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Slavery Prosecutions in International Criminal Jurisdictions

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Abstract

This article explores how the findings of international criminal tribunals (ICTs) in respect of enslavement as a form of system criminality can be translated for a proper assessment of slavery outside (armed) conflict. The author has found that, while ICTs are jurisdictionally limited to addressing only forms of institutionalized slavery, they have exceeded this restricted understanding of the practice. They have acknowledged that enslavement need not be officially endorsed at all and they have developed parameters for the identification of the actus reus *of enslavement that bear relevance for the assessment of the commission of this crime by private individuals beyond the context of armed conflict or widespread repression. A second important contribution of ICTs to notions of enslavement is the differentiation between slavery and related crimes, such as forced marriage. ICTs have indirectly contributed to the law enforcement with respect to enslavement and slavery by expanding and elucidating these concepts. Moreover, the refined differentiations serve the goal of norm expression.*

1. Introduction

At present, 'modern slavery' is commonly associated with private actors who exploit individuals for purposes of making profits. These forms of slavery typically occur outside the realm of armed conflict or institutionalized repression.[1] At first blush, the International Criminal Court (ICC) and international criminal tribunals (ICTs) may not seem to hold great relevance, neither in respect of concrete prosecution of the perpetrators of modern slavery, nor for the benefit of a further elucidation of the content and elements of this crime. After all,

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1 See, for instance, Kevin Bales, who, in his groundbreaking study, primarily discusses practices of private business agents, which are, although often condoned by governments, formally illegal. See K. Bales, *Disposable People* (University of California Press, 1999, revised 2012).

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the substantive jurisdiction of these courts is restricted to genocide, crimes against humanity and war crimes, which either presuppose a system of organized repression or the existence of an armed conflict. Nonetheless, the meaning of the *dicta* of ICCs and tribunals may well transcend the prosecution of enslavement as a crime against humanity or (sexual) slavery as a war crime, as they may shed light on the requisite *actus reus* and *mens rea* of the crime of slavery as such. The crucial question is, therefore, how the findings of ICTs in respect of enslavement as a form of system criminality can be translated for a proper assessment of slavery outside (armed) conflict.

In this brief essay, I intend to investigate whether the ICTs, by engaging in an inquiry into the legal content of enslavement and slavery,[2] have contributed to the further clarification of these concepts in a general sense, *id est*, apart from their being a form of system criminality in the context of a conflict. This article starts with a survey and discussion of the main findings on enslavement of the Nuremberg and Tokyo tribunals. The third section demonstrates how enslavement as a crime against humanity and (sexual) slavery as a war crime feature in the normative framework of the ICC and ICTs. The fourth section follows with an analysis of the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) on enslavement as a crime against humanity. Next, the fifth section engages in a discussion of the case law on sexual slavery as a crime against humanity or a war crime. Although the classifications of, and differences between, sexual violence crimes have been exhaustively discussed elsewhere and are, as such, beyond the scope of this essay, I will briefly touch upon the relationship between sexual slavery and forced marriage, insofar as this is relevant for the delineation of the concept of enslavement. The essay ends, in the final section, with some final reflections, summarizing the main findings and briefly discussing the possibilities of improved law enforcement with respect to modern slavery.

2. Slavery During the Second World War: The Findings of the Nuremberg and Tokyo Tribunals

The vast scale of the mobilization of the working force of occupied countries by German and Japanese forces and their subsequent exposure to forced labour and slavery in factories and concentration camps served to boost the war efforts of Germany and Japan. As Plenipotentiary General for Labour Mobilization, Fritz Sauckel had been responsible for the movement and forced employment of some five million foreign workers in Germany. Sauckel himself boasted that out of the five million 'not even 200,000 came voluntarily'.[3] Sauckel stood trial and was convicted by the Nuremberg Tribunal on the count of enslavement as a crime against humanity, under Article 6(c) of the

2 'Enslavement' refers to a dynamic act of bringing an individual into a — static — situation of slavery. The two terms are often used interchangeably and I will do the same in this article.

3 A. Tusa and J. Tusa, *The Nuremberg Trial* (Atheneum Books, 1984), at 378.

London Charter of the International Military Tribunal. While women were comparatively underrepresented as slave workers in factories,[4] their forced recruitment as domestic workers did not escape the attention of the Nuremberg Tribunal. Martin Bormann was found guilty — in his absence — for his prominent involvement in the wartime slave labour programme, including his supervision of slave labour matters and control over 500,000 female domestic workers transferred from Eastern Europe to Germany.[5]

The so-called 'second generation' military tribunals at Nuremberg that had been established by virtue of Control Council Law No. 10 addressed the involvement of owners of industrial corporations in the slave labour programme of *Das Reich*. With respect to the deportation of civilians of occupied countries to concentration camps and slave labour, the Military Tribunal in the *Krauch* case (*I.G. Farben Trial*) held that:

> The use of concentration camp labour and forced foreign workers at Auschwitz, with the initiative displayed by the officials of Farben in the procurement and utilization of such labour, is a crime against humanity and, to the extent that non-German nationals were involved, also a war crime, to which the slave labour program of the Reich will not warrant the defence of necessity.[6]

While the living conditions of forced labourers were generally appalling, feeble efforts were made to improve their fate at times, out of sheer self-interest. Sauckel admonished *Gauleiters* in a letter in 1943: 'Cool commonsense demands proper treatment of foreign labour, including even Soviet-Russians. Slaves who are underfed, diseased, resentful, despairing, and filled with hate will never yield that maximum of output which they might achieve under normal conditions.'[7] However, the comparatively 'decent' treatment of inmates did not change the Tribunal's judgment. The core of 'enslavement' consisted of the absolute loss of human freedom, as the Tribunal emphasized in a famous passage in the *Pohl* case that would later be quoted by the ICTY Trial Chamber in *Kunarac*:

> Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery — compulsory uncompensated labour — would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.[8]

The Tokyo judgment focused on the slave programme that was imposed on civilians of occupied countries and prisoners of war, who were forced to toil

4 Fritz Sauckel and Hermann Goering had advocated the larger involvement of women in factory work, but Hitler was adamantly opposed to that suggestion, arguing that he did not wish to expose them to the mental and physical harms of such an environment. See on this R. Conot, *Justice at Nuremberg* (Basic Books, 1983), at 244.

5 1 *Trial of the Major War Criminals Before the International Military Tribunal* (1948), at 340–341.

6 US Military Tribunal, *Krauch case (I.G. Farben Trial)*, judgment of 29 July 1948.

7 Tusa and Tusa, *supra* note 3, at 379.

8 US Military Tribunal, *Pohl case*, judgment of 3 November 1947, at 970.

in concentration camps or at public construction sites, like the Burma railway. While the Tokyo Tribunal did not distinguish between enslavement as a crime against humanity or as a war crime, it confirmed the involvement of, and criminal responsibility for, the slave labour system of some of the high-placed defendants, like Foreign Minister Shigemitsu and War Minister Hideki Tojo. The Tribunal described the slave labour system in the following general terms:

> Having decided upon a policy of employing prisoner of war and civilian internees on work directly contributing to the prosecution of the war, and having established a system to carry that policy into execution, the Japanese went further and supplemented this source of manpower by recruiting laborers from the native population of the occupied territories. This recruiting of laborers was accomplished by false promises and by force. After being recruited, the laborers were transported to and confined in camps. Little or no distinction appears to have been made between these conscripted laborers on the one hand and prisoners of war and civilian internees on the other hand. They were all regarded as slave laborers to be used to the limit of their endurance.[9]

The Tokyo Tribunal focused almost entirely on the aspects of labour exploitation in slavery. What the Tribunal failed to do — much to the dismay of scholars conducting analysis of the judgment — was to recognize the widespread practices of forced prostitution as 'enslavement'.[10] While the Tribunal acknowledged that women in, for instance, the Chinese province of Canton had been recruited and forced into prostitution with Japanese troops, it did not qualify these atrocities as 'enslavement'.[11] Unwittingly, the Tribunal may, thus, have reinforced false stereotypes of compliant 'comfort women' who sustained the Japanese war effort.

The Tokyo and Nuremberg tribunals could not fail to address enslavement as a crime against humanity or war crime, committed on a widespread scale during the Second World War. Both tribunals have paid due attention to the slave programmes, employing forced labourers, as systems of institutionalized repression. Such emphasis on the systemic aspects of slavery as a source of labour may partially be explained by the fact that representatives of the military and political leadership were standing in the dock. After all, they could be held responsible for the planning and organization of the programmes. However, it cannot be denied that the recruitment of 'comfort women' was also part and parcel of a larger policy that required involvement of higher level politicians and military. The impression cannot be escaped that female slavery was not in the limelight of the tribunals' attention. This would only be redressed in the subsequent trials of the ad hoc tribunals, which displayed a greater sensitivity to addressing crimes against male and female victims.

9 B.V.A. Röling and C.F. Rüter (eds), *The Tokyo Judgment: The International Military Tribunal for the Far East* (APA University Press, 1977), at 416.

10 Compare P.V. Sellers, 'Wartime Female Slavery: Enslavement?' 44 *Cornell International Law Journal* (2011) 115, at 120.

