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Forced Labour and Human Trafficking Casebook of Court Decisions

**A TRAINING MANUAL FOR
JUDGES, PROSECUTORS AND LEGAL PRACTITIONERS**

Special Action Programme to Combat Forced Labour

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PREFACE

In a global report on forced labour, published in 2005, the ILO observed that the offence of exacting forced labour, even when recognized under national law, is very rarely punished. Moreover, when forced labour cases are prosecuted, the sanctions are often very light compared to the gravity of the offence.

In the years since then, there has been a slow but steady increase in national prosecutions, either for the offence of forced labour as such, or for related offences including trafficking for either labour or sexual exploitation, debt bondage, slavery and slavery-like practices. The impetus has come in large part from the entry into force, in 2003, of a Protocol on human trafficking to the United Nations Convention against Transnational Organized Crime, adopted in 2000. In the years since, a significant number of countries have amended their criminal and other legislation in order to give specific recognition to the offence of human trafficking for a number of purposes, including sexual exploitation, various forms of labour exploitation and the removal of organs. The penalties for the criminal offence of human trafficking tend to be severe, generally involving long terms of imprisonment. Law enforcement agencies are also having to consider the important issue of compensation for the wrongs they have suffered to the victims of forced labour and trafficking.

These developments are posing considerable challenges for judges and prosecutors, and for law enforcement more generally. They are required to address, often for the first time, cases of forced labour and related forms of exploitation by private agents. They are required to deal with cases in which the alleged forms of abuse may be extremely subtle, involving psychological pressures and threats rather than overt physical restraint and violence. Moreover, they are required to pass judgment in different contexts, and under different legal traditions that may vary considerably in their definitions of such abuses as forced labour, human trafficking and exploitation. Some countries deal with forced labour under their criminal laws, others under their labour laws, yet others under both. Some countries have detailed definitions of human trafficking, perhaps including a separate chapter on forced labour; others have broad definitions, leaving interpretation largely to the discretion of the judiciary. Furthermore, the Palermo Trafficking Protocol introduces to international law the concept of trafficking for exploitation. This is a notion for which there is almost no juridical precedent, and which prompts questions for both legislators and judges. Is it linked with coercion, or can it be based instead on unacceptable working conditions? As will be seen in this casebook, there have been different approaches to these questions at national level.

The ILO's first Convention on forced labour, No. 29 of 1930, contains a basic definition of forced labour, as a situation where work or service is exacted from people under the menace of any penalty, and for which they have not offered themselves voluntarily. The Convention also indicates that forced labour shall be punishable as a serious offence, through penalties imposed by law that are

genuine disincentives and are strictly enforced. The Convention is the most widely ratified of all the ILO instruments, with 173 ratifications at present. The present day challenge is to apply this Convention effectively to a modern context in which some 80 percent of the 12 million people subjected to forced labour are exploited by private agents.

The casebook is part of the ILO's broader efforts to address forced labour through promotional means and technical cooperation. A Special Action Programme to Combat Forced Labour (SAP-FL) was created in 2001, as part of measures to promote the core labour standards embodied in a 1998 Declaration on Fundamental Principles and Rights at Work. The SAP-FL programme has conducted extensive research and surveys on modern forced labour, and strengthened the capacity of a range of stakeholders to contribute to the fight against it. Earlier guidance manuals and toolkits have been prepared for legislators and law enforcement, labour inspectors, employers' organizations and the business community, among others.

We believe that the present casebook fills an important gap. It covers a range of national experience, from judicial decisions on forced and bonded labour in a number of developing countries, through to the more recent decisions on forced labour and trafficking in industrialized countries. In particular, it seeks to illustrate how national court decisions have taken into account the provisions of the ILO's own Conventions on forced labour, and how this may provide useful guidance for future court decisions. By increasing familiarization with and awareness of jurisprudence on forced labour, we hope also to promote cross-fertilization of experience and dialogue among judicial practitioners, both within domestic courts and between domestic and international courts. To enrich future editions of this casebook, the first of its kind, we also urge readers to share copies of court decisions involving forced labour.

The casebook was researched and written by Alli Jernow, ILO consultant and former prosecutor, under the guidance of Gao Yun, Legal Officer of the SAP-FL programme, who designed and coordinated the project.

We are grateful to the many individuals who have given their time and shared relevant experience. Particular thanks are due to Rosanna Carreon, who devoted her time and energy to collecting cases through various channels and preparing a preliminary report. Credit must be given to specialists from different ILO Departments, Regional Offices and Country Offices for their invaluable contributions and sound comments, namely Jose Ramirez (IPEC), Rosinda Silva (NORMES), Jane Hodges (GENDER), Aurélie Hauchère, Caroline O'Reilly, Beate Andrees (SAP-FL), Tauqir Shah (Islamabad Office) and Coen Kompier (New Delhi Office). We also want to thank Katy Thompson (UNDP), Martin Fowke (UNODC) and Richard Danziger (IOM) for taking the time to send us information and meet our researchers.

Special thanks go to Frédéric Kurz, the Deputy General Public Prosecutor of the Court of Liège, and Jonge van Ellemeet Heleen, researcher at the Bureau of the Dutch Rapporteur on Human Trafficking, who continuously send us not only the latest court decisions from their countries but also their in-depth legal analyses.

Finally, thanks are extended to Coralie Thompson for her assistance through the various stages of this publication.

Roger Plant
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to Combat Forced Labour*

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1. INTRODUCTION

1.1 The ILO and Forced Labour

The ILO was founded in 1919 with a mandate to develop international labour standards and promote their ratification and implementation. In 1946, it became a specialized agency of the United Nations. It has a unique, tripartite structure consisting of representatives of governments, employers and workers. The International Labour Conference meets once a year and adopts new international labour standards. As of 2007, the International Labour Conference had adopted 188 conventions, which are binding on the member states that ratify them, and 199 recommendations, which are non-binding guidelines. Between sessions of the International Labour Conference, the ILO is guided by a Governing Body, which is also composed of government, employer and worker members.

The ILO has been concerned with forced labour from its earliest years. Amid growing condemnation of the use of forced labour for public works by colonial governments, the ILO Governing Body appointed a Committee of Experts on Native Labour in 1926. The eventual result was the Forced Labour Convention (No. 29), which was adopted in 1930 and entered into force in 1932. Article 2 of the Forced Labour Convention defines “forced or compulsory labour” as “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”. The Forced Labour Convention was the first – and until 1999 the only – ILO Convention to require criminalization of a prohibited labour practice.

In the 1950s, the ILO became concerned with the use of forced labour as a means of political reeducation or suppression of dissent, especially by totalitarian regimes. The Abolition of Forced Labour Convention (No. 105) was adopted in 1957 and entered into force in 1959. In 1999, the ILO adopted the Worst Forms of Child Labour Convention (No. 182). Neither of the latter two conventions altered the definition of forced labour contained in the Forced Labour Convention. Together, these three are among the most widely ratified ILO conventions. As of September 2008, the Forced Labour Convention had 173 ratifications, the Abolition of Forced Labour Convention had 169 ratifications and the Worst Forms of Child Labour Convention had 169 ratifications.

In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work in order to strengthen the application of four fundamental principles. The Declaration commits member states to respect these principles regardless of whether or not they have ratified the relevant Conventions. The elimination of all forms of forced or compulsory labour and the effective abolition of child labour are among the fundamental principles listed in the Declaration. In November 2001, as part of its effort to promote the Declaration, the ILO Governing Body created the Special Action Programme to Combat Forced Labour (SAP-FL). SAP-FL conducts research and carries out technical assistance activities in the field of forced labour.

1.2 How the ILO Works

Once a member state has ratified a convention, it is required to report regularly on measures taken to implement it. In 1926, the ILO set up a Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) to examine the growing number of government reports on ratified conventions. The Committee of Experts consists of 20 jurists appointed by the Governing Body for three-year terms. Their role is to provide an impartial and technical appraisal of a member state's application of international labour standards.¹ The Committee of Experts may make two kinds of comments: observations and direct requests. Observations, which are published in the annual report, are used to comment on serious or long-standing cases of a government's failure to fulfil its obligations or to note cases of progress. Direct requests are used to obtain information or clarification on particular issues.² The annual report of the Committee of Experts is then examined by the Conference Committee on the Application of Standards. The Conference Committee, a tripartite committee of the International Labour Conference, selects some observations for further discussion and comments by governments. The discussions and recommendations of the Conference Committee are published in its General Report.

Although Article 37 of the ILO Constitution vests authority to interpret any conventions in the International Court of Justice, this procedure has been used rarely. In practice, a kind of jurisprudence particular to the ILO Conventions has been developed through the comments and observations of the Committee of Experts and the Conference Committee. The Committee of Experts has stated that, "in so far as its views are not contradicted by the International Court of Justice, they are to be considered as valid and generally recognized".³ Its work thus constitutes a body of interpretation and guidance to which practitioners and courts may refer when assessing the implementation of international labour standards.

