

International Criminal Law and Anti-Slavery Today

Panel: Going Global: New Perspectives on Slavery Studies
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Until recently, the non-governmental anti-slavery lobby has had a monopoly on what constituted 'slavery'. That control of the term meant that it was expanded to include any type of human exploitation, whether real or perceived which the group sought to place on its agenda. Slavery was then reconceived as 'contemporary forms of slavery' by the United Nations and moved to cover such issues as apartheid, colonialism, incest, and trafficking in organs. As Suzan Miers notes, in her 2003 *Slavery in the Twentieth Century*, the use of the term "covers such a wide range of practices" so as to render it "virtually meaningless".

This can no longer persist, as 'slavery' now comes up against another international human rights norm: the right of an accused, as a result of the inclusion of 'enslavement' as a crime against humanity and a war crime under the jurisdiction of the newly established International Criminal Court as well as the inclusion of 'slavery' as a type of exploitation to be suppressed by the 2001 UN and 2005 Council of Europe conventions dealing with trafficking.

The definition of slavery accepted in international law is found in Article 1 of the 1926 Slavery Convention negotiation under the auspices of the League of Nations. It states that "**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**". While the definition has been accepted and for instances is integrated into the 1956 Supplementary Convention and the 1998 Statute of the International Criminal Court, its actual meaning has been contested. This is so, because advocates have sought to expand the definition so as to include not only slavery but also lesser servitudes. A rather creative reading of a 1926 Report to the Assembly of the League of Nations on the provisions of the Article 1 has persisted in some legal quarters from the time of the International Commission of Inquiry into the Existence of Slavery and Forced Labour in the Republic of Liberia in 1930 through 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 Right¹.

How then should the definition of slavery as found in Article 1 of the 1926 Slavery Convention be interpreted? International law provides guidance: Article 31 of the Vienna Convention on the Law of Treaties says that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

However, as has transpired recently, two international courts have interpreted this definition in diametrically different manners. For the European Court of Human Rights, in the 2005 *Siliadin v. France* case – where a Togolese child in France was held as an unpaid domestic worker for more than four years, working fifteen hour days with no days

¹ For further consideration of issue, see my "A Legal Consideration 'Slavery' in Light of the *Travaux Préparatoires* of the 1926 Convention", Paper presented at the Conference: Twenty-First Century Slavery: Issues And Responses, Wilberforce Institute for the Study of Slavery and Emancipation, 23 November 2006; available at <http://www.lawvideolibrary.com/hr/index.htm> under the link: Slavery Project.

off, – while finding against France, found no violations touching on slavery. The Court, determined that there had not been an exercises of “a genuine right of legal ownership” over the victim².

In contradistinction, the Yugoslav Tribunal in its 2002 judgment in the *Kunarac et als.* case related to the systematic detention and rape of women by Serbian forces in the town of Foca, Bosnia, in 1992, also considered the 1926 definition, but observed “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”³.

Two courts then, considering the same provision came to two different conclusions, the first that legal ownership was required for slavery to exist (a proposition which exists nowhere today), the second that a right of ownership was not required, instead it was the powers attached to such a right which was crucial. How to settle the issue?

The Vienna Convention on the Law of Treaties provides further assistance. Article 32 notes that when interpreting a provision, if the result is “ambiguous or obscure”, then recourse may be “had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion”.

Having considered these supplementary means by reconstructing the legislative history – the *travaux préparatoires* – of the 1926 Slavery Convention and the 1956 Supplementary Convention from the archives in Geneva⁴, it has become clear that the Yugoslav Tribunal understanding of the term is consonant with those who negotiated those treaties. That the definition speaks of ‘powers attached to the right of ownership’ as opposed to the ‘right of ownership’ means that the definition not only covers *de jure* slavery, but also *de facto* slavery. Like drug dealers who cannot legally ‘own’ a kilo of heroin and thus have a dispute over its ownership settled by a court of law; this does not diminish the fact that one or the other exercise powers attached to the right of ownership – *de facto* ownership.

A thorough examination of the legislative history has revealed, that in 1953 the United Nations Secretary General actually turned his attention to the issue and explained that the ‘powers attached to the right of ownership’ were the purchase; transfer; absolute control over a person, their labour and the product of that labour; and that the end of the status of conditions was indeterminate for the enslaved; while the status or condition could be hereditary⁵.

This understanding of *de jure* but also *de facto* ownership constituting slavery has major ramifications as it establishes clear limits as to what is and what is not ‘slavery’ while laying out a rather wide pathway in attempting to hold individuals criminally liable for exploiting another by exercising control tantamount to ownership.

² See European Court of Human Rights, *Siliadin v France* (Application 73316/01), 26 July 2005.

³ United Nations, Security Council, International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, paras. 117-119.

⁴ See Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Martinus Nijhoff, 2008, 821 pp (<http://www.brill.nl/default.aspx?partid=10&mcid=9&pid=28429>).

⁵ See United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude (Report of the Secretary-General), UN Doc. E/2357, 27 January 1953.