11 Röling and Rüter, *supra* note 9, at 393.

3. Enslavement and (Sexual) Slavery in the Normative Framework of the ICTs and the ICC

The Nuremberg and Tokyo tribunals set the scene for the further development of standards with respect to the prohibition of enslavement and slavery under international criminal law. In Principle 6 of the Nuremberg Principles, 'enslavement' was recognized as a crime against humanity and 'deportation to slave labour' as a war crime.[12] All subsequent statutes of the ICTs and the ICC Statute would henceforth include 'enslavement' as a crime against humanity.[13] Both the Statute for the Special Court for Sierra Leone (SCSL) and the ICC Statute single out 'sexual slavery' as a separate crime against humanity.[14] Moreover, sexual slavery is identified as a war crime in the ICC Statute, provided that the crime is committed in the context of, and is associated with, an armed conflict.[15]

The statutes of the ad hoc tribunals and the SCSL do not explicitly depict (sexual) slavery as a war crime. However, the open-ended reference to violations of the laws and customs of war allows the inference that the jurisdiction of these tribunals would encompass serious infringements of the Geneva Conventions and their Additional Protocols. The statutes of the International Criminal Tribunal for Rwanda (ICTR) and SCSL, moreover, explicitly mention Common Article 3 of the Geneva Conventions and Additional Protocol II.[16] The latter Protocol identifies 'slavery and the slave trade in all their forms' as an act that 'shall remain prohibited at any time and in any place whatsoever' and the practice can, therefore, without doubt be qualified as a 'serious violation of international humanitarian law'. Unlike the ICC Statute, slavery is not limited to sexual purposes.

Apart from these explicit or implicit references to enslavement or slavery in the respective statutes, other crimes within the jurisdiction of the ICTs have appeared to be wide enough to enable the tribunals to subsume slavery or forced labour under their scope. In the *Krajišnik* case, for instance, the Trial Chamber held that acts of forced labour, being part of the widespread and systematic attack against the Muslim and Croat civilian population, constituted 'persecution' as a crime against humanity.[17] More generally, one may conclude that the statutes offer a satisfactory normative framework for the prosecution of slavery as crime against humanity or war crime and that the international tribunals have shown some boldness in further developing the law when necessary. The most conspicuous advances have been made in the realm of enslavement for sexual purposes and forced marriages.

12 Nuremberg Principles, UN Doc. A/1316, 29 July 1950.
13 Art. 5(c) ICTYSt., Art. 3(c) ICTRSt., Art. 2(c) SCSLSt., Art. 7(c) ICCSt.
14 Art. 2(g) SCSLSt., Art. 7(1)(g) ICCSt.
15 Art. 8(2)(b)(xxii) ICCSt., for international armed conflicts; Art. 8(2)(e)(vi) ICCSt., for non-international armed conflicts.
16 Art. 4 ICTRSt. The provision subsequently identifies a number of violations, but adds that the jurisdiction of the ICTR 'is not limited to them'. Similarly, Art. 3 SCSLSt.
17 Judgment, *Krajišnik* (IT-00-39-T), Trial Chamber, 27 September 2006, § 815.

4. 'Enslavement' According to the ICTY

In *Kunarac*, the Trial Chamber and Appeals Chamber had the opportunity to elaborate on the elements of enslavement as a crime against humanity.[18] Dragoljub Kunarac and Radomir Kovač were charged with enslavement and rape of Muslim girls and women whom they detained over periods of months and subjected to repeated rapes and other forms of sexual violence. The Trial Chamber took the authoritative definition of the 1926 Slavery Convention as the point of departure: 'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'[19] The Trial Chamber inquired whether this definition had crystallized into a rule of customary international law, and to that purpose, consulted a host of sources, including judgments of the Nuremberg and Tokyo tribunals, relevant provisions of the Geneva Conventions, findings of the International Law Commission and case law of the European Court of Human Rights. The Chamber confirmed the customary legal nature of the definition, but added that 'enslavement as a crime against humanity' may be 'broader than the traditional and sometimes apparently distinct definitions of slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law'.[20] In search of the characteristics of this crime, the Trial Chamber identified a number of parameters. Physical and psychological control — 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape' — was an important indication of enslavement.[21] Secondly, the Trial Chamber stressed the relevance of the use of force, threat of force or other forms of coercion, rendering the determination of (lack of) consent or free will irrelevant.[22] Other important factors included duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.[23] Enslavement would not necessarily serve the obtainment of monetary profit, but would usually imply the exploitation of another person, be it by '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'.[24]

Although the Trial Chamber drew an accurate portrait of enslavement as a socioeconomical and psychological phenomenon, from a *legal* perspective the analysis was less satisfactory, because the Chamber did not indicate whether some or all of these factors would have to be present for qualification as enslavement. Moreover, the Trial Chamber suggested that international law harboured different definitions of slavery and enslavement, thus sowing

18 Judgment, *Kunarac and others* (IT-96-23-T & IT-96-23/1-T), Trial Chamber, 22 February 2001 (hereinafter, '*Kunarac* Judgment').
19 Art. 1(1) Slavery Convention.
20 *Kunarac* Judgment, *supra* note 18, § 541.
21 *Ibid.*, § 542.
22 *Ibid.*
23 *Ibid.*, § 543.
24 *Ibid.*, § 542.

confusion on the proper understanding of enslavement as a crime under international (criminal) law.