In addition to the regular supervisory mechanism, the ILO Constitution provides for complaint procedures. Under Article 24, an employers' or workers' organization can submit a representation against any government that, in its view, has not properly applied a Convention it has ratified. If the representation is receivable, the ILO Governing Body will set up a three-member tripartite committee to examine it. The representation and the response may be published. Under Article 26, a complaint of non-observance may be submitted and the Governing Body may appoint a commission of inquiry. Under Article 33 of the ILO Constitution, if a country fails to carry out the recommendations of a commission of inquiry, the Governing Body may recommend to the International Labour Conference actions to secure compliance. Article 33 was invoked for the first time in 2000 in relation to the practice of forced labour in Myanmar.⁴

1 For a full description of the supervisory system, see ILO, *Handbook of procedures relating to international labour conventions and recommendations*, 2006, and also www.ilo.org/global/what_we_do/InternationalLabourStandards/lang--en/index.htm.

2 All comments of the Committee of Experts and the Conference Committee on individual countries are available on the database of international labour standards at www.ilo.org/ilolex. General reports of the Committee of Experts and Conference Committee are also available there.

3 *General Report of the Committee of Experts on the Application of Conventions and Recommendations*, 1990, at para. 7.

4 See ILO, *Forced labour in Myanmar (Burma)*, Report of the Commission of Inquiry appointed under article 26 of the Constitution of the ILO to examine the observance by Myanmar of the Forced Labour

1.3 Aims of Casebook

The purpose of this casebook is to introduce judges, prosecutors and other legal practitioners to the ways in which national and international courts have analyzed the term 'forced labour'. The hope is that this teaching tool will be useful to practitioners in adjudicating cases, as well as to policy- and decision-makers who draft legislation, investigate allegations and bring charges in (criminal or civil) courts or labour tribunals. In giving context to the term, this study of judicial notions of forced labour should also contribute to a deeper understanding of how to identify and eradicate the practice.

The need for such a study is great. Although the Forced Labour Convention was adopted in 1930 in response to the issue of forced and compulsory labour in territories under colonial administration, both the Convention and the concept of 'forced labour' have heightened relevance today, given modern global recognition of the crisis and scale of human trafficking, and especially of trafficking for labour exploitation.

The nature of forced labour has changed. With some prominent exceptions, such as Myanmar, the primary culprits are no longer states.⁵ Instead, illegal exaction of forced labour from workers is being carried out by individuals. The old pattern of cases – typically involving complaints about compulsory work obligations imposed for particular professions or as welfare requirements – has given way to a new type, in which the employer is a private individual or corporation, or even a member of a criminal organization. This means that there is now a real convergence between forced labour and criminal law. Although Article 25 of the Forced Labour Convention requires member states to penalize the "illegal exaction of forced or compulsory labour", the need to do so is more urgent than ever before. States can no longer comply with their obligations under the Convention by regulating state conduct alone. Rather, states must ensure that private perpetrators are adequately penalized. Failure to prosecute forced labour can itself be a violation of the Convention.

This obligation is not unique to the Forced Labour Convention. Article 5 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Trafficking Protocol) similarly requires the criminalization of human trafficking. Moreover, the European Court of Human Rights has held that countries may be liable under the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) for

Convention, 1930 (No. 29), 1998 [hereafter: *Forced labour in Myanmar*, Report of the Commission of Inquiry]; *Measures, including action under article 33 of the Constitution of the ILO, to secure compliance by the Government of Myanmar with the recommendations of the Commission of Inquiry established to examine the observance of the Forced Labour Convention*, Governing Body doc. GB.277/6, 277th Session, Geneva, March 2000.

⁵ The ILO estimates that of some 12.3 million people who are victims of forced labour worldwide, about 9.8 million are exploited by private agents. See *A global alliance against forced labour*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, 2005, p. 10 [hereafter: *Global alliance*]. See also *Eradication of forced labour*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, ILC, 96th Session, 2007, p. 52 ("In contrast to the general tendency of the worldwide decline of state practices imposing compulsory labour on the population, the Committee has been commenting for a number of years on one extremely serious case of flagrant violation of the Convention by the authorities and military in [Myanmar].") [hereafter: *Eradication of forced labour*, General Survey of 2007]. There have also been serious cases of state-imposed forced labour in other countries. See *Global alliance*, p. 25 (describing the situation in Tajikistan and Uzbekistan).

failure to provide redress for victims of forced labour. In order to effectively penalize and prosecute forced labour violations, judges and other legal practitioners should understand how courts have interpreted forced labour.

Although the framework for this inquiry is the ILO Forced Labour Convention, not all courts analyze forced labour with explicit reference to the ILO Convention. Some courts apply the Forced Labour Convention directly in order to interpret national laws or international obligations.⁶ Some courts view forced labour as a norm of customary international law. For other courts, the primary issue is how to interpret a parallel domestic provision. The concepts, however, remain the same. At issue in each case is how to assess whether the work or labour performed was in fact forced labour.

The aim here is not to produce a comprehensive review of all forced labour cases. Such a survey would be largely descriptive, and while it might inform the reader about the economic sectors where forced labour is likely to be found or the factors that render people vulnerable to exploitation, it would tell us very little about how forced labour is analyzed as a legal concept. Worldwide, there is clearly a need for the development of more law in the area of forced labour and trafficking for labour exploitation. Nevertheless, the cases included here portray some of the more common aspects of forced labour and show how forced labour itself has changed. No longer primarily imposed by states for a public cause, it is instead exacted by private parties, typically for economic gain. This means that the right to be free from forced labour – a classically human right protected from interference by the state – has acquired a new dimension. Now it is also an offence in criminal law, one for which individuals bear responsibility. States now must not only refrain from imposing forced labour, they must prosecute it as a crime.

Nevertheless, although individual criminal responsibility is part of the evolving picture of forced labour today, it is important for the reader to remember that criminal law is a blunt instrument and that criminal courts are only one route to accessing justice. Forced labour is also a human rights issue and a labour law issue. In some countries, forced labour is prohibited by the national constitution. Thus a forced labour case may arise in civil court, before a labour or employment tribunal, or before a constitutional court.⁷ Different courts have different remedial powers. While a constitutional court may have the power to condemn a practice as unconstitutional, it may not have authority to impose a prison sentence or a fine. Compensation orders for unpaid wages might only be available through a labour court. In Brazil, for example, labour courts cannot impose prison sentences. In the US, criminal courts can issue compensation orders for financial and moral damages. In France, a plaintiff might win an order for state-funded compensation in a civil case even if the defendants are acquitted in the companion criminal case. Thus the remedy available depends both on where forced labour is located in national legislation – as a provision of constitutional, civil and labour, or penal law – and on where the case is brought.

⁶ See *Use of international law by domestic courts: A compendium of decisions*, ILO International Training Centre, August 2007, for a collection of court decisions that make use of international labour standards generally.

⁷ For a discussion of the interplay of civil, labour and criminal law in the context of enforcing disability rights, see ILO, *Achieving equal employment opportunities for people with disabilities through legislation: Guidelines*, 2007, at pp. 9-13 and pp. 71-73.

1.4 Reading this Casebook: An Overview of Common Themes

This casebook is designed as a learning tool. It presents excerpts from individual court decisions and compares them with observations from ILO supervisory bodies and other research material, including comments from academics. Each case summary is followed by a series of questions for active discussion. Participants are encouraged to draw their own conclusions about the soundness of a particular court's method or mode of analysis. Case summaries are divided into **Factual Background and Legal Analysis for ease of reference**. In addition, the symbol ► is used to highlight a particular aspect of the court's decision-making.

Throughout the casebook you will notice the recurrence of certain issues. We touch on them here briefly because these themes illuminate common concerns of courts when dealing with forced labour cases.

(1) The definition of forced labour contained in Convention 29 has three elements: (1) work or service; (2) performed under menace of any penalty; (3) for which the person has not offered himself voluntarily. Some judicial decisions actively make use of these three elements and, in doing so, elaborate upon their meaning. Other judicial decisions do not refer to Convention 29's definition at all, but instead fashion their own tests for determining whether labour is involuntary. We will focus attention on these divergent ways of interpreting the term forced labour.

(2) There is a tension between internal and external evidence. Because forced labour depends on the character of the work, courts must decide whether a worker's testimony or individual belief that the work was involuntary is sufficient, or whether there should be an objective component to the analysis. Are there objective, externally visible facts that make work into forced labour? What weight should be given to the worker's perspective? In this regard, read the decision of the ICTY Trial Chamber in *Prosecutor v. Krnojelac* and the US Supreme Court decision in *US v. Kozminski*. Keep in mind that each individual is different and the pressure or constraint that makes labour 'forced' for one person may not be the same as for another.

(3) Courts are struggling with the issue of indirect forms of coercion. If the coercion at issue is psychological, is it too subjective to be quantified? To borrow the phrase of the Sindh High Court in Pakistan, can a worker be bound by 'mental detention' instead of physical walls and chains? What defence does an employer have against the charge that his or her legitimate warnings regarding job performance were in fact 'threats' that transformed the work into forced labour? See, for example, the decision of the US First Circuit Court of Appeals in *US v. Bradley*.

