

**Guest Lecture Series of the Office of the Prosecutor**

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**“The Definition of ‘Slavery’ in General International Law and the Crime  
of Enslavement within the Rome Statute”**

**26 April 2007**

**The Hague**

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The following study emerges from a larger project, which is to draft a treatise entitled *Slavery in International Law*, that considers slavery within the various subfields of international law, including: the law of the sea, international human rights law, international humanitarian law, international criminal law, international labour law, and international refugee law. The study has required an in depth consideration of the 1926 and 1956 slavery conventions, which have forced a drafting of the non-existent Travaux Préparatoires of both instruments. This latter study (within a study) will appear later this year, or more likely in early 2008 as: *The Slavery Convention: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Martinus Nijhoff Publishers.

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1. For more than two hundred years, the antislavery movement has had a monopoly on what 'slavery' means. Over the last eighty years, this has meant that the definition of 'slavery' in law has lived in the shadow lands of disuse resulting from the anti-slavery movement's messianic ambitions to rid the world of human exploitation. Yet, this ambition has meant that 'slavery' as propagated by the anti-slavery movement has become an ever-growing phenomenon, so that for instance, the UN Working Group on Contemporary Forms of Slavery has examined issues such as apartheid, colonialism and incest, under the guise of slavery<sup>1</sup>. In proportion to slavery's growth in breadth, has been its diminishing legal worth, to the extent that the leading academic (and President of the NGO Free the Slaves) in the field, Kevin Bales, has discarded the legal definition for his own, one based on "three key dimensions: loss of free will, the appropriation of labour power, and the use or threat of violence"<sup>2</sup>; and a recent study on Modern Slavery in the United Kingdom defined it as "severe economic exploitation; the lack of a human rights framework; and control of one person over another by the prospect or reality of violence"<sup>3</sup>. The anti-slavery ownership of the term slavery, however, no longer holds true, as 'slavery' in the twenty-first century comes up against a countervailing human right: the right of an accused to "be informed promptly and in detail of the nature, cause and content of the charge" of enslavement before the International Criminal Court<sup>4</sup>.

2. The coming into existence of the International Criminal Court in 2002 and the right of the accused to know the content of the charge of enslavement requires a precise understanding of what 'slavery' means in general international law and what the parameters of 'enslavement' are within international criminal law. Emerging from the shadow lands then is the 1926 League of Nations definition which remains – much to the chagrin of advocates of the end of exploitation – the agreed-upon definition of slavery in international law. That definition, which is repeated in the 1956 United Nations slavery convention, also finds its way into the 'legislation' of the International Criminal Court. The 1926 definition, found at Article 1(a) of the 1926 Convention to Suppress the Slave Trade and Slavery, reads:

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

That definition is added to under Article 7(a) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery as follows:

<sup>1</sup> United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Contemporary Forms of Slavery: Updated review of the implementation of and follow-up to the conventions on slavery: Addendum – Forms of Slavery*, UN Doc. E/CN.4/Sub.2/2000/3/Add.1, 26 May 2000.

<sup>2</sup> See Kevin Bales "'No One Shall be Held in Slavery or Servitude': A Critical Analysis of International Slavery Agreements and Concepts of Slavery", *Understanding Global Slavery*, 2005, p.57.

<sup>3</sup> Gary Graig, Aline Gaus, Mick Wilkinson, Klara Skrivankova and Aidan McQuade, *Contemporary Slavery in the UK: Overview and Key Issues*, (Joseph Rowntree Foundation), 2007, p. 12.

<sup>4</sup> See Article 67(1)(a), Rome Statute of the International Criminal Court, 17 June 1998.

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

Finally, under the Rome Statute, ‘enslavement’ is deemed a crime against humanity under Article 7(1)(c) and defined at Article 7(2)(c) as:

“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.

3. What remains consistent in each of these definitions is the phrase: “the powers attaching to the right of ownership”. The notion of ‘ownership’ thus appears to be the *sine qua non* of slavery in international law – yet this is not an accurate reading of the phrase. This paper considers the evolution of the definition of slavery as it emerges in 1926 and reiterated in 1956 as a means to understand its parameters while giving special attention to the phrase ‘any or all of the powers attaching to the right of ownership’ – *as opposed to ‘ownership’*. This is done so as to give *content* and *context* to the notion of enslavement before the International Criminal Court and thus provide for the possibility of actually holding an individual internationally criminally responsible for this crime against humanity. What emerges from this consideration of the legal definition of slavery is an understanding which does not diverge significantly from what Professor Bales or other anti-slavery advocates put forward as their understanding that of slavery but channels such an understanding away from meaningless hyperbole manifest in the UN Working Group towards a definition which can be relied upon in a court of law and used to find persons guilty of enslavement. It should be said that the anti-slavery movement has misinterpreted the definition of slavery, having picked up on a vein of interpretation which has channelled the understanding of slavery away from its legal definition towards one which has done a disservice to the anti-slavery movement. From the preparation of the 1926 definition onwards, attempts have been made to obfuscate the term ‘slavery’ and to distance its legal definition from a definition that might well be attached to any type of exploitation. Individuals interested in ending exploitation in the guise of forced, bonded, or indentured labour or sexual exploitation muddied the waters of what was meant by ‘slavery’ and sought to intimate that ‘slavery’ persisted beyond the 1926 Convention definition, even where the ‘powers attaching to the right of ownership’ were not at issue. In so doing, they forced the legal definition of slavery into a shadow land of disuse where it retained its normative value among States but hibernated as an anti-slavery tool for repression or advocacy against exploitation. This paper seeks to redress the balance by demonstrating that the legal definition goes further in advancing an anti-slavery agenda as it is wide enough to be accepted by advocates while opening a new vista, one which can be used to hold individuals criminally responsible for enslavement, whether *de jure* or *de facto*.

### Drafting the 1926 Definition of Slavery

4. The 1926 definition of slavery emerged as a result of the dynamics between anti-slavery advocates and colonial States, members of the League of Nations, in the period between 1924 and 1926. While the 1924 Temporary Slavery Commission, composed of independent experts had proposed the establishment of an international convention meant to suppress slavery in all its forms; a 1925 draft convention narrowed its application, for instance, away from forced labour; and limited its obligations, i.e. to bring about, *progressively and as soon as possible*, the complete abolition of slavery in all its forms, thus allowing for the 1926 Convention to be acceptable to States. While the Members of the Temporary Slavery Commission had sought a wide definition of ‘slavery’ encompassing all types of exploitation, it was clear that Members of the League of Nations – and primarily States which retained the use of various forms of exploitive labour in their colonies – wanted to deal, in essence, with the end of legal slavery. As the French Member of the Temporary Slavery Commission, Maurice Delafousse, wrote in private correspondence to his British counterpart, Lord Frederick Lugard, “I was, like you, rather surprised at the

line adopted [...] regarding the Slavery Convention. As the matter has been agreed to, much does not remain of the work of the Temporary Commission, expect your idea of an international convention”<sup>5</sup>.

5. Instead of these independent experts, it fell to Viscount Cecil of Chelwood, the son of former British Prime Minister Salisbury and winner of the Nobel Peace Prize, to act as Rapporteur and usher a draft towards acceptance by States as the 1926 Convention. It was he who, on 22 September 1925, proposed<sup>6</sup> a definition which would ultimately become Article 1(a) of the 1926 Convention:

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised<sup>7</sup>.