The Appeals Chamber shed light on some elements, thereby contributing to a further clarification of the concept.[25] Rejecting the appellants' claim that lack of resistance could be interpreted as (implicit) consent, the Appeals Chamber held that lack of consent does not have to be proven by the prosecutor as an element of the crime, because the coercive circumstances that usually surround enslavement would render the entire concept of consent meaningless.[26] The analogy with rape as war crime or as a crime against humanity is apparent. Secondly, the Appeals Chamber did not agree with the appellant's contention that enslavement implies that the victims are enslaved indefinitely, or at least for a prolonged period of time. While the Appeals Chamber conceded that duration was one factor, the Chamber added that it was not an indispensable element of the crime, explaining that the 'quality' of the relationship between the accused and victim was decisive.[27] Finally, and most importantly, the Appeals Chamber pondered on the development of the general concept of enslavement and on its proper limits. The Appeals Chamber affirmed the findings of the Trial Chamber that:

> [T]he 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]

According to the Appeals Chamber, the current understanding of enslavement as an international crime covers also less absolute and permanent control over the bodies and minds of persons than the complete domination associated with 'chattel slavery', but the difference is one of degree. What all these forms have in common is 'the destruction of the juridical personality, as a result of the exercise of any or all of the powers attaching to the right of ownership'.[29]

What the Appeals Chamber sought to underline, however, is that the ownership should not be understood in a legal sense:

> The Appeals Chamber will however observe that the law does not know of a 'right of ownership over a person'. Article 1(1) of the Slavery Convention speaks more guardedly of 'a person over whom any or all of the powers attaching to the right of ownership are exercised.' That language is to be preferred.[30]

This interpretation seems to comport with Jean Allain's findings that the definition of slavery includes both *de jure* and de facto enslavement:

> By 'powers attaching to the right of ownership' as opposed to 'right of ownership', the definition can be understood as implying that one would have the powers of ownership but for

25 Judgment, *Kunarac and others* (IT-96-23 & IT-96-23/1/-A), Appeals Chamber, 12 June 2002.
26 *Ibid.*, § 120.
27 *Ibid.*, § 121.
28 *Ibid.*, § 117.
29 *Ibid.*
30 *Ibid.*, § 118 (footnotes omitted).

> the fact that the right of ownership cannot be vindicated in law. In other words, exercising the 'powers attaching to the right of ownership' should be understood as meaning that the enslavement of a person does not mean the possession of a legal right of ownership over the individual (as such a claim could find no remedy in modern law today); *instead it is the powers attached to such rights*, but for the fact that ownership is illegal.[31]

This observation is not to be underestimated, because it acknowledges that the understanding of slavery has moved beyond the parameters of a legally sanctioned (or condoned) practice. Enslavement encompasses factual relations of power and control over persons that are treated as commodities which are not only prohibited by international law, but which are beyond the pale of most (municipal) law.[32] It has opened the gate for the recognition that enslavement includes private crimes of offenders that are completely detached from any official authority. It is both relevant and interesting that the ICTY has apparently confirmed this point of view. Whereas the analysis of the ICTY in *Kunarac* obviously concerned 'enslavement as a crime against humanity', the identification of the *actus reus* of enslavement arguably had a wider bearing and shed some light on the broader crime of slavery, detached from enslavement as crime against humanity.[33] This awareness widens the purport of the ICTY's findings, and made the decision highly influential in other judicial forums, as other articles in this collection attest. While ICTs are, through the limitations of their jurisdictional mandate, confronted with structural and systematic injustice that is sanctioned or condoned by the state, the ICTY acknowledges that enslavement does not by definition require such involvement of public authorities, nor the existence of an armed conflict. For domestic courts and human rights bodies these findings provide an important guideline.

5. Sexual Slavery and Its Relationship to Other Forms of Sexual Violence

Sexual slavery may qualify both as a crime against humanity and a war crime, provided that the contextual elements are fulfilled. In the ICC Statute and in

31 J. Allain, 'The Definition of Slavery in International Law', 52 *Howard Law Journal* (2009) 239, at 261 (emphasis in original).

32 It does not mean, however, that slavery is universally prohibited in all domestic jurisdictions. Customary law of West African states, in particular, permit marrying women in conditions of slavery, as was confirmed by Niger's Tribunal de Grand Instance in the (in)famous *Hadijatou* case. Compare on this case, H. Duffy, '*Hadijatou Mani Koroua v Niger*: Slavery Unveiled by the ECOWAS Court', 9 *Human Rights Law Review* (2009) 151.

