

**Title: Slavery in International Law (Chap 3 & 6)**  
**Author: Jean Allain, Professor of International Law, Queen's University Belfast.**  
**Year: 2012**

**Source URL:**

**[https://www.researchgate.net/publication/301671340\\_6\\_-\\_Enslavement\\_in\\_International\\_Criminal\\_Law\\_-\\_from\\_Slavery\\_in\\_International\\_Law](https://www.researchgate.net/publication/301671340_6_-_Enslavement_in_International_Criminal_Law_-_from_Slavery_in_International_Law)**

# SLAVERY



## Chapter 3

For most of human history slavery has been a basis of society. All great civilisations developed on the shoulders of slaves. Today, wherever one lives, an exercise in working back in time would find inevitably traces of a by-gone era where slavery persisted in both the building of public infrastructures and in lives of owners made easier by the drudgery of slaves. Over the last two hundred years, an international movement developed which, in law, abolished the slave trade, slavery and a number of lesser servitudes: forced labour, debt bondage, serfdom, servile marriage, and child trafficking. The most recent manifestation of this move to end human exploitation has been the introduction, in 2000, of the United Nations Palermo Protocol, a legal instrument which requires the suppression of the trafficking in persons where the ultimate purpose is their exploitation.

As we have seen in the previous Chapter, through much of the Nineteenth Century the abolition of the slave-trade at sea came about by an active campaign by the United Kingdom, utilising its hegemony over the seas to press forward a foreign policy objective which resulted, not only in the legal abolition of the slave-trade, but in its wholesale end. In its wake, the first half of the Twentieth Century would see the legal abolition of slavery and lesser servitudes, with European colonialism as the engine to both the legal abolition and the suppression of slavery where it continued to persist; and the regulation of forced labour and other servitudes so as to allow for its ‘civilising mission’ to bear fruit.<sup>1</sup> In the latter half of the Twentieth Century, the convulsions of the end of colonialism and the emergence of newly independent States threw into confusion the regime of human exploitation by confounding the legal terms of slavery and servitude with the politically-charged term ‘slavery-like practice’ so as to attack apartheid. Despite the perplexity caused by this term which created a subjective area that often ran roughshod over the legal; a parallel movement was taking place in which the terms ‘slavery’, ‘servitude’, and ‘forced labour’, were being incorporated into international human rights law, both universally within the International Covenant on Civil and Political Rights, and regionally within constitutive instruments of the African, European, and Inter-American human rights systems.

As the Twentieth Century turned to the Twenty-First Century it should be recognised that slavery and lesser servitudes had, by and large, been both abolished in law and ended as a State-sanctioned institution. Yet, it became apparent as the Cold War era gave way to an era of neoliberal global economics that human exploitation, while outlawed, was flourishing. Slavery, forced labour, debt bondage and other types of exploitation had reemerged, this time at the retail level, as an illegal activity benefiting private actors – individuals and businesses.

This growing awareness of a ‘New Slavery’ was brought to the fore by the work of Kevin Bales; while the move to address contemporary slavery saw history repeating itself.<sup>2</sup> We thus find ourselves in a ‘neo-abolitionist era’ one that, like its British predecessor, finds its roots in religious convictions which are backed by coercive legislation imposed by the most dominant State of our times. Just as Quaker activism and Anglican evangelicalism laid the foundation

---

<sup>1</sup> See Jean Allain, “Slavery and the League of Nations: Ethiopia as a Civilised Nation”, *Journal of the History of International Law*, Vol. 8, 2006, pp. 213-244.

<sup>2</sup> See Kevin Bales, *Disposable People: New Slavery in the Global Economy*, 1999; Kevin Bales, *Understanding Global Slavery: A Reader*, 2005; Kevin Bales, *Ending Slavery: How We Free Today’s Slaves*, 2008; and Kevin Bales and Ron Soodalter, *Slave Next Door: Human Trafficking and Slavery in America Today*, 2010.

for the British abolitionist campaign which would first end the transatlantic slave trade and later lead to the legal abolition of slavery; so too should we recognise the role of the ‘Religious Right’ in the United States of America and its influence on the American Congress in passing its anti-trafficking legislation.<sup>3</sup> Just as British dominance of the seas during the Nineteenth Century allowed it to force a network of bilateral ‘right to visit’ treaties which effectively authorised it to police the seas and end the slave trade at sea; so too has the 2000 *Victims of Trafficking and Violence Protection Act*, and later acts of the United States of Congress, forced countries to act to end not only trafficking in human beings, but also slavery and lesser servitudes.<sup>4</sup>

While the United States of America may find itself the *de facto* enforcer; it is enforcing transnational criminal law in the guise of 2000 United Nations Palermo Protocol – the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime. The Palermo Protocol sets out a definition of trafficking in persons which, in essence, renews obligations previously undertaken to suppress domestically – most important for the purposes of this Chapter – slavery, but also other types of exploitation. Article 3(a) of the Protocol reads:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

The dominant position which the United States of America holds has allowed it to require a large number of States to pass legislation that criminalise the trafficking of persons for various purposes including slavery. Just as in its most recent incarnation, the *William Wilberforce Trafficking Victims Protection Re-authorization Act of 2008*, the original 2000 legislation makes it “the policy of the United States not to provide non-humanitarian, nontrade-related foreign assistance to any government that (1) does not comply with minimum standards for the elimination of trafficking; and (2) is not making significant efforts to bring itself into compliance with such standards”.<sup>5</sup> As a result, countries have turned their thoughts not only to trafficking but also to criminalising the types of exploitation noted in the definition of trafficking.

Beyond this rather clear influence of the United States of America in driving this neo-abolitionist agenda, the Twentieth Century has witnessed the emergence of international criminal law, in large part at the prompting of the United States, the “driving force behind the

---

<sup>3</sup> See Christopher Leslie Brown, *Moral Capital*, 2006; and Ronald Weitzer, “The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade”, *Politics Society*, Volume 35, 2007, pp. 447-475.

<sup>4</sup> See Section 110, United States, Department of State, *Victims of Trafficking and Violence Protection Act*, 28 October 2000; which threatens non-complying States with the prospect of losing foreign aid, multilateral assistance including the United States voting against such States at the World Bank and IMF.

<sup>5</sup> Section 110, *id.*

These minimum standards related to legislating criminal liability for those involved in trafficking in person and requires that the State “should make serious and sustained efforts to eliminate severe forms of trafficking in persons”. In 2011, the US Department of State has placed fifty-eight States on its Special Watch List, as it was deemed that these States, *inter alia*: “(a) had a very significant or significantly increasing number of trafficking victims, [and] (b) had failed to provide evidence of increasing efforts to combat TIP from the previous year. [...]”. See: United States, Department of State, Trafficking in Persons Interim Assessment Report, 5 April 2011, <http://www.state.gov/g/tip/rls/reports/2011/160017.htm>.

establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda”.<sup>6</sup> These *ad hoc* Tribunals, served as a testing ground and cleared the way for the creation, in 2002, of the International Criminal Court.<sup>7</sup> While the United States has remained hostile to becoming party to the Statute of the International Criminal Court, it has been willing to act instrumentally, in using its influence within the United Nations Security Council to get the Court to indict the leaders of Sudan and Libya and, in so doing, has furthered its foreign policy objectives. Where the International Criminal Court gathers importance for our purposes is that, for the one-hundred and twenty States party to the Statute of the International Criminal Court, these have had to incorporate so-called ‘implementing legislation’ so as to allow the Court to function in a way complementary to their domestic legal orders. Part of that legislation has related to the crimes under the jurisdiction of the International Criminal Court and for a number of States, including Burundi, Malta, Niger and Romania, this has included the incorporation of ‘enslavement’ into their domestic order.

Thus, the neo-abolitionist era in which we find ourselves in seeks to end human exploitation by emphasising law; but not simply abolition by incorporation of domestic legislation. This new push goes further, as it requires the suppression of slavery by legal action, by holding those to account for contemporary forms of slavery by their prosecution in criminal law.

Such prosecutions would be simple enough task, but for the fact that we do not, as yet – rather curiously – have an overarching consensus of what the term ‘slavery’ means in law.

This Chapter takes on this challenge and sets out a unified approach to understanding what ‘slavery’ means in law, thus providing the legal certainty needed to build a case against those that would enslave others. It might be added as a corollary that such legal certainty would also provide for the integrity of the criminal process as it would allow for the defence of a client against charges of slavery, while allowing judges at the trial and appellate level to feel confident that the parameters of slavery are such as to ensure that justice is served. This unified approach takes the definition of slavery as first elaborated in 1926 and demonstrates how it captures the essence of what we might recognise as the lived experience of a slave today. While the definition of slavery has, in the past, been contentious, the approach now put forward creates an understanding of slavery which is both internally consistent with a reading of the 1926 definition while being consonant with a sociological understanding of what constitutes contemporary slavery.

By anchoring a definition which captures the essence of what is recognised on the ground as slavery with the established, international, legal definition of slavery as first set out in 1926, we provide a foundation not only for legal cases to move forward, but for a shared understanding of slavery across the social sciences. This is much needed within the context of the study of contemporary slavery where the very basis of what is being studied is called into question by an inability, across disciplines or amongst researchers, to settle the most fundamental of questions: what is ‘slavery’? The 1926 definition is the authoritative definition of slavery; as such, a reading which is consistent with the lived experience of contemporary slaves allows us to escape from the definitional quagmire, by setting out a firm foundation from which to establish a shared understanding of what constitutes slavery in a contemporary situation where the legal status no longer exists but the *de facto* situation persists.

## **The Legislative History of the Definition of Slavery**

---

<sup>6</sup> John Cerone, “Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals”, *The European Journal of International Law*, Volume 18, 2007, p. 288.

<sup>7</sup> See, William Schabas, *An Introduction to the International Criminal Court*, 2011, p. 13.

Coming from an international law perspective, most jurists would identify the intersection between slavery and international law with the dicta of the International Court of Justice in the 1970 *Barcelona Traction* case. In that case, which related to diplomatic protection of shareholders by Belgium as against Spain, the Court noted:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.<sup>8</sup>

This pronouncement, which may be one of the most well-known of the International Court of Justice, need not detain us too long.

James Crawford places the dicta in context, noting that the Court was “in effect apologizing for getting it wrong in 1966”; when it determined that Ethiopia and Liberia did not have standing to challenge apartheid South Africa’s continued presence in Namibia.<sup>9</sup> While the International Court recognised that States could be held international responsible for breaches of obligations owed to the international community as a whole, the issues of such responsibility being invoked where slavery is concerned has not, in the intervening years, come to pass.

Just as the protection from slavery is recognised as creating obligations *erga omnes* – obligations which, if breached, allow any State to deem itself injured and thus invoke State Responsibility<sup>10</sup> – so too is slavery recognised as being a *jus cogens* norm.<sup>11</sup> That slavery has attained the level of a *jus cogens* norm, that is: a peremptory norm of international law, means that when violations transpire, they carry with them what in domestic law might be termed strict liability. That is to say that no justification could preclude State Responsibility for a breach of an obligation tied to slavery.<sup>12</sup> One further manifestation of slavery as a ‘super-norm’ is recognised, this time in international human rights treaties where – and leading on from its *jus cogens* nature – slavery is deemed to be a non-derogable right, wherein the prohibition against slavery is exempt from being suspended in times of war or national emergency.<sup>13</sup> The link between a *jus cogens* norm and a non-derogable right is that no exception is made for the failure to respect, in this case, the norm prohibiting slavery.

---

<sup>8</sup> International Court of Justice, *Case concerning The Barcelona Traction, Light and Power Company, Limited*, 5 February 1970, p. 32.

<sup>9</sup> James Crawford, “Multilateral Rights and Obligations in International Law”, *Collected Courses of the Hague Academy*, Vol. 319, 2006, p. 410.

<sup>10</sup> See Article 42(b), United Nations, General Assembly, International Law Commission, Articles on State Responsibility. UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001.

<sup>11</sup> See United Nations, General Assembly, International Law Commission, Draft Articles on the Law of Treaties with Commentary, 1966, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 248. While no examples of *jus cogens* norms are included in the provisions of Articles 53 or 64 of the 1969 Vienna Convention on the Law of Treaties, members of the International Law Commission in drafting the Convention set out “some of the most obvious and best settled rules of *jus cogens*” as being “trade in slaves, piracy or genocide”.

<sup>12</sup> See Articles 53 or 64 of the 1969 Vienna Convention on the Law of Treaties and Articles 26, 40 and 50 of the International Law Commission 2001 Articles on State Responsibility.

<sup>13</sup> The term ‘super-norm’ is taken from Crawford, n. 9, p. 452.

Article 4 of the 1966 International Covenant on Civil and Political Rights, set out the possibility of derogations from the Covenant, then at Article 4(2) list a number of non-derogable rights including Articles 8(1 and 2) which reads: “1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude.” Article 4, reads in part:

While general international law and international human rights law have provided this super-normative armour to slavery, it must be said that very little movement has taken place to actually protect individuals from slavery within either of these regimes. The catalyst that has brought slavery back into the limelight in the Twenty First Century is, as already mentioned, international criminal law which, in its wake, has made international human rights courts sit up and take notice. The lack of true engagement with slavery in any sub-field of international law during much of the Twentieth Century has meant that we remain at the most fundamental stages of developing an understanding of what constitutes slavery in law. It is with this in mind that we turn to consider what, in law, constitutes slavery.

The definition of slavery which was developed in the 1926 Slavery Convention remains the accepted definition of slavery in international law. This is so, as the definition was reaffirmed when States once more opened it to negotiation in their elaboration of both the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery and the 1998 Statute of the International Criminal Court. In both instances, the definition was not modified in substance, its reproduction having been deemed an accurate definition of the term. That said, in seeking to understand the provisions of the 1926 definition of slavery, the negotiations leading to the 1956 Supplementary Convention and the 1998 Rome Statute are instructive as the provisions related to the interpretation of legal instruments set out in the Vienna Convention on the Law of Treaties makes plain, such “subsequent agreement” provides context which “shall be taken into account” when interpreting or applying the provisions of, in this case, the definition of slavery.<sup>14</sup>

The definition itself emerges from the work the Temporary Slavery Commission, a body of independent experts that examined issues of what would be considered today ‘human exploitation (so: the slave-trade, slavery, servitude, forced labour, etc.) from 1924 to 1926. The work of the Temporary Slavery Commission is very much in evidence in the DNA of both the 1926 Slavery Convention and the 1956 Supplementary Convention. And yet, as the French Member of the Temporary Slavery Commission, Maurice Delafousse, wrote in private correspondence to his British counterpart, Lord Frederick Lugard, “I was, like you, rather surprised at the line adopted [...] regarding the Slavery Convention. As the matter has been agreed to, little remains of the work of the Temporary Commission except your idea of an international convention”<sup>15</sup>. This is so, as much of the work of the Temporary Slavery Commission focused on lesser servitudes, while the 1926 Slavery Convention was, in the main, fixed on slavery (and the slave-trade). The imprimatur of the 1926 Slavery Convention was given to it by a man-of-State, Robert Cecil – Viscount Cecil of Chelwood, the son of British Prime Minister Salisbury and winner of the Nobel Peace Prize – who acted as Rapporteur and marshalled States towards accepting the 1926 Slavery Convention. It was he who, on 22 September 1925, proposed a definition which would ultimately become Article 1(1) of the 1926 Convention<sup>16</sup>:

---

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11 ,15, 16 and 18 may be made under this provision. [...]

<sup>14</sup> Article 31(3)(a), Vienna Convention on the Law of Treaties, 1969.

<sup>15</sup> See Delafousse to Lugard, 16 November 1925, Papers of Baron Lugard of Abinger, Box 102/1, Folio 31, Rhodes House Library, Oxford. Translated from the French.

<sup>16</sup> See League of Nations, Slavery, A.VI/SC1/ Drafting Committee/14. (this document number having been pencilled out and replaced with A.VI/6.1925), 24 September 1925; as found in Folder R.67.D.46214 entitled *La*

‘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>17</sup>

While attempts were made to include lesser servitudes into the 1926 Convention, these were objected to in the main by the Republic of South Africa, which resulted in the deletion of provisions so as to make clear that what was being abolished was slavery as defined in Article 1(1) of the 1926 Convention.<sup>18</sup> To this end, Viscount Cecil in his Report to the Assembly of the League of Nations stated that the obligations which flowed from the 1926 Convention where slavery was concerned were “to bring about the disappearance from written legislation or from the custom of the country of everything which admits the maintenance by a private individual of rights over another person of the same nature as the rights which an individual can have over things”.<sup>19</sup> In seeking to emphasise the difference in legal terms between slavery as defined by the Article 1(1) of the 1926 Slavery convention and lesser servitudes, the successor to the Temporary Slavery Commission, the League of Nations Committee of Experts on Slavery made plain that one had to look to the substance of a situation to determine “whether it amounts to ‘slavery’ within the definition of the Slavery Convention”, and that whatever form a practice might “take in different countries – is not ‘slavery’ within the definition set forth in Article 1 of the 1926 Convention, unless any or all the powers attaching to the right of ownership are exercised by the master”.<sup>20</sup>

During the early years of the United Nations, the issue of slavery was once more considered, this time by the United Nations *Ad Hoc* Committee on Slavery which, in 1950, was tasked with answering a number of questions including: “Is the definition of slavery in Article 1 of the [1926] Convention satisfactory?”.<sup>21</sup> In its 1951 Report, the *Ad Hoc* Committee on Slavery ultimately decided “that the definition of slavery [...] contained in Article 1 of the International Slavery Convention of 1926 should continue to be accepted as accurate and adequate”. That said, the Committee called for the creation of a new legal instrument dealing with lesser servitudes, as it recognised that there had been “rather loose

---

*question de l’esclavage: Discussions, y relatives, de la VIe Assemblée*, 1925, where it reads: “Amendments proposed by Lord Cecil to the text of draft Convention adopted by the Drafting Committee of the Sub-Committee of the VIth Commission (Document A.VI/S.C.I/ Drafting Committee 12 (1))”.