More importantly for this study, was Viscount Cecil’s deftly drafted Report accompanying the proposed 1926 Convention, which appeared to allow for the abolition of slavery in all its forms yet, in fact, clearly established that the ‘powers attaching to the right of ownership’ were required for slavery to exist. It is from this Report that advocates of an expanded understanding of slavery have sought to justify their claims.

6. While the discussion leading to the establishment of a definition of slavery do not explain what is meant by ‘any or all of the powers attaching to the right of ownership’, the *travaux préparatoires* do go into detail with regard to the notion of the ‘abolition of slavery in all its forms’. This phrase is part of Article 2(b) of 1926 Convention which sets out the obligation flowing from the definitions in Article 1. It requires that ‘High Contracting Parties undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, so far as they have not already taken the necessary steps: [...] (b) To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms’. But as proposed in 1925, the draft Article 2(b) read:

To bring about progressively and as soon as possible the disappearance of slavery in every form, notably in the case of *domestic slavery and similar conditions*.<sup>8</sup>

7. In his Report to the Assembly of the League of Nations on the 1925 Draft Convention, Viscount Cecil considered the notion of ‘domestic slavery and similar conditions’ which he noted was meant to “include all forms of ‘debt slavery’, the enslaving of persons disguised as the adoption of children, and the acquisition of girls by purchase disguised as payment of dowry, etc. as mention in the report of the Temporary Slavery Commission”<sup>9</sup>. However, in the intervening year, when this time reporting to the Assembly of the League of Nations on the 1926 Convention, Viscount Cecil took into consideration the comments made by States and modified his language to make plain that there was but one type of ‘slavery’ – where the powers attaching to the right of ownership are exercised. While mentioning the work of the Temporary Slavery Commission once more, Chelwood rephrased the manifestation of exploitation so as to include the term ‘slavery’ where it had been absent in the Report of the Temporary

<sup>5</sup> See Delafouss to Lugard, 16 November 1925, Papers of Baron Lugard of Abinger, Box 102/1, Folio 31, Rhodes House Library, Oxford. Translated from the French.

<sup>6</sup> See League of Nations, Slavery, LofN Doc. A.VI/SC1/ Drafting Committee/14. (this document number having been pencilled out and replaced with A.VI/6.1925), 24 September 1925; as found in Folder R.67.D.46214 entitled *La question de l’esclavage: Discussions, y relatives, de la VIe Assemblée*, 1925. where it reads: “Amendments proposed by Lord Cecil to the text of draft Convention adopted by the Drafting Committee of the Sub-Committee of the VIth Commission (Document A.VI/S.C.I/ Drafting Committee 12 (1))”.

<sup>7</sup> League of Nations, Sixth Committee, Sub-Committee, Drafting Committee Slavery: Synopsis of the Convention (with handwritten amendments so as to be re-entitled Sixth Committee, Slavery: Synopsis of the Convention), LofN Doc. A.VI/S.C.I/ Drafting Committee/12(1) Revised (this document number having been pencilled out and replaced with A.VI/5.1925, 22 September 1925); as found in Folder R.67.D.46214 entitled *La question de l’esclavage: Discussions, y relatives, de la VIe Assemblée*, 1925.

<sup>8</sup> League of Nations, Annex: Draft Convention, League of Nations Official Journal (Special Supplement 33) Records of the Sixth Assembly: Text of Debates, 26 September 1925, p. 439. Emphasis added.

<sup>9</sup> *Id.*

Viscount Cecil noted in 1925 that such similar conditions “approach very close to and are, in fact a form of slavery, but are not usually included in the simple term slavery. With respect to all those, we [re: the Drafting Committee] ask for their abolition, we ask all the nations to agree to their abolition, which will be carried out, as all reform must necessarily be carried out, as progressively as may be possible, and as soon as possible”. See League of Nations, Question of Slavery: Report of the Sixth Committee; Resolution, League of Nations Official Journal (Special Supplement 33) Records of the Sixth Assembly: Text of Debates, Nineteenth Plenary Meeting, 26 September 1925, p. 156.

Slavery Commission. Viscount Cecil enumerated the types of domestic slavery and similar conditions as “all those conditions mentioned by the Temporary Slavery Commission and to which I referred to last year”<sup>10</sup>. Yet Viscount Cecil speaks of “debt slavery” where the Temporary Slavery Commission spoke of “forms of pledging or reducing to servitude of persons for debt or other reason”. Instead of using the language of the Commission, “considering conditions analogous to slavery, as for example”, the adoption “of children, [...] with a view to their virtual enslavement” or the acquisition “of girls by purchase disguised as payment of dowry”, Viscount Cecil’s 1926 Report speaks of the “enslaving of persons disguised as adoption of children and the acquisition of girls by purchase disguised as payment of dowry”<sup>11</sup>. Furthermore, Viscount Cecil sought to reaffirm the link between slavery and the powers attached to the right of ownership, as he noted that:

Even if, as is possible, these last practices do not come under the definition of slavery as it is given in Article 1, the [drafting] Commission is unanimously of the opinion that they must be combated. In a more general way, it interprets Article 2 as tending to bring about the disappearance from written legislation or from the custom of the country of everything which admits the maintenance by a private individual of rights over another person of the same nature as the rights which an individual can have over things<sup>12</sup>.

In other words, Viscount Cecil recognised that ‘slavery in all its forms’ required the demonstration of a power attached to the right of ownership to be exercised over an individual as established by the definition of slavery in Article 1.

8. The modification of the 1925 draft of the convention so as to expunge the term ‘domestic and other slavery’ was brought about as a result of comments made by States which sought to ensure that only slavery as defined by Article 1(a) was included in the Convention and that other types of exploitation would be excluded. This precise point was made by the Union of South Africa, when it commented that the 1925 draft “Convention as drafted goes somewhat further than seems necessary for the abolition of slavery [...]”<sup>13</sup>.

That definition puts as the test of slavery the status or condition of a person over whom all or any of the powers attaching to the right of *ownership* are exercised. In other words, a person is a slave if any other person can, by law or enforceable custom, claim such property in him as would be claimed if he were an inanimate object; and thus the natural freedom of will possessed by a person to offer or render his labour or to control the fruits thereof or the consideration therefrom is taken from him<sup>14</sup>.

The South African comment continues:

If the draft Convention had merely proceeded to impose on the contracting parties the duty to prevent within their community any person being in a condition of slavery as defined in Article 1 [...] there would be little criticism to offer upon the draft. But in Article 2(b), the draft Convention desires to bring about the disappearance not only of slavery as defined in Article 1 but to bring about *progressively* the disappearance of what is called “domestic slavery and similar conditions”. It is obviously therefore desired to extend the definitions given in Article 1 (which makes property or rights of ownership the test) to conditions wherein no property of one person in another is recognised by law – such as the relationship by custom of heads of families to persons related to them by consanguinity or marriage or to person who are deemed by adoption to be placed in such relationships. This seems to go beyond the object of the draft Convention as set out in the Preamble.

<sup>10</sup> League of Nations, Slavery Convention: Report presented to the Assembly by the Sixth Committee, LofN Doc. A.104.1926.VI, as found in League of Nations, Publications of the League of Nations, VI.B.Slavery.1926, VI. B. 5, 24 September 1926, p. 1.

<sup>11</sup> *Id.* Emphasis added.

<sup>12</sup> *Id.*, pp. 1-2.