33 This distinction is correctly made in N. Tavakoli, 'A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an international Crime', 9 *International Criminal Law Review* (2009) 77, at 87: 'At no stage did the Tribunal make the definition of enslavement contingent on the fulfilment of the requirements of a crime against humanity. … [I]t is submitted that the fact that enslavement was considered a crime against humanity relates to the method of the attack, i.e. "widespread or systematic", rather than the requirements of the crime of slavery itself which is a free standing crime.'

the Statute of the SCSL — as far as crimes against humanity are concerned — sexual slavery is lumped together with rape, enforced prostitution and forced pregnancy as a form of sexual violence.[34] The Elements of Crimes under the ICC Statute identify two elements in sexual slavery, both as a crime against humanity and a war crime. First, the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. Secondly, the perpetrator caused such a person or persons to engage in one or more acts of a sexual nature.

The first element immediately makes clear that sexual slavery is *specialis* of the crime of enslavement. It has been categorized as a separate crime to highlight the sexual aspect of serious violations of human rights and acknowledge that sexual slavery is a denial of individual autonomy through sexual means.[35]

Both the SCSL and the ICC have had the opportunity to elaborate on the content of sexual slavery as a war crime or crime against humanity.[36] Whereas the Pre-Trial Chamber of the ICC had initially confirmed charges of sexual slavery during, and in the aftermath of, the attack on the village of Bogoro, Germain Katanga was finally acquitted of those allegations.[37] In the *AFRC* case, the SCSL thoroughly assessed the nature of the crime of sexual slavery, especially its relationship with other forms of sexual violence, like forced marriage. The Trial Chamber observed that the powers of ownership, mentioned in the first element of sexual slavery in the Elements of Crimes of the ICC (purchasing, selling, lending, bartering) are non-exhaustive. Referring to Footnote 18 — the delegates to the Working Group on the Elements of Crimes added this footnote to Article 8(2)(b)(xxii) on sexual slavery as a war crime in international armed conflicts — the Trial Chamber recalled that the powers of ownership need not have a commercial nature.[38] Moreover, the Chamber confirmed

34 Art. 2(g) SCSLSt., Art. 7(1)(g) ICCSt., Art. 8(2)(b)(xxii) ICCSt., for international armed conflicts, Art. 8(2)(e)(vi) ICCSt., for non-international armed conflicts. Arts 7, 8 ICCSt., add enforced sterilization.

35 Compare V. Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law', 25 *Michigan Journal of International Law* (2004) 605, at 650–651, who gives an exhaustive overview and analysis of the genesis of the crime during the negotiations of the text of the ICCSt.

36 Judgment *Brima, Kamara and Kanu* (*AFRC*) (SCSL-04-16-T), Trial Chamber, 20 June 2007, §§ 701–714 (hereinafter, '*AFRC* Trial Judgment'; Judgment, *Brima, Kamara and Kanu* (*AFRC*) (SCSL-2004-16-A), Appeals Chamber, 22 February 2008 (hereinafter, '*AFRC* Appeals Judgment'); Decision on the Confirmation of Charges, *Katanga and Chui* (ICC-01/04-01/07), Pre-Trial Chamber, 30 September 2008, §§ 339–354.

37 Jugement rendu en application de l'article 74 du Statut, *Katanga* (ICC-01/04-01/07), Trial Chamber, 8 March 2014. Charges of sexual slavery are still extant against Ntaganda. Cf. Decision on the Confirmation of the Charges, *Ntaganda* (ICC-01/04-02/06), Pre-Trial Chamber, 9 June 2014. Charges of sexual slavery have been issued against the recently arrested Dominic Ongwen, the alleged Brigade Commander of the Sini Brigade of the Lord's Resistance Army. See Situation in Uganda, *Kony and others* (ICC-02/04).

38 *AFRC* Trial Judgment, *supra* note 36, § 709. Footnote 18 comments on the addition 'or by imposing a similar deprivation of liberty', explaining that such a deprivation of liberty 'may, in some

that the physical and psychological loss of freedom, inherent in sexual slavery, did not require the confinement to a particular place but would include situations in which persons remain in the absolute control of their captors because they have nowhere else to go and fear for their lives.[39] Obviously, the Chamber refers to a situation of psychological terrorization and forced dependence.

The core issue that the Chamber addressed in its judgment was how 'forced marriage' related to sexual slavery. The Chamber held that 'marriage' was a euphemism that served to conceal the true relationship of complete subservience and dependence. The Chamber noted that girls and women had been taken against their will as 'wives' by individual rebels who exercised full control over their sexuality, their movements and their labour.[40] The Chamber held that 'the use of the term "wife" by the perpetrator in reference to the victim is indicative of the intent of the perpetrator to exercise ownership over the victim, and not an intent to assume a marital or quasi-marital status with the victim in the sense of establishing mutual obligations inherent in a husband wife relationship'. Moreover, the 'husband/owner' was able to make free use of his 'wife/property' as if she was a 'thing'. The Chamber found that: 'In fact, while the relationship of the rebels to their "wives" was generally one of exclusive ownership, the victim could be passed on or given to another rebel at the discretion of the perpetrator.' [41] The Trial Chamber concluded that 'forced marriage' — at least in the concrete factual situation as it had been charged — amounted to, and completely overlapped with, sexual slavery. It was held that 'the evidence adduced by the Prosecution is completely subsumed by the crime of sexual slavery and there is no lacuna in the law which would necessitate a separate crime of "forced marriage" as an "other inhumane act"'.[42]

