AMICUS CURIAE BRIEF

RESPECTFULLY SUBMITTED BY HELEN DUFFY, 'HUMAN RIGHTS *in* PRACTICE'

TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE CASE OF:

Trabalhadores Fazenda Brazil Verde v Brazil, (Case no. 12.066)

A. Introduction: Significance of the Present Case and Interest of the Intervener

The prohibition on slavery and slavery-like practices is among the oldest, most well-established and fundamental norms in international law. Enshrined in all major international and regional human rights treaties, the right to be free from slavery is recognised as a non-derogable right applicable at all times,[1] and as constituting a *jus cogens* norm, ranking among the most sacrosanct of the international legal order and corresponding to obligations *erga omnes*,[2] owed to the international community as a whole.

Despite this, modern day slavery is rife globally.[3] Precise figures as to scale are predictably elusive, given the criminal and clandestine nature of the practices, though several surveys provide some insight in this respect. A recent 'Global Slavery Index' referenced by the UN Global Initiative to Fight Human Trafficking,[4] estimates 35.8 million people currently living in modern day slavery across the 167 countries surveyed, including 21 million victims of forced labour specifically.[5] Of these victims, the ILO estimated that at least 5.5 million are children.[6] Despite the oft-cited 'abolition' of slavery in the 19th Century, modern day slavery is growing and, relatedly, is vastly lucrative.

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[1] *E.g. Rantsev v. Cyprus and Russia*, App No. 25965/04, ECtHR (2010), § 283: The Court recalled that Article 4 enshrines absolute rights and "makes no provision for exceptions and no derogation ... even in the event of a public emergency threatening the life of the nation".

[2] Mentioned as *erga omnes*, in an *obiter dictum*, in *Barcelona Traction, Light and Power Company, Limited, Judgment*, ICJ Reports (1970) 3,. § 34. See also IACtHR, *Rio Negro Massacres v. Guatemala*, Judgment of 4 September 2012, Series C, No. 250, § 141; *Mme Hadijatou Mani Koroua v. The Republic of Niger*, 27 October 2008, No. ECW/CCJ/JUD/06/08 ('Judgment'), § 81, citing *Barcelona Traction.*

[3] Global Slavery Index Survey 2014, p. 17, available at http://www.globalslaveryindex.org (visited 4 March 2016).

[4] On http://www.ungift.org/knowledgehub/en/publications.html?vf=/stories/ (visited 4 March 2016).

[5] Global Slavery Index Survey 2014, p. 17, available at http://www.globalslaveryindex.org (visited 4 March 2016). The scope of modern day slavery is discussed below. In this survey it includes in the definition of modern day slavery forced labour, trafficking, slavery and slavery like practices including debt bondage, forced or servile marriage, the sale or exploitation of children and descent-based slavery.

[6] See ILO figures on forced labour and child slavery cited in: ILO, Global Estimate of Forced Labour, Geneva, 2012; ILO, Hard to See, Harder to Count (Survey Guidelines), Geneva, 2012

A schism thus emerges between the normative regulation of slavery, which reflects apparent agreement on the fundamental nature of the prohibition of practices that eviscerate all other rights, on the one hand, and the chilling disregard for such norms in practice on the other. This underscores the importance of cases such as that before the Court, which seek to give meaningful effect in practice to norms that have so long been honoured on paper. Given the egregious nature of the violations and their global scale, it is noteworthy that relatively few international cases have been brought or proceeded to judgement. The jurisprudence of international human rights courts and bodies therefore remains somewhat limited,[7] no doubt reflecting, inter alia, the myriad obstacles that prevent victims accessing justice in this field. There has, however, been a core body of cases in recent years across international criminal jurisdictions and regional and international human rights systems that have sought to grapple with the definitions of slavery, the nature of states obligations, and their application in the evolving contexts in which slavery manifests itself in practice in the world today. This brief seeks to set out that comparative experience, should it assist the court in its determination of this important case.

While the Inter-American Court has dealt with issues falling under Article 6 of the Inter-American Convention on Human Rights previously,[8] *Fazenda Brasil Verde v. Brazil* is the first case which deals centrally with the issue of slavery on the continent. As such, it presents a significant opportunity for the Court to address forced labour, trafficking and other forms of modern day slavery in the region and to make a critical contribution to evolving jurisprudence.

Interest of the Amicus and Scope of the Intervention

The amicus intervener in this case is Professor of Human Rights and Humanitarian Law at the University of Leiden and director of an international human rights law practice, 'Human Rights *in* Practice', which has as one of its areas of thematic focus the strategic litigation of slavery and human trafficking. The intervener has been involved as counsel or amicus curiae in cases before diverse sub-regional and regional systems on issues relevant to the present case, including several of the slavery-related cases that have shaped jurisprudence to date on the international level referred to in this brief. She was co-counsel in the case of *Hadijatou Mani* before the Court

[7] H. Duffy, Litigating Modern Day Slavery in Regional Courts: A Nascent Contribution, Journal of International Criminal Justice (2016), p. 26. The special edition contains a series of articles on slavery and related practices.
[8] *E.g.* Violations of Article 6 were discussed amongst many other violations in *Rio Negro Massacres v. Guatemala*,. *See*, also, forced labour issues under Art. 6(2) discussed in *Ituango Massacres v. Colombia*, IACtHR Series C, No.148 (2006).

of the Economic Community of West Africa (ECOWAS Court), and third party intervener before the European Court of Human Rights (ECtHR) in the *Rantsev v Cyprus and Russia* and *Kawogo v UK* cases.

This intervention hopes to assist the Court by highlighting the approach of other courts and bodies in relation to the interpretation and application of slavery related provisions. As amicus curiae the intervener does not address the facts of the case. Rather this brief addresses relevant international standards and case law in relation first to the scope and definition of the prohibition of slavery and related practices at the heart of this case, and secondly and more briefly to the nature of states obligations in this respect. The scope of the prohibition and definition of slavery and related practices has been the subject of some controversy, and, as the standards highlighted will show, evolution over time.

The point of departure for the analysis is long-established conventional law, set out at Part B below. Part C considers the contribution of international criminal law and mechanisms to the elucidation of the elements of the definition of slavery in contemporary contexts. The main focus of the brief, Part D, considers the comparative experience of other human rights courts and bodies applying provisions comparable to Article 6 of the ACHR. It highlights first the approaches to interpretation that have informed the jurisprudence of these bodies, which are also reflected in the practice of this court. It describes case law, and its evolution, as regards the definitions of slavery and related practices in the European and African contexts. Part E looks at how the practice of human trafficking has been addressed, within the prohibition on slavery and related practices. The final section Part F addresses how international standards and case law to date informs our understanding of positive obligations in relation to slavery-like practices falling within Article 6.

B. Definition and Scope of the Prohibition on Slavery and related practices: conventional approaches

Definitions in the Slavery Convention and Protocol

Various definitions of and approaches to slavery have emerged in international law and practice over time. Yet the starting point for the discussion of the meaning of slavery is almost invariably the definition found in the Slavery, Servitude, Forced Labour and Similar Institutions

and Practices Convention of 1926 (Slavery Convention or 1926 Convention).[9] Although there had been earlier agreements on slavery, the 1926 Convention represented an attempt to codify a definition of the term 'slavery' as well as calling on states to take the 'necessary steps' to 'bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.'[10] The relevant provision defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" (art. 1(1)).

The 1926 Convention, like many other treaties, is a creature of and reflects the particular phenomena that lead to its adoption, namely the rejection of the transatlantic slave trade. As such the focus of the Convention is what is sometimes referred to a 'chattel slavery', whereby individuals were bought and sold. While this form of slavery persists today (see e.g. *Hadijatou Mani Koroua v. The Republic of Niger* discussed below), it is not the predominant form of slavery in the modern world. It has therefore been noted by numerous sources, courts and bodies that the 1926 definition constitutes a point of departure rather than the end point in the journey to identify the elements of modern day slavery.

Two aspects of the 1926 definition nonetheless deserve note, particularly given their relevance to subsequent approaches to the definition by bodies in more recent times. One is that slavery under the Convention is explicitly described as a 'status' *or* a 'condition,' hence covering *de iure* but also *de facto* enslavement, with the latter requiring an assessment of the factual conditions to which the victims in question are subject. Related to this is the fact that the key question under the Convention is not 'ownership' as such, but the exercise of 'powers' of ownership. This underscores the fact that, even from the terms of the Convention itself, it is not formal or legal ownership that is envisaged, but a factual determination of the extent and nature of the 'powers' actually exercised over human beings in all the circumstances of the case.

As the jurisprudence set out in Parts C (international criminal law) and D (human rights) will show, the 1926 Convention is often still cited as a source in respect of cases concerning contemporary forms of slavery, but not in a way that limits slavery to the form in which it was

[9] Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.
[10] For background see J. Allain, The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention, Vol. 1 (Leiden: Martinus Nijhoff Publishers, 2008) at 31.

understood in 1926. Key examples will be seen in the ICTY's *Kunarac* trial, the ECtHR's approach in the *Rantsev case* or that of the ECOWAS court in the *Mani* case, all of which noted the need to interpret the convention in light of modern day realities, and to understand the powers of ownership in terms of the nature and extent of exploitation and control of human beings.