(4) What consideration should be given to general economic pressure? Although the Committee of Experts recognizes debt bondage as a form of forced labour, it has not accepted the argument that economic constraint in general can make work into forced labour, nor that an employer should necessarily be liable for external

constraints or indirect coercion that he does not create. At least one American court has interpreted the element 'menace of any penalty' to mean a purposeful action on the part of the employer. Other courts, notably the Supreme Court of India, have been more receptive to the idea of economic compulsion. In this regard, see *Bandhua Mukti Morcha v. Union of India*.

(5) What elements should be recognized as constituting a situation of vulnerability or dependence? Some elements are explicitly provided for in law, such as youth, migrant status, physical and/or mental incapability and gender, while others are left to the discretion of judges. In France, a court has identified the risk of unemployment as creating a situation of workers' economic dependence vis-à-vis their employer. See *Procureur de la République v. Monsieur B*.

(6) What role do a worker's own unique vulnerabilities play in the analysis of whether labour was forced? Should coercion still need to be proved when vulnerabilities are apparent, bearing in mind that vulnerabilities render coercion unnecessary? In India, courts have tried to create legal presumptions to level the playing field for economically disenfranchised workers. One issue running through these cases is whether a victim's own characteristics may in some sense make up for the lack of any overt threat or menace of penalty. Courts appear to require less overt coercion when they recognize that a particular kind of victim is especially likely to be exploited in the labour field. To what extent should a person's unique vulnerabilities be taken into account? Consider the decision of the European Court of Human Rights in *Siliadin v. France*.

(7) What remedy is ordered by the court? Some of these are criminal cases that result in terms of imprisonment for the defendant. In some cases, whether civil or criminal, the court orders payment of compensation to the victim. Compensation may be paid for financial losses, such as lost wages, or non-financial losses, such as moral damages or pain and suffering. The remedies actually ordered depend on a court's powers to trace and seize assets, impose prison sentences and fines, and order compensation. Looking at the remedies provided is one way of determining whether pursuing forced labour in court is an effective means of obtaining justice.⁸

⁸ For a general discussion of compensation provided to victims of human trafficking, see *Compensation for Trafficked and Exploited Persons in the OSCE Region*, OSCE Office for Democratic Institutions and Human Rights, Warsaw, 2008.

Finally, it is obvious from all these cases that forced labour is increasingly viewed not only as a human rights concern which imposes obligations on states, but also as a norm of criminal law, both domestic and international. Individuals are criminally liable for imposing forced labour, and states may have positive obligations to prosecute such crimes. The Forced Labour Convention has renewed relevance today because, as the European Court of Human Rights said of the European Convention, "it is a living instrument which must be interpreted in the light of present-day conditions".⁹

Throughout, readers should pay close attention to the negative cases – the ones where courts held that a claim of forced labour (or related claims such as peonage, debt bondage, involuntary servitude or enslavement) was **not** substantiated. These negative cases, often involving difficult fact patterns, can provide a telling view of what forced labour is by examining what it is not.

Some attention should also be given to cases in which claims are brought before the courts against legal persons, including multinational enterprises (MNEs), for their use of forced labour. These lawsuits represent an effort by the home country to assert jurisdiction over MNEs in an attempt to influence their behaviour overseas.

Because the focus here is on judicial interpretation, the view of forced labour presented is necessarily incomplete. Some common forms of forced labour are reflected here, including domestic servitude, wartime enslavement, migrant agricultural workers and sweatshop workers, but others are missing because of the lack of legal cases. For example, situations of state-imposed forced labour or prison labour almost never end up in court. Nor are there any cases contained here involving traditional chattel slavery.¹⁰ Even in some countries where all the concerned parties – the government, workers' and employers' organizations, nongovernmental organizations and the ILO – recognize that there is a significant forced labour problem, there have been relatively few prosecutions. Clearly there is a worldwide need to combat forced labour by increasing the number of criminal prosecutions.

9 *Siliadin v. France*, European Court of Human Rights, 26 July 2005, para. 121.

10 Chattel slavery, sometimes also referred to as traditional or classic slavery, is a system whereby one person has legal ownership of another person.

2. INTERNATIONAL INSTRUMENTS

Labour law, human rights law and criminal law all contain standards relevant to forced labour. This section summarizes the most important instruments: the ILO forced labour conventions; the UN slavery conventions; the UN Trafficking Protocol; and the statutes of the ICTY and the International Criminal Court (ICC).

The Forced Labour Convention, 1930 (No. 29), and the Slavery Convention, 1926, were drafted in the same time period and should be read in tandem for an understanding of how the related concepts of slavery and forced labour were viewed. Later instruments, particularly the International Covenant on Civil and Political Rights (ICCPR), 1966, and the European Convention on Human Rights, 1950, modelled their prohibitions on forced labour and slavery on these earlier definitions.¹¹ The European Court of Human Rights, acknowledging the reliance of the European Convention's drafters on the ILO Forced Labour Convention, has used the ILO instrument as a guide.¹² Similarly, the Human Rights Committee, the treaty body that monitors implementation of the ICCPR, has noted that ILO definitions are relevant in elucidating the meaning of the terms forced and compulsory labour.¹³

In the field of criminal law, both the UN Trafficking Protocol and the ICTY and ICC Statutes offer expansive definitions of, respectively, 'trafficking' and 'enslavement' that include forced labour. These international instruments are not at all mutually exclusive. A given case of labour exploitation might well fall within the definition of each one, and it would be a mistake to assume that a particular act or pattern of conduct could give rise to only one kind of violation. It is the view of the ILO that the definition of forced labour is sufficiently broad to encompass most forms of slavery, with the possible exception of a form of slavery consisting of ownership in which the slave is not under any obligation to perform work or services. Similarly, the definition of forced labour covers most forms of trafficking, including sexual exploitation (since it is a form of labour), but would probably not extend to forced organ donation. Because the concept of forced labour includes these related concepts, ILO supervisory mechanisms have examined a variety of practices relevant to forced labour.

11 Sarah H. Cleveland, "Book Review: Global Labour Rights and the Alien Tort Claims Act", in *Texas Law Review*, Vol. 76, May 1998, pp. 1533, 1573; see also Marc J. Bossuyt, *Guide to the travaux préparatoires of the International Covenant on Civil and Political Rights* (Martinius Nijhoff 1987), p. 169; Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (Kehl Strasbourg 1993), p. 144.

12 *Van der Musselle v. Belgium*, Application no. 8919/80, at para. 32

13 *View of the Human Rights Committee*, CCPR/C/85/D/1036/2001 (Jurisprudence) at para. 7.5.



2.1 The ILO Forced Labour Conventions and ILO Views

2.1.1 Forced Labour Convention, 1930 (No. 29)

This convention defines forced labour, requires states to criminalize it and contains a list of exceptions.

Article 2, para. 1 defines the term 'forced or compulsory labour' as:

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.

Article 2, para. 2 provides exceptions for work that is required by: (1) compulsory military service, provided it is of a purely military character; (2) normal civic obligations; (3) a conviction in a court of law; (4) cases of emergency; and (5) minor communal services performed by members of a community and in the direct interest of the community.

The "imposition of forced or compulsory labour for the benefit of private individuals, companies or associations" was prohibited immediately (Art. 4, para. 1), but forced labour imposed by public authorities was not outlawed outright. Rather, member states undertook to "suppress the use of forced or compulsory service in all its forms within the shortest possible period" (Art. 1, para. 1). During a transitional period, recourse to forced labour could be had "for public purposes only and as an exceptional measure" (Art. 1, para. 2). Since 1998, the Committee of Experts has held that this transitional period can no longer be invoked to justify forced labour practices.¹⁴ In its 2007 *General Survey concerning the Forced Labour Convention*, the Committee observed that the transitional period expired long ago and that "consideration should be given to the adoption of a protocol" that would have the effect of revoking references to the transition period.¹⁵

Article 25, criminalized forced labour:

The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.

¹⁴ Individual Observation by the Committee of Experts on the Application of Conventions and Recommendations concerning Convention No. 29, Forced Labour, Bangladesh, 86th Session, Geneva, 1998 (In this respect, the Committee observes that... each Member of the ILO... undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period... Since the Convention, adopted in 1930, calls for the suppression of forced labour within the shortest possible period, to invoke at the current time (67 years after its adoption) that certain forms of forced or compulsory labour comply with one of the requirements of this set of provisions, is to disregard the transitional function of these provisions and contradict the spirit of the Convention.").

¹⁵ *Eradication of forced labour*, General Survey of 2007, at paras. 10 & 196.

