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THE INTERPLAY OF SLAVERY AND SLAVE TRADE- THROUGH THE IMPUNITY GAPS

Slave Trading was first codified in the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention. It also finds its way through the deftly codified Additional Protocol II to the Geneva Convention, International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

The Prohibition of slave trade is now a peremptory norm. It is considered to be a crime under customary international law,[i] a non-derogatory human right[ii] and is also prohibited under international humanitarian law. In the 19th century, through unilateral, bilateral and multilateral negotiations, states abolished the Trans-Atlantic Slave Trade and East African Slave Trade.[iii] However, it only came to an end after the same was abolished in North and South America.[iv] Despite being one of the foremost crimes to have been recognized as an international offence at a global level, the underutilization of the same in holding perpetrators responsible, has thrown slave trade into desuetude.

PRECURSORY CONDUCT TO SLAVERY

International Tribunals have held enslavement and sexual slavery to be considered within the ambit of 'crimes against humanity' and 'war crimes' under their respective statutes. The jurisprudence related to conflict-related slavery crimes has evolved through judgments rendered in *Kunarac,[v] Sesay,[vi] Taylor* and *Ntaganda[vii].* The Trail Chambers, while examining the evidence of enslavement and sexual slavery in *Krnojelac[viii]* (the companion case to *Kunarac), Brima[ix]* and *Katanga[x]* declared that determination of enslavement or sexual slavery proves that the perpetrator has exercised all or any of the rights of ownership over a victim. This legal element traces its root to the definition of slavery which has been provided in the Slavery Convention of 1926 and Supplementary Slavery Convention of 1956.[xi] Under customary international law, the individual exercising such powers and under Rome Statute, whether exercising such powers should be considered as 'deprivation of liberty'[xii] has been the cynosure of judicial contours.

However, legal significance of conduct which precedes such enslavement or precursory facts and circumstances indicating such exercise of ownership rights over the victim have not been the focal point of judicial scrutiny. Examination of the same demands stricter judicial intervention. Precursory conduct often includes abductions, kidnappings, captures and even exchanges. The minute scrutiny of the same will indicate how the victims are maintained or rather what they are reduced to in slavery. The evidence of such conduct finds mere mention in the judgements but we do not have precedence of the same being charged separately.

In *Ntaganda*[xiii] case, an 11-year-old girl was captured by Simba, a commander, in Kobu, in a 'mop-up' operation. She was subsequently taken to Bunia where she was forced to have 'sexual relationships' with Simba to save her life. The trail chamber while examining sexual slavery under crimes against humanity under the Rome Statute, held Simba to have committed the same. The sequence of acts by the perpetrator were held to be indicative of Simba exercising the powers attached to the rights of ownership over the girl. The initial act of keeping the victim in captivity and deprivation of her liberty was demonstrative of the same.

Another victim, P-0018, in *Ntaganda* was captured by the soldiers of Union of Congolese Patriots (UPC) and Patriot Forces for the Liberation of Congo (FPLC) in Jitchu and forced to transport goods to Buli, where she was raped along with other women in captivity. The trail chamber however, did not declare it to be an act of sexual slavery for the lack of evidence of the soldiers exercising powers attached to rights of ownership over P-0018. The Chamber differentiated the case of 11-year old victim from that of P-0018 on the grounds that the former involved prima facie evidence of sexual slavery because the victim was forced to have sexual relationship with Commander Simba. While in the case of P-0018, the capture and the subsequent act of forcing the victim to sell items did not constitute deprivation of liberty because eventually movement of the victim was not restricted in literal sense. The act of being forced to sell items could not be seen as the perpetrators of crime exercising powers attached to the rights of ownership over the body of P-0018. The trial although noted that the act of forcing the victim to sell goods was unlawful, yet the conduct cannot be charged separately. Thus, in the instant example, the precursory conduct of capturing and transporting did not constitute the act of sexual slavery. The trail chamber termed it as unlawful, but did not devise mechanisms to redress it legally.

The cursory overview of the above instances is indicative of the impunity gap for such criminal conduct. The precursory conduct such as capture, abduction, kidnapping et el is

usually met with a hesitant acknowledgment of the degree of criminality involved in the act. This is accelerated due to unfamiliarity with a responsive legal framework. The duty of framing of evidence for such conduct lies with prosecution first and judiciary thereafter. It is not sufficient to such conduct under other categories of offences for example, crimes against humanity or war crimes. To emphasize upon the need for a better legal characterization of the 'precursory act', the example of Yazidis and ISIS fighters is taken into consideration hereinafter.

ISIS, in their endeavour of establishing religious superiority enslaved Yazidi women, girls and boys. Buying, selling and gifting of female captives was arranged for their fighters by ISIS. The policy reduced non-believing women and children[xiv] into slavery and declared them to be Caliphate property. The female slaves held captive were called '*sabaya'*.[xv] The Caliphate institutionalized the precursory conduct to slavery and carried out buying and selling of Yazidi women in organized slave markets.[xvi] The nexus of slavery was organized to the extents where ISIS fighters documented and kept details such as name, age, marital status and photographs of Yazidi women at their holding sites. Yazidi women and children were also auctioned at online platforms with all the requisite information. Slave vendors with official designations in the Caliphate were responsible for transportation of Yazidi women slaves between the slave markets in Iraq and Syria. It was a vicious cycle of selling, reselling, gifting and regifting which eventually translated into sexualized enslavement [xvii] because of ISIS fighters exerting various forms of ownership over women, children, girls and boys alike.

Parallels can be drawn between the conflict-related abductions, kidnappings, captures and other forms of enslavement carried out by ISIS to that of *Ntaganda* and other judgements in line like *RUF* and *Kunarac[xviii].* However, ISIS policies, detailed out more organized and concretized steps which preceded the enslavement of Yazidis.

INTERNATIONAL CRIME OF THE SLAVE TRADE

Post 19th century, after successful attempts were made at abolishment of slave trade in domestic regimes, League of Nations undertook the humongous task of drafting an international convention to jointly address the issue of slave trade and slavery. The uncontested Draft Slavery Convention[xix] was passed in the year 1925 and was followed by 1953 Supplementary slavery Convention.

The treaty definition prohibits reduction of individuals into slavery irrespective of the transport deployed thus, attempting to deprive slave traders and their accomplices' safe

haven. Article 2(a) of the 1926 Slavery Convention obligates the 'High Contracting Parties' to 'prevent and supress the slave trade. While Article 3(1) of the 1956 Supplementary Slavery Convention criminalized slave trade.[xx] Both of the conventions attempt at seizing the overlapping intersections of slave trade and slavery. Slavery is defined through the definitions of slave and slaveowner. On the other hand, 'slave trade' routes through how an individual is reduced to slavery, transported and maintained as a slave.[xxi] The fact that such crimes are interlinked and occur in tandem was foreseen by the drafters, yet the loophole exists at not being able to identify and further prosecute distinguishable crimes separately.

Slave trading in most cases happens prior to the act of slavery. There is an entire chain of events which precedes before the individual is reduced to the singular act of slavery. For example, a slave trader might not be a slaveowner, however, his contributions are at par with that of slaveowner when it comes to reducing the individual into the act of slavery. Slave trading does not involve exercising any or all powers attached to the rights of ownership, as is the case with slavery.