An example of the acknowledged need for an evolutive approach to the 1926 definition from the national level is the *Queen v Tang*[11] case before the High Court of Australia, in which it was noted*:*

> "On the evidence it was open to the jury to conclude that each of the complainants was made an object of purchase (although in the case of one of them the purchaser was not the respondent); that, for the duration of the contracts, the owners had a capacity to use the complainants and the complainants' labour in a substantially unrestricted manner; and that the owners were entitled to the fruits of the complainants' labour without commensurate compensation.
>
> The reference to "chattel slavery" in the second ground of cross-appeal is a reference to the legal capacity of an owner to treat a slave as an article of possession, subject to the qualification that the owner was not allowed to kill the slave; power over "the slave's person, property, and limbs, life only excepted". *Without doubt, chattel slavery falls within the definition in Art 1 of the 1926 Slavery Convention, but it would be inconsistent with the considerations of purpose, context and text referred to in the preceding paragraph to read the definition as limited to that form of slavery*. (emphasis added)"[12]

The definition of slavery in the 1926 Convention was endorsed, but extended, by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956 (1956 Protocol). The Protocol thus embraced slavery like

[11] *The Queen v Tang* [2008] HCA 39 (28 August 2008).
[12] *Queen v Tang*, §§ 26 – 27.

institutions and practices, including debt bondage, serfdom, forced marriage and the sale of wives, and child labour and servitude. [13]

'Restatements' of the definition have likewise taken the 1926 definition as a point of departure but recognised that the approaches of 1926 and 1956 did not necessarily fully reflect modern day practices.[14] Several Special Rapporteurs have for example focused on slavery as enshrining 'forced exploitation of their labour'.[15] Their approaches to 'trafficking' as a form of modern day slavery are addressed specifically in Section E below. Both the former UN Special Rapporteur on Contemporary forms of Slavery, including its Causes and Consequences, Gulnara Shahinian, in her 2008 Report to the General Assembly, and the current Special Rapporteur Urmila Boolal, have noted the need to define prohibitions, and their mandates, in light of 'changing social and economic realities'.[16]

It has however been through the application of the law, case by case, first by international criminal tribunals and in turn by human rights courts and bodies, that the conventional approaches to international slavery have been developed and applied to these modern day realities. Developments in international criminal law and human rights jurisprudence are particularly instructive, and addressed in turn in the following section.

Human Trafficking Convention

Much later, in 2000, a conventional legal framework for human trafficking finally emerged in the form of a protocol to the United Nations Convention on Transnational Organized Crime.

[13] United Nations, *Treaty Series*, vol. 266, p. 3, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, Art 1.
[14] Discussed at, OHCHR, *Abolishing Slavery and its Contemporary Forms*, by David Weissbrodt and Anti-Slavery International, 2002, p. 6, § 18, available at www.ohchr.org/Documents/Publications/**slavery**en.pdf (visited 5 March 2016).
[15] Benjamin Whitaker, *Slavery: report updating the Report on Slavery submitted to the Sub-Commission in 1966*, UN doc. E/CN.4/Sub.2/1982/20, (1982), § 9. Gulnara Shahinian, Special Rapporteur on Contemporary forms of Slavery (2008-2014), Report of the *Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, UN doc. A/HRC/9/20, 28 July 2008.
[16] UN doc. A/HRC/9/20, 28 July 2008, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian*, § 8. The current special Rapporteur in Urmila Bhoola; see The Role of the UN in encouraging Compliance with International Criminal Justice, Urmila Bhoola, Jnl of International Crim Justice, Spring 2016.

The 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children' (the Palermo Protocol)[17] defines 'trafficking in persons' as:

> '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.'

The core elements to be discerned from this definition of human trafficking are threefold: the act (recruitment, transfer etc), the means (coercion or deception) and the purpose (exploitation of whatever type). The Protocol deliberately did not define, or limit, the forms that this exploitation might take. While some of the elements of the acts, such as the transfer integral to trafficking, will be distinct from at least some other situations of slavery, the definition of trafficking and of slavery more broadly are closely related and overlapping. It has been suggested that both slavery and trafficking involve a certain level of control of persons, involving 'minimising personal autonomy' and the commission of myriad other violations of human rights, for the purposes of exploitation.[18] At least as regards state responsibility, human rights bodies have found that slavery and trafficking as defined in the Palermo Protocol are closely linked, with the former constituting one manifestation of modern day slavery[19] (see part E below).

C. International criminal law and practice

International criminal tribunals have played a crucial role in elucidating the definition of slavery and related practices. They have naturally done so in relation to individual as opposed to state responsibility, determining questions whether 'enslavement' or 'sexual slavery' constitutes a war

[17] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000 entered into for 25 December 2003) U.N. Doc. A/53/383 (Palermo Protocol)

[18] A. Gallagher, 'Human Rights and Human Trafficking: Quagmire Or Firm Ground? A Response to James Hathaway' 50 Virginia Journal of International Law (2009) 789-846, at 789.

[19] Some commentators have questioned or criticized the lack of clarity as regards the elements of offences and particular care is undoubtedly due in the criminal context to ensure that domestic law specifies with sufficient clarity the nature of the offences to be prosecuted (in light of the rigorous standards of *nullum crimen sine lege*). Somewhat different considerations arise for the purposes of state responsibility under human rights law however. See Urmila Boola, JICJ 2016.

crime or a crime against humanity. The international criminal tribunal for the former Yugoslavia (hereafter 'ICTY') has found that slavery and enslavement share the same elements of the offence,[20] and in defining 'enslavement' (independently of whether other elements of crime have been met), that tribunal has made an important contribution to our understanding of terms which has provided the basis for the definition of relevant prohibitions in the human rights context, as discussed in the next section.

The seminal case in point was the *Prosecutor* v *Kunarac, Kovač and Vuković (*hereafter *Kunarac* case*)*,[21] in which the ICTY considered the definition of enslavement as a crime against humanity. The Tribunal found that the 1926 definition, which had since applied in other criminal contexts, reflected customary law. It also noted however that enslavement as a crime against humanity should be understood as broader than the traditional concept of slavery or the slave trade, and has evolved to cover 'contemporary forms of slavery'.[22]

The Tribunal focused on the degree of de facto *control* over another human being as the defining element of enslavement. It considered that "the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement ..." The factors that may indicate slavery in the circumstances of the particular case were deemed to include (but not be limited to) the following:

> 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.[23]

What constitutes such control will depend on all the circumstances and conditions to which the victims were subject, as well as subjective factors concerning the victims themselves. It is noteworthy in this respect that the Trial Chamber also considered factors such as the age and vulnerability of victims as an aggravating factor for the purposes of determining sentence.[24]

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[20] *Prosecutor v Krnojelac* (IT-97-25-T), Trial Chamber Judgment, 15 March 2002, at § 356.
[21] *Prosecutor v. Kunarac, Kovač and Vuković*, Judgment, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001 and, on appeal, *Kunarac et als*., (IT-96-23 &-IT-96-23/1-A) Appeals Chamber Judgment, 12 June 2002
[22] *Kunarac et als*., Appeals Chamber Judgment, §117.
[23] *Kunarac et als*., Appeals Chamber Judgment, p. 36.
[24] *Kunarac et als*., § 874, 979.

The ICTY emphasised as a second dimension that this control may be linked to the use of force, or to threats or other forms of coercion, corresponding with the control being physical or psychological in nature. The Trial and Appeals Chambers agreed that there was no need in such circumstances for the Prosecutor to prove a lack of consent on the part of those allegedly enslaved.[25]

Also of note in the context of the present case is that the Tribunal explicitly noted that the exploitation inherent in slavery could take many forms, including but not limited to the sexual exploitation that had arisen in the Foca camp. These included: '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.'[26]

The Appeals Chamber upheld the Trial Chambers inclusive approach to the definition and elements of enslavement. Referring back to the 1926 definition, it reiterated that slavery cannot be interpreted to require ownership in a legal sense, but the de facto exercise of associated 'powers' and control over individuals.[27] As a general reassertion of the evolutive approach the Appeals Chamber found 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 rights of ownership.'[28]

The Special Court for Sierra Leone (SCSL) has adopted a similar approach to identifying non-exhaustive factors that may, in a particular case, be indicative of slavery. In the Trial Chamber decision in the case of *Brima, Kamara and Kanu*, directly referring to the ICTY Trial Chamber in the *Kunarac* case, the Special Court cited the following factors of enslavement:

> "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

[25] *Kunarac et als*., Appeals Chamber Judgment, § 120, rejected the ground of appeal that suggested that lack of resistance may indicate implicit consent and upheld the view that the prosecutor did not need to prove lack of consent.
[26] *Prosecutor v. Kunarac, Kovač and Vuković*, Judgment 2001 at § 542; see also 539-40.
[27] *Kunarac et als*., (IT-96-23 &-IT-96-23/1-A) Decision on Appeal, 12 June 2002 at § 117-8. This was particularly so as 'the law does not know right of ownership over a person'.
[28] *Kunarac*, Decision on Appeal.