2.1.2 Abolition of Forced Labour Convention, 1957 (No. 105)

This Convention makes no change to the definition of forced labour provided in Convention 29.¹⁶ The Committee of Experts has explained that these two conventions are complementary. “While Convention No. 105 is the more recent instrument, it builds on the foundation laid down by Convention No. 29 to prohibit forced or compulsory labour in specific instances. Convention No. 29, on the other hand, lays down a general prohibition on forced and compulsory labour, admitting only a few exceptions.”¹⁷

Article 1 provides that forced or compulsory labour shall not be used:

- (a) as a means of political coercion or education, or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;**
- (b) as a method of mobilizing and using labour for purposes of economic development;**
- (c) as a means of labour discipline;**
- (d) as a punishment for having participated in strikes;**
- (e) as a means of racial, social, national or religious discrimination.**

2.1.3 Worst Forms of Child Labour Convention, 1999 (No. 182)

Article 3 of this Convention defines the ‘worst forms of child labour’ as:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;**
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;**
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;**
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.**

Article 7 provides that each member “shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions”.

¹⁶ See *Forced labour*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, ILC, 52nd Session, Geneva, 1968, para. 42 [hereafter: *Forced labour*, General Survey of 1968.]. See also *Eradication of forced labour*, General Survey of 2007, at para. 11 (“Convention No. 105 does not constitute a revision of Convention No. 29, but was designed to supplement it.”).
¹⁷ ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A) International Labour Conference, 85th Session, Geneva, 1998, para. 105.



2.1.4 The ILO Committee of Experts on the Meaning of Forced Labour

The definition of forced labour given in Article 2 can be analyzed in terms of three elements:

- (1) work or service performed;
- (2) under the menace of any penalty;
- (3) for which the person has not offered himself or herself voluntarily.

Through individual observations and general reports or surveys, the Committee of Experts has offered its views on the meaning of these elements. Throughout this casebook, individual observations of the Committee of Experts are included to show the reader the ILO's perspective on particular issues. What follows is a summary of general statements by the Committee of Experts on forced labour. A more detailed presentation can be found in *Eradication of forced labour*, General Survey of 2007.¹⁸

Work or Service – The Committee of Experts has explained that an obligation to undergo compulsory education is not 'work or service' exacted under the menace of a penalty. Similarly, a compulsory vocational training scheme does not usually constitute compulsory work or service within the meaning of Convention No. 29. But since vocational training perhaps "entails a certain amount of practical work", it may be necessary to examine closely the factual context, to "determine whether it is unequivocally one of vocational training or on the contrary involves the exaction of work or service within the definition of 'forced or compulsory labour'".¹⁹

Menace of any Penalty – According to the Committee of Experts, this phrase should be construed broadly. It "need not be in the form of penal sanctions" but might also take the form "of a loss of rights or privileges" such as a promotion, transfer, access to new employment, housing, etc.²⁰ Considerable attention has been devoted to this element, particularly over whether psychological coercion or economic compulsion might amount to a penalty within the meaning of the Forced Labour Convention. In general, ILO supervisory bodies have recognized that psychological coercion might amount to the menace of a penalty, but have been hesitant to accept the argument that a general situation of economic constraint that keeps a worker on a job is equivalent to the menace of any penalty.²¹ Instead, the Committee has pointed out that the employer or State is "not accountable for all external constraints or indirect coercion existing in practice... [thus] the need to work in order to earn one's living could become relevant only in conjunction with other factors for which they are answerable".²²

Voluntary Offer – This element is distinct from 'menace of any penalty', but the Committee of Experts has noted that work accepted under the menace of any penalty is not work accepted voluntarily. In other words, there is no 'voluntary offer' under

¹⁸ All General Surveys dating back to 1985 are available at www.ilo.org/ilolex.

¹⁹ *Abolition of forced labour*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, ILC, 65th Session, Geneva, 1979, para. 20 [hereafter: *Abolition of forced labour*, General Survey of 1979.]. See also *Eradication of forced labour*, General Survey of 2007, at para. 36.

²⁰ *Abolition of forced labour*, General Survey of 1979, op. cit., at para. 21; see also *Eradication of forced labour*, General Survey of 2007, at para. 37.

²¹ See *ILO, Report of the Committee set up to examine the Article 24 representation concerning Portugal*, 1985, para. 97.

²² ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), International Labour Conference, 90th Session, Geneva, 2002, p. 98.

threat. Furthermore, where deceit and fraud are involved in the original work offer, the worker's acceptance cannot be considered knowing and voluntary.²³ At all times, a worker's right to free choice of employment is inalienable.²⁴ A worker must always be free to choose to leave his or her work. Thus the question here consists of two parts: whether the consent to work was in fact freely given, and whether the worker retains the ability to revoke his or her consent.

2.2 The UN Slavery Conventions

2.2.1 Slavery Convention, 1926

The League of Nations, concerned about the continued trade in African slaves, appointed a Temporary Slavery Commission in 1924 to investigate and report on the issue. In 1926, the League adopted the Slavery Convention, which entered into force in 1927. This was the first international instrument to provide a definition of slavery.

Article 1 provides that:

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.

There was debate about the possible inclusion of forced labour, but ultimately the delegates decided to treat it as a separate issue.²⁵ Unlike the Forced Labour Convention, the Slavery Convention contained no permissible derogations and no transition period. The parties were to "bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms" (Art. 2[b]). In the Preamble, the League also noted its desire to "prevent forced labour from developing into conditions analogous to slavery".

2.2.2 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956

In 1956, the United Nations, citing both the Forced Labour Convention and the Slavery Convention, decided to adopt a Supplementary Convention on the Abolition of Slavery. The Preamble noted that "slavery, the slave trade and institutions and practices similar to slavery have not yet been eliminated in all parts of the world", and expressed the need for the original Slavery Convention of 1926 to be "augmented by the conclusion of a supplementary convention designed to intensify national as well as international efforts". The intent was to outlaw debt bondage, serfdom, servile marriage and certain forms of child labour.

²³ Individual Observation Concerning Peru, 87th Session, Geneva, 1999, para. 3 (noting that certain forms of deceitful or violent recruitment of labour were forced labour).

²⁴ Abolition of forced labour, General Survey of 1979, op. cit., para. 68; Eradication of forced labour, General Survey of 2007, at para. 40.

²⁵ See Renee Colette Redman, "The League of Nations and the Right to Be Free from Enslavement: The First Human Right to Be Recognized as Customary International Law", in *Chicago-Kent Law Review*, Vol. 70, 1994, pp. 759, 781 (describing debate on forced labour).



Article 1 provides that:

Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in Article 1 of the Slavery Convention, signed at Geneva on 25 September 1926:

- (a) Debt bondage, that is to say the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;**
- (b) Serfdom, that is to say the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;**
- (c) Any institution or practice whereby:**
 - (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or**
 - (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or**
 - (iii) a woman, on the death of her husband, is liable to be inherited by another person.**
- (d) Any institution or practice whereby a child, or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person, or of his labour.**

2.3 International Criminal Instruments

2.3.1 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000

Early international instruments prohibiting trafficking were concerned exclusively with the traffic of women – specifically white, European women – for the purpose of sexual exploitation.²⁶ In the 1990s, increased global migration and some high-profile criminal cases directed world attention to the problem of trafficking of men, women and children for both sexual and labour exploitation. In December 1998, the UN General Assembly passed a resolution to establish an ad hoc committee to address trafficking. In 2000, the committee concluded its work with a Convention against Transnational Organized Crime and two protocols – one on migrant smuggling and one on trafficking.²⁷ The UN Trafficking Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, is the first international instrument to define trafficking as including forced labour. It also offers an expansive view of coercion and holds the victim's consent irrelevant if any of the prohibited means are used. It thus represents a significant reconceptualization of the term 'trafficking' and highlights the problem of forced labour. It was adopted in November 2000 and entered into force in 2003.

Article 3 provides, in part, that:

For the purposes of this Protocol:

- (a) '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;**
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.**

²⁶ See International Agreement for Suppression of White Slave Traffic (1904); International Convention for the Suppression of White Slave Traffic (1910); Convention for Suppression of Traffic in Persons and Exploitation of Prostitution of Others (1949).

²⁷ The UN Protocol against the Smuggling of Migrants by Land, Air and Sea is sometimes confused with the UN Trafficking Protocol. In French, 'human trafficking' should be translated as 'la traite des personnes' while migrant smuggling should be translated as 'trafic illicite de migrants.' In Spanish, 'human trafficking' should be translated as 'la trata de personas' while 'migrant smuggling' should be translated as 'el tráfico ilícito de migrantes'.



