

ATTACHMENT

***AMICUS CURIAE* ON OBSERVATIONS RELATED TO SEXUAL SLAVERY
SUBMITTED BY
QUEEN'S UNIVERSITY BELFAST HUMAN RIGHTS CENTRE**

Public Document

INTRODUCTION

1. Having been granted leave pursuant to Rule 103 of the Rules of Procedure and Evidence, the Queen's University Belfast Human Rights Centre [hereafter: QUB Human Rights Centre] submits its observations relating proper determination of the crime against humanity and war crimes of sexual slavery in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* by considering the legal parameters of the common Element 1 of the Elements of Crimes of sexual slavery.
2. QUB Human Rights Centre examines common Element 1 of the Elements of Crimes of sexual slavery and its relationship to the definition of enslavement as set out in the Statute of the International Criminal Court [hereafter: the Statute].
3. QUB Human Rights Centre demonstrates the manner in which common Element 1 of the crimes of sexual slavery and its footnote can be read so as to be consistent with the Statute.

COMMON ELEMENT 1 OF THE CRIMES OF SEXUAL SLAVERY AND ITS RELATIONSHIP TO ENSLAVEMENT

4. The crimes of sexual slavery appear as a crime against humanity in Article 7(1)(g) of the Statute; as a war crime applicable in an international armed conflict in Article 8(2)(b)(xxii); and as a war crime applicable in a non-international armed conflict in Article 8(2)(e)(vi) of the Statute. The crime of sexual slavery appears, in each instance, as a crime a sexual nature: "Rape, *sexual slavery*, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity".
5. Hereafter, the three crimes of sexual slavery in Articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute will be considered as 'the crimes of sexual slavery'.

6. The crimes of sexual slavery as established by the Statute are further elaborated in the Elements of Crimes.¹ These have common Elements 1 and Elements 2, which read:

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 perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

7. The QUB Human Rights Centre considers the legal parameters of Element 1 common to the crimes of sexual slavery, that is: the ‘slavery’ element; and not the ‘sexual’ element.²

8. Attached to common Element 1 of the crimes of sexual slavery is a footnote which reads:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.³

9. While the term ‘sexual slavery’ is not defined by the Statute of the International Criminal Court, the crime of enslavement is established as a crime against humanity by Article 7(1)(c) of the Statute.

10. Article 7(2)(c) defines that crime as follows:

‘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.

¹ See Article 7(1)(g)-2 -- Crime against humanity of sexual slavery; Article 8(2)(b)(xxii)-2 -- War crime of sexual slavery; and Article 8(2)(e)(vi)-2 -- War crime of sexual slavery.

² As the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Gay J. McDougall, noted in her *Report on Systematic rape, sexual slavery and slavery-like practices during armed conflict*, the “term ‘sexual’ is used in this report as an adjective to describe a form of slavery, not to denote a separate crime. In all respects and in all circumstances, sexual slavery is slavery [...] United Nations, Economic and Social Council, Commission in Human Rights, *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 30.

³ See footnotes 18, 53, and 65 of the Elements of Crimes.

11. It should be recognised that common Element 1 of the crimes of sexual slavery is an exact reproduction of Element 1 of the crime of enslavement. Element 1 of Article 7(1)(c) of the Elements of Crimes dealing with the ‘crime against humanity of enslavement’, reads:

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.

12. Just as with common Element 1 of the crimes of sexual slavery, Element 1 of the Elements of Crimes of enslavement reproduces, in identical terms, at footnote 11, the following:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

13. As such, the common Element 1 of the crimes of sexual slavery must be understood as assisting the Court in “the interpretation and application”⁴ of the crime of enslavement as defined by the Statute.

ENSLAVEMENT BEFORE THE INTERNATIONAL CRIMINAL COURT

14. Recalling that Article 7(2)(c) of the Statute defines ‘enslavement’ as:

the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

15. During the negotiation process of what would become the Statute of the International Criminal Court, delegations to the Preparatory Committee on the Establishment of an

⁴ See Article 9(1) of the Statute.