> 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."[29]

The SCSL Trial Chamber's subsequent decision in the case of the *Prosecutor v Sesay, Kallon and Gboa,* also cites the aforementioned *Kunarac* tribunal's indicia of "control of someone's movement, control of physical environment, psychological control...", which the Chamber must be mindful of "in determining whether or not enslavement has occurred".[30]

Both the ICTY and the SCSL have considered forced labour as a form of enslavement. In *Krnojelac* before the ICTY, the prosecution alleged that enslavement of detainees in the detention centre in Foca, Bosnia and Herzegovina, was "primarily in relation to forced labour". In that case the Trial Chamber held that forced labour had not been proven, but set out the requirement of what needs to be proved:

> "To establish the allegation that detainees were forced to work and that the labour detainees performed constituted a form of enslavement, the Prosecution must establish that the Accused (or persons for whose actions he is criminally responsible) forced the detainees to work, *that he (or they) exercised any or all of the powers attaching to the right of ownership over them*, and that he (or they) exercised those powers intentionally. International humanitarian law does not prohibit all labour by protected persons in armed conflicts. Generally, the prohibition is against *forced* or *involuntary* labour. It is clear from the Tribunal's jurisprudence that "*the exaction of forced or compulsory labour or service" is an*

[29] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac et als,*. Judgment 2001, § 542, referred to in *Prosecutor v. Brima, Kamara and Kanu*, Trial Judgement, SCSL-04-16-T-628, Trial Chamber II, 20 June 2007, § 745.
[30] *Prosecutor v. Sesay, Kallon and Gbao*, Trial judgment, Case No. SCSL-04-15-T, Trial Chamber I, 2 March 2009, § 199.

"indication of enslavement", and a "factor to be taken into consideration in determining whether enslavement was committed" (emphasis added).[31]

In the Charles Taylor case before the SCSL, the Trial Chamber qualified forced labour as enslavement.[32] Likewise, in *Co-Prosecutors v. Kaing*,[33] the Appeals Chamber of the Extraordinary Chambers in the Courts of Cambodia upheld the Trial Chamber's finding that forced labour may also constitute enslavement.[34] The Trial Chamber noted that forced labour may potentially rise to the level of enslavement without any additional evidence of mistreatment.

The refusal to see sharp distinctions between slavery and forced labour is also supported by earlier international criminal precedent. In the *Pohl* case of 1947 before a US Military Tribunal, it was held for example that "involuntary servitude, even if tempered by humane treatment, is still slavery".[35]

The practice of the International Criminal Court (ICC) in relation to slavery has yet to develop, though several charges are currently pending so its practice is currently evolving.[36] The ICC Statute includes for example the crime against humanity of enslavement under Article 7(1)(c).[37] The 2002 'Elements of Crime' document annexed to the statute provides more flesh to the bones of the crime, reflecting both the 1926 definition and the more inclusive subsequent approaches referred to above. The Elements of Crime document provides a definition of enslavement and examples of what might constitute slavery, as "the exercise of any or all of the powers attaching to the right of ownership over a person such as by purchasing…*or by imposing on them a similar deprivation of liberty (emphasis added)*".[38] It is explained that the deprivation of liberty "includes the exercise of such power in the course of trafficking in persons, in particular

[31] International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Milorad Krnojelac* (IT-97-25-T) Judgment, 15 March 2002, p. 147. See also Special Court for Sierra Leone, *Brima et als*., Trial Chamber, Judgement, SCSL-2004-16-T, 20 June 2007.
[32] *Prosecutor v Charles Taylor*, Judgment, SCSL-03-01-T, Trial Chamber II, 18 May 2012 (Taylor Trial Judgment)
[33] *Co-Prosecutors v. Kaing,* Appeal Judgement, F28; 001/18-07-2007-ECCC/SC (ECCC SC, Feb. 03, 2012).
[34] *Co-Prosecutors v. Kaing,* § 126.
[35] *US v Oswald Pohl and Others,* Judgement of 3 November 1947, reprinted in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council No. 10,* Vol. 5, (1997), p. 958, at p. 969.
[36] The prosecutor was criticised for failing to charge sexual slavery, despite its inclusion in the statute, in the Lubanga case and victims efforts to amend the indictment were unsuccessful. In Katanga and Ngudjolo the accused was acquitted for lack of evidence of sexual slavery and rape and conscription of child soldiers. Charges of sexual slavery are pending against Joseph Kony. Dominic Ogwen of the Lord's Resistance Army is on trial for charges which include enslavement in addition to sexual slavery, forced marriage and forced pregnancy.
[37] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Article 7(1)(c).
[38] International Criminal Court, Elements of Crimes, 2011, ISBN No. 92-9227-232-2, Article 7(1)(c), Element 1.

women and children."[39] The ICC definition therefore moves away from traditional concepts of chattel slavery, explicitly drawing trafficking within its definition and reflecting an inclusive approach to embrace modern day slavery practices. As such, it drew on the practice of the ad hoc tribunals which built on but moved beyond adhering rigidly to the 1926 definition of slavery.

While referring to the powers attaching to the rights of 'ownership', emphasis has been placed in international criminal practice on the exercise of powers over individuals through the key element of 'control,' with non-exhaustive 'indicia' of the level of control that may suffice to constitute the crime of enslavement. As seen in the section that follows, this approach has been followed in many subsequent human rights cases (see e.g. *Rantsev v. Cyprus and Russia* before the ECtHR or *Mani v Niger* before the ECOWAS court, which followed closely the jurisprudence of the ad hoc tribunals.)

D. Human Rights Jurisprudence and Definitions of Slavery

Article 6 of the Inter-American Convention on Human Rights, which is subject to interpretation and application in the present case, sets out the right to be free from slavery. Within this is a clear prohibition explicitly on slavery and involuntary servitude, the slave trade, trafficking in women and forced or compulsory labour. Specifically, the Convention sets out:

> 1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.
>
> 2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.
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> 3. For the purposes of this article, the following do not constitute forced or compulsory labor:
>
> a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such

[39] International Criminal Court, Elements of Crimes, 2011, ISBN No. 92-9227-232-2, Article 7(1)(c), fn 11; see also Elements for Article 8 (2) (b) (xxii)-2 on sexual slavery as a war crime.

> work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;
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> b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;
>
> c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or
>
> d. work or service that forms part of normal civic obligations.[40]

Article 6(1), unlike Article 4 ECHR or Article 5 ACHPR, explicitly recognises the need to embrace slavery and involuntary servitude *in all their forms*. Article 6 reflects other regional Human Rights Conventions, in not detailing what constitutes these various forms of slavery. However, the practice of human rights bodies set out provides some guidance on the evolving approaches to the definition and application of the provisions in question.

Relevant interpretative approaches

The practice of international courts and tribunals in adjudicating allegations of modern day slavery points to the adoption of certain interpretative approaches of particular relevance to the Court's approach to interpretation and application of Article 6 in the present case. These approaches will be familiar to this Court, as they are fully consistent with and reflected in its own method and reasoning as it seeks to give full effect to the American Convention and related instruments.[41]

The case law of this Court, the ECtHR and the ECOWAS Court in addressing recent slavery, reveals interpretative approaches that include the following: a) a 'contextual' or holistic analysis, interpreting human rights provisions in light of other international instruments and having regard

[40] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Art. 6.

[41] An interesting example of this Court's approach to date, reflective of several of the approaches highlighted below, is the case of *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica,* Judgement of 28 November 2012, IACtHR (Ser. C) No. 257, section VIII, C. *See* also, discussion of evolutive and purposive approach to addressing violations under Article 6 of the ACHR, in *Ituango Massacres v. Colombia*, IACtHR Series C, No.148 (2006), § 155.

to the approach of other human rights courts and bodies; b) a protective 'purposive' interpretation of the Convention, consistent with the need to avoid 'vacuums of protection' and to ensure that the instruments can be given meaningful effect and achieve their purpose; and c) an 'evolutive' approach to the provisions as 'living instruments' that evolve and adjust to changing human rights realities over time.