An early draft of the Trafficking Protocol defined 'forced labour' as "all work or service extracted from any person under the threat [or] use of force [or coercion], and for which the person does not offer himself or herself with free and informed consent", followed by a list of exceptions that mirror Convention 29.²⁸ The footnotes to this draft reflect an active debate among the delegations on the meaning of the words 'forced,' 'consent,' and 'coercion'.²⁹ Some countries argued that 'forced labour' should be defined with reference to the ILO definition, but ultimately there is no reference to Convention 29 or the elements of forced labour in the final text.³⁰ However, the guide to the Protocol prepared by the United Nations Office on Drugs and Crime (UNODC) refers to the ILO Conventions No. 29, 105 and 182 as well as to international instruments prohibiting slavery.³¹

The Council of Europe Convention on Action against Trafficking in Human Beings adopts the UN Trafficking Protocol definition of trafficking. The Council of Europe has noted that the Universal Declaration of Human Rights, the ICCPR, the ILO Forced Labour Convention and the ILO Abolition of Forced Labour Convention are relevant to the definition of forced labour.³²

Beginning in 2001, the ILO called on all countries, as part of their reporting obligations under the Forced Labour Convention, to provide information on measures taken to prevent, suppress and punish trafficking in persons. The Committee of Experts explained that since an essential element of the UN Trafficking Protocol was exploitation, which included forced labour, there was a link between the Trafficking Protocol and the Forced Labour Convention. "Any situation where someone is... forced to work without his or her valid consent, regardless of whether trafficking is involved, falls within the scope of the [Forced Labour] Convention by virtue of its definition of forced labour."³³

28 *Revised draft protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, A/AC.254/4/Add.3/Rev.6 at 4 (4 April 2000).

29 See *Ibid.* at n. 14-19.

30 See *Revised draft protocol to Prevent, Suppress and Punish Trafficking in Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, A/AC.254/4/Add.3/Rev.1 at n. 9 ("Australia and Canada proposed that a new paragraph be added after this paragraph to define the term 'forced labour,' perhaps by reference to existing international definitions such as the definition contained in the Forced Labour Convention, 1930, of the International Labour Organization (No. 29).").

31 *Legislative guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, UNODC 2004, at n.14.

32 *Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report*, 2005, at para. 89.

33 Committee of Experts Individual Observation concerning Convention No. 29 (Mexico), 2007.

2.3.2 The Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993

The ICTY Statute lists 'enslavement' as one of the crimes against humanity over which the court has jurisdiction but does not define it (Article 5[c]).³⁴ In interpreting 'enslavement,' the Tribunal relied in part on the Draft Code of Crimes against the Peace and Security of Mankind. The Draft Code was adopted by the International Law Commission in 1996. Article 18 includes the offence of 'enslavement' when committed "in a systematic manner or on a large scale and instigated or directed by a Government or by an organization or group". The Comment provides that:

Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29, concerning Forced or Compulsory Labour (forced labour).³⁵

2.3.3 Rome Statute of the International Criminal Court, 1998

The Rome Statute both created the International Criminal Court and defined a series of crimes within its jurisdiction, including the crime of genocide, crimes against humanity, war crimes and the crime of aggression (Article 5(1)[a-d]).³⁶ Article 7 lists a series of crimes against humanity, one of which is 'enslavement' (Article 7(2)[c]), and 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 women and children.

Although the first part of the definition of 'enslavement' reads like the Slavery Convention, both the second part and the elaboration contained in the Elements of Crime make clear that the offence is intended to be much broader. According to Article 7(1)[c] of the Elements of Crime, the first element of the crime of enslavement is defined as follows:

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.

³⁴ See S/Res/827 (1993) (adopting the Report of the Secretary-General).

³⁵ 1996 Draft Code of Crimes against the Peace and Security of Mankind with commentaries, UN Doc A/51/10 at 48.

³⁶ A/CONF.183/9 of 17 July 1998, available at: www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf.



Footnote 11 then provides that: "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."³⁷

This footnote was largely the result of pressure during the drafting process from NGOs that wanted to make sure that the new offence of enslavement was not limited to slavery. Human Rights Watch, for example, argued: "By restricting the examples of enslavement to traditional forms of slavery involving commercial transaction, and other 'similar' forms of deprivation of liberty, the text fails to embrace slavery-like practices in the modern world. If the Court's jurisdiction over this crime is to be meaningful, it must encompass practices such as debt bondage and forced labor."³⁸ Human Rights Watch specifically noted that the International Law Commission comment on the 1996 Draft Code of Crimes against the Peace and Security of Mankind included forced labour within the definition of enslavement.³⁹

³⁷ See Elements of Crimes, ICC-ASP/1/3 at 117.

³⁸ Human Rights Watch Commentary to the 5th Preparatory Commission at hrw.org/campaigns/icc/docs/prepcom-0600.htm.

³⁹ *Ibid.* at n. 37 (citing Report of the International Law Commission on the Work of its 48th Sess.).

3. FORCED LABOUR IN INTERNATIONAL COURTS

3.1 The International Court for the Former Yugoslavia: Defining and Refining the Concept of Enslavement

The ICTY has heard several forced labour cases under the caption of 'enslavement'. As noted above, enslavement is listed in Article 5(c) of the Statute of the Tribunal. In addition, forced labour may be charged as a violation of the laws or customs of war under Article 3 or as a form of persecution under Article 5(h).⁴⁰

The ICTY undertook a close analysis of the requirements of an enslavement charge in the case of *Prosecutor v. Kunarac*, which was based on acts of sexual abuse. The definition of enslavement elaborated in *Kunarac* was then applied in the forced labour case of *Krnjelac*.

3.1.1 Defining Enslavement:

Prosecutor v. Kunarac, Case No. IT-96-23 (22 February 2001) and Case No. IT-96-23-A (12 June 2002) (Appeals Chamber)⁴¹

Factual Background. In *Kunarac*, defendants were charged with enslavement for acts that included keeping two girls in a house for several months and treating them as personal property. The girls were required to do all household chores and comply with all sexual demands. This was the first time a charge of enslavement had been brought before the ICTY.

Legal Analysis. The Trial Chamber was required to determine what was meant by enslavement as a crime against humanity under Article 5(c). After reviewing the applicable law, including the Slavery Conventions, the Forced Labour Convention, the Nuremberg Charter and case law, decisions of the European Court of Human Rights, including *Van der Musselle*, and the work of the UN International Law Commission, the Trial Chamber held that enslavement, as a crime in customary international law, "consisted of the exercise of any or all of the powers attaching to the right of ownership over a person".⁴²

The Trial Chamber was aware that this definition might 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".⁴³ The court was, however, guided by the International Law Commission's *Draft Code of Crimes Against the Peace and Security of Mankind*, and in particular

⁴⁰ Article 5 deals generally with 'crimes against humanity'. Both 'enslavement' and 'persecution' are listed there. Article 3 deals with violations of the laws and customs of war. Slavery has been held to be a violation of customary international law. See *Krnjelac* Trial Judgment paras. 352-353.

⁴¹ All ICTY cases are available at www.un.org/icty/cases-e/index-e.htm.

⁴² *Kunarac* Trial Judgment para. 539.

⁴³ *Ibid.* at para. 541.



its commentary on the draft provision concerning enslavement, which it defined as “establishing or maintaining over persons a status of slavery, servitude or forced labour”. The ILC itself did not define these terms but referred instead to the existing conventions – specifically the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the ICCPR, and ILO Conventions Nos. 29 and 105.⁴⁴

The Trial Chamber decided that enslavement incorporated elements of forced labour and found the following factors relevant.

► **Indicators of Enslavement**

Elements of control and ownership: the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; 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.

Remedy. The lead defendant, Dragolub Kunarac, was sentenced to 28 years’ imprisonment. Two lesser defendants were sentenced to 20 years’ and 12 years’ imprisonment respectively. These sentences were upheld by the Appeals Chamber.

Appellate Argument. The defendants argued that the Prosecutor had failed to prove the element of ownership. Furthermore, the defendants maintained that the victims’ lack of consent had not been proven, since the victims themselves had “testified that they had freedom of movement within and outside the apartment and could therefore have escaped or attempted to change their situation”.⁴⁵

The Prosecutor, in response, argued that the Trial Chamber had “correctly identified the indicia of enslavement” and that in such cases “consent is often rendered impossible or irrelevant by a series of influences such as detention, captivity or psychological oppression”.⁴⁶

Appellate Opinion. The Appeals Chamber accepted the Trial Chamber’s definition of enslavement, but added its own emphasis.

⁴⁴ “Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29 concerning Forced or Compulsory Labour (forced labour).” *Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996) at 48 (text adopted by the ILC at its 48th Session in 1996).*

⁴⁵ *Kunarac Appeals Judgment* at para. 108.

⁴⁶ *Ibid.* at para. 113.

The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery', has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various 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. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.⁴⁷

3.1.2 Climate of Fear:

Prosecutor v. Krnojelac, Case No. IT-97-25 (15 March 2002) and Case No. IT-97-25-A (17 September 2003) (Appeals Chamber)

Factual Background. In *Krnojelac*, the lead defendant was charged with several counts based on the forced labour of detainees in a detention camp called KP Dom. The excerpt below gives some indication of the underlying factual allegations.

⁴⁷ Ibid. at para. 117.



Excerpt from *Prosecutor v. Krnojelac*, Third Amended Indictment

**COUNT 1
(Persecutions)**

5.1 MILORAD KRNOJELAC, from April 1992 until August 1993, while acting as the camp commander at the Foca KP Dom, together with the KP Dom guards under his command and in common purpose with the guards and soldiers specified elsewhere in this indictment, persecuted the Muslim and other non-Serb male civilian detainees at the KP Dom facility on political, racial or religious grounds.