<sup>17</sup>League of Nations, Sixth Committee, Sub-Committee, Drafting Committee Slavery: Synopsis of the Convention (with handwritten amendments so as to be re-entitled Sixth Committee, Slavery: Synopsis of the Convention), A.VI/S.C.I/ Drafting Committee/12(1) Revised (this document number having been pencilled out and replaced with A.VI/5.1925, 22 September 1925); as found *id.*

<sup>18</sup> See Jean Allain, “The Definition of Slavery in International Law”, *Howard Law Journal*, Vol. 52, 2009, pp. 245-251. Note the following consideration by the Republic of South Africa:

That definition puts as the test of slavery the status or condition of a person over whom all or any of the powers attaching to the right of ownership are exercised. In other words, a person is a slave if any other person can, by law or enforceable custom, claim such property in him as would be claimed if he were an inanimate object; and thus the natural freedom of will possessed by a person to offer or render his labour or to control the fruits thereof or the consideration therefrom is taken from him.

League of Nations, Draft Convention on Slavery, Replies of Governments, Reply from the Government of the Union of South Africa, A.10(a).1926.VI, 22 July 1926, p. 5; as found in Publications of the League of Nations, VI.B.Slavery.1926, VI. B. 3.

<sup>19</sup> League of Nations, Slavery Convention: Report presented to the Assembly by the Sixth Committee, A.104.1926.VI, as found in Publications of the League of Nations, VI.B.Slavery.1926, VI. B. 5, 24 September 1926, pp. 1-2.

<sup>20</sup> League of Nations, Slavery: Report of the Advisory Committee of Experts, Third (Extraordinary) Meeting of the Advisory Committee, C.189(I). M.145.1936, VI, 13-14 April 1936, pp. 27 and 25.

<sup>21</sup> United Nations, Economic and Social Council, Notes on the Terms of Reference of the Ad Hoc Committee on Slavery (Memorandum submitted by the Secretary-General), UN Doc. E/AC.33/4, 3 February 1950, pp. 3-4.

[...] usage of the term ‘slavery’” and there was “little prospect of formulating a definition of it which will be so precise and comprehensive as to embrace all types of *servitude* in all societies”. “As a result of its examination of this question”, the *Ad Hoc* Committee on Slavery “decided that there is not sufficient reason for discarding or amending the definition of slavery contained in Article 1 of the International Slavery Convention of 1926”.<sup>22</sup> In considering the overall issue, including the reports of the *Ad Hoc* Committee on Slavery, the United Nations Secretary-General determined, in 1953, that:

It would appear from a study of the International Slavery Convention of 1926, and of the preparatory work leading to its adoption, that the obligations of the Parties therefore extended to all institutions or practices, whether or not designated as ‘slavery’, provided that, as stated in Article 1 of the Convention, ‘any or all of the powers attaching to the right of ownership are exercised’ over a person in these institutions or practices.<sup>23</sup>

In that same 1953 Memorandum, the UN Secretary-General sought to analyse the 1926 definition of slavery and consider its fundamental element, that of: ‘the powers attaching to the right of ownership’. For the Secretary-General it could “reasonably be assumed that the basic concept” which the drafters of the definition “had in mind was that of the authority of the master over the slave in Roman law, the ‘*dominica potestas*’. This authority was of an absolute nature, comparable to the rights of ownership, which included the right to acquire, to use, or to dispose of a thing or of an animal or of its fruits or offspring”.<sup>24</sup> For the Secretary-General, the exercise of such powers attaching to the right of ownership, were manifest in the following characteristics:

1. the individual of servile status may be made the object of a purchase;
2. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law;
3. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;
4. the ownership of the individual of servile status can be transferred to another person;
5. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;
6. the servile status is transmitted *ipso facto* to descendants of the individual having such status.<sup>25</sup>

These considerations fed into the drafting of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which, on the one hand, moved to abolish four conventional servitudes which had originally been identified by the League of Nations Temporary Slavery Commission – debt bondage, serfdom, servile marriage, and child trafficking – while; on the other hand, acknowledging that these servitudes might also be deemed slavery as being “covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926. While the 1956 Supplementary Convention set out the definitions of these four servitudes, it also reproduces in substance the definition of Article 1(1) of the 1926 Convention, as Article 7(a) of the Supplementary Convention, which reads:

<sup>22</sup> *Id.*, pp. 6-7. Emphasis added.

<sup>23</sup> United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, p. 28.

<sup>24</sup> *Id.*, p. 27.

<sup>25</sup> *Id.*, p. 28.



‘Slavery’ means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and ‘slave’ means a person in such condition or status.

Where the 1998 Statute of the International Criminal Court is concerned, we see a convergence between ‘slavery’ as conceived in general international law through the 1926 and 1956 Conventions and the international crime of ‘enslavement’, where ultimately, the crime against humanity of enslavement is defined, once more in substance, with recourse to the 1926 definition of slavery; thus the Statute of the International Criminal Court reads, *inter alia*:

‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.<sup>26</sup>

This definition came about as some delegates of the 1996 Preparatory Committee on the Establishment of an International Criminal Court “expressed the view that enslavement required further clarification based on the relevant legal instruments”. This was so as considerations of international crimes from the Nuremburg Trials onwards had, on occasion, lumped together under the heading of enslavement, both slavery and lesser servitudes.<sup>27</sup> Ultimately the text which travelled to Rome for the 1998 United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court included the crime against humanity of enslavement, though it was left undefined; while “slavery and the slave trade in all their forms” remained a live option as a war crime.<sup>28</sup> While this option was not taken up during the Rome Conference, in the final week of negotiations the Jordanian Delegate stated that “following consultations with other delegations, he proposed the following refinement of the definition of enslavement”: “‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership of a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”; which was then adopted.<sup>29</sup>

Thus the definition of slavery as first elaborated in the 1926 Slavery Convention remains the normative understanding of what is considered slavery in international law. Through the considerations of both the League of Nations era and through the work of the United Nations, a picture emerges of the content of the definition of slavery, based on a consideration of the substance of a practice versus its form. In other words, it is not enough to call a practice debt bondage or child soldiering; instead one must look past what it is called (thus the form), and look to individual cases and what is actually taking place. If the substance of the practice manifests the exercise of any or all of the powers attaching to the right of ownership, then a case of slavery is present. This point should be driven home by the realisation that the 1926 Slavery Convention seeks to protect against the possibility of forced labour ‘developing into conditions analogous to slavery’; and with reference to the 1956 Supplementary Convention which requires the abolition of its conventional servitudes ‘where they still exists and whether or not they are covered by the definition of slavery contained in article 1 of the

---

<sup>26</sup> Article 7(2)(c), Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998. See Chapter 6, for considerations of enslavement.

<sup>27</sup> See, for instance, United Nations, General Assembly, International Law Commission, *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER.A/1996 (Volume 1), 1996, p. 74.

<sup>28</sup> United Nations, United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, p. 24.

<sup>29</sup> *Id.*, p. 332.

Slavery Convention’. Thus we should always look to the substance of the relationship at hand and recognise that, be it termed forced labour, debt bondage or some other type of exploitation, that it will, if it meets the definitional threshold of Article 1(1) of the 1926 Convention, constitute slavery. Or, to give emphasis once more to the words of the United Nations Secretary-General, that slavery will extend “to all institutions or practices, whether or not designated as ‘slavery’, provided that, as stated in Article 1 of the Convention, ‘any or all of the powers attaching to the right of ownership are exercised’ over a person in these institutions or practices”.<sup>30</sup>

## **The Content of the Definition of Slavery**

While the 1926 Slavery Convention required States “to adopt the necessary measures in order that severe penalties may be imposed” for infractions of its provisions; States have taken a number of different approaches to incorporating provisions prohibiting slavery into their domestic legal order. While a number of States – Australia, Kenya, Liberia, Mauritius, Malta, Sierra Leone, Sri Lanka, and Zambia – have incorporated the 1926 definition of slavery into their legislation, most States have simply include the prohibition against slavery without defining the term. Thus, for instance, more than a dozen States incorporate the prohibition against slavery at the level of the constitution; where, for instance, the Republic of Congo simply states “No one shall be subject to slavery”, while the constitutions of the Seychelles, South Africa, South Sudan, and Sudan all track the language of the 1948 Universal Declaration of Human Rights (re: ‘No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’) and/or Article 8 of the 1966 UN International Covenant on Civil and Political Rights (‘No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.’). For a large group of States, reference to slavery is to be found in domestic legislations providing human rights protection, while an equally large collection of States mentions slavery within their anti-trafficking legislation.<sup>31</sup> Yet in all of these cases – and more generally, with regard to the majority of States – no definition of slavery is set out in the domestic legal order.

While I will come back to some of the definitions which have been established in domestic law, reference now turns to the international legal order and the considerations of slavery before international courts. In the past, I have been critical of the jurisprudence of international courts in their considerations of slavery.<sup>32</sup> And yet, if one moves the optic back from the individual cases and look at them as a whole, it becomes evident that international

---

<sup>30</sup> United Nations, Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, p. 28.

<sup>31</sup> The following are States which include provisions on slavery within human rights legislation:

Antigua and Barbuda, Bahamas, Barbados, Bolivia, Bosnia-Herzegovina, Botswana, Brazil, Chad, Colombia, Cyprus, Dominica, Gambia, Ghana, Grenada, Guyana, Honduras, Ireland, Kenya, Lesotho, Liberia, Malawi, Malaysia, Marshall Islands, Mauritius, Namibia, Nicaragua, Nigeria, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Sierra Leone, Singapore, Solomon Islands, Tuvalu, Uganda, United Kingdom, Zambia, and Zimbabwe.

The following States are those which have included slavery within their anti-trafficking statutes:

Albania, Argentina, Armenia, Bulgaria, Cambodia, Cameroon, Costa Rica, Czech Republic, Denmark, Dominican Republic, Egypt, Equatorial Guinea, Fiji, Finland, Haiti, Israel, Italy, Kyrgyzstan, Latvia, Lebanon, Liberia, Luxembourg, Madagascar, Myanmar, Nepal, Netherlands, Norway, Oman, Poland, Republic of Moldova, Romania, Russia, Senegal, Tajikistan, United Arab Emirates, Tanzania, Uruguay, and Venezuela.

See Slavery in Domestic Legislations database: <http://www.qub.ac.uk/slavery/>.

courts have struggled with the very conception of slavery and have lacked the established jurisprudence or the doctrinal studies to base their finding upon. This is so, as slavery as a violation of general international law and international human rights law (thus incurring State Responsibility), or enslavement as an international crime were not tried during the Twentieth Century. With the advent of the neo-abolitionist era – and it might be said the proliferation of international courts<sup>33</sup> – we have witnessed cases in the Twenty-First Century dealing with slavery before the Community Court of the Economic Community of West Africa States, the European Court of Human Rights, the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, and the Special Court for Sierra Leone.<sup>34</sup>

Where there appears to be some coalescing of an understanding of what slavery means in law, it has come with reference to the *Kunarac* case before the International Criminal Tribunal for the former Yugoslavia, as each of the other international courts have taken this case as the basis for formulating their approach to the issue.<sup>35</sup> While each court acknowledges the definition of enslavement/slavery turns on the exercise of ‘any or all of the powers attaching to the right of ownership’, in each instance where a court makes referred back to *Kunarac*, it quotes sections of the Judgment which do not truly address the definition of slavery.

Both the Community Court of the Economic Community of West Africa States and European Court of Human Rights quote a passage which speaks to “the operation of the factors or *indicia* of enslavement” as opposed to what might constitute enslavement. Thus, instead of engaging with the definition of slavery head-on, these courts take the *Kunarac* lead in looking not internally to the definition of slavery but externally to *indica* that could point the way to what slavery might entail. These included:

control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.<sup>36</sup>

---

<sup>32</sup> See Jean Allain “*Rantsev v. Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery*”, *Human Rights Law Review*, Vol. 10, 2010, pp. 546-557; and Jean Allain, “*Hadijatou Mani Koraou v. Republic of Niger*”, *American Journal of International Law*, Vol. 103, 2009, p. 311-317.

<sup>33</sup> See Jean Allain, *A Century of International Adjudication: The Rule of Law and its Limits*, 2000.

<sup>34</sup> It may be also worth noting that the African Commission on Human and Peoples’ Rights determined in a 2000 case brought by a number of Non-Governmental Organisations against Mauritania that it “cannot conclude that there is a practice of slavery [in Mauritania] based on the evidence before it”. That said, the Commission, in a case related to political repression and marginalisation of ‘black ethnic groups’, include the Haratines (descendants of slaves), determined that there was a violation of Article 5 of the 1981 African Charter on Human and Peoples’ Rights, which reads:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The Commission noted that such a violation was “due to practices analogous to slavery, and emphasises that unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being. It furthermore considers that the conditions to which the descendants of slaves are subjected clearly constitute exploitation and degradation of man, both practices condemned by the African Charter Communications 54/91, 61/91, 98/93, 164/97–196/97 and 210/98, *Malawi African Association and others v. Mauritania*, 13<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples’ Rights, 1999–2000, Annex V, Addendum, paras. 135 and 136.

<sup>35</sup> See Community Court of the Economic Community of West African States, *Hadijatou Mani Koraou v. the Republic of Niger*, No. ECW/CCJ/JUD/06/08, 27 October 2008, p. 12; European Court of Human Rights, *Rantsev v Cyprus and Russia*, Application No. 25965/04, Judgment of 7 January 2010, p. 68; and Special Court for Sierra Leone *Brima et als.*, Trial Chamber, Judgement, SCSL-2004-16-T, 20 June 2007, pp. 217 and 229-230.

For the Special Court for Sierra Leone, it chose to quote from the Trial Chamber rather than the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, but it too looked to the “indications of enslavement” rather than to the actual definition of slavery. The section which the Special Court for Sierra Leone quotes from *Kunarac* sets out the following as indications of enslavement, as including:

elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.<sup>37</sup>

While hesitating as to how to interpret the definition of slavery, the international jurisprudence has gravitated towards an understanding of the fundamental nature of slavery. That slavery is ultimately about control. Control which deprives a person, in a significant manner, of their individual liberty or autonomy; and ultimately, that this control is meant to allow for exploitation and is typically maintained through coercion or violence. Beyond considerations of the nature of slavery within the international jurisprudence, deliberation has also transpired at the domestic level in 2008, in the *Tang* case before the High Court of Australia where, in a Concurring Opinion, Hayne J, considered “the antithesis of slavery”, which he deemed freedom: “Asking what freedom a person had may shed light on whether that person was a slave”.<sup>38</sup>

In looking back at the international jurisprudence on slavery developed over the last decade, we have this convergence of recognition that what the enslaved lacks – call it what you may: autonomy, freedom or liberty. It is this which we abhor in slavery, as it goes against our contemporary societal inclination to regard people as being born free. Thus we seek to deny the possibility to hold dominion over others and withdraw the ability to lord over them. Ultimately, where the international jurisprudence has struggled, is in bringing these considerations of the nature of slavery into a coherent narrative which speaks in terms of the definition of slavery as set out in the 1926 Slavery Convention. In essence, the international jurisprudence looks to indications of slavery rather than to slavery.

Yet, a coherent narrative is possible, one that establishes a clear objective standard as to what constitutes slavery in law, providing a firm boundary within which we find slavery and where beyond such parameters, instances which fail to meet the threshold of slavery can be excluded as falling short of the legal definition of slavery. Such an approach relies on little else but engaging with the definition of slavery on its own merits and seeking to draw out the component parts which create a coherent whole, while being internally consistent with its property paradigm.

The definition of slavery as originally set out in the 1926 Slavery Convention, and reproduced in substance in the 1956 Supplementary Convention and adopted as the definition of the crime of enslavement in the 1998 Statute of the International Criminal Court is, to repeat:

---

<sup>36</sup> International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.*, (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, p. 36.

<sup>37</sup> International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23-T &-IT-96-23/1-T) Judgment, 22 February 2001, p. 193.

<sup>38</sup> High Court of Australia, *The Queen v Tang*, (Hayne J.) [2008] HCA 39, 28 August 2008, pp. 62 and 65.

The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

At first blush one might consider the definition to require that one person own another. While we shall turn shortly to consider what ownership means in the context of the 1926 definition, it should be recognised that to assert a legal right of ownership is to claim a right in a court of law. But while the definition of slavery addresses a legal right of ownership over a person it also recognises *de facto* ownership through the notions of ‘condition’ rather than ‘status’. This is fundamental as in the main *de jure* – chattel – slavery no longer exists today. Thus the contemporary relevance of the definition is to be found in its application in *de facto* situations.

But how can somebody not own something or somebody in a legal sense but do so in a *de facto* sense? The answer lies in illegal commodities such as drugs or guns. In being apprehended with illegal drugs or having been caught running guns, one cannot assert one’s right of ownership over such contraband; yet a judge will recognise in such cases *de facto* ownership. To give a more concrete example, consider the case of a dispute between two drug dealers over a kilo of heroin. Were our righteous criminals to bring a civil case to determine the true ‘ownership’ of the heroin, the judge would have to decline to pass judgement as neither would have a legal claim to the drugs. That said, the courthouse might be a buzz with a prosecutorial interest in seeking to establish which of the two, righteous but ultimately ill-advised, drug dealers ‘owns’ the kilo of heroin in the *de facto* sense. As with most drugs cases, such a determination would come down to possession, to a consideration of who controlled the substance.

This distinction between status as *de jure* and condition as *de facto* is consonant with the ordinary meaning of these terms. With regard to ‘status’, the *Oxford English Dictionary* defines status in the legal sense of the word as “the legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations; condition in respect, e.g., of liberty or servitude, marriage or celibacy, infancy or majority”. Where the term ‘condition’ is concerned, it is defined, *inter alia*, as a “mode of being, state, position, nature”. The most pertinent example given under this heading is a “characteristic, property, attribute, quality (of men or things)”.<sup>39</sup> Where the 1926 definition of slavery is concerned, the High Court of Australia has spoken to the issue in *Tang*, as Gleeson CJ, for the majority, determined that:

Status is a legal concept. Since the legal status of slavery did not exist in many parts of the world, and since it was intended that it would cease to exist everywhere, the evident purpose of the reference to ‘condition’ was to cover slavery *de facto* as well as *de jure*.<sup>40</sup>

A further element might be pointed to within the definition of slavery which speaks to its application both *de facto* and *de jure*. The definition does not speak of the exercise of a right of ownership, but the powers ‘attaching’ to such rights of ownership. As a result of this step back from ownership, what is being exercised are the powers attaching to such a right rather than the actual right of ownership itself. As a result, this opens the possibility of the exercise either *de facto* or *de jure* of such powers, rather than what would simply be a *de jure* application of the definition if it spoke in narrower terms of the exercises of a right of ownership. In both *de facto* and *de jure* situations of slavery, there would be an exercise of the powers attaching to the right of ownership; in a *de jure* situation, that exercise of the powers attaching to the right of ownership would be recognised as a right in law.