The jurisprudence highlighted below reflects and draws on the diverse historical sources of relevance to the definition of slavery and forced labour. In so doing, courts have had regard to treaty norms from beyond human rights conventions, including the Slavery Conventions and Protocols, ILO conventions on forced labour and related practices, and the more recent Trafficking conventions. It likewise reveals an attentiveness to the practice of other courts and tribunals, giving way to a cross fertilisation of legal standards between international criminal law and human rights law, and between human rights courts and bodies regionally and internationally. This reflects a broader phenomenon of growing mutual regard and 'transjudicial dialogue' between human rights mechanisms now commonplace in the work of this Court. Thus for example ILO standards were referred to by the IACrtHR in *Ituango Massacres v. Colombia*:

> In the instant case, when examining the scope of the said Article 6(2) of the Convention, the Court finds it useful and appropriate to use other international treaties than the American Convention, such as the International Labour Organization (hereinafter "ILO") Convention No. 29 concerning Forced Labour, to interpret its provisions in keeping with the evolution of the inter-American system, taking into consideration the developments on this issue in international human rights law. [42]

These approaches are well illustrated in the seminal ECtHR case of *Rantsev v. Cyprus and Russia* of 7 January 2010.[43] Called on to determine whether human trafficking was included within Article 4 of the European Convention on Human Rights prohibiting slavery, absent any explicit reference in the Convention (discussed at Part E below), the Court first discussed the obligation to interpret the Article 4 prohibition on slavery, in line with the Vienna Convention on the Law of Treaties 1969, *"in the light of the object and purpose of the provision from which*

[42] *Ituango Massacres v. Colombia*,§ 157.
[43] *Rantsev. v. Cyprus and Russia*, § 274.

they are drawn" as well as the overarching purpose of the Convention itself.[44] Importantly, the Court highlighted the convention to be, "a treaty for the *effective protection of individual human rights*",[45] whose object and purpose "requires that its provisions be interpreted and applied so as to make its safeguards *practical and effective*".[46] In finding that human trafficking fell within the definition of slavery, it noted that it 'threaten[ed]' "the human dignity and fundamental freedoms of its victims" and was incompatible with democratic society and the Convention's values.[47]

This purposive approach was coupled with the need to interpret it "in such a way as to promote internal consistency and harmony between its various provisions" while taking account "of any relevant rules and principles of international law applicable in relations between the Contracting Parties and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part".[48] These rules of international law included the Palermo protocol on human trafficking. It is noteworthy in the context of the case before this Court that although the Protocol was not binding on the states in question or on other member states, the Court found that it could be used as a tool in the interpretation for the binding provisions in question.

Finally, the 'living nature' of the European Convention on Human Rights (ECHR) was discussed and the requirement for the Court to interpret the Convention in light of present day conditions.[49] In this vein, the Court recognised trafficking to be a phenomenon of increasing prevalence and relevance,[50] in light of this proliferation "of both trafficking itself and of measures taken to combat it." The Court therefore considered "the extent to which trafficking itself may be considered to run counter to the spirit and purpose of Article 4 of the Convention…."[51] This approach contributed to the Court's conclusion, set out below, that the prohibition of slavery enshrined in Article 4 of the ECHR, should be interpreted to incorporate trafficking. The *Rantsev* case epitomises certain interpretative approaches that are seen across a number of the other slavery-related cases that have been adjudicated on the supra-national level.

[44] *Rantsev. v. Cyprus and Russia*, § 274.
[45] *Rantsev. v. Cyprus and Russia*, § 274.
[46] *Rantsev. v. Cyprus and Russia*, § 275.
[47] *Rantsev. v. Cyprus and Russia*, § 282.
[48] *Rantsev. v. Cyprus and Russia*, § 282.
[49] *Rantsev. v. Cyprus and Russia*, § 277.
[50] *Rantsev. v. Cyprus and Russia*, § 278.
[51] *Rantsev. v. Cyprus and Russia*, § 279.

What follows is a brief survey of decisions of regional bodies in relation to the definition and application of slavery related provisions, and the development and evolution of approaches over time.

1. European Court of Human Rights (ECtHR)

i) Early domestic slavery or servitude

The European Convention on Human Rights (ECHR) guarantees the right to be free from 'slavery or servitude' (Article 4(1)) and 'forced and compulsory labour' (Article 4(2)). Neither provision defines the terms, with Article 4(3) delimiting what is *not* covered by forced labour, by reference to the exclusion of work carried out in the ordinary course of detention, military service, service pursuant to a state of emergency or which forms part of 'normal civic obligations'. Beyond these exclusions, the meaning of which has itself been litigated,[52] the Convention contains no guidance on what constitutes the slavery, servitude or forced labour specified in Article 4. It has been the role of human rights litigation to gradually illuminate the scope of the provision and the content of these terms in the context of evolving practices in the European continent, as well as to give content to the states obligations in respect of them.

In the first human rights case to address slavery and servitude on the supranational level, *Siliadin v. France*,[53] the Court considered the case of a Togolese national who originally arrived in France with the intention to study but alleged that she had her passport confiscated and was forced to work long days without pay or holidays, over a period of several years, as a domestic servant in a private household. The applicant alleged domestic slavery. The Court found it established that the applicant worked for years, without respite or remuneration, and against her will.[54]

[52] See Council of Europe/European Court of Human Rights, *Guide on Article 4 of the Convention – Prohibition of Slavery and Forced Labour*, 2014. See cases *Stummer v. Austria*, App. No. 37452/02, ECtHR (2011); *Van Der Mussele v. Belgium*, ECtHR (1983), Series A, No. 70; *Raziani-Weiss v. Austria*, App. No. 31950/06, ECtHR (2011); *Bucha v. Slovakia*, App. No. 43259/07, ECtHR (2011); *Sokur v. Ukraine*, App. No. 29439/02 (Partial Decision), ECtHR (2002); *Antonov. v. Russia*, App. No. 38020/03 ECtHR (2005); *Schuitemaker v. The Netherlands*, App. No. 15906/08, ECtHR (2010).
[53] *Siliadin v. France* ECHR 2005-VII (2006), 43 EHRR 16, § 369.
[54] *Siliadin v. France*, § 114.

However the Court found, somewhat controversially, that the applicant's treatment did not amount to *slavery*, on the basis that her employers, while exercising control over her, had not had "a genuine right of legal ownership over her reducing her to the status of an 'object'."[55]

The Court's application of what has been referred to as "chattel slavery" approach, requiring the "right of legal ownership" of persons, has been subject to criticism as misconceived, outdated and out of step with other approaches to the definition of slavery discussed in this brief.[56] The Court's approach may reflect the lack of comparative experience or jurisprudence at this point, combined with a narrow approach to the 1926 definition.

Nonetheless, the Court did find that *Siliadin* had been the victim of *servitude* and *forced labour* in violation of Article 4 of the ECHR. Its approach to those definitions is more flexible and focused on the degree of control and constraint incumbent on the applicant in practice as the key question of fact. As regards forced labour, it again looked to other sources of international law, in this case ILO standards. It noted that under these standards forced labour involves the 'menace of a penalty,' but adopted a flexible approach to how such terms should be understood. The Court noted that:

> "What there has to be is work "exacted ... under the menace of any penalty" and also performed against the will of the person concerned, that is work for which he "has not offered himself voluntarily".[57]

Although the applicant was not threatened by a "penalty" as such, she was in an equivalent situation in light of the seriousness of the threats and fear to which she was subject.[58] As such, as regards "forced or compulsory labour" the Court asked whether there was "physical or mental constraint." Applied to the particular facts and circumstances, involving an adolescent girl, unlawfully present in a foreign land and living in fear of deportation by the authorities - a fear that was nurtured by those exercising control over her - this amounted to forced labour. [59]

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[55] *Siliadin v. France*, § 122.
[56] See for example the subsequent case law of the ECOWAS Court in the *Mani* case, below, following the ICTY's more embracing approach to elements of control rather than the right to ownership itself. For criticism of *Siliadin*, see for example, J. Allain, 'The Definition of Slavery in International Law', Howard Law journal 52 (2009): 239-275, § 242.
[57] *Siliadin v. France*, § 117.
[58] *Siliadin v. France* § 118.
[59] *Siliadin v. France*, § 118.

As regards servitude, the Court relied on previous case law to conclude that "servitude" means an obligation to provide one's services that is imposed by the use of coercion. The Court noted that servitude is 'linked' to the concept of "slavery".[60] Several factors were relevant to determining that the situation amounted to servitude in this case, including: the *duration* of the forced labour; the *individual's circumstances and particular vulnerabilities, including age, isolation and social vulnerability,* put in this position by persons in positions of power and influence, and *immigration status*. The characteristics of the victim, the perpetrators, the conditions in which she lived and control to which she was subject, as well as the impact on her, in terms of fear and hopelessness, were all highlighted as contributing to the court's overall assessment of her situation as constituting servitude.[61]

The next case before the Court also concerned domestic service. *C.N. and V. v. France*, built on *Siliadin*, though it arose in the perhaps even more challenging context of an extended family environment.[62] Two orphaned Burundi sisters, of 16 and 10 years of age, alleged that they were subject to servitude or to forced or compulsory labour by being forced to engage in unremunerated domestic chores in their aunt and uncle's home in France.