5.2 As part of the persecution, MILORAD KRNOJELAC participated in or aided and abetted the execution of a common plan involving... the prolonged and frequent forced labour of Muslim and other non-Serb male civilian detainees at KP Dom...

**COUNTS 16-18
(Enslavement)**

5.41 From May 1992 until October 1994, detainees were subjected to forced labour. MILORAD KRNOJELAC participated in these criminal actions from May 1992 until August 1993. During May 1992, MILORAD KRNOJELAC approved decisions to force individual detainees to work. In July 1992, MILORAD KRNOJELAC, in concert with other high-level prison staff, formed and began to supervise a workers' group of approximately 70 of the detainees with special skills. Most of these detainees were kept imprisoned from the summer 1992 until 5 October 1994, for the primary purpose of being used for forced labour. Further details of the forced labour occurring during the administration of MILORAD KRNOJELAC are described in paragraphs 5.42 through 5.45. The names of detainees subjected to forced labour are provided in attached Schedule E.

5.42 At all times relevant to this Indictment, the guards called out members of the workers' group on a daily basis and forced them to work inside and outside the camp, from 7 a.m. to at least 3 or 4 p.m. The detainees were not paid for their work. Work was not voluntary. Even ill or injured detainees were forced to work. Those who refused were sent to solitary confinement. During their work, the detainees were either guarded by the regular prison guards or by Serb soldiers.

5.43 Within the prison, the detainees had to work in the kitchen, the furniture factory and the metal and mechanical workshop. In the workshop, the detainees had to repair army vehicles or looted cars.

* * * * *

5.46 By his participation in the acts or omissions described in paragraphs 5.41 to 5.45, MILORAD KRNOJELAC committed:

Count 16: A CRIME AGAINST HUMANITY, punishable under Article 5 (c) (enslavement) of the Statute of the Tribunal;

Count 18: A VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable under Article 3 of the Statute of the Tribunal and recognized under the Slavery Convention and International Customary Law (slavery).

Legal Analysis. The Trial Chamber understood the enslavement charges to be based on forced labour.⁴⁸ The *Kunarac* Court had already identified forced labour as an indicator of enslavement, but it had not further defined forced labour. The *Krnjelac* Court, observing that “involuntariness is the fundamental definitional feature of ‘forced or compulsory labour’”, held that: “[This is a] factual question which has to be considered in light of all the relevant circumstances on a case by case basis... What must be established is that the relevant persons had no real choice as to whether they would work”.⁴⁹

The Trial Chamber nevertheless concluded that the allegation of forced labour with respect to most of the detainees was not established. The Trial Chamber did not believe that the general conditions in the detention camp were sufficient to establish that the work of every detainee was involuntary. “Whether a particular detainee was forced to work is to be assessed on an individual basis, as to whether he had no real choice as to whether he had to work.”⁵⁰ The Trial Chamber considered the following factors relevant:

- the substantially uncompensated aspect of the labour performed;
- the vulnerable position of the detainees;
- the allegations that unwilling detainees were either forced to work or placed in solitary confinement;
- the inhumane conditions in the detention camp.

However, the Trial Chamber found no direct evidence that individual detainees who were unwilling to work were forced to do so. “Many of the Prosecution’s witnesses expressed their own conclusions that this was the case, but no attempt was made to demonstrate the factual basis for those conclusions.”⁵¹ In fact, several detainees testified that they never refused to work or expressed disagreement with orders to work. In short, the Trial Chamber held their beliefs were legally insufficient.

- ▶ **Subjective Beliefs**
The beliefs and fears of the detainees, in particular in the context of the general inhumane conditions and atmosphere in the KP Dom, are of course relevant to a determination whether they worked voluntarily, but a reliance solely on such unsupported conclusions expressed by the witnesses would not be [justified].⁵²

Remedy. Krnjelac was acquitted of enslavement and slavery, counts 16 and 18 of the indictment. He was convicted on a number of other counts, including persecution as a crime against humanity, inhumane acts as a crime against humanity and cruel treatment as a violation of the laws or customs of war, both as a superior and for his individual conduct. He was sentenced to 7½ years in prison.

48 *Krnjelac* Trial Judgment para. 357.

49 *Ibid.* at para. 359 and n. 966 (citing Bossuyt, Guide to the travaux préparatoires of the ICCPR at 167).

50 *Ibid.* at para. 372.

51 *Ibid.* at para. 376.

52 *Ibid.* at para. 377.



Appellate Argument. The Prosecutor of the Tribunal argued that the Trial Chamber had erred in finding that there was insufficient evidence that the labour was involuntary. Whereas the Trial Chamber had required proof that a particular detainee “had objected to working or... had been told by a person in authority that he would be punished if he did not” work, the Prosecutor contended that the court should have considered that circumstances were “so coercive as to negate any possibility of consent”.⁵³

Appellate Opinion. The Appeals Chamber agreed. In sustaining the Prosecutor’s appeal, the Chamber noted that the detention camp was characterized by severe overcrowding, deliberate starvation, the lack of heat or adequate clothing, the absence of medical care, and regular beatings and other forms of mistreatment.

Given the specific detention conditions of the non-Serb detainees at the KP Dom, a reasonable trier of fact should have arrived at the conclusion that the detainees’ general situation negated any possibility of free consent... The climate of fear made the expression of free consent impossible, and it may neither be expected of a detainee that he voice an objection nor held that a person in a position of authority need threaten him with punishment if he refuses to work in order for [the offence of] forced labour to be established.⁵⁴

But the Appeals Chamber rejected the argument that a detainee’s subjective opinion that he was forced to work was, in itself, sufficient to establish the lack of consent. “[T]he detainees’ personal conviction that they were forced to work must be proven with objective and not just subjective evidence.”⁵⁵ Nevertheless, in this particular case and given the circumstances of the detention centre, “there was sufficient objective evidence to prove that the detainees were in fact forced to work, thus bearing out their conviction that the labour they performed was forced” (Ibid.).

Remedy. The Appeals Chamber vacated the 7½-year sentence handed down to Krnojelac and re-sentenced him to 15 years.

⁵³ *Krnojelac Appeal Judgment* at para. 192.

⁵⁴ *Ibid.* at para. 194.

⁵⁵ *Ibid.* at para. 195.

QUESTIONS FOR DISCUSSION

(1) Although the ICTY does not adopt the same elements used by the ILO in analyzing forced labour, it does frame the question as one of voluntariness. How does the ICTY assess voluntariness?

(2) The *Kunarac* decision includes 'forced labour' within its definition of the crime of enslavement, but it then defines 'enslavement' in terms of "powers attaching to the right of ownership", a definition that suggests slavery. How do you reconcile this? One commentator has suggested that, in *Kunarac*, the ICTY "asserted that ownership was an essential element", but then found that enslavement had been established "in circumstances which could just as easily be described as control rather than ownership".⁵⁶ Do the indicia relied upon by the *Kunarac* Court all go to the right of ownership? Are these indicia helpful in forced labour cases?

(3) The *Kunarac* enslavement decision was based in part on allegations of buying and selling women and girls for sex. Is the enslavement definition crafted in *Kunarac* applicable when there is no commercial transaction in the underlying conduct?

(4) How does the *Krnjelac* Trial Chamber view the victims' testimony about the involuntary nature of their work? How does the *Krnjelac* Appeals Chamber view the same evidence?

(5) Look at enslavement as it is defined by the ILC in the Comment to the Draft Code, the ICTY in *Kunarac*, and finally in the Rome Statute of the International Criminal Court. How would you describe the relationship between these textual definitions of enslavement?

⁵⁶ Holly Cullen, op. cit., p. 592.



3.1.3 A Closer Look at the Concept of Climate of Fear

The Appeals Chamber treats the detention camp conditions very differently than the Trial Chamber, but the concept of 'climate of fear' is not new in forced labour cases. In a series of cases involving migrant agricultural workers, American courts recognized that the coercion which renders work involuntary may be the result of a 'climate of fear'.⁵⁷ Just as the Appeals Chamber in *Krnjelac* found that the climate of fear in KP Dom was so coercive that individual detainees were not required to voice objections to orders to work, so American courts have found that, where there is a pervasive climate of fear, any opportunity to escape is irrelevant. "Threats and acts of violence are... imposed to create a climate of fear which intimidates workers and prevents them from leaving the camp. That the worker had the opportunity to escape is of no moment, if the defendant has placed him in such fear of physical harm that he is afraid to leave."⁵⁸

The issue of wartime industrial forced labour has been raised before the Committee of Experts on several occasions, most recently in connection with Japan. It presents a clear violation of the Convention.

