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Articles

States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations

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Abstract

A number of rulings by international human rights tribunals, made in the last few years, elucidate the nature of states' obligations with regard to the prohibition on slavery, forced labour and servitude. In particular, these decisions help to clarify the extent to which trafficking in human beings is covered by the prohibition, as well as elaborating the scope of states' positive obligations towards those who have been trafficked or are at risk of being trafficked. The author discusses the significance of these decisions and relates them to earlier rulings of the War Crimes Tribunal for the former Yugoslavia relating to enslavement.

1. Introduction

Trafficking in human beings is frequently stated to be a violation of human rights. The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities identified it as such in 1998.[1] It has been likened to slavery;[2] indeed described as a contemporary form of slavery. However, it is not specifically prohibited in most of the main human rights instruments. This article considers the prohibition of trafficking in light of recent decisions of international tribunals, in particular

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[1] UN Working Group on Contemporary Forms of Slavery, Report on its twenty-third session (E/CN.4/Sub.2/1998/14), stated that 'transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights'. The 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' of the UN High Commissioner for Human Rights (2002) provide (Guideline 1): 'Violations of human rights are both a cause and a consequence of trafficking in persons'; while the 'Miami Declaration of Principles on Human Trafficking' (2005) provides (para 1) that trafficking in human beings 'is a human rights violation that constitutes a contemporary form of slavery'. Most recently, the European Union has described trafficking as 'a gross violation of fundamental rights': Directive 2011/36/EU of the European Parliament and of the Council of 5 Apr 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Preamble, recital (1).

[2] C Rijken, *Trafficking in Persons: Prosecution from a European Perspective* (2003), 74-9.

how these decisions have clarified the obligations of states towards those who have been trafficked or are at risk of it. The article also considers how these tribunals have categorised trafficking within the prohibition of slavery, forced labour and servitude.

Slavery, servitude and forced labour are serious violations of human rights.[3] They are absolutely prohibited in the major human rights instruments and the prohibition is non-derogable. The exact scope of the obligation has been unclear because there have been very few cases alleging violations. However, the concept of slavery appears to have evolved through quite recent developments in human rights law as well as international criminal law; it will be seen that enslavement remains a real and serious crime, with important human rights ramifications, particularly with regard to trafficking in human beings.

We can now find some elucidation of the notion of enslavement as an international crime in the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as well as in the Rome Statute of the International Criminal Court (ICC)[4] but, of course, that is not human rights law. However, several decisions of international tribunals in the last few years have shed some light on the prohibition from a human rights perspective.

These decisions show that, in some places, slavery, or practices akin to slavery including forced labour and servitude, still exist, despite the apparently absolute prohibition. Furthermore, we can now see how the prohibition of enslavement and forced labour has resonance and value in post-communist Europe and beyond. It applies not only to the Auschwitz of World War II but to the bars and brothels of the 21st century.

2. 'Traditional' slavery

Slavery is defined in Article 1 of the Slavery Convention[5] of 1926 thus:

(1) 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.

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

[3] European Convention on Human Rights 1950, art 4, ETS No 5; American Convention on Human Rights 1969, art 6, OAS Treaty Series No 36; African Charter on Human and Peoples' Rights 1981, art 5, 1520 UNTS 363; International Covenant on Civil and Political Rights 1966, art 8, 999 UNTS 171.

[4] 2187 UNTS 3.

[5] 212 UNTS 17.

This definition, which has been recognised as having the status of customary international law and even of *jus cogens*,[6] focuses on the notion of 'ownership', the idea that a person could be bought or sold, and therefore 'owned'. That is not the case. Nevertheless, it is evident that the practice of enslavement subsists even although it is not legally possible to own another human being. Contemporary slavery has been described as 'a relationship in which one person is controlled by another through violence, the threat of violence, or psychological coercion, has lost free will and free movement, is exploited economically, and is paid nothing beyond subsistence'.[7] That may describe some of the conditions in which many people who might be perceived as 'slaves' live, but the legal definition is narrower. The element of ownership or, rather, 'powers attached to the right of ownership', is crucial.[8] This is not nowadays regarded as requiring the 'acquisition' of a person for money or some other value.[9]

Trafficking may amount to enslavement (as is provided in the Statute of the ICC). However, not all trafficked persons will necessarily be slaves. The link between trafficking and slavery, as well as the consequences for states with regard to their human rights obligations, has been considered in several cases before international tribunals (both with regard to human rights and international criminal law) in the last few years. What has become clearer is that the state has a duty under human rights law to *prevent* enslavement, forced labour and servitude perpetrated by private citizens, as well as to protect those at immediate risk. The decisions considered below have both relied to some extent on decisions of the ICTY and it is therefore necessary to consider what that tribunal has had to say on the matter.

3. International criminal law

The ICTY addressed individual responsibility for enslavement in the *Kunarac* case.[10] The Tribunal took note of a variety of pertinent human rights instruments that treat slavery and related practices as human rights violations, as well as the Report of the Working Group on Contemporary Forms of Slavery, which stated that 'transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and

[6] *Prosecutor v Kunarac, Kovac and Vukovic*, Judgment of 22 Feb 2001, Case No IT-96-23-T and 23/1, para 520 (regarding the customary status of the norm); *Case Concerning Barcelona Traction, Light and Power Company Ltd*, ICJ Rep 1970 3, 32 (regarding slavery as *jus cogens*).