DISENTANGLING SLAVERY AND THE SLAVE TRADE FROM HUMAN TRAFFICKING

The Rome Statute's marginalization of the slave trade is perplexing, even if well intentioned. Firstly, neither the prohibition of the slave trade nor slavery is enumerated under Article 8, the exclusive war crimes' clauses that preclude further supplementation.[xxii] Hence, Ntaganda and Katanga did not adjudicate actions that constituted slave trade as war crimes. Allain states that slavery and the slave trade were bracketed in the unofficial documents of the Chair of the Preparatory Committee under war crimes in non-international military conflict.[xxiii] The Women's Caucus for Gender Justice recommended the implementation of the slave trading as understood by treaty and customary law. Subsequent preparatory works, however, reveal no commentary about the slave trade. Bartels argues that the omission of slavery and the slave trade, as well as hunger, as war crimes, are 'non-deliberate and non-logical'.[xxiv]

Furthermore, Article 7(2) (c), the crimes against humanity clause, states that 'enslavement implies the exercise of any or all of the powers belonging to the right of ownership over a individual and involves the exercise of such power in the process of trafficking in persons, in particular women and children.' The Women's Caucus proposals anticipated that enslavement reflect aspects of trafficking and the slave trade.[xxv] However, the consequent certification of enslavement arguably conflates without substantively adding to the definitions of slavery and

slave trading found in the 1926 Slavery Convention.[xxvi] It also appears to exclude the essence of the slave trade prohibition — the *mens rea* or intent to reduce an individual to slavery — and transposes actions that ordinarily may constitute acts of the slave trade to indicia of slavery.[xxvii]

Thirdly and most importantly, this definition confusingly incorporates the descriptive term 'trafficking in persons', which is a transnational crime and does not include the jurisdictional elements of crimes against humanity. Apart from Article 7(2)(e) definition of slavery, the International Criminal Court (ICC) Elements of Crimes do not mention any aspects of trafficking as a crime. Supposedly, trafficking is neither a separate crime nor an item of enslavement underneath the Rome Statute. Actually, it defines behaviour. [xxviii]

The slave trade, unlike slavery, does not necessitate evidence of subsequent exploitation. The aim to reduce or retain anyone in slavery and an act of slave trade suffices to create the crime it is not contingent upon the result of slavery occurring or the form of service received from slaves.[xxix] A human, even, can be sold into slavery and not perform any toil. While trafficking seems to coincide with transporting persons into the exploitation of slavery, its aim does not involve intent to reduce anyone into slavery. Exploitation does not readily correlate with the intent to force others into de jure or de facto slavery.[xxx] Traffickers' exploitative intent against victims could be financial, charging exorbitant rates for transportation to foreign states with promises of jobs that never materialize. This violence may constitute slavery but not amount to an aim to the slave trade.

Moreover, trafficking requires evidence of 'means', while the slave trade does not countenance such facts. Trafficking aspect of means is to show an adult victim 's lack of consent.[xxxi] Proof must establish that traffickers used 'threat or use of force or other means of intimidation, of kidnapping, of fraud, of deceit, of the abuse of power or of a place of weakness or of the giving or receiving of payments or benefits'. Defendants may contest the evidence of intimidation to claim a consent defence for adult victims.[xxxii] Even when 'any of the means set out in Article (3)(a) have been used', the Palermo Protocol disallows consent as a defence. The trafficker, however, could pose a consent defence to negate the prima facie aspect of coercive means by arguing that the victim was told and agreed to be trafficked.[xxxiii]

As per the UNODC, in most trafficking the defendants do raise consent to rebut evidence of severe exploitation. The Special Rapporteur on Trafficking in Persons has stated that 'no person willingly consents to the suffering and exploitation that trafficking of persons entails.

Aside, legally a consent defense will refute proof of coercive means under trafficking. Conversely, the slave trade does not require proof of coercive circumstances. Coercive circumstances are of no legal relevance and are insufficient to counter proof of the *mens rea* or *actus reus* under the slave trade. Likewise, consent is neither an item nor a defense to the slave trade. Consistent with the simple language in Article 1(2) of the 1926 Slavery Convention, what are determinative is the slave traders' intent and their actions, not the victim's state of mind.

Trafficking somewhat resembles the slave trade, except that neither involves the exercise of any powers of control over the individual being trafficked. So, whenever traffickers exercise powers of control over an individual, they effectively are perpetrating slavery. The Rome Statute's Article 7(2)(e) accordingly defines a form of slavery as it refers to trafficking activities as powers of ownership are exercised.