As regards forced labour, reflecting *Siliadin*, the ECtHR again imports the requirement of "work or service that is exacted from any person under the menace of any penalty" from Article 2§1 of ILO Convention No. 29 of 1930 on forced labour.[63] The Court elaborates on its flexible approach to the "penalty" requirement, finding that,

> it may go as far as physical violence or restraint, but it can also take subtler forms, of a psychological nature, such as threats to denounce victims to the police or immigration authorities when their employment status is illegal.[64]

The Court suggests groups of factors that distinguish "forced labour" from effort that can reasonably be expected of other family members or people sharing accommodation. These include the "type and amount of work involved," as well as the nature of the 'restraint', threats and psychological pressure it found to be inherent in the notion of the penalty referred to above.

[60] *Siliadin v. France*, § 124.
[61] *Siliadin v. France*, § 126-128.
[62] *C.N & V. v. France*, App. No. 67724/09, ECtHR (2012).
[63] *C.N & V. v. France*, § 71.
[64] *C.N & V. v. France*, § 77.

As noted above, the distinctions that the ECtHR drew between slavery, servitude and forced labour in these early domestic servitude cases has been subject to some criticism for lack of clarity as to distinctions and for the basis for the findings drawn in relation to each in the particular case.[65] Many of the factors indicating servitude under the *Siliadin* doctrine outlined above would for example be factors indicating slavery under the *Kunerac* approach highlighted above. Where slavery stops and servitude begins is undoubtedly not as clear and uncontroversial as the Court may have sought to convey. While the Court in these cases sought to forge distinctions and reach findings as to whether particular practices, in all the circumstances of the case, involved slavery, servitude or forced labour, subsequent practice suggests that the court seems to be moving away from this approach. Evolving approaches in the context of human trafficking are highlighted below.

ii.) Human trafficking: Rantsev v. Cyprus and Russia

One of the key ECtHR judgments in this field, and the first to addressing the phenomenon of human trafficking, is the seminal case of *Rantsev. v. Cyprus and Russia* of 7 January 2010.[66] It is in this case that the ECtHR seems to have moved on from controversial aspects of its approach in its first case (*Siliadin* above).

The applicant was the father of Russian born Ms Oxana Rantseva, who was working as an 'artiste' in a Cabaret in Limassol, Cyprus, on a work permit arranged by the Cabaret's owner. Some weeks after beginning her work, Ms Rantseva sought to leave, but was found in another nightclub and taken by force to the Limassol police, who transferred her back into the custody of her employers. The next morning she was found dead on the street beneath the fifth floor room in which she had been held.

The ECtHR found for the first time that, although not referred to explicitly, human trafficking was prohibited under the provisions governing slavery, servitude and forced labour of the ECHR. In its approach to the definition of slavery, the ECtHR notably moved away from placing emphasis on concept of ownership as in chattel slavery. It noted that, like slavery, trafficking in human beings, by its very nature and the aim of exploitation, was based on the exercise of

[65] H. Duffy, Litigating Modern Day Slavery in Regional Courts: A Nascent Contribution, Journal of International Criminal Justice (2015), p. 27.
[66] *Rantsev. v. Cyprus and Russia*. The author was involved in the third party intervener as legal director of Interights at the time.

powers attaching to the right of ownership - it treated human beings as commodities to be bought and sold and put to forced labour; it implied close surveillance of the activities of victims, whose movements were often circumscribed; and it involved the use of violence and threats against victims. At the same time the Court found there was no need to distinguish the various forms of slavery like practices falling within the Article 4 prohibition and to determine whether trafficking in this case amounted to one or other. Rather it adopted a more inclusive and flexible approach that found the prohibition in Article 4 to embrace modern forms of slavery including, in this case, human trafficking. In relation to the absence of a reference to trafficking in the Convention, the ECtHR stated:

> The absence of an express reference to trafficking in the Convention is unsurprising. The Convention was inspired by the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations in 1948, which itself made no express mention of trafficking. In its Article 4, the Declaration prohibited "slavery and the slave trade in all their forms". However, in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention's special features or of the fact that it is a living instrument, which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies …[67]

Although this decision has on occasion been criticised for not articulating clearly the definition of trafficking and whether it constitutes slavery[68] or forced labour, this approach in the human rights (as opposed perhaps to criminal context where particularly stringent requirement of legality and certainty prevail) has also been lauded by, inter alia, the Special Rapporteur on Contemporary forms of Slavery.[69] She notes that "the European Court of Human Rights interpreting Article 4 of the European Convention has adopted a progressive interpretation which

[67] *Rantsev. v. Cyprus and Russia*, § 276.
[68] See e.g. Criticism trafficking: Piotrowicz, R., 2012, *States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations,* International Journal of Refugee Law Vol. 0 No. 0 pp. 1–21, p. 16;
[69] Urmila Boola, JlICJ 2016, *supra*. She also notes that "it is widely acknowledged in human rights law that the distinction between these practices is blurry, and that contemporary slavery involves not formal ownership but a "critical level of control"

removes the superficial distinctions between slavery, servitude and forced labour, which is a cause of much intellectual debate."[70] The Court finds that in all the circumstances the degree of control over the life of the deceased was such that she could be described as a victim of trafficking under Article 4. In an apparent departure from its previous approach, it resists determining whether trafficking fell within slavery, servitude, forced labour, all of which are infringements of Article 4 of the Convention, and simply refers to other international standards on the meaning of trafficking:

> There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention. [71]

2. AFRICA

i) ECOWAS Court (Hadiajtou Mani v Niger 2008)

The question of 'powers attaching to the rights of ownership' was also considered, and a flexible approach adopted, by the Court of the Economic Community of West African States in the case of *Hadijatou Mani Koroua v. Niger*.[72] This case concerned the sale, purchase and abuse of a child, a remarkable yet common scenario in Niger today, where tens of thousands of people currently live as slaves.[73] Hadijatou Mani was born the daughter of a slave, and as such inherited her mother's servile status, and at the age of 12 was sold by a representative of her

[70] Ibid.
[71] *Rantsev. v. Cyprus and Russia*, § 282.
[72] *Mme Hadijatou Mani Koroua v. The Republic of Niger*.
[73] Numbers are hard to reliably ascertain. At the time of the Hadijatou Mani case, Anti-Slavery International put the number at 43,000 available online at http://www.antislavery.org/english/slavery_today/descent_based_slavery/slavery_in_niger/default.aspx, (visited 7 December 2015). In 2014 the Walk Free Foundation Global Slavery Index suggested there were 132,900 currently in 'modern day slavery' in Niger available online at http://www.globalslaveryindex.org/country/niger, (visited 20 January 2016).

mother's owner to a master who had four wives and seven other 'sadaka'[74] or female slaves. She was subjected to a daily diet of rape, sexual harassment and harsh labour without pay or time off, and was severely punished for attempts to escape. When eventually 'liberated' by her former owner, on the basis that he wished to marry her, she fled but ultimately found and detained and prosecuted for 'bigamy'. Her attempts to assert her right to be free from slavery before the courts of Niger were unsuccessful and she took her case to the Court of Justice of the Economic Community (ECOWAS).[75]

Hadijatou Mani's case was a classic case of chattel slavery. Nonetheless the ECOWAS Court recognised as the key element, the degree of control to which she was subject. In so doing, the Court defined slavery by reference to the ICTY jurisprudence noted above. It recognized that slavery may be present where 'powers attached to ownership' are exercised over the individual, but rather than taking a rigid view of what this meant, relied on the ICTY indicators as relevant to assessing whether, *de facto*, the threshold of power and control had been met.[76] Citing the ICTY's *Kunarac* judgement, the Court set out that:

> "apart from exercising the powers attached to the right of ownership typical of the notion of slavery, it also depends 'on the operation of the factors or indicia of enslavement…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".[77]

[74] The Court describes the practice of *sadaka* or *wahiya* as 'acquiring a young girl, generally in servile conditions, to serve both domestically and as a concubine', *Mme Hadijatou Mani Koroua v. The Republic of Niger,* § 8.The form of slavery in practice in Hadijatou Mani's case was *wayiha* or *sadaka* which consists of acquiring a young girl as a slave, sometimes referred to as one of the 'fifth wives', that is, as a supplement to the four a man can legally marry in accordance with Islam's Recommendations as interpreted in Niger. The 'Sadaka' does housework and is at the 'master's service' for sexual relations at any time. See also §§ 9-10 of the Judgement.

[75] The intervener was co-counsel for Mani before the ECOWAS. For more analysis see Helen Duffy, 'Human Rights Litigation in Sub-regional African Courts: Towards Justice for Victims or Just More Fragmentation?' in v.d. Herik and Stahn, The Diversification and *Fragmentation of International Criminal Law International Law*, Martinus Nijhoff (2012), 163-184; 'Hadijatou Mani v Niger: Slavery Unveiled by the ECOWAS Court', Human Rights Law Review (2009), 151-170.

[76] *Kunarac et al.,* Appeals Chamber Judgement, § 119.