<sup>39</sup> *Oxford English Dictionary*, 1989, pp. 165 and 437.

<sup>40</sup> High Court of Australia, *The Queen v Tang*, [2008] HCA 39, 28 August 2008, p. 13.

## **‘The Powers Attaching to the Right of Ownership’<sup>41</sup>**

The most authoritative pronouncement of what constitutes such powers attaching to the right of ownership was made, as previously mentioned, in 1953, by the United Nations Secretary-General. In essence, the Secretary-General considers such powers as being the ability to purchase or transfer a person, utilising their capacity to work and gaining the benefit of their labour in an unrestricted manner, and finally that such a status or condition would be indeterminate for the enslaved and could be conveyed to future generations. Further, it will be recalled that the Secretary-General spoke of the power of dominion over a person, the authority of such ‘*dominica potestas*’ was of an “absolute nature, comparable to the rights of ownership, which included the right to acquire, to use, or to dispose of a thing or of an animal or of its fruits or offspring”.<sup>42</sup>

A more recent elaboration of those ‘powers attaching to the right of ownership’ transpired via the International Criminal Court. As part of the negotiation process of the Statute of the International Criminal Court, it was decided that the crimes under the jurisdiction of the Court would require further elaboration. This materialised through the adoption, in 2002, of the Elements of Crimes. With regard to the crime against humanity of enslavement– which it will be recalled is defined as ‘the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children’ – the first Element provides examples of powers attaching to the right of ownership.<sup>43</sup> These are: the “purchasing, selling, lending or bartering such a person or persons”. The first Element of the crime against humanity of enslavement then goes further in stating that such powers will include the imposing on a person or persons “similar deprivation of liberty”. Thus, within the secondary legislation of the International Criminal Court, we not only see examples of powers attaching to the right of ownership, but reference to a conceptual framework: exercising powers attaching to the right of ownership in such a manner as to deprive a person of their liberty – in a manner which is similar to the buying or selling of a person.

Returning now to consider some of the definitions of slavery set out in domestic law, the 2006 Israeli law dealing with trafficking in persons defines slavery in such a manner as to touch on many of elements discussed thus far:

---

<sup>41</sup> The consideration in this section has been developed in large part through a UK Arts and Humanities Research Council grant which allowed me to create a Research Network of leading expertise in the area of slavery and property law. Their input is here acknowledged with gratitude as what follows echoes our collaboration. The results of this collaboration are the *Bellagio-Harvard Guidelines on the Parameters of Slavery* (where the Members of the Research Network are named); Jean Allain (ed.) *The Legal Understanding of Slavery: From the Historical to the Contemporary*, 2012; and Jean Allain and Robin Hickey, “Property Law and the Definition of Slavery”, *XX* Volume 39, 2012, 18 pp.

<sup>42</sup> See Report of the Secretary-General, n. 23, pp. 27-28.

<sup>43</sup> The Elements of Crimes of the Crime against Humanity of Enslavement read, in full:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

See International Criminal Court, Assembly of States Parties, Elements of the Crimes, ICC-ASP/1/3, 9 September 2002, p. 117.

‘slavery’ means a situation under which powers generally exercised towards property are exercised over a person; in this matter, substantive control over the life of a person or denial of his liberty shall be deemed use of powers as stated.<sup>44</sup>

In Nigerian Law, the Criminal Code prohibits ‘Slave Dealing’, where ‘a slave’ is defined as “a person who is held in bondage whose life, liberty, freedom and property are under absolute control of someone”.<sup>45</sup> Beyond these examples which speak to the nature of slavery; a number of States have, despite not having incorporated the 1926 definition into their legislation, made the link between slavery and ownership. For instance, in its trafficking legislation, Timor-Leste established that “a person is considered to be in a condition of enslavement whenever, even if only *de facto*, said person is under submission to powers corresponding to those of property rights, or to any concrete right, or is bound to the disposal of anything”.<sup>46</sup> In a like-manner, Italy considers that “anyone who exercises on a person powers equal to those of the right of property or reduces or keeps a person in a continuous state of subjugation [...] is punishable with imprisonment from eight to twenty years”.<sup>47</sup>

In the same manner as the Elements of Crimes of the International Criminal Court set out examples of powers attaching to the right of ownership (‘purchasing, selling, lending or bartering’), domestic law is replete with such examples. The Azerbaijani Criminal Code speaks of sale, transfer and exchange; the Penal Code of Brunei make mention of the importing, removal, buying, selling, or disposing of a person; while the Ethiopia Criminal Code prohibits the selling, alienating, pledging, buying, or trading of persons in conditions of slavery.<sup>48</sup> The Kuwaiti Penal Code states that “anyone who purchases, offers for sale or gives away a person as a slave, shall be liable to a penalty of up to five years’ imprisonment”; while the Thai Criminal Code mandates, in the case of slavery, that the “bringing into or sending out of the Kingdom, removing, buying, selling, disposing, accepting or restraining any person, shall be imprisoned not out of seven years and fined not out of fourteen thousand Baht”.<sup>49</sup>

These considerations, both domestic and international, provided authoritative grounding, from which to investigate the parameters of the legal definition of slavery by setting out an overall consideration of what constitutes those powers attaching to the right of ownership. In so doing, it might be emphasised at the outset that this construct of ‘powers attaching to the right of ownership’ is very familiar to property lawyers, as much of domestic jurisprudence differentiates between a legal right of ‘ownership’ and the powers or privileges which flow from such a right.<sup>50</sup> What we are thus considering, in examining the exercise of the *powers*

---

<sup>44</sup> Prohibition of Trafficking in Persons (Legislative Amendments) Law, 5766 – 2006, 29 October 2006.

<sup>45</sup> Section 50, Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, Act No. 24, 14 July 2003. The offence of Slave Dealing is found under Offences against Liberty at: Section 369, Criminal Code Act, 1990.

<sup>46</sup> Penal Code of Timor Leste, 7 June 2009.

<sup>47</sup> Section 660, Measures against Trafficking in Persons, Act No 228, 11 August 2003.

<sup>48</sup> Of interest might be the provisions of Brunei, which read in full:

Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives, or detains against his will any person as a slave, shall be punished with imprisonment for a term which may extend to 30 years and with whipping with not less than 12 strokes.

Section 370, Chapter 22, Penal Code, 1951, Revised Edition 2001.

<sup>49</sup> The original legislation can be accessed through Slavery in Domestic Jurisdictions, n. 31.

<sup>50</sup> See generally, A.M. Honoré, “Ownership”, A.G. Guest (ed) *Oxford Essays in Jurisprudence*, 1961 where he goes beyond the characterisation of ownership as constituting a ‘bundle of rights’, and lists (at p. 113) eleven ‘standard incidents’ of ownership, of which the majority are rights, but also include obligations:

attaching to the right of ownership are its manifestations: in exercising power of ownership over a person or thing what, in fact, transpires.

Property lawyers might be inclined to read the notion of ‘powers’ in narrower terms, as considering the rights of ownership to be manifest not only as powers but also as claim rights, liberties (privileges), and immunities. Yet, this approach while first introduced by Wesley Hohfeld in 1914, does not appear to have formed part of the thinking which went into the drafting process of the 1926 definition of slavery.<sup>51</sup> As originally conceived the use of the term ‘powers’ was used in the more general sense of the various manifestations or instances of the exercise of the rights of ownership. As originally proposed, the definition of slavery was first formulated in 1925 as “the status in which a person exercises a right of property over another”.<sup>52</sup> Through the negotiation process the term ‘powers’ emerged but not with regard to ownership, rather in the first instance, with reference to property: “Slavery is the status of a person over whom another person or group of persons exercises the power attaching to proprietorship [...]”.<sup>53</sup> It was only later in the process that the definition came to be centred on the powers of the right of ownership rather than powers of proprietorship.<sup>54</sup> Further, in the authentic French text of the 1926 Slavery Convention, it does not speak of powers but the attributes (*les attributs*) of the rights of ownership. Rather curiously, while the English definitions of slavery is reproduced in substance as the crime against humanity of enslavement in the 1998 Statute of the International Criminal Court, the French text has been modified so as to mirror more closely the English reading of the translation as it now speaks of ‘powers attaching’ to the right of ownership (*pouvoirs liés*). As a result of these considerations of the drafting process, it should be understood that the term ‘powers’ should not be read in the narrow, technical sense which property lawyers might be more familiar with, but in the wider sense of manifestations or attributes of a right of ownership.<sup>55</sup>

Where ownership is concerned, in general terms an owner of a thing would expect (and courts would generally confirm *a legal right*) to possess and use a thing, to make decisions about how to use it and how it might be used by others; to enjoy the income produced by the thing, to sell it or to give it away, including as an inheritance. The owners would expect a measure of security over the thing; that it not be taken by others or expropriated by the State without good cause. And that ownership over the thing would be maintained until the owner decided otherwise, either by giving it away, selling it, consuming it, or destroying it. How then might these considerations of what ownership entails be translated into a coherent narrative of the definition of slavery, so as to be applicable to human beings in a manner

- 
- 1) The right to possess; 2) The right to use; 3) The right to manage; 4) The right to the income of the thing;
  - 5) The right to the capital; 6) The right to security; 7) The right or incidents of transmissibility; 8) The right or incidents of absence of the term; 9) The prohibition of harmful use; 10) Liability to execution; and 11) Incident of residuary.

<sup>51</sup> See J E Penner, “The Concept of Property and the Concept of Slavery”, (Jean Allain (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary*, 2012, p. XX; where Penner consideration of ‘powers’ in the legal sense to provided an eloquent solution to the marrying of the 1926 definition to manifestations of slavery. However, his approach, which follows the pattersonian thesis of ‘social death’, requires third-party societal acknowledgment of the status of enslavement and thus has less contemporary purchase, as slavery today is illegal and thus clandestine my nature.

<sup>52</sup> League of Nations, Journal of the Sixth Assembly of the League of Nations, Geneva 1925, No. 3, 9 September 1925, p. 25.

<sup>53</sup> League of Nations, Draft Resolution and Protocol, League of Nations Official Journal (Special Supplement 33) Records of the Sixth Assembly: Text of Debates, Annex I, 1925, p. 40.

<sup>54</sup> League of Nations, Slavery: Draft Protocol Text adopted by Sub-Committee of the VIth Commission on 17<sup>th</sup> of September 1925 A.VI/S.C.1/8.1926 as found in Folder R.67.D.46214 entitled *La question de l’esclavage: Discussions, y relatives, de la VIe Assemblée*, 1925.

<sup>55</sup> See James Penner Chapter and Robin Hickey Chapter XX, in (Jean Allain (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary*, 2012,



which acknowledges that, in the main, we are speaking of *de facto* instances of the exercise of the powers attaching to the right of ownership?

Much as in the same manner as a property lawyer would understand ownership to be anchored in control over a thing, we should recognise that the exercise of ‘the powers attaching to the right of ownership’ is manifest in control over a person in such a way as to significantly deprive that person of his or her individual liberty. Such a significant diminution in autonomy will result from a case of enslavement transpiring in an environment heavy with the threat or use of violence force, deception and/or coercion. The end result of this process of enslavement will be the ability, once control has been established, to exploit a slave through their use, management, profit, transfer or disposal. How then should we think of this control which leads to, calling it what you may: loss of freedom, transfer of agency, significant deprivation of individual liberty, or diminution in autonomy?<sup>56</sup>

In his seminal piece on ownership published more than fifty-years ago, Antony Honoré made plain that in considering those powers attaching to the right of ownership (he speaks of instances of ownership), it should be realised that possession is “the foundation on which the whole superstructure of ownership rests”.<sup>57</sup> Thus ownership implies a background relationship of control which we would recognise as possession. This then is the foundational power attaching to the right of ownership, which is central to allowing us to make a determination as to what constitutes slavery in law. In a given case of alleged slavery, we should look to possession manifest as control: does a person control another as they would a thing possessed in the legal sense.

While such control might be physical, psychological, or otherwise, it would operate in such a manner as to significantly deprive the enslaved of their individual liberty for a period of time which would, for that person, be indeterminate. In cases of slavery, control would be tantamount to possession. Just as with other illegal commodities, such as a drugs or firearms, a judge will look to control tantamount to possession in making a determination as to who, in a *de facto* sense, ‘owns’ the item in question; so to, in considering if a person is a slave, the issue should turn on control tantamount to possession. In setting a threshold of control where it is tantamount to possession, we distinguish instances of slavery from those where control of a lesser magnitude is exercised. We can thus differentiate the enslavement of a person from control which would be exercised in situations where a factory manager makes legitimate decisions with regard to managing employees by requiring them to work, for instance, in a specific location (at the factory and within specific department), and for a set number of hours. Control is being exercised in such a case, but it is not the equivalent of the control which one has over something he or she possess. The same would be true with regard to control over a child. Where the best interest of the child is maintained, control which is

---

<sup>56</sup> Consider a 1993 reading of the 1926 definition of slavery by the *Corte d’Assise* of Florence, as reproduced by Federico Lenzerini, “Italian Practice on Slavery: The Application of International Obligations Prohibiting Slavery by Italian Courts”, *The Italian Yearbook of International Law*, Volume 10, 2000, p. 276:

“[T]he peculiar element which permits to qualify as slavery *any condition of subjection among human beings*, is the reduction of one of them, fully deprived of his faculties of autonomy and self-determination, to the object of a right of ownership in the exclusive enjoyment and disposal of another person. Singling out of concrete situation belonging to the legal definition [of slavery] is a judge duty, who ... is not bound to verify the existence of specific modalities pertaining to the [criminal] conduct (violence, threat, etc.), or to determine special characteristics of the case (for instance, the use of physical coercion), but has the only duty *to verify the effect (results) of the denial to the victim, for an indefinite period, of those freedoms ... that otherwise would qualify his as a free man.*”

<sup>57</sup> Honoré, “Ownership”, n. 50, p. 113. An historical footnote might be added here of the 1963 case before the High Courts of the Federation, Nigeria, in which there was a *de facto* sale of a person. The Court noted that the legislation under consideration allowed for such a sale as “There cannot be a ‘real sale’ of a human being as a slave, as such sale will be illegal and void ab initio as being contrary to public policy”. See *Regina v Gilbert Fanugbo* [1963] 2 *All Nigeria Law Reports* 142.

exercised does not meet the threshold of possession, it is exercised in a fiduciary manner. Agency remains with the child, and unpacked over time with the stewardship of the parents or guardians. Yes, control is exercised by parents and guardians, but only with difficulty might we say this is slavery.

Using the threshold of control tantamount to possession, we can also distinguish cases within a tighter band, between slavery and lesser instances of exploitation. For instance, where a person is required to labour for less than minimum wage under the menace of being fired, such an instance of forced labour while being exploitive does not meet the threshold of enslavement. The individual involved has freedom beyond the workplace, they can leave their job at will. Slavery in law requires more.

Before going on to consider other powers attaching to the right of ownership beyond possession, it might be worthwhile to pause for a moment to provide clarity to the time element in issues of slavery. Mention has already been made that control tantamount to possession will operate in such a manner as to significantly deprive a person of their individual liberty. This understanding is recognised in the Elements of Crimes adopted by the International Criminal Court and speaks to Justice Hayne's consideration in *Tang* – which it might be emphasised here is based on an historical reading of the jurisprudence of the United States Supreme Court – of the antithesis of slavery being freedom. However, what I wish to emphasise is that such a diminution of autonomy should be evidenced as being for an indeterminate time for the person enslaved. While one might consider that in cases of chattel slavery of old, where a *de jure* right of ownership existed, slavery was a status for life. In fact, manumission speaks to the opposite being true. Better to understand both *de jure* and *de facto* instances of slavery, whether of a contemporary nature or as an historical manifestation as being or having been indeterminate in duration for the person enslaved. That is to say, that it is for the owner, not the slave, to determine when the status or condition of slavery ceases. In a situation of chattel slavery, a slave might expect to continue to be a slave throughout his or her life; and yet this could change at the whim of his or her owner, who could decide to manumit or free their slave. Likewise, in a contemporary situation, where a person exercises control tantamount to possession over another, the enslaved may not consider that they will be in this situation for their lifetime, but the period of time of their enslavement is indeterminate, beyond their control and centred on the determination of the person holding them in a condition of slavery.<sup>58</sup>

This raises a difficult question: would not rape amount to slavery, as in the instance which rape transpires, the attacker holds powers attaching to the right of ownership? Control is established and that control is – for the victim – indeterminate while the attack takes place. If we follow this reading of what transpires during the crime of rape, then indeed the legal solution does not allow for an easy answer. The approach might be to say that while rape meets the threshold of slavery, it is worth maintaining the distinction in law as does the International Criminal Court which provides for both the war crimes of rape and sexual slavery. However, such a distinction would be subjective in nature: while acknowledging the indeterminacy of an episode of rape, one might consider rape as an attack – a short, violent episode – whereas a longer duration of indeterminacy might be expected in slavery. Yet, such a reading is fraught with a lack of legal certainty. More stable legal terrain may be found in accepting that in cases of rape, while control is present, it has not been asserted to the extent that we would recognise the threshold of being tantamount to possession. That is to say, that

---

<sup>58</sup> Consider the *Brima* case before the Special Court for Sierra Leone, where the Trial Chamber accepted that “a person may be enslaved for a short period of time provided that in that time the perpetrator intentionally exercised a degree of control over the person sufficient to constitute the *actus reus* of the crime [re: the exercise of those powers attaching to the right of ownership]”. See *Brima et als.* case, Special Court for Sierra Leone, Trial Chamber, Judgement, SCSL-2004-16-T, 20 June 2007, pp. 364-365.

control is not tantamount to possession. While maintaining the legal integrity of the crime of rape, the cold, legal, analogy might be found in the law of finders, that while a person may possess something, a claim to ownership can only hold where there has been an abandonment of a proprietor claim by another. That in rape there has been a negation of agency, not abandonment.

Turning now to consider other powers attaching to the right of ownership. With possession being the foundation upon which the edifice of ownership is built, it should be recognised that a mutual relationship exists between it and the other powers attaching to the right of ownership. That relationship is such that on the one hand, the foundation of control tantamount to possession makes possible the exercise of further powers; while on the other hand, an exercises of a further power attaching to the right of ownership may serve to indicate the presence of control of a person tantamount to possession. This correlative relationship allows for a recognition that any (or all) of the powers attaching to the right of ownership, when exercised in the context of a relationship of control tantamount to possession, will constitute – in law – slavery.

The first of these other powers attaching to the right of ownership will be the most obvious, the ability to *buy or sell* a person.<sup>59</sup> In considering the ability for a person to sell another human being, the notion of control tantamount to possession as a background relationship helps explain how such a transaction can transpire. In a situation where in the main, the ability to sell oneself into slavery no longer exists; one might consider what would compel a person to allow themselves, to be a subject of such a transaction. I would suggest that the answer lies in the control exercised over that person through violence or coercion which then takes from that person the freedom to say no or to walk away from the nefarious deal.

Looked at another way, it is not uncommon for a professional athlete, who is displeased with his or her labour relationship, to complain about being treated as a slave.<sup>60</sup> This, is often manifest in situations where athletes are traded to another club or team and complain that they are being treated like slaves, having been bought and sold. In such a situation, while it may be true that their services have been sold by a club and bought by another, such a transaction fails to meet the threshold of slavery if there is a lack of control over the athlete which would amount to possession. While the football player having been sold to another team may be ‘forced’ to move cities and may deem this unfair; they will not be compelled to go under threats of violence. The athlete may not like it, but they can walk away; their freedom to chose remains intact, at least in the sense of going to the new club or changing professions. In cases of slavery, somebody is exercising control in such a manner as to significantly deprive the enslaved of their individual liberty; they are dictating what the

---

<sup>59</sup> An historical footnote might be added here of the 1963 case before the High Courts of the Federation, Nigeria, in which there was a *de facto* sale of a person. The Court noted that the legislation under consideration allowed for the prosecution of such a sale as “There cannot be a ‘real sale’ of a human being as a slave, as such sale will be illegal and void ab initio as being contrary to public policy”. See *Regina v Gilbert Fanugbo* [1963] 2 *All Nigeria Law Reports* 142.

<sup>60</sup>

Consider one such incident in 2011, where Adrian Peterson, and professional (American) football player for the Minnesota Vikings took issue with the tactics of the owners of National Football League in locking out the players as part of a labour dispute, saying that this was “modern-day slavery”. While Peterson later apologised for his statement saying “there is nothing, absolutely nothing that you can compare to slavery”; in the era of social media, another footballer, the running-back for the Green Bay Packers, **Ryan Grant**, comment on Twitter that “I have to totally disagree with Adrian Peterson’s comparison to this situation being modern-day slavery. [...] There is unfortunately actually still slavery existing in our world. Literal modern-day slavery”. See Judd Zulgad, “Peterson Regrets Earlier ‘Slavery’ Comment”, *Star Tribune* (Minnesota), 5 August 2011. See <http://www.startribune.com/sports/vikings/126921718.html>.

enslaved is to do and backing this up by actual or latent violence. So, it is not enough to meet the threshold of slavery to say that a person has been ‘bought’ or ‘sold’, though it may an indication of slavery being present. What is required is to first establish, in substance, whether control tantamount to possession is present; in such cases the buying or selling of a person is evidence of slavery.

In considering the notion of the power to buy or sell somebody as being an incident of ownership, we are actually speaking of such incidents within a larger conception of property law of *transfer*, in this case, of human beings. Beyond the buying or selling of a person, the grouping of transfer includes similar transactions to buying or selling, such as bartering, exchanging, or the giving or receiving of a person as a gift. As part of her 2011 considerations of Ecuador, the United Nations Special Rapporteur on Contemporary Forms of Slavery, Gulnara Shahinian, noted such a transfer, in the context of the lending or renting of children:

The Special Rapporteur also received information about the ‘lend or rent of children’ for small amounts of money for the entire period of work ranging from 30 to 80 dollars to ‘help’ those to whom they have been lent in a wide variety of tasks. During the time children are lent, they are left at the full mercy of their ‘tenants’ and their parents are unaware of the whereabouts or occupation of their children. While in some instances children have been reported to be “used” as street vendors and farm workers, in others they have been reported to be in domestic servitude or smuggled to neighbouring countries (including Chile, Colombia, Peru and the Bolivarian Republic of Venezuela) for forced labour activities, sexual exploitation and mendicity.<sup>61</sup>

We might also include within this power manifest in ownership the transferring of a person through inheritance or the conveying of the status or condition of slavery to a successive generation. With regard to the former, Human Rights Watch noted, in its 2003 Report on the violations of women’s property rights in Kenya, that it was rather common for widows, upon the death of their husbands, to be inherited by a member of his family. The Kenyan customary law principles were such that all property of the deceased man reverted to his family; this including his wife. If she was to refuse, she would be denied any property and thus be left destitute.<sup>62</sup> Where conveyance is concerned, slavery from one generation to the next still persists in Mauritania, where, as the Special Rapporteur on Contemporary Forms of Slavery has noted, as a society, Mauritania is “highly stratified along ethnic and racial lines”, where “slaves and their descendants [come] at the very bottom”.<sup>63</sup> Although, the Special Rapporteur noted in her 2010 Report that officials from the West African State “denied the existence of slavery” as it had been “legally abolished”; she saw things otherwise, concluding “that *de facto* slavery continues to exist in certain remote parts of Mauritania”:

After analysing the interviews conducted with victims of slavery in Atar, in Rosso and from Nema, the Special Rapporteur believes that the situations described to her meet the key elements that define slavery. The victims described situations whereby they were completely controlled by their owner using physical and/or mental threats; could not independently make any decision related to their lives without his or her master’s permission; were treated as commodities – for example, girls being given away as wedding presents; lacked freedom of movement; and were forced to work long hours with very little or no

---

<sup>61</sup> United Nations, General Assembly, Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences*, Gulnara Shahinian, UN Doc. A/HRC/15/20/Add.3, 20 June 2011, p. 13.

<sup>62</sup> See Human Rights Watch, See Human Rights Watch, *Double Standards: Women’s Property Rights Violations In Kenya*, Vol. 15, No. 5 (A) – March 2003, pp. 10-12.

<sup>63</sup> United Nations, General Assembly, Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences*, Gulnara Shahinian, Mission to Mauritania, Addendum, UN Doc. A/HRC/15/20/Add.2, 16 August 2010, p. 6.

remuneration. In addition, the victims were further denied the right to inherit. These victims had escaped slavery and talked about the relatives that they had left behind who still lived in slavery.<sup>64</sup>

To sum up, while driving the point home, it should be recognised that the transferring of a person, such as in a case of buying or selling (or in the other examples given) is a power attaching to the right of ownership. Such a transfer will amount to slavery only in situations where a person exercises control tantamount to possession over another. That said, the transferring of a person may also act as an indicator of the presence of such control being present in a given situation.

A further instance of the powers attaching to the right of ownership will be the ability to *use a person*. It will be recalled that in his 1953 Report, the United Nations Secretary-General, identified one of the powers attaching to the right of ownership as being characterised in the following terms: “the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction”. Again, like the other powers manifest in ownership, it should be recognised that the simple use of a person does not amount to slavery. The Secretary-General for his part spoke of the ability to use somebody ‘in an absolute manner’. With regard to the definition of slavery which is framed in a property law context, it seems best to conceive of the use of a person as meeting the threshold of slavery where such use is exercised against the background relationship of control which amounts to possession. By using a person, what is meant here is deriving benefit from their service or their labour. A slave then could be used by working for little or no pay, utilised for sexual gratification, or used in providing a service.

While fuller consideration is given to the issue in Chapter 7, the phenomenon of ‘forced marriages’ in recent wars in Africa is instructive. In a typical case across conflicts in Democratic Republic of the Congo, Liberia, Sierra Leone, Rwanda, and Uganda, a woman is abducted by rebel forces in a military raid, is taken possession of through threats of death and acts of violence, including rape. Once having submitted to the will of the soldier, she was forced to porter, to cook, and to wash clothing, under a false paradigm of ‘forced marriage’. In this context, such soldiers benefit from the use of the enslaved, as the women’s sexual autonomy has been taken away from her, while her ability to determine in any manner what she will do was forfeited. The corollary of this then is that the soldier could use his victim in a manner which truly speaks to having dominion over her: a use without limit.

Closely associated with the use of a person, is the power to *manage the use of a person*. In general terms, it goes without saying that to manage a person is not to enslave them. Division of labour is such that employers make legitimate decisions on a daily basis with regard to the management of workers. Where such management of a person will amount to slavery is when there exists control tantamount to possession. Such management can be thought of in either direct or more abstract terms. In the abstract, the management of the use of a person may assist in consolidating the enslavement process. Having once established possession over the person, say through violence, the enslaved may be managed in such a manner that the need for active violence recedes, to be replaced by latent forms of violence and coercion and ultimately, the acceptance of one’s new fate. This will often take place by managing the use of that person, in such a manner as to forge a new identity thus isolating the individual, making them more malleable to their new condition. Such a process might transpire through the compelling of a new religion, language, place of residence or marital relationship. Think here of the fate of Eastern European girls who have been deceived

---

<sup>64</sup> *Id.*, p. 10. See also International Labour Office, International Labour Conference, 101<sup>st</sup> Session, Item III, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (Part 1B), 2012, pp. 124-125.

through false promises of a better life, only to be taken to a foreign country with an alien tongue; being beaten and raped into submission so as to be made malleable for exploitation as a sex worker on the Western European market.

In more direct terms, management of the use of person which would meet the threshold of slavery would, in the first instance, require that background relationship of control tantamount to possession. From there, the management of the use of the slave would be evident where the slaveholder delegates management responsibility of the use of the slave to another. This might transpire in cases of night managers of a brothel who has been delegated authority to manage sex workers in situations of enslavement.

A more concrete example of such direct management is to be found in the case of *Swarna v. Al-Awadi and Al Shaitan*, heard before a United States Court of Appeals in 2010. That case, beyond manifesting direct management of a person enslaved, also raised an interesting issue of public international law regarding diplomatic immunity. Vishranthamma Swarna, an Indian national, came to work for Al-Awadi and Al-Shaitan in New York City; the former acting as Third Secretary to the Permanent Mission of the State of Kuwait to the United Nations. Swarna's ordeal was horrific, she was sequestered in the diplomat's home, effectively denied contact with the outside world, forced to work long hours with little food or privacy, beaten and raped.<sup>65</sup> Managing to escape, Swarna ultimately brought a default judgement claim against Al-Awadi and Al-Shaitan and Kuwait, as Al-Awadi had left to take up a posting in Paris. When Kuwait and Al-Awadi responded to the case, it was argued that Al-Awadi was immune from the local jurisdiction as a result of being in the diplomatic

---

<sup>65</sup>Consider the following description by the Court of the what transpired to Vishranthamma Swarna:

The individual defendants did not permit Swarna to leave the apartment without supervision, and even when she was so permitted -- which occurred ten to fifteen times during the course of four years -- she was instructed to look down at the ground and to avoid making eye contact with anyone. Swarna was usually locked inside the apartment, she was not permitted to use the telephone, and she was prohibited from speaking to anybody outside of the individual defendants' family. To prevent Swarna from speaking with other people, she was confined to her room "[w]henver the handyman, electrician, or others visited the apartment during the day". [...] They also intercepted calls from her family in India, read her mail, and read her letters before she could send them to her family. To this end, an official from the Kuwait Mission was arranged to translate Swarna's correspondence. [...]

The individual defendants repeatedly assaulted and abused Swarna, both physically and psychologically. For example, Swarna was threatened to have her tongue cut out and was dragged by her collar on several occasions. The individual defendants referred to Swarna as 'dog' or 'donkey', and forcibly cut her hair -- which was "an important part of [Swarna's] identity and sense of self" -- against her will. Swarna slept in the children's bedroom, she had no privacy and no place of quiet refuge, and she often cried herself to sleep.

By mid-1998, Swarna, who weighed 150 pounds before working for the individual defendants, weighed only 100 pounds and looked as if she was afflicted with tuberculosis. Swarna's diminished constitution prompted the individual defendants to order Swarna "to get a checkup for [tuberculosis]". Swarna's checkup, which occurred at her own expense, did not reveal any signs of tuberculosis. In September 1998, Al-Awadi raped Swarna. He threatened to kill her if she told anyone, particularly his wife Al-Shaitan. Al-Awadi thereafter raped Swarna "on many occasions", and Swarna "constantly feared that [Al-Awadi] would rape me at any time when Al-Shaitan was not at home".

These abusive conditions led Swarna to suffer hair loss, nightmares and fatigue, and caused her to contemplate suicide.

When I was working in the Al-Awadi's kitchen, I could look out the window and see the view of what I now know to be the East River and the Citibank office tower in Queens. I often imagined escaping the Al-Awadi home so that I could jump in the river, drown myself, and end the misery of my life in the Al-Awadi home. It was only the enduring need of my sick husband and five children in India that kept me from doing so.

On or about June 25, 2000, the individual defendants and Swarna were preparing for a trip to Kuwait. Swarna begged to be sent back to India. Al-Awadi became angry, screamed at Swarna, and threw a packed suitcase at her. This attack caused Swarna to bleed and left bruises on her body. Al-Awadi then threatened to hit Swarna with an iron rod. Al-Shaitan slapped Swarna across the face, and Al-Awadi warned Swarna that if she did not continue to work for him, she would be harmed during the family's trip to Kuwait, where his brother and father were "high ranking police officials".

*Swarna v. Al-Awadi and Al Shaitan*, United States Court of Appeals for the Second Circuit, 622 F.3d 123, 24 September 2010, p. 3.

service. While the Court of Appeal recognised the sovereign immunity of Kuwait, it denied that Al-Awadi or his wife maintained residual immunity after leaving the United Nations posting; thus allowing the default judgment.<sup>66</sup> The Court pointed out that diplomats lose much of their immunity upon leaving their post, but where residual immunity did persist it related, in the words of 1961 the Vienna Convention on Diplomatic Relations, to ‘acts performed [...] in the exercise of his function as a member of the mission’. While Al-Awadi sought protection of the Vienna Convention, the Court decided that:

Ultimately, however, Al-Awadi’s argument must be rejected, as it assumes a fact that is not supported by the record. The alleged facts clearly show that Swarna was employed to meet Al-Awadi’s and his family’s private needs and not any mission-related functions. Swarna worked an average of seventeen hours a day, seven days a week, cooking, cleaning, caring for Al-Awadi’s children, and tending to the family’s personal needs. Al-Awadi also allegedly raped Swarna. If Swarna’s work for the family may not be considered part of any mission-related functions, surely enduring rape would not be part of those functions either.<sup>67</sup>

In this case, the Kuwaiti diplomat clearly managed Vishranthamma Swarna; the lower court noting that the “supervision and management of a domestic servant who was required to cook, clean, care for the children, and otherwise tend to the diplomat’s personal affairs, but also required to assist in entertaining official guests at the diplomat’s home” did not amount to mission-related functions.<sup>68</sup>

A further power attaching to the right of ownership stemming from the use of a person, in the context of slavery – where control tantamount to possession is present – is to *profit from the use of a person*. While we might ordinarily think of a person profiting from another person in the sense of making money from them, in property law the concept would go further so that slavery might include profit which emerges from the mortgaging of a person, from a person being let for profit, or being used as collateral. When we consider the example of tomato picking in the United States, agricultural workers who are controlled in a way which deprives them of their individual liberty in such a manner as to recognise in them the type of control tantamount to possession, we would identify two instances of profit being accurate from the use of these workers. In the first instance, the individual gaining profit would do so from the crop which has been harvested, so gaining from – dare it be said – the fruits of that labour. Second, profit would also be acquired by the appropriation of wages; in cases where little or no money was paid to the agricultural workers for their labour.<sup>69</sup>

A final instance of a power attaching to the right of ownership with a link to the use of a person is the ability to use up property; to exhaust a thing owed; or to consume it. One can

---

<sup>66</sup> Article 39(2) of the 1961 Vienna Convention on Diplomatic Relations reads:

When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

<sup>67</sup> *Swarna v. Al-Awadi and Al Shaitan*, n. 65, p. 5.

<sup>68</sup> *Id.*

<sup>69</sup> Consider the nine prosecutions of slavery and lesser servitudes brought about as a result of the Anti-Slavery Campaign by Coalition of Immokalee Workers, at: <http://www.ciw-online.org/slavery.html>; and also, see Organization of American States, Inter-American Commission on Human Rights, *José Pereira/Brazil*, Friendly Settlement Report Number 95/03, 24 October 2003; relating to the serious injury of José Pereira and the death of another worked “when both attempted to escape, in 1989, from the ‘Espírito Santo’ estate, where they had been drawn with false promises concerning working conditions, and found that they had to work forcibly, without the freedom to leave and under inhumane and illegal conditions, which they suffered along with other 60 workers on that estate”. Brazil recognised that the case was “illustrative of a more general practice of ‘slave’ labor and of the lack of judicial guarantees and labor security, which make this practice widespread”. As a result, Brazil utilised this case to commit itself to far-reaching measures to combat what it has termed slave labour.

use a car until it is run into the ground, one can exhaust a pack-mule, or consume food. In the case of slavery this power attaching to the right of ownership might be understood as the ability to *dispose of a person*. In such a context, the mistreatment or neglect of a person may point to slavery. However, where control tantamount to possession is present, the mistreatment or neglect of a person that would lead to their physical or psychological exhaustion, and ultimately, if it was to continue, to their destruction, would be an act of slavery. The consideration of the power to dispose of a person as constituting a power attaching to the right of ownership speaks to the ability to use a person, to exhaustion, so that the slave might be considered as being disposable. Evidence of such mistreatment or neglect might include sustained physical and psychological abuse, whether it is calculated or indiscriminate. The imposition of such physical or psychological demands would severely curtail the capacity of the human body to sustain itself or function effectively". In this manner the person would, effectively, be disposable.

In property law one further instance of ownership might be recognised, that of 'security of holding'. Such security of holding would protect property from attempts by others to take it, or the State to expropriate it. As is recognised in international law, while the State is allowed to expropriate foreign property with fair compensation, domestically that expropriation – depending on the State – should, in the main, respect due process. In the case of contemporary slavery, as the State no longer recognises a property right in persons, no such security of holding will exist. Instead, where slavery is concerned one should look to the opposite being true, that there exists an 'insecurity of holding', wherein there is a duty on the State to 'expropriate' or to 'confiscate' individuals held in slavery so as to reverse the deprivation of liberty by freeing them from their situation. Such insecurity of holding is made plain by the International Covenant on Civil and Political Rights which establishes that each State Party must "ensure to all individuals within its territory and subject to its jurisdiction" are not to "be held in slavery" and that "slavery and the slave-trade in all their forms shall be prohibited".<sup>70</sup> Flowing from the 1926 Slavery Convention is the requirement that States "adopt the necessary measures in order that severe penalties may be imposed" with regard to "the complete suppression of slavery [and] the slave trade."<sup>71</sup> Whereas Article 6(1) of the 1956 Supplementary Convention goes further, requiring ancillary elements touching on slavery to be criminalised:

The act of enslaving another person or of inducing another person to give himself or a person dependent upon him into slavery, or of attempting these acts, or being accessory thereto, or being a party to a conspiracy to accomplish any such acts, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to punishment.

Beyond this, the 1956 Supplementary Convention also requires that "mutilating, branding or otherwise marking a slave" be criminalised.<sup>72</sup> Lest one think that such mutilation is a thing

<sup>70</sup> Articles 2(1) and 8(1), United Nations International Covenant on Civil and Political Rights, 1966. Note also in the European context the positive obligations with regard to 'trafficking/slavery' are wider, as a result of *Rantsev v Cyprus and Russia*, Application no. 25965/04, 7 January 2010. I say 'trafficking/slavery' as the Court stated: that it "considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership". European Court of Human Rights, *Rantsev v Cyprus and Russia*, Application no. 25965/04, 7 January 2010. p. 68. See Jean Allain, "Rantsev v. Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery", *Human Rights Law Review*, Vol. 10, 2010, pp. 546-557.

<sup>71</sup> Article 6, Slavery Convention, 1926.

<sup>72</sup> Article 5, 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery reads:

In a country where the abolition or abandonment of slavery, or of the institutions or practices mentioned in article I of this Convention, is not yet complete, the act of mutilating, branding or otherwise marking a slave



of the past, in 2006 Judgment before the Inter-American Court of Human Rights in the *Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, a statement by a Jesuit priest was included which noted that:

Inside Detention Center of Catia ‘the strongest dominated the weakest’. This was condoned by prison officers. In addition, this type of dominance was represented graphically by branding inmates who served as slaves. There were two types of slavery: labor slavery and sexual slavery. Labor slaves were branded with a burner, like cattle brands, which identified who owned the slave, i.e. who was the head prisoner of the hall. If they were branded on the buttocks, they were sexual slaves.<sup>73</sup>

Likewise, the 2004 Report of the Sierra Leone Truth and Reconciliation Commission noted that women and girls who had been abducted and forced to take up arms were sometimes branded. The Truth and Reconciliation Commission considered their existed “a deliberate policy [...] to target girls and women between the ages of 13 and 24 and forcibly ‘brand’ them with the acronyms of the fighting forces”, by “deliberately marking them on their chests”, via the “carving the initials of the particular fighting force”.<sup>74</sup>

Beyond these contractual obligations flowing from the 1926 and 1956 Conventions, further imputes towards States interfering with the relationship between the slave-holder and the slave and ensuring an insecurity of holding is to be found in the positive obligations flowing from international human rights law. The *Rantsev* case before the European Court of Human Rights is instructive. While only binding the parties and forming part of the jurisprudence meant to be applicable within the Council of Europe; beyond the shores of Europe it is worth noting *de lege ferenda*. That case, with turned on the short life and death of Oxana Rantseva who had come to work in a night club in Cyprus. Having left the job after three days, her former employer sought to have her arrested on immigration charges; this failed, but the police released Ms Rantseva into the hands of her former employer, in whose house she succumbed to her death the same night.

The Court found Cyprus in breach of Article 4 of the European Human Rights Convention for failing to give Ms Rantseva “practical and effective protection against trafficking and exploitation”; it having stated that it considered “that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership”.<sup>75</sup> Caution must thus be exercised in the following consideration as the European Court conflates trafficking and slavery and thus the positive obligations now considered must be seen in that light. That said, it is worth restating that these positive obligations will be applicable within Europe, while only carrying persuasive value beyond the Council of Europe.

The European Court of Human Rights first sought to confirm its earlier determination that there is “a specific positive obligation on member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour”. To comply, the Court noted, States must “put in place a legislative and administrative framework to prohibit and punish” violations related to Article 4 of the European Human Rights Convention, which set out the prohibitions against slavery, servitude

---

or a person of servile status in order to indicate his status, or as a punishment, or for any other reason, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to punishment.

<sup>73</sup> Inter-American Court of Human Rights, *Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 5 July 2006, p. 23.

<sup>74</sup> Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Volume 3B, 2004, p. 142.

<sup>75</sup> European Court of Human Rights, *Rantsev v Cyprus and Russia*, Application no. 25965/04, 7 January 2010. p. 68 and 86.

or forced or compulsory labour. The Court then noted that in certain circumstances, States may have to take operational measures to protect victims, or potential victims”. [...] A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. The victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests”.<sup>76</sup>

It is through the various positive obligations that States are meant to disrupt the relationship between the person holding a slave and the individual enslaved. It is through these obligations that the last of the powers attaching to the right of ownership is given effect, wherein an insecurity of holdings is meant to ensure that no relationship where one person controls another in the same manner as they might possess a thing.

## Conclusion

This Chapter has set out an approach to interpreting the internationally recognised definition of slavery. The ordinary meaning of the term slavery as first set out in the 1926 Slavery Convention, but confirmed in 1956 and introduced, in substance, as the definition of enslavement in the 1998 Statute of the International Criminal Court, functions within a property law paradigm. Ultimately, an understanding of what constitutes slavery turns on the exercise of the powers attaching to the rights of ownership. Having had recourse to the *travaux préparatoires*, having taken into consideration the object and purpose of these instruments and the recent jurisprudence to emerge from courts, both domestic and international, it appears that not only can slavery be read in such a way as to capture the lived experience of contemporary slaves, but that such an interpretation is, in law, internally consistent with a reading of the definition of slavery.

The approach taken: to read the definition of slavery within a property law paradigm creates a unified understanding of slavery which gives it both legal integrity in the court room, but also grounds the study of slavery, of human exploitation and human trafficking, providing a common understanding of the phenomenon from which to study it. Capturing the essence of contemporary condition of slavery through recognising that control tantamount to possession is fundamental to unlocking the potential of the 1926 definition. When consider slavery, recent pronouncements of international courts have set out *indicia* which point to instances of slavery. Yet, when considering these, they fall broadly into two categories: the means by which one is brought into the condition of slavery – the enslavement process – and what transpires once the enslavement process has taken place – the manner in which the individual is exploited. The reading of the 1926 definition put forward, intervenes between these two and asks: Has the process of enslavement established itself by such control being exercised as we would be recognised in a situation where a person possess a thing?; and, is the control such that the exercise of the other powers attaching to the right of ownership – the power to use, to manage, to profit, to transfer or to disposal of person – possible? In so doing, the indicators are evidentiary, but separate from the legal determination of slavery as defined in international law.

The value in having this common reading of the definition of slavery is paramount as we moved deeper into the neo-abolitionist era which is spurred on by the anti-trafficking conventions and the creation of the crime of enslavement before International Criminal Court. Established jurisprudence will not only provide consistency amongst international courts, but will also provide guidance to domestic courts, as most States have the prohibition

---

<sup>76</sup> *Id.*, pp. 69, 70 and 71. Note also *Ooo and others v Commissioner of Police for the Metropolis*, Queen’s Bench Division, [2011] EWHC 1246 (QB), 20 May 2011, where the police in London, UK, were found in breach of the positive obligation to investigate flowing from *Rantsev*.

against slavery established in law, but have yet to define or prosecute it. A clarification of the law is the first step towards making this happen.

# ENSLAVEMENT



## Chapter 6

This Chapter considers the crime of ‘enslavement’ as it has evolved in international criminal law so that today it can be considered, in substance, as being synonymous with slavery as first defined by the 1926 Slavery Convention. This was not always so, as in the aftermath of the Second World War, jurists sought to reconcile their reading of slavery in wartime with the Nuremberg Charter. The work of the United Nations International Law Commission, which touched on slavery in times of war, though never ratified by States, was considered by some to reflect customary international law. That approach, while acknowledged by the International Criminal Tribunal for the former Yugoslavia, was set aside for one which relied on the exercise of the powers attaching to the right of ownership. It was this approach which was later picked up by those negotiating the 1998 Rome Statute of the International Criminal Court and the judges interpreting the Statute of the Special Court for Sierra Leone.

Having considered this evolution of the crime of enslavement, the Chapter turns to examine the manner in which the relevant provisions of the secondary legislations of the International Criminal Court – the Elements of Crimes – although appearing *prima facie* to be at variance with the definition of enslavement, can be read so as to be consistent with the Rome Statute. Ultimately, by establishing that enslavement is a crime against humanity only where there is the exercise of the powers attaching to the right of ownership means that the crime is both established with legal certainty, and by dropping reference to lesser servitudes, that the International Criminal Court truly has jurisdiction, as the Rome Statute states, over only ‘the most serious crimes of concern to the international community as a whole’.

### **The Evolution of Enslavement in International Criminal Law**

Before considering the customary basis of the crime against humanity of enslavement, it is worth recalling as set out in Chapter 1, that warfare was a primary means of enslaving people. In Roman Law, it was recognised that in terms of *jus gentium* “people become slaves on being captured by enemies”.<sup>1</sup>

While the move to abolish slavery generally comes in the wake of the Nineteenth Century move to abolish the slave trade at sea<sup>2</sup>; the move to abolish slavery in the specific situation of war – the genealogical genesis of enslavement – emerges from a different source: The 1863 Instructions for the Government of Armies of the United States in the Field. Those Instructions – the so-called Lieber Code – issued during the United States Civil War, declared as a war measure that “private citizens are no longer [to be] enslaved”. This war-time declaration made by United States President Abraham Lincoln was meant to hold the troops of the Southern Confederacy to a declared standard, should the Northern Union emerge victorious. The Instructions dismiss domestic law, instead stating that “there exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land”. That provision was then given substance by first turning to the issue of slavery and, though it plays rather fast

---

<sup>1</sup> The Digest of Justinian (5 Marcian, Institutes, book 1) as reproduced in Stanley Engerman, Seymour Drescher, and Robert Paquette (eds.), *Slavery* (Oxford Readers), 2001, p. 99.

<sup>2</sup> See Jean Allain “Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade”, *British Yearbook of International Law* 2007, Vol. 78, 2008, pp. 342-388.

and loose with Roman Law, declares that “any fugitive slave falling into the hands of United States’ troops will be deemed to be free with no future claim of compensation for lost property being entertained”.<sup>3</sup> Beyond this, the Leiber Code declares, at Article 58, that any enslavement of United States troops will be met with the ultimate penal sanction:

The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

It is here that we witness the genesis of provisions of what would come to be termed ‘enslavement’ in international criminal law. While the first Geneva Convention touching on the laws of armed conflict would emerge later in that same year of 1863, the issue of enslavement was not present, as that instrument dealt with the care of the wounded and sick in the field. Despite the growing corpus of international humanitarian law during the Twentieth Century, no treaty provision dealing with enslavement emerges until the sole mention in 1977.<sup>4</sup>

That said, enslavement did find voice in international criminal law and evolved from Nuremburg onwards through pronouncements which came to be regarded as customary international law. The 1945 Charter of the International Military Tribunal sets out its jurisdiction, *ratione materiae*, at Article 6, in the following terms:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against Peace: [...]

---

<sup>3</sup> See Article 42, United States of America, Instructions for the Government of Armies of the United States in the Field, General Order Number 100, 24 April 1893; which reads:

Slavery, complicating and confounding the ideas of property, (that is of a ‘thing’) and of personality, (that is of ‘humanity’) exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that ‘so far as the law of nature is concerned, all men are equal’. Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or State can have, by the law of postliminy, no belligerent lien or claim of service.

<sup>4</sup> See Article 4(2), Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, which mirrors the provisions of the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, as it reads, in part, that the “following acts against the persons [...] are and shall remain prohibited at any time and in any place whatsoever: [...] (f) slavery and the slave trade in all their forms”.

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or *deportation to slave labor* or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(c) Crimes against Humanity: namely, murder, extermination, *enslavement*, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.<sup>5</sup>

Where Article 6(b) is concerned, the International Military Tribunal stated that such war crimes were already established under international law, as being covered by provisions of either the 1907 Hague Regulations or the 1929 Geneva Convention on the Treatment of Prisoners of War. Despite the fact that the notion of ‘deportation to slave labor’ is not found in either of these instruments (nor forced labour or slavery), the Tribunal went on to say that “violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument”.<sup>6</sup> This final statement is difficult to reconcile, as the deportation to slave labour during the National Socialist era was a new phenomenon and no mention of enslavement or this nebulous ‘deportation to slave labor’ found voice in provisions dealing with the laws of war, but for the tangential provisions of the 1863 Lieber Code noted earlier.

That said, the defendant, Fritz Sauckel was found guilty of both war crimes and crimes against humanity and sentenced to death by hanging for having been “in charge of a programme which involved deportation for slave labour of more than 5,000,000 human beings, many of them under terrible conditions of cruelty and suffering”.<sup>7</sup> Sauckel had been

---

<sup>5</sup> Article 6, Charter of the International Military Tribunal, 8 August 1945. Emphasis added.

<sup>6</sup> *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10*, Volume I, 1947, p 253.

<sup>7</sup> With regard to crimes against humanity, the International Military Tribunal does not give voice in its Judgment of Fritz Sauckel to the crime he was found guilty of, though the presumption would be, it was Count 4(A), which reads:

(A) Murder, Extermination, Enslavement, Deportation, and Other Inhumane Acts Committed against Civilian Populations before and during the War

For the purposes set out above, the defendants adopted a policy of persecution, repression, and extermination of all civilians in Germany who were, or who were believed to be, or who were believed likely to become, hostile to the Nazi Government and the common plan or conspiracy described in Count One. They imprisoned such persons without judicial process, holding them in ‘protective custody’ and concentration camps, and subjected them to persecution, degradation, despoilment, enslavement, torture, and murder.

Special courts were established to carry out the will of the conspirators; favored branches or agencies of the State and Party were permitted to operate outside the range even of nazified law and to crush all tendencies and elements which were considered “undesirable”. The various concentration camps included Buchenwald, which was established in 1933, and Dachau, which was established in 1934. At these and other camps the civilians were put to slave labor, and murdered and ill-treated by divers means, including those set out in Count Three above, and these acts and policies were continued and extended to the occupied countries after 1 September 1939, and until 8 May 1945.

As regard war crimes, Sauckel was found guilty of the following:

(B) *Deportation for Slave Labor and for other Purposes of the Civilian Populations of and in Occupied Territories*

During the whole period of the occupation by Germany of both the Western and the Eastern Countries it was the policy of the German Government and of the German High Command to deport able-bodied citizens from such occupied countries to Germany and to other occupied countries for the purpose of slave labor upon defense works, in factories, and in other tasks connected with the German war effort.

In pursuance of such policy there were mass deportations from all the Western and Eastern Countries for such purposes during the whole period of the occupation.

## Plenipotentiary General for the Utilisation of Labour, who in the words of the Nuremberg Tribunal:

set up a programme for the mobilisation of the labour resources available to the Reich. One of the important parts of this mobilisation was the systematic exploitation, by force, of the labour resources of the occupied territories. Shortly after Sauckel had taken office, he had the governing authorities in the various occupied territories issue decrees, establishing compulsory labour service in Germany. Under the authority of these decrees Sauckel's Commissioners, backed up by the police authorities of the occupied territories, obtained and sent to Germany the labourers which were necessary to fill the quotas given them by Sauckel. He described so-called 'voluntary' recruiting by Janates 'a whole batch of male and female agents just as was done in the olden times for shanghaiing'. That real voluntary recruiting was the exception rather than the rule is shown by Sauckel's statement on 1st March, 1944, that 'out of five million foreign workers who arrived in Germany not even 200,000 came voluntarily'. Although he now claims that the statement is not true, the circumstances under which it was made, as well as the evidence presented before the Tribunal, leave no doubt that it was substantially accurate. [...]

Sauckel [...] was informed of the bad conditions which existed. It does not appear that he advocated brutality for its own sake, or was an advocate of any programme such as Himmler's plan for extermination through work His attitude was thus expressed in a regulation: "All the men must be fed, sheltered and treated in such a way as to exploit them to the highest possible extent at the lowest conceivable degree of expenditure".<sup>8</sup>

Beyond these considerations given by the International Military Tribunal, the issue of slave labour was given an airing beyond Nuremberg as a result of trials held by the United States of America in its zone of occupation, under the provisions of Control Council Law Number 10. Two of these cases – *Milch* and *Pohl*– dealt with the use of civilians as slave labour. In both cases, findings of guilt with regard to crimes against humanity were handed down; in *Pohl*, it being noted that "compulsory uncompensated labour" constituted slavery.<sup>9</sup> However, in both cases, no substantive discussion took place as to the content of the norm.

### *The International Law Commission*

The law itself was not tried in any significant manner at Nuremberg<sup>10</sup>; however, the victorious Powers, having solidified the peace through the establishment of the United Nations Organisation in 1945 moved, shortly thereafter, to give voice to the legal principles which emerged from the post-Second World War trials of Nuremberg and Tokyo. This took place in the guise of the formulation of the 1950 Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, by the United

---

Such deportations were contrary to international conventions, in particular to Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and to Article 6 (b) of the Charter.

Particulars of deportations, by way of example only and without prejudice to the production of evidence of other cases are as follows:

1. From the Western Countries: [...]
2. From the Eastern Countries: The German occupying authorities deported from the Soviet Union to slavery about 4,978,000 Soviet citizens. [...]

See Nuremberg War Crimes Trials at [http://avalon.law.yale.edu/subject\\_menus/imt.asp](http://avalon.law.yale.edu/subject_menus/imt.asp).

<sup>8</sup> *Id.*

<sup>9</sup> *United States v Oswald Pohl and Others*, 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10*, Volume V, 1997, p 970.

<sup>10</sup> In 1996, the International Law Commission noted that: "An initial formulation of crimes against humanity was provided in article 6, subparagraph (c), of the Charter of the Nurnberg [sic] Tribunal, although the Nurnberg Tribunal was very circumspect in applying it".

Nations International Law Commission.<sup>11</sup> When the United Nations General Assembly asked the Commission to formulate these Principles, it also requested that it prepare a consideration of international crimes under the heading of a ‘draft code of offences against the peace and security of mankind’.<sup>12</sup> Jean Spiropoulos, the individual tasked by the International Law Commission to act as Special Rapporteur and develop a draft code, put forward in his second Report in 1951, a provision which included enslavement:

Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.

“This paragraph”, Mr. Spiropoulos noted, “corresponds substantially to article 6, paragraph (c), of the Charter of the Nurnberg [sic] Tribunal, which defines ‘crimes against humanity’.<sup>13</sup> That provision was adopted by the International Law Commission, in 1954 as Article 2(11) of the draft Code of Offences against the Peace and Security of Mankind.<sup>14</sup>

This is where things stood until 1981, when the UN General Assembly invited the “International Law Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind”.<sup>15</sup> In 1986, as part of his Fourth Report to the Commission, the new Special Rapporteur, Doudou Thiam, included the following provision without comment as part of his revamping of the draft Code:

Inhuman acts which include, but are not limited to, murder, extermination, *enslavement*, deportation or persecutions, committed against elements of a population on social, political, racial, religious or cultural grounds.<sup>16</sup>

In his Seventh Report of 1989, Mr. Thiam “had recast the draft articles on war crimes and crimes against humanity which he had submitted in his fourth report”, and focused in particular on, *inter alia*, inhuman acts, with special reference to slavery and forced labour.<sup>17</sup> From hereon, but for the end product of his work on the draft Code, Mr. Thiam shifted focus dealing with the issue of ‘slavery’ as opposed to ‘enslavement’.

In turning to consider the issue of slavery, it was acknowledged that there “was general agreement in the Commission on the need to include slavery as a crime against humanity in the draft code”, and that it was deemed preferable to establish a separate article devoted to the issue.<sup>18</sup> As a result, the Special Rapporteur proposed that “Slavery and all other forms of bondage, including forced labour” should constitute a crime against humanity.<sup>19</sup> He did so by reference to the 1926 Slavery Convention, the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights (ICCPR); Mr. Thiam

---

<sup>11</sup> United Nations, General Assembly, International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, UN Doc. A/1316 (A/5/12).

<sup>12</sup> See United Nations, General Assembly, Resolution 177 (II), 21 November 1947.

<sup>13</sup> United Nations, General Assembly, Report of the International Law Commission to the General Assembly, UN Doc. A/1858, 1951, p. 136.

<sup>14</sup> See United Nations, General Assembly, Report of the International Law Commission to the General Assembly, UN Doc. A/2693, 1954, p. 151.

<sup>15</sup> United Nations, General Assembly, Resolution 106 (36), 10 December 1981.

<sup>16</sup> See United Nations, General Assembly, Report of the International Law Commission to the General Assembly, UN Doc. A/CN.4/398, 1986, p. 86. Emphasis added.

<sup>17</sup> United Nations, General Assembly, Report of the International Law Commission to the General Assembly, UN Doc. A/44/10, 1989, p. 86.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, p. 86.



acknowledging that the latter two instruments “condemned the practice of slavery in the strongest terms”. Reference was also made to the ICCPR wherein it spoke of “servitude and forced labour”, with the Special Rapporteur noting that the “Covenant also followed the provisions of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which stated in its preamble that ‘no one shall be held in slavery or servitude’”.

This was followed by an approach by the Special Rapporteur – and endorsed by the International Law Commission – which was hardly consonant with a reading of the 1956 Supplementary Convention, nor the object and purpose of that instrument as put forward by its drafters. In its Report to the General Assembly, the Commission writes: “It was pointed out that the Commission had the choice between the traditional concept of slavery as it appeared in the 1926 Slavery Convention and the wider definition given in the Supplementary Convention, which referred to ‘slavery ... and institutions and practices similar to slavery’”. In fact the 1956 Supplementary Convention, far from assimilating the two concepts, makes a clear distinction between slavery and institutions and practices similar to slavery.<sup>20</sup> Article 7(a) picks up the definition of slavery as defined by 1926 Convention *verbatim*, with the addition of a final clause which reads: “and ‘slave’ means a person in such condition or status”. While the following provision – Article 7(b) – defines ‘A person of servile status’ as meaning “a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention”, that is: the institutions or practices of debt bondage, serfdom, servile marriage, and child trafficking.

Mr. Thiam goes on to say, rather strikingly – making reference to the work of the Subcommittee on the Prevention of Discrimination and Protection of Minorities – that the scope of the concept of slavery “had been widened in recent years” and “now covered debt bondage and a whole range of other forms of exploitation”. With regard to debt bondage, and specifically the draft Article being put forward, which spoke of ‘slavery and all other forms of bondage, including forced labour’: “the general opinion in the Commission was that it lacked precision and that its content should be clarified”. Where forced labour was concerned, it was pointed out that Article 5 of the 1926 Slavery Convention spoke of a need ‘to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery’; and thus that the 1926 “Convention dealt not so much with forced labour as with the risk of it turning into slavery”.<sup>21</sup> As a result of these interventions, the Special Rapporteur said that the question would need further study.

That further study manifest itself in new provisions as part of the 1991 Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission, wherein Article 21 dealt with “Systematic or mass violations of human rights” including “establishing or maintaining over persons a status of slavery, servitude or forced labour”.<sup>22</sup> The shift from inhuman acts to systematic and mass violations of human rights

<sup>20</sup> This is confirmed by the fact that a proposal by Portugal to define slavery together with institutions and practices similar to slavery under the heading of ‘servile status’ was expressly rejected at the Diplomatic Conference negotiating the 1956 Supplementary Convention. See Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, 2008, pp. 518-519.

<sup>21</sup> Report of the International Law Commission, n. 17, p. 61.

<sup>22</sup> United Nations, General Assembly, Report of the International Law Commission on the work of its forty-third session, *Yearbook of the International Law Commission*, UN Doc. A/46/10 (Volume 2, Part 2), 1991, p. 103. The provision of Article 21, Systematic or mass violations of human rights, reads in full:

An individual who commits or orders the commission of any of the following violations of human rights:

- murder
- torture
- establishing or maintaining over persons a status of slavery, servitude or forced labour

was brought on by the “considerable development in the protection of human rights since the 1954 draft Code”. With regard to ‘establishing or maintaining over persons a status of slavery, servitude or forced labour’, “the Commission considered that, since there were specific conventions on these matters it was enough for the draft article to enumerate the crimes and leave it to the commentary to mention the principles of international law underlying these conventions”.<sup>23</sup>

When the International Law Commission once more considered the issue of slavery, the landscape of international criminal law had been fundamentally altered, with the creation of the *ad hoc* tribunals for the former Yugoslavia and Rwanda by the UN Security Council. The Commission this time around reverted to speaking of ‘enslavement’ as opposed to ‘slavery’. In its 1994 Report, the International Law Commission, noting Article 5 of the International Criminal Tribunal for the former Yugoslavia, wherein, as a crime against humanity, subparagraph (c) enumerated “enslavement”, stating that Article 5 covered, in substance, its own draft Article 21.<sup>24</sup> As a result, the Special Rapporteur proposed a new text of Article 21 of the draft Code of Crimes against the Peace and Security of Mankind entitled ‘Crimes against humanity’, which in part stated that a “crime against humanity means the systematic commission of any of the following acts: [...] Reduction to slavery”.<sup>25</sup>

This was followed, by the adoption of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, the culmination of the work of both Mr. Thiam as Special Rapporteur and the International Law Commission on the issue. At Article 18 of the 1996 Draft Code, crimes against humanity was defined, in part as “any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: [...] (d) Enslavement”.<sup>26</sup> In the Commentary to that provision, the Commission had the following to say:

- 
- persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or
  - deportation or forcible transfer of population shall, on conviction thereof, be sentenced [to. . .].

<sup>23</sup> United Nations, General Assembly, Report of the International Law Commission on the work of its forty-third session, *Yearbook of the International Law Commission*, UN Doc. A/46/10 (Volume 2, Part 2), 1991, p. 104. The Commission provides examples of these specific conventions:

For example, slavery is defined in the Slavery Convention, of 25 September 1926, and in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 7 September 1956, which also defines servitude. Both slavery and servitude are also prohibited under article 8 of the International Covenant on Civil and Political Rights, of 16 December 1966. The article also prohibits forced labour, a concept which it spells out, and which also forms the subject of some conventions, such as ILO Conventions Nos. 29 and 105 concerning the Abolition of Forced Labour.

<sup>24</sup> See United Nations, General Assembly, Report of the International Law Commission on the work of its forty-sixth session, *Yearbook of the International Law Commission*, UN Doc. A/49/10 (Volume 2, Part 2), 1994, p. 40.

Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia reads, in part: “The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: [...] (c) Enslavement; [...]”.

<sup>25</sup> United Nations, General Assembly, Report of the International Law Commission on the work of its forty-seventh session, *Yearbook of the International Law Commission*, UN Doc. A/50/10 (Volume 2, Part 2), 1995, p. 25.

<sup>26</sup> United Nations, General Assembly, International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, *Yearbook of the International Law Commission*, UN Doc. A/51/10 (Volume 2, Part 2), 1996, p. 47. Article 18 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind reads, *inter alia*: “A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: [...] (d) Enslavement; [...]”.

Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29, concerning Forced or Compulsory Labour (forced labour). Enslavement was included as a crime against humanity in the Charter of the Nurnberg Tribunal (art. 6, subpara. (c)), Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3) as well as the Nurnberg Principles (Principle VI) and the 1954 draft Code (art. 2, para. 11).

### *International Criminal Tribunal for the former Yugoslavia*

In the 2001 judgment in *Kunarac* case before the International Criminal Tribunal for the former Yugoslavia, the Trial Chamber endorsed the work of the International Law Commission (read: that enslavement refers to ‘establishing or maintaining over persons a status of slavery, servitude or forced labour’), by stating that as “a body consisting of experts in international law, including government legal advisers, elected by the UN General Assembly, the work of the ILC, at least in relation to this issue, may be considered as evidence of customary international law”. That said, while it is difficult to see where the *opinio juris* and State practices manifest in the narrative of the International Law Commission just provided; the question would ultimately become moot as the International Criminal Tribunal for the former Yugoslavia would read enslavement in a different light.

The Tribunal considered that the parameters of “enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person”<sup>27</sup>. The Trial Chamber went on to say that:

Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator.

The Trial Chamber then added:

The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.

The Trial Chamber, stated that the “‘acquisition’ or ‘disposal’ of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone”.

The Trial Chamber then accepted the approach put forward by the Prosecutor, as to the factors “to be taken into consideration in determining whether enslavement was committed”:

These are the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor.<sup>28</sup>

---

<sup>27</sup> International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23-T &-IT-96-23/1-T) Judgment, 22 February 2001, pp. 191 and 192.

<sup>28</sup> *Id.*, pp. 193. Footnote references have been omitted.

Where forced labour was concerned, the Trial Chamber added little, stating that such labour was not prohibited by the Fourth Geneva Convention, though “strict conditions” govern such labour.

For its part, the Appeals Chamber in *Kunarac* maintained the distinction between slavery and ‘enslavement’ though it accepted “the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as ‘chattel slavery’, has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership”<sup>29</sup>. The Appeals Chamber appeared to make the distinction between *de jure* slavery (read: chattel slavery) and *de facto* slavery, though it does not express itself in those terms; instead it spoke of contemporary forms of slavery wherein “the victim is not subject to the exercise of the more extreme rights of ownership associated with ‘chattel slavery’, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of ‘chattel slavery’ but the difference is one of degree”.<sup>30</sup>

The Appeals Chamber then noted that “the law does not know of a ‘right of ownership over a person’. Article 1(1) of the 1926 Slavery Convention speaks more guardedly ‘of a person over whom any or all of the powers attaching to the right of ownership are exercised.’ That language is to be preferred”. Repeating the “factors or indicia” noted by the Trial Chamber, the Appeals Chamber, while indicating that the list was not exhaustive, stated that “the question whether a particular phenomenon is a form of enslavement” will be based on, *inter alia*:

the ‘control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour’.<sup>31</sup>

In the *Krnojelac* case before the Yugoslav Tribunal, while the Trial Chamber determined that the Prosecutor had failed to make the case that Milorad Krnojelac had enslaved individuals by means of forced labour, the Chamber did consider the law of enslavement. For the Trial Chamber, the case to be made by the Prosecutor was that individuals (in this case detainees) were forced to work and that there was an intentional exercise of any or all of the powers attaching to the right of ownership.<sup>32</sup> Noting that labour was not prohibited by international humanitarian law, the Trial Chamber stated that “[g]enerally, the prohibition is against *forced* or *involuntary* labour”. It continued: “it is clear from the Tribunal’s jurisprudence that ‘the exaction of forced or compulsory labour or service’ is an ‘indication of enslavement’, and a ‘factor to be taken into consideration in determining whether enslavement was committed’”.<sup>33</sup> This understanding that the exaction of forced or compulsory labour or service is an indication of enslavement appears to be at variance with a reading of the 1930 Forced Labour Convention. While Article 2 of that Convention

---

<sup>29</sup> International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, p. 35..

<sup>30</sup> *Id.*, pp. 35-36. The Appeals Chamber felt compelled to add a footnote which states: “It is not suggested that every case in which the juridical personality is destroyed amounts to enslavement; the concern here is only with cases in which the destruction of the victim’s juridical personality is the result of the exercise of any of the powers attaching to the right of ownership.

<sup>31</sup> *Id.*, p. 36.

<sup>32</sup> International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Milorad Krnojelac* (IT-97-25-T) Judgment, 15 March 2002, p. 147. Note that on appeal, Milorad Krnojelac was found guilty of forced labour, not on the grounds of enslavement, but of persecution. See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Milorad Krnojelac* (IT-97-25-A) Judgment, 17 September 2003.

<sup>33</sup> *Id.*, p. 147. Emphasis in the original.

establishes that “the term ‘forced or compulsory labour’ shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. The Convention also establishes exceptions, which are deemed to escape the definition of forced labour. These include compulsory military service, normal civic obligations of the citizens, penal labour, and community service, but also “any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity [...]”.<sup>34</sup> While the provision dealing the normal civic obligations is directed to citizens, the provisions for wartime make no distinction between citizens and those whether prisoners of war or civilians under occupation, finding themselves in the hands of the enemy. Thus, *prima facie*, that forced labour will be an indication of enslavement means that this crime is wider than that of slavery. This is so, as this reading of the Trial Chamber regarding forced labour appears not to recognise the exceptions to the exacting of forced labour in the event of war, despite this exception being integral to the overall definition of forced or compulsory labour set out in the 1930 Forced Labour Convention.

That said, for the Trial Chamber the question of determining enslavement fell to a question of fact as to whether the labour of protected persons (read: detainees) was involuntary or not. As a basis for making this determination, it reverted to the pronouncement in the *Kunarac* case, as being reflective of relevant circumstance:

The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.

Stating that Article 5(1) of Additional Protocol II “sets out the applicable standard”<sup>35</sup> as to labour for detainees in armed conflict, the Trial Chamber stated that if the fundamental guarantees established by Article 4 of Protocol II were to be “violated, the performance of that labour may be treated as an indication of enslavement”. Article 4 Additional Protocol II, as quoted by the Trial Chamber, reads:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction [...]
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever [...]
  - (f) slavery and the slave trade in all their forms [...]

---

<sup>34</sup> Article 2(2)(d), ILO Convention (No. 29) Concerning Forced Labour, 1930; reads:

Any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

<sup>35</sup> Article 5(1), Additional Protocol (II) to the Geneva Conventions of 1949, 1977 reads:

In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained; [...] (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

This then is the test set out with regard to forced labour as enslavement. With reference to Article 4, the issue cannot be with regard to sub-paragraph (f), as this would be a circular argument: that a violation of that provision in the performance of labour ‘may be treated as an indication of enslavement’. Instead, it appears that the Trial Chamber was saying that forced or involuntary labour exacted from protected persons ‘may be treated as an indication of enslavement’ where it fails to provide ‘respect for their person, honour and convictions and religious practices’. This appears to stray rather far from the exercise of any or all of the powers attaching to the right of ownership and to a determination on the sole basis of whether forced labour was extracted; not whether forced labour met the threshold of powers attaching to the right of ownership.<sup>36</sup>

Regardless of the above interpretation, it may be said that the evolution of international law from Nuremburg through the work of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind considered enslavement as a crime which went beyond the definition of slavery to include lesser servitudes. With the International Criminal Tribunal for the former Yugoslavia, we witness a transition from this broader understanding of enslavement to one which provides more legal certainty at trial, on the basis of the 1926 definition. This understanding is incorporated into the Statute of the International Criminal Court and has been given voice before the Special Court for Sierra Leone.

### **Enslavement and the Statute of the International Criminal Court**

In the move to establish the International Criminal Court – which had its genealogy intertwined with the work of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind as early as 1993 – A Preparatory Committee on the Establishment of an International Criminal Court was established in 1996. Where enslavement was concerned, the Preparatory Committee noted that:

Some delegations expressed the view that enslavement required further clarification based on the relevant legal instruments. There were proposals to refer to enslavement, including slavery-related practices and forced labour; or the establishment or maintenance over persons of a status of slavery, servitude or forced labour. The view was expressed that forced labour, if included, should be limited to clearly unacceptable acts.

There was clearly a lack of agreement as to what should be included with regard to the crime of enslavement. Thus, for instance, in the Chairman’s informal texts of proposals and suggestions, slavery appeared (not enslavement) as a war crime, but also, though in square brackets, other types of exploitation so as to read: “slavery [and the slave trade,] [slave-related practices, and forced labour] in all their forms”. Likewise, enslavement as a crime against humanity was also bracketed against the following: “[, including slavery-related practices and forced labour];[establishing or maintaining over persons a status of slavery, servitude or forced labour]”.<sup>37</sup> Where enslavement was concerned, the following definition – mirroring the definition of slavery as found in the 1926 Slavery Convention – was

<sup>36</sup> Here it should be recalled that the preamble of the 1926 Slavery Convention states as an object of that instrument “that it is necessary to prevent forced labour from developing into conditions analogous to slavery”; while Article 5 reads in part that State Parties are “to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery”.

<sup>37</sup> United Nations, General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, UN Doc. A/AC.249/1, 7 May 1996, pp. 64, 69 and 70.

Square brackets are utilised in the negotiation text to connote a lack of agreement prior to the final negotiation, in this case at Rome in the summer of 1998.

contemplated: “Enslavement means intentionally placing or maintaining a person in a condition in which any or all of the powers attaching to the right of ownership are exercised over him”. However, by 1997, the Preparatory Committee had settled on including only the crime of enslavement as a crime against humanity<sup>38</sup>, though “slavery and the slave trade in all their forms” remained a live option as a war crime.<sup>39</sup> In fact, that latter provision remained a live option until the 1998 United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, though it was ultimately not included in the Rome Statute.<sup>40</sup> Instead, the parties negotiating the Statute of the International Criminal Court established the ‘crime against humanity of enslavement’ at Article 7(1)(c) and defined that crime at Article 7(2)(c) in the following terms:

‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.<sup>41</sup>

The definition of enslavement as found in Article 7(2)(c) is, in substance, the same as that of slavery as established by the 1926 Slavery Convention and later included in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. By this definition, the States Parties negotiating the Rome Statute rejected the move to establish enslavement to include slavery and lesser servitudes as was mooted during the work of the Preparatory Committee. In so doing, by treaty-law the States Parties limited amongst themselves the normative content of enslavement as against what had been deemed customary international law. The States Parties did so by assimilating the crime against humanity of enslavement to slavery.

However, before proceeding to consider the content of this provision, word should be given to the latter part of the definition of enslavement as found in the Statute of the International Criminal Court. It should be understood that this provision, which reads “[...] and includes the exercise of such power in the course of trafficking in persons, in particular women and children”, does not add to the substance of the definition of enslavement but simply confirms that the powers attaching to the right of ownership may be found in instances of trafficking in persons. Such a latter element constitutes what the High Court of Australia called “a common drafting technique”.<sup>42</sup> The latter half of the definition of enslavement does not extend the operation of the overall definition, it simply brings trafficking to the attention of judges and makes them aware that they should not exclude the issue *ipso facto* but should, in fact, consider issues of trafficking if they manifest powers

---

<sup>38</sup> See United Nations, General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, Working Group on definition of crimes, Draft Consolidated Text, UN Doc. A/AC.249/1997/WG.1/CRP.5, 20 February 1997, p. 1.

<sup>39</sup> See United Nations, General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5, 12 March 1997, p. 1.

<sup>40</sup> United Nations, United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, p. 24.

<sup>41</sup> Article 7(2)(c), Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

<sup>42</sup> *The Queen v Tang* [2008] HCA 39, 28 August 2008, para. 33. In that case, the High Court considered the latter half of the following like provisions:

For the purposes of this Division, *slavery* is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

attaching to the right of ownership. As a result it should be emphasised that the substance of the crime of enslavement – ‘the exercise of any or all of the powers attaching to the right of ownership over a person’ – as set out in the Statute, mirrors that of ‘slavery’ as established in international law.

Despite the fact that the crime against humanity of enslavement as defined by Article 7(2) (c) of the Statute of the International Criminal Court is in essence the same as that of slavery as first defined in the 1926 Slavery Convention, it should be noted that the secondary legislation of the International Criminal Court – the Elements of Crimes – appears, *prima facie*, to bring into questions this understanding of enslavement as being synonymous with slavery. Article 9 of the Statute of the International Criminal Court states that the “Elements of Crimes shall assist the Court in the interpretation and application” of the jurisdiction *ratione materiae*. Where enslavement is concerned, the Elements of the Crimes, which were drafted in 2000 by the Preparatory Commission for the International Criminal Court, and later endorsed by the Assembly of States Parties to the Rome Statute at its first session, in September 2002, state the following at Article 7(1)(c):

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>43</sup>

While Element 2 and 3 speaks to establishing the threshold of enslavement as a crime against humanity, Element 1 sets out to elaborate on the definition of enslavement established by the Statute of the International Criminal Court.<sup>44</sup> Element 1 provides examples of what constitutes powers attaching to the right of ownership including “purchasing, selling, lending or bartering such a person or persons”. These examples are in line with those put forward by the United Nations Secretary-General in his 1953 Report mentioned earlier; though it should be emphasised that the Secretary-General goes further in providing examples of what would constitute such powers with regard to, for instance, the use of an individual or their labour in an unrestricted manner and gaining the unfettered benefit of the product of that labour.<sup>45</sup>

Element 1 of the crime against humanity of enslavement emerges from negotiations attached to a further crime under the Statute: the war crime and crime against humanity of sexual slavery. While the crime of sexual slavery is not defined in the Statute, it was agreed during the deliberations of the 1999 Preparatory Commission for the International Criminal Court (not to be confused with the Preparatory Committee which preceded it) that Element 1

---

<sup>43</sup> International Criminal Court, Assembly of States Parties, Elements of the Crimes, ICC-ASP/1/3, 9 September 2002, p. 117.

<sup>44</sup> It should be noted that Element 1 of the crime against humanity of enslavement is reproduced in exact terms (including its footnote) as common Element 1 to the crimes of sexual slavery as found at Articles 7(1)(g)-2 -- Crime against humanity of sexual slavery; 8(2)(b)(xxii)-2 -- War crime of sexual slavery; and 8(2)(e)(vi)-2 -- War crime of sexual slavery of the Elements of Crimes.

For a consideration of the slavery element of sexual slavery before the International Criminal Court see: International Criminal Court, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. German Katanga and Mathieu Ngudjolo Chui, *Motion for Leave to Submit as Amicus Curiae on Observations Related to Sexual Slavery Submitted by Queen’s University Belfast Human Rights Centre*, ICC-01/04-01/07-1257, 30 June 2009, Annex.

<sup>45</sup> For the six instances of powers attaching to the right of ownership set out by the Secretary General see Chapter 3, p. XX.



would, as Eve La Haye notes, “define the concept of slavery” for both enslavement and sexual slavery.<sup>46</sup>

It might be worthwhile to take a short pause from our consideration of Element 1 to speak to the crime of sexual slavery.<sup>47</sup> In the context of the International Criminal Court, sexual slavery should be understood not as a distinct crime, but enslavement plus a sexual element. This reading mirrors the approach taken the year previous to the elaborations of the Elements of Crimes by Gay McDougall, in her 1998 Report to the now defunct United Nations Sub-Commission on the Promotion and Protection of Human Rights in which she wrote that, with regard to sexual slavery, the “term ‘sexual’ is used in this report as an adjective to describe a form of slavery, not to denote a separate crime. In all respects and in all circumstances, sexual slavery is slavery”.<sup>48</sup> The relevant elements of the crime of sexual slavery found in Elements of Crimes bear this out, as they read:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

Returning to our considerations of Element 1, and recalling that its genealogy is based in discussions of sexual slavery rather than enslavement, it was the United States that first put forward a proposal regarding elements of the crime of sexual slavery. In the American proposal of February 1999, the slavery element read: “That the accused deprived one or more persons of their liberty”. That proposal included a commentary, stating that:

Besides physically detaining or confining a person to a particular place without consent, the deprivation of liberty required by this offence could also include severe deprivations of autonomy and freedom of movement, which are universally recognized as impermissible under international law.<sup>49</sup>

However, as it was recognised that elements of sexual slavery could constitute elements of another crime under the jurisdiction of the Court, Costa Rica, Hungary and Switzerland put forward the following proposal that gravitated towards enslavement: “The perpetrator treated a person as chattel by exercising any or all of the powers attaching to the right of ownership, including sexual access through rape or other forms of sexual violence”.<sup>50</sup> This proposal did not emerge in a vacuum as the United States had put forward the following proposal for the elements of crime of enslavement, which gave voice, in the first instance, to the 1926 definition of slavery:

1. That the accused intended to exercise powers attaching to the right of ownership over one or more persons.

---

<sup>46</sup> Eve La Haye, “Article 8(2)(b)(xxiii) – Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization and Sexual Violence”, Roy Lee (ed.) *International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, 2001, p. 191.

<sup>47</sup> See generally, Valerie Oosterveld, “Sexual Slavery and the International Criminal Court: Advancing International Law”, *Michigan Journal of International Law*, Vol. 25, 2003-2004, pp. 605-651.

<sup>48</sup> United Nations, Economic and Social Committee, Sub-Commission on the Promotion and Protection of Human Rights, Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict: Final Report submitted by Gay J. McDougall, Special Rapporteur, UN Doc E/CN.4/Sub.2/1998/13, 22 June 1998, p. 9.

<sup>49</sup> Preparatory Commission for the International Criminal Court, Proposal submitted by the United States of America: Draft elements of crimes, Addendum, PCNICCI1999IDP.4/Add.1, 4 February 1999, p. 6.

<sup>50</sup> Preparatory Commission for the International Criminal Court, Proposal submitted by Costa Rica, Hungary and Switzerland on certain provisions of Article 8 para. 2 (b) of the Rome Statute of the International Criminal Court: (viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi), PCNICCI1999/WGECIDP.8, 19 July 1999, p. 4.

2. That the accused either purchased or sold one or more persons or deprived them of their liberty and forced them to do labour without compensation.

3. That any deprivation of liberty or forced labour was without, and the accused knew it was without, lawful justification or excuse.

4. That the purchase, sale or deprivation and forced labour was part of, and the accused knew it was part of, a widespread or systematic attack against a civilian population.

To this the American proposal provided the following comment, that “‘purchased or sold’ need not be limited to the establishment of technical legal ownership but can include effectively equivalent transactions’.<sup>51</sup> Here then there was recognition in 1999, from the United States that the exercise of powers attaching to the right of ownership held in both *de jure* and *de facto* situations.

Where the proposal by Costa Rica, Hungary and Switzerland is concerned, “many delegations [of the Preparatory Commission] stressed the inadequacy and outdated nature of the word ‘chattel’”. Instead, the pithier ‘slavery as the powers attaching to the right of ownership’ was considered; but this definition was thought to lack precision.<sup>52</sup> In the lead up to the December meetings of the Preparatory Commission, Canada and Germany made a proposal which married the proposal by Costa Rica, Hungary and Switzerland to the United States’ proposal including the substances of both the definition of slavery and the notion of liberty into an element which was now made applicable to both the draft Elements of the Crimes of enslavement and sexual slavery.<sup>53</sup> By mid-December, there was agreement on the substance of the elements common to enslavement and sexual slavery:

---

<sup>51</sup> Preparatory Commission for the International Criminal Court, Proposal submitted by the United States of America: Draft elements of crimes, Addendum, PCNICCI1999IDP.4/Add.1, 4 February 1999, p. 4.

<sup>52</sup> La Haye, n. 46, p. 191.

<sup>53</sup> Element 1 of the Canada and Germany proposal reads:

The accused exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

As commentary, the proposal added: “*Enslavement includes the exercise of such power in the course of trafficking in persons, in particular women and children*”. See Preparatory Commission for the International Criminal Court, Proposal submitted by Canada and Germany on Article 7, PCNI CCI1999/WGEC/DP.36, 23 November 1999, pp. 3-4.

Note that a group of Arab States proposed that the crimes of enslavement and sexual slavery include an element which read: “Powers attaching to ownership does not include rights, duties and obligations incident to marriage between a man and a woman or between parent and child.” Preparatory Commission for the International Criminal Court, Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity, PCNICC/1999/WGEC/DP.39, 3 December 1999, pp. 2 and 3. This proposal did not garner the needed support. See Valerie Oosterveld, “Sexual Slavery and the International Criminal Court: Advancing International Law”, *Michigan Journal of International Law*, Vol. 25, 2003-2004, pp. 636-637.

Note also a proposal made by Columbia during the December sessions of the Preparatory Commission, which speaks to the frustration which it saw in the discussions around the common element for the crimes of enslavement and sexual slavery, noting that “the debate has centered on the inclusion or omission of the forms of ownership. For our delegation, this is not a substantive discussion”. Preparatory Commission for the International Criminal Court, Proposal submitted by Columbia: Comments on the proposals submitted by Canada and Germany on article 7 and by Japan on the ‘structure’ of Elements of Crimes against Humanity, PCNICC/1999/WGEC/DP.41, 6 December 1999, p. 2.

The accused exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>54</sup>

Though, with regard to the element of the crime of enslavement, a footnote appears which provides more guidance, this time to what is to be understood to constitute ‘deprivation of liberty’.<sup>55</sup> That footnote would come to be added to the crime of sexual slavery and would be introduced into Elements of Crimes which were ultimately adopted by the Assembly of States Parties of the Rome Statute on the International Criminal Court in September 2002. That footnote reads:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.<sup>56</sup>

Having considered the drafting process of the provisions of the Elements of Crimes common to enslavement and sexual slavery, attention now turns to developing a reading of its provisions that is in harmony with the Statute of the International Criminal Court.

### *Similar Deprivations of Liberty*

Beyond providing examples of powers attaching to the right of ownership, the common element to the crimes of enslavement and sexual slavery adds a final phrase which reads “or by imposing on them a similar deprivation of liberty”. An ordinary reading of this provision in the context of the overall provision of common Element 1 could lead to two readings, however, both readings leading to the same interpretation of that provision.

As this will be a rather technical consideration, the provisions of Element 1 are reproduced and separated by reference to their sentence structure:

*Primary clause:* The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons,

*Secondary clause:* such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. [...]

*Final phrase of the secondary clause:* [...] or by imposing on them a similar deprivation of liberty.

With regard to the link between the first part of the secondary clause and its final phrase, it should be noted that the conjunction ‘or’ can, in English grammar, provide for either a continuation or an alternation in the sentence.

The first reading of the phrase ‘or by imposing on them a similar deprivation of liberty’ would be that this phrase is but a continuation of the examples provided in the secondary

---

<sup>54</sup> Preparatory Commission for the International Criminal Court, Discussion paper proposed by the Coordinator, PCNICC/1999/WGEC/RT.16, 15 December 1999, pp. 2 and 5.

<sup>55</sup> See *id.*, p. 2, n. 7, which reads: “It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”

<sup>56</sup> See footnotes 11, 18, 53 and 66, Elements of Crimes. Assembly of States Parties to the Rome Statute of the International Criminal Court, 9 September 2002; which deal with the crime against humanity of enslavement, the crime against humanity of sexual slavery, the war crime of sexual slavery in an international armed conflict, and the war crime of sexual slavery in a non-international armed conflict.

clause, so as to form part of the following train of examples of powers attaching to the right of ownership: the purchasing, selling, lending, bartering or the imposing of similar deprivations of liberty on a person. In this first reading, the ‘similar deprivations of liberty’ are those similar to that manifest in the purchasing of a person, the selling of a person, or the lending or bartering of a person. As these are examples of powers attaching to the right of ownership, a similar deprivation of liberty would have no independent meaning, but would be a deprivation of liberty similar to those characterised as powers attaching to the right of ownership. In Valerie Oosterveld’s first-hand account of the negotiations of the Preparatory Commission, she states that delegations took issue with the list of powers provided (re: ‘purchasing, selling, lending, bartering’) as these “focused on examples with a commercial or pecuniary aspect”. Where this first reading of the phrase ‘or by imposing on them a similar deprivation of liberty’, is concerned, Oosterveld goes on to say, that “the use of the term ‘similar deprivations of liberty’ compounds the problem of the narrow list because ‘similar’ could be read to mean ‘similar to actions with a commercial or pecuniary nature’”.<sup>57</sup> La Haye notes that this concern led to the drafting of the footnote that elaborates on the notion of ‘deprivation of liberty’.

A second reading of the final phrase of Element 1 would be as an alternative. That ‘similar deprivations of liberty’ is to be considered as distinct from (or an alternative to) the rest of the secondary clause. However, such a reading cannot hold as there are two items which link the final phrase to the rest of the secondary clause. First, the reference to the act of ‘imposing on *them*’ which relates to the ‘one or more persons’ over whom the perpetrator is exercising powers attaching to the right of ownership. Second, mention of ‘similar deprivation of liberty’, speaks to a deprivation which would be similar to those powers attaching to the rights of ownership which are provided as examples. Finally, the negotiations of the Preparatory Commission do not accord with such a reading, but speak to the first reading noted above.

Thus, the final phrase, which speaks of ‘similar deprivations of liberty’, must be understood as an example of a power attaching to the right of ownership. As a result, not only is this a proper textual reading of common Element 1 of the crimes of enslavement and sexual slavery consonant with the *travaux préparatoires*, but it also meets the requirement of Article 9(3) of the Statute of the International Criminal Court which requires that the Elements of Crimes “shall be consistent with this Statute”. Such consistency between Element 1 and the Statute is manifest by the fact that the notion of ‘a similar deprivation of liberty’ has no independent meaning beyond constituting a power attaching to the right of ownership.

However, this is not the true end point of a consideration of this notion of ‘a similar deprivation of liberty’, as Element 1 has appended to it a footnote which sets out an understanding of ‘deprivation of liberty’. It will be recalled that the footnote reads:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

Through this footnote what appears to have transpired is the expansion of enslavement to include, beyond the established definition of slavery, as a deprivation of liberty the lesser servitudes of forced labour, debt bondage, serfdom, servile marriage or child trafficking – the latter four being the servile statuses set out in the 1956 Supplementary Convention.<sup>58</sup> This is so, as these deprivations of liberty would *appear* by way of this footnote to not only be

<sup>57</sup> See Oosterveld, n. 47, p. 632.

similar to powers attaching the right of ownership but to include the exacting of forced labour or the reduction of a person to a servile status through serfdom, debt bondage, servile marriage or child trafficking as constituting such powers. Through the addition of this footnote then, the narrowing of parameters of the crime against humanity of enslavement as established by the Statute of the International Criminal Court *appears* to have been enlarged by a footnote of what William Schabas terms the “subordinate legislation” of the International Criminal Court: the Elements of Crimes.<sup>59</sup>

However, this cannot hold as, in general terms, a footnote is meant to expand or clarify, not to detract from or contradict the provision to which it is appended. The phrase ‘a similar deprivation of liberty’ as found in common Element 1 is understood as an example of a power attaching to the right of ownership, and requires that the footnote be read in a manner which does not detract from, but expands or clarifies the understanding of ‘similar deprivation of liberty’, consonant with its reading as found in common Element 1 and, by extension, in conformity with the obligation of the provisions of Article 9(3) of the Statute which require that the “Elements of Crimes [...] shall be consistent with this Statute”. An interpretation which by the stealth of a footnote found in the Elements of Crimes which purports to expand the definition of enslavement beyond slavery to include lesser servitudes stretches the notion of consistency with the Statute beyond the judicial horizon of sound interpretation of international law.