[7] K Bales, Z Trodd and AK Williamson, *Modern Slavery: The Secret World of 27 Million People* (2009), 31.

[8] J Allain, *The Slavery Conventions: the Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (2008), 59; AT Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' (2009), 49 VJIL 789, 799-810.

[9] *Kunarac*, above n 6, para 542. See also Gallagher, ibid, 805, citing, albeit with some reservation, the 1953 'Report of the Secretary-General on Slavery, the Slave Trade and Other Forms of Servitude', and arguing: '. . . the existence of slavery does not require a legal right of ownership'.

[10] Above n 6.

constitutes a serious violation of human rights'.[11] Of course, trafficking can take place *within* a state too; however the legal focus in recent years has been more on trafficking as a transnational offence. While there are inherent risks for the traffickers in moving their victims across state frontiers, there are obvious benefits: first, the market for the victims is more lucrative in certain countries and regions; and second, one of the most effective ways to establish and maintain control over victims is to take them outside their own environments so that they are more vulnerable to exploitation, being without access to support. Moreover, transnational trafficking is inherently a matter for international concern and cooperation, unlike that which occurs within the jurisdiction of one state.

The Court in *Kunarac* stated that:

> [I]ndications of enslavement include elements of control and ownership; the restriction or control of a person'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 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*.[12]

In this case, the ICTY was dealing with crimes committed during an armed conflict. To that extent it was dealing more in international humanitarian law than in human rights law. However, there is a clear link. Human rights law continues in force during armed conflict. The prohibition on slavery, servitude and forced labour is non-derogable and the state is bound to ensure that it is given effect. The prosecution of serious violations of humanitarian law as criminal offences does not exclude that the offences may also have been human rights violations. In *Kunarac*, enslavement was prosecuted as a crime against humanity. This is significant because crimes against humanity can be perpetrated when there is no armed conflict taking place at all. It is misleading - in fact wildly inaccurate - to think of enslavement occurring only during armed conflict; although there is no doubt that the kind of conditions of living created by armed conflict and its aftermath – the poverty, chaos and displacement – mean that the most vulnerable, women and children, are at increased risk of being trafficked or enslaved. Nevertheless, enslavement and related practices, including trafficking, can happen at any time and whereas, it is suggested, it is probably better from the victim's perspective that it be treated as a human rights issue (because

[11] ibid, para 536, n 1323.
[12] ibid, para 542 (emphasis added).

their protection needs are more likely to be addressed), we should not underestimate the significance of treating it as a crime against humanity:[13] this at least underlines the gravity of the offence as well as establishing particular criminal justice obligations. There are, however, inherent limitations in focussing on crimes against humanity. The most important is that, to be a crime against humanity, the criminal act must be committed 'as part of a widespread or systematic attack directed against any civilian population'.[14] While some acts of trafficking may be covered by this definition, a great many clearly will not. The true significance of classifying trafficking as a crime against humanity lies more in emphasising the gravity of the offence than in the practical matter of successfully prosecuting traffickers.

The ICTY has more recently held that enslavement can also be a war crime. In *Prosecutor v Krnojelac*, the Tribunal found that enslavement contained the same elements both as a war crime and as a crime against humanity.[15] The Statute of the ICC also sheds light on the offence. Although enslavement is not recognised as a war crime in the Statute, it is suggested that the act could qualify as an outrage upon personal dignity, which the Statute does consider a war crime.[16] Furthermore, enslavement is recognised as a crime against humanity: article 7(2)(c) provides that enslavement means '. . . the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular of women and children'.

While it is true that these cases dealt with individual criminal responsibility for serious violations of international humanitarian law rather than state responsibility for violations of human rights, they are nevertheless important for the analysis of the human rights dimension because they clarify what is meant by contemporary slavery. Moreover, the decisions of the ICTY have been explicitly taken into account by international human rights tribunals in assessing allegations of slavery and related practices.[17]

4. Human rights law

Slavery, servitude and forced labour are expressly prohibited in many human rights instruments.[18] No derogation is permitted from that prohibition:

[13] See T Obokata, 'Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System' (2005) 54 ICLQ 445; R Piotrowicz, 'Preempting the Protocol: Protecting the Victims and Punishing the Perpetrators of People Trafficking', conference paper, European Law Students Association conference, Konstanz, Nov 2001, 19-26 (text available from the author).

[14] Art 7, ICC Statute.

[15] Judgment of 15 Mar 2002, Case No IT-97-25-T, para 356.

[16] Art 8(2)(b)(xxi) and (c)(ii). See G Werle, *Principles of International Criminal Law* (2nd edn, 2009), para 1089.