[77] *Mme Hadijatou Mani Koroua v. The Republic of Niger,* § 77, citing *Kunarac et al.,* Appeals Chamber Judgement, § 119.

ii) The Limited Role of the African Commission on Human and Peoples' Rights (ACHPR)

Given the widespread prevalence of slavery-related practices in Africa, it is noteworthy how few slavery-related cases have come before the ACHPR, with none yet having been fully adjudicated on the merits as to specific claims of slavery. A number of cases have been brought and dismissed or the slavery allegations ignored or found not proven.[78] In some cases, practices 'analogous to slavery' and forms of "exploitation and degradation of man",[79] including unremunerated work have been found to violate the right to respect for dignity inherent in the human being.[80] The Commission's work to date recalls is the close relationship between the prohibition on slavery and the protection of human dignity, including the prohibition on torture, cruel, inhuman or degrading punishment and treatment, protected under the same provision (Article 5 of the Banjul Charter).[81] While practice to date has been limited, a number of other slavery cases are however pending before the Commission and Committee within the African system and greater elaboration of legal standards in this context is likely to emerge in the near future.

E. Trafficking within the scope of the Prohibition of Slavery related practices

It is understood that one of the issues of contention in the present case is whether trafficking in persons, not only trafficking of women, or indeed trafficking for sexual exploitation, is included in Article 6. The Courts attention is therefore drawn to a growing body of international practice indicating that trafficking in human beings can fall within the definition of slavery under contemporary international law, and is covered by the prohibition on slavery-like practice embraced in major human rights instruments such as Article 6.

While there are many sources in international law and practice that may be invoked in support of the view that trafficking should be understood to constitute a form of slavery, a few recent manifestations of the view that trafficking may constitute slavery and does fall within the

[78] For full discussion of cases to date see H. Duffy, Litigating Modern Day Slavery in Regional Courts: A Nascent Contribution, Journal of International Criminal Justice (2015), (forthcoming).
[79] *Malawi African Association and Others v. Mauritania*, (2000) AHRLR 149 (ACHPR 2000), § 135.
[80] *Malawi African Association and Others v. Mauritania*, § 135; 142.
[81] Art. 5 African Charter states: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

prohibition on slavery and related practices in provisions such as Article 6 ACHR or Article 4 ECHR are worthy of note.

On the regional level in Europe, as noted above, the ECtHR in *Rantsev* considered the absence of a reference to trafficking in the European Convention. It found the absence of an express reference in the ECHR and other instruments 'unsurprising', but in finding the ECHR prohibits slavery in all forms, including trafficking, it referred to Article 4 of the Universal Declaration of Human Rights prohibited "slavery and the slave trade *in all their forms*"[82]. The wording of Article 6 ACHR, referring to 'all forms of slavery', reflects the UDHR.

The Court emphasised the link between trafficking and slavery, making clear that it may fit within the broad approach to the interpretation of slavery adopted by the ICTY. Most notably, the Court took the view that trafficking in human beings:

> "by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere…It implies close surveillance of the activities of victims, whose movements are often circumscribed…It involves the use of violence and threats against victims, who live and work under poor conditions."[83]

As noted above, the Court did not ultimately decide whether the trafficking in this case should be found to constitute slavery as such, servitude or a separate practice covered by Article 4, as making such distinctions was, in its view, unnecessary for the purposes of state responsibility under human rights law. What was clear to the court was that its own slavery prohibition had to be read the provision in light of "changes over time and current conditions" and that trafficking feel within the scope of the prohibition in Article 4.

Trafficking has also been directly referred to as a form of slavery by several UN Special Rapporteurs dedicated to giving effect to the prohibitions in question. For example, in the 2009 Report of the former Special Rapporteur on Contemporary Forms of Slavery including its

[82] *Rantsev. v. Cyprus and Russia*, § 276.
[83] *Rantsev. v. Cyprus and Russia*, § 281.

Causes and Consequences,[84] trafficking is discussed in the context of bonded labour and 'advance payments' are referred to as the 'tool of enslavement' through which the trafficker or creditor is then put in a 'dominant position'.[85] The UN Special Rapporteur on Trafficking in Persons, especially Women and Children, Joy Ngozi Ezeilo, has also referred in another 2009 report to trafficking as constituting a 'modern day slave trade' on a massive scale.[86] In discussing the Legal and Policy Framework of her mandate, she goes on to highlight trafficking as a violation of a number of human rights including the right not to be held in slavery or servitude.[87]

Finally, it should be recalled that the approach to the definition of slavery in international criminal law supports the inclusion of human trafficking within the definition of slavery and related practices. The Rome Statute of 1998 is instructive in explicitly defining slavery under Article 7(2)(c), as "the exercise of any or all of the powers attaching to the right of ownership over a person . . . includ[ing] the exercise of such power in the course of trafficking in persons, in particular women and children".[88]

It is recognised that Article 6(1) makes direct reference to "traffic in women," although the terms of Article 6 are explicitly illustrative and not exhaustive of 'all forms' of slavery-like practices that may fall within its reach. Since 1969 when the Convention was first adopted, a great deal more information regarding the practice of trafficking has come to light, and there is no room for doubt that the definition now stretches beyond trafficking in women, recognising also the plight of men and boys and covering sexual and non-sexual exploitation. In 2000, the UN Special Rapporteur on Violence against Women highlighted trafficking in women to be "one component of a larger phenomenon of trafficking in persons, including both male and

[84] UN doc. A/HRC/12/21, 10 July 2009, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian,* p. 15, § 66.
[85] UN doc. A/HRC/12/21, 10 July 2009, p. 15, § 66.
[86] UN doc. A/HRC/10/16, 20 February 2009, *Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo,* p. 5, § 6: "The world today is confronted with a huge human trafficking problem, driven by the same forces that drive the globalization of markets, as there is no lack of demand and supply. In varying degrees and circumstances, men, women and children all over the world are victims of what has become a modern day slave trade."
[87] UN doc. A/HRC/10/16, 20 February 2009, p. 9, § 19.
[88] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Article 7(2)(c).

female adults and children."[89] The Palermo Protocol, like the work of international bodies dedicated to human trafficking, makes no distinction as regards the type of exploitative purposes that may give rise to trafficking.[90]

As the 1969 formulation may reflect, more attention may have been focused historically on women victims, and on sexual exploitation, as the horrors of these on-going practices came to light. The scale of other forms of trafficking, and the particular impunity surrounding them, is however increasingly recognised, and calls for a modern interpretation of Article 6 to address a diverse and widespread modern phenomenon.[91] It would moreover be highly anomalous, and out of step with a holistic approach to the Convention, including its equality provisions, if provisions governing trafficking, deemed by international authorities to constitute a form of slavery, were held only to protect women. Rather, the international legal authorities cited above support the view that, independent of any explicit reference to traffic in women, human trafficking more broadly falls within the prohibition on slavery and related practices protected in Article 6.[92]

There can be little doubt from practice on UN, regional and international criminal contexts that human trafficking is covered by the obligations in respect of the prohibition of slavery 'in all its forms'.

F. The Nature of Positive Obligations in Relation to Slavery/Trafficking

In relation to slavery specifically, the obligations on state parties to 'prevent and suppress' the slave trade and 'to bring about progressively and as soon as possible the complete abolition of slavery' were made clear as early as the 1926 Slavery Convention. The Convention makes clear that the state should 'give effect to the purposes of the present convention by adopting necessary measures in order that severe penalties may be imposed in respect of such infractions.' The

[89] Economic and Social Council, Integration of the Human Rights of Women and the Gender Perspective: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, UN Doc., E/CN.4/2000/68 (2000), para. 1.
[90] See Section B above.
[91] A 2013 US Department of State report notes that Impunity is particularly high in respect of non-sex related cases of trafficking and exploitation report indicates there were only 1199 forced labour prosecutions globally in 2013, as opposed to 9000 for sex trafficking.
[92] See e.g. *Rantsev* judgement, and other sources cited above.

Supplementary Convention in 1956 similarly obliges states to "…take all practicable and necessary legislative and other measures to combat slavery…".

Even before the explosion of international human rights standards and jurisprudence on positive obligations, it has therefore long been clear and accepted by states that they are obliged to take necessary and effective measures, including through the use of criminal law, to prevent and respond to slavery.

As with other human rights, alongside the obligation to refrain from engaging in slavery practices, states are also under the positive obligation to take steps to prevent practices addressed under Article 6 of the Convention and to respond to them. The nature of states positive obligations to 'respect' and 'secure' (ACHR) or 'ensure' (ECHR) rights under the relevant human rights conventions has been fleshed out and given content through a rich body of jurisprudence, which began in the Inter-American system seminal *Velasquez Rodriquez* case but has developed across the European and African systems and on the universal level. This brief will not seek to address the full range of states positive obligations under Article 6. It will touch on some aspects of the positive obligations of states in respect of slavery-related standards and provisions that have been fleshed out in international standards and the work of human rights bodies, including through the litigation discussed above in relation to the scope and definition of the prohibition.

There is no precise formula for what constitutes the sort of necessary and effective measures required of states to give effect to obligations in the challenging context of slavery, forced labour and trafficking. But international standards and the work of human rights bodies and tribunals provide a flavour of the sorts of measures that are necessary to address violations such as those at issues in the present case, through monitoring, regulation, investigation, prosecution and punishment of those responsible and reparation to victims. A few aspects are highlighted below.