The decision of the Trial Chamber to subsume forced marriage with the crime of sexual slavery was not unanimous,[43] and has been criticized in legal literature.[44] The majority's opinion was censured for narrowly focusing on the sexual aspects of 'forced marriage' and ignoring the wider psychological repercussions for the victim that stemmed from the perversion of an honourable institution (marriage) associated with love, loyalty and free consent. According to Justice Doherty, in her Dissenting Opinion, the crucial element of forced marriage was 'the mental and moral trauma resulting from the imposition, by

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

39 *Ibid.*

40 *Ibid.*, § 711.

41 *Ibid.*

42 *AFRC* Trial Judgment, *supra* note 36, § 712.

43 Partly Dissenting Opinion of Justice Doherty, *AFRC* Trial Judgment.

44 N. Jain, 'Forced Marriage as a Crime Against Humanity', 6 *Journal of International Criminal Justice* (2008) 1013.

threat or force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victim'.[45] Furthermore, Justice Doherty acknowledged the risk of ostracism, suffered by the victim as a result of her having been exposed to 'forced marriage' as follows: 'the use of the label "wife" could lead to stigmatization and rejection of the victims by their families and community. This could cause prolonged mental suffering by negatively impacting the ability of the victim to re-integrate into the community'.[46] Justice Doherty concluded that 'forced marriage' should be distinguished from sexual slavery.[47] It should be qualified as an 'other inhumane act', under the heading of Article 2(i) of the Statute, because it inflicted great suffering, or serious injury to mental or physical health and had a gravity similar to the acts specifically referred to as constituting crimes against humanity in Article 2(a) to (h) of the Statute.[48]

The Appeals Chamber followed the reasoning of Justice Doherty.[49] The Chamber distinguished between forced marriages and sexual slavery by holding that, while forced marriages may certainly involve non-consensual sex and deprivation of liberty, they have additional elements. Characteristic of forced marriage was a forced conjugal association resulting in great physical and mental suffering. Moreover, forced marriage, unlike slavery, involved a relationship of exclusivity between the 'husband' and the 'wife', which could lead to disciplinary consequences for breach of such an exclusive arrangement.[50] On the basis of this analysis, the Appeals Chamber defined forced marriage as a 'situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim'.[51] In assessing whether forced marriage would qualify as an 'Other Inhumane Act', in the sense of Article 2(i) of the Statute, the Appeals Chamber considered the atmosphere of violence surrounding the abduction and the fact that the coerced associations were often accompanied by rapes, forced labour, corporal punishment and deprivation of liberty.[52] The Chamber found acts of forced marriage to hold similar gravity as several enumerated crimes against humanity, including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence and concluded that it constituted an 'Other Inhumane Act', capable of incurring individual criminal responsibility in international law.[53]

45 Partly Dissenting Opinion of Justice Doherty, *AFRC* Trial Judgment, *supra* note 36, § 52.
46 *Ibid.*, § 51.
47 See also the astute analysis of the dissenting opinion by I. Haenen, *Force & Marriage: The Criminalization of Forced Marriage in Dutch, English and International Criminal Law* (Intersentia, 2014), at 270–271.
48 Partly Dissenting Opinion of Justice Doherty, *AFRC* Trial Judgment, *supra* note 36, § 71.
49 *AFRC* Appeals Judgment, *supra* note 36.
50 *Ibid.*, §195.
51 *Ibid.*, § 196.
52 *Ibid.*, § 200.
53 *Ibid.*, §§ 200, 202.

In the *RUF* case, the Trial Chamber adopted the Appeals Chamber's definition of forced marriage in *AFRC* and distinguished it from sexual slavery.[54] Because the elements of both crimes did not fully overlap, the Trial Chamber found it permissible to enter a conviction for both crimes.[55] On the one hand, 'forced marriage' was a broader concept than sexual slavery, as it encompassed other, non-sexual obligations, like cooking, washing and cleaning. On the other hand, as had been explained by the Trial Chamber, forced marriage differed from sexual slavery in being a forced conjugal association, which is based on exclusivity between perpetrator and victim.[56] The Trial Chamber suggested that such 'exclusivity' was not a necessary element of sexual slavery. At this point, however, the findings of the Trial Chamber became somewhat confusing, because it apparently used the concept of 'exclusivity' in a double meaning, as Iris Haenen has correctly observed.[57] 'Exclusivity' may pertain to the permanent monopoly that a 'husband' exercises over his 'wife'. At other places, the Trial Chamber was inclined to follow the ICTY in *Kunarac* and consider 'assertion of exclusivity' as proof of the crime of enslavement.[58] The 'husband' treated his 'wife' as if she was his property. In that case, there seems to be no meaningful distinction between 'forced marriage' and 'enslavement'. [59]