<sup>13</sup> League of Nations, Draft Convention on Slavery, Replies of Governments, Reply from the Government of the Union of South Africa, LofN Doc. A.10(a).1926.VI, 22 July 1926, p. 5; as found in League of Nations, Publications of the League of Nations, VI.B.Slavery.1926, VI. B. 3.

<sup>14</sup> *Id.* Emphasis in the original.

If it does not go beyond those objects, there seems no reason why the so-called domestic slavery should not be included in the definition of Article 1. The argument seems to be that the so-called domestic slavery can only be brought to an end *progressively*; and thus admittedly the draft Convention is asking the signatories to the Convention to interfere as opportunity presents itself in the social conditions and custom of the people forming their communities. It is even uncertain as to what would thus be suppressed because to 'domestic slavery' is added 'or similar condition' – an expression by which, it is explained, is meant all forms of "debt slavery", enslaving of persons disguised as adoption of children, and the acquisition of girls by purchase disguised as payment of dowry.

Having noted this, the submission by the Union of South Africa turned to legal analysis:

Now either such persons are *sui juris* [re: a separate category] or they are not. If they are *sui juris*, they can only become subject to domestic slavery or similar conditions by a voluntary act, and the essential element of slavery is absent. If they are not *sui juris*, they can only be subject to domestic slavery or similar conditions by the acts of those who by law are their guardians, and it is no more than a form of paternal power. If, further, they have become domestic slaves or persons in similar conditions in the manner indicated, that can only be because others have acquired a right of property in them, and they are therefore slaves as defined in Article 1. There seems no reason, then, to differentiate them from the person in a condition of slavery defined in that article. If, on the other hand, no right of property in them exists, the scope of the draft Convention seems to be extended to compel the signatories to undertake to interfere in social customs<sup>15</sup>.

9. Beyond these comments, which were at the heart of the suppression of the phrase 'domestic slavery and similar conditions', two failed attempts by States seeking to expand the definition of slavery beyond manifestations of the powers attached to the right of ownership transpired. Germany proposed a new subparagraph creating for States the obligation to suppress types of servitude. The German proposal read:

To endeavour, as far as possible, to bring about the disappearance of conditions of servitude resembling slavery, e.g. debt slavery, sham adoption, childhood marriage, traffic in women, etc<sup>16</sup>.

This proposal, like the one made by the Delegate of Haiti ("To endeavour to bring about as soon as possible the disappearance of all voluntary or involuntary subjections")<sup>17</sup> was not taken up by the Sixth Committee or later by the Assembly. Thus, there was an unwillingness to include servitude in the Convention. For his part, Viscount Cecil reported to the Assembly of the League of Nations in 1926 that "the words 'notably in the case of domestic slavery and similar conditions' [were] being now omitted. This modification was made because it was believed that such conditions came within the definition of slavery contained in the first article and that no further prohibition of them in express terms was necessary"<sup>18</sup>.

10. The argument being put forward here is that without this background the 1926 Report to the Assembly of the League of Nations by Viscount Cecil of Chelwood appears to be ambiguous on the definition of slavery, yet it is not. Viscount Cecil did not seek to give voice to a wider the definition of slavery. That 'domestic slavery and similar conditions' was omitted was a result of the understanding that where so-called 'domestic slavery and similar conditions' manifested powers attaching to the right of ownership, they fell into the definition of slavery as established by Article 1(a) of the 1926 Convention. If they did not, such exploitation was not covered by the Convention. Thus, Viscount Cecil is clear: despite

<sup>15</sup> *Id.*, p. 6. Emphasis in the original.

<sup>16</sup> League of Nations, Draft Convention on Slavery, Replies of Governments, Reply from the Government of Germany, LofN Doc. A.10(a).1926.VI, 22 July 1926, p. 4.

<sup>17</sup> League of Nations, Draft Convention on Slavery and Proposed Amendments, LofN Doc. A.VI/S.C.1/1, 10 September 1926; as found in Folder R.77.D.46781 entitled Draft Convention on Slavery: Discussion at the 7<sup>th</sup> Assembly; 1926.

<sup>18</sup> League of Nations, Slavery Convention: Report presented to the Assembly by the Sixth Committee, LofN Doc. A.104.1926.VI, as found in League of Nations, Publications of the League of Nations, VI.B.Slavery.1926, VI. B. 5, 24 September 1926, p. 1.

the wishes of the Temporary Slavery Commission, which sought to outlaw 'domestic slavery and similar conditions'; that 'slavery' is manifest only where 'any or all of the powers attaching to the right of ownership are exercised'.

11. During the 1930s, a schism emerged between those within the League of Nations who used the Article 1(a) definition of slavery and those who sought to advocate against exploitation, the latter of whom misrepresented Viscount Cecil's remarks as giving licence to also include, within the definition of slavery, the types of servitude mentioned in the 1924 Report of the Temporary Slavery Commission, even where powers attached to the right of ownership were not exercised<sup>19</sup>. Turning to the former, in 1936 the League of Nations Committee of Experts on Slavery considered the issue of serfdom and emphasised 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 realise 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>20</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

<sup>19</sup> That schism emerged as a result of the Report of the 1930 International Commission of Inquiry into the Existence of Slavery and Forced Labour in the Republic of Liberia which truncated Viscount Cecil's 1926 Report to read:

The Report of the Assembly Committee responsible for drafting of the convention has explained that reference to domestic slavery and similar conditions was omitted 'because it was believed that such conditions came within the definition of slavery contained in the first article and that no further prohibition of them in express terms was necessary. This applies not only to domestic slavery but to all those conditions mentioned by the Temporary Slavery Commission *i.e.*, debt slavery, enslaving of persons disguised as payment of dowry, etc.'

And no more, giving the impression that all such conditions were covered by the 1926 Convention. This type of use of Chelwood's Report is of contemporary significance as it is repeated in United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Contemporary Forms of Slavery: Updated review of the implementation of and follow-up to the conventions on slavery*, Working Paper prepared by David Weissbrodt and Anti-Slavery International, UN Doc. E/CN.4/Sub.2/2000/3, 26 May 2000. Note my critique of that Paper in Jean Allain, "A Legal Consideration of 'Slavery' in Light of the Travaux Préparatoires of the 1926 Convention", Paper presented at the Wilberforce Institute, Hull, 23 November 2006 available on-line by Googling: Allain, Slavery. In that Working Paper, it was stated at p. 5 that:

By referring to "any or all of the powers of ownership" in its definition of slavery, and setting forth as its stated purpose the "abolition of slavery in all its forms" the Slavery Convention covered not only domestic slavery but also the other forms of slavery listed in the Report of the Temporary Slavery Commission

To which the following footnote was added:

The report to the Sixth Committee of the League of Nations Assembly in 1926 also clarified, in relation to article 2 (b) of the final text of the Slavery Convention, that the words "notably in the case of domestic slavery and similar conditions" were being omitted on the grounds that "such conditions come within the definition of slavery contained in the first article and that no further prohibition of them in express terms was necessary. This provision applies not only to domestic slavery but to all those conditions mentioned by the Temporary Slavery Commission ... *i.e.* debt slavery, the enslaving of persons disguised as adoption of children and the acquisition of girls by purchase disguised as payment of dowry".