In total, the Rome Law does not enumerate the slave trade or slavery, under Article 8 as war crimes. It does not describe the slave trade within the crime of enslavement under Article 7(g) as a crime against humanity or quantify a distinct provision sanctioning the slave trade within the background of a systematic assault on the civilian population.[xxxiv] Consequently, slave traders' conduct is not implicated directly within ICC jurisdiction. The Rome Statute forbids only individuals possessing powers belonging to rights of possession, not perpetrators of the slave trade who move or participate in any actions of the slave trade without possessing those powers. The 1926 Slavery Convention, Additional Protocol II and 1956 Supplemental Slavery Convention denounce the slave trade as a separate offense, not as a lesser-included offence of slavery, a form of aiding and abetting slavery, or as a 'type' of trafficking.

Muddling the slave trade and slavery is troublesome. The practical effect is the under focus of legal justice for victims of the slave trade.[xxxv] Sadly, the Rome Statute establishes an almost inconceivable legitimacy void by omitting the slave trade completely as a war crime and as a crime against humanity

CONCLUSION

The slave trade ban is a central international crime with *erga omnes* obligations. The substantive exclusion from legal measures of redress ingrains the dearth of defense from the intent to minimize and to retain persons in slavery.[xxxvi] The implicit and explicit exclusion from international judicial instruments, particularly as a war crime, a crime against humanity or a distinct international crime rooted in customary law, is baffling. Considering the

prevalence of unlawful precursory acts to slavery, it is not unreasonable to surmise that the slave trade continues, particularly in relation to armed conflict. The study above leads the authors to believe that many factors may have led to the slave trade crime's underutilization.

Second, adjudication of foreign proceedings that require behaviour characterizable as slavery and the slave trade has concentrated narrowly on the slavery prong, even when confronted with evidence of the slave trade. Secondly, misinterpretation of the legal structure helps to weaken the slave trade's juridical usefulness. Thirdly, laws of the ad hoc tribunals declined specifically to enumerate or pursue redress for the slave trade as a war crime. Likewise, Article 8 of the Rome Law omits slavery and the slave trade from the list of war crimes. Fourthly, while well intended, the Rome Statute 's Article 7(g) does not implement the customary law prohibition of the slave trade under crimes against humanity, neither as a separate prohibition nor as part of the concept of enslavement. The recognized precursory behaviour of enslavement is left legally bereft as observed in *Ntaganda*. Fifthly, the term 'trafficking of persons' disarrays the distinctions between the slave trade and slavery, hampering their interlinked functionality. Such considerations should be re-examined and discussed. The jurisprudence on the prohibition of slave trade appears reluctant if not illusive, even though improper precursory behaviour to slavery is detectable.[xxxvii] A return to prosecuting the scope of the illegal activity of the slave trade is justified. At the national level, recourse to articles that condemn the slave trade found in constitutions, penal codes and universal jurisdiction clauses is required. The desuetude of the slave trade has the potential to erode state practice and *opinio juris* as well as, thus, corrode the resilience of customary international law. On the international level, the express enumeration, even via amendments, of prohibitions of the slave trade into laws and treaties.

[i] Max Planck, Encyclopedia of Public International Law (MPEPIL), available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1423?prd¼EPIL (visited 5 February 2020).
[ii] Art. 4 UDHR; Art. 8 ICCPR.
[iii] Declaration Relative to the Universal Abolition of the Slave Trade (Congress of Vienna,Act XV) 2 Martens 432 (8 February 1815).
[iv] H.S. Klein, The Atlantic Slave Trade: New Approaches to the Americas (Cambridge University Press, 1999), at 2, 163.
[v] The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT-96-23-T & IT-96-23/1-T, (February 22, 2001).
[vi] The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused), SCSL-04-15-T, (March 2, 2009).
[vii] The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06. (August 14, 2014).
[viii] The Prosecutor v. Milorad Krnojelac, IT-97-25-T, (March 15, 2002).