This was, indeed, the track that the Trial Chamber was inclined to choose in the *Taylor* case.[60] First, the Trial Chamber rejected the use of the term 'forced marriage' as a misnomer: 'The Trial Chamber does not consider the nomenclature of "marriage" to be helpful in describing what happened to the victims of this forced conjugal association and finds it inappropriate to refer to their perpetrators as "husbands"'.[61] In effect, the offence combined two main elements: sexual slavery and forced labour, in the form of domestic work. Accordingly, as the Trial Chamber concluded, what had otherwise been incorrectly termed 'forced marriage', represents two different forms of enslavement imposed through forced conjugal association ('conjugal slavery').[62]

The meanderings of the Trial Chambers and Appeals Chamber in the several judgments of the SCSL reflect the variety of opinions on the relationship between 'forced marriage' and (sexual) slavery. The somewhat easy equation of forced marriage with sexual slavery by the Trial Chamber in the *AFRC* judgment has raised valid concerns. Forced marriage does not only involve sexual

54 Judgment, *Sesay, Kallon and Gbao* (*RUF*) (SCSL-04-15-T), Trial Chamber, 2 March 2009 (hereinafter, '*RUF* Trial Judgment').

55 *Ibid.*, § 2307. The Trial Chamber followed the approach of the Appeals Chamber in the *Čelebići* case, whereby an accused may be convicted under different statutory provisions based on the same conduct to the extent that each provision requires proof of a materially distinct element that is not required by the other provision.

56 *AFRC* Appeals Judgment, *supra* note 36, § 195.

57 Haenen, *supra* note 47, at 277–279.

58 *RUF* Trial Judgment, *supra* note 54, § 160.

59 The conflation of 'forced marriage 'and 'enslavement' has been forcefully defended by Sellers, *supra* note 10, at 137.

60 Judgment, *Taylor* (SCSL-03-01-T), Trial Chamber, 18 May 2012.

61 *Ibid.*, § 426.

62 *Ibid.*, §§ 427–428.

violence. It also involves harms flowing from the perversion of the institution of marriage. The gains of the Appeals Chamber's meticulous differentiations in the same judgment are largely nullified, however, by the categorization of forced marriage as 'other inhumane act', which relegates the crime into obscurity.

In the *Taylor* judgment, the Trial Chamber favoured a different approach, by breaking up the forced marriages charges and putting the sexual violence under sexual slavery, while qualifying the forced labour aspects as 'enslavement'. The effort to search for similarities with existing crimes has at least the advantage of serving the *nullum crimen sine lege* principle. Whereas 'forced marriage' bears a close resemblance to enslavement, they should, in the author's opinion, still be differentiated, because they originate in the perversion of different legal and social institutions, to wit 'ownership' and 'wedlock'. [63] In this context, one might question whether the 'enslavement' tag would always comport with the self-identification of the victims.[64] Arguably, the categorization of forced marriage as 'enslavement' would better match the situation in Cambodia during the Khmer Rouge regime. During that period, forced marriages were imposed by an official (third) party forcing two people to marry, rather than by one (male) party forcing another (female) person into wedlock, as an instrument to control both the sexuality and reproductive functions of both persons.[65] Arguably, the best solution would be recognition of forced marriage as a separate crime against humanity and war crime, which would acknowledge its specific features. Proposals in this direction did not result in an amendment of the ICC Statute during the Review Conference in Kampala in 2010.[66]

6. The Concept of Enslavement as an International Crime: Between Expansion and Differentiation

The concept of enslavement as an international crime is rooted in the successful efforts to abolish the inhumane slave trade that was not only legalized, but also sustained the economies of the major western powers, well into the 19th

63 On this point, see the valuable observations of M.P. Scharf, 'Forced Marriage as a Separate Crime Against Humanity', in C.C. Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press, 2014) 193, at 208–211.

64 V. Oosterveld, 'Evaluating the Special Court for Sierra Leone's Gender Jurisprudence', in *ibid.*, 234, at 252.

65 Compare the vivid analysis of Jain, *supra* note 44, at 1022–1025 with Haenen, *supra* note 47, at 345. Two of the Khmer Rouge's surviving senior leaders, namely, Nuon Chea and Khieu Samphan, have been charged with 'forced marriages' as 'other inhumane acts'. As the proceedings have been split in three smaller trials, Trial No. 002/03 (involving crimes against humanity, including forced marriage) has not commenced. It is scheduled for 2016/2017.