Thus from both these considerations of the definition of slavery is the omitted what Viscount Cecil went on to say:

Even if, as is possible, these last practices do not come under the definition of slavery as it is given in Article 1, the Commission is unanimously of the opinion that they must be combated. In a more general way, it interprets Article 2 as tending to bring about the disappearance from written legislation or from the custom of the country of everything which admits the maintenance by a private individual of rights over another person of the same nature as the rights which an individual can have over things.

See League of Nations, Slavery Convention: Report presented to the Assembly by the Sixth Committee, LofN Doc. A.104.1926.VI, as found in League of Nations, Publications of the League of Nations, VI.B.Slavery.1926, VI. B. 5, 24 September 1926, p. 1.

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

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>21</sup>

Taking these examples into consideration, it is clear that ten years after the establishment of the 1926 Convention, the expert body established to consider issues of slavery was of the view that the definition of slavery confined to the parameters of Article 1(a). Thus, the powers attached to the right of ownership remained the *sine quo non* of slavery.

### The Powers Attached to the Right of Ownership

12. Consideration now turns to the United Nations era, not to consider the divergence between the legal definition of slavery and the ever-expanding notion of slavery, but instead, to examine the most significant pronouncement regarding the legal definition of slavery as the starting point for an examination of what constitutes 'any or all of the powers attaching to the right of ownership'. In 1949 the United Nations General Assembly requested that the Economic and Social Council study the problem of slavery<sup>22</sup>. As a result, the Economic and Social Council, by way of a resolution, instructed the UN Secretary-General to appoint an *ad hoc* committee to, *inter alia*, "suggest methods of attacking" issues of slavery and servitude<sup>23</sup>. With regard to this point, the Secretary-General suggested that the newly established 1950 *Ad Hoc* Committee on Slavery might propose a new convention:

Should the Committee find that the substantive provisions of the Slavery Convention of 1926 are no longer adequate in the light of the present situation, it might consider the possibility and desirability of proposing a new convention on slavery. Several questions may be raised and studied with respect to the substantive provisions of the 1926 Convention. For instance:

- (a) Is the definition of slavery in Article 1 of the Convention satisfactory? [...] <sup>24</sup>

To that end, the *Ad Hoc* Committee expressed the view in its first Report that:

certain modifications of the International Slavery Convention of 1926 appeared to be necessary and that it might prove desirable to draft a new convention broader in scope, or alternatively, to draw up an instrument supplementary to the existing Convention<sup>25</sup>.

By the time the *Ad Hoc* Committee on Slavery produced its second Report in 1951, it called for "the preparation and adoption of an international convention supplementary to the Slavery Convention of 1926", which "should be more precise than that instrument in defining the exact forms of servitude dealt with"<sup>26</sup>. The United Nations Economic and Social Council, for its part, having considered the Draft Resolution prepared by the *Ad Hoc* Committee on Slavery noted that it was unable to deal with the Recommendations, as "the material is not at present in such a form as to allow the Council to act upon", and called on the Secretary-General to report back to it "indicating what action the United Nations and

<sup>21</sup> League of Nations, Slavery: Report of the Advisory Committee of Experts, Third (Extraordinary) Meeting of the Advisory Committee, , LofN Doc. C.189(I). M.145.1936, VI,13-14 April 1936, pp. 24-25. Emphasis added.

<sup>22</sup> General Assembly, Resolution 278 (III), 13 May 1949.

<sup>23</sup> Economic and Social Council, Resolution 238(IX), 20 July 1949.

<sup>24</sup> Economic and Social Council, Notes on the Terms of Reference of the Ad Hoc Committee on Slavery (Memorandum submitted by the Secretary-General), UN Doc. E/AC.33/4, 3 February 1950, pp. 3-4.

<sup>25</sup> United Nations Economic and Social Council, Report of the First Session of the *Ad Hoc* Committee on Slavery to the Economic and Social Council, UN Doc E/AC.33/9, 27 March 1950, p. 11.

<sup>26</sup> United Nations Economic and Social Council, Report of the *Ad Hoc* Committee on Slavery (Second Session), UN Doc E/AC.33/13, 4 May 1951, pp. 16-17.



specialized agencies could most appropriately take in order to achieve the elimination of slavery, the slave trade and forms of servitude resembling slavery in their effects”<sup>27</sup>.

13. The Secretary-General reported back to the Economic and Social Council in 1953, stating that the *Ad Hoc* Committee had envisioned an instrument which covered the subject matter of the 1926 Convention and “certain other institutions and practices” and would “be in operation side by side with that Convention”<sup>28</sup>. The Secretary-General also considered the definition of slavery as found in the 1926 Convention. He, started by once more noting Viscount Cecil’s Report on the 1926 Convention and cited the relevant text in full:

In this interpretation the Rapporteur stated that reference to domestic slavery and similar conditions was omitted:

because it was believed that such conditions came within the definition of slavery contained in the first article and that no further prohibition of them in express terms was necessary. This applies not only to domestic slavery but to all those conditions mentioned by the Temporary Slavery Commission ... i.e., ‘debt slavery’, the enslaving of persons disguised as the adoption of children, and the acquisition of girls by purchase disguised as payment of dowry, etc. Even if, as is possible, these last practices do not come under the definition of slavery as it is given in Article 1, the Commission is unanimously of the opinion that they must be combated. In a more general way, it interprets Article 2 as tending to bring about the disappearance from written legislation or from the custom of the country of everything which admits the maintenance by a private individual of rights over another person of the same nature as the rights which an individual can have over things.

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

14. The Secretary-General, then turned, by way of an extended footnote at the end of the paragraph, to consider the meaning of the phrase ‘any or all of the powers attaching to the right of ownership are exercised’. According to the Secretary-General, one “does not find in the *travaux préparatoires* of the International Slavery Convention of 1926 any precise indication of the meaning of the ‘power attaching to the right of ownership’ to which the drafters of that Convention intended to refer, or of the legal system by which they were guided”. The Secretary-General then continued:

In the absence of such an indication, it may reasonably be assumed that the basic concept which they had in mind was that of the authority of the master over the slave in Roman law, the ‘*dominica potestas*’. This authority was of an absolute nature, comparable to the rights of ownership, which included the right to acquire, to use, or to dispose of a thing or of an animal or of its fruits or offspring. By virtue of this right, in its most general form the master could utilise the services of the slave in his house or on his land. The children of the slave also belonged to the master, and he could sell them separately from their mother and father. As a result of the evolution of Roman law, the authority of the master over the slave was subjected successively to more and more limitations; but

<sup>27</sup> Economic and Social Council, Resolution 388(XIII), 10 September 1951.