[17] *Hadijatou Mani Koraou v The Republic of Niger*, Economic Community of West African States Community Court of Justice, ECW/CCJ/JUD/06/08, Judgment of 27 Oct 2008 (unofficial translation), para 77; *Rantsev v Cyprus and Russia*, European Court of Human Rights, Application No 25965/04, Judgment of 7 Jan 2010, para 280.

[18] See above n 3.

there can *never* be a legitimate justification for these practices. The wording varies but the basic prohibition is the same. The ECHR50 provides (article 4): '[N]o one shall be held in slavery or servitude' (paragraph 1) and that '[n]o one shall be required to perform forced or compulsory labour' (paragraph 2). The ICCPR66 also bans slavery, servitude and forced labour, while expressly providing that 'slavery and the slave trade in all their forms shall be prohibited' (article 8). The ACHR69 forbids the same practices, and (interestingly for an instrument adopted in 1969) specifically prohibits 'traffic in women' (article 6), while the ACHR81 is a bit different in that it treats slavery as a form of degradation along with torture. Article 5 stipulates:

> 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.

Apart from the African Charter, each instrument recognises that some forms of compulsory labour, such as military service, certain work required in the course of detention or work that forms part of normal civic obligations, will not constitute breaches.

Notably, these obligations have a positive dimension too, a requirement for states to act to ensure fair treatment for workers. Thus the ICESCR66 stipulates, at article 7: '[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work',[19] including fair remuneration, safe and healthy working conditions, as well as rest, leisure and reasonable working hours. This does not mean only those employed directly by the state: 'everyone' is everyone, alien or citizen, whether working lawfully or otherwise.

There have been very few cases alleging state breach of the prohibition. This does not necessarily mean that states have never been in breach; nor that slavery and forced labour, in some form or another, do not exist. The crucial point is that most forms of enslavement are perpetrated by individuals. As such, they are private criminal enterprises (trafficking is typical of this). In that scenario, in the absence of some form of state involvement or complicity, it becomes problematic to argue that the state is in some way directly responsible for the undoubtedly egregious practices to which victims are subjected. This is key to understanding the issue. In the case of slavery and related practices, we are dealing more with the state's responsibility to regulate, and prevent, the actions of others, including criminals, failure in which will lead the state to be in breach of its human rights obligations.

[19] 999 UNTS 3.

The meaning and scope of article 4 of ECHR50 were considered by the European Court of Human Rights in the *Siliadin* case,[20] at the time the only case in which the court had been required to address treatment akin to trafficking. The applicant alleged a violation of article 4 because of the forced domestic labour she was required to perform for several years.[21] After a neighbour reported what was going on, the couple for whom she worked were prosecuted and convicted of wrongfully obtaining unpaid or insufficiently paid services from a vulnerable or dependent person and for subjecting that person to working or living conditions incompatible with human dignity, both breaches of the French Criminal Code. The accused were acquitted on appeal.[22] The case was subsequently referred to the Versailles Court of Appeal, which found the accused guilty of forcing the applicant to work unpaid, but did not find that her working and living conditions were incompatible with human dignity.[23]

The applicant was not complaining that France was directly responsible for a breach of article 4. As in trafficking cases, the acts complained of were perpetrated by private individuals. The complaint was that France needed to do more than simply refrain from breaches by state agents, that it had a positive obligation to avoid breaches of article 4. This the court accepted:

> . . . the Court considers that limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that States have positive obligations, in the same way as under Article 3, for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice . . .[24]

Full compliance with article 4 therefore requires positive acts by the state to discourage and penalise slavery, servitude and forced labour. The notion

[20] *Siliadin v France*, Chamber Judgment, European Court of Human Rights, Application No 73316/01, 26 Oct 2005. See also H Cullen, '*Siliadin v France*: Positive Obligations under Article 4 of the European Convention on Human Rights' (2006) 6 HRLR 585.

[21] The applicant, a Togolese citizen, arrived in France in 1994, aged fifteen. She was accompanied by a French citizen who had undertaken to regularise her immigration status and organise her education. The applicant was supposed to do housework until she had earned enough to repay the cost of her flight to France. Her passport was confiscated and she became effectively an unpaid servant. After several months she was 'lent' to a couple to assist with household tasks. She was obliged to work very long hours with little time off. She slept on a mattress on the floor of a room she shared with the couple's two young children. She was not paid, but was occasionally given small amounts of cash amounting to no more than pocket money. This situation lasted from Oct 1994 to July 1998, apart from a few months when she escaped and worked for another person for a fair salary. She then returned to the couple on the orders of her uncle. She did not attend school and her immigration status was not regularised.

[22] Para 40.

[23] Para 44.

[24] Para 89.

of positive obligations arising for states under the ECHR is well recognised.[25] In *Marckx v Belgium*, concerning the right to respect for family life (article 8), the court found that Article 8 'does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life',[26] such as, in that particular case, equal legal status between legitimate and illegitimate children. Furthermore, such positive obligations may extend to protect the individual against infringement of their interests by other private individuals, although there are limits on how much can reasonably be expected of the state.[27] The significance of this with regard to trafficking is obvious, and the principle was applied in *Rantsev*, as shall be seen. While the precise rationale for the development of positive obligations may be unclear,[28] what does seem clear enough, in the case of article 4 at least, is that the court considered that it was necessary to make the prohibition on slavery, servitude and forced labour more effective.

As to the alleged breach of article 4, the applicant argued that her treatment was analogous to slavery.[29] Furthermore, she argued that the French penal law in force at the time 'had not afforded her adequate protection from servitude or from forced or compulsory labour in their contemporary forms, which were contrary to Article 4'.[30] The fact that she had been awarded compensation as a consequence of criminal proceedings against her exploiters was not, in the applicant's view, sufficient 'to absolve the State of its obligation to establish a criminal-law machinery which penalised

[25] DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (1995), 19-22. At the time, the authors wrote that '[t]he full extent to which the Convention places states under positive obligations to protect individuals against infringements of their rights by other private persons has yet to be established' (at 21). That remains the case; the court in *Rantsev* set out certain positive obligations arising under art 4. Importantly, it also made clear that there are limits to what can be expected of the state in terms of positive obligations. See also, more recently, A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

[26] App no 6833/74, Judgment of 13 June 1979, Series A no 31, 7, para 31 (1979).

[27] *Osman v United Kingdom*, European Court of Human Rights, Judgment of 28 Oct 1998 (87/1997/871/1083). The case concerned art 2 (the right to life). While the court accepted that 'Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another' (para 115), 'bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible burden on the authorities' (para 116).

[28] Cullen, above n 20, 589-90.

[29] Para 91 ff. Trafficking for the purpose of domestic servitude has been described as 'an invisible form of exploitation which is extremely difficult to detect due to the hidden nature of the work provided. The particularity of domestic work is that it takes place out of sight in private households, thereby isolating the workers', Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings (Organization for Security and Co-operation in Europe), *Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude* (2010) (Main author: G Vaz Cabral), 10.

[30] Para 102.

effectively those guilty of such conduct and deterred others'.[31] In other words, if the applicant's submission were accepted, the state's obligation under article 4 extended to preventing forced labour and analogous practices not only by the adoption of legislation that criminalised them but also through providing for sufficiently serious punishments. Only such measures could ensure that the state met its obligations under article 4. This the court accepted:

> . . . in accordance with contemporary norms and trends in this field, the member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation.[32]

The court found that the applicant had been subjected to 'forced labour within the meaning of Article 4'[33] because she had been threatened by her 'employers' with arrest by the police owing to her unregulated immigration status and given no choice about doing the work. While article 4 does not explain what precisely is meant by 'forced or compulsory labour', the court referred for clarification to ILO Convention No 29 concerning Forced or Compulsory Labour,[34] article 2(1) of which states that such labour means 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. However, the court held that she had not been held in slavery because the people for whom she was forced to work did not exercise a genuine right of legal ownership over her.[35]

This last finding on slavery is narrow and, it is suggested, wrong. In fact it might be argued that, according to the court's logic, no one could ever be held in slavery since slavery, in the sense of exercising rights of ownership, has been abolished: if it is not legally possible to keep a 'slave', because one cannot own another person, then no one can ever be enslaved. It is suggested here that enslavement may occur without actual legal ownership of the enslaved person; that is clearly what emerges from the other cases discussed here.

Despite its negative finding with regard to slavery, the court did hold that the applicant had been required to perform forced labour[36] and held in servitude, in violation of article 4.[37] Servitude was defined as 'a particularly serious form of denial of freedom', including 'the obligation to perform certain services for others' and 'the obligation of the "serf" to live on another

[31] ibid.
[32] Para 112.
[33] Para 120.
[34] Para 116.
[35] Para 122.
[36] Para 120.
[37] Para 129.

person's property and the impossibility of altering his condition'.[38] The applicant's circumstances qualified as servitude because she was denied freedom of movement and was required to remain nearly always at the house where she worked, she had no resources of her own and she was required to perform forced labour. As for France's obligation: this was to have in force criminal-law legislation to afford the applicant 'practical and effective protection against the actions of which she was a victim',[39] which it had failed to do.

The *Siliadin* case did not involve allegations of trafficking, yet it is arguable that the applicant had been trafficked. Trafficking is defined in the Palermo Protocol to the UN Convention on Transnational Organised Crime 2000.[40] Article 3(a) provides:

> 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Furthermore, in the case of a minor, meaning in this case anyone under the age of eighteen – and the applicant was a minor at the time she was taken to France – there is no need to establish that any of the methods listed in article 3(a) have been used.[41] One can therefore say that the applicant had been trafficked in the sense of the Palermo Protocol, which is now a very widely adopted instrument. She was taken from Togo to France under false pretences to be exploited there. She was deceived about what her life would be like in France.

The case is important for clarifying the meaning of forced or compulsory labour and servitude under article 4 of the ECHR50. It shows how the state may be responsible for a violation of that provision although the state has not itself made the victim carry out the forced labour nor kept her in servitude. Nevertheless, the decision is disappointing for its reasoning on slavery and failure to make the connection with trafficking. However, two subsequent decisions have addressed the issue of how the acts of enslavement, and trafficking, may cause a state to be in breach of its human rights obligations. In doing so they have clarified what the state must do so as to avoid being in breach of the prohibition of enslavement and related practices.

In 2008, the ECOWAS (Economic Community of West African States) Community Court of Justice found Niger responsible for a violation of the

[38] Para 123.
[39] Para 148.
[40] Entered into force 25 Dec 2003; 147 parties (2 Dec 2011).
[41] Art 3(c).

rights of one of its citizens by allowing her to be held in slavery: 'recognising the slave status of Mrs Hadijatou Mani Koraou without denouncing this situation is a form of acceptance, or at least, tolerance of this crime or offence'.[42] In that case the claimant, at the time aged twelve, had effectively been sold in 1996 into the ownership of a tribal chief, 34 years her elder, with whom she was obliged to live for several years, with whom she had four children, and for whom she was required to perform domestic duties. This seems to have been in accordance with a then-current practice in Niger, called *Wahiya*. On 18 August 2005 Mrs Mani was given a 'liberation certificate from slavery' by El Hadj Souleymane Naroua, the tribal chief to whom she had been sold, signed by him, Mrs Mani and the chief of the village. This purported to 'free' her. However she was denied permission to leave the house of her former master on the ground that she was still his wife. She, nevertheless, left, with the intention never to return.

On 14 December 2007, Mrs Mani filed a complaint before the ECOWAS Community Court of Justice, alleging breach by Niger of several provisions of the ACHR81, including article 5, the prohibition of slavery. Mrs Mani was successful and the case is important for its (admittedly limited) reasoning on slavery, as well as for what it tells us about state responsibility under human rights law for what are, essentially, private acts. It will be seen that, in this respect, the court's reasoning was very similar to that of the European Court of Human Rights in Siliadin. The court found that Mrs Mani 'was subject for nearly a decade to psychological pressure characterised by submission, sexual exploitation, hard labour in the house and the fields, physical violence, insults, humiliation and the permanent control of her movements by her purchaser'.[43] Furthermore the document that purported to free her was entitled 'liberation certificate (of slave)'. The court referred to the statement in the *Kunarac* case (Appeal),[44] that slavery did not mean just the exercise of powers attached to the right of ownership typical of the notion of slavery; it also depends, quoting from paragraph 119 of the Appeal ruling (incorrectly stated to have been made on 12 June 2000; it was in fact 12 June 2002), 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.'[45]

[42] Above n 17.
[43] Para 76.
[44] *Prosecutor v Kunarac, Kovac and Vukovic* (Appeals Chamber), Judgment of 12 June 2002, Case No IT-96-23/-23/1-A.
[45] Para 77.

Many, if not all, of these indicia were present here. In the view of the court, El Hadj Souleymane Naroua clearly intended to exercise the powers attached to ownership, even after he 'freed' Mrs Mani.[46]

The court then addressed certain decisions of the Nigerien Court of First Instance. It found that the national court had acted incorrectly in failing to denounce the applicant's slave status as a violation of Nigerien criminal law. It had also erred in stating that 'the marriage of a free man with a slave woman is lawful, as long as he cannot afford to marry a free woman and if he fears to fall into fornication . . .'. This amounted to acceptance or, at least, tolerance of the crime of slavery.[47] Furthermore, the applicant had a right to be protected against slavery by the relevant Nigerien authorities.[48]

In acting thus, the court was assessing Niger's responsibility for the fact that Mrs Mani was forced to live for nearly ten years in what it found amounted to slavery. The court did not assert that Niger itself had enslaved her; rather, that it was responsible because it had breached an obligation to protect her from slavery by allowing it to happen, as well as by failing to address the matter appropriately in its Court of First Instance. Crucially, the court found:

> . . . the defendant becomes responsible under international law as well as national law for any form of human rights violations of the applicant founded on slavery *because of its tolerance, passivity, inaction and abstention* with regard to this practice.[49]

This is an important statement, not only for the condemnation of slavery, but also for these comments on the extent of state responsibility for the protection of human rights. It was nowhere suggested that Niger itself, as a state, had enslaved Mrs Mani; that was done by the man to whom she was sold (and presumably, by the person who sold her, although that does not appear to have been considered by the court). Niger's responsibility arose for allowing Mrs Mani to be bought, as well as for the ill treatment to which she was subsequently subjected, and for failing to do anything about it. Niger was furthermore responsible for even supporting what happened to Mrs Mani to some extent through the decision of the Court of First Instance.

The question arises: did her buyer breach Mrs Mani's human rights by enslaving her? For sure he breached the criminal law of Niger. On one level, one might argue that the act of enslavement breached Mrs Mani's human rights. However, the obligation undertaken by Niger was to prevent slavery and to take action against it. The relevant provision of the ACHR81

[46] Para80.
[47] Para 84.
[48] Para 85.
[49] ibid (emphasis added).

is fundamentally the same as in other human rights instruments. Article 1 provides:

> The . . . parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

In other words, the human rights obligation lies with the state; not the individual. Acts by individuals, such as enslavement, only breach the victim's human rights in that the state has failed to prevent it or failed to take appropriate action against it. As the court put it, in its findings on the merits (point 2): 'Mrs Hadijatou Mani Koraou was victim of slavery and . . . the Republic of Niger is responsible because of its administrative and judicial authorities' inaction'. A similar point has been made by the United Nations Human Rights Committee, in its General Comment No.31:

> The . . . obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law . . . However the positive obligations on States Parties to ensure Covenant rights [ie, rights under the ICCPR6] will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.[50]

The crucial issue is the extent to which the prohibition of enslavement and related practices is 'amenable to application between private persons or entities'. In this case, the court clearly decided that it was very amenable indeed.

The significance of this case lies in the clear recognition that slavery still exists, and that states may be accountable for it under human rights law when it happens, even if it is a private activity. It is also significant because it does not address slavery, or forced labour for that matter, during armed conflicts but during peace time. The ICTY case law has addressed slavery or slave-like practices during the extreme circumstances of armed conflict and occupation of territory by another country, or by the other side in a civil conflict. In an armed conflict, the enslaved person is victimised probably because of their nationality or because they belong to an identifiable group. In peace time, it may be that someone is more vulnerable to enslavement because of their membership of a particular national, religious or social group; but it may also happen because of other factors personal to that person's situation, factors which are quite unamenable to change by the unempowered victim.

[50] UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004.

Soon after this case, the prohibition on slavery, servitude and forced labour was subjected to careful scrutiny by the European Court of Human Rights in the *Rantsev* case.[51] In January 2010, the court ruled on a case involving a Russian woman, Oxana Rantseva, who was recruited to work as an 'artiste' in Cyprus. Ms Rantseva died in suspicious circumstances soon after her arrival in Cyprus in March 2001. Following and prompted by her death, the Cypriot Ombudsman published a report on the regime regarding entry and employment of alien women as artistes in entertainment venues in Cyprus.[52] That report made it clear that so-called artistes were actually working as prostitutes in Cyprus.[53] The important point is that the Cypriot state was aware of this, and aware of the risks to the women involved.

Ms Rantseva died after falling from a flat belonging to another employee of the person whose employment she had left soon after her arrival in Cyprus. She had been released into the custody of her employer by the police and he had taken her to the flat. Her father argued that there had been a failure by both Russia and Cyprus to protect Ms Rantseva from the risk of trafficking and exploitation, contrary to article 4 of the ECHR50.

The court reviewed extensively the legal instruments, including some soft law, pertinent to slavery and trafficking. It also referred to a unilateral declaration made by Cyprus to the court on 10 April 2009.[54] The declaration is remarkable for the wide range of breaches of the ECHR50 conceded by Cyprus: article 2 (violation of a positive obligation towards the applicant and his daughter to take preventive measures to protect Ms Rantseva from the criminal acts of another individual); article 3 (violation of a procedural obligation through failure to carry out an adequate and effective investigation as to whether Ms Rantseva was subjected to inhuman or degrading treatment prior to her death); article 5(1) (action of the police in handing Ms Rantseva over to her former employer instead of simply releasing her from custody). These are very serious failures. Even more important is the admission by Cyprus that:

> it violated its positive obligations towards the applicant and his daughter arising out of Article 4 of the Convention in that it did not take any measures to ascertain whether the applicant's daughter had been a victim of trafficking in human beings and/or been subjected to sexual or any other kind of exploitation.[55]

Here we have a clear statement by Cyprus regarding its interpretation of the extent of its obligations under article 4: having Ms Rantseva in its custody at the police station, it should have taken steps to find out to what

[51] Above n 17.
[52] ibid, Para 80.
[53] Para 83.
[54] Para 187.
[55] ibid (para (c) of the declaration).

risks she might be exposed in the event of her release – and, should it have found that she faced risks, then certain consequences flowed.

The court could have stopped the case there and then, under article 37(1), because Cyprus had acknowledged its failure of protection with regard to Ms Rantseva. However, it decided that there was a need to look further:

> [a]lthough the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention states.[56]

The court made it clear that the allegations of people trafficking were serious, and that there was awareness of the need to take steps to deal with trafficking. The problem in Cyprus was especially acute at the time, and sexual exploitation of cabaret artistes gave rise to particular concern.[57] Furthermore, there was no case law arising out of article 4 so far as trafficking was concerned, and no ruling on the extent to which, if at all, article 4 required states to take positive steps to protect potential victims of trafficking outside the framework of criminal investigations and prosecutions.[58] This is significant because it shows the court contemplating the possibility that merely taking steps in accordance with its criminal law will not necessarily be enough for a state to satisfy the protection requirements of article 4. Accordingly, the court chose to consider the allegations made against Cyprus more fully and this is reflected in its reasoning with regard to the alleged breaches of article 4.

The alleged violation of article 4 was that the Russian and Cypriot authorities had failed to protect Ms Rantseva from being trafficked and had failed to conduct an effective investigation into the circumstances of her arrival in Cyprus and the nature of her employment there.[59] The court decided to assess whether trafficking could fall within the article 4 prohibition without considering specifically whether the practice was slavery, servitude or forced labour.[60] While not expressly describing trafficking as slavery, the court stressed the clear links between the two practices:

[56] Para 197.
[57] Para 199.
[58] Para 200.
[59] Para 253.
[60] Para 282: '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 . . .'.

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 . . . It involves the use of violence and threats against victims, who live and work under poor conditions.[61]

In other words, while one cannot legally own another person, the contemporary reality is that powers tantamount to ownership are exercised by traffickers. The court here came close to treating trafficking as a form of slavery. The more general finding, that trafficking may breach article 4 (without going any further), might *seem* better from a victim-protection perspective simply because it is wider: there can be a breach of article 4 without the need to establish that there has been slavery, forced labour or servitude specifically. Nevertheless, it would have been better had the court indicated to which practice, in the particular case, the victim had been subjected; this might have provided clearer guidance on the precise legal nature of trafficking from the perspective of the rights of the victims. The court basically avoided the issue by declining to say precisely how trafficking of human beings is a violation of article 4. That shows weakness and, perhaps, intellectual incoherence. On the other hand, it creates scope to argue that trafficking violates article 4 without the need to explain exactly how. This does not promote legal certainty and it probably does not help victims of trafficking either: is the court saying that *all* cases of trafficking potentially violate article 4 (depending on the state's role)?

What then did the *Rantsev* judgment actually deliver? Article 4 obliges states to prosecute and penalise effectively anyone who has engaged in acts aimed at holding another in slavery, servitude or forced labour. In *Rantsev* the court went further. In particular, states must now have in place national legislation:

. . . 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.[62]

The obligation is no longer confined to the criminal law, as required by *Siliadin*. It addresses victims and potential victims (who may themselves have already been trafficked). States cannot turn a blind eye to businesses that act as fronts for trafficking; furthermore, they must look at their own immigration rules to see whether they are in line with the protective function of article 4 – for instance, in the *Rantsev* case, one problem was that

[61] Para 281.
[62] Para 284.

the Cypriot visa regime in force at the time made it relatively easy for the employer to control and exploit the foreign worker. This weakness had to be confronted and remedied by Cyprus.

Furthermore, in some situations the state might have to take measures (ie, beyond the legislative) directly aimed at protecting a victim or potential victim. This would occur where:

> the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified victim had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.[63]

The court is saying here that the obligation under article 4 can go well beyond the general one to have effective criminal laws in place, to actually preventing potential breaches of the criminal law where the state is aware of a real and imminent risk to the individual. This might mean securing the immediate physical safety of the trafficked person (for instance, by arranging a place in a recognised shelter). In the opinion of the European Commission's Group of Experts on Trafficking in Human Beings, such practical measures should include:

- 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.[64]

It is true that the court did not outline what measures were required in such detail. However, these measures can be justified in terms of aiding recovery of victims and providing effective short-term protection from the risk of being trafficked in future.

While such measures may suffice to fulfill the immediate obligation, regard will need to be had to the longer-term scenario too. The duty may also entail either the facilitation of the safe repatriation of the individual or possible assessment of the need for short or longer-term international protection. In fact, the possible international protection entitlements of

[63] Para 286.

[64] Opinion No 6/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission, 22 June 2010, para 9.

those at risk of being trafficked are well recognised, whether through refugee status or, more likely, subsidiary/complementary protection.[65]

So, article 4 includes an obligation, in urgent cases, to take operational measures to secure the safety of a person at risk, but, as noted previously, this is not an absolute obligation. The court recognised that there are limits to what the state can actually do because of other demands on its resources, and the obligation had to be interpreted in a way that did not impose 'an impossible or disproportionate burden on the authorities'.[66] This statement repeated the limitation on the state's obligation recognised by the court in *Osman v United Kingdom*.[67] It therefore remains to be seen what exactly this might mean in individual cases. What might be an impossible or disproportionate burden for one state will not necessarily be so for another. However, it is difficult to envisage a state being able to rely on this limitation of its obligation to justify failure to offer effective practical assistance to someone who is clearly at risk.

Article 4 was also found by the court to include a procedural obligation to investigate situations of *potential* trafficking. This existed independently of any complaint: as soon as the state authorities were aware of a situation that might lead to someone being trafficked they had to initiate an investigation which would be capable of leading to the identification and punishment of the persons responsible. Of course, there could be no guarantee of successful prosecution: the point is that the state should have in place systems that would enable it to mount a credible investigation and, if justified, prosecution. Furthermore, while a requirement of promptness and reasonable expedition was always implicit, that became a requirement of urgent action where there was a possibility to remove an individual from a harmful situation.[68]

Finally, the court outlined the duty of states, also under article 4, not only to conduct investigations into trafficking activities on their own territories but also, in light of the transnational nature of the offence, 'in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories'.[69] What is particularly interesting is that, in

[65] 'Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of refugees to victims of trafficking and persons at risk of being trafficked', HCR/GIP/06/07; R Piotrowicz, 'The UNHCR's Guidelines on Human Trafficking' (2008) 20 IJRL 242. The protection obligation is noted recently by the Group of Experts on Trafficking in Human Beings set up by the European Commission, Opinion No 4/2009 of 16 June 2009, 'On a possible revision of Council Directive 2004/81/EC of 29 Apr 2004 on the residence permit issues to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities', para 20.

[66] Para 287.

[67] Above n 27.

[68] Para 288.

[69] Para 289.

making this assessment, the court did not construe article 4 in isolation: it took account of the Council of Europe Convention on Action against Trafficking in Human Beings (2005) and its requirement that states establish jurisdiction over trafficking offences committed on their territory, and explicitly stated this to be a part of the duty under article 4.[70] Accordingly, even states that have chosen not to become bound by the anti-trafficking convention may to some extent be bound by it indirectly as a consequence of the court's interpretation.

As for Ms Rantseva, the court found several breaches by Cyprus and Russia. Cyprus violated article 4 in that its visa regime at the time failed to afford her practical and effective protection against exploitation: a failure of its positive obligation to put in place an appropriate legislative and administrative framework.[71] Cyprus had also breached its positive duty to take protective measures with regard to Ms Rantseva, through its failure to make immediate enquiries by its police as to whether she had been trafficked, through its failure to release her unconditionally but, rather, transferring her to the custody of her former employer, and through the failure to take measures to protect her. Although it was not established for sure that Ms Rantseva had actually been trafficked, the fact that the circumstances of the case indicated that she *might* have been trafficked was sufficient to establish an obligation of protection upon Cyprus. Accordingly Cyprus had breached article 4.[72] At no point was it suggested that Cyprus was actively involved in trafficking; rather, state responsibility arose because of its tolerance of the practice, including its failure to take sufficient measures to address it.

Cyprus was therefore in breach as the destination state but what of Russia, the source state? There can be little doubt, as the court stressed, that effective action against trafficking cannot be undertaken by destination states alone. Source and transit states must also play a role. In this context, it should be recalled that, under the now very widely accepted definition of trafficking contained in article 3(a) of the Palermo Protocol, all actors engaged in the trafficking process, from recruitment through transfer, transportation and harbouring to ultimate exploitation, are in fact traffickers. Source and destination states cannot therefore turn a blind eye to this yet hope to remain within the law. As the court made clear, source states must also take action, within their means, to combat trafficking. On the other hand, source states must be careful to avoid unlawful curbs on the undisputed right to leave one's own state: there is a balance to be struck here.

[70] Para 289.
[71] Para 293.
[72] Para 298.

The court found that Russia had an obligation to put in place an appropriate legislative and administrative framework, like Cyprus, but that it – at least on the facts of the instant case – had done enough to comply.[73] Furthermore, Russia had, as a source state, met its positive obligation to take protective measures with regard to its nationals by warning them of the general risks of trafficking. However it left open the possibility that Russia – again, as a source state – might have had to do more in particular cases in the event that it had a credible suspicion of a real and immediate risk to a particular individual.[74] Russia did not emerge with completely clean hands. It was found to have violated its procedural obligation to investigate potential trafficking because of its failure to investigate how Ms Rantseva had been recruited in the first place.[75]

It cannot be stressed strongly enough, as the court said in a subsequent decision concerning alleged violations of article 3 of the convention, that the measures adopted by states to meet their obligations must be genuinely effective if they are to comply:

> . . . the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where . . . reliable sources have reported practices resorted to *or tolerated by* the authorities which are manifestly contrary to the principles of the Convention.[76]

5. Conclusion

The *Rantsev* decision is the third decision of international human rights tribunals in five years to address human rights complaints relating to trafficking and slavery. Each decision acknowledged and referred to the case law of the ICTY with regard to prosecutions for enslavement. Although the decisions of the ICTY are not binding on other tribunals they have clearly had an impact. In the first place, they have made it clear that, even though slavery is banned, it can, and does, exist. Moreover, the courts have accepted that there are clear linkages between slavery and trafficking in human beings. Slavery is considered to exist even although there is no legal right to own another person, which was a requirement in the past, because in reality traffickers and others are able to exercise powers tantamount to ownership.

The *Rantsev* decision goes significantly further than the earlier case, *Siliadin*, in setting out the procedural and substantive obligations of all involved states – not only the destination state – in addressing trafficking of

[73] Para 303.
[74] Para 305.
[75] Para 308.
[76] *MSS v Belgium and Greece*, Application No 30696/09, 21 Jan 2011, para 353 (emphasis added).

human beings. While it remains the case that trafficking of human beings is a criminal act and not, as such, a violation of human rights, the response of the state (or the failure of response) may amount to a violation of its human rights obligations because the state has duties under the ECHR50, not only with regard to the way it directly conducts its affairs – that is, through the acts of its agents – but also indirectly, with regard to the measures it takes to regulate criminal acts with regard to trafficking, to punish the perpetrators and to assist victims and potential victims.

Although the link between trafficking and slavery has been clearly acknowledged by the European Court of Human Rights, that court has shied away from stating explicitly that trafficking amounts to enslavement. Nevertheless, the ruling supports the notion – recognised under international criminal law – that enslavement can still take place in the 21st century, and that it does not require actual ownership of another human being.