66 Compare on this proposals M. Frulli, 'Advancing International Criminal Law; The Special Court for Sierra Leone Recognizes Forced Marriage as a "New" Crime against Humanity', 6 *Journal of International Criminal Justice* (2008) 1033.

century.[67] To a certain extent, the classifications of enslavement and sexual slavery as a crime against humanity or a war crime reflect this institutionalized perspective of enslavement as they refer to state or organizational policies to repress (enemy) civilians. It is noteworthy that ICTs, though jurisdictionally limited to address only these forms of system criminality, have exceeded this restricted understanding of the practice. They have acknowledged that enslavement need not be officially endorsed at all and they have developed parameters for the identification of the *actus reus* of enslavement that bear relevance for the assessment of the commission of this crime by private individuals beyond the context of armed conflict or widespread repression. The distinguishing feature of enslavement is the exercise of powers attaching to the right of ownership, which denotes that the perpetrator acted towards the victim *as if* he or she owned the victim. The ICTs have thus expanded the concept of enslavement as an international crime and have provided guidance to domestic legislators and courts by pointing out factors that would be indicative of such far-reaching powers.

The second important contribution of ICTs to the development of the concept is the differentiation between enslavement and related crimes. The ICC Statute and SCSL Statute distinguish between enslavement and sexual slavery and separate the latter, within the wider category of sexual violence, from rape, enforced prostitution and forced pregnancy. The Appeals Chamber of the SCSL, in particular, has followed suit by distinguishing forced marriage from sexual slavery. The legality principle compelled the Appeals Chamber to classify 'forced marriage' as an 'other inhumane act', but the Chamber, at least, gave an impetus to consider forced marriage as a separate crime. Such refined differentiations should be welcomed from a perspective of norm expression. They are helpful in precisely indicating society's reproach of the perpetrator and tend to enhance the understanding of the suffering of the victim.[68] While these crime categories certainly overlap, they have all conspicuous elements that deserve to be highlighted. In a similar vein, it makes sense to distinguish between enslavement and trafficking in human beings. The latter category encompasses a wide gamut of criminal activities that vary in intensity and duration. The pimp who exploits the charms of his lover or prostitute would easily fall within the definitional scope of trafficking in human beings, while he would probably not qualify as a 'slave trader'.[69]

67 For historical surveys see M. Cherif Bassiouni, 'Enslavement as an International Crime', 23 *NYU Journal of International Law and Politics* (1990–1991) 445; J. Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers, 2011), at Chapters 1, 2.

68 In a similar vein, Oosterveld, *supra* note 64, at 250: 'Naming is an important expressive tool of the law, and the recognition of forced marriage or conjugal slavery as prohibited acts within crimes against humanity authoritatively transformed a previously legally unacknowledged experience into acknowledged wrongs.'

69 I have defended this point of view in an earlier article. See H. van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts', 13 *Chinese Journal of International Law* (2014) 297, at 314–315.

ICTs have, therefore, indirectly contributed to the law enforcement with respect to enslavement and slavery by expanding and elucidating the concept. It is an interesting question whether the proliferation of 'modern slavery' and its concomitant acknowledgement require a larger contribution of regional or ICTs or the ICC in the prosecution and trial of these crimes. Much depends on the scale and the systematic way in which slavery is practiced. Whenever the state itself engages in slavery — like, for instance, in Myanmar or North Korea — [70] or when governments are unable to rein rebellious or terrorist groups that perpetrate slavery — like Boko Haram or the Islamic State — not much is to be expected from domestic law enforcement. In such situations, international or regional criminal courts may serve as a useful and necessary default mechanism. Several options could be considered.[71] A lowering of the threshold of 'organizational policy' as a requirement for crimes against humanity will increase the potential of the ICC to deal with enslavement practices of terrorist groups. Regional criminal courts may include slavery and trafficking in human beings in their subject matter jurisdiction.[72] Finally, the establishment of a special transnational criminal court could be envisaged, which would have jurisdiction over several forms of transnational crime, including slavery and trafficking in persons.[73]

Beyond the realm of systemic crime, enslavement and slavery-like practices that are developed by private initiatives can probably best be countered by national criminal law enforcement. After all, ICTs do not dispense a superior kind of justice. An effective repression of the dismal practice of enslavement would certainly require intensification and more sophisticated international cooperation between states, like the establishment of joint investigation teams and exchange of evidence and information.

70 See R.E. Howard-Hassmann, *State Enslavement in North Korea*, 14 October 2011, available online at http://genocidewatch.org/images/N.Korea.12.2.22.state.enslavement.pdf (visited 9 November 2015). Referring to North Korea, Howard-Hassmann remarks that 'the crime of enslavement is not only committed by private criminals; it is also a state practice that benefits elites, and sometimes the entire economy of a country'.

71 For a brief survey of the possibilities, see van der Wilt, *supra* note 69, at 329–334.

72 It is interesting to note in this respect that trafficking in human beings features on the list of crimes over which the African Court of Justice and Human Rights will prospectively have jurisdiction. See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Executive Council of the African Union, 22nd Ordinary Session, 21–25 January 2009, Art. 28(a).

73 See on this initiative the interesting propositions of N. Boister, 'International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?' 23 *Criminal Law Forum* (2012) 295.