International Criminal Court “expressed the view that enslavement required further clarification based on the relevant legal instruments”.⁵

16. Although there was a number of proposals to have the scope of enslavement not only include slavery but also lesser servitudes, the States negotiating decide against this at the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court.⁶

17. Instead, the definition of the crime of enslavement found in the Statute is, in substance, the same as ‘slavery’ as defined by Article 1(1) of the 1926 Slavery Convention – and confirmed by its reappearance in Article 7(a) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (hereafter: the 1956 Supplementary Convention).

18. Article 1(1) of the 1926 Slavery Convention reads:

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

19. Article 7(a) of the 1956 Supplementary Convention reads:

‘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.

⁵ United Nations, General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, UN Doc. A/AC.249/1, 7 May 1996, p. 64.

⁶ The QUB Human Rights Centre would draw the attention of the Court to the fact that the definition of enslavement as found in Article 7(2)(c) of the Statute appears to be narrower in scope than that recognised by the International Criminal Tribunal for the former Yugoslavia as forming part of customary international criminal law.

The QUB Human Rights Centre has provided a narrative of the evolution of enslavement in customary international criminal law: See Appendix to this *amicus curiae* entitled: *Enslavement in Customary International Criminal Law*.

The customary nature of enslavement is of no consequence to the International Criminal Court, as the Court is governed first and foremost by its own treaty and is bound to apply, by virtue of Article 21 of its Statute, “in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence”.

20. Article 7(2)(c) of the Statute of the International Criminal Court defines enslavement 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.

21. It will be noted that the first part of the definition of enslavement, as set out in the Statute, reproduces the substance of the definition of slavery as found in the 1926 Slavery Convention and 1956 Supplementary Convention:

“Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person [...].

22. The latter part of the definition of enslavement, as found in the Statute, does not add to the substance of the definition of enslavement but simply confirms that the powers attaching to the right of ownership may be found in instances of trafficking in persons.

23. That latter part of the definition of enslavement reads:

[...] and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

24. The latter half of the definition of enslavement, is what High Court of Australia noted in the August 2008 *Queen v Tang* case a “a common drafting technique”.⁷ The latter half of the definition of enslavement does not extend the operation of the overall definition, it simply brings trafficking to the attention of judges and makes them aware that they should not exclude the issue *ipso facto* but should, in fact, consider issues of trafficking if they manifest powers attaching to the right of ownership.

⁷ *The Queen v Tang* [2008] HCA 39, 28 August 2008, para. 33. In that case, the High Court considered the latter half of the following provisions:

For the purposes of this Division, *slavery* is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

25. Thus, it should be emphasised that the substance of the crime of enslavement – ‘the exercise of any or all of the powers attaching to the right of ownership over a person’ – as set out in the Statute, mirrors that of ‘slavery’ as established in international law.

SLAVERY AS ESTABLISHED IN INTERNATIONAL LAW

26. *Queen v Tang* appears to be a watershed in the understanding of the definition of slavery in international law.⁸ During much of the twentieth century, slavery was considered within a human rights paradigm in which a strict legal definition gave way to the use of the term in a visceral manner to be attached to any perceived evil such as sex tourism, mail-order brides, apartheid, colonialism, or even incest.⁹ In so doing, it rendered the term “virtually meaningless”¹⁰.

27. In the twenty-first century, with the introduction of slavery as a type of exploitation within the 2000 UN Palermo Protocol¹¹ and 2005 Council of Europe Convention¹² related to trafficking; and enslavement as a crime against humanity within the jurisdiction of an established International Criminal Court, the countervailing right of accused to know the charges against them requires that the content of ‘slavery’ – and by extension enslavement and common Element 1 of the crimes of sexual slavery be established with legal certainty.

28. The 1926 Slavery Convention establishes 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.

⁸ This watershed manifests itself in the Anne Gallagher’s response to an article by James Hathaway considering slavery as part of discussions touching on human trafficking. See Anne Gallagher, “Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway, (2009) 49 *Virginia Journal of International Law* 789 and James Hathaway “Human Rights Quagmire of ‘Human Trafficking’, (2008) 49 *Virginia Journal of International Law* 1.