<sup>28</sup> United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, p. 40.

even though it was restricted, the master never had towards his slave the obligations that an employer has today towards his servant or employee.<sup>29</sup>

To justify this interpretation, the Secretary-General pointed to the submission of the Union of South Africa, saying that this “seems to have been the guiding concept in Geneva, as is apparent from the following quotation of a government communication to the League of Nations in 1926”:

‘a person is a slave if any other person can, by law or enforceable custom, claim such property in him as would be claimed if he were an inanimate object; and thus the natural freedom of will possessed by a person to offer or render his labour or to control the fruits thereof or the consideration therefrom is taken from him. The term 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’.<sup>30</sup>

15. Turning to the Roman Law, in his classic 1908 text *The Roman Law of Slavery*, W. W. Buckland considered the laws applicable to slaves during the Roman era. Interestingly, much of the book deals with the slave as a man and the law applicable to a slave as a person, while only one chapter is devoted to the slave as a thing that is chattel slavery. This is so because the essence of slave laws since time immemorial has been the inability to treat slaves exclusively as property and, thus, to recognise in them their humanity. With regard to Roman Law, it should first be noted that slavery as an institution persists though it was recognised as being against natural law. The institution was allowed to persist as against this *Ius Naturale* as the *Ius Gentium* (the Law of Nations) deemed that captives in war, instead of being put to death, forfeited their lives to their captors and thus became enslaved<sup>31</sup>. From this flowed the Roman Law notion of the individual as *res* – a thing or an object – which can be owned, and thus was chattel. This notion of chattel – ‘goods’ – the personal property of another, is the fundamental basis for slavery in Roman Law. As Buckland writes, the “slave, like any other chattel, might be the subject of all ordinary transactions”<sup>32</sup>. But what were these transactions, and did they differ where slaves were concerned?

Ownership is a rather elusive concept. A social construct, it is typically understood as a prior right over something. As A. M. Honoré puts it; “those legal rights, duties and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system”<sup>33</sup>. That ‘greatest interest’ thus does not mean that an individual has a sovereign or absolute right over a thing but, rather, the ability to enjoy and dispose of the thing “provided that one abstains from any use forbidden by statute or subordinate legislation”<sup>34</sup>. Thus ownership entails rights, but those rights are often termed not as absolute but as right vis-à-vis others where one holds the best claim to a thing. Moving beyond the common characterisation of ownership as constituting a ‘bundle of rights’, Honoré lists what he calls the eleven ‘standard incidents’ of ownership, of which the majority are rights, but some are also obligations. These incidents are:

- |  |   |
|--|---|
| 1) The right to possess;                 | 7) The right or incidents of transmissibility;    |
| 2) The right to use;                     | 8) The right or incidents of absence of the term; |
| 3) The right to manage;                  | 9) The prohibition of harmful use;                |
| 4) The right to the income of the thing; | 10) Liability to execution; and                   |

<sup>29</sup> *Id.*, p. 27. It may be noted that the notion of ‘*dominica potestas*’ appears to come from the 1910 study entitled *Slavery as an Industrial System* by H.J. Nieboer wherein he seeks to establish a working definition for his study: See H.J. Nieboer, *Slavery as an Industrial System*, 1910, pp. 8-9.

<sup>30</sup> *Id.*, p. 28.

<sup>31</sup> W. W. Buckland, *The Roman Law of Slavery: The Condition of the Slave in Private Law Augustus to Justinian*, 1908, p. 1. Beyond enslavement as a prisoner of war, one could become a slave under Roman Law by two further means, by birth, or through the civil law: by selling yourself or your offspring, or through debt or serious crime.

<sup>32</sup> *Id.*, p. 11.

<sup>33</sup> A.M. Honoré, “Ownership”, A.G. Guest (ed) *Oxford Essays in Jurisprudence*, 1961, p. 105.

<sup>34</sup> *Id.*, p. 110.



abolition of slavery is that the status of slavery should no longer be recognised in the eye of the law” and went so far as to define what it meant by the abolition of the legal status of slavery:

The “abolition of the legal status” means that every slave has the right to assert his freedom, without ransom and without going through any formal process of fulfilling any prior condition, by simply leaving his master if he desire to do so. He enjoys and can exercise all the civil rights of a free man – *e.g.*, can sue and be sued in court, can prosecute his master for ill-treatment, and can bequeath and inherit property.<sup>39</sup>

While this definition was not taken up during the drafting process which led to the 1926 Convention, the Temporary Slavery Commission’s suggestion that the “abolition of the legal status of slavery” might form part of a proposed instrument was clearly integrated into the definition of slavery in Article 1(a).

20. In the definition of slavery, the notion of ‘status’ is juxtaposed with the term ‘condition’ by the conjunction ‘or’. ‘Condition’, as a noun, is defined, *inter alia*, in the *Oxford English Dictionary* as a “mode of being, state, position, nature”. The most pertinent example given under this heading is a “characteristic, property, attribute, quality (of men or things)”. As opposed to the term ‘status’, the definition in law provided in the *Oxford English Dictionary* of ‘condition’ does not apply in the context of the definition of slavery, which definition reads: “In a legal instrument, *e.g.* a will, or contract, a provision on which its legal force or effect is made to depend”, *i.e.* “Something demanded or required as a prerequisite to the granting or performance of something else; a provision, a stipulation”. With regard to the *travaux préparatoires* and the 1926 Convention, the term ‘condition’ was used during the negotiations of the Convention as part of the phrase ‘domestic slavery and similar conditions’ which, it will be recalled, was excluded from the substance of the Convention but was recognised as being subsumed within the definition of Slavery during the negotiation process, were the powers of the right of ownership were exercised. While referring to the types of exploitation that the Temporary Slavery Commission had wished to see in the Convention, Viscount Cecil conceded that, while such conditions might not always come under the definition in Article 1, it was clear that the obligation manifest in Article 2 – “To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms” – touched on two elements, namely the bringing about of the disappearance from “written legislation” and “the custom of a country” of those items which admit “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>40</sup>.

21. From the forgone textual interpretation, it may be said that the phrase ‘status or condition’ seeks to distinguish between slavery *de jure* and slavery *de facto*, whereby slavery as ‘status’ is a recognition of slavery in law; and slavery as ‘condition’ is to be understood as slavery in fact. This interpretation is confirmed first by the dichotomy put forward by Viscount Cecil between the suppression of slavery in law: ‘written legislation’ and in fact: ‘the custom of a country’. It is also manifest in the 1926 submission of the Union of South Africa to the League of Nations’ request for comment on the draft Convention, when that State reworded the definition including the phrase ‘status or condition’ to read: “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”<sup>41</sup>.

22. Building on this understanding and reintroducing the second expunged phrase and thus completing the definition as found in the 1926 Convention, gives the following reading: *Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised*. By ‘powers attaching to the right of ownership’ as opposed to ‘right of ownership’ the

<sup>39</sup> League of Nations, Temporary Slavery Commission, Report of the Temporary Slavery Commission adopted in the Course of its Second Session, July 13<sup>th</sup>-25<sup>th</sup> July, 1925, LofN Doc A.19.1925. VI, 25 July 1925, p. 3.

<sup>40</sup> League of Nations, Slavery Convention: Report presented to the Assembly by the Sixth Committee, LofN Doc. A.104.1926.VI, as found in League of Nations, Publications of the League of Nations, VI.B.Slavery.1926, VI. B. 5, 24 September 1926, p. 2. Emphasis added.

<sup>41</sup> League of Nations, Draft Convention on Slavery, Replies of Governments, Reply from the Government of the Union of South Africa, LofN Doc. A.10(a).1926.VI, 22 July 1926, p. 5. Emphasis added.

definition implies that one would have the powers of ownership but for the fact that the right of ownership cannot be vindicated in law. In other words, exercising the 'powers attaching to the right of ownership' should be understood as meaning that the enslavement of a person does not mean the possession of a legal right of ownership over the individual (such a claim could find no remedy in modern day law) *but the powers attached to such rights* but for the fact that ownership is illegal. To use an analogy, the powers attached to the right of ownership are the powers that manifest themselves say, when two drug dealers have a dispute over a kilo of heroin. Neither can have their claim dealt with in a court of law, but one or the other will exercise the powers attached to the right of ownership, for example, possession; thus what would amount to a right of ownership but for the fact that it is illegal to own, or possess, heroin.