Comprehensive Programme for Effective Prevention, Protection and Punishment

In general, the UN The Working Group on Contemporary Forms of Slavery has described the obligation on states to "ensure the effectiveness of the rule of law and fully applying legal and

judicial procedures" in the context of slavery, forced labour and trafficking.[93] The need for a comprehensive approach was signalled in the *Rantsev* case referred to above:

> The Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes *measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers.* It is clear from the provisions of these two instruments that the Contracting States, including almost all of the member States of the Council of Europe, have formed the view that only a *combination of measures addressing all three aspects can be effective in the fight against trafficking*. Accordingly, the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking. The extent of the positive obligations arising under Article 4 must be considered within this broader context.[94]

It is noteworthy that the UN Human Rights Committee's concluding observations on Brazil in 1996 described forced labour and debt bondage as a 'widespread problem' in Brazil, and noted its concern regarding child labour and child prostitution.[95] The Committee went on to set out some of the positive obligations Brazil was under in light of the right to freedom from slavery under Article 8 of the International Covenant on Civil and Political Rights:

> The Committee urges the State party to enforce laws prohibiting forced labour, child labour and child prostitution and to *implement programmes to prevent and combat* such human rights abuses. In addition, the Committee exhorts the State party to *establish more effective supervisory mechanisms to ensure compliance with the provisions of national legislation and relevant international standards*.[96] [emphasis added]

Prevention therefore assumes active and effective investigation and monitoring, as noted above. In terms of the prevention and protection of specific individuals, The Group of Experts on Trafficking in Human Beings of the European Commission (GRETA) has noted, in opinion

[93] UN Doc. E/CN.4/Sub.2/2001/30, Report of the Working Group on Contemporary Forms of Slavery on its twenty-sixth session, 16 July 2001, Recommendation 4, § 2.
[94] *Rantsev v. Cyprus and Russia*, § 285.
[95] HRC 24 July 1996, 57th Session, CCPR/C/79/Add. 66 (Concluding Observations Brazil), § 14.
[96] HRC 1996, Concluding Observations Brazil, § 31.

6/2010, "it is not open to the State to plead ignorance of an individual's situation where it should have made itself aware of the risk faced."[97]

The *Rantsev* judgement referred to the need to adopt 'practical measures of protection.' In this respect the European Commission GRETA expert group, went on to note that such practical measures include, for example, "the securing of the immediate physical safety of the trafficked person, or person at risk of being trafficked; their physical, psychological and social recovery, with the immediate provision of information about their rights and options in a language that they understand; referral to assistance and support with the aim of long-term social inclusion." The Group considers that these immediate measures should be taken regardless of whether the person is able or willing to cooperate with the authorities. In addition, such measures might include, but are not restricted to "ensuring that the person has legal assistance and access to justice; evaluating the need for short or longer-term international protection, whether through refugee status or subsidiary/complementary protection; safe and dignified repatriation involving cooperation with the source State and relevant NGOs and following an individual risk assessment.."[98]

Effective prevention is clearly a long-term commitment involving a range of measures directed at addressing causes and contributors to modern day slavery, including underlying discrimination and systemic inequality, too numerous and complex to itemise in a brief such as this. It is noted though that a comprehensive package of measures would include the long-term commitment to 'educational, social or cultural measures' cited by the General Assembly in relation to human trafficking.[99] 'Basic education for all' has likewise been noted as a key condition for enabling bonded labourers to escape from servitude, while general awareness raising and training and capacity building of officials and the establishment of effective institutions are also important elements.[100]

[97] GRETA, Opinion No. 6/2010 of the Group of Experts on Human Trafficking in Human Beings of the European Commission, On the Decision of the European Court of Human Rights in the Case of Rantsev v. Cyprus and Russia, § 9.
[98] GRETA, Opinion No. 6/2010, §§ 9-10.
[99] UN Doc. A/RES/61/180, GA Resolution on 'improving the coordination of efforts against human trafficking', 8 March 2007, at 5.
[100] Report of the Working Group on Contemporary Forms of Slavery on its twenty-sixth session, 16 July 2001, Recommendation 4. See also the Rantsev judgment, and GRETA reports on combating human trafficking.

Regulation including, but not limited to, Criminal Law

Inherently linked to effective prevention, is the obligation to ensure an adequate and effective legal framework within the state to address the range of slavery practices prohibited under Article 6. This includes through laws that criminalise slavery and related practices as serious offences. This was again discussed by the Human Rights Committee (HRC) in its Concluding Observations on Brazil in 2005. Here the Committee stated:

> While noting the establishment of the National Commission for the Eradication of Slave Labour, the Committee is still concerned about the persistence of practices of slave labour and forced labour in the State party and the absence of effective criminal sanctions against these practices (art. 8).
>
> *The State party should reinforce its measures to combat practices of slave labour and forced labour. It should create a clear criminal penalty for such practices, prosecute and punish perpetrators, and ensure that protection and redress are granted to victims.*[101]

The Committee clearly states the need for a 'clear criminal penalty' for practices falling under Article 8 of the ICCPR.

The ECtHR has repeatedly highlighted the need for criminal law, and criminal sanctions, to be adequate, comprehensive and effective. For example, in *CN v. UK* before the ECtHR,[102] concerning a Ugandan applicant working as a live-in carer for an elderly couple with little remuneration or time off,[103] the applicant's solicitor sought an investigation into her case as 'trafficking', which was an offence under domestic law,[104] but the investigation was discontinued for lack of evidence of that crime. The ECtHR found that the effectiveness of the investigation was inherently linked to the appropriate classification of the criminal conduct under domestic law: although there was legislation in place which criminalized particular aspects of slavery, servitude and forced labour, the absence of a specific offence of domestic servitude meant the

[101] HRC 1 December 2005, 85th Session, CCPR/C/BRA/CO/2 (Concluding Observations Brazil), § 14, http://www.refworld.org/pdfid/4537779f0.pdf (visited 5 March 2016).
[102] *C.N. v. the United Kingdom*, App No.4239/08, ECtHR (2012).
[103] For the facts of this and other cases, see H. Duffy, Litigating Modern Day Slavery in Regional Courts: A Nascent Contribution, Journal of International Criminal Justice (2015), (forthcoming).
[104] Section 4 of the Asylum and Immigration Act related only to trafficking for the purposes of exploitation, not slavery or forced labour.

authorities were unable to properly assess the applicant's complaint.[105] A similar finding on the inadequacy of the law was seen in the French cases concerning servitude referred to above.[106] States should therefore ensure that the full range of modern day slavery practices, including trafficking and forced labour, are enshrined in domestic criminal law.

The ECtHR decision in *Rantsev* is also key to fleshing out the positive obligations of states in this respect. The judgment articulates the obligation of states to ensure that criminal law provisions prohibit and punish traffickers in law and are applied in practice.[107] Across human rights practice one finds expressions of the requirement that the framework must be adequate on paper and effective in practice.

The judgement also makes clear the need to ensure that the regulatory framework embraces the responsibility of individuals, but also of businesses. Laws must address a range of forms of involvement including the encouragement, facilitation or tolerance of trafficking and stringent positive obligations on states to take measures to prevent such practices:

> The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures *regulating businesses* often used as a cover for human trafficking. Furthermore, *a State's immigration rules* must address relevant concerns relating to *encouragement, facilitation or tolerance of trafficking*.[108]

While the Court has identified the obligation on states to implement a legislative, regulatory and administrative framework for the effective penalisation and prosecution of perpetrators[109] as indispensible, it is not therefore itself sufficient. International law requires a comprehensive legislative framework directed at prevention, including ensuring corporate responsibility and

[105] *C.N. v. the United Kingdom*, § 80.
[106] *See e.g., Siliadin v France* § 89.
[107] *Rantsev. v. Cyprus and Russia*, § 285.
[108] *Rantsev. v. Cyprus and Russia*, § 284.
[109] *Rantsev. v. Cyprus and Russia*, § 285.

addressing how other aspects of domestic law, such as immigration law, may impact upon giving effect to states obligations to prevent, protect and respond. [110]

Effective Investigation, Prosecution and Proportionate Punishment

Several cases have highlighted particular aspects of the general obligations of the state to conduct prompt, thorough, effective and impartial investigations in the face of serious allegations, such as those envisaged by Article 6. This brief will not address the vast amount of jurisprudence from the Inter-American system, reflected in its European and African counterparts, in relation to the obligation to investigate, but notes only a few comparative approaches in the context of slavery-related provisions specifically.