⁹ See United Nations, Office of the United Nations High Commissioner for Human Rights, Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, UN Doc. HR/PUB/02/4, 2002.

¹⁰ Suzanne Miers, *Slavery in the Twentieth Century*, 2003, p. 453.

¹¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

¹² Council of Europe Convention on Action against Trafficking in Human Beings.

29. The clause ‘status or condition’ refers to the legal ‘status’ and *de facto* ‘condition’ of slavery. As the High Court of Australia relates, with regard to when the 1926 Convention was drafted:

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*.¹³

30. The clause regarding the exercise of “the powers attaching to the right of ownership” should be understood as not entailing legal ownership *per se*, but the powers which manifest themselves in situations of ownership. As the High Court of Australia relates:

In its application to the *de facto* condition, as distinct from the *de jure* status, of slavery, the definition was addressing the exercise over a person of powers of the kind that attached to the right of ownership when the legal status was possible.¹⁴

31. To use the analogy of another illegal commodity: if there is a dispute of ‘ownership’ with regard to a kilo of heroin as between two drug dealers, the dispute cannot be remedied in law. However, a judge will make a determination in a drugs case as to the exercise of a power attaching to the right of ownership, to hold a drug dealer guilty of the offence of, say, possession of an illegal substance.¹⁵

32. Thus, with its finding on slavery in 2008, the High Court of Australia confirmed the contemporary relevance of the definition of slavery as set out in the 1926 Slavery Convention. That definition is reproduced in substance as the definition of enslavement in the Statute.

¹³ *The Queen v Tang* [2008] HCA 39, 28 August 2008, para. 25. See also, Jean Allain, “The Definition of Slavery in International Law”, *Howard Law Journal*, Vol. 52, 2009, pp. 258-261.

¹⁴ *The Queen v Tang* [2008] HCA 39, 28 August 2008, para. 26.

¹⁵ See Jean Allain, “The Definition of Slavery in International Law”, *Howard Law Journal*, Vol. 52, 2009, pp. 261-262.

33. The essence of the definition turns on the concept of the exercise of any or all of the ‘powers attaching to the right of ownership’. The High Court of Australia in *Queen v Tang* looked to a 1953 Report by the United Nations Secretary-General which sets out what was considered to be six characteristics of such powers:

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.¹⁶

34. Turning to consider each of these characteristics of powers attaching to the right of ownership in turn, the first characteristic is that “the individual of servile status may be made the object of a purchase”. In such a situation where a person is bought or sold, a perpetrator would exercise a power which would create a proprietary right if it was exercised as against a thing. Being a object of *de jure* or *de facto* purchase would constitute but one characteristic of the exercise of a power normally attaching to the right of ownership.

¹⁶ 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.

Although the Secretary General delivered his Report in 1953, his Report should be given added consideration beyond the authority associated with his position. As the definition of ‘slavery’ was reconsidered in 1956, the Report constitutes part of the *travaux préparatoires* of the definition of slavery. See Article 31(3), Vienna Convention on the Law of Treaties which reads: “There shall be taken into account [in the interpretation of treaties], together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”. See also, Richard Gardiner, *Treaty Interpretation*, 2008, pp. 216-25.

35. The second characteristic of a power attaching to the right of ownership put forward by the UN Secretary-General reads: “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”. As the UN Secretary-General points out, the evolution of the law of slavery from Roman times forward was one where the “authority of the master over the slave was subjected successively to more and more limitations”,¹⁷ whereas today there is an overarching prohibition against using “the individual [...] and in particular his capacity to work, in an absolute manner”.
36. The third of the Secretary-General’s characteristics is “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.” A person subject to enslavement has no control over the fruits of their labour, they are treated like a thing, to be exploited for the benefit of another.
37. The fourth of the Secretary-General’s six characteristics of powers attaching to the right of ownership, “the ownership of the individual of servile status can be transferred to another person”, is a classic attribute of ownership, much like the buying or renting of a thing. With the definition of slavery established by the 1926 Slavery Convention, the issue is not whether a person ‘owns’ another in a legal sense, but instead whether a person can exercise a power of ownership, such as being able to transfer an individual without their consent.
38. The fifth characteristic put forward in 1953 by the United Nations Secretary-General is that the “the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it.” From the manner in which this characteristic is formulated, it is clear that Secretary-General understood permanency not in the sense of a person necessarily being enslaved for life, but in the sense that, from the perspective of the person being held as a slave, it is an indefinite status or condition.¹⁸