23. To buttress this argument, consider Article 33(4) of the Vienna Convention on the Law of Treaties<sup>42</sup>, which mandates that where there is a difference in meaning between the authentic texts of a treaty, the meaning which is best reconciled with the object and purpose of the treaty is to be adopted – the notion of 'powers attaching to' comes into play. In the only other language in which the text was authenticated in – French – the phrase 'powers attaching to' appears as '*les attributs*', which can be translated into English in the literal sense of 'attributes' of the right of ownership. Thus we are not speaking of a right of ownership, but exercising the attributes of the right of ownership without exercising the legal right of ownership. Thus, these three elements, the difference between status and condition, the notion of the 'powers attaching to the right of ownership' versus the right of ownership; and the use of the term '*les attributs*' in the French text, all point towards a definition of slavery that includes both *de jure* and *de facto* enslavement.

24. The Secretary-General's 1953 Memorandum, after examining the Roman Law nature of the 1926 definition of slavery, turns to consider "the characteristics of the various powers attaching to the 'right of ownership'". As such, the Secretary-General spells out what should be understood not as the right of ownership where it touches upon slavery, but rather, the exercise of the powers attached to the right of ownership:

1. the individual of servile status may be made the object of a purchase;
2. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law;
3. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;
4. the ownership of the individual of servile status can be transferred to another person;
5. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;
6. the servile status is transmitted *ipso facto* to descendants of the individual having such status.<sup>43</sup>

<sup>42</sup> Article 33 -- Interpretation of treaties authenticated in two or more languages of the 1969 Vienna Convention of the Law of Treaties reads:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language,  
[...]
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

<sup>43</sup> United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, p. 28.

Thus, when these characteristics of the various powers attached to the right of ownership are considered in light of the overall definition of slavery – that is to say “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised” – what emerges are elements which, taken separately or together, constitute slavery in law.

25. Turning to each of the six characteristics of the powers attached to the right of ownership put forward by the UN Secretary-General, it should first be noted that the use of ‘servile status’ by the Secretary-General predates the use of the term as noted 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, but 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. Turning to the first and fourth of the Secretary-General’s six characteristics, a person who finds him or herself being made the object of purchase or transfer would, thus, be in the status or condition of slavery. 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 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.

26. 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 returning to the earlier discussion which the Secretary-General had with regard to 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”.<sup>44</sup> Of course in a state of *de facto* slavery, due to its overall illegal nature, there would be no restrictions expressly provided by law but, instead, an overarching prohibition. Despite this, or as a result, the ‘master’ would be able to use the individual and their labour ‘in an absolute manner’. The third of the Secretary-General’s characteristics, follows closely on 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 slavery or being in the condition of slavery remains irrelevant to the fact that the master would benefit from exercising the power attached to the right of ownership with regard to the fruits of one’s labour. The 1926 submission of the Union of South Africa, it may be recalled, picked up on this precise 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 him<sup>45</sup>.

<sup>44</sup> *Id.*, p. 29.

<sup>45</sup> League of Nations, Draft Convention on Slavery, Replies of Governments, Reply from the Government of the Union of South Africa, LofN Doc. A.10(a).1926.VI, 22 July 1926, p. 5; as found in League of Nations, Publications of the League of Nations, VI.B.Slavery, 1926.VI.B.3. Emphasis in the original.

27. Having already considered the fourth of the Secretary-General's six characteristics of the powers attaching to the right of ownership, 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 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, 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"<sup>46</sup>. But here one sees that the Secretary-General is not concerned as much with there being a permanent status or condition which would last until the slave dies but, instead, that status or condition "cannot be terminated by the will of the individual subject to it", thus an indefinite status or condition.

28. 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 except that, unlike Honoré's "right or incidents of transmissibility", such a power looks also to be *ipso facto* illegal and thus as a legal status it might no longer exist. Yet, for instances in the area of debt-bondage, the 'condition' of slavery manifests itself through the inheritance of debt, and, as such, it remains, like the other UN Secretary-General's characteristics, an authoritative description of a manifestation of the exercise of a power attached to the right of ownership, and thus slavery.

29. It should be noted that the 1953 Memorandum by the Secretary-General argued against the need for a further international instrument regulating lesser forms of exploitation than slavery as defined in the 1926 Convention, the Secretary-General writing:

an examination of the institutions or practices described by the *ad hoc* Committee on Slavery [re: debt-bondage serfdom, forced marriage and child exploitation] indicates that in the main these institutions or practices are covered by the undertaking contained in Article 2(b) of the International Slavery Convention of 1926, interpreted in the light of the definition of slavery contained in Article 1 (1) of the same Convention<sup>47</sup>.

The 1956 Convention concretely manifests of the fact that States did not agree with the Secretary-General's Memorandum and thus moved to establish a supplementary Convention. This, however, does not detract for the Secretary-General's analysis in his 1953 Memorandum because the 1956 Convention accepts that the institutions and practices it seeks to abolish may well be covered by the 1926 definition, yet seeks to abolish them even if they do not fall within the 1926 definition of slavery.

30. What emerged as the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was first put forward for consideration as a 1954 Draft Convention penned by the United Kingdom. Article 1 of that British Draft Convention, which set out various forms of servile status (i.e.: debt bondage, serfdom, sham marriages, and exploitation children) opened with the following paragraph:

All practicable and necessary measures, including legislation where appropriate, shall be taken to bring about, progressively and as soon as possible, the complete abolition or abandonment of the following institutions and practices, where they still exist.<sup>48</sup>

<sup>46</sup> *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. 14.

<sup>47</sup> United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953, p. 29.

<sup>48</sup> See Economic and Social Council, The Draft Supplementary Convention of Slavery and Servitude Submitted by the Government of the United Kingdom and Comments Thereon (Memorandum by the Secretary-General), UN Doc E/AC.43/L.1, 2 December 1955, p. 24.

31. A 1956 *Ad Hoc* Drafting Committee of the Economic and Social Council established to draft the 1956 Convention, turned to consider the 1954 British Draft Convention. In its Report to Economic and Social Council, the Drafting Committee noted that:

The representative of the United Kingdom proposed<sup>49</sup> to insert at the end of the introductory paragraph the phrase, "and whether or not they are covered by the definition of slavery contained in Article 1 of the Slavery Convention of 25 September 1926". He explained that the proposal was in line with the suggestion of The Anti-Slavery Society<sup>50</sup>.

The representative of India and Australia agreed that the amendment was necessary and that it would help to clarify the text.

The Committee unanimously adopted the amendment at the 11th meeting.<sup>51</sup>

The suggested proposal was further adopted during the 1956 Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, such that the first paragraph of Article 1 of the 1956 Convention reads:

Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926.<sup>52</sup>

Thus the 1956 Convention should be understood as dealing with various servile statuses where there are no powers attached to the right of ownership. Thus, this Convention supplements the 1926 Convention by dealing with institutions and practices which do not meet that threshold.

### The Crime of Enslavement within the Rome Statute

32. In contrast to what has been discussed thus far, what follows, with regard to the crime of enslavement within the Statute of the International Criminal Court, must be considered as tentative, as an in depth consideration of enslavement in the evolution of international criminal law has yet to be taken, likewise, for the legislative history of the negotiations leading to, and transpiring in, Rome in 1998. Furthermore, what follows should be understood as applying *mutates mutandis* to the term 'slavery' as it is manifest in 'sexual slavery', both as a crime against humanity and as a war crime.

