# CASE NOTES

## R v TANG*

## CLARIFYING THE DEFINITION OF 'SLAVERY' IN INTERNATIONAL LAW



### I INTRODUCTION

The 21st century has witnessed a renaissance of court cases dealing with slavery. In the wake of the 2000 United Nations *Palermo Protocol*[1] and the 2005 *Council of Europe Trafficking Convention*,[2] both of which establish 'slavery' as a type of exploitation to be suppressed; and the coming into force of the 1998 *Rome Statute of the International Criminal Court* in 2002, with jurisdiction over the crime against humanity of enslavement,[3] there have been three noteworthy decisions that shed light on the term 'slavery' in international law. Beyond the 2002 appeals decision in the *Kunarac* case before the International Criminal Tribunal for the former Yugoslavia[4] and the 2005 *Siliadin v France* decision before the European Court of Human Rights,[5] the High Court of Australia in its August 2008 case, *R v Tang*,[6] brought much depth of understanding to the parameters of what constitutes 'slavery' both in the Australian context, but also in international law.

The decision by the High Court is welcome, as the ICTY and the European Court of Human Rights come to diverging conclusions as to what constitutes 'slavery' in law. For the European Court, the 1926 *Slavery Convention* definition, which reads '[s]lavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are

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* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) ('*Tang*').

1 *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55th sess, 62nd plen mtg, Annex II (*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*), Agenda Item 105, UN Doc A/Res/55/25 (15 November 2000) art 3(a) ('*Palermo Protocol*').

2 Council of Europe, *Convention on Action against Trafficking in Human Beings*, opened for signature 16 May 2005, CETS 197 (entered into force 1 February 2008) art 4(a) ('*Council of Europe Trafficking Convention*').

3 Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) arts 7(1)(c), 7(2)(c) ('*Rome Statute*').

4 *Prosecutor v Kunarac* (Appeals Chamber) Case No IT-96-23 and IT-96-23/1-A (12 June 2002) (Judgment) ('*Kunarac*').

5 *Siliadin v France* (2005) VII Eur Court HR 333 ('*Siliadin*').

6 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008).

exercised',[7] is consistent with 'the "classic" meaning of slavery as it was practiced for centuries'.[8] Accordingly, the Court failed, in the *Siliadin* case, to find that the victim 'was held in slavery in the proper sense, in other words that [the perpetrators] exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object"'.[9] However, the Court did find France in violation of art 4 of the *European Convention of Human Rights*, but for lesser types of human exploitation, those of forced labour and of servitude.[10]

By contrast, the Appeals Chamber of the ICTY observed that:

> the law does not know of a 'right of ownership over a person'. Article 1(1) of the 1926 Slavery Convention speaks more guardedly 'of a person over whom any or all of the powers attaching to the right of ownership are exercised.' That language is to be preferred.[11]

The Appeals Chamber went on to say that in the case of contemporary forms of slavery,

> the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree.[12]

With this conflicting case law in mind, the High Court provided a thorough analysis of the definition of slavery and, unlike the European Court of Human Rights, found that the 1926 definition includes both *de jure* and *de facto* slavery. Yet, the High Court did not go as far as the ICTY in accepting that *de facto* slavery includes elements that do not manifest powers normally associated with a right of ownership.

## II FACTS

Wei Tang, the respondent before the High Court, was originally tried in the County Court of Victoria, along with another accused in April 2005. The jury in that case found the co-defendant not guilty but could not reach a verdict where Tang was concerned. Having been retried on 3 June 2006, Tang was found guilty on five counts of possessing slaves and five counts of using slaves in relation to five women of Thai nationality used as sex workers in a brothel in 2002 and 2003. The women, who had worked in the sex industry in Thailand, had come to Australia voluntarily to work as sex workers. They were escorted during their flight and upon arrival were 'treated as being "owned" by those who procured [their] passage', with a sum of AU$20 000 having been used to 'purchase' each

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7 *Slavery Convention*, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927).

8 *Siliadin* (2005) VII Eur Court HR 333, [122].