CEACR Individual Observation concerning Convention No. 29, Forced Labour, 1930 Japan (ratification: 1932) Published: 2003

The Committee has previously considered the wartime practice involving the forcible conscription of hundreds of thousands of labourers from other Asian countries, including China and the Republic of Korea, to work under private-sector control in Japanese wartime factories, mines and construction sites. The Committee has noted a 1946 report of the Japanese Ministry of Foreign Affairs (MOFA) entitled *Survey of Chinese labourers and working conditions in Japan*, which details very harsh working conditions and brutal treatment, including a death rate of 17.5 percent, and up to 28.6 percent in some operations. Although these workers had been promised pay and conditions similar to those of Japanese workers, they in fact received little or no pay. The Committee has found that the massive conscription of labour to work for private industry in Japan under such deplorable conditions was a violation of the Convention.

⁵⁷ *United States v. Warren*, 772 F.2d 827, 833-834 (11th Cir. 1985). For other discussions of 'climate of fear' evidence, see *United States v. Alzanki*, 54 F.3d 994, 999 (1st Cir. 1995); *United States v. Booker*, 655 F.2d 562, 566 (4th Cir. 1981).

⁵⁸ *Warren*, op. cit., at 834.

4. FORCED LABOUR IN REGIONAL COURTS

4.1 The European Court of Human Rights: Imposing Positive Obligations on States for Individual Violations of Criminal Law

Although the European Court of Human Rights has a large and growing case-load, Article 4 has been one of the least litigated provisions of the European Convention.⁵⁹ Prior to 2005, all the cases examined by either the Court or its screening body, the European Commission on Human Rights, had concerned state-imposed obligations that allegedly breached the provision. For forced labour jurisprudence, there are two cases of special significance – *Van der Mussele* and *Siliadin*. In both cases, the Court relies on the ILO definition of forced labour and proceeds to identify and analyze the constituent elements. Furthermore, the two cases, separated by a span of 22 years, show just how much the face of forced labour has changed in the intervening decades. Thus *Van der Mussele* and *Siliadin* together stand for the continued vitality of the Forced Labour Convention.

4.1.1 Offer to Work Not Involuntary:

Van der Mussele v. Belgium, Application No. 8919/90 (23 November 1983)

Factual Background. In *Van der Mussele*, a Belgian lawyer argued that his uncompensated pro bono service – required as part of his training as an *avocat* (lawyer) – violated Article 4. The Court ultimately rejected the applicant’s claim, but it first proceeded to analyze each element of a forced labour violation.

Legal Analysis. Noting that “the authors of the European Convention – following the example of the authors of Article 8 of the draft International Covenant on Civil and Political Rights – based themselves, to a large extent, on an earlier treaty of the International Labour Organization, namely Convention No. 29 concerning Forced or Compulsory Labour”, the Court took the ILO definition as a ‘starting point’. Convention 29 defines ‘forced labour’ as all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

⁵⁹ Warren, op. cit., at 834.



- ▶ **Work or Service**
Under the first element, the Court held that Van der Mussele's pro bono representation of an indigent client amounted to 'labour' for purposes of Article 4.⁶⁰

- ▶ **Menace of any Penalty**
To determine whether the work provided was forced or compelled, the Court first rejected the idea that work "carried out in pursuance of a freely negotiated contract" might violate Article 4 simply because "one of the parties has undertaken with the other to do that work and will be subject to sanctions if he does not honour his promise".⁶¹ "What there has to be is work 'exacted... under the menace of any penalty' and also performed against the will of the person concerned, that is work for which he 'has not offered himself voluntarily'." The Court, guided both by the use of the term 'any' in the ILO definition and the comments of the Committee of Experts, found that the prospect of being struck from the roll of pupils or being rejected in his application for entry on the register of *avocats* were both "sufficiently daunting" to be capable of constituting the menace of a penalty.⁶²

- ▶ **Voluntary Offer**
For the third element, the Court noted Van der Mussele's initial consent but said that this alone was not dispositive. Instead, the Court held that the required service could violate Article 4 if it "imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of that profession" that it "could not be treated as having been voluntarily accepted beforehand".⁶³ However, because the services did not "fall outside the ambit of the normal activities of an *avocat*", and also contributed to Mr. Van der Mussele's own professional training, the burden was not excessive or disproportionate. Thus there was no violation of Article 4.

Remedy. No remedy was ordered because the Court found no violation of any Article of the Convention. However, the Court did note that the Government of Belgium had ended the practice of not reimbursing pupil *avocats* for their expenditures incurred in the required representation of clients.

60 *Siliadin v. France*, op. cit., para. 33.

61 *Ibid.*, para. 34.

62 *Ibid.*, para. 35.

63 *Ibid.*, para. 37.

QUESTIONS FOR DISCUSSION

- (1)** Does the Court’s treatment of Van der Mussele’s initial consent suggest that there might be circumstances in which initial consent is vitiated by later conduct? What might be the circumstances under which a worker’s initial consent to work results in forced labour? Could a ‘freely negotiated contract’ ever result in forced labour?

- (2)** Is this a broad or narrow interpretation of ‘menace of any penalty’? Is it justified?

- (3)** What are the factors in the Court’s decision on voluntariness? Are they factors that can be applied to other factual situations?



Consider the following excerpt from the 1968 General Survey on Forced Labour as it relates to the reasoning in *Van der Musselle*.

**General Survey of the Reports relating to the Forced Labour Convention,
ILO Committee of Experts (1968)**

27. To fall within the definition of 'forced or compulsory labour' in the 1930 Convention, work or service must be exacted 'under the menace of any penalty'. It was made clear during the consideration of the draft instrument by the Conference that the penalty here in question need not be in the form of penal sanctions, but might also take the form of a loss of rights or privileges. This may occur, for instance, where persons who seek to terminate their employment in contravention of legislative restrictions may not be taken into employment by another undertaking, being thus impelled to continue in particular work under the menace of being deprived of the right to free choice of employment.

**4.1.2 Extreme Vulnerability Amounting to Menace of a Penalty:
Siliadin v. France, Application No. 73316/01 (26 July 2005)**

Factual Background. In *Siliadin*, the applicant alleged that the criminal law provisions of France did not provide her sufficient and effective protection against servitude or forced labour. Siwa-Akofa Siliadin had arrived in France from Togo in 1994 at the age of 15. Her father had arranged that she work for a family there, in return for attending school and having her visa regularized. In reality, she became an unpaid housemaid for the family of Mr. and Mrs. B. and her passport was taken from her. Here is an excerpt from the factual description of the Court:

She worked seven days a week, without a day off, and was occasionally and exceptionally authorized to go out on Sundays to attend mass. Her working day began at 7:30 a.m., when she had to get up and prepare breakfast, dress the children, take them to nursery school or their recreational activities, look after the baby, do the housework and wash and iron clothes. In the evening she prepared dinner, looked after the older children, did the washing up and went to bed at about 10:30 p.m.... In December 1995, the applicant was able to escape with the help of a Haitian national who took her in for five or six months. She looked after the latter's two children, was given appropriate accommodation and food, and received 2,500 French francs per month.

Subsequently, in obedience to her paternal uncle, who had been in contact with Mr. and Mrs. B., she returned to the couple, who had undertaken to put her immigration status in order. However, the situation remained unchanged: the applicant continued to carry out household tasks and look after the couple's children. She slept on a mattress on the floor of the children's bedroom, then on a folding bed, and wore second-hand clothes. Her immigration status had still not been regularized, she was not paid and did not attend school (Paras. 14-17).

Siliadin eventually managed to recover her passport and confided her situation to a neighbour, who alerted the Comité Contre l'Esclavage Moderne (CCEM), a Paris-based NGO that helps victims of domestic servitude. CCEM filed a complaint with the police, who raided the house. Mr. and Mrs. B. were charged under Articles 225-13 and 225-14 of the French Penal Code.⁶⁴ They were convicted of the first count but not the second. On appeal to the Paris Court of Appeal, however, the defendants were acquitted of all charges. The public prosecutor elected not to appeal this decision to the Court of Cassation, with the result that only the applicant's civil claim was appealed to the highest court. The Court of Cassation quashed the judgment of the Court of Appeal with regard to the civil claim, finding that its conclusions were not substantiated by the facts. On remand to the Versailles Court of Appeal, the applicant was awarded civil damages but the criminal acquittals were allowed to stand.

Before the European Court, Siliadin argued that France had positive obligations to adopt criminal law provisions that would adequately deter and punish such offences. The existing criminal law provisions were vague and poorly defined. According to Siliadin, "in the absence of any appropriate criminal-law machinery to prevent and punish the direct perpetrators of alleged ill-treatment, it could not be maintained that civil proceedings to afford reparation of the damage suffered was sufficient to provide her with adequate protection against possible assaults on her integrity" (Para. 69). The Government responded that there were remedies in both civil and criminal law for this kind of conduct, and that the offences charged against Mr. and Mrs. B had resulted in convictions in other cases. Thus the Government's position was that France had satisfied whatever positive obligations might be held to exist (Paras. 75-76).

Legal Analysis. This was the first time the Court was called upon to consider whether Article 4 imposed positive obligations on states, and it concluded that it did. It based its conclusion in part on the fact that Article 4 "enshrines one of the most basic values of the democratic societies making up the Council of Europe" (Para. 82). It further noted the absolute ban on forced labour for the benefit of private individuals contained in Article 4 of the Forced Labour Convention (Para. 85).