<sup>49</sup> See Economic and Social Council, Committee on the Drafting of a Supplementary Convention on Slavery and Servitude, United Kingdom: Amendment to Article 1 of the Draft Convention on the Abolition of Slavery and Servitude (E/2540/Add.4), UN Doc. E/AC.43/L.2, 16 January 1956.

<sup>50</sup> See Economic and Social Council, Committee on the Drafting of a Supplementary Convention on Slavery and Servitude, United Kingdom: Amendment to Article 1 of the Draft Convention on the Abolition of Slavery and Servitude (E/2540/Add.4), UN Doc. E/AC.43/L.10, 17 January 1956.

<sup>50</sup> See the proposal of The Anti-Slavery Society at Economic and Social Council, The Draft Supplementary Convention of Slavery and Servitude Submitted by the Government of the United Kingdom and Comments Thereon (Memorandum by the Secretary-General), UN Doc E/AC.43/L.1, 2 December 1955, pp. 21-22. In his Memorandum, the Secretary-General when on to explained that the proposal by the Anti-Slavery Society was being put forward as the "possibility of differing opinions as to the precise scope of these definitions would thus be recognized" *id.*, p. 22.

<sup>51</sup> Economic and Social Council, Slavery: Draft Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery: Report of the Committee appointed by Resolution 564 (XIX), 7 April 1955, UN Doc E/2824, 15 February 1956, p. 20.

<sup>52</sup> Article 1 of the 1956 Convention was adopted during the Sixth Meeting of the Conference, sss Economic and Social Council, United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Summary Record of the Sixth Meeting, 16 August 1956, UN Doc E/CONF.24/SR.6, 11 November 1958, p. 3.



33. As noted earlier, 'enslavement' is deemed a crime against humanity under Article 7(1)(c) of the Rome Statute and defined at Article 7(2)(c) as:

"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.

What is interesting here is the extension of the definition to include the 'exercise of such power in the course of trafficking in persons, in particular women and children'. This need not detain us, as the international definition of 'trafficking in persons' as found in the 2001 United Nations Palermo Protocol (and reproduced in the 2005 Council of Europe Convention) 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.<sup>53</sup>

Thus, imbedded in the definition of 'trafficking in persons' is the term 'slavery', a manifestation of enslavement, which despite meeting the other elements of the definition 'trafficking in persons',<sup>54</sup> constitutes not 'trafficking in persons' but 'enslavement' before the International Criminal Court.

34. In the secondary legislation of the International Criminal Court – the Elements of the Crimes – the crime of enslavement is elaborated upon at its corresponding Article 7(1)(c):

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

35. In adopting the Elements of the Crimes as drafted by the Preparatory Commission, the Assembly of State Parties expanded the understanding of 'enslavement' by not only itemising the types of powers attached to the right of ownership which a perpetrator might exercise – which track those noted by the Secretary-General in his 1953 Memorandum (i.e. 'purchasing, selling, lending or bartering such a person') – , but also including the phrase 'imposing on them a similar deprivation of liberty'. At the end of Article 7(1)(c)(1), a footnote is added which elaborates on what should be understood by this phrase:

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

<sup>53</sup> See Article 3(a), 2001 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and Article 4(a), 2005 Council of Europe Convention on Action against Trafficking in Human Beings.

<sup>54</sup> Read: the *actions* – 'the recruitment, transportation, transfer, harbouring or receipt of persons' or the *means* – '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'.

1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

Excluding the final sentence of this footnote which has been addressed above, the inclusion of the 'purchasing, selling, lending or bartering such a person' adds credence to the analysis undertaken above with regard to slavery in general international law, that is to say that 'slavery', like 'enslavement' is to be understood as not only being manifest in *de jure* slavery but also in *de facto* slavery. Thus, it should be understood that the Elements of the Crimes with regard to enslavement truly reflect the evolution of the fundamental elements of slavery in general international law, namely the exercise of 'any or all of the powers attaching to the right of ownership'.

36. Before considering the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, which it can be said, confirms the understanding of 'slavery' within international criminal law, attention should be given to the European Court of Human Rights' very narrow interpretation in its only significant consideration of the issue, the 2005 *Siliadin* case. As opposed to international criminal law, where exploitation is manifest only in the crime of slavery, within international human rights law servitude and slavery often go hand-in-hand as they appear in the same article in the 1948 Universal Declaration of Human Rights, the 1966 International Covenants on Civil and Political Rights and, with regard to the case at hand, the 1950 European Convention for the Protection of Human Right and Fundamental Freedoms. In *Siliadin*, the Court found that there was a case of forced labour and servitude in violation of Article 4, but it was unwilling to find that there had been a breach of the provision related to slavery, despite depending on the 1926 conventional definition:

It notes 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>55</sup>

37. The rationale of the judges here plays not on the powers attached to the right of ownership but on the requirement of demonstrating 'a genuine right of legal ownership'. This truly narrow interpretation of the provisions of Article 1(a) of the 1926 Convention, does not reflect a consideration of the *travaux préparatoires* and may well be a manifestation – maybe the first – of the fragmentation of international law. Thus, that there are two diverging streams of interpretation in international law, between slavery in international human rights law – or at least within the context of the Council of Europe – which can be juxtaposed to 'servitude' and thus raises the threshold for meeting a determination of slavery as requiring a 'genuine right of legal ownership'. It should be said, however, that this interpretation is at odds with the evolution of the term 'slavery' in general international law. Thus, *Siliadin* need not detain us, in part because it reflects a European context in which the 1950 Convention was drafted in the wake of atrocities of the Second World War which included the legal use of slave labour; and thus within a European context to use 'servitude' for *de facto* slavery, allows the term 'slavery' to be kept in reserve for situations mirroring the 1930s and the rise of exploitative policies instituted by the likes of the National Socialist Party in Germany, as manifest in *de jure* enslavement.

38. More importantly, *Siliadin* need not detain us as the International Criminal Tribunal for the former Yugoslavia (ICTY) has pronounced itself on 'enslavement' as a crime against humanity and has made determinations which are clearly in tune with the understanding of 'slavery' in general international law as presented here. In the *Kunarac* case, the Trial Chamber made a determination, having surveyed international human rights law, international humanitarian law, the work of the International Law Commission, and the jurisprudence of the Tokyo and Nuremberg tribunals, that at the time of the offences under consideration, "enslavement as a crime against humanity in customary international law consisted

<sup>55</sup> European Court of Human Rights, *Siliadin v France* (Application 73316/01), 26 July 2005, para. 122.

of the exercise of any or all of the powers attaching to the right of ownership over a person"<sup>56</sup>. The Trial Chamber noted that while this definition "may be broader than the traditional and sometimes apparently distinct definitions of slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law", it pointed to the case-law of the Second World War and the work of the International Law Commission as supporting its conclusion.

39. The Trial Chamber went on to say:

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

The Trial Chamber continued:

With respect to forced or compulsory labour or service, international law, including some of the provisions of Geneva Convention IV and the Additional Protocols, make clear that not all labour or service by protected persons, including civilians, in armed conflicts, is prohibited – strict conditions are, however, set for such labour or service. The 'acquisition' or 'disposal' of someone for monetary or other compensation is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement.