9 Ibid.

10 Ibid [149].

11 *Kunarac* (Appeals Chamber) Case No IT-96-23 and IT-96-23/1-A (12 June 2002) (Judgment) [118].

12 Ibid [117].

woman.[13] The amount which the women were to pay back was set at $45 000 (this included the purchase price of $20 000, plus airfare and living expenses while working off the debt); this was to be achieved by working six days a week and reducing their debt by $50 for each customer. When the brothel, Club 417, in Fitzroy, a suburb of Melbourne, was raided in May 2003, two of the women had worked off their debt but remained as sex workers. The High Court summarises the facts thus:

> each complainant was to work in the respondent's brothel ... serving up to 900 customers over a period of four to six months. The complainants earned nothing in cash while under contract except that, by working on the seventh, 'free', day each week, they could keep the $50 per customer that would, during the rest of the week, go to offset their contract debts.[14]

The trial judge noted that the women were vulnerable upon arriving in Australia, spoke no English, had little to no money, knew nobody and were not aware of either the terms of their debt or their expectant living conditions. They were required to keep hidden to avoid the immigration authorities and their passports and return tickets were kept by Wei Tang. The High Court, noting the trial judge's findings, stated that the five women 'were well-provisioned, fed, and provided for' and 'were not kept under lock and key';[15] though the trial judge noted that they were 'effectively restricted to the premises'.[16] For the women who had paid off their debt, the restrictions were lifted, passports and tickets were returned and free choice of work hours and accommodations were granted.[17]

The trial verdict was heard on appeal by the Court of Appeal of the Supreme Court of Victoria in 2007, wherein Eames JA for the Court noted that while the original 'verdict was not unsafe and unsatisfactory … this Court could not be satisfied beyond reasonable doubt of the guilt of the applicant'.[18] The Court of Appeal accepted that the directions to the jury had been inadequate. As a result, the Court determined that leave to appeal be granted and that the convictions and sentence be quashed accordingly. The prosecutor appealed the case to the High Court of Australia, with Tang making a cross-appeal on three grounds: the first two dealing with the meaning and constitutional validity of s 270.3(1)(a) of the Australian *Criminal Code Act 1995* (Cth) ('*Criminal Code Act*'), which speaks of 'a person who … possesses a slave' and the third ground being the directions to the jury. The High Court, with the Attorney-General and the then Human Rights and Equal Opportunity Commission ('HREOC') as interveners, rendered judgment on 28 August 2008, with Gleeson CJ writing for the majority.

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13 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [7]–[8].

14 Ibid [14].

15 Ibid [16].

16 Ibid.

17 Ibid [17].

18 *R v Tang* (2007) 16 VR 454, [195]–[196].

## III ON SLAVERY: THE HIGH COURT MAJORITY JUDGMENT

The charges against Tang stemmed from s 270.3(1) of the *Criminal Code Act*, which establishes that

> a person who, whether within or outside Australia, intentionally:
> (a) possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership or ...
> (c) enters into any commercial transaction involving a slave ...
> is guilty of an offence;

with the penalty being 25 years imprisonment. The definition of 'slavery' as found in s 270.1 of the *Criminal Code Act* differs in two ways from the definition found in the *Slavery Convention*. First, the *Slavery Convention* speaks of the 'status or condition' whereas the s 270.1 definition mentions only the 'condition' of slavery. Second, the definition in the *Criminal Code Act* adds a final clause, so as it reads in its entirety:

> For the purposes of this Division, slavery is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, *including where such a condition results from a debt or contract made by the person*.[19]

On cross-appeal to the High Court, Tang first argued that the Court of Appeal had erred in holding that ss 270.1 and 270.3(1)(a) were within Australia's legislative power. The second ground for cross-appeal was that:

> the Court of Appeal erred in holding that the offences created by s 270.3(1)(a) extended to the behaviour alleged in the present case and that they were not confined to situations akin to 'chattel slavery' or in which the complainant is notionally owned by the accused or another at the relevant time.[20]

