

# Contemporary Slavery and Its Definition in Law

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*Jean Allain*

Had Olaudah Equiano, Abraham Lincoln, or William Wilberforce been able to look into the future to the twenty-first century, what they may have been most struck by was not how far we had come in ending slavery and suppressing human exploitation but, rather, that we had yet to agree on what in fact the term “slavery” means. This is a rather intriguing puzzle, as a consensus has existed for more than eighty-five years among states as to the legal definition of slavery. Yet, this definition has failed to take hold among the general public or to “speak” to those institutions interested in the ending of slavery.

At first blush, this is not so hard to understand since the definition, drafted in the mid-1920s by legal experts, is rather opaque and seems to hark back to a bygone era. The definition found in the 1926 Slavery Convention reads: “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised.”<sup>1</sup> At first sight, the definition really does not convey much to the reader, but for the fact that it appears to require that a person own another. As the ownership of one person by another has been legislated out of existence – again – it appears that this definition would have no traction in the contemporary world. Yet, this is not so since the legal definition of slavery established in 1926 has been confirmed twice: first, by being included in substance in the 1956 Supplementary Convention

on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Supplementary Convention) and, more recently, in the 1998 Rome Statute of the International Criminal Court (Rome Statute).<sup>2</sup> Further, the definition's contemporary relevance has been validated by international courts and been given its most in-depth consideration by the High Court of Australia in the 2008 case *The Queen v Tang*.<sup>3</sup> Thus, we know that the definition holds, but what we do not truly know is what it means.

This chapter unpacks the 1926 definition of slavery to demonstrate the manner in which it can and should be read so as to give it substance both as a legal tool – to assist in the prosecution of individuals involved in enslaving others, be it through the trafficking process or otherwise – and as an advocacy tool meant to aid in bringing contemporary slavery to the forefront of public consciousness, in suppressing slavery, and in assisting the victims. This chapter starts unpacking the definition by providing guidance as to how the property paradigm of the definition can be translated so as to reflect both the lived experiences of slaves and to provide the legal parameters, so as to give the term slavery legal certainty. That is to say, it provides a manner to read the definition and apply it. The chapter then works backwards in time, putting in place the background and evolution that allow for this contemporary understanding to emerge by further unpacking the 1926 definition and considering its various elements with reference to the *Tang* judgment. The chapter then concludes by going back further in time, to consider the evolution of the 1926 definition and to show the dynamics that have been at play, which first marginalized its use but later breathed new life into the definition. In setting out this chapter in this manner, it will read like a “how to” manual, giving the reader both the ability to understand what slavery means in legal terms and, if need be, to follow its genealogy backwards to provide further understanding if need be.

### **Understanding the Definition of Slavery**

Over a two-year period, from 2010 through to 2012, more than a dozen experts in the area of slavery and the law came together to develop the *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*.<sup>4</sup> This Research Network on the Legal Parameters of Slavery, established

through funding of the United Kingdom's Arts and Humanities Research Council, was built on three pillars, personified by Antony Honoré, whose classic article on ownership was published more than fifty years ago; by Seymour Drescher, Stanley Engerman, and Orlando Patterson, who represent the historical study of slavery; and by Kevin Bales, who is the leading scholar and activist dealing with contemporary issues of slavery. The research network sought to provide guidance to defence counsel, judges, juries, and prosecutors as to the legal parameters of slavery so as provide legal certainty, thus ensuring the integrity of the legal process through fair trials and respect for the rights of the accused to know the charges against him or her.

The research network provided more than an interpretation of the 1926 definition of slavery; it provided an understanding of this definition that is applicable in a contemporary setting where slavery is no longer legally allowed. In so doing, it shows that the property paradigm of the 1926 definition does in fact capture the essence of slavery, be it contemporary or otherwise. In considering the work of the research network, it is worth repeating the 1926 definition of slavery to give it emphasis: "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised."

The focus was to try to understand what constitutes those "powers attaching to the right of ownership." By unpacking this phrase, it would be expected that the parameters of what was and was not to be considered slavery would become evident. The research question was, if you wish: what powers does one exercise when one owns a person? The answer, it seems to me, comes on two counts from Antony Honoré, emeritus regius professor of civil law at Oxford University. First, in his seminal piece entitled "Ownership," which appeared in the 1961 *Oxford Essays in Jurisprudence*, he develops, at the level of first principles, what constitutes ownership, by setting out its various instances. These instances provided a framework for the approach of the network in seeking to apply a property paradigm to slavery. Second, in an essay meant as his contribution to the research network, Honoré considers the very notion of slavery from both a legal and philosophical perspective, pointing out that ultimately what we object to in slavery is the inability

of a person to exercise their natural capacities when they find themselves in a “state of unlimited subordination to another individual.”<sup>5</sup>

The link between this property paradigm and slavery is, in a word, control. In any situation of ownership, the owner controls the thing owned. This is normally understood a possession. Typically, possession means physical possession, but it can also mean the ability to control access to a thing, such as when a person possesses the content of their house by simply controlling access to that house by means of the front door key. With this in mind, slavery should be understood as the ability of one person to control another as they would possess a thing. Ownership implies such a background relationship of control. Where a slave is concerned, this control is tantamount to possession. It is control exercised in such a manner as to significantly deprive that person of their individual liberty. Normally, this control is exercised through violence and later through threats of violence or coercion, but it may also emerge through deception and/or coercion. One need not physically control a person, in the same way that one need not physically possess the contents of one’s house; control tantamount to possession of a person goes beyond their physical control.

In the language of the 1926 definition of slavery, possession is one of the powers attaching to the right of ownership. To exercise possession over a person is foundational to the concept of slavery. It is the hallmark of slavery. Slavery can only be present if possession is present; if control tantamount to possession is being exercised. It is foundational, as the *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery* make plain – possession is a hallmark of slavery – and only if possession is exercised can any or all of the other powers attaching to ownership be exercised. Thus, one cannot sell something if one does not first possess it. In the same manner, one cannot sell a person if one does not control him or her in a manner that is tantamount to possession. In a related manner, the ability to sell a person will be indicative of the presence of control tantamount to possession. The reverse also holds: possession allows for the ability to sell; selling indicates possession.

What then are the other powers attaching to the right of ownership? Well, the power to buy or sell a person – to involve a person as the object

of a transaction – may provide evidence of slavery. It is worth emphasizing that it *may* provide evidence of slavery. It is sometimes said that athletes are slaves because they are bought and sold. While it may be true that their services are being bought and sold, such transactions fail to meet the threshold of slavery if there is a lack of control over the athlete that would amount to possession. While the football player having been sold to another club and forced to move cities may deem it unfair; he or she will not be compelled to go be it under threats of violence or otherwise. The athlete may not like it, but he or she can walk away. In cases of slavery, somebody is exercising control in such a manner as to significantly deprive the enslaved of her or his individual liberty. The person enslaving is dictating what the enslaved is to do and backing up these dicta with violence either actual or latent. So, it is not enough in meeting the threshold of slavery to say that a person has been bought or sold, though it may indicate that slavery is present. What is required is to establish whether control tantamount to possession is present. The same would be true where other such transactions involving human beings are concerned, such as bartering, exchanging, or gifting a person to another.

A second power attaching to the right of ownership is the ability to use a person. Again, one person can use another, but this need not amount to slavery. Nevertheless, such use may amount to slavery if the background relationship of control is present to such an extent that it is tantamount to possession. By using a person, what is meant is the deriving of benefit from his or her service or labour. In the case of slavery, such benefit might be the savings incurred as a result of paying little or no salary for labour or the gratification from sexual services. Closely associated with the use of a person is the power attaching to the right of ownership manifest in the ability 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 about the management of workers. Where it will amount to slavery is when there exists control tantamount to possession, and then management of the use of a slave takes place. Such management will include direct management, where, for instance, a brothel owner delegates powers to a day manager in a case of slavery

within the context of sex work. It may also include more abstract management, where a person manages the use of a slave by isolating them from their previous social relationships and forging a new identity of that person through the compelling of a new religion, language, place of residence, and/or even marriage.

Beyond the case of both the management and the use of a person may be added the power attaching to the right of ownership of profiting from the use of a person. In the case of slavery, this will be where, once control tantamount to possession has been established over a person, money can be made from his or her use. Thus, the use of the slave is translated into the making of money for the enslaver, but such profit might also entail the mortgaging of a person, being let for profit, or being used as collateral. In concrete terms, this would mean that a slave is used and the money received from the toil of that slave – either his or her salary or the product of his or her labour – goes to the person who has enslaved. Thus, to exercise the power of profiting from the use of a person, in the case of the enslavement of an agricultural worker would entail the establishment of control (ordinarily through violence, coercion, and/or deception) that would amount to possession. Having established this control, the agricultural worker is made to harvest crops, and the profit from that labour, along with the salary that was meant to go to the worker, is appropriated by the enslaved.

A further power attaching to the right of ownership that is often thought to be less common, yet fits into the property paradigm, is the ability to transfer a person to an heir or successor. In this situation, it would be difficult to see how such a transfer would be able to truly take place without the background element of control tantamount to possession being in place. Regardless, such control would need to be present for such an inheritance to constitute slavery. Lest it be thought that such cases of inheritance are a thing of the past, they are not. There are a number of systematic cases of widow inheritance in various countries. The case of Igbo and Hausa-Fulani of Nigeria is instructive. Among these communities, “widows are considered part of the estate of their deceased husband and, therefore, have no inheritance rights themselves,” and, as such, certain customary laws prescribe that a widow be “inherited” by “a male relative of the former husband.”<sup>6</sup>

In the language of property law, it is said that ownership can entail the ability to use up property; to exhaust a thing owned; to consume it. You can use a car until you run it into the ground; you can exhaust a pack mule; you can consume food. In the case of slavery, this power attaching to the right of ownership may be understood in relation to the disposal, mistreatment, or neglect of a person. Having established control tantamount to possession, slavery will be manifest where the disregard for the well-being of the person is evidenced by severe physical or psychological exhaustion, which, if allowed to carry on to its logical conclusion, would entail the death of the enslaved. In this case, the destruction of the person is a process of physical or psychological exhaustion; the person is broken and, over time, he or she grows frail, either in body or in mind.

A final power attaching to the right of ownership is worth mentioning, but more for its inapplicability to human beings than for its value in seeking to establish evidence of slavery taking place. With regard to what in property law is called “security of holding,” the owner of property can exercise a power attaching to the right of ownership against an attempt by the state to expropriate. Such security of holding will not mean that expropriation is not allowed but, rather, that there is due process, a public interest, and that fair, market value, compensation will be provided. However, in a contemporary setting where individuals can no longer own slaves *de jure*, such ownership of slaves is no longer protected from expropriation by the state. Of course, the corollary is that expropriation cannot take place because the state cannot then take over the deed of ownership of a person. Instead, where slavery is concerned, one might think of an “insecurity of holding,” a duty on the state to “expropriate”; to confiscate human beings held in situations tantamount to possession, so as to liberate them. What I am thinking of here is the positive obligation on the state to suppress slavery. In human rights law, there is established, at minimum, a positive obligation to bring about the end of slavery and to effectively criminalize such enslavement.<sup>7</sup>

Having set out the various powers attaching to the right of ownership, one gets a sense of what will constitute slavery in law. Having established a background relationship of control that would amount to possession, the exercise of powers attaching to the right of ownership

will include the buying, selling, using, managing, profiting, and even the destruction of another person. In seeking to make a determination as to whether slavery exists in such a situation, it would be important to evaluate the specific circumstances and not make a judgment based on what the specific practice might be called. This is important as there is confusion within the realm of human exploitation, as certain terms, such as “slavery” and “practices similar to slavery” are terms of law, whereas other terms such as “contemporary forms of slavery” and “slavery like practices” are terms of art, which have no legal currency. As result, it is best to look at the substance of the relationship and simply ask: is there an exercise of any or all of the powers attaching to the right of ownership?

Where one is asked to consider the distinction in law between, say, slavery and forced labour or slavery and one of the “practices similar to slavery” (that is, one of the servitudes set out in the 1956 Supplementary Convention: debt bondage, serfdom, servile marriage, or child exploitation), it may be best to start by looking at the more serious of the offences and ask whether any or all of the powers attaching to the right of ownership are exercised in a given situation; if so, then slavery is present. In a case where one is making a decision between slavery and forced labour and slavery is not present, then one would look to the International Labour Organization’s 1930 Forced Labour Convention, which establishes that “the term ‘forced or compulsory labour’ shall mean all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>8</sup> If it can be demonstrated that in the case at hand a person has been compelled to work under a menace of a penalty and that they did not offer themselves voluntarily, then this will, in law, constitute forced labour.

Likewise, in cases where the conventional servitudes found in the 1956 Supplementary Convention are at play – as between slavery and debt bondage, serfdom, servile marriage, or child exploitation – reference would first be made to the more serious of the offences, and, if the circumstances do not meet the threshold of the exercise of any or all of the powers attaching to the right of ownership, reference would then be made to the definition of those conventional servitudes as set out at Article 1(a)–(d) of the 1956 Supplementary Convention so as to

determine if the situation has met a specific definitional threshold. Thus, by reference to the established legal definitions found in international instruments, conceptual clarity emerges and, with it, the ability to disaggregate concepts such as “trafficking,” “modern slavery,” “contemporary forms of slavery,” or other umbrella terms meant to capture various forms of exploitation.<sup>9</sup>

### **The Contemporary Relevance of the 1926 Definition of Slavery**

Having provided, up front, an explanation of the manner in which the definition of slavery can be understood and applied in a contemporary setting, this chapter now works backward to further unpack the definition so as to demonstrate how, in fact, the 1926 definition has contemporary relevance. In other words, before we could consider what constituted the various powers attaching to the right of ownership, a more fundamental question has to be asked of the definition: does the 1926 definition only apply to situations of chattel slavery or historical types of slavery where one owns – *de jure* – a slave? *De jure* enslavement is, in other words, ownership in the legal sense, where a right of ownership could be vindicated in a court of law in regard to a dispute between two individuals claiming ownership over an enslaved person. If the 1926 definition of slavery was only applicable *de jure* and not to *de facto* situations of ownership, then it would have little contemporary relevance, and, thus, the elaboration of the content of the powers attaching to the right of ownership would be a moot exercise. However, as we shall see, just as with illegal drugs or illegal weapons, one can exercise the power that attaches to ownership without actually owning such drugs or weapons in the legal sense. The question then turns on whether the wording of the definition of slavery found in the 1926 Slavery Convention allows for an interpretation that gives it contemporary relevance.

It bears repeating that the definition of slavery found in Article 1(1) of the 1926 Slavery Convention states: “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised.” One would be led to believe that, internationally, the definition has contemporary relevance since states negotiating the 1956 Supplementary Convention reproduced the substance of the 1926 definition in their text. Likewise, in 1998, states negotiating the

establishment of an International Criminal Court once more reproduced in substance the 1926 definition of slavery in the Rome Statute. In its 1998 version, the text sets out a definition of “enslavement” under the heading of a crime against humanity. This definition 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.”<sup>10</sup>

I say that the definition is “reproduced in substance” since the latter half of the sentence does not add anything new to the substance of the definition. Instead, this is a common legislative tool used to bring to the attention of judges, prosecutors, and so on, that they should pay particular attention in cases of trafficking to those instances where women or children may be involved. Thus, in international law, the definition of slavery, as first set out in 1926, is very much the definition accepted by states. But the question remains: does the 1926 definition of slavery have contemporary relevance?

As late as 2005, the question was answered in the negative by the European Court of Human Rights (ECtHR) in the *Siliadin v France*.<sup>11</sup> In this case, the ECtHR, in considering the fate of a Togolese girl who had been exploited as a domestic worker by her French hosts, determined that both forced labour and servitude had transpired in breach of Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but it failed to find a case of slavery.<sup>12</sup> By reference to the 1926 definition, the court stated that

this definition corresponds to the “classic” meaning of slavery as it was practiced for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an “object.”<sup>13</sup>

It might be added here that the ECtHR has, by reference to its 2010 judgment in *Rantsev v Cyprus and Russia*, moved away from its 2005 position, recognizing, in the case of trafficking into Cyprus for the purposes of prostitution – which had left a young Russian woman dead

– 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” although there was no question of *de jure* ownership transpiring in this case.<sup>14</sup>

A more thorough consideration of the definition of slavery has come about not via human rights courts but, rather, through criminal courts, where, I would argue, the process is much more rigorous as there are competing human rights at play: the prohibition against slavery versus the rights of the accused to know the charges laid. In this regard, the 2002 judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Prosecutor v Kunarac et al.* case, is instructive.<sup>15</sup> The case dealt with the Serbian commanders of the ethnically cleansed town of Foca, Bosnia-Herzegovina, who, in maintaining a detention centre, used it as a means for regularly raping scores of Muslim women. With regard to this case, the Appeals Chamber 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>16</sup>

The Appeals Chamber did not recognize that the definition applied only to cases of ownership – that is *de jure* ownership – of a person since it stated that

The Appeals Chamber will however observe 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.<sup>17</sup>

A further case that shines much light on the definition of slavery is the 2008 *Tang* case, which was decided by the High Court of Australia. This case, which involved five Thai women who were sold and bonded into prostitution in Melbourne, allowed the highest court in the land

to consider whether the definition of slavery had contemporary relevance. In other words, the Court decided whether the definition was applicable to cases of *de jure* slavery as the ECtHR intimated in its 2005 *Siliadin* judgment or whether it applied in *de facto* situations where a person did not legally own another person but, instead, exercised powers of ownership in a factual manner.

Before setting out the reasoning of the High Court of Australia in the *Tang* case, it might be worthwhile to take the reader through “Treaty Interpretation 101.” The reference point for interpreting a provision like the definition of slavery is the 1969 Vienna Convention on the Law of Treaties (VCLT), which provides guidance on all things related to international agreements, including how treaties should be interpreted. The general rule is that a provision of a treaty should be interpreted in good faith, that one should look to the ordinary meaning of the words, considering them in their context (both in relation to other provisions of the treaty and to the treaty as a whole), and, finally, that the interpretation should be made in light of the object and the purpose of the treaty. If the outcome of an interpretation, in the language of the VCLT, “leads to a result which is manifestly absurd or unreasonable” or, more germane to our considerations, “leaves the meaning ambiguous or obscure,” then “recourse may be had to the supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.” These supplementary means are thus the legislative history of the negotiations or, in the parlance of international diplomacy, the *travaux préparatoires*. The final element of treaty interpretation found within the VCLT relates to treaties negotiated in two or more languages. Where each of these texts is deemed authoritative, it may transpire that there exists a divergence between them. In such cases, and where the general rules and the supplementary rules of treaty interpretation do not eliminate the need, reference can be had to “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty.” These, then, are the interpretive tools set out in the VCLT that allows us now to consider the definition of slavery as first set out in the 1926 Slavery Convention.<sup>18</sup>

It will be recalled that the definition speaks of “slavery as the status or condition of a person over whom any or all of the powers attaching

to the right of ownership is exercised.” Turning first to consider the ordinary meaning of the terms “status or condition.” The *Oxford English Dictionary* defines status, in the legal sense, 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.”<sup>19</sup> Inference as to the term “status” being used in the legal sense can be drawn from the *travaux préparatoires* where, for instance, it was noted that the “most important measure for the gradual abolition of slavery is that the status of slavery should no longer be recognised in the eye of the law.”<sup>20</sup>

In the definition of slavery, legal status is juxtaposed by the conjunction “or” with the term “condition,” which may be deemed a “mode of being, state, position, nature.” It is further described by the *Oxford English Dictionary* as a “characteristic, property, attribute, quality (of men or things).”<sup>21</sup> While “condition” has a legal meaning, this meaning is not relevant here since it speaks of a condition as a prerequisite for receiving, for instance, an inheritance on condition of the heir having reached the age of majority.<sup>22</sup> Thus, while “condition” in the legal sense is not applicable in the context of the definition, the juxtaposition of it with regard to legal “status” (that is, reading it “in context”), accompanied by its ordinary meaning as being an attribute of a person and a mode of being, speaks to slavery in factual terms. Such a reading of the phrase “status or condition,” it might be noted, was confirmed by the High Court of Australia in *Tang*. The Court noted 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>23</sup>

While it might be said that it is enough to base an understanding of the definition of slavery as being applicable in both *de jure* and *de facto* situations by reference to a reading of the phrase “status or condition,” I would argue that there are two more elements that speak to this understanding of the definition, thus confirming it. Both deal with the phrase “powers attaching to the right of ownership” that is found in the definition of slavery. With regard to the first element, it will be recalled that

the Appeals Chamber of the ICTY noted that “the law does not know of a ‘right of ownership over a person,’” but, in fact, the definition speaks of the exercise of the “powers attaching to the right of ownership.” The phrase is a step removed from ownership. One does not need to own the thing but, instead, to exercise a power attaching to the right of ownership. In the context of the definition of slavery, it does not speak of having a right of ownership over a person – a legal right of ownership – but, rather, of exercising powers of ownership even when, for instance, such ownership might be legally impossible. Here, one might draw an analogy to a case of a kilogram of heroin. While a court will not determine a “right of ownership” of the prescribed drug, for this is impossible, it will ask instead: who exercised “a power attaching to the right of ownership,” such as possession, and sentence accordingly. In this manner, we see that the definition goes beyond the strict confines of the exercise of a right of ownership over person and, instead, speaks of the exercise of a power attaching to a right of ownership. Thus, the definition goes beyond a legal right of ownership (*de jure* ownership) and encompasses the exercise of such powers in *de facto* situations.

The second element touching on the phrase “powers attaching to the right of ownership” turns on the difference in meaning found in the authentic French and English versions of the 1926 Slavery Convention; more specifically with regard to the phrase “powers attaching to,” which in the French text appears as “*les attributs*.” *Les attributs* can be translated to English literally so that the phrase would now read “the attributes of the right of ownership.”<sup>24</sup> Since the object and purpose of the 1926 Slavery Convention, as noted in its preamble, is “securing the complete suppression of slavery in all its forms,” the meaning of the term between “powers attaching to” and “*les attributs*” that best reconciles the texts would appear to be the one that allows for an expansive, rather than a restrictive, interpretation of the phrase. As a result, in speaking of the attributes of a right of ownership, the French text appears to go beyond the legal interpretation and gives credence to the general and supplementary rules of treaty interpretation, which speak to the definition of slavery going beyond the legal and being applicable also in situations of *de facto* ownership.

This interpretation of the definition of slavery, taking into consideration the rules of interpretation of the VCLT, produces the same

outcome that the High Court of Australia arrived at in the *Tang* case – namely that the definition of slavery has contemporary relevance as it is applicable not only in situations of *de jure* ownership but also in situations where one does not own another person in a legal sense – since this is almost impossible today – but, in fact, exercises a power attaching to the right of ownership. Let us now turn to the *Tang* case in more detail.

In 2005, a Melbourne brothel owner was found guilty of five counts of both “intentionally possessing a slave, and ... of intentionally exercising over a slave a power attaching to the right of ownership.” Thus, in the Australian context, the definition of slavery was incorporated in its domestic legislation. The case revolved around five sex workers who had been escorted to Australia and each sold for AUS \$20,000 – that is to say, in the language of the buyers quoted by the High Court of Australia, “the amount for this girl,’ ‘the amount of money we purchased this woman’ and ‘the money for purchasing women from Thailand to come here.’”<sup>25</sup> These women were then bonded through a debt of between AUS \$42,000 and AUS \$45,000 related to their purchase, travel, and accommodation expenses, which was to be repaid through sex work. In summary, the Court noted that

while under contract, each complainant was to work in the respondent’s brothel in Melbourne six days per week, serving up to 900 customers over a period of four to six months. The complainants earned nothing in cash while under contract except that, by working on the seventh, “free,” day each week, they could keep the \$50 per customer that would, during the rest of the week, go to offset their contract debts.<sup>26</sup>

The reasoning in the *Tang* judgment is instructive in two ways. First, the majority judgment of the court, penned by its chief justice, Murray Gleeson, sets out the legal reasoning, which demonstrates the contemporary relevance of the definition of slavery. Second, the concurring opinion of Justice Kenneth Madison Hayne takes a different approach, asking fundamental, normative questions in seeking to understand the applicability of the definition in a contemporary situation. Gleeson CJ

sets out the reasoning of the court on the contemporary relevance of the definition of slavery and its reading of the exercise of “powers attaching to the right of ownership” as being applicable in *de facto* as well as *de jure* situations in the following manner.

He notes that in 1926 many of the states party to the Slavery Convention had already abolished the legal status of slavery and that the declared object of the parties was to bring about “the complete abolition of slavery in all its forms.” The court continues:

It would have been a pitiful effort towards the achievement of those ends to construct a Convention that dealt only with questions of legal status. The slave trade was not, and is not, something that could be suppressed merely by withdrawal of legal recognition of the incidents of slavery. It is one thing to withdraw legal recognition of slavery; it is another thing to suppress it. The Convention aimed to do both.

In its application to the *de facto* condition, as distinct from the *de jure* status, of slavery, 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; not necessarily all of those powers, but any or all of them ... 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.<sup>27</sup>

The court goes on to state 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 ... 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.<sup>28</sup>

While the Court would go on to consider the textual make-up of the wording of the Australian Criminal Code and the determination of its lower Court of Appeal, it followed on its previous pronouncement by concluding that

powers of control, in the context of an 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.<sup>29</sup>

While Hayne J concurs with the reasoning of Gleeson CJ, he considers the notion of "ownership" stating that it "must be read as conveying the ordinary English meaning that is captured by the expression "dominion over" the subject matter.<sup>30</sup> Where ownership is a legal relationship, Hayne J relates, "an 'owner' has an aggregation of powers that are recognised in law as the powers permissibly exercised over the subject matter. It is a term that connotes at least an extensive aggregation of powers, perhaps the fullest and most complete aggregation that is possible."<sup>31</sup> Since ownership of a person is impossible in the Australian context, Hayne J states that "what the alleged offender has done must then be measured against a factual construct: the powers that an owner would have over a person if, contrary to the fact, the law recognised the right to own another person."<sup>32</sup> In considering the powers attaching to a right of ownership, Hayne J sees in possession the power of dominion over a person; he thus uses ownership and possession as being synonymous, stating that "possession, like ownership, refers to a state of affairs in which there is the complete subjection of that other by the first person." He then continues, stating that

one, and perhaps the most obvious, way in which to attempt to give practical content to the otherwise abstract ideas of ownership or possession (whether expressed by reference to subjection, dominion or otherwise) is *to explore the antithesis of slavery*. That is, because both the notion of ownership and of possession, when applied to a person, can be understood as an exercise of power over that person that does not depend upon the assent of the person concerned, it will be relevant to ask *why* that person's assent was irrelevant. Or, restating the proposition in other words, in asking whether there was the requisite dominion over a person, the subjection of that person, it will be relevant to ask whether the person concerned was deprived of freedom of choice in some relevant respect and, if so, what it was that deprived the person of choice.<sup>33</sup>

Having turned to, and considered, the jurisprudence related to issues of slavery and “involuntary servitude” in the United States, Hayne J draws a number of insights, the first being that the American cases “show that some assistance can be obtained in the practical application of the abstract concepts of ownership and possession by considering the antithesis of slavery and asking whether, and in what respects, the person alleged to be a slave was free.” Hayne J then continues: “Asking what freedom a person had may shed light on whether that person was a slave. In particular, to ask whether a complainant was deprived of choice may assist in revealing whether what the accused did was exercise over that person a power attaching to the right of ownership.”<sup>34</sup> As a result of this analysis, which moves us closer to understanding not the criminality of the accused but, rather, the deprivations of the victim, Hayne J gets to the heart of the normative understanding of slavery and provides further guidance, beyond the majority judgment in *Tang*, as to the application of the definition of slavery in a contemporary setting.

### **The 1926 Definition of Slavery**

Having worked backwards in the previous section to demonstrate the contemporary relevance of the definition of slavery manifest both in the wording of the definition and in the *Tang* case and, thus, grounding

the opening section of this chapter that considers the parameters of those powers attaching to the right of ownership, this section will take one further step back to consider the very foundation of the definition. This section considers the genesis of the definition of slavery as well as the reasons why it failed to take hold and have relevance throughout much of the twentieth century. The final point is worth emphasizing as throughout the twentieth century, the definition of slavery slipped further and further into obscurity so that, as the new millennium approached, its applicability was near naught; only to be given new life at the dawn of the twenty-first century by the work of the research network that developed the *Bellagio-Harvard Guidelines*.

The definition of slavery, and the Slavery Convention itself, was developed within the context of a League of Nations that was a European colonialist club, seeking to end slavery beyond its membership while curbing the excesses of servile labour while leaving it intact within the colonies. The genesis of the 1926 Slavery Convention emerged out of the provisions of Articles 22 and 23 of the 1919 Covenant of the League of Nations, which dealt with the Mandate Territories that were transferred from the vanquished to the victors of the First World War and, more specifically, those colonial possessions of Central Africa.<sup>35</sup> Article 22 states that among the responsibilities of the new mandate holders was “the prohibition of abuses such as the slave trade,” while under Article 23, the Covenant required the members of the League of Nations to “endeavour to secure and maintain fair and humane conditions of labour for men, women, and children” as well as granting “general supervision over the execution of agreements with regard to the traffic in women and children.”

Action with regard to these provisions was first precipitated by a memorandum circulated by Sir Frederick Lugard, a British member of the Permanent Mandates Commission, who proposed that Ethiopia, an independent, non-member state of the League, be placed under a mandate for its inability to suppress the slave trade.<sup>36</sup> This led to a chain of events that not only saw Ethiopia join the League of Nations but also the establishment of an instrument suppressing the slave trade, slavery, and forced labour.<sup>37</sup> The League of Nations established a body of experts,

the Temporary Slavery Commission, whose work in 1924 and 1925 would be the DNA of the legal provisions related to forced labour, slave trade, slavery, and the convention servitudes found in the 1956 Supplementary Convention, which emerged over the next thirty years.

Where the 1926 Slavery Convention is concerned, while most of its provisions have been superseded by other obligations found in more recent treaties, what remains applicable are its definitions of both slavery and the slave trade. Where the slave trade is concerned, the convention sets out the following definition:

The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

With regard to the definition of slavery, it will be recalled that Article 1(1) of the Slavery Convention reads: “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership is exercised.” This definition, while it was considered by a drafting committee, found its final form through the pen of Robert Cecil, that is: Viscount Cecil of Chelwood.<sup>38</sup> Viscount Cecil, having considered feedback from states as to his proposed definition, reiterated his understanding of the definition of slavery as “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>39</sup> At the prompting of the Union of South Africa, Viscount Cecil made plain that unless a practice reached the threshold of the exercise of powers attaching to the right of ownership, it did not constitute slavery as defined by the 1926 Slavery Convention.<sup>40</sup>

This point was brought home in 1936, when the League of Nations’ Committee of Experts on Slavery considered the issue of serfdom, emphasizing that one must make a distinction between slavery as defined in the convention and other forms of exploitation:

It is important, however, to keep the fundamental distinction clearly in mind, and to realize that the status of “serfdom” is a condition “analogous to slavery” rather than a condition of actual slavery, and that the question whether it amounts to “slavery” within the definition of the Slavery Convention must depend upon the facts connected with each of the various systems of “serfdom.”<sup>41</sup>

The Committee of Experts on Slavery was more explicit in regard to its considerations of debt slavery, noting that at least theoretically

debt slavery is only a temporary form, for the assumption is that the slavery ends as soon as the debt is repaid. In practice, however, the conditions in which the debt-slave lives are often of the nature that repayment is an impossibility and the debtor is therefore a slave for life. Even worse than this may sometimes happen, for in some systems there are cases in which the debt is “hereditary” and, after the death of the debtor, it is transmitted to the children and children’s children. It is right, perhaps, that one should realise quite clearly that the system – *whatever form it may 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>42</sup>

Despite such an understanding of the definition of slavery, shortly after the establishment of Slavery Convention, another stream emerged that sought to read into the definition of slavery an interpretation that went beyond its ordinary meaning so as to encompass lesser servitudes or types of human exploitation.<sup>43</sup> While this had its genesis in abolitionist groups that had to reinvent themselves in the wake of the 1926 Slavery Convention, it reached its fullest expression during the United Nations (UN) era. In 1956, the UN adopted an instrument meant to supplement the 1926 Slavery Convention. Though originally meant to suppress various servitudes, for reasons related to the obligations to be undertaken and not to the normative standards set, the term servitude was dropped, and the instrument was entitled the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and *Institutions*

*and Practices Similar to Slavery*. While the reasons for this change need not concern us here, what is important is the recognition that servitudes were now to be understood as “institutions or practices similar to slavery” or, in its shorter form, as “practices similar to slavery.”<sup>44</sup>

This distinction is important since 1956 was a watershed for international relations. The previous year’s Bandung Conference had created what would come to be known as the Non-Aligned Movement, while, in 1957, Ghana became the first African state to gain its independence from European colonial powers. The decolonization process would realign the UN as the original fifty-one member states would lose their democratic majority as newly independent states joined the organization, ultimately raising the Organization’s membership by a factor of four. This loss of dominance within the democratic bodies of the UN (that is, excluding the UN Security Council) meant that newly independent states could set the agenda. Where slavery was concerned, this agenda related to the legacy of colonialism, including the African slave trade, but even more to the apartheid regimes of southern Africa, which were considered to be aligned with contemporary manifestations of slavery. If it was not slavery, then at least servitude – that is, at least, in the language of the 1956 Supplementary Convention: “a practice similar to slavery.”

Consider the main proponent of this approach, Waldo Waldron-Ramsey, the representative of Tanzania, who, in 1966, stated:

The policy of apartheid followed by South Africa in its own territory and in South West Africa, by the racist, traitorous and illegal regime in the Colony of Rhodesia and the colonialist methods applied by the Portuguese Government in the so-called Portuguese territories of Mozambique, Angola, and Portuguese Guinea, were flagrant examples of slavery. It was manifest that the methods traditionally used by the colonialist must be regarded as practices similar to slavery.<sup>45</sup>

However, the advocacy of apartheid (and, to a lesser extent, colonialism) as slavery or as a practice similar to slavery was not accepted by the old guard. Despite having lost their majority, the original members of the UN held enough seats to be the gatekeepers of international law since

the route to establishing a new legal norm through treaty law was via an international conference, which procedurally required a two-thirds majority throughout. For newly independent states, the numbers did not add up. Thus, the link between slavery and practices similar to slavery, on the one hand, and apartheid and colonialism, on the other hand, could not be sustained in legal terms.

As a result, Waldron-Ramsey changed tactics – though he was not happy – and, ultimately, what would emerge from the UN Economic and Social Council was a compromise found in a 1966 resolution that would see the creation of a term not of law but, rather, of art – a political term – that would gain much currency in the UN system.<sup>46</sup> This resolution decided “to refer the question of slavery and the slave trade in all their practices and manifestations including the *slavery-like practices* of apartheid and colonialism, to the Commission on Human Rights.”<sup>47</sup> This term would add a layer of confusion to the regime of human exploitation – beyond what was created when “servitude” was replaced with a “practice similar to slavery” in the 1956 Supplementary Convention – since there was now the term of art “slavery-like practice,” which was a near replica of the legal term “practice similar to slavery.”

Having sowed confusion by this nomenclature, any momentum that might have been generated in addressing issues of slavery was lost from 1966 onwards. It might be noted, as Suzanne Miers has shown, that the emphasis on apartheid and colonialism by newly independent states deflected attention away from its “entrenched customs,” such as child marriage and widow inheritance, which were legislated against in the 1956 Supplementary Convention.<sup>48</sup> That said, the confusion would lead to a loss of direction most evident in the work of the UN Working Group on Contemporary Forms of Slavery (1975–2006), which by the end of its tenure had overseen the collapse of the applicability of slavery at the international level. The working group failed to grasp the distinction between the political and the legal, utilizing the term “slavery-like practice” to mean provisions under the 1956 Supplementary Convention, coining the phrase “contemporary forms of slavery,” which went beyond the definition of slavery to include situations that moved quite far away from the legal. Under the heading of “contemporary forms of slavery,” the working group considered a number of social ills, including

trafficking in persons, exploitation of prostitutes (in 1989); child pornography, children in armed conflict (1990); child soldiers (1991); removal of organs (1992); incest (1993); migrant workers, sex tourism (1994); illegal adoption (1996); early marriages, and detained juveniles (1997). Many of its considerations strayed very far from the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

Where the legal came into play, and the definition of slavery gained some traction, which would lead to its contemporary application, was the move internationally within the realm of international criminal law. Towards the end of the twentieth century, what emerged was a “neo-abolition era,” which was based, like its predecessor, on religious convictions that were backed by coercive legislation imposed by the most dominant state of the era. Thus, history repeated itself. Just as Quaker activism and Anglican evangelicalism laid the foundation for the British abolitionist campaign, which would first end the transatlantic slave trade and, in its wake, lead to the end of the slave trade on land and the abolition of slavery, so too did the “Religious Right” in the United States influence the American Congress in passing the 2000 Victims of Trafficking and Violence Protection Act (Victims of Trafficking Act).<sup>49</sup> Just as British dominance of the seas during the nineteenth century allowed it to force a network of bilateral “right to search” treaties that effectively authorized it to police the seas, controlling commerce in such a manner as to force the end of the slave trade at sea, so too did the Victims of Trafficking Act and its progeny force states – by threatening non-complying states with the prospect of losing foreign aid and multi-lateral assistance, and even have the United States vote against them at the World Bank and International Monetary Fund – to implement domestic legislation criminalizing the trafficking of people.<sup>50</sup>

While the United States may consider itself the enforcer; it is enforcing international criminal law in the guise of an international instrument, as its anti-trafficking legislation is based on the UN’s 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol).<sup>51</sup> The Trafficking Protocol sets out a definition of trafficking in persons that, in essence, renews obligations previously undertaken to suppress slavery and also,

most importantly for our purposes, other types of exploitation domestically. 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 that the United States holds has allowed it, through informal empire, to require states to pass legislation that criminalizes the trafficking of persons for various purposes including slavery, servitude, and forced labour. Just as in the United States’ later legislation, the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act, 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>52</sup> As a result, states have turned their thoughts to slavery as a criminal offence in ways they had not during the twentieth century.

Further, the emergence of slavery in legal terms has also benefited from the criminal law paradigm as a result of the development of international criminal law manifest primarily in the jurisprudence of the ICTY in the *Kunarac* case and the establishment of the crime against humanity of enslavement in the Rome Statute. In *Kunarac* case, the Appeals Chamber’s determination of enslavement was “based on the exercise of any or all of the powers attaching to the right of ownership.”<sup>53</sup> This reference to the definition of slavery and the willingness to utilize it in international criminal law was confirmed by the definition’s inclusion in the 1998 Rome Statute. The statute established the

crime against humanity of enslavement 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.”<sup>54</sup> This definition is supplemented by the secondary legislation of the International Criminal Court (ICC) and its 2002 Elements of the Crimes, which seek to give more flesh to the bare bones of the crimes as set out in the Rome Statute. Where enslavement is concerned, the Elements of the Crimes set out the following, *inter alia*: “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>55</sup> This provision brings us full circle as it provides a short list of the “powers attaching to the right of ownership,” which are considered in the opening section of this chapter, while pointing to the fundamental element of slavery – “the loss of personal liberty of the victim” – though it might be added: where it reaches the threshold of control tantamount to possession.

### Conclusion

The Trafficking Protocol and the Rome Statute are fundamental to understanding the re-emergence of the legal definition of slavery in the twenty-first century. As a result of these instruments, a majority of states – that is, well over a hundred states – have had to bring their domestic legislation into conformity with their international obligations by ensuring that slavery is criminalized, at least transnationally and internationally. In so doing, and with the possibility of the ICC looking into issues of systematic enslavement within a country and the United States tying World Bank assistance to the suppression of trafficking of persons for the purposes of, among other things, slavery, it goes a long way to explaining the emergence of our contemporary neo-abolitionism era. Having considered the genesis of the definition of slavery from the League of Nations through to the United Nations era, a sense emerges as to why it was not utilized throughout most of the twentieth century. The *Tang* judgment flows from the criminal law side of the equation and truly engages with the definition of slavery by reading contemporary relevance into the 1926 definition. Having determined that the

definition of slavery held not only in *de jure* situations but also in *de facto* situations, the Research Network on the Legal Parameters of Slavery took it upon itself to elaborate the *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, which flesh out the exercise of powers attaching to the right of ownership in situations of slavery. The fundamental understanding of the definition of slavery then, if Olaudah Equiano, Abraham Lincoln, or William Wilberforce were interested, is the controlling of another person as one would possess a thing. Having established such control, the powers attaching to the right of ownership will include the buying, selling, use, management, profit, transfer, or even the destruction of a person held in slavery.

### Notes

- 1 Slavery Convention, 25 September 1926, 60 LNTS 253.
- 2 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, 226 UNTS 3 (Supplementary Convention); Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 (Rome Statute).
- 3 *The Queen v Tang*, [2008] HCA 39.
- 4 The listing of the members of the Research Network on the Legal Parameters of Slavery is found within the *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, which are reprinted in the appendix in this volume. Research Network on the Legal Parameters of Slavery, *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, 2010–11.
- 5 Antony Honoré, “Slavery: From Ancient to Modern,” in Jean Allain, ed., *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford: Oxford University Press, 2012), 9–39.
- 6 Immigration and Refugee Board of Canada, *Nigeria: Levirate Marriage Practices among the Yoruba, Igbo and Hausa-Fulani; Consequences for a Man or Woman Who Refuses to Participate in the Marriage; Availability of State Protection, February 2006*, Doc. NGA101045.E, 16 March 2006, <http://www.unhcr.org/refworld/docid/45f1478811.html> (accessed 18 October 2016).
- 7 In the European context, the positive obligations with regard to slavery are wider, as a result of the 2010 *Rantsev* case before the European Court of Human Rights. See ECtHR, *Rantsev v Cyprus and Russia*, Application no. 25965/04, 7 January 2010. Consider also Jean Allain, “*Rantsev v. Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery,” *Human Rights Law Review* 10 (2010): 546–57; Jean Allain, *The Law and Slavery* (Leiden: Martinus Nijhoff, 2015), 217–29.

- 8 Forced Labour Convention, 28 June 1930, 39 UNTS 55.
- 9 See generally Jean Allain, *Slavery in International Law* (Leiden: Martinus Nijhoff, 2013).
- 10 Rome Statute, Article 7(2)(c).
- 11 ECtHR, *Siliadin v France*, Application no. 73316/01, 26 July 2005.
- 12 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.
- 13 *Siliadin*, para. 122.
- 14 *Rantsev*, 280.
- 15 ICTY, *Prosecutor v Kunarac et al.*, Case nos. IT-96–23 and IT-96–23/1-A, 12 June 2002.
- 16 *Ibid.*, para. 117.
- 17 *Ibid.*, paras. 118–19.
- 18 See Articles 31 and 32, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.
- 19 *Oxford English Dictionary* (Oxford: Oxford University Press, 1989), 2<sup>nd</sup> ed., Volume 16, 573.
- 20 Temporary Slavery Commission, League of Nations, *Report of the Temporary Slavery Commission adopted in the Course of its Second Session, 13th July–25th July 1925*, Doc. A.19.1925.VI, 25 July 1925, 3.
- 21 *Oxford English Dictionary*, (Oxford: Oxford University Press, 1989), 2<sup>nd</sup> ed., Volume 3, 684.
- 22 The *Oxford English Dictionary* reads: “In a legal instrument, e.g. a will, or contract, a provision on which its legal force or effect is made to depend” – that is, “something demanded or required as a prerequisite to the granting or performance of something else; a provision, a stipulation.” See *Oxford English Dictionary*, (Oxford: Oxford University Press, 1989), 2<sup>nd</sup> ed., Volume 3, 683.
- 23 *Tang*, 13 (emphasis added).
- 24 See *Oxford English Dictionary*, 2<sup>nd</sup> ed., Volume 1, (Oxford: Oxford University Press, 1989), 775, where it states that “attribute” “as a mental act” is “to ascribe *to* as belonging or proper; to consider or view as belonging or appropriate *to*. Italics in the original.
- 25 *Ibid.*, 8.
- 26 *Ibid.*, 9.
- 27 *Ibid.*, 13 (emphasis added).
- 28 *Tang*, 16.
- 29 *Ibid.*, 16. Criminal Code Act 1995 (Cth).
- 30 *Ibid.*, 60; Hayne J follows by explaining in more detail his understanding of dominion:

As explained earlier, to constitute “ownership” one person would have dominion over that other person. That is, the powers that an owner of another person would have would be the powers which, taken together, would constitute the complete subjection of that other person to the will of the first. Or to

put the same point another way, the powers that an owner would have over another person, if the law recognised the right to own that other, would be powers whose exercise would not depend upon the assent of the person over whom the powers are exercised.

31 *Ibid.*, 60.

32 *Ibid.*, 60.

33 *Ibid.*, 62.

34 *Tang*, 65.

35 Covenant of the League of Nations, 28 June 1919, 225 Parry 195.

36 Suzanne Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem* (Walnut Creek, CA: AltaMira Press, 2003), 103.

37 See Jean Allain, “Slavery and the League of Nations: Ethiopia as a Civilised Nation,” *Journal of the History of International Law* 8 (2006): 213–44; see also Allain, *The Law and Slavery*, 121–58.

38 See Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Leiden: Martinus Nijhoff, 2008), 51–60.

39 League of Nations, *Slavery Convention: Report Presented to the Assembly by the Sixth Committee*, Doc. A.104.1926.VI, 24 September 1926, 1–2.

40 See Allain, *The Slavery Conventions*, 76–79.

41 League of Nations, *Slavery: Report of the Advisory Committee of Experts, Third (Extraordinary) Meeting of the Advisory Committee*, Doc. C.189(I).M.145.1936.VI, 13–14 April 1936, 27.

42 *Ibid.*, 24–25 (emphasis added).

43 See, for instance, Report of the International Commission of Inquiry into the Existence of Slavery and Forced Labour in the Republic of Liberia, (United States Department of State: Government Printing Office, Washington, DC) 8 September 1930.

44 For those interested in a fuller elaboration of the move from servitude to “practice similar to slavery,” see Jean Allain “On the Curious Disappearance of Human Servitude from General International Law,” *Journal of the History of International Law* 11 (2009): 303–32; see also Allain, *The Law and Slavery*, 297–324.

45 United Nations Economic and Social Council, Social Committee, *Summary Record of the Five Hundred and Thirty-Sixth Meeting*, 7 July 1966, UN Doc. E/AC.7/SR.536, 14 December 1966, 5.

46 Consider Waldo Waldron-Ramsey’s words, as the Greek representative proposed that a conference be convened to settle the issue:

The Committee was not asked to go back to the 1926 or 1956 Conventions, to which the Greek representative had referred, but to deal with slavery in 1966. Some delegations interpreted the notion of slavery in a limited technical sense and were endeavouring to restrict its definition to suit their own ends; he was not fooled by their humbug.

They drew attention to the slavery alleged to exist in India and Pakistan where it was supposed to result from traditional debtor-creditor relationships, or in the High Andes of Peru and Bolivia, where it was said to stem from landlord-tenant relationships. In point of fact there was no slavery either in those Asian countries or in Latin America, but slavery undoubtedly existed in the African countries he had mentioned [re: South Africa, Rhodesia, etc.].

Similarly, it had been claimed that forms of slavery were to be found in certain Islamic customs, particularly polygamy. He protested against such allegations which were designed purely to camouflage other motives. Forms of bondage similar to slavery might be said to exist in certain European and American countries particularly in the Anglo-Saxon countries where prostitution and drug addiction were rife, as he remembered from the time when he had practised as a barrister in London.

Nor could the question of racialism be excluded, for it was the direct corollary of slavery. In his opinion, the classic definition of slavery he had given should either be accepted or extended to include all related manifestations of it without exception.

United Nations Economic and Social Council, *Summary Record of the Five Hundred and Thirty-Sixth Meeting*, 5.

- 47 United Nations, Economic and Social Council, Social Committee, *Slavery, Algeria, Gabon, Cameroon, Iran, Iraq, Morocco and the United Republic of Tanzania: Draft Resolution*, UN Doc. E/AC.7/L.492, 14 July 1966 (emphasis added).
- 48 Miers, *Slavery in the Twentieth Century*, 362.
- 49 See Christopher Leslie Brown, *Moral Capital* (Chapel Hill: North Carolina Press, 2006); Ronald Weitzer, "The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade," *Politics Society* 35 (2007): 447–75. Victims of Trafficking and Violence Protection Act, 2000, PL 106-386 (Victims of Trafficking Act).
- 50 See Jean Allain, "Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade," *British Yearbook of International Law* 78 (2008): 342–88 (as reproduced in Allain, *The Law and Slavery*, 46–100); Victims of Trafficking Act, s. 110.
- 51 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 15 November 2000, 40 ILM 335 (2001).
- 52 Victims of Trafficking Act, s. 110. William Wilberforce Trafficking Victims Protection Re-authorization Act, 2008, PL 106-386. These minimum standards related to legislating criminal liability for those involved in trafficking in persons require that the state "should make serious and sustained efforts to eliminate severe forms of trafficking in persons." According to the *Trafficking in Persons Interim Assessment Report*, 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 US Department of State, *Trafficking in Persons Interim Assessment Report*, 5 April 2011, <http://www.state.gov/g/tip/rls/reports/2011/160017.htm> (accessed on 18 October 2016).

53 *Kunarac et al.*, para. 117.

54 Rome Statute, Article 7(2)(c).

55 International Criminal Court, Assembly of States Parties, *Elements of the Crimes*, Doc. ICC-ASP/1/3, 9 September 2002, 117. Note that attached to these *Elements of the Crimes* is a footnote that 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.