The *Rantsev* case for example highlighted the positive obligation to investigate situations of potential trafficking as soon as the matter comes to the attention of the authorities.[111] It noted that "where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency."[112] The ECtHR considered an obligation to investigate to arise where there was a 'credible suspicion' of domestic servitude following a complaint by the applicant to the domestic authorities.[113] Reflecting the court's prior case law on domestic violence,[114] the obligation does not depend on a complaint by the applicant.[115] This reflects the *ex officio* nature of the State's obligation to investigate as identified by this Court in several cases, including in relation to Article 6 in *Rio Negro Massacres v. Guatemala*. Here the Court stated that "when States become aware of an act constituting slavery or involuntary servitude, in the terms of Article 6 of the American Convention, they must open the pertinent investigation *ex officio,* in order to establish the corresponding individual responsibilities."[116]

Like this court, the ECtHR has repeatedly highlighted, including in slavery-related cases, that an 'effective' investigation is one which is independent and 'capable of leading to the identification and punishment of individuals responsible.'[117] Several recent ECtHR cases have accordingly

[110] See also GRETA opinion No 6/2010 on the Decision of the ECtHR in Rantsev v Cyprus and Russia (2010)
[111] *Rantsev. v. Cyprus and Russia*, § 288.
[112] *Rantsev. v. Cyprus and Russia*, § 288.
[113] *C.N. v. the United Kingdom*, § 71.
[114] *Opuz v. Turkey, Application no. 33401/02,* ECtHR (2009).
[115] *Rantsev. v. Cyprus and Russia*, § 288.
[116] *Rio Negro Massacres v. Guatemala*, § 225.
[117] *Rantsev. v. Cyprus and Russia*, §§ 285-89.

underscored positive obligations to, for example, "penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour. In order to comply with this obligation, member States are required to put in place a legislative and administrative framework to prohibit and punish human trafficking..."[118]

One case in the course of which the state acknowledged that its legislative framework was not conducive to effective investigation and needed reform was *Kawogo v. the United Kingdom*. Soon after the Court's decision in *CN v UK* noted above, a factually similar domestic servitude case was brought against the UK.[119] When the case was therefore brought before the ECtHR[120] the UK made a unilateral declaration and the case was struck out in light of the wide-reaching nature of 'the admissions' set out in the declaration, and the proposed measures of redress.[121] The government's declaration suggested that new legislation will "[make] it easier for the relevant authorities to investigate and prosecute such cases where there has been no trafficking, or it is difficult to prove trafficking."[122] The government also committed to providing guidance regarding the new offence to police, judicial and prosecuting authorities. It was in light of commitments of this nature that the Court was willing to regard the complaint as reflecting "a 'historical' problem, the facts of which are unlikely to be repeated" and struck the case out.[123] The commitments provide some indication of steps, in law and in practice, which are required to ensure that investigations can lead to effective prosecutions.

The positive obligations of the various states to *cooperate* in respect of trafficking investigations and prosecution is a further noteworthy feature of ECtHR jurisprudence in light of the *Rantsev* judgment. The Court reasserted that State authorities are required to conduct a domestic investigation into those aspects of the chain of trafficking events occurring on their own territories, and to establish jurisdiction for crimes committed therein.[124] But it went further in

[118] *Rantsev. v. Cyprus and Russia*, § 285

[119] The case concerned a Tanzanian national who came to the UK in 2006 with her employer on a domestic worker visa but was left in the UK in domestic service wherein she was not allowed to leave the house, and required to work without remuneration to be allowed to return to her home country. Just as in the previous case of *CN*, referred to above, a decision was taken by the CPS not to prosecute the employer's parents on the basis of insufficient evidence, and no further action was taken against the applicant's employer.

[120] The author was involved in the third party intervener as legal director of Interights at the time.

[121] *Kawogo v. United Kingdom* App no. 56921/09 (ECtHR 22 June 2010), p. 6.

[122] *Kawogo v. United Kingdom*, p. 5.

[123] *Kawogo v. United Kingdom*, p. 6.

[124] Recognising the international and cross-border nature of trafficking, the Court notes that the "Anti-Trafficking Convention explicitly requires each member State to establish jurisdiction over any trafficking offence committed in

suggesting that parties to the convention were also subject to a duty, in cross-border trafficking cases, to cooperate effectively with the relevant authorities of *other* States in the investigation of events on their territories, despite those events having occurred outside the state in question and not involved the responsibility of the state.[125] Such an approach to obligations of international cooperation is in keeping with the approach in the Palermo Protocol as well as certain international agreements on mutual legal assistance.[126]

International standards also suggest that the prosecution of those responsible for serious crimes should be accompanied by proportionate penalties. The Slavery Convention of 1926 itself specifies the prosecution of those responsible for slavery and the imposition of appropriately severe penalties. Of particular note is the report of the HRC in relation to slavery practices in Brazil:

> "It is imperative that persons who are responsible for, or who directly profit from, forced labour, child labour and child prostitution, be severely punished under law"[127]

Obligations of Reparation

Finally, states' obligations of reparation are multi-faceted, as reflected in the leading practice of this Court on issues of reparation. While general standards of relevance here are not reiterated in this brief, it is worth recalling that the HRC in its Concluding Observations on Brazil of 2005, called for victims to be provided adequate redress.[128]

The African Commission has referred in the context of slavery allegations to "the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection," in accordance with Article 23(3) of the Universal Declaration of Human Rights, complemented by those of Article 7

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its territory." Such an approach is, in the Court's view, only logical in light of the general obligation, outlined above, incumbent on all States under Article 4 of the Convention to investigate alleged trafficking offences.

[125] *Rantsev v. Cyrpus and Russia,* for example, at § 245 refers to a "duty on the State where evidence is located to render any assistance within its competence and means sought under a legal assistance request."

[126] It is obliged to secure to all persons on its territory or subject to its jurisdiction the rights under the convention. The court found that what happened in Cyprus was beyond the scope of Russian jurisdiction for ECHR purposes. Nonetheless states appear to have duties of investigation and cooperation under the ECHR even in respect of events that did not arise within the jurisdictional scope of the state's Convention obligations.

[127] HRC 1996, Concluding Observations Brazil, § 31.

[128] HRC, Concluding Observations Brazil, 2005, § 14.

of the International Covenant on Economic, Social and Cultural Rights. The failure to remunerate and the right to human dignity are therefore closely interrelated. Adequate compensation is an important dimension of reparation, embracing not only loss of earnings but the broader impact of slavery-related practice on human dignity and on the life potential of those trapped within it.

Compensation, while important, is plainly also insufficient. The full range of forms of reparation, including recognition and guarantees of non-repetition, are crucial in addressing the profound impact of slavery related exploitation and the multiplicity of human rights violations it involves.

Among the positive measures required of the state are practical measures of protection and restitution, some of which are addressed in relation to protection above. The Working Group on Contemporary Forms of Slavery has noted that the state is obliged to 'protect the victim from further harassment or harm' and '[ensure] their reintegration into society and [provide] those who are destitute with the material means to sustain themselves and their families.'[129]

G. Conclusions

Approaches to the definition of slavery, and the scope of the prohibition of related practices in Article 6, have therefore evolved over time, reflecting evolution in slavery practices themselves. While standards and jurisprudence often begin with an analysis of the 1926 Convention, this definition has been interpreted in a flexible way so as to render convention rights relevant to changing circumstances and innovations in the forms of objectification and enslavement of human beings, and ensure that rights are rendered 'practical and effective.'

Contemporary international practice, emerging *inter alia* from the jurisprudence of international criminal tribunals and human rights courts, suggests certain elements of the prohibition on slavery, and 'indicators' of relevance to determining when slavery and servitude may arise. This points to a *de facto* test to establish slavery based on the nature and extent of the 'powers' exercised over other human beings and the 'control' and exploitation to which they are subject.

[129] Report of the Working Group on Contemporary Forms of Slavery on its Twenty-sixth session, 16 July 2001, Recommendation 4. See also the work of the European Commission Expert group (GRETA) on various forms of assistance, protection and support with e.g. long-term social inclusion.

A substantial body of practice now endorses an inclusive approach to the scope of the prohibition on slavery and related practices enshrined in provisions such as Article 6 of the ACHR, so as to embrace all forms of what is often referred to as 'modern day slavery,' including specifically human trafficking. Practice generally does not indicate clear-cut distinctions between the different practices of slavery, servitude, forced labour and trafficking that all fall within the purview of provisions such as Article 6. The ECHR has taken the view that it may not be necessary in certain cases to determine into which category practices fall, where it is clear that they are covered by the absolute prohibition and give rise to wide-reaching positive obligations. Appropriate recognition by this Court of the nature and gravity of the violations involved in forms of modern day slavery such as forced labour and human trafficking is however important as a contributor to emerging standards in this field, and can itself constitute a form of recognition for victims.

State have multifaceted 'comprehensive' positive obligations to prevent and respond to slavery related practices as highlighted in international standards and jurisprudence. Ensuring greater clarity around the scope of these positive obligations and ensuring effective implementation is imperative in the face of widespread practices of modern day slavery by non-state actors on the continent and beyond. This case represents an opportunity to clarify and to seek to give content and meaningful effect to the prohibition of slavery, so long acknowledged on paper but disdained by the growing and increasingly lucrative global business of human exploitation that this case represents.