Both these grounds centred on what 'slavery' means in law, and it is to that question that the High Court turned. Noting that the definition found in s 270.1 derives from the definition found in art 1(1) of the *Slavery Convention* and is repeated, in essence, in the 1956 *Supplementary Convention*[21] and most recently in the 1998 *Rome Statute*, Gleeson CJ noted that the 'travaux préparatoires of the 1926 *Slavery Convention* are not especially illuminating as to the meaning of art 1' yet 'certain observations may be made as to the text and context, including the purpose, of the Convention'.[22]

Three such observations led the majority of the Court to conclude that the definition found in the *Slavery Convention* applies to both *de jure* and *de facto* slavery. First, Gleeson CJ notes that for many states, including Australia, which became a party to the *Slavery Convention* in 1926, the legal status of slavery no

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19 *Criminal Code Act 1995* (Cth) s 270.1 (emphasis added).

20 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [19].

21 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 30 April 1956, 226 UNTS 3 (entered into force 30 April 1957) ('*Supplementary Convention*').

22 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [25], citing Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (2008).

longer existed.[23] Second, the aim of the *Slavery Convention* was to bring about the same situation universally. Third, the phrase 'status or condition' found within the definition of the *Slavery Convention* makes the distinction between de jure ('status is a legal concept') and de facto slavery. Taking into consideration the first and second observations made, the majority of the Court reasoned that 'the evident purpose of the reference to "condition" was to cover slavery *de facto*'.[24]

The High Court made one final observation that the 'definition turns upon the exercise of the power over a person'; and that in *de facto* conditions the 'definition was addressing the exercise over a person of powers of the kind that attached to the right of ownership when the legal status was possible'.[25] The High Court then went on to consider what should be understood by such powers which are manifest when ownership is legal.

At this point, the High Court did not take on board the more expansive understanding of the 'powers attaching to the right of ownership' that HREOC put forward. HREOC, as intervener, having laid out its understanding of the law on slavery, which depended heavily on the *Kunarac* case, identified 'a (non-exhaustive) list of the factors that might indicate that a power attaching to a right of ownership has been exercised'. That list reads:

> (a) The partial or total destruction of the juridical personality of the victim.
> (b) Some restriction or control of an individual's autonomy, freedom of choice or freedom of movement.
> (c) The control of matters relating to an individual's sexual activity.
> (d) The psychological control or oppression of [an] individual.
> (e) The control or partial control of an individual's personal belongings.
> (f) The measures taken to prevent or deter a person from escape.
> (h) The absence of informed consent or the fact that consent has been rendered irrelevant by the use of force or coercion, the use of deception or false promises or the abuse of power in the context of the relationship where the individual over whom the power is exercised is in a position of vulnerability.
> (i) The threat or use of force or other forms of coercion.
> (j) The use of, or the fear of the use of, violence including, for example, the cruel treatment or abuse of an individual.
> (k) The quality of the relationship between the accused and the person over whom the powers are exercised, including any abuse of power, the person's vulnerability, the person's socio-economic situation and the duration of the relationship.
> (m) The exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship, sex, prostitution and human trafficking.[26]

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23 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [25].

24 Ibid.

25 Ibid [26].

26 Amicus Curiae Brief, *R v Tang* (High Court of Australia) (HREOC, *Submission in Support for Leave to Intervene and Submissions on the Appeal*, 5 May 2008) 15 (citations omitted). In its amicus curiae brief, HREOC omitted factors (g) and (l).

HREOC's use of the indicators in *Kunarac* appeared to stretch the understanding of slavery beyond the judicial horizons of what the High Court was prepared to accept. Introducing issues such as the oppression of the individual; deception and abuse of power creating a situation of vulnerability; and cruel treatment or abuse, went beyond the Court's interpretation of powers reflecting ownership, with the exception of the power of control and restriction of movement. The judgment noted that:

> the capacity to make a person an object of purchase, the capacity to use a person and a person's labour in a substantially unrestricted manner, and an entitlement to the fruits of the person's labour without compensation commensurate to the value of the labour. Each of those powers is of relevance in the present case.[27]