In [these] circumstances, 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 Governments have positive obligations... to adopt criminal-law provisions which penalize the practices referred to in Article 4 and to apply them in practice (Para. 89).

⁶⁴ Art. 225-13: "It shall be an offence... to obtain from an individual the performance of services without payment or in exchange for payment that is manifestly disproportionate to the amount of work carried out, by taking advantage of that person's vulnerability or state of dependence." Art. 225-14: "It shall be an offence... to subject an individual to working or living conditions which are incompatible with human dignity by taking advantage of that individual's vulnerability or state of dependence."



As for whether there was a violation of Article 4, the Court reviewed the applicant's allegations. "Her freedom to come and go had been limited, her passport had been taken away from her, her immigration status had been precarious before becoming illegal, and she had also been kept by Mr. and Mrs. B in a state of fear that she would be arrested and expelled."⁶⁵ Relying on the ILO definition of forced labour, the Court then proceeded to analyze the three elements.⁶⁶

▶ **Menace of any Penalty**

The Court notes that, in the instant case, although the applicant was not threatened by a 'penalty', the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat. She was an adolescent girl in a foreign land, unlawfully present in French territory and in fear of arrest by the police. Indeed, Mr and Mrs B. nurtured that fear and led her to believe that her status would be regularized. Accordingly, the Court considers that the first criterion was met, especially since the applicant was a minor at the relevant time, a point which the Court emphasizes.

▶ **Voluntary Offer**

As to whether she performed this work of her own free will, it is clear from the facts of the case that it cannot seriously be maintained that she did. On the contrary, it is evident that she was not given any choice.⁶⁷

The Court concluded that Siliadin was subjected to forced labour within the meaning of Article 4 of the Convention. It then considered whether she was also held in servitude or slavery. Finding the slavery definition inapplicable, because Mr. and Mrs. B. had not "exercise[d] a genuine right of legal ownership over her", the Court turned to the concept of 'servitude'. The European Commission had earlier defined 'servitude' as follows: "[I]n addition to the obligation to provide certain services to another [it includes] the obligation on the 'serf' to live on the other's property and the impossibility of changing his status."⁶⁸ Thus 'servitude' was an "obligation to provide one's services that is imposed by the use of coercion".⁶⁹ In supporting its finding of servitude, the Court identified the following factors:

- Siliadin's labour lasted almost fifteen hours a day, seven days a week.
- She had not chosen to work for Mr. and Mrs. B.
- As a minor, she had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of Mr. and Mrs. B.
- She was entirely at Mr. and Mrs. B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularized, something that had never occurred.

⁶⁵ Siliadin v. France, op. cit., para. 94.

⁶⁶ Ibid., paras. 115-117.

⁶⁷ Ibid., paras. 118-119.

⁶⁸ Ibid., para. 123 (citing *Van Droogenbroeck v. Belgium*, 9 July 1980, Series V, vol. 44, p. 30).

⁶⁹ Ibid., para. 124.

- In addition, the applicant, who was afraid of being arrested by the police, was not in any event permitted to leave the house, except to take the children to their classes and various activities. Thus she had no freedom of movement and no free time.
- As she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on Mr. and Mrs. B.⁷⁰

Remedy. Under Article 41 of the Convention, the Court has the power to order 'just satisfaction' to the injured party. Siliadin had not claimed damages, but she had claimed costs and expenses. The Court ordered full payment in the amount of €26,209.69 for her costs and expenses, plus interest. Before the French courts, Siliadin had been awarded €15,245 in compensation for psychological trauma, an award that was upheld by the Versailles Court of Appeal. In addition, she was awarded €31,238 in back wages by the Paris industrial tribunal.

QUESTIONS FOR DISCUSSION

(1) What menace or threat to Siliadin does the Court identify? Why does the Court consider that Siliadin faces a 'threat' but not the threat of a penalty?

(2) How do an individual's vulnerability or vulnerabilities affect the analysis of the 'menace of any penalty'?

(3) According to the Court's analysis, would any underage illegal migrant face consequences that are equivalent to the menace of a penalty?

(4) Why does the Court not spend as much time on the issue of voluntariness as it did in *Van der Mussele*? Siliadin is a very different individual from Van der Mussele in terms of age, education, national origin and citizenship. Do these differences matter? Why?

(5) Are the facts supporting the servitude finding the same or different from the facts that support the forced labour finding? What is the difference between forced labour and servitude? One writer describes *Siliadin* as "retain[ing] the classic distinction between slavery and forced labour, allowing the concept of servitude to fill any gap between the two".⁷¹ Do you agree or disagree with this description?

(6) As one commentator has noted, ILO materials are cited for two purposes in *Siliadin*. One of those reasons is to "assist in the determination of the material scope of the provision".⁷² What is the other reason for the Court's reference to the Forced Labour Convention?

⁷⁰ Ibid., paras. 126-128.

⁷¹ Holly Cullen, "Siliadin v. France: Positive Obligations Under Article 4 of the European Convention on Human Rights", in *Human Rights Law Review*, Vol. 6, 2006, pp. 585, 592.

⁷² See Virginia Mantouvalou, "Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers", in *Industrial Law Journal*, Vol. 35, December 2006, pp. 395, 406-407.



(7) Is Siliadin's vulnerability heightened by the fact that she is female?⁷³
Is this fact as relevant in a country with a relatively developed system of gender equality? Why does the court not address it?

73 In the field of trafficking, research has often focused on trafficking for sexual exploitation. Most of the presumed victims are female. See, generally, *Stopping forced labour*, op. cit., at pp. 49-50. The ILO minimum estimate of the number of persons in forced labour indicates that women and girls represent 56% of the victims in situations of economic exploitation, but 98% of the victims in forced commercial sexual exploitation. See *A global alliance*, op. cit., at p. 15. For a description of the economic factors that are behind the increase in employment of irregular migrants as domestic workers, see Gijsbert Van Liemt, *Human trafficking in Europe: An economic perspective*, ILO Working Paper, 2004, pp. 5, 9.

Consider the comments of the Committee of Experts on the practice of 'Restavek' children in Haiti and the parallels with the *Siliadin* case. Note that the Committee does not consider all child domestic work as forced labour.

**CEACR Comments 2004/75th Session on Convention 29:
'Restavek' children in Haiti**

Domestic labour by 'Restavek' children is very common in Haiti, and generally constitutes forced labour or slavery. 'Restavek' involves the children of poor, primarily rural, families being sent to live with more affluent families and to perform domestic labour in exchange for room and board. In many cases the poor family receives income from the recipient family, effectively selling their children into slavery. Some estimates suggest nearly 300,000 'Restavek' children in Haiti. Very few of the 'Restavek' children receive an education, only 20 percent attend school at all, and less than one percent reach secondary school... The Committee observes that, even though not all work done by children in domestic services amounts to forced labour, it is essential to examine the conditions in which such work is carried out and to measure them against the definition of forced labour, particularly as concerns the validity of consent given to performing such work, the young age of the children involved and the possibility of leaving such employment, in order to determine whether the situation falls within the scope of the Convention.

For an example of when domestic work might violate the Forced Labour Convention, consider the following request to Saudi Arabia.

**CEACR: Individual Direct Request Concerning Convention No. 29,
Forced Labour, 1930 Saudi Arabia Submitted: 1998**

The Committee considered that, in certain cases, even though forced or compulsory labour is prohibited in principle, employers could be in a position to exercise excessive control over workers, particularly foreign workers and others, such as agricultural and domestic workers who are not covered by labour legislation... [W]orkers are subjected to conditions which transform their employment into a situation of near slavery. First, the employer, or the employing agency, routinely takes possession of the worker's passport. The justification is that it is for 'safe-keeping', but the result is that the passport holder can no longer exercise her or his freedom of movement and certainly cannot leave the country or change employers freely. A second common occurrence is the non-remuneration of work, often for months on end. The worker cannot afford to seek other employment without risking the loss of all her or his earnings.

Recall that Article 25 of the Convention requires that "the penalties imposed by law are... strictly enforced". In at least one case, a Commission of Inquiry appointed under Article 26 of the ILO Constitution has held that the failure to enforce a penal prohibition on forced labour amounted to a violation of Article 25 of the Convention.⁷⁴

⁷⁴ *Forced labour in Myanmar*, Report of the Commission of Inquiry, op. cit., at para. 514.



4.2 Economic Community of West African States (ECOWAS) Community Court of Justice: Recognizing Positive Obligations of States to Protect Individuals from Slavery

Despite the abolition of slavery, vestiges remain in Niger and other West African states. Descendants of slaves may work as household servants, tend livestock or undertake agricultural tasks. "Threats and punishments are reportedly used to prevent slave descendants from fleeing. But diverse social and psychological factors can also come into play, such as fear of supernatural retaliation... or fear of the unknown world beyond the familiar confines of the traