

Mobilization of International Law to Address Trafficking and Slavery

Trafficking Women and Children after the End of Slavery:
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Dr. Jean Allain
Queen's University of Belfast
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If one were to consider the long history of the 'abolition of slavery' in international relations, the epochs could be set out as such: the nineteenth century would be characterised by the move to abolish the slave trade; while the twentieth century could be divided into two or three distinct phases: the dominance of colonial powers and abolition of slavery (1920-1945); the decline of empire and the abolition of servitudes (1945-1966); and the post-colonial era and the development of the political term 'slavery-like practice' (1966-1998). The twenty-first century, for its part, is poised to move beyond the political – a post-post-colonialism if you wish – to once more emphasise the legal basis of the 'abolition of slavery', but this time by holding individuals responsible under international criminal law, as opposed to States under general international law or international human rights law.

The notion of 'abolition of slavery', has been placed in quotation marks, as it has been used as short hand to express the overall movement to end human exploitation. Today, when nongovernmental organisations such as Anti-Slavery International, Free the Slaves, or Interights speak of ending slavery, they are using the term rhetorically, as in law slavery has a very specific definition, one related to the powers attached to ownership. With the advent of the twenty-first century, international law has caught up to the fundamental purpose of the continuing abolitionist movement: to end human exploitation through the development of the 2000 UN 'Palermo' Protocol on human trafficking.

Since 1926, States have dealt with human exploitation in a fragmented manner, outlawing certain activities which, contemporaneously, were deemed to go beyond what was acceptable in what was, at its essence, a labour relationship. Thus, slavery, then segments of forced labour, followed by serfdom, debt-bondage, servile marriage, child exploitation and servitude more generally where all – individually – brought under the control of international law. In 2000, these various exploitive practices were brought together within one definition dealing with trafficking. The definition of 'trafficking in persons', as found in Palermo Protocol on Trafficking in Persons¹, has since been reproduced in the 2005 Council of Europe Convention on Trafficking in Human Beings² as:

"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.*

¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2000.

² Council of Europe Convention on Action against Trafficking in Human Beings, 2005.

This Paper considers this – what is now a – legal definition and seeks to unpack the various elements of what should be understood as human exploitation. In so doing, the Paper argues that exploitation can only be understood against its most serious manifestation: slavery; and that the criminalisation of exploitation internationally has meant that human exploitation – in legal terms – is being taken seriously for the first time.

The Legal Concept of Exploitation

While it is common to think of labour in binary terms as being either free or coerced, in fact a continuum exists which allows one to consider the various limitations which are put on free labour moving it from a situation of benefit, towards one of exploitation resulting from increasing degrees of coercion. The introduction of the legal concept of ‘exploitation’ into the international anti-trafficking conventions provides the opportunity to consider the role that law plays in ensuring that labour distances itself from exploitive practices. The various examples of exploitation laid down by the trafficking conventions are, it should be emphasised ‘at minimum’, the types of exploitation to be confronted. This acknowledgment opens the possibility for considering a ‘continuum of coercion’ which moves from free labour to exploitation; to abuse through servile situations including forced labour; and finally, to the most extreme type of coercion manifest in slavery.

During much of the twentieth century, international law dealing with forced labour, servitude, and slavery sought to address exploitation by States; yet today it is recognised that exploitation takes place primarily at the hands of non-State actors. International law is well placed to deal with private individuals and companies where exploitation takes place, as international human rights law has, at the dawn of the twenty-first century, come to encompass not only the obligation of States not to exploit, but also the duty – a so-called ‘positive’ duty – to ensure that exploitation does not take place within its jurisdiction.³ A failure to protect a worker’s human right is ultimately backed by criminal sanctions where exploitation reaches the threshold of enslavement. In such an extreme case, the policy-maker has two options, either to address the exploitive behaviour so as to ensure it does not recur; or second, to stand in the dock for failing to take adequate positive steps to suppress such exploitation. Thus, what we are witnessing in international law is the growth of top-down pressure to conform to legal obligations to end exploitive practices: failure to respect labour standards will trigger considerations of human rights law which will, in turn, if human rights law are not being enforced, prompt consideration of international criminal law.

The rather nebulous term ‘exploitation’ is set out in the trafficking conventions as including “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”. Here then we see a list, though not exhaustive, of types of exploitation: sexual exploitation including prostitution, forced labour, slavery,

³ See generally, Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, 2008; and Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 2004.

practices similar to slavery, servitude, or the removal of organs. It is important to note at this juncture, that these types of exploitation have a pedigree in international law, they are, by and large, defined by previous international treaties and thus have definitions established in law.

The inclusion of the phrase ‘at a minimum’ means that ‘exploitation’ however, goes further than the types of exploitation enumerated in the trafficking conventions. Yet, one must undertake a bit of intellectual acrobatics to allow the very concept to come into focus. While the examples given – say slavery or forced labour – are examples of what ‘at minimum’ exploitation constitutes, these are actually examples of exploitations at its most severe, at its maximum. What the definitions is actually setting out is not the threshold of exploitation but a minimum number of examples of exploitation, which by their nature are maximist examples of human exploitation. Thus ‘at a minimum’ means that there are other types of exploitive practices, and that as international law has legislated in the most coercive areas, that other types of exploitation while be those of a lesser magnitude, but which still meet (or should meet) the threshold of exploitation. This Paper argues that exploitation is best understood as manifesting itself when coercion is used as a means of compelling labour. The continuum of coercion, forces a person to decide between disagreeable alternatives, while international law seeks to legislate so as to ensure that the worker need not choose under duress the lesser of these two evils. International law does this through the standards it establishes, also on a continuum, from labour law, through human rights law, to criminal law.

Exploitation takes place where sub-standard working conditions exist. In seeking to establish where the minimum threshold exists wherein a practice becomes exploitive, recourse should be made to the international labour standards developed by the International Labour Organisation (ILO). When employers fails to meet international labour standards established by States as reflected in ILO conventions and recommendations, it can be said that they are being exploitive of their labour force. But exploitation should not be understood as being synonym with ‘criminal’, much less with ‘forced labour’. As the ILO Committee of Experts on the Application of Conventions and Recommendations – the supervisory body of ILO labour standards – relates, the worse type of human exploitation – slave labour “is characterized by the combination of a number of violations of labour legislation”.⁴ In isolation, violations of international labour standards may be considered exploitive, but such breaches are typically deal with as labour infractions. Give a choice, the disagreeable alternatives of working below minimum wage or not working at all, an individual will often choose the lesser of two evils. But such an infraction of a labour code often times does not reach the threshold of a criminal law, but is dealt with through administrative sanction, requiring, for instance, the reimbursement of back-wages and the payment of a fine. Where international labour standards are concerned, it is the antithesis which is worth highlighting: if employers are meeting the ILO standards, then their labour practices are not explosive *ipso facto*.

International labour standards for their part seek to ensure a decent work environment and have, at their core, the principles established in eight fundament conventions which were highlighted in the ILO’s 1998 Declaration on Fundamental Principles and Rights at

⁴ International Labour Office, International Labour Conference, General Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), Nineteen-seventhly Session, 2008, p. 201.

Work.⁵ These eight instruments touch on the following areas of labour relations: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. Beyond this hardcore, international labour standards include ILO conventions and recommendations which deal with labour inspection and administration, wages, working hours, occupational safety and health promotion, employment security, social security, employment policy, social policy, vocational guidance and training, maternity protection, plus protection to specific categories of workers, including seafarers, fishers, dockworkers, migrant workers and indigenous peoples. These instruments “aim to guarantee a minimal universal threshold of protection for workers”.⁶ They do so by acknowledging that States are at various levels of economic development and seek to establish frameworks or regimes to be incorporated into domestic law as a baseline for ensuring the protection of workers, decent work and adequate standards in the workplace. Thus, international labour standards are the benchmark for determining whether or not a practice is exploitive.

Where such exploitation becomes more severe, whether in degree or cumulatively, and moves along, what I have termed the ‘continuum of coercion’, they will fall within those practices which are deemed ‘exploitation’ by the trafficking conventions. Where exploitation meets this threshold, legal remedies are prescribed where violation are manifest. International human rights law has progressed to the point where today, States recognise that they have an obligation to ensure that rights are protected; in other words, not only is the State not to violation human rights, but that the State also have an obligation – a positive obligation – not to allow private persons or companies to violate person’s human rights. Such positive obligations of international human rights law create downward pressure, requiring States to have in place a system of protection of workers which seeks to *prevent* exploitive labour practices from reaching the threshold of a human rights violation, to *punish* those who are committing such violations of human rights, to *investigate* with a look to ensuring that such violations do not take place again, and to *redress the harm* caused. In this manner, international human rights law leaves it to States to address the issue, but acts as oversight, should the State fail to abide by its obligations.

Further downward pressure is created by the introduction via the trafficking conventions and the 1998 Statute of International Criminal Court of obligations on States to utilise criminal law to suppress the most severe type of exploitation as failure to do so

⁵ The eight Convention are: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

⁶ International Labour Conference, *Labour Inspection*, General Survey of the reports concerning the Labour Inspection Convention, 1947 (No. 81), and the Protocol of 1995 to the Labour Inspection Convention, 1947, and the Labour Inspection Recommendation, 1947 (No. 81), the Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Labour Inspection (Agriculture) Recommendation, 1969 (No. 133), Report III (Part 1B), Report of the Committee of Experts on the Application of Conventions and Recommendations, Ninety-fifth Session, 2006, p. 3.

may mean that State officials are held criminally liable. Thus, the failure to deal with violations of international labour standards, which by their severity or cumulative effect might raise to the level of a violation of international human rights law, forces the State to act, or be held in violation of human rights law. Failure to deal adequately with violations of international human rights norms will then move from being an issue of State Responsibility to one of individual criminal responsibility, where that exploitation is so severe as to manifest powers ordinarily attached to ownership.

Before turning to consider 'slavery' as the pinnacle of human exploitation, it might be worthwhile to consider the manner in which the notion of 'exploitation' fits into the overall definition of 'trafficking in persons'. It must be recognised that trafficking for the purpose of, say, forced labour is different than the actual crime of forced labour. Trafficking for forced labour, like trafficking for any other type of exploitation, does not require that forced labour actually take place; instead trafficking requires three elements: that "recruitment, transportation, transfer, harbouring or receipt of persons" have taken place – these are the so-called 'methods'; that the following means be utilised: "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"); and finally that these methods and means are used 'for the purpose of exploitation' rather than actual exploitation.

The definition of trafficking in persons assists in legal terms by not only identifying the manner in which a person will be trafficked (i.e.: recruitment, transportation, transfer, harbouring or receipt of persons), but also speaks to the manner in which exploitation manifests itself (i.e.: through "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"). In so doing the definition not only sets out the means by which a person is trafficked, it also is indicative of the means by which a person will be kept in exploitive situations. This is worth repeating: not only will "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", be the means of trafficking somebody into, say debt-bondage, but it is also indicative (i.e.: *prima facie* evidence) of the means by which a person will be maintained in a situation of debt-bondage.

Slavery as the Pinnacle of Exploitation

In a number of instances, international instruments have, like the trafficking conventions, grouped together some or all of the concepts of slavery, practices similar to slavery, servitude and forced labour.⁷ The International Criminal Tribunal for the former

⁷ This includes the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, the African, European and Inter-American human rights instruments. The 1999 Worst Forms of Child Labour Convention speaks of all "forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict".

Yugoslavia, like the European Court of Human Rights, sees exploitation as being hierarchical, the Yugoslav Tribunal speaking of ‘degrees’.⁸ The European Court of Human Rights, for its part, in the *Siliadin* case, found that once forced labour has been established, it must then be “determine whether the applicant was also held in servitude or slavery” and that the latter two concepts are indeed “link[ed]”.⁹ For its part, the Council of Europe in its Explanatory Note accompanying its trafficking convention states that, for instance, servitude is “to be regarded as a particular form of slavery, differing from it less in character [...] than in degree”.¹⁰

Where slavery and other forms of exploitation are concerned it may be said that a true hierarchy does exist and though a practice may be tantamount to forced labour, to serfdom or to debt bondage, if it meets a certain threshold it will also be deemed slavery in law. In law, this hierarchy is recognised as, for instance, the 1926 Slavery Convention speaks of preventing “compulsory or forced labour from developing into conditions analogous to slavery”, while the 1956 Supplementary Convention dealing with practices similar to slavery, moves to abolish servitudes, “where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention”. How is this established hierarchy, with slavery at the pinnacle of human exploitation, to be determined in law?

The definition of slavery as established by the 1926 Slavery Convention is “the status or condition of a person over which any or all of the powers attaching to the right of ownership are exercised”. In seeking to make a distinction between slavery and lesser forms of exploitation, one must turn to consider in greater depth the notion of the ‘powers attaching to the right of ownership’. In 2008, the Australian Human Rights and Equality Commission intervened in a case in the High Courts of Australia – regarding a brothel owner who was appealing a ten-year prison sentence for having enslaved Thai prostitutes – seeking to speak to the definition of slavery in international law. The Commission’s “list of the factors that might indicate that a power attaching to a right of ownership has been exercised” is as follows:

- (a) The partial or total destruction of the juridical personality of the victim.
- (b) Some restriction or control of an individual's autonomy, freedom of choice or freedom of movement.
- (c) The control of matters relating to an individual's sexual activity.
- (d) The psychological control or oppression of the individual.
- (e) The control or partial control of an individual's personal belongings.
- (f) The measures taken to prevent or deter a person from escape.
- (h) The absence of informed consent or the fact that consent has been rendered irrelevant by the use of force or coercion, the use of deception or false promises or the abuse of power in the context of the relationship where the individual over whom the power is exercised is in a position of vulnerability.

⁸ United Nations, Security Council, International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, p. 36, para. 117.

⁹ See Council of Europe, European Court of Human Rights, *Siliadin v France* (Application 73316/01), 26 July 2005, pp. 37 and 38.

¹⁰ Council of Europe, Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, Council of Europe Treaty Series - No. 197, 16 May, 2005, p. 40, para 95. Note that the original reads: “servitude is ‘to be regarded as a particular form of slavery differing from it less in character less than in degree’. This appears to be a poor translation of the following: ‘Il ressort que la servitude est une forme particulière d’esclavage, qui s’en distingue moins par la nature que par le degré’; which appears in the French version of the Explanatory Report.

- (i) The threat or use of force or other forms of coercion.
- (j) The use of, or the fear of the use of, violence including, for example, the cruel treatment or abuse of an individual.
- (k) The quality of the relationship between the accused and the person over whom the powers are exercised, including any abuse of power, the person's vulnerability, the person's socio-economic situation and the duration of the relationship.
- (m) 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.¹¹

This approach was deemed to have gone too far, as it escaped the link to ownership, either *de facto* or *de jure*, which is the basis of the definition of slavery.

Yet, an attempt to say that slavery could be manifest even where the powers attached to the right of ownership were not present has been a staple of the international discourse since at least the 1931 International Commission consider the issue of slavery in Liberia¹², which although mandated to consider slavery, readily acknowledged that it went further and considered lesser servitudes where “issues of powers attaching to the right of ownership were not manifest”. In 2007, the Court of Appeal of the Supreme Court of Victoria spelled out these two approach to ‘slavery’ in international law, saying:

The understanding of the scope of the definition of slavery stated by Jean Allain is at odds with that of David Weissbrodt in his paper commissioned by the Office of the United Nations High Commissioner for Human Rights¹³. Weissbrodt concluded that the definition was intended to include the broader range of practices that had been addressed by the Temporary Slavery Commission of 1924, including debt bondage, serfdom, practices involving restrictions of liberty and personal control analogous to slavery, practices such as acquisition of women and girls in the guise of payment of dowry, and so forth. It was not limited to chattel slavery, but required examination of the degree of restriction and control exercised over the person, rather than concentration on the criterion of ownership.¹⁴

In that case, the Court of Appeal noted that “in final analysis, it is unnecessary to resolve the dispute between Allain and Weissbrodt”.

However on appeal, in August 2008, the supreme court of Australia – the High Courts of Australia – settled the issue in *The Queen v Tang*.¹⁵ Relying in part of research I had developed in 2007 and published early in 2008, High Court brought some much needed rigour to the issue of the parameters of what constitutes ‘slavery’ both in the Australian context, but also in international law. In writing for the majority, Chief Justice Murray Gleeson noted that the “travaux préparatoires of the 1926 Slavery Convention are not especially illuminating as to the meaning of Art 1”; yet, “certain observations may be made as to the text and context, including the purpose, of the Convention”.¹⁶ Three such

¹¹ See Australian Human Rights and Equality Commission, Submission in Support of the Application for Leave to Intervene and Submission on the Appeal, *Commonwealth Director of Public Prosecution v Wei Tang*, High Court of Australia, Melbourne, 5 May 2008, p 15. Footnotes excluded:

¹² See *International Commission of Inquiry into the Existence of Slavery and Forced Labour in the Republic of Liberia, Report of the International Commission of Inquiry*, 1931.

¹³ David Weissbrodt and Antislavery International, *Abolishing Slavery and its Contemporary Forms*, ESC Res 2001/282, UN Doc HR/Pub/02/04 (2002).

¹⁴ Supreme Court of Victoria (Court of Appeal), *Queen v Wei Tang*, [2007] VSCA 134, 2 July 2007, para 36.

¹⁵ See Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, 2008.

¹⁶ *The Queen v Tang* [2008] HCA 39, 28 August 2008, p. 12.

observations led the majority of the Court to conclude that the 1926 definition found in Slavery Convention applies to both *de jure* and *de facto* slavery. First, Gleeson CJ noted that for many States, including Australia, which became party to the Convention in 1926, the legal status of slavery no longer existed. Second, that the aim of the Convention was to bring about the same situation universally. Third, that the phrase ‘status or condition’, found within the 1926 definition makes the distinction between *de jure* (“Status is a legal concept.”); and, taking into consideration the first and second observations made, “the evident purpose of the reference to “condition” was to cover slavery *de facto* [...]”.¹⁷

The High Court made one final observation: that the “definition turns upon the exercise of the power over a person”; and that in *de facto* conditions the “definition was addressing the exercise over a person of powers of the kind that attached to the right of ownership when the legal status was possible”. The High Court then went on to consider what should be understood by such powers which are manifest when ownership is legal.

At this point, the High Court did not take on board the more expansive understanding of the ‘powers which attach to the right of ownership’ which were put forward by the Human Rights and Equality Commission, instead, the High Court based itself on a consideration of the powers attaching to the right of ownership made by the United Nations Secretary General in 1953, wherein he stated that these powers include the following:

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.¹⁸

The first and fourth of these characteristics, that is: a person who finds him or herself being made the object of purchase or transfer would, thus, be in the status or condition of slavery¹⁹. Put this way, it becomes clear that being made the object of purchase or transfer, if this were legal, would create in the individual the status of a slave and create for the master a right of ownership over the individual; whereas if a person is made the object of purchase or transfer where no such selling or transfer is possible in law, it creates for the individual the *condition* of slavery and manifests, for the recipient, an

¹⁷ *Id.*, p. 12.

¹⁸ See 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.

¹⁹ It should be noted that the use of the phrase ‘servile status’ by the Secretary-General predates the use of the term as defined in Article 7(2) of the 1956 Convention: “‘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”, with the institutions and practices in Article 1 being debt bondage, serfdom, forced or sham marriages and exploitation of children via adoptions. Thus, the definition as set out in Article 7(2) of the 1956 Convention of ‘a person of servile status’ is not applicable here as being retrospective; instead, ‘servile status’ should be understood as being synonymous with the status or condition wherein, if one of the six characteristics of the Secretary-General is attached, a power of the right of ownership would be exercised, and thus slavery would be manifest.

exercise of a power attached to the right of ownership, though not a *right of ownership* able to be vindicated in a court of law.

The second of the UN Secretary-General's six characteristics of the powers attaching to the right of ownership turns on the ability to exploit another: "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". Here the apparent contradiction between being able to use an individual in 'an absolute manner' as against 'without any restriction other than that which might be expressly provided by law' is solved by reference to an earlier discussion by the Secretary-General regarding Roman Law where he noted that the "authority of the master over the slave was subjected successively to more and more limitations; but even though it was restricted, the master never had towards his slave the obligations that an employer has today towards his servant or employee".²⁰ As *de jure* slavery no longer exists, an overarching prohibition exists and thus restrictions existing in law no longer hold. Despite this, or as a result, the 'master' in using the individual and their labour 'in an absolute manner', would be acting outside the law. The third of the Secretary-General's characteristics, follows closely from the second, as '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'. Here, whether having the status of a slave or being in the condition of slavery remains irrelevant to the fact that the master would benefit from exercising the power attaching to the right of ownership with regard to the fruits of one's labour. The 1926 submission of the Union of South Africa of the draft of the Slavery Convention, picks up on this point:

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 him²¹.

Having already considered the fourth of the Secretary-General's six characteristics, consideration now turns to the fifth: "the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it". The discussion by the Secretary-General deals with an assertion made in 1926 by the Union of South Africa that the definition of slavery "also seems to imply a *permanent* status or condition of a person whose natural freedom is taken away, for from the proprietary interest of the other person in the person to whom that status attaches is implied a right of disposal of sale, gift or exchange"²². But here one sees that the Secretary-General is not concerned so much with there being a permanent status or condition which would last until the enslaved dies but, instead, that the status or condition "cannot be terminated by the will of the individual

²⁰ 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. 29.

²¹ 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. Emphasis in the original.

²² *Id.* The temporal issue of whether slavery had to be permanent in nature also arose in the considerations of 1930 the International Commission of Inquiry into the Existence of Slavery and Forced Labour in the Republic of Liberia. 8 September 1930, at p. 14.

subject to it”, and thus an indefinite status or condition exists, as far as the enslaved is concerned.

The final characterisation of a power attached to the right of ownership which the Secretary-General mentions is that ‘the servile status is transmitted *ipso facto* to descendants of the individual having such status’. Little need be said about this power as for instance with regard to debt-bondage, the condition of slavery often manifests itself through the inheritance of debt, and, as such, it is, like the other UN Secretary-General’s characteristics, an authoritative description of a manifestation of the exercise of a power attaching to the right of ownership and thus ‘slavery’ as established by international law.

For the High Court of Australia, where the facts of the case at hand were concerned, Chief Justice Murray Gleeson noted that those powers which were relevant included:

the capacity to make a person an object of purchase, the capacity to use a person and a person’s labour in a substantially unrestricted manner, and an entitlement to the fruits of the person’s labour without compensation commensurate to the value of the labour. Each of those powers is of relevance in the present case.

Gleeson CJ ended his consideration of the first grounds of cross-appeal by noting that:

On the evidence it was open to the jury to conclude that each of the complainants was made an object of purchase (although in the case of one of them the purchaser was not the respondent); that, for the duration of the contracts, the owners had a capacity to use the complainants and the complainants’ labour in a substantially unrestricted manner; and that the owners were entitled to the fruits of the complainants’ labour without commensurate compensation.

In consider whether slavery could only be deemed as *de jure* slavery, Chief Justice Gleeson stated that it was clear that chattel slavery “falls within the definition [...] but it would be inconsistent [...] to read the definition as limited to that form of slavery”.²³ Noting that it was “unnecessary and unhelpful” in the present case “to draw boundaries between slavery and cognate “concepts such as servitude, peonage, forced labour, or debt bondage”, the Gleeson CJ noted that the concepts were not mutually exclusive, that the 1956 Supplementary Convention recognised the possibility that servitudes could slip into slavery where they manifest powers attaching to the right of ownership and that those “who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy”.²⁴ Instead, the Chief Justice followed the High Court’s assessment of the concept of slavery as defined by the 1926 Slavery Convention, noting that:

It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery. The term ‘slave’ is sometimes used in a metaphorical sense to describe victims of such conditions, but that sense is not of present relevance. Some of the factors identified as relevant in *Kunarac*, such as control of movement and control of physical environment, involve questions of degree. An employer normally has some degree of control over the movements, or work environment, of an employee. Furthermore, geographical and other circumstances may limit an employee’s freedom of movement. Powers of control, in the context of an

²³ *The Queen v Tang* [2008] HCA 39, 28 August 2008, p. 13.

²⁴ *Id.*, p. 15.

issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place.²⁵

With this, Gleeson CJ turned to consider the 2007 decision of the Court of Appeal of the Supreme Court of Victoria which, in turn regarded as the “critical issues” at trial that of “character of the exercise of the power by the accused over the victim” and “how is a jury to distinguish between slavery, on the one hand, and harsh and exploitative conditions of labour, on the other?” Chief Justice Gleeson, then proceeded to answer the question:

The answer to that, in a given case, may be found in the nature and extent of the powers exercised over a complainant. In particular, a capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services. The answer, however, is not to be found in the need for reflection by an accused person upon the source of the powers that are being exercised. Indeed, it is probably only in a rare case that there would be any evidence of such consideration.²⁶

The High Court went on to conclude that:

In this case, the critical powers the exercise of which was disclosed (or the exercise of which a jury reasonably might find disclosed) by the evidence were the power to make the complainants an object of purchase, the capacity, for the duration of the contracts, to use the complainants and their labour in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation. As to the last three powers, their extent, as well as their nature, was relevant. As to the first, it was capable of being regarded by a jury as the key to an understanding of the condition of the complainants. The evidence could be understood as showing that they had been bought and paid for, and that their commodification explained the conditions of control and exploitation under which they were living and working.

It was not necessary for the prosecution to establish that the respondent had any knowledge or belief concerning the source of the powers exercised over the complainants, although it is interesting to note that, in deciding to order a new trial, the Court of Appeal evidently took the view that the evidence was capable of satisfying a jury, beyond reasonable doubt, of the existence of the knowledge or belief that the Court of Appeal considered necessary.²⁷

Coming back to the distinction between slavery and other types of human exploitation; it is important to understand the hierarchy which has developed, which deems slavery to occupy the terrain wherein *de jure* or *de facto* rights of ownership are manifest and lesser forms of exploitation where such powers attaching to the right of ownership are not present. This is rather important as, in international criminal law there exists the crime of ‘enslavement’, most prominent in the 1998 Statute of the International Criminal Court, but no crime of forced labour, practices similar to slavery, or servitude *per se*.

The Statute of the International Criminal Court establishes enslavement as a crime against humanity; and sexual slavery as both a crime against humanity and a war crime.

²⁵ *Id.*

²⁶ *Id.*, p. 20.

²⁷ *Id.*, p. 22.

Enslavement 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”.²⁸ Here then there is an acknowledgement of slavery being an example of exploitation manifest in the trafficking conventions. But, there is more to the story than that. The International Criminal Court has secondary legislation which seeks to provide further understanding to the meaning of the crimes under its jurisdiction: the Elements of the Crimes.²⁹ Where enslavement is concerned, the Elements of the Crimes elaborates on this definition by noting, in part, that it should be recognised that the perpetrator will have “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”. Attached to this, detailing of the crime of enslavement, is a footnote 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 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.³⁰

The Elements of the Crimes, thus recognise that ‘enslavement’ is different than ‘slavery’, as the definition of the former will include lesser servitudes such as forced labour, practices similar to slavery or the exploitive practices manifest in the trafficking conventions. Here then we see that international criminal law is fundamentally different than general international law or international human rights law, as these regimes have made clear normative distinctions between various types of servitude, while international criminal law seeks to subsume all within the grander definition of ‘enslavement’.

In its 2001 Judgment by the Trial Chamber in the *Kunarac* case, the International Criminal Tribunal for the Former Yugoslavia considers forced labour, slavery, the practices similar to slavery, and servitude as its basis for ‘enslavement’; thus allowing us an opportunity to consider the commonalities which the Yugoslav Tribunal deduced from what are clearly, for the purposes of trafficking, forms of exploitation. Such indicators 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 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.³¹

²⁸ Article 7(2)(c), Statute of the International Criminal Court, 1988.

²⁹ See Assembly of States Parties to the Rome Statute of the International Criminal Court, “Elements of the Crimes”, ICC-ASP/1/3, 3-10 September 2002, pp. 108-155.

³⁰ *Id.*, p. 117. Note that, for sexual slavery, the Elements of the Crimes repeat verbatim the elements of enslavement but add that the “perpetrator caused such person or persons to engage in one or more acts of a sexual nature”. The footnote is also repeated verbatim.

³¹ United Nations, Security Council, International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, p. 193.

Two elements emerging from this consideration are control and lack of consent. To this, having considered the various forms of exploitation in the trafficking conventions, a third might be added; that this control and lack of consent leads to the benefit of one person and to the detriment of the other.

If one considers the forms of exploitation included in the trafficking conventions, it is clear that the issue of *control* is common to the various types of exploitation established, but for the different ‘species’ of the removal of organs. That control, whether it be of the person or their labour, is present to varying degrees in the exploitation of the prostitution of others or other forms of sexual exploitation, in forced labour, in slavery, in practices similar to slavery and in servitude. At its most extreme that control over the person or their labour will be complete and exhibit the powers which would normally be attached to ownership. The enslaved, having lost autonomy is now treated as a thing, to be used at the complete discretion of another.

Where *lack of consent* is concerned there is a direct correlation to the issue of control and the shift from personal autonomy to being compelled to do something against one’s will. For the Yugoslav Tribunal, like the trafficking conventions, this lack of consent results from coercion, deception, or the abuse of power or of a position of vulnerability; These means for inducing consent – and maintaining control – appear to be central to understanding the common characteristics of what constitutes exploitation. While they are constituted within the trafficking conventions as the means of placing somebody in a position to be trafficked; it must also be recognised that through coercion – as manifest in most of the means outlined in these conventions – individuals are often maintained in exploitive situations.

The final commonality to be found in the different forms of exploitation enumerated in the trafficking conventions is the benefit to be incurred by some at the expense of others. That benefit, for the most part, is commercial or financial in nature: work undertaken with the financial or material rewards going to those who exploit. Where it is not, it tends to be sexual in nature or commensurate with perceived ‘marital duties’.

Conclusion

The concept of ‘exploitation’ is central to understanding the process, but more so, the outcome of ‘trafficking in persons’ as established in law. This Paper has consider the hierarchy of exploitation wherein the various forms of exploitation will, if severe enough, manifest the characteristics of the powers which would normally be ascribed to ownership and thus meet the threshold required to be considered ‘slavery’. New research clearly demonstrates that the definition of slavery in international law is stable enough to be used, as it was in *The Queen v Tang*, to hold individuals criminally responsible for not only slavery but also for this type of exploitation as a product of trafficking. The nebulous term ‘exploitation’ requires further research to establish both what the component parts of its definition as found in the trafficking conventions means, and as a result of these components being considered ‘at minimum’ what, in general terms, ‘exploitation’ encompasses. This Paper has sought to demonstrate that there is a ‘continuum of coercion’ manifest in the various types of exploitation and that at minimum, exploitation should be understood as failing to meet the standards of international labour standards. That failure to respect labour standards, may allow such

exploitive activities to meet the threshold of abuses of international human rights law; and if by its severity, magnitude, or accumulation these abuses exhibit powers which would normally be attached to ownership, that such exploitation would ultimately carry with it international criminal liability.