Gleeson CJ ended his consideration of the first grounds of cross-appeal by noting that:

> On the evidence it was open to the jury to conclude that each of the complainants was made an object of purchase (although in the case of one of them the purchaser was not the respondent); that, for the duration of the contracts, the owners had a capacity to use the complainants and the complainants' labour in a substantially unrestricted manner; and that the owners were entitled to the fruits of the complainants' labour without commensurate compensation.[28]

Regarding the second ground for cross-appeal, Tang argued that the Court of Appeal erred in determining that offences established by s 270.3(1)(a)[29] extend 'to the behaviour alleged in the present case and that they were not confined to situations akin to "chattel slavery" or in which the complainant is notionally owned by the accused or another at the relevant time'.[30]Gleeson CJ stated that, from what had been said in previous paragraphs, it was clear that chattel slavery 'falls within the definition … but it would be inconsistent … to read the definition as limited to that form of slavery'.[31] The High Court turned to the *Kunarac* case before the ICTY,[32] to buttress its understanding that slavery goes beyond that of treating a person as chattel, noting that 'enslavement as a crime against humanity in customary international law consisted of the exercise of any

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27 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [26] and confirmed at [50]. The three further powers noted by the UN Secretary-General are:

> (4) the ownership of the individual of servile status can be transferred to another person; (5) the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it; (6) the servile status is transmitted *ipso facto* to descendants of the individual having such status.

See generally, UN Economic and Social Council, *Slavery, the Slave Trade, and Other Forms of Servitude (Report of the Secretary-General)*, UN Doc E/2357 (27 January 1953) 28 (on file with author).

28 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [26].

29 The *Criminal Code Act 1995* (Cth) s 270.3(1) sanctions a person who, whether within or outside Australia, intentionally: (a) 'possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership'.

30 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [19].

31 Ibid [27].

32 *Kunarac* (Appeals Chamber) Case No IT-96-23 and IT-96-23/1-A (12 June 2002) (Judgment).

or all of the powers attaching to the right of ownership over a person'.[33] Gleeson CJ then noted that it was 'unnecessary, and unhelpful' in the present case 'to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage'.[34] Instead the Chief Justice noted that the concepts were not mutually exclusive, that the 1956 *Supplementary Convention* recognised the possibility that servitude could slip into slavery where it manifests powers attaching to the right of ownership, and that those 'who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy'.[35]

The High Court then turned to the decision of the European Court of Human Rights in *Siliadin*,[36] finding it unhelpful and noting that the Court 'referred briefly and dismissively to the possibility that the applicant was a slave within the meaning of Art 1 of the 1926 Slavery Convention'.[37] Gleeson CJ, seeking to distance that case from the one at hand, stated that while this was understandable in the context of that case, it was to 'be noted that the Court did not refer to the definition's reference to condition in the alternative to status, or to powers as well as rights, or to the words "any or all"'.[38] Gleeson CJ, referring to the European Court's decision that no 'genuine right of legal ownership' was manifest, stated that, on the assumption that slave ownership was illegal in France, no such exercise of a genuine right of ownership was possible and that this was 'self-evident'.[39] He continued: 'but it would not have been a complete answer if there had been a serious issue of slavery in the case'.[40] The Chief Justice followed this by giving the High Court's assessment of the concept of slavery as defined by the 1926 *Slavery Convention*:

> It is important not to debase the currency of language, or to banalise crimes against humanity, by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention. In particular it is important to recognise that harsh and exploitative conditions of labour do not of themselves amount to slavery. … An employer normally has some degree of control over the movements, or work environment, of an employee. Furthermore, geographical and other circumstances may limit an employee's freedom of movement. Powers of control, in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place.[41]

The majority opinion in *Tang* then shifted from the international to the Australian context, stating that s 270.1 of the *Criminal Code Act* speaks only of

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33 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [28].

34 Ibid [29].

35 Ibid [29].

36 (2005) VII Eur Court HR 333.

37 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [30].