The Trial Chamber then concluded by noting that it was in general agreement with the factors adduced by the Prosecutor in the case:

The Trial Chamber is therefore in general agreement with the factors put forward by the Prosecutor, to be taken into consideration in determining whether enslavement was committed. These are the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor. The Trial Chamber considers that the *mere ability* to do so is insufficient, such actions actually occurring could be a relevant factor.<sup>57</sup>

40. For its part, 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>58</sup>. It went on to say:

<sup>56</sup> International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23-T &-IT-96-23/1-T) Judgment, 22 February 2001, p. 192.

<sup>57</sup> *Id.*, pp. 193-194. Footnote references have been omitted.

<sup>58</sup> International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, para. 117.

In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree.

41. The Appeals Chamber did in fact consider the 1926 definition of slavery, drawing the same conclusions as emerge from the above study of the *travaux préparatoires*:

The Appeals Chamber will however observe that the law does not know of a 'right of ownership over a person'. Article 1(1) [sic] 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.

The Appeals Chamber considers that the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour". Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea; this Judgement is limited to the case in hand.<sup>59</sup>

42. The Appeals Chamber turned to the "Appellants' contention that lack of resistance or the absence of a clear and constant lack of consent during the entire time of the detention can be interpreted as a sign of consent". The Appeals Chamber, for its part, did "not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership";

accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent. In the view of the Appeals Chamber, the circumstances in this case were of this kind.

The ICTY Appeals Chamber continued:

The Appellants contend that another element of the crime of enslavement requires the victims to be enslaved for an indefinite or at least for a prolonged period of time. The Trial Chamber found that the duration of the detention is another factor that can be considered but that its importance will depend on the existence of other indications of enslavement. The Appeals Chamber upholds this finding and observes that the duration of the enslavement is not an element of the crime. The question turns on the quality of the relationship between the accused and the victim. A number of factors determine that quality. One of them is the duration of the relationship. The Appeals Chamber considers that the period of time, which is appropriate, will depend on the particular circumstances of each case.

43. Finally, the Appeals Chamber turned to the issue of *mens rea* with regard to the enslavement, where it concurred with the Trial Chamber "that the required *mens rea* consists of the intentional exercise of a power attaching to the right of ownership. It is not required to prove that the accused intended to detain

<sup>59</sup> *Id.*, paras. 118-119.

the victims under constant control for a prolonged period of time in order to use them for sexual acts”<sup>60</sup>. The Appeals Chamber then concluded that it was “of the opinion that the Trial Chamber’s definition of the crime of enslavement is not too broad and reflects customary international law at the time when the alleged crimes were committed”.

## Conclusion

44. It appears clear from the foregoing, that the evolution of the crime of enslavement has stayed true to the understanding of the definition of ‘slavery’ as established in the 1926 Convention. Although advocates, such as Professor Kevin Bales, have discarded that definition of slavery, this should be understood in the light of the fact that very little to no effort has gone in to understanding what the ‘status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’ actually means but for the recent pronouncement of the Yugoslav Tribunal. While sending the 1926 definition to the shadow land of disuse, advocates from the 1930 International Commission of Inquiry in Liberia to the 2000 Working Paper prepared by David Weissbrodt and Anti-Slavery International for the UN Sub-Commission on the Promotion and Protection of Human Right have hung their hat on an expanded understanding of the definition. This has come about as a result of a misreading of Viscount Cecil of Chelwood’s 1926 Report to the League of Nations<sup>61</sup>, which has led to interpreting the term ‘slavery’ as being so all-encompassing as to render it meaningless in law. What this Paper has sought to do is to consider the definition of Article 1(a) of the 1926 Convention in-depth, and to demonstrate that a legal interpretation of the term ‘slavery’ get one not only as far, but arguable further, than either Bales academic definition (loss of free will, the appropriation of labour power, and the use or threat of violence) or the ever expanding definition used within a number of United Nation *fora*.

45. Having considered the drafting history of the 1926 and the 1956 Conventions with regard to pronouncement made as to the phrase ‘powers attaching to the right of ownership’, this Paper has shown that the definition of Article 1(a) as encompasses not only *de jure*, but *de facto*, slavery; it also brings with it, out of the shadow lands, six characteristics which the United Nations Secretary-General put forward in his 1953 Memorandum as being powers attached to the right of ownership. The fundamental argument of this Paper is as follows: to *exercise the right of ownership* over an individual is fundamentally different than *exercising powers attached to the right of ownership*. Using the analogy of a dispute over illegal drugs, it becomes clear that while no right of ownership – to be remedied in a court of law – exists, the powers attached to the right of ownership do exist for one or the other of the heroin dealers. Thus, like the dealer, the ‘master’ of a *de facto* slave possesses a right of ownership over his or her ‘property’ but for the fact that such a legal right does not exist as it can not be vindicated in law. In essence, both the dealer and the master exercise powers attached to the right of ownership over their illegal ‘property’, but do not exercise any legal rights of ownership. If the argument being put forward is correct, then it creates a true avenue in international criminal law for the prosecution of individuals involved in enslavement, while giving advocates a wide enough berth to use the definition of slavery found in the 1926 Convention to combat what they term ‘contemporary forms of slavery’.

<sup>60</sup> *Id.*, para. 122. The Appeals Chamber continued: Aside from the foregoing, the Appeals Chamber considers it appropriate in the circumstances of this case to emphasise the citation by the Trial Chamber of the following excerpt from the *Pohl* case:

Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery - compulsory uncompensated labour - would still remain . There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.

The passage speaks of slavery; it applies equally to enslavement.

<sup>61</sup> See United Nations Sub-Commission on the Promotion and Protection of Human Right, *Contemporary Forms of Slavery: Updated review of the implementation of and follow-up to the conventions on slavery*, Working Paper prepared by David Weissbrodt and Anti-Slavery International, UN Doc. E/CN.4/Sub.2/2000/3, 26 May 2000. Note my critique of that Paper in Jean Allain, “A Legal Consideration ‘Slavery’ in Light of the Travaux Préparatoires of the 1926 Convention”, Paper presented at the Wilberforce Institute, Hull, 23 November 2006 available on line by Googling: Allain, Slavery.

46. This in-depth study of 'slavery' in general international law, though the European Court of Human Rights has taken a different tact, is consistent with the interpretation of 'enslavement' as a crime against humanity as it has developed in international criminal law. The Trial and Appeals Chamber in the *Kunarac* case have done well to, in essence, interpret 'any or all of the powers attaching to the right of ownership' in good faith, within its ordinary meaning, in context, and with a look to the object and purpose of its Statute. As has been demonstrated, despite the attempts of the anti-slavery movement to expand that definition, and the European Court to restrict it; the *travaux préparatoires* of the 1926 and 1956 Conventions confirm the approach taken by the ICTY and within the Rome Statute and the Elements of the Crimes, as to the definition of 'slavery' and by extensions 'enslavement' as a crime against humanity. Despite these anti-slavery and European Court countervailing forces at work, the International Criminal Court would be well grounded, in law, to retain the interpretation of enslavement as put forward by the ICTY; as any doubt as to the meaning of 'any or all of the powers attaching to the right of ownership', as being 'ambiguous or obscure' (to use the language of Article 31 of the Vienna Convention on the Law of Treaties) can no longer said to be so, in light of a thorough consideration of the *travaux préparatoires*.