* (2005) 113, at 131–132.

³¹ ‘*Les sociétés modernes, érigeant en principe inviolable la liberté du contrat individuel de travail, et laissant libre jeu à la loi de l’offre et de la demande (qui n’est que la loi du plus fort économiquement), ont longtemps consacré l’esclavage du besoin.*’ Scelle, *supra* note 4, vol. 1, at 77.

³² The expression ‘utopian socialism’ was coined by Marx and Engels in their *Communist Manifesto* (1848) to criticize the insistence of French thinkers to reorganize society and to establish a new sense of community,

and Pierre-Joseph Proudhon (1809–1865).³³ One of their shared ambitions was to upset the certainties of nascent industrial capitalism. In order to denounce the poor conditions of industrial workers, they contextualized the 'exploitation of man by man' – identified as an integral part of labour law – within the rudest form found in slavery:

Finally, the exploitation of man by man, which was in the past – in its most direct, grossest form – slavery, continues to exist at a very high degree in the relations between owners and workers, masters and wage-earners. ... The master's relationship to his employee is slavery's latest transformation.³⁴

Proudhon's well-known response to the question: what is property? ('*property is theft!*') was based on an explicit analogy with the institution of slavery.³⁵

When Scelle entered law school in 1897, many French scholars had taken up the analogy between slaves and industrial workers. It had become part of a larger leftist discourse that sought to denounce 'the flagrant and profound contradiction between the ideas of the Revolution and the findings of modern sociology'.³⁶ Progressive jurists of the Third Republic were criticizing the discrepancy between facts and norms,

not through a proletarian revolution but through the liberation of all and a fair repartition of wealth. K. Marx and F. Engels, *Manifesto of the Communist Party* (1969 [1948]). See *infra*, Part 4.

³³ Among other things, and despite their differences, they all sought to introduce the methodological rigour of the 'exact sciences' into social studies. They also saw science as an alternative mode of governing. Saint-Simon wrote that the 'parasites of society' such as the aristocracy, lawyers and churchmen, should give way to the 'doers' – i.e., the scientists and the engineers, who were best placed to organize society. C.-H. Saint-Simon, *Oeuvres choisies de C.H. de Saint-Simon précédées d'un essai sur sa doctrine* (1839), vol. 3, at 60. None of them saw the state as being able to redress social inequalities and injustices; the happy future laying beyond capitalism would be made of independent, worker-governed enterprises. Charles Fourier is undoubtedly the one who went the furthest in computing mathematically the best social organization. He believed that human misery was a result of the repression of our passions. Freeing these passions would lead to happiness and unity. He envisioned self-sufficient communities of 1,600 to 1,800 people matched scientifically for their talents and interests ('*phalanstères*'), which would compete against traditional institutions, eventually replacing them without violence. See Merclé, 'La "science sociale" de Charles Fourier', 2(15) *Revue d'Histoire des Sciences Humaines* (2006) 69.

³⁴ 'Enfin, l'exploitation de l'homme par l'homme, que nous avons montré dans le passé sous sa forme la plus directe, la plus grossière, l'esclavage, se continue à un très haut degré dans les relations des propriétaires et des travailleurs, des maîtres et des salariés. ... Le rapport du maître avec le salarié est la dernière transformation qu'a subie l'esclavage.' S.-A. Bazard and P. Enfantin, *Doctrine de Saint-Simon* (1830), at 174. The same argument is taken up by Proudhon in *De la justice dans la Révolution et dans l'Église: Nouveaux principes de philosophie pratique* (1858), vol. 2, at 147–148.

³⁵ 'If I were asked to answer the following question: *What is slavery?* and I should answer in one word, *It is murder!*, my meaning would be understood at once. No extended argument would be required to show that the power to remove a man's mind, will, and personality, is the power of life and death, and that it makes a man a slave. It is murder.' Proudhon, 'What Is Property? On an Inquiry into the Principle of Right and of Government', in I. McKay (ed.), *Property Is Theft! A Pierre-Joseph Proudhon Anthology* (2011) 1, at 87. Proudhon would spend much time afterwards explaining that what is theft is actually not property *per se* but the unfair distribution of property by the State.

³⁶ T. Ferneuil, *Les principes de 1789 et la science sociale* (1889), at 18. By this, the author meant that no society had ever been constituted by way of a formal contract among isolated individuals; a proper analysis of the facts compelled us to view societies as organisms.

including the discrepancy between formal equality under the law and material inequalities between the proletariat and the capitalist bourgeoisie. But only a few of them had taken a step further and called for the proletariat to gain effective political power through the conquest of the means of production. Duguit, for instance, was explicitly opposed to such a call; instead of taking radical steps, he said, we should ‘march progressively [to ensure that] power would belong not only to one privileged class but to a true majority composed of representatives of all classes of the nation and of all parties’.³⁷

My point is that the young Scelle was influenced by the sociological turn in legal theory (as put forth by Duguit and others), but that he did not endorse its liberal, reformist ethos. This is what brings him closer to thinkers associated with ‘utopian socialism’ (such as Saint-Simon, Fourier and Proudhon).³⁸ To say it differently, Scelle, like Duguit, envisaged law as an instrument and a reflection of social solidarity.³⁹ But Scelle did not endorse Duguit’s conception of solidarity as resting on a lofty ‘sentiment of sociality and the sentiment of justice’.⁴⁰ Scelle’s initial conception of solidarity was one of raw exploitation. According to him, modern law may have prohibited the most visible form of exploitation (that is, traditional slavery), but it has left untouched – and, thus, legitimated – the capitalist mode of production. In short, his position was more radical than that of his ‘mentor’:⁴¹ what he found deplorable was the fact that the situation of the European proletariat working in industries was not that different from the situation of Africans enslaved in the American plantations. The difference was one of degree, not of nature. His critique of modern law is acerbic:

While slavery is the end-point of the natural law of exploitation, there are other instances – even though less striking – where we can see that law at work. The list would be endless if one were to enumerate all possible ways to distort a fair distribution of work product and to challenge the modern formula according to which all members of the community will receive a profit equal to the utility they bring to it. This formula seems so fair and clear that, nowadays, the only indeterminacy left lies in the evaluation of each member’s contribution. But it is as if the law has not been working in that direction; in fact, it has ensured the triumph of the opposite principle: the survival of the fittest.⁴²

³⁷ L. Duguit, *Le droit social, le droit individuel et la transformation de l’Etat: Conférences faites à l’Ecole des Hautes Etudes Sociales* (2nd edn, 1911) at 45.

³⁸ For the ‘return to Proudhon’ among the left at the end of the 19th century, see Rolland, ‘Le retour à Proudhon’, 10 *Mil neuf cent* (1992) 5.

³⁹ It is worth noting that Scelle failed at the *agrégation de droit public* twice (in 1906 and in 1910). It is only in 1912 that he succeeded. The jury was then presided by no other than Léon Duguit. Scelle was ranked first.

⁴⁰ Duguit, ‘Objective Law: IV’, 21(3) *Columbia Law Review* (1921) 242, at 251.

⁴¹ Herrera, *supra* note 30, at 114.

⁴² ‘Si l’esclavage est l’aboutissement dernier de cette loi naturelle d’exploitation, d’autres effets, pour le moins accentués qu’ils soient, en découlent pourtant encore directement. La liste serait infinie qui voudrait énumérer tous les moyens de fausser la juste répartition des produits du travail et prendre le contre-pied de la formule moderne: à chaque membre de la communauté un profit égal à la somme d’utilité qu’il y apporte. Cette formule semble aujourd’hui si juste et si claire, que la discussion roule seulement sur la difficulté de doser les apports, et malgré cela toutes les législations se sont comme appliquées à étouffer son dégagement, et à faire triompher le principe contraire: la loi du plus fort.’ Scelle, *supra* note 4, vol. 1, at 77.

2 A Critique *Avant la Lettre* of International Humanitarianism

Scelle's broad understanding of slavery – or his utopian socialism – was at odds with the sensibilities of international lawyers.⁴³ At the time, slavery was somewhat of a fashionable topic among the nascent international legal profession. European states had recently adopted the 1885 Berlin Conference Act and the 1890 Brussels Conference Act, in which they had declared the slave trade illegal. Many legal scholars, especially doctoral students, were elaborating a progressive narrative in which international law intervened to abolish slavery. For this purpose, they examined the conduct of Spain and other European powers after the arrival of Columbus at Hispanola in 1492.⁴⁴ They contrasted the early slavery practices with 19th-century colonialism and the on-going civilizing mission of Africa. They insisted on the long march undertaken by European states towards the abolition of slavery and the need for the further civilization of 'barbaric' peoples. One example among many is the doctoral thesis that Henry de Montardy defended in the Faculty of Law at the University of Paris in 1906 – that is, the same year as Scelle – under the supervision of Louis Renault. After revisiting the carriage of African captives across the Atlantic and after celebrating the abolition of the slave trade through bilateral and multilateral treaties concluded by European states, de Montardy posits that it would be a terrible mistake to grant Africans absolute freedom. Time and education were needed for the emancipation of those who had sold their own people during the barbarous slave trade. 'Only civilisation can, thanks to its slow but firm penetration, be a solution to the problem of slavery.'⁴⁵

Scelle's thesis has little to do with such work. He does not sensationalize the slave trade's atrocities nor does he present them as an apology for Europe's civilizing mission in Africa. What is more, he does not portray the slave trade as an abnormality that international law would have helped to eradicate in the 19th century. Scelle presents the slave trade more coolly as a legal enterprise. He takes the slave trade to be as much a legal system as a political and economic system. Under his writing, therefore, black slavery did not emerge despite of, or in opposition to, the law. The enslavement of Africans was made possible, was commercialized and was globalized through extensive legal work. This legal work is what constitutes his object of inquiry. Again, his approach contrasts with the plethora of essays that international lawyers were writing – and have continued to write – on the abolition of slavery.⁴⁶ Too often, these studies are self-congratulatory

⁴³ Koskenniemi, *supra* note 8, at 69–70.

⁴⁴ See, e.g., J. Couvé, *La traite au point de vue du droit des gens* (1889); H. Lévy, *La traite des noirs et les Puissances* (1894); H. Quéneuil, *De la traite des noirs et de l'esclavage: La conférence de Bruxelles et ses résultats* (1907); M. Sarrien, *La traite des nègres et le droit de visite au cours du XIXe siècle dans les rapports de la France et de l'Angleterre* (1910); K. Gareis, *Der Sklavenhandel, das Völkerrecht und das deutsche Recht* (1885).

⁴⁵ '[L]a civilisation seule peut apporter par sa pénétration lente, mais sûre, une solution au problème de l'esclavage.' H. de Montardy, *La traite et le droit international* (1906), at 203.

⁴⁶ See, e.g., Barclay, 'Le droit de visite, le trafic des esclaves et la Conférence anti-esclavagiste de Bruxelles', 22 *Revue de Droit international et de législation comparée (RDILC)* (1890) 317; Rolin-Jaequemyns, 'Quelques mots encore sur l'acte général de la conférence de Bruxelles et la répression de la traite', 23 *RDILC* (1891) 560; Fischer, 'The Suppression of Slavery in International Law', 3 *International Law Quarterly* (1950) 28; Schreiber, 'La convention supplémentaire du 4 septembre 1956 sur l'abolition de l'esclavage', *Annuaire*

exercises, stressing the role that international law has played in addressing slavery issues. On the backdrop of such ideological move, Scelle comes in to remind us that slavery was a global legal regime and that we have to deal with it as such.

Is this why Scelle's thesis was sidelined and had limited repercussion among his peers? According to Antonio Tanca, Scelle was awarded a prize for his state thesis.⁴⁷ I have not been able to find any trace of it. Instead, it seems to me that his thesis had limited repercussion and received little recognition from international lawyers. And that, despite Scelle's attempt to trigger interest by publishing a summary of his thesis in the *Revue générale de droit international public* in 1906, which was then translated into English and published in 1910 in the *American Journal of International Law*.⁴⁸

There may be another explanation for this indifference. Indeed Scelle's understanding of black slavery as an epiphenomenon of 'social solidarity' stood out among the gentle civilizers in yet another way. Scelle did not speak of the slave trade 'through a complicated language of humanitarian regret and historical inevitability'.⁴⁹ He did not present the slave trade as an inevitable historical phenomenon that could have been an element of progress if exercised according to some broad principles and humanitarian values. Instead, he saw the slave trade as a form of economic arrangement.⁵⁰ Because of this, Scelle's study offers a critique *avant la lettre* of 'international humanitarianism', expressive of the idea that human beings have obligations to their distant others and should work to reduce their suffering.⁵¹

The preface that Pillet wrote to Scelle's thesis is a good place to start. After denouncing the ways in which Europeans reduced Africans to 'human cattle' that got shuttled from one side of the ocean to the other, Pillet expresses the following regret: '[I]n this huge machinery, we had forgotten only one thing, namely, that we were trading humans and thus that we should have treated them with humanity'.⁵² What is condemned is not the slave trade *per se* but its inhumane application. Pillet is appalled

française de droit international (1956) 547. For recent work, see E. Decaux, *Les formes contemporaines de l'esclavage* (2009). J. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (2011).

⁴⁷ Tanca, *supra* note 6, at 240.

⁴⁸ G. Scelle, 'Une institution internationale disparue: l'Assiento des nègres', 13 *Revue générale de droit international public* (1906) 357. For the English summary, which is the one on which most scholars rely, see note 11 in this article. Could the lack of recognition by international lawyers explain the fact that the third volume of Scelle's work was never published, even though it was announced as such in the introduction to the first volume?

⁴⁹ Koskeniemi, *supra* note 8, at 105.

⁵⁰ The fact that Scelle understood black slavery as part of a larger (and exploitative) economic system is made explicit when he analyses the ramifications of the slave trade in Europe. Up until 1663, the Spanish government administered the slave trade by granting licences to individuals willing to ship slaves. Scelle explains how the massive capital generated by the licensing system trickled down and helped to pay for such things as the king's private debts, the state employees' salaries, retirees' pensions, public work, and so forth: 'If the impurity of that money were to contaminate anything that uses it, there would not be, in today's terms, a cog in the Spanish administration nor a class of the Spanish society that would be untainted.' Scelle, *supra* note 4, vol. 1, at 284.

⁵¹ We know that the 20th century would witness an extensive practice of 'international humanitarianism'. For a critical appraisal, see D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2005).

⁵² His argument is as follows: the inhuman treatment did not start *ab initio*. As Africans began to be brought to the colonies, the Spanish crown saw how lucrative the slave trade could be, and organised it accordingly.

by the conditions under which slaves travelled from Africa to America and by the treatment they received once they stood foot in the colonies. He does not, however, denounce the commercial colonization of the 'New World' through the shipping, enslavement and exploitation of Africans. He seems to suggest that the slave trade would have been an acceptable (though perhaps regrettable) institution so long as slaves would have been treated with humanity. In other words, his feeling of compassion towards the slaves does not lead him to condemn the entire system that was in place. In a subtle way, compassion and repression work together to form what Didier Fassin has recently called a 'compassionate repression'.⁵³

Except for one occasion where Scelle echoes his supervisor's concerns with regard to the lack of humanitarian concerns,⁵⁴ he proves to be very critical of measures taken to 'humanize' slaves. Take the measures adopted by planters in the Caribbean to encourage marital relationships between male and female slaves. These measures were meant to run the plantations more efficiently, says Scelle, outraged; they were meant to pacify angry slaves (as settlers were afraid of an uprising) and to facilitate cheap reproduction of the labour force in the plantations. Can you really expect to obtain such convenient results from the same ones 'whom you have fundamentally deprived of their human quality'?⁵⁵

What is more, Scelle's analysis shows that the emphasis placed on the slaves' humanity did not always work in favour of greater protection. For the slaves' humanness was, at times, precisely the problem. One salient example is the high mortality rates during the Middle Passage, which was a concern for everyone involved in the slave trade for obvious financial reasons. Various regulations were adopted by the Spanish authorities to cover the ships' carrying capacity, the amount of provisions to be brought along and the medical care on board.⁵⁶ A system of bonuses was even established for doctors and captains on ships that arrived in the Americas with what were considered to be low mortality rates. A recurring question concerned slaves who arrived on the American continent severely sick but still alive. In 1693, the Spanish authorities decided that every living slave who arrived in the Americas through the Company of Cacheu had to be counted (that is, had to be deducted from the company's overall allowance), except if the slave died within three days. Let us not be fooled, writes Scelle: given that the company had no incentive to maintain sick slaves alive (as they were unsellable), such a measure was 'highly dangerous for the dying slaves'.⁵⁷

This is when the Spanish failed to treat Africans humanely: '[W]e only saw in the slave trade the most important branch of commerce between the metropolis and its colonies.' Pillet, *supra* note 10, at viii.

⁵³ F. Fassin, 'Compassion and Repression: The Moral Economy of Immigration Policies in France', 20(3) *Cultural Anthropology* (2005) 362.

⁵⁴ After having explained the meaning and scope of *piezas de India*, the unit of counting African slaves in a standardized form, Scelle laments: '[T]his way of treating human merchandise shows how little humanitarian concerns were taken into account. Economically speaking, a slave is less than cattle. For animals are usually sold piece by piece. Here, slaves are sold according to some unit, as mere economic commodities.' Scelle, *supra* note 4, vol. 1, at 506.

⁵⁵ *Ibid.*, at 128.

⁵⁶ For an example, see *ibid.*, at 457.

⁵⁷ *Ibid.*, vol. 2, at 28, n. 2.

Interestingly, the dialectic between compassion and repression reappears – yet in a reverse order – when Scelle analyses the theological discourse on the slave trade. Scelle begins by recalling how much the Roman Catholic Church ‘tried to soften the condition of slaves, to protect them; the Church not only helped enslaved people gain their freedom but it also made sure that free people could not be enslaved. Thanks to its humanitarian and civilizing influence, the Church had a beneficial input on slavery.’⁵⁸ Soon after, however, Scelle emphasizes that the Catholic Church did not advocate for the abolition of slavery. It also failed to condemn the slave trade when the king and many of his subjects turned to the clergy, as doubts of conscience were weighing upon them: were they sinful to enslave humans in Africa, to transport them across the Atlantic and to sell them in America? In 1685, an important controversy arose in relation to an *asiento* contracted with a ‘heretic’ Dutchman, such that Charles II ordered a full-scale investigation of the slave trade.⁵⁹ He asked the Council of the Indies to let him know what theologians and jurists had to say about the legitimacy of the slave trade. Scelle seizes the occasion to recall the legal sources of slavery that had existed under Roman (and Spanish) law until then. The capture or sale of ‘heretics’ was legitimate under five circumstances. Slavery was justifiable by birth, when a slave was born as such; in just wars, when winners enslaved losers; in criminal law, when offenders were punished by losing their freedom; in cases of extreme necessity such as hunger, ‘when parents had to sell their children’; and, finally, by self-enslavement.⁶⁰ Accordingly, the debates surrounding the slave trade concerned not the enslavement of Africans *per se* but the legitimacy of their enslavement – that is, had they been legally or illegally enslaved? Two opinions were held. The first one condemned the slave trade, holding that the system was flawed from the start, given the difficulty in establishing whether or not African slaves were legitimate captives under one of the five legal sources.⁶¹ The second one, largely prevailing, held that African slaves were *prima facie* legitimate captives until proven otherwise.⁶²

Scelle does not hide his disappointment with the decision of the Council of the Indies to go for the second solution and to ignore the first set of arguments. And, yet, he believes that the council itself was not thoroughly convinced by the use of such ‘sophisms’ and ‘specious arguments’.⁶³ At one point in its response to the king, so Scelle argues, the Council of the Indies ‘confessed’ that economic necessity was the only possible justification for the slave trade.⁶⁴ No legal rule or moral principle could be upheld as a justification other than the cruel fact that African slaves were necessary for the

⁵⁸ *Ibid.*, vol. 1, at 92.

⁵⁹ In 1685, the Spanish authorities granted the *asiento* to a Dutch banker from Amsterdam named Coymans. The Council of the Inquisition opposed the measure on the ground that if a Dutch were to receive the *asiento*, Africans would become contaminated with Protestantism and they would spread the ‘disease’ through America. See *ibid.*, at 699–700, 703–750.

⁶⁰ *Ibid.*, at 711.

⁶¹ Scelle recalls the writings of Bartolomé de Albornoz and Tomás de Mercado. *Ibid.*, at 213.

⁶² Scelle details the reasons put forth by the Jesuit Alonso de Sandoval. See G. Scelle, ‘Théories relatives à l’esclavage en Espagne au XVII^e siècle’, *Revue d’histoire des doctrines économiques et sociales* (1912) 200, at 212. This is an extended version of a chapter of Scelle’s thesis: ch. 7, part III, vol. 1.

⁶³ *Ibid.*, at 212.

⁶⁴ Scelle, *supra* note 4, vol. 1, at 726.

'development and maintenance of the colonies'.⁶⁵ Scelle regrets that the Council of the Indies did not state this more explicitly and ultimately preferred to argue for the legitimacy of the slave trade on humanistic grounds. The council assured that the slave trade was also in the slaves' best interests because they were freed ('saved') from cannibal practices and evangelized and raised in the Catholic faith.⁶⁶

Scelle's view of slavery becomes even clearer when he examines the chain of reasoning adopted by Bartolomé de Las Casas in the 16th century. Although the latter is often fondly remembered for his fervent defence of the Indians, he is also well known for his proposals to extend the African slave trade westward. Critics have pointed at him as being responsible for the beginning of the transatlantic slave trade. Scelle protests on repeated occasions: the critics' virulence is misplaced.⁶⁷ It is true that Las Casas advocated for the importation of African slaves in order to alleviate the pressure on the Indians, whose population was decimating, and to make up for the labour force shortage. But Las Casas had initially asked the king to encourage (white) ploughman to come to the Indies, and it is only once this measure failed that Las Casas thought that the settlers should emigrate, at no cost, with their (black) domestic slaves. In short, Las Casas never advocated for the establishment of a commercial slave trade between Africa and America; he did not expect – and could not have expected – black slavery to expand the way it did.⁶⁸ What transpires from Scelle's discussion is how much he identified himself with Las Casas, whose 'good faith' could not be doubted.⁶⁹ Las Casas sincerely tried to protect the Indians based on his 'Catholic sense of human dignity and pity'.⁷⁰ He did the best he could in light of the information he had at his disposal, and he grew to realize and to regret the unintended consequences of his actions. Here, the interplay between compassion and repression takes on an eschatological nature. Scelle sympathizes with Las Casas because he did his best in the given circumstances and hoped for salvation.⁷¹

3 Slavery as a Necessary Evil?

Through his reflections on the role played by Las Casas, Scelle's deep ambivalence *vis-à-vis* black slavery is brought into focus. At the very end of the discussion, he turns to the reader and asks: were Las Casas' propositions not partly excused by 'the necessity requirement and the theory of the lesser evil'?⁷² After all, the colonies' resources had to be extracted for America to prosper, and the Native Americans were decimated and

⁶⁵ *Ibid.*, at 727.

⁶⁶ Scelle, *supra* note 62, at 205, 212.

⁶⁷ See, e.g., Scelle, *supra* note 11, at 619. This is where Angel de Altolaguirre disagrees with Scelle. See Altolaguirre, *supra* note 13, at 343–345.

⁶⁸ Scelle, *supra* note 4, vol. 1, at 134.

⁶⁹ *Ibid.*, at 136.

⁷⁰ Scelle, *supra* note 62, at 204.

⁷¹ Is this not similar to David Kennedy's observation that 'we must act on faith and hope for grace'? Kennedy, *supra* note 51, at 347.

⁷² Scelle, *supra* note 4, vol. 1, at 135.

Europeans proved to be unfit for hard work.⁷³ Who else could have done it? ‘One Negro was worth four [Natives], it was said’.⁷⁴ This is not to say that Scelle morally approved the recourse to black slavery. But surely, you cannot make an omelette without breaking some eggs? What we see here is the uneasy relationship between Scelle’s conception of law and the moral unacceptability of slavery.

On the one hand, Scelle’s realist conception of law deprives him of a normative standpoint from which to criticize the slave trade. If law is based on the ‘natural law of exploitation’, then the legal system will allow some people to exploit others. There is no other way. On the other hand, Scelle refuses to look at the slave trade through the lens of moral indignation – this is what humanitarianism is all about. He considers black slavery to be a necessary evil under the given circumstances. This perspective allows him to make cold-blooded calculations: how was the trade regulated? What were the rationales for such and such measure? How could the system have been improved? How could fraud have been prevented? At one point, Scelle wonders why the Spanish authorities did not ensure a better ‘repartition of the labour force’ among their colonies.⁷⁵ This is not a rhetorical move; it is a managerial question. The same applies to the assertion that ‘from the start, the sugar industry made a horrendous consumption of blacks’.⁷⁶ There is no sarcasm involved; Scelle is concerned about the insatiable need for supply, given the harsh conditions on the plantations and the need for economic growth.

The dangers of such technocratic position are evident, and Scelle is not immune to them. On several occasions, he loses all critical distance and participates in commodifying slaves. While analysing a draft *asiento* that a settler in Vera Cruz had sent to Madrid in 1682, for instance, Scelle pauses and ponders:

The project, undoubtedly interesting, suggested such an easy way to prevent fraud that we are surprised not to have seen it before. The *asentistas* would have been required, upon receiving their Negroes from Dutch factories, to mark them with their own ‘carimbo’, i.e., a hot silver instrument that would leave a mark, depending on the Negroes’ quality, either on their forearms, on their shoulders, or on their backs.⁷⁷

The commodification of slaves is also strengthened by Scelle’s tendency to draw analogies with other types of legal agreements. Take an obligation found in an *asiento* concluded in 1587 that Scelle compares with ‘what we now call leasing or royalties’. The *asentistas* agreed to offer two slaves per year to the Spanish king in the same way ‘our farmers today promise to give their landlords two fat poultry’.⁷⁸ By making such comparison, Scelle is by no means denouncing the slavery system, not even in an ironical mode. He is fully absorbed by his work, meticulously explaining the dispositions found

⁷³ Scelle has no difficulty to write that Native Americans were ‘an inactive, lazy race, showing [such] sluggishness that they preferred death to work’, whereas Europeans ‘were unaccustomed to work, unfitted to endure the climate’. Scelle, *supra* note 11, at 615.

⁷⁴ *Ibid.*, at 615.

⁷⁵ Scelle, *supra* note 4, vol. 1, at 461.

⁷⁶ *Ibid.*, at 165; another example is found at vol. 2, at 102.

⁷⁷ *Ibid.*, vol. 1, at 639.

⁷⁸ *Ibid.*, at 328.

in the successive *asientos*, assessing their strengths and weaknesses and laying down their evolution over three centuries.

I wrote that Scelle viewed black slavery to be a necessary evil under the given circumstances. But what, exactly, are the 'given circumstances'? To answer this question, it may be good to recall that for many 19th-century radical left socialists, exploitation was ambiguously undesirable. Let us consider Karl Marx for a moment.⁷⁹ He regarded the enslavement of African peoples in America to be exploitative and 'a fundamental aspect of rising capitalism'.⁸⁰ There have been debates as to whether Marx conceived of such exploitation as morally wrong, given that his primary concern was to offer a 'scientific' explanation of the cause of exploitation.⁸¹ In any case, he considered that an exploitative system such as capitalism created the seeds of its own destruction. Exploitation of man by man was indispensable, historically speaking, for the revolution to take place – the more exploitation, the more opposition and clashes between the contenting classes. This is *not* how Scelle envisaged the situation. His bourgeois preference for the *status quo* transpires throughout his thesis, and it becomes crystal clear when he states that 'one does not radically change the basis of economic production that has been there for centuries without generating serious disorder, perhaps even cataclysms; in light of this, the statement of the Council of the Indies [on the necessity of African slaves] is justified'.⁸²

This is where Scelle's realist or radical conception of law goes hand in hand with a liberal agenda.⁸³ The young Scelle thinks that solidarity (by which he means the 'natural law of exploitation') on which all legal systems rest is so powerful that we should not be surprised by the 'long and cruel exploitation of human beings that resulted from the conquest of America'.⁸⁴ No matter how laudable, the moral doubts that some enlightened Dominican monks expressed in the 16th century – that is, long before the actual abolition campaigns – could not have prevented or stopped the slave trade. Exploitation was bound to happen for economic progress to take place and, ultimately, for civilization to happen. This is what Scelle meant by the 'given circumstances'. Black slavery was indispensable to achieve economic growth and to spread civilization. That slavery was necessary for History is a premise that becomes visible the moment Scelle refuses

⁷⁹ Utopian socialists such as Louis Blanc and Charles Fourier condemned black slavery as the worst form of exploitation. But the solution had to echo the one foreseen for the (white) proletariat – i.e., the instauration of a social order lying beyond capitalism and made of independent, worker-governed enterprises. In other words, the abolition of black slavery could only take place gradually. See Blanc, 'De l'abolition de l'esclavage aux colonies', *Revue du progrès* (1840) 3; Fourier, 'Remède aux divers esclavages', 5 *La Phalange* (1835) 1.

⁸⁰ 'Without slavery, you have no cotton; without cotton you have no modern industry. It is slavery that has given the colonies their value; it is the colonies that have created world trade, and it is world trade that is the pre-condition of large-scale industry. Thus slavery is an economic category of the greatest importance'. K. Marx, *The Poverty of Philosophy: A Reply to M. Proudhon's Philosophy of Poverty* (1847), at 94, quoted in K. Lawrence, *Karl Marx on American Slavery* (1976). See *contra* Saba, 'Slavery and Capitalism in America: A Review', 1(1) *Theoretical Review* (1977) 210.

⁸¹ For an overview, see Geras, 'The Controversy about Marx and Justice', 150 *New Left Review* (1985) 47.

⁸² Scelle, *supra* note 4, vol. 1, at 726, n. 3.

⁸³ This, again, brings Scelle close to the French utopian socialists of the early 19th century. See critique by Marx and Engels, *supra* note 37.

⁸⁴ Scelle, *supra* note 62, at 201.

to investigate what was made, in Europe, of the goods extracted by African slaves, such as gold and silver. Such an exercise is ‘pointless’, he states; black slavery was certainly abhorrent, but an ‘impartial historian’ would approve it insofar as it allowed for ‘architectural treasures’ in Europe, and any other view on the matter would belong to a ‘revolutionary *communard*’.⁸⁵ In the end, thus, Scelle accepts exploitation not in the name of revolution but, rather, in the name of greater wealth and prosperity.

4 Freedom of Slaves versus Freedom of Trade

Looking back, it is tempting to interpret Scelle’s position as utterly opportunistic. His realist or radical conception of law enabled him to underline the law’s intrinsic role in establishing and in maintaining the slave trade, while his own privileges and lifestyle remained critique proof. Did he really think that brutal and abusive labour conditions had always existed and that we would not be living in our beautiful cities and comfortable houses if it were not for it. That back in those days, someone had to do the dirty work, and that only Africans were ‘strong and fit’ for it?⁸⁶ I am of the opinion that we should avoid this reading; Scelle is by no means a cynical *profiteur*. He is aware of his position’s pitfalls and the thin line between critique and apology: if the exploitation of man by man is unavoidable and if humanitarianism offers no comfort, what shall we do? Can we not at least circumvent the excesses of the slave trade and commercial colonization? Scelle hopes to find a solution in free trade.

In his mind, what considerably burdened and perturbed the commercial colonization of Spanish America is the state’s constant involvement in the matter. We find a clear indication of this when Scelle examines the first expeditions that Sevillian merchants carried out in the early 16th century, as they ventured ‘spontaneously and freely’ from Africa to America.⁸⁷ He concludes with these words: ‘This is how the slave trade began. It goes without saying that it would have continued to develop naturally, in relation to the colonies’ needs, had it remained free.’⁸⁸ But the Spanish government stubbornly attempted to regulate the slave trade in accordance with the ‘colonial pact’, while its actions continuously proved to be counter-productive.⁸⁹

⁸⁵ Scelle, *supra* note 4, vol. 1, at 264.

⁸⁶ Scelle, *supra* note 11, at 615.

⁸⁷ Scelle, *supra* note 4, vol. 1, at 125.

⁸⁸ ‘*La traite espagnole était née: Elle eût sans nul doute suivi son développement naturel, en rapport avec les besoins, si elle fût demeurée libre.*’ *Ibid.*, at 137.

⁸⁹ All commercial relations between European powers and their colonies were governed by the ‘colonial pact’. This meant that all products extracted from Spanish colonies had to be carried upon Spanish vessels to Spain directly, under the lead of Spanish merchants. The latter were invested with a second monopoly that was the logical counterpart of the first: they provided the colonies with all manufactured products that were necessary to them. However, it turned out to be economically disastrous for Spain to keep the trade business with America for itself. The results were ‘fatal’, so Scelle argues: ‘[T]he products of the colonies were bought excessively cheap, as they were in superabundance and had but a single market; on the other hand, the manufactured products of the mother-country reached exorbitant prices, being more insufficient to the demand as the colonies became more extended and more populous.’ Scelle, ‘The Slave-Trade in the Spanish Colonies’, *supra* note 11, at 613.

Scelle's thesis is full of statements about how legal initiatives were doomed to fail from the moment they interfered with the natural laws of commerce. For instance, in 1556, the Spanish king addressed the settlers' concerns about high tariffs by promulgating a *cedula* fixing the maximum selling price of slaves. This immediately gave rise to a plethora of trials, during which Spanish judges had to decide, among others, whether the fixed price did apply to slaves bought, shipped and/or sold during the 10-month lapse between the *cedula's* adoption in Seville and its publication in Mexico. For Scelle, these trials demonstrate 'with unmistakable clarity that a tariff arbitrarily fixed cannot be maintained. Goods prices surely depend on something other than the legislature's will.'⁹⁰

It is worth noting that the French utopian socialists, with whom Scelle shares important premises and political sensibilities, had been rather sceptical about free trade. Proudhon, in particular, had criticized free trade for contributing to the supremacy of the ruling class: 'Given the imperfection of the existing social organism, we see that where free trade becomes the rule, there are just as many poor and rich people as there were before.'⁹¹ As an admirer of Adam Smith, Proudhon believed that competition and free exchange should take place *but* only once society would have been reorganized. The new society would be based on 'mutualism', and it would take the form of an agro-industrial federation.⁹²

Under Scelle's writing, the pull of free trade has taken over such 'utopian' considerations. His thesis can be read as a critique of mercantilism, which included the principle of colonial exclusiveness, and therefore as an ode to free competition and free trade. The importance of *asientos de negros* diminished in the mid-18th century, Scelle explains, when Spain understood that an interventionist role in the economy, especially in foreign trade, was damaging. Why? Because it only encouraged foreign smuggling or interloping to the detriment of the state's own finance. It is upon this realization that Spain liberalized the slave trade and opened the American market. As Scelle argues, '[m]uch more even than that of the liberal economists, it is the proof furnished by smuggling vessels which decided the conversion of the Spaniards to ideas of commercial liberty'.⁹³ Implicit in this statement is the following idea. Spain realized from practical experience that since *salus populi* could not be met by state intervention and legal regulation, it could perhaps be attained by refraining from

⁹⁰ 'Il était clair qu'un tarif aussi arbitrairement établi ne pourrait se maintenir. Le prix des denrées dépend de tout autre chose que de la volonté du législateur.' Scelle, *supra* note 4, vol. 1, at 288. Another example can be given. In 1611, the Council of the Indies granted all trading licences to a Spanish official on the condition that slaves would pass through Seville on their way from Africa to America. The results were disastrous, says Scelle: the requirement for vessels to come through Seville was financially burdensome and led to dramatic mortality rates. As a result, the fraud the Council had hoped to circumscribe in America grew in unprecedented ways, and the various *cedulas* promulgated to fight contraband back did nothing to remedy the situation: 'An excess of regulation was therefore equivalent to no regulation at all' (at 421).

⁹¹ P.-J. Proudhon, *Système des contradictions économiques* (1846), vol. 2, at 332.

⁹² See Castleton, 'Un inédit de Pierre-Joseph Proudhon: Après Karl Marx, pourquoi lire un inédit de Pierre-Joseph Proudhon?', 3(43) *Cités* (2010) 127. Charbit, 'Proudhon et le piège malthusien', 1(116) *Cahiers internationaux de sociologie* (2004) 5.

⁹³ Scelle, 'The Slave-Trade in the Spanish Colonies', *supra* note 11, at 660.

state intervention and regulation. This is where Scelle's narrative comes close to Adam Smith's construction in the *Wealth of Nations*.⁹⁴ Scelle believes that everyone involved in the slave trade would have been better off if ruled by the natural laws of human society directly, without the distorting effects of ambitious rulers and corrupted officials.

The problem is obviously that 'everyone involved in the slave trade' excludes the slaves themselves.⁹⁵ They are leftovers from the *salus populi*; they are out of the equation or, rather, they are the implicit but necessary condition upon which everyone else's business could prosper.⁹⁶ Throughout his analysis, Scelle endorses the slaves' perspective only sporadically; most of the time, he oscillates between only two perspectives: that of maximizing the contractors' profit⁹⁷ or that of obtaining an affordable price for the settlers.⁹⁸ That Scelle is blind to the lives and interests of slaves is supported by the fact that he has no problem to say that both America and Europe benefited from the liberalization of the slave trade. On the one side, America would not have been able to survive, let alone to prosper, under the 'political and economic delusion' that colonial exclusivism was.⁹⁹ On the other side, all European nations found in America a 'market' to receive their products and a 'society' to develop their aptitudes.¹⁰⁰ The argument that a 'free slave trade' is a win-win situation for America and Europe is made at the expense of another continent – Africa – the great absentee in Scelle's observations.

⁹⁴ A. Smith, *Wealth of Nations* (2003 [1776]).

⁹⁵ Consider the following example. In 1676, Sevillian merchants, finding the prices that shipbuilders charged for freight too high, asked the state to legislate on the matter. After criticizing the government's attempt to fix freight rates, Scelle makes a comment indicative of the fact that he takes everyone's interests into account – except for those most directly affected by the transportation: 'The simple and effective means to ensure fair and balanced freight rates would have been to have no tonnage limitation at all. There is no doubt that the shipbuilding industry would have boomed upon the increasing demand for ships, so that freight rates would have fallen. This would have enabled the Sevillian merchants to ship more goods and to make more money in the Americas, where abundant supply would have in turn lowered excessive prices of goods. A simple and liberal measure would thus have reconciled all at once the apparently conflicting interests of Sevillian merchants, shipbuilders, and American consumers.' Scelle, *supra* note 4, vol. 1, at 596, n. 1.

⁹⁶ For a powerful critique, see Marks, 'Exploitation as a Legal Concept', in S. Marks (ed.), *International Law on the Left: Re-Examining Marxist Legacies* (2008) 281, at 304–305.

⁹⁷ Take Scelle's explanation for the creation of a general warehouse in America where slaves would be introduced first, before being dispatched to specific locations. He says that the long travel between Africa and the Indies and the spread of contagious diseases caused many slaves to die along the way or to be in terrible condition when they arrived in the Americas. If newly arrived slaves were brought immediately to new ports or to inland markets, the *asentista* 'will be ruined'. There must be a place for 'refreshing' and 'acclimatizing' slaves in order 'to sell them at a better prize'. *Ibid.*, at 29. For another example, see Scelle, *supra* note 4, vol. 1, at 592.

⁹⁸ After having explained the difficulties for merchants to obtain permission from the Asiento Company to trade slaves in French Antilles, and the measures taken to facilitate the company's trade, Scelle exclaims sarcastically: 'What a magnificent result from the settlers standpoint ... it is obviously that ... the negroes, which are already very rare, would become all the more expensive!' Scelle, *supra* note 4, vol. 2, at 251.

⁹⁹ Scelle, *supra* note 11, at 660.

¹⁰⁰ *Ibid.*, at 661.

What is equally striking is Scelle's understanding of freedom. He is fascinated by the strength or what he calls the 'naturalness' of interloping: the latter could not be stopped, no matter how much the government intervened to prevent or to hinder it.¹⁰¹ When the Council of the Indies suspended all trade between the metropolis and its American colonies in 1640, the colonies received no black labour through official channels; however, Dutch interlopers generously furnished them: 'Widespread smuggling was such that it could be called *de facto* freedom of commerce; it should have been allowed to continue in its own right.'¹⁰² In other words, if interloping could not – and ought not – be combatted, it is because it was nothing other than freedom of commerce itself.¹⁰³ Market freedom was so important and attractive for Scelle that it prevailed over and completely overshadowed the quest for freedom from slavery.

Conclusion

Why read and review Scelle's state thesis 110 years after its publication? I can think of at least three reasons. First, it complicates our image or understanding of Scelle's intellectual and political journey. The social conception of law he endorsed in his early career contrasts with his later view. Furthermore, his study of the slave trade reveals a historically informed and broad interdisciplinary perspective. It is thus reductive to associate Scelle simply with the concept of *dédoublement fonctionnel* and his reflections on 'international constitutional law'. These findings invite us to look further into the trajectory of his ideas. When did his conception of solidarity change? For which reasons and at what point did he become a social reformer? To answer these questions requires more research. But World War I clearly had an impact on him. From 1914 to 1918, Scelle served in the French army, mainly as a legal expert. From that moment onwards, he abandoned the language of political economy; his critique of statehood became intertwined with the quest for world peace.¹⁰⁴

Second, Scelle's state thesis gives us an occasion to explore the meaning and ambivalences of a certain left consciousness that is rarely brought to the fore in

¹⁰¹ See, e.g., Scelle, *supra* note 4, vol. 1, at 491; vol. 2, at 563, n. 3.

¹⁰² *Ibid.*, vol. 1, at 491. Scelle rigorously condemns the decision to suspend all trade: such 'radical measure' was doomed to fail on the basis that 'it necessarily follows from the prohibition to trade slaves that settlers would complain or engage in smuggling activities'. *Ibid.*, at 483.

¹⁰³ At the end of the 18th century, once the slave trade was liberalized, it meant that interloping was no longer combatted. In Scelle's words, it was 'raised as a noble institution'. *Ibid.*, vol. 2, at xxiv.

¹⁰⁴ Scelle wrote, 'We must deliberately and definitively reject the notion of sovereignty, for it is false and it is harmful', see G. Scelle, 'Une ère juridique nouvelle', *La paix par le droit* (July–August 1919), at 297–298. The Peace through Law Association (Association de la paix par le droit) was a French pacifist organization established in the last quarter of the 19th century. It was active in the years before World War I and continued to promote its cause throughout the inter-war period. Scelle became a prominent member and frequently wrote in the journal in the 1920s and 1930s. He also wrote that that the First War War had been 'the greatest event recorded by History since the fall of the Roman Empire'. See G. Scelle, *Le pacte de la Société des Nations et sa liaison avec le traité de Paix* (1919), at 6.

our discipline. My ambition in this article has been to use Scelle as a case study to account for a social-utopian sensibility endorsed by a French radical international lawyer at the turn of the 20th century. What did his position allow for? Against whom was he writing? What were his blind spots? I have shown that Scelle's realist conception of law provided him with a broad understanding of slavery, which encompassed what we would now call forms of 'forced labour'. What is also striking about Scelle's approach is his rejection of the humanitarian sentiment, or outcry against slavery, on the basis that it limited the range of issues to be addressed. He conceived the slave trade more placidly as a form of economic arrangement in which law played a central role. As a result, he was able to analyse the evolution of the slave trade's legal regime through socio-economic computation. But such an analysis came with a dark side. With an astonishing liberal confidence, Scelle drew attention to the power of 'freedom' understood not as freedom from slavery but, rather, as freedom to commerce. His main argument consists in saying that the evolution of *asientos de negros* resulted from free trade. No matter how hard Spanish authorities fought to keep the slave trade within their realm, protectionism was doomed to fail. Free trade appears here as a meta-historical force that led to the 'internationalisation' of *asientos*.¹⁰⁵

At the time Scelle wrote his thesis, national protectionism was on the rise. The Méline tariffs of 1892 had been meant to protect French industries as well as agricultural products against foreign competition. The Third Republic had also converted to a protectionist colonial trade policy from 1873 onwards, through the adoption of differential tariffs in West Africa.¹⁰⁶ In this sense, Scelle's celebration of free trade may be seen an anti-establishment move. But this move did not come with a condemnation of colonialism. What did the young Scelle think of the extent to which colonial powers relied on forced labour or, in his terminology, on slavery? It is difficult to conceive that Scelle was so thoroughly ingrained in France's imperial culture to be blind to the ideological work undertaken to cover the renewed exploitation of Africans under the 'mission to civilize'.¹⁰⁷ Was the hubris of science so pervasive that he shared the 'scientific' belief in the white man's superiority and the correlation that European civilization was the model for all humankind?¹⁰⁸ Or did he understand the colonial system of forced labour as a regrettable and yet inevitable

¹⁰⁵ Scelle, *supra* note 4, vol. 2, at 158.

¹⁰⁶ The move to protectionist policies was, among others, a result of pressure from French industries, which had difficulty to compete with British products in world markets. See Newbury, 'The Protectionist Revival in French Colonial Trade: The Case of Senegal', 21(2) *Economic History Review* (1968) 337. A. Girault, *The Colonial Tariff Policy of France* (1916), at 81–84. Historians have shown that this 'tariff factor' played a significant part in Britain's readiness to make territorial acquisition in the early 1880s. See I. Wallerstein, *Africa and the Modern World* (1986).

¹⁰⁷ For a thorough analysis of the work done in the Third Republic to raise public awareness about the necessity and legitimacy of the colonial enterprise and maintenance of the Empire, see P. Blanchard, S. Lemaire and N. Bancel (eds), *Culture coloniale en France: De la Révolution française à nos jours* (2008).

¹⁰⁸ See Petitjean, 'Science and the "Civilizing Mission": France and the Colonial Enterprise', in B. Stuchtey (ed.), *Science across the European Empires: 1800–1950* (2005) 107.

aspect of liberal colonialism? These questions bring me to the third reason for reading past work: it can act as a mirror. It is difficult for us to make sense of Scelle's denial or oblivion of the freedom from slavery. What we see, with historical insight, is the failure of his approach. But failure is interesting. The hopes and pitfalls of Scelle's approach are relevant to anyone who intervenes in a world structured by a radically unjust distribution of power and wealth.