38 Ibid [31].

39 Ibid.

40 Ibid.

41 Ibid [32].

'condition' not 'status'. They noted that the legal status of slavery does not exist in Australia, and thus Australian law 'is concerned with *de facto* slavery'. This means that:

> the reference to powers attaching to the right of ownership, which are exercised over a person in a condition described as slavery, is a reference to powers of such a nature and extent that they are attributes of effective (although not legal, for that is impossible) ownership. Secondly, the concluding words of the definition in s 270.1 ('including where such a condition results from a debt or contract made by the person') do not alter the meaning of the preceding words because it is only where 'such a condition' (that is, the condition earlier described in terms of the 1926 *Slavery Convention*) results that the words of inclusion apply. The words following 'including', therefore, do not extend the operation of the previous words but make it plain that a condition that results from a debt or a contract is not, on that account alone, to be excluded from the definition, provided it would otherwise be covered by it.[42]

As a result of this and a consideration of the phrase 'including where such a condition results from a debt or contract made by the person', the High Court determined that:

> the definition of 'slavery' in s 270.1 falls within the definition in Art 1 of the 1926 Slavery Convention, and the relevant provisions of Div 270 are reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under that Convention. They are sustained by the external affairs power. They are not limited to chattel slavery.[43]

With this, Gleeson CJ turned to consider the 2007 decision of the Court of Appeal, which regarded the 'critical issue' at trial as that of 'the character of the exercise of the power by the accused over the victim'.[44] Having given voice to the opinion of the Court of Appeal expressed by Eames JA, and noting that it was right for that Court to be 'concerned about a problem presented by s 270.3(1)(a), at least in a borderline case' as to how 'a jury [is] to distinguish between slavery, on the one hand, and harsh and exploitative conditions of labour, on the other?',[45] Gleeson CJ answers the question:

> The answer to that, in a given case, may be found in the nature and extent of the powers exercised over a complainant. In particular, a capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services. The answer, however, is not to be found in the need for reflection by an accused person upon the source of the powers that are being exercised. Indeed, it is probably only in a rare case that there would be any evidence of such consideration.[46]

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42 Ibid [33].

43 Ibid [34] (citation omitted).

44 Ibid [37], citing *R v Tang* (2007) 16 VR 454, [196] (Eames JA).

45 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [44].

46 Ibid.

The High Court went on to conclude that:

> In this case, the critical powers the exercise of which was disclosed (or the exercise of which a jury reasonably might find disclosed) by the evidence were the power to make the complainants an object of purchase, the capacity, for the duration of the contracts, to use the complainants and their labour in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation. As to the last three powers, their extent, as well as their nature, was relevant. As to the first, it was capable of being regarded by a jury as the key to an understanding of the condition of the complainants. The evidence could be understood as showing that they had been bought and paid for, and that their commodification explained the conditions of control and exploitation under which they were living and working.
>
> It was not necessary for the prosecution to establish that the respondent had any knowledge or belief concerning the source of the powers exercised over the complainants, although it is interesting to note that, in deciding to order a new trial, the Court of Appeal evidently took the view that the evidence was capable of satisfying a jury, beyond reasonable doubt, of the existence of the knowledge or belief that the Court of Appeal considered necessary.[47]

With this the majority of the High Court concluded its consideration of the second ground of cross-appeal.

Gleeson CJ gave little time to the third ground for cross-appeal: that the Court of Appeal had 'erred in failing to hold that the verdicts are unreasonable or cannot be supported having regard to the evidence'.[48] The Chief Justice noted that 'there was cogent evidence of the intentional exercise of powers of such a nature and extent that they could reasonably be regarded as resulting in the condition of slavery' and as such the Court of Appeal made 'no error of principle'.[49] The High Court, having accepted the cross-appeals, then ordered that the first two grounds be 'treated as instituted, heard instanter, and dismissed', and that the third be refused.[50] The High Court then ordered that Tang's cross-appeal against conviction be dismissed, and returned the case to the Court of Appeal for consideration of sentencing.