Despite this, consideration of the first sentence of this footnote with reference to the evolution of the lesser servitudes established in law provides the possibility for the footnote to be read so as to be internally consistent with the Statute. The footnote establishes that a deprivation of liberty may, *in some circumstances*, include forced labour or a servile status (leaving aside trafficking for the moment). Those circumstances would be when forced labour or a servile status manifest powers attaching to the right of ownership and, despite their nomenclature and definition in law, slip their titular moorings to meet the definitional threshold of enslavement as found in the Statute of the International Criminal Court. Established law recognises this possibility.

Consider forced labour. Forced or compulsory labour is defined in the 1930 Forced Labour Convention as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.<sup>60</sup> Yet, before that definition was laid down, a provision dealing with forced labour was included in the 1926 Slavery Convention of which the introductory paragraph reads:

The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures *to prevent compulsory or forced labour from developing into conditions analogous to slavery.*

Article 5 of the 1926 Slavery Convention which placed the first limitation on forced labour, reserving it for public purposes only, acknowledges that forced labour could develop into conditions analogous to slavery. As such, it would be in these circumstances, when forced labour became analogous to slavery – becomes, in law, slavery – that it could then be included as a deprivation of liberty in line with the footnote of Element 1, with Element 1 itself, and with the definition of the crime against humanity of enslavement as set out in the Statute of the international Criminal Court.

---

<sup>58</sup> Note that the final sentence of Element 1, dealing with trafficking, is addressed it in the next section of this study.

<sup>59</sup> William Schabas, *An Introduction to the International Criminal Court*, 2007, p. 91.

<sup>60</sup> Article 2(1), ILO Convention (No. 29) Concerning Forced Labour, 1930.

Where “servile status as defined by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956” is concerned, Article 7(b) of that Convention states that “‘A person of servile status’ means a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention”. Thus, institutions or practices, as considered in depth in Chapter 4, are set out Article 1 of the 1956 Supplementary Convention as debt bondage, serfdom, types of servile marriages, and child trafficking. There is an introductory paragraph to this Article 1, which states that States Parties “shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of [these] institutions and practices”. However, that introductory paragraph continues by stating that the abolition or abandonment of these institutions and practices should take place “where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926”.

Thus, it was recognised in 1956 that debt bondage, serfdom, servile marriage or child trafficking, while they should be abolished in their own right could, if they manifest powers attaching to the right of ownership constitute slavery as defined by the 1926 Slavery Convention.<sup>61</sup> While an institution or practice may be considered as, for example, child exploitation or servile marriage; if powers attaching to the right of ownership are exercised, such institutions or practices would also be “covered by the definition of slavery” found in the 1926 Convention.

The footnote which seeks to clarify the term ‘a deprivation of liberty’ found attached to Element 1 recognises that, *in some circumstances*, such a deprivation may include forced labour, debt bondage, serfdom, servile marriage or child trafficking. Yet, Element 1 requires that such deprivation of liberty be similar to that manifest when the powers attaching to the right of ownership are exercised against a human being. This is required by a reading of Element 1; but more importantly it is imperative as Article 9(3) of the Statute requires that Elements of Crimes “be consistent with this Statute”, while Article 7(2)(c) of the Statute of the International Criminal Court defines enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person [...]”. Thus, only when a perpetrator exacts forced labour, or reduces a person to debt bondage, serfdom, servile marriage or child trafficking to such an extent that the action degenerates into the exercise of any or all of the powers attaching to the right of ownership will the interpretation of the footnote be in line with the Elements of Crimes and the Statute of the International Criminal Court. Further, with the International Criminal Court holding jurisdiction only where the powers attaching to the right of ownership are present and not when lesser servitudes are at play, means that the Court will also properly exercise its jurisdiction, as per Article 5(1) of the Statute, to apply exclusively to “the most serious crimes of concern to the international community as a whole”.

### *Trafficking in Persons*

---

<sup>61</sup> This was confirmed by the High Court of Australia in its 2008 *The Queen v Tang* case, when it stated:

It is unnecessary, and unhelpful, for the resolution of the issues in the present case, to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage. The 1956 Supplementary Convention in Art 1 recognised that some of the institutions and practices it covered might also be covered by the definition of slavery in Art 1 of the 1926 Slavery Convention. To repeat what was said earlier, the various concepts are not all mutually exclusive.

See *Queen v Tang* [2008] HCA 39, 28 August 2008, para. 29.

In both the definition of enslavement found in the Statute of the International Criminal Court and its elaboration via a footnote attached to Element 1 of the crimes against humanity of enslavement, the phrase ‘trafficking in persons, in particular women and children’ appears. While the primary legislation of the International Criminal Court, its Statute, provides that enslavement may take place in the course of trafficking where the powers attaching to the right of ownership are exercised; Element 1 by way of the footnote goes much further, seeking to make trafficking synonymous with enslavement. The second sentence of the footnote, it will be recalled, reads: “It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.” Where, in the previous section, in the case of ‘a deprivation of liberty’, common Element 1 could be reconciled with the Statute; here, with regard to trafficking in persons, the subordinate legislation goes beyond the confines of the established definition of enslavement as set out in the Statute to include elements which have no relation to the exercise of powers attaching to the right of ownership.

Article 7(2)(c) of the Statute of the International Criminal Court reads:

‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

It will be recalled that the latter half of the definition – ‘and includes the exercise of such power in the course of trafficking in persons, in particular women and children’ – does not add to the substance of the definition of enslavement but simply confirms that the powers attaching to the right of ownership may be found in instances of trafficking in persons. As a result, the International Criminal Court, in applying the provisions of Article 7(2)(c) of its Statute, would not be able to exclude *ipso facto* cases of trafficking from its jurisdiction, but could consider such cases where there is a demonstration of the exercise of the powers attaching to the right of ownership.

This is an accurate reflection of the law as it has evolved since the Rome Diplomatic Conference which negotiated the Statute of the International Criminal Court as an international consensus has emerged as to the definition of ‘trafficking in persons’, which is reflected in its appearance in both the 2000 United Nations Palermo Protocol and the 2005 Council of Europe Convention in the following identical terms:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>62</sup>

As will be noted from that definition, trafficking in persons consists of three elements, *a method* (‘the recruitment, transportation, transfer, harbouring or receipt’), *a means* (threat or use of force, other forms of coercion, abduction, fraud, deception, abuse of power, position of vulnerability, etc.) and *a purpose* – to exploit a person (‘for the purpose of exploitation [... of which examples are then given]’). Of the types of exploitation enumerated, slavery appears, as does lesser servitudes, including those found in the 1956 Supplementary Convention (via: ‘practices similar to slavery’), forced labour and ‘servitude’ (which has its own standing in

---

<sup>62</sup> See Article 3(a), 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women; and Children and Article 4(a), 2005 Council of Europe Convention on Action against Trafficking in Human Beings.

international human rights law, see for instance Article 8 of the ICCPR).<sup>63</sup> Therefore, only in situations where there is one of the enumerated methods and one of the enumerated means undertaken for the purpose of exploitation, and this exploitation reaches the threshold of manifesting powers attaching to the right of ownership, could an act of trafficking be considered as enslavement as defined in Article 7(2)(c) of the Statute of the International Criminal Court.

Having considered trafficking as it relates to the Statute of the International Criminal Court, it is now time to turn to the Elements of Crimes. Recalling that common Element 1 reads:

The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

Here, no mention is made of trafficking in persons. However, at the end of common Element 1, the footnote reads:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.<sup>64</sup>

That last sentence of the footnote appears to extend the definition of enslavement to not only those powers attaching to the right of ownership which might be present in a case of trafficking but to actually equate trafficking to enslavement.

Turning now to consider that final sentence in more detail. This sentence appears rather ambiguous as the first sentence of the footnote provides examples of deprivations of liberty, while the second sentence deals with trafficking. The second sentence is better read as a stand-alone sentence, as the phrase ‘described in *this* element’ does not refer to the first sentence of the footnote, but to Element 1. Also, the start of the first and second sentences of the footnote point to two distinct considerations (re: ‘It is understood’ and ‘It is also understood’). The final sentence of the footnote does not address the notion of ‘deprivation of liberty’ which is at the heart of the first sentence. Instead, the second sentence speaks directly to the elaboration of Element 1, and more specifically to: ‘The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons’. Thus the final sentence of the footnote should be read as: “it is understood that the conduct [the perpetrator

---

<sup>63</sup> Note however, that from a normative perspective no distinction is to be made between the content of institution and practices similar to slavery and servitude; see Jean Allain, “On the Curious Disappearance of Human Servitude from General International Law,” *Journal of the History of International Law*, Vol. 11, 2009, pp. 303-332.

<sup>64</sup> The introduction of the clause regarding trafficking in persons was first proposed by Spain at the negotiations of the Preparatory Commission, on the following terms: “Exercise of powers attaching to property ownership in the course of trafficking in persons, in particular women and children”. See Preparatory Commission for the International Criminal Court, Proposal submitted by Spain: Working Paper on Elements of Crimes, Addendum, PCNICC/1999/DP.9/Add.1, 16 February 1999, p. 3.

It might be emphasised that towards the end of the negotiations of the Preparatory Commission, Columbia made plain that it considered “it necessary to retain the terminology used in the Statute, that is, to refer explicitly to trafficking in persons in particular women and children. Preparatory Commission for the International Criminal Court, Proposal submitted by Columbia: Comments on the proposals submitted by Canada and Germany on article 7 and by Japan on the ‘structure’ of Elements of Crimes against Humanity, PCNICC/1999/WGEC/DP.41, 6 December 1999, p. 2.



exercised any or all of the powers attaching to the right of ownership over one or more persons] [...] includes trafficking in persons”. In essence then trafficking in persons is enslavement. This is a rather different proposition than that found in the definition of enslavement as established Statute, wherein only if powers attaching to the right of ownership are exercised during a case of trafficking in persons is the Court able to assert jurisdiction.

As a result, the Elements of Crimes applicable to the crime of enslavement and the crimes of sexual slavery, specifically common Element 1 with its attached footnote goes much further by deeming that where – as per a reading of the definition of trafficking in persons – *a method* and *a means* of trafficking is present, that any type of exploitation used would then amount to enslavement. Take the following as an example: where a perpetrator recruits a person by means of fraud for the purpose of the removal of organs, this would amount to enslavement as per the Elements of Crimes via the final sentence of the footnote attached to Element 1. This expanded understanding of enslavement does not appear to conform to the limits of the definition as set out in Article 7(2)(c) of the Statute; and is thus not, in the words of Article 9 of the Rome Statute, “consistent with this Statute”.

By equating trafficking with enslavement, the Elements of the Crimes seek to, by the stealth of a footnote, include within the jurisdiction of the International Criminal Court lesser types of exploitation where trafficking is present. This expansion of the definition of enslavement appears to be open-ended as it will be noted that the types of exploitation enumerated in the definition of trafficking in persons are but examples (i.e.: “shall include, at a minimum ...”) and appear to be the most egregious types of exploitation. This would leave the possibility of other, lesser, types of exploitation within the context of trafficking in persons open to the jurisdiction of the International Criminal Court.<sup>65</sup> One such example might be the trafficking of workers with the intended purpose of paying them less than minimum wage under the menace of being dismissed if they do not accept the terms of employment. While the paying of less than minimum wage would ordinarily invoke an administrative sanction – the paying of back-pay and say a fine in the domestic context; under the Elements of Crimes, the other elements of trafficking being present, would lift this act to the level of the crime against humanity of enslavement. Yet, this is hardly consonant with the more general jurisdictional element of the Statute of the International Criminal Court that provides that only “the most serious crimes of concern to the international community as a whole” be tried. Nor does this case of forced labour meet the threshold, *ratione materiae*, of the crime of enslavement as manifesting any of the powers attaching to the right of ownership.

### **Special Court for Sierra Leone**

In 2002 the Special Court for Sierra Leone was established at the prompting of the United Nations Security Council to “prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”.<sup>66</sup> As part of its jurisdiction, the Court was empowered to consider cases of the crime against humanity of enslavement.<sup>67</sup> In 2007, the Trial Chamber rendered judgment in the *Brima* case against three senior members of the Armed Forces Revolutionary Council, one of the factions involved in the Civil War in Sierra Leone. While much of the next Chapter is handed over to examining that case; consideration

<sup>65</sup> See Chapter 8, p. XX for examples of what States have deemed to be ‘exploitation’ within their domestic anti-trafficking legislation.

<sup>66</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, 16 January 2002.

<sup>67</sup> Article 2(c), Statute of the Special Court, Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Annex, 16 January 2002.

in this Chapter will focus specifically on the Special Court for Sierra Leone's finding of enslavement.

Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, were found guilty of enslavement, having been indicted for the "widespread and large scale abductions of civilians and use of civilians as forced labour". "Forced labour", the Indictment continued, "included domestic labour and use as diamond miners".<sup>68</sup> In surveying the established law on the issue, the Trial Chamber of the Special Court for Sierra Leone concluded, by reference to the *Krnjelac* case before the Yugoslavia Tribunal, that for forced labour to constitute enslavement, "the Prosecutor must demonstrate that 'the Accused forced the detainees to work, that he exercised any or all of the powers attaching to the right of ownership over them, and that he exercised those powers intentionally'".<sup>69</sup> The Special Court noted that the "crime of 'enslavement' has long been criminalised under customary international law" and mentioned the Nuremberg Charter, the International Law Commission and the Draft Code of Crimes against the Peace and Security of Mankind, though it gave no voice to a reading of enslavement broader than set out by the International Criminal Tribunal for the former Yugoslavia or incorporated in the Statute of the International Criminal Court.<sup>70</sup>

In seeking set legal parameters around the crime against humanity of enslavement, the Special Court for Sierra Leone adopted as its own element of the crime of enslavement, the one developed by the International Criminal Court: Element 1 of the crime against humanity of Enslavement:

The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>71</sup>

Thus, the Prosecutor in the *Brima* case sought to prove that not only were the accused compelling others to labour, but also that the exercise of any or all of the powers attaching to the right of ownership were in evidence. In making such a determination that forced labour amounting to the crime against humanity of enslavement had transpired in the *Brima* case, the Trial Chamber of the Special Court for Sierra Leone considered those instances where men were abducted, then forced to work in diamond fields. The case of the Tongo Field is instructive, as in some cases, it appears that forced labour was extracted from miners which does not meet the threshold of enslavement, while other labourers, were indeed enslaved. While the Trial Chamber does not make this distinction; the facts could have allowed for it.

With regard to the miners, anonymous Witness TF1-062 appearing before the Special Court, testified that he and others were compelled by threats and actual violence to spend two 'government days' a week mining diamonds.<sup>72</sup> While providing their coerced labour on government days, they were free to return to their homes at night and to work other days for their own profit.<sup>73</sup> This was distinct from men who were captured. As anonymous Witness TF1-045 stated, these labourers, were undressed, tied together and brought to the mines "where they were forced to work at gunpoint".<sup>74</sup> Beyond the forced labour in diamond mines, the Trial Chamber considered that testimony adduced from Prosecution witnesses demonstrated that individuals were abducted then forced to labour, acting as soldiers and

<sup>68</sup> *Brima et als.* case, Special Court for Sierra Leone, Trial Chamber, Judgement, SCSL-2004-16-T, 20 June 2007, p. 228.

<sup>69</sup> *Id.*, p. 230.

<sup>70</sup> See *id.*, p. 228-229.

<sup>71</sup> See *id.*, p. 230-231.

<sup>72</sup> *Id.*, pp. 367-368.

<sup>73</sup> See *Brima et als.* case, Special Court for Sierra Leone, Trial Chamber, Transcripts, 27 June 2005, pp. 27-28.

<sup>74</sup> *Brima et als.* case, Special Court for Sierra Leone, Trial Chamber, Judgement, SCSL-2004-16-T, 20 June 2007, p. 369; See also, Transcripts, 19 July 2005, pp. 5.

logistical support to the military including acting as porters, carrying ammunition and supplies, but also booty. This is related by Witness DAB-140, who testified that “rebels used to take corrugated iron and doors from people’s houses in Buedu [in the Eastern Province] and force civilians, under threat of violence, to carry the iron to Liberia and the doors to Guinea. Civilians who refused to take loads were beaten or killed”.<sup>75</sup>

Ultimately, the Trial Chamber found the three accused guilty of the crime of enslavement manifest in forced labour, stating that “the only reasonable inference on the evidence is that the perpetrators intentionally exercised powers attaching to the right of ownership over the abductees”.<sup>76</sup>

## Conclusion

The 1998 Statute of the International Criminal Court narrows the parameters of crime against humanity of enslavement, as against what was the established customary international law, by defining it, in substance, as ‘slavery’ as set out in the 1926 Slavery Convention. It can be foreseen that the establishment of enslavement as being synonymous with slavery in the treaty governing the International Criminal Court and dropping lesser servitudes from the crime as developed through apparent customary law will ultimately mean the withering away of the expansive understanding of enslavement put forward, for instance by the International Law Commission as the crime of ‘establishing or maintaining over persons a status of slavery, servitude or forced labour’. Instead, as more States become party to the Rome Statute and the effect of that treaty and prosecutions materialise, what will emerge is not so much a *North Sea Continental Shelf* moment where the Rome Statute crystallises a new customary norm of enslavement synonymous with slavery; but instead, that the International Criminal Court would become the reference point for the trying of the crime against humanity of enslavement thus displacing and ultimately subsuming custom through practice based on the treaty à la *Nicaragua*. We witness this long shadow already falling over international criminal law, with the Special Court for Sierra Leone turning to the Elements of Crimes of the International Criminal Court in basing its definition of enslavement on the exercise of the powers attaching to the right of ownership.

The establishment of this crime against humanity of enslavement provides the legal certainty to ensure a fair hearing by circumscribing its parameters and thus meeting the requirements of fair trial with accused knowing the charges against them. The departure from an expanded reading of the crime of enslavement by the Rome Statute is welcomed; where lesser servitudes – be they forced labour, servile status as set out in the 1956 Supplementary Convention, or trafficking – are at play, they will only fall under the jurisdiction of the Court where they manifest the powers attaching to the right of ownership. This is as it should be, as Article 5(1) of the Statute of the International Criminal Court provides the Court with jurisdiction solely over “the most serious crimes of concern to the international community as a whole”.

Thus, where enslavement is concerned, its normative substance is to be found in an understanding of what constitutes the exercise of the powers attaching to the right of ownership. But to explain that understanding, a whole chapter would need to be devoted to the subject. I would thus refer readings back to Chapter 3 for a thorough reading of slavery in law.

---

<sup>75</sup> *Brima et als.*, n. 68, p. 387.

<sup>76</sup> *Id.*, p. 366.