¹⁷ 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. 36, fn. 1.

¹⁸ *Id.*

39. The final characteristic of a power attached to the right of ownership that the Secretary-General mentions is that “the servile status is transmitted *ipso facto* to descendants of the individual having such status.” Like property rights which are transmissible, the fact that an individual can exercise such powers akin to ownership by forcing sons and daughters into a servile status or condition by, for instance, the inheritance of debt clearly demonstrates the commodification of the individual.
40. These six characteristics of power attached to the right of ownership as set out by the United Nations Secretary-General, give authoritative substance to the definition of enslavement as set out in the Statute.

THE STATUTE AND COMMON ELEMENT 1 OF THE CRIMES OF SEXUAL SLAVERY

41. Article 9(1) of the Statute states that the “Elements of Crimes shall assist the Court in the interpretation and application” of the crimes.
42. Article 9(3) of the Statute requires that “The Elements of Crimes [...] be consistent with this Statute”.
43. Common Element 1 of the crimes of sexual slavery appears to extend the notion of enslavement as defined by Article 7(2)(c) of the Statute beyond that of ‘powers attaching to the right of ownership’ by introducing the notion of a “similar deprivation of liberty” and, through a footnote, lesser types of servitudes including forced labour, servile statuses, and trafficking. This appears to conflict with Article 9(3) of the Statute.
44. However, this *prima facie* reading fails to recognise that lesser servitudes can – if a perpetrator crosses the threshold and exercises powers attaching to the right of ownership – shift from being a case of a lesser servitude to a case of enslavement. Such a possibility is provided for in international law.

45. To understand this possibility, consideration must first turn to the grammatical construction of the sentences of common Element 1 of the Elements of Crimes of the crimes of sexual slavery which, as noted earlier, states:

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.

46. The primary clause of common Element 1 reads: “The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons”.

47. The secondary clause which follows is exemplary or illustrative in providing a non-exhaustive list of powers attaching to the right of ownership: including “purchasing, selling, lending or bartering such a person or persons”.¹⁹

48. Beyond providing examples of powers attaching to the right of ownership, the secondary clause adds a final phrase which reads “or by imposing on them a similar deprivation of liberty”. The conjunction ‘or’ at the start of this phrase can, in English grammar, provide for either a continuation or an alternative.

49. The first reading of the phrase ‘or by imposing on them a similar deprivation of liberty’ is that the phrase is but a continuation of the examples provided in the secondary clause, so as to form part of the following train of examples of powers attaching to the right of ownership: “such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”.

50. In this first reading, a ‘*similar* deprivation of liberty’ is one similar to the purchasing of a person, the selling of a person, or the lending or bartering of a person. As these are examples of powers attaching to the right of ownership, the ‘similar deprivation of liberty’ has no meaning independent from such a power.

¹⁹ These examples are in line with those put forward by the United Nations Secretary-General in his 1953 Report. See *id.*

51. A second reading of the final phrase of Element 1 of the crimes of sexual slavery would be as an alternative. That ‘similar deprivation of liberty’ is to be considered as distinct from (or an alternative to) the rest of the secondary clause.
52. However, such a reading cannot hold as there are two elements which link the final phrase to the rest of the secondary clause. First, the reference to the act of ‘imposing on *them*’ relates to the ‘one or more persons’ over whom the perpetrator is exercising powers attaching to the right of ownership. Second, mention of ‘*similar* deprivation of liberty’, speaks to a deprivation which would be similar to those powers attaching to the rights of ownership which are enumerated.
53. Therefore, the final phrase, which speaks of ‘similar deprivation of liberty’ is to be understood as an example of a power attaching to the right of ownership. As a result, this phrase and thus common Element 1 of the crimes of sexual slavery is, as per the requirement of Article 9(3) of the Statute, consistent with the definition of enslavement established by the Statute.

THE FOOTNOTE TO COMMON ELEMENT 1 OF THE CRIMES OF SEXUAL SLAVERY

54. At the end of Common Element 1 of the Elements of Crimes of the crime of sexual slavery, is the footnote which reads:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

55. In providing an understanding of deprivation of liberty, the footnote to common Element 1 of the crimes of sexual slavery appears to extend the definition of enslavement as established by the Statute by including the lesser servitudes of forced labour, servile status and trafficking.

56. It should be recalled that, in general terms, a footnote is meant to expand or clarify, not to detract from the provision to which it is attached. This, along with the fact that ‘similar deprivation of liberty’ as found in common Element 1 of the crimes of sexual slavery is understood as an example of a power attaching to the right of ownership, requires that the footnote be read in a manner which does not detract from but expands, the understanding of ‘similar deprivation of liberty’ consonant with common Element 1, and by extension, the Statute.
57. If the Court decides that there is an issue of exacting forced labour or reducing a person to servile status, it must look to the first sentence of the footnote of common Element 1 of the crimes of sexual slavery. The footnote establishes that a deprivation of liberty may, *in some circumstances*, include forced labour or a servile status (leaving aside trafficking for the moment). Those circumstances would be when forced labour or a servile status manifest powers attaching to the right of ownership and, despite their nomenclature and definition in law, slip their moorings to meet the definitional threshold of enslavement as found in the Statute. International law recognises this possibility.
58. Forced or compulsory labour is defined in the 1930 Forced Labour Convention as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.²⁰ Yet, before that definition was laid down, a provision dealing with forced labour was included in the 1926 Slavery Convention of which the introductory paragraph reads:

The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures *to prevent compulsory or forced labour from developing into conditions analogous to slavery*.

59. Article 5 of the 1926 Slavery Convention acknowledges that forced labour can develop into conditions analogous to slavery. As such, it would be in *these circumstances*, when forced labour becomes analogous to slavery, that forced labour could be considered as a deprivation of liberty as noted in the footnote, and thus consonant with common Element

²⁰ Article 2(1), ILO Convention (No. 29) Concerning Forced Labour, 1930.

1 of the crimes of sexual slavery and, ultimately, consistent with the definition of enslavement as found in the Statute.²¹

60. Where “servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956”, is concerned, this is found in Article 7(b) of the 1956 Supplementary Convention, which states that: “‘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”.

61. Article 1 of the 1956 Supplementary Convention defines these institutions or practices, in the following manner:

(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

²¹ Note that the High Court of Australia recognised (See *Queen v Tang* [2008] HCA 39, 28 August 2008, para. 32) the distinction between slavery and exploitive labour in the following manner:

It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery. The term ‘slave’ is sometimes used in a metaphorical sense to describe victims of such conditions, but that sense is not of present relevance. Some of the factors identified as relevant in *Kunarac*, such as control of movement and control of physical environment, involve questions of degree. An employer normally has some degree of control over the movements, or work environment, of an employee. Furthermore, geographical and other circumstances may limit an employee’s freedom of movement. Powers of control, in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place.

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

62. The introductory paragraph to Article 1 of the 1956 Supplementary Convention notes that States Parties “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 [these] institutions and practices”. However, that introductory paragraph continues by stating that the abolition or abandonment of these institutions and practices should take place “*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*”.

63. As was confirmed by the High Court of Australia in *Queen v Tang*, the 1956 Supplementary Convention recognised that debt bondage, forced labour, serfdom, servile marriage and/or child exploitation, while they should be abolished in their own right, could if they manifest powers attaching to the right of ownership also be covered by the definition of slavery found in the 1926 Slavery Convention.²²

²² See *Queen v Tang* [2008] HCA 39, 28 August 2008, para. 29; where it states:

It is unnecessary, and unhelpful, for the resolution of the issues in the present case, to seek to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage. The 1956 Supplementary Convention in Art 1 recognised that some of the institutions and practices it covered might also be covered by the definition of slavery in Art 1 of the 1926 Slavery Convention. To repeat what was said earlier, the various concepts are not all mutually exclusive.

This understanding was confirmed some ten years after the establishment of the 1926 Slavery Convention when the League of Nations Committee of Experts on Slavery considered the issue of serfdom in 1936 and sought to emphasise the distinction between slavery as defined in the 1926 Convention and other forms of servitudes:

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’

The Committee of Experts on Slavery was more explicit when it turned to debt bondage, addressing it as ‘debt slavery’, and stating that it “is right, perhaps, that one should realise quite clearly that the system – whatever

64. Therefore, it is only *in these circumstances*, when a perpetrator exacts forced labour, or reduces a person to debt bondage, serfdom, servile marriage or child exploitation to such an extent that the action degenerates into the exercise of any or all of the powers attaching to the right of ownership, that the interpretation of the footnote will be in line with common Element 1 of sexual slavery and be consistent with the Statute.

65. In such circumstances, where lesser servitudes meet the threshold of slavery, it can be said that the Court is truly exercising its jurisdiction, as per Article 5(1) of the Statute, to apply “the most serious crimes of concern to the international community as a whole”.

66. If the Court decides that there is an issue of trafficking, it must look to the final sentence of the footnote attached to common Element 1 of the crimes of sexual slavery, which reads:

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

67. This sentence appears ambiguous as the first sentence of the footnote provides examples of deprivations of liberty, while the second sentence deals with trafficking. The second sentence is better read as a stand-alone sentence. This is so, as the phrase ‘described in *this* element’ does not refer to the first sentence, but refers to common Element 1 of the crimes of sexual slavery. Also, the start of the first and second sentences of the footnote point to two distinct considerations (re: ‘It is understood’ and ‘It is also understood’).

68. The second sentence of the footnote seeks to clarify common Element 1 by establishing that the “conduct described” includes trafficking (i.e: that the “perpetrator exercise [...] 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”).

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.

See League of Nations, Slavery: Report of the Advisory Committee of Experts, Third (Extraordinary) Meeting of the Advisory Committee, C.189(I). M.145.1936, VI, 13-14 April 1936, p. 27 and pp. 24-25.

69. Article 7(2)(c) of the Statute of the International Criminal Court defines enslavement 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.*

70. Recalling that the latter part of that definition simply confirms that the powers attaching to the right of ownership may be present in instances of trafficking in persons.

71. If the second sentence of the footnote to common Element 1 of the crimes of sexual slavery is to be “consistent with the Statute” in line with Article 9(3) of the Statute, then it must be read so as to acknowledge that the crimes of sexual slavery can transpire in situations of trafficking and is not to be excluded *ipso facto*. Therefore trafficking should only be considered if it manifests powers attaching to the right of ownership, and thus meets the requirement of common Element 1 of the crimes of sexual slavery.

72. The 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.²³

73. The acknowledgement that Element 1 of the crimes of sexual slavery can transpire in situations of trafficking is correct in law, as the term ‘slavery’ is imbedded in the definition of ‘trafficking in persons’. That is not the same as saying that trafficking is synonymous with slavery.²⁴ In law it is not.

²³ See Article 3(a) of the 2001 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime and Article 4(a) of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings. Emphasis added.

²⁴ See the critique by Jean Allain of the book *Trafficking in Human Beings: Modern Slavery* in the (forthcoming) *European Journal of International Law*, Vol. 20(2), 2009, 5 pp.

74. The definition of ‘trafficking in persons’ requires three elements: *an action* (re: recruitment, transportation, transfer, etc.); *a method* (re: coercion, abduction, fraud, etc.); and that this action and method be utilised for the *purpose* of exploitation, of which ‘slavery’ is given as but one example of types of exploitation (re: sexual exploitation, forced labour, servitude, etc.).
75. As a result, for the Elements of Crimes to be consistent with the Statute, it should be understood that the second sentence of the footnote points, like the latter half of the definition of enslavement as set out in the Statute, to the possibility of trafficking being considered; but only where the powers attaching to the right of ownership are exercised, and as a result only where the conduct described in common Element 1 of the crimes of sexual slavery is present.
76. In such a manner the Court would be exercising its jurisdiction in situations of enslavement and thus consonant with Article 5(1) of the Statute, that is, with regard “to the most serious crimes of concern to the international community as a whole”.

CONCLUSION

77. The Statute limits the crime of enslavement to that of slavery as defined by the 1926 Slavery Convention.
78. Common Element 1 of the crimes of sexual slavery requires that powers attaching to the right of ownership be exercised for the crime of sexual slavery to transpire.
79. The powers attaching to the right of ownership are given content through a 1953 Report by the United Nations Secretary-General.
80. The apparent wider scope of enslavement under customary international law is not applicable before the International Criminal Court, if the Elements of Crimes are to be consistent with the Statute, as per Article 9(3) of the Statute.

81. If the Court considers issues of the exacting forced labour or otherwise reducing a person to servile status, then the circumstance in which such a deprivation of liberty would fall under its jurisdiction is where the exacting of forced labour or the reduction of a person to servile status would demonstrate the exercise of any or all of the powers attaching to the right of ownership.
82. If the Court considers issues of trafficking, it must focus not on *the action* or *the method*, but ask if the type of exploitation taking place meets the threshold of slavery; that is the exercise of the powers attaching to the right of ownership as found in common Element 1 of the crimes of sexual slavery.
83. In essence, where common Element 1 of the crimes of sexual slavery is concerned, no matter the nomenclature one wishes to attribute to an act of exploitation (for instance: forced labour); that exploitation will only come under the jurisdiction of the International Criminal Court as ‘one of the most serious crimes of concern to the international community as a whole’, where there is the exercise of the powers attaching to the right of ownership.

APPENDIX

ENSLAVEMENT IN CUSTOMARY INTERNATIONAL CRIMINAL LAW

1. While the *amicus curiae* submitted by the QUB Human Rights Centre demonstrates that the Statute of the International Criminal Court establishes the crime against humanity of enslavement as being synonymous with slavery as defined by the 1926 Slavery Convention, the QUB Human Rights Centre seeks to draw the attention of the Court to the evolution of the crime of enslavement prior to the coming into force of the Statute of the International Criminal Court, wherein it appears that enslavement included lesser servitudes, most notably forced labour.

2. Slavery as a human condition has its roots in the laws of war, as in antiquity *jus gentium* allowed for the enslavement whereby “people become slaves on being captured by enemies”.¹

3. While the move to abolish slavery comes in the wake of the nineteenth century move to abolish the slave trade at sea², the move to abolish slavery in war – the genealogical genesis of enslavement – emerges from a different source: the 1863 Instructions for the Government of Armies of the United States in the Field. Those Instructions – the so-called Lieber Code – issued during the Civil War of the United States of America declares as a war measure that “private citizens are no longer [to be] enslaved”.³

4. The Charter of the International Military Tribunal at Nuremberg included as a war crime the deportation to slave labour, and the crime against humanity of enslavement. These were utilised in the American zone of occupied Germany, based on Control Council Law Number 10, wherein there was a finding in the *Pohl* case with regard to the crime against

¹ The Digest of Justinian (5 Marcian, Institutes, book 1) as reproduced in Stanley Engerman, Seymour Drescher, and Robert Paquette (eds.), *Slavery* (Oxford Readers), 2001, p. 99.

² See Jean Allain “Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade”, *British Yearbook of International Law* 2007, Vol. 78, 2008, pp. 342-388.

³ See Article 23, United States of America, Instructions for the Government of Armies of the United States in the Field, General Order Number 100, 24 April 1893. See also Articles 42 and 58.

humanity of enslavement wherein the civilian population had been used for “compulsory uncompensated labour”.⁴

5. The United Nations International Law Commission formulated the 1950 Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.⁵
6. When the United Nations General Assembly asked the Commission to formulate those Principles, it also requested that it prepare a consideration of international crimes under the heading of a ‘draft code of offences against the peace and security of mankind’.⁶
7. Consideration of a Draft Code of Offences against the Peace and Security of Mankind culminated in 1996. At Article 18 of the 1996 Draft Code, crimes against humanity was defined, in part as “any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: [...] (d) Enslavement”.⁷ While the International Law Commission did not seek to define enslavement, the Commentary to that provision stated that:

Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29, concerning Forced or Compulsory Labour (forced labour). Enslavement was included as a crime against humanity in the Charter of the Nurnberg Tribunal (art. 6, subpara. (c)), Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3) as well as the Nurnberg Principles (Principle VI) and the 1954 draft Code (art. 2, para. 11).⁸

⁴ *United States v Oswald Pohl and Others*, 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10*, Volume V, 1997, p 970.

⁵ United Nations, General Assembly, International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, UN Doc. A/1316 (A/5/12), 1950.

⁶ See United Nations, General Assembly, Resolution 177 (II), 21 November 1947.

⁷ United Nations, General Assembly, International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, *Yearbook of the International Law Commission*, UN Doc. A/51/10 (Volume 2, Part 2), 1996, p. 47.

⁸ *Id.*

For Mr. Calero Rodrigues, the Chairman of the Drafting Committee which put the finishing touches on the 1996 Draft Code and introduced Article 18 to the Commission for its final consideration, the term ‘enslavement’

8. The International Criminal Tribunal for the former Yugoslavia in the *Kunarac* case, determined at trial that “enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person”⁹.
9. Despite this, the Trial Chamber determined that enslavement went beyond the definition of slavery established in the 1926 Slavery Convention, stating that where enslavement was concerned 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”. The Trial Chamber continued: “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”.¹⁰
10. For its part, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia made no distinction between slavery and ‘enslavement’ as it 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.¹¹
11. In speaking of contemporary forms of slavery, the Appeals Chamber stated that

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

was a “simpler term”, one “found in many legal instruments, [which] had been used to refer to the crime of ‘establishing or maintaining over persons a status of slavery, servitude or forced labour’, which had been included in the article adopted on first reading”, that is: as found in Article 21 of the 1991 draft Code. See United Nations, General Assembly, International Law Commission, *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER.A/1996 (Volume 1), 1996, p. 74.

⁹ 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.

¹⁰ *Id.*, 193.

¹¹ International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, p. 35.

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".¹²

12. The Appeals Chamber then noted 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". Repeating the "factors or indicia" noted by the Trial Chamber, the Appeals Chamber, while indicating that the list was not exhaustive, stated that "the question whether a particular phenomenon is a form of enslavement" will be based on, *inter alia*:

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'.¹³

CONCLUSION

13. Though there is very little evidence of *opinio juris* or state practice to back it up, the evolution of customary international criminal law, from Nuremberg through the International Law Commission work on the now defunct Draft Code of Crimes against the Peace and Security of Mankind,¹⁴ to the rather ambiguous case-law of the International Tribunal for the former Yugoslavia, established the crime against humanity of enslavement as a crime which went beyond the definition of slavery to include lesser servitudes, most notably forced labour.

¹² *Id.*, pp. 35-36. The Appeals Chamber felt compelled to add footnote 145 which states: "It is not suggested that every case in which the juridical personality is destroyed amounts to enslavement; the concern here is only with cases in which the destruction of the victim's juridical personality is the result of the exercise of any of the powers attaching to the right of ownership".

¹³ *Id.*, p. 36.

¹⁴ See Jean Allain and John R.W.D. Jones, "A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind", *European Journal of International Law*, Vol. 8, 1997, pp. 100-117.