## IV CONCURRENT OPINIONS

While all Justices concurred in large part with the opinion of Gleeson CJ, two Justices, Kirby and Hayne JJ, also wrote in-depth opinions. Kirby J agreed with Gleeson CJ, but for the fact that he believed a re-trial should take place on the basis that — what is termed in the Australian context — 'a miscarriage of trial' had taken place. This miscarriage resulted from a failure to explain to the jury, in accurate and clear terms, where the fault element of intention manifested itself in all of the ingredients of the offence of slavery.[51] Kirby J noted that the trial judge found himself in a novel position where slavery was concerned, as pointed out by

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47 Ibid [50]–[51].
48 Ibid [53].
49 Ibid [56].
50 Ibid [57].
51 Ibid [65] (Kirby J).

the Court of Appeal: 'the trial judge had the misfortune to be the first judge in Australia called on to devise directions for these novel offences'.[52] The issue for Kirby J was one of 'intention', as a basis for determining whether violations of the provisions of s 270.3 of the *Criminal Code Act* had taken place. In conclusion, Kirby J noted that, where the issue of intention is concerned, there were 'very confusing directions … presented to the jury by the trial judge'.[53]

In constructing his opinion, Kirby J devoted a section to the 'conformability with international law', and sees the issue of slavery in the same light as the Court of Appeal, having an interpretation which is 'more consonant' with the 1926 *Slavery Convention* and 'the extremely grave international crime that "slavery", so expressed, involves'.[54] For Kirby J, the fact that slavery is a *jus cogens* norm and is non-derogable requires that it be defined 'very carefully and precisely'.[55] As a result, Kirby J stated that 'the crimes provided by s 270.3(1) are reserved to indisputably serious offences containing a substantial, not trivial, intention element'.[56]

The concurring opinion of Hayne J took no issue with the Order put forward by Gleeson CJ in his majority opinion. Instead, Hayne J wished to consider the terms 'slavery' and 'slave' as used in the *Criminal Code Act*. For Hayne J, the substance of the definition of slavery found in the 1926 *Slavery Convention* (powers attaching to the right of ownership) can be rephrased as 'the powers that an owner would have over another person, if the law recognised the right to own that other, would be powers whose exercise would not depend upon the assent of the person over whom the powers are exercised'.[57] By bringing into the equation the 'assent of the person', Hayne developed his argument on the 'antithesis of slavery' by putting forward the following proposition: 'whether the person concerned was deprived of freedom of choice in some relevant respect and, if so, what it was that deprived the person of choice'.[58] As Hayne J later noted, '[a]sking what freedom a person had may shed light on whether that person was a slave'.[59] Hayne J then concluded by considering the trial transcript and determining that the evidence allows for the conclusion that each of five women were indeed held as slaves, that each was used and possessed 'as an item of property at the disposal of those who had bought the complainant regardless of *any* wish she might have'.[60]

## V CONCLUSION

Beyond the judgments of the European Court of Human Rights and the ICTY, the High Court of Australia's decision in *R v Tang* provides a thorough assessment of what 'slavery' means in international law. Gleeson CJ's

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52 Ibid [88], citing *R v Tang* (2007) 16 VR 454, [93] (Eames JA).

53 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [127] (citation omitted).

54 Ibid [110]–[111].

55 Ibid [111].

56 Ibid [112].

57 Ibid [142].

58 Ibid [149].

59 Ibid [156].

60 Ibid [166] (emphasis in original).

consideration of the case of *Siliadin v France* rendered by European Court of Human Rights takes little away from that pronouncement, which fails to engage with the basis of the definition of slavery, as 'powers attaching to the right of ownership'. Where the *Kunarac* case before the ICTY is concerned, the majority judgment by the High Court does well to state that 'some of the factors identified as relevant in *Kunarac* … involve questions of control', but Gleeson CJ distances himself for the most part from the rather expansive interpretation given to the definition of slavery by the ICTY. Rather he states that:

> Powers of control, in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place.[61]