[ix] The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accussed), SCSL-04-16-T, (June 20, 2007).
[x] The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07 OA 8, (September 25, 2009).
[xi] 1926 Slavery Convention and 1956 Supplementary Slavery Convention, Art.1(1).
[xii] Rome Statute, Art. 7(1)(c).
[xiii] Supra note vii.
[xiv] Middle E. Media Res. Inst., 'Islamic State (ISIS) Releases Pamphlet on Female Slaves', 4December 2014, available online at http://www.memrijttm.org/islamic-state-isis-releasespamphlet-on-female-slaves.html(visited 27 September 2019).
[xv] UN Human Rights Council, 'They Came to Destroy': ISIS Crimes Against theYazidis, UN Doc. A/HRC/32/CRP.2, 15 June 2016, § 55.
[xvi] UNAMI/OHCHR Report, 'A Call for Accountability and Protection: YezidiSurvivors of Atrocities Committed byISIL', August 2016, available online at http://www.ohchr. org/Documents/Countries/IQ/UNAMIReport12Aug2016_en.pdf (visited 27 September 2019).
[xvii] Amnesty International, Escape from Hell: Torture and Sexual Slavery in Islamic State Captivityin Iraq (2014), available online at https://www.amnesty.org/download/Documents/MDE140212014ENGLISH.pdf (visited 27 September 2019), at 13.
[xviii] Supra note v.
[xix] J. Allain, The Slavery Conventions:The Travaux Pre´peratoires of the 1926 League of Nations Convention and the 1956 United NationsConvention (2008), at 78.
[xx] Supplementary Slavery Convention, 1956, at Art. 3(1).
[xxi] H. van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity:Unravelling the Concepts', 13 Chinese Journal of International Law (2014) 297–334, at 303.
[xxii] Art. 8 ICCSt.
[xxiii] Allain, Slavery in International Law: Of Human Exploitation and Trafficking (Martinus Nijhoff, 2013), at 273.
[xxiv] V. Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law', 25 Michigan Journal of International Law (2003–2004) 605–651.
[xxv] Art. 7(2)(g) ICCSt.
[xxvi] Convention to Suppress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 1926, at Art. 1(1).
[xxvii] Art. 7(g) ICCSt.
[xxviii] P. Viseur Sellers, 'Q&A, The Nexus Between Conflict-related Sexual Violence and Human Trafficking for Sexual Exploitation in Times of Armed Conflict During Court Proceedings: An Insider's View', 3 Journal of Trafficking and Human Exploitation (2019) 147–158.
[xxix] P. Viseur Sellers, 'Wartime Female Slavery: Enslavement?' 44 Cornell International Law Journal (2011) 115–143, at 123.
[xxx] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 15 November 2001, 2237 UNTS 319, at Art. 3(a).
[xxxi] N. Siller, '''Modern Slavery'' Does International Law Distinguish between Slavery, Enslavement and Trafficking?' 14 Journal of International Criminal Justice (2016) 405–427, at 417.
[xxxii] A.M. Pesman, Prosecuting Human Trafficking Cases as a Crime Against Humanity? (November 2012) 15 and 16.
[xxxiii] S. Huda Integration of the Human Rights of Women and the Gender Perspective, UN Doc. E/CN.4/2005/ 71, 22 December 2004.
[xxxiv] J. Allain, The Definition of 'Slavery' in General International Law and the Crime of Enslavement Within the Rome Statute (ICC-CPI 2007), at 12.
[xxxv] Supra note xxiii, at 247.
[xxxvi] R. Rastan, 'Complementarity: Contest of Collaboration', in M. Bergsmo (ed.), Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes (TorkelOpsahl Academic EPublisher, FICHL Pub. Ser. No. 7, 2010), at 123.
[xxxvii] Art. 7(g) ICCSt.