Briefing Paper: Human Trafficking: Does Slavery Exist Today

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Had William Wilberforce been able to look into the future, to the twenty-first century, what may have struck him most was not how far we had come in ending slavery and suppressing the slave-trade exploitation, but that we had yet to agree on what in fact the term 'slavery' means. This is a rather intriguing puzzle, as a consensus has existed for more than eighty-five years amongst States as to what the legal definition of slavery is.

In essence, the failure to agree on what slavery means, was a result of the major currents of the Twentieth Century: Colonialism and De-Colonisation. It was only with the advent of the 'Neo-Abolitionist' phase which we are currently living through, having commenced in the Twenty-First Century, that slavery has once more made its way on the agenda of legislator and legislatures throughout the world. This is a result of two manifestations. The willingness of countries to become party to the International Criminal Court which came into existence in 2002, wherein the crimes of enslavement and sexual slavery fall under the jurisdiction of the Court and the move to establish trafficking instruments (2000 UN Palermo Protocol; 2005 EU Anti-trafficking Convention; 2001 EU Directive). The renewed interest in the issue of slavery at the legislative level is most evident through the introduction for the first time in the United Kingdom of legislation (*Coroners and Justice Act* 2009, Section 71) outlawing slavery in a country where

it had always been maintained that it had "a soil whose air is deemed too pure for slaves to breathe in it".[1]

Yet, since 1926, there has been an internationally agreed to definition of slavery, one which has been re-considered, not once but twice (in 1956 and 1998), by the international community to be an accurate understanding of the term. Yet, that definition, which 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***, has remained, but until recently in a shadow-land of disuse.

This is as a result of the fact that during much of the Twentieth Century, anti-slavery advocates and both the League of Nations and the United Nations did not see fit in promoting a legal definition of slavery, instead they sought to utilise the term 'slavery' as an evocative term, which could encompass a number of social ills – no matter how far removed from an understanding of slavery manifest in the 1926 definition. For instance the United Nations' Working Group on Contemporary Forms of Slavery considered the following issues as being within its mandate: child pornography, children in armed conflict (1990); child soldiers (1991); removal of organs (1992); incest (1993); migrant workers, sex tourism (1994); illegal adoption (1996); and, early marriages and detained juveniles (1997).[2]

The 1926 definition could easily be dismissed by simply saying that its essence is about ownership, and as ownership in persons has been abolished, the definition is no longer relevant.

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1 Somerset v Stewart, Lofft 1, 98 ER 499, 14 May 1772.

2 See the reports of theWorking Group on Contemporary Forms of Slavery (UN Doc: E/CN.4) at the website of the UN High Commissioner for Human Rights: http://ap.ohchr.org/Documents/ gmainec.aspx.

And yet, as the *Coroners and Justice Act* 2009 attests, slavery still exists. How then to reconcile these two contradictory propositions?

The project which was undertaken started in 2002 and has now come to an end as an academic venture, manifest in a trilogy by Allain (*The Slavery Conventions*, 2008, *The Legal Understanding of Slavery*, ed.), 2012, and *Slavery in International Law*, 2013). That project has demonstrated – as leading Anti-Slavery NGOs and the High Court of Australia attests – that a reading of the 1926 is indeed not only possible but the proper legal reading of the term, in light of its ordinary meaning and its object and purpose. Further that the interpretation which will now be put forward has contemporary relevance as it not only applies to situations of both *de jure* slavery and *de facto* slavery, but also speaks to the lived experience of a person who is enslaved today.

In the first instance it should be recognised that definition speaks of 'status or condition', as I have demonstrated by considering the legislative history, this should be understood as slavery in law (status) and slavery in fact (condition)[3]. Here the Australia High Court goes further but comes to the same conclusion: "Status is a legal concept. Since the legal status of slavery did not exist in many parts of the world, and since it was intended that it would cease to exist everywhere, the evident purpose of the reference to 'condition' was to cover slavery *de facto* as well as *de jure*"[4]. We should further recognise that we are not speaking of the exercise of the right of ownership over a person, but one step removed from that: the 'powers attaching' to the right of ownership.

[3] Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Martinus Nijhoff, 2008, 821pp.

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

What then are these "powers attaching to the right of ownership"? As there had been limited consideration of this conception, I gathered about two-dozen leading academics and practitioners focused on property law, the history of slavery, law and slavery and contemporary slavery. The results of our deliberations are manifest in a 2012 edited collection entitled: *The Legal Understanding of Slavery*[5]. The core of our findings are articulated in the *2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery* which state that the exercise of these powers should be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty. Such control would be tantamount to *possession* if it were exercised over a thing which one owned. The enslavement process (often a brutal exercise of violence) would then open up the possibility to exercise of powers normally attached or associated with ownership: *use, management, profit, transfer or disposal of a person.*

In real terms that, a distinction is to be made with the exercise of the powers noted above, say management, in situations which fall short of exploitation. Thus, normal employment allows for the management of staff, by the allocation of for example of time and place. But this is a far cry from enslavement because the fundamental underpinning of property law is absent: the notion of possession. For slavery to be present, such management of a person would need to take place in the context of the employer (now enslaver) exercising control over the employee (now a slave) to such an extent that agency in that individual has been lost – in other words, that control has been established to such an extent that it is tantamount to possession.

[5] Jean Allain, *The Legal Understanding of Slavery: From the Historical to the Contemporary*, Oxford University Press, 2012, 410 pp.

By giving legal 'legs' to the 1926 definition of slavery – by demonstrating that the definition of slavery is both internally consistent with its property paradigm and captures the lived experience of slaves today, this reading of an 88 year old definition gives us the possibility to both acknowledge that slavery exists today, but also hold those to account that would seek to treat others as their property and to rob them of their liberty, freedom and ability to dignity.[6]

[6] For more considerations on this issue see: Jean Allain and Kevin Bales, "Slavery and its Definition", *Global Dialogue*, Vol. 14, 2012 (see: http://ssrn.com/abstract=2123155); and Jean Allain and Robin Hickey, "Property Law and the Definition of Slavery", *International and Comparative Law Quarterly*, Volume 61, 2012.