The majority decision by the High Court of Australia, penned by Chief Justice Murray Gleeson, delivered on the day before his constitutionally mandated retirement from the Court, brings into focus a renewed interest in the legal definition of slavery. Where the issue of slavery in international law is concerned, the 20th century could be characterised as dealing with slavery as a human rights issue, which entails state responsibility. By contrast, the 21st century — with the inclusion of slavery in the *Palermo Protocol*, and *Council of Europe Trafficking Convention*, and enslavement within the *Rome Statute* — shifts the focus to individual responsibility and criminal liability. The very expansive notion of slavery — which Suzanne Miers noted in her 2003 book rendered the term 'virtually meaningless'[62] — cannot persist in the 21st century, as the prohibition of slavery comes up against the countervailing right of the accused to know the charges against them.[63]

By giving emphasis to the powers attaching to the right of ownership as laid out by the Secretary-General in 1953, the High Court has avoided taking on an expansive notion of 'enslavement' as developed in the *Kunarac* case. Considering 'enslavement' as a crime against humanity in that case, the ICTY stated that the 'definition may be broader than the traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law'.[64] This is so that general international law and international human rights law make the normative distinction between slavery and other lesser servitudes, while international criminal law knows only 'enslavement' as a crime against humanity. The ICTY for its part sought, through interpretation, to introduce lesser types of servitudes. This approach, although it is not found in the 1998 *Rome Statute* — which limits the jurisdiction of the Court to 'powers attaching to the right of ownership' — remains plausible as a basis of judicial interpretation

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61 Ibid [32].

62 Suzanne Miers, *Slavery in the Twentieth Century* (2003) 453.

63 See, eg, Jean Allain, 'The Definition of "Slavery" in General International Law and the Crime of Enslavement within the Rome Statute, International Criminal Court' (Lecture delivered at Guest Lecture Series of the Office of the Prosecutor, The Hague, Netherlands, 26 April 2007) [2]; see also Jean Allain, 'The Definition of Slavery in International Law' (2009) 52 *Howard Law Journal* 239.

64 *Kunarac* (Trial Chamber) Case No IT-96-23 and IT-96-23/1-T (22 February 2001) (Judgment) [541].

before the International Criminal Court.[65] That said, it should be realised that both the *Palermo Protocol* and the *Council of Europe Trafficking Convention* define human trafficking as being for the purposes of exploitation, and go on to enumerate types of exploitation to include forced labour, slavery, practices similar to slavery, and servitude.

Short of the crime against humanity of 'enslavement', slavery is a concept of criminal law which the High Court does well to engage with. It should be noted that, as Gleeson CJ relates, 'at a time after the alleged offences the subject of these proceedings, a further offence described as "debt bondage" was added' to the *Criminal Code Act*; and that '[i]t may be that the facts of this case would have fallen within [that offence] had it been in force'.[66] This, Gleeson CJ stated, 'is immaterial';[67] instead the High Court busied itself in *Tang* with seeking to place parameters around the legal concept of slavery so as to give it legal certainty. As such, the High Court should be commended for providing the most far-reaching and cogent examination to date of the definition of 'slavery' as established in international law.

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65 *Rome Statute*, above n 3, art 7(2)(c). Note, however, that the states parties to the *Rome Statute* have sought, apparently, to expand the understanding of 'enslavement' through the secondary legislation of the Court: the elements of the crimes, wherein the crime of 'enslavement' is given content in the following terms: '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'. This final phrase 'by imposing on them a similar deprivation of liberty', is considered, in a footnote, in the following terms:

> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a 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.

For a consideration of the implications of the Elements of the Crimes on the understanding of 'enslavement' before the ICC, see Jean Allain, 'The Parameters of "Enslavement" in International Criminal Law' (Paper presented at the International Symposium on the New Developments of International Criminal Law, China University of Political Science and Law, Beijing, China, 25 April 2009).

66 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [4]. The definition of 'debt bondage' established in s 271.8 of the *Criminal Code Act* mirrors the definition in international law as a practice similar to slavery as found in the 1956 *Supplementary Convention*, above n 21, and carries a lesser penalty than slavery. See, eg, Allain, *The Slavery Conventions*, above n 22, 273–86.

67 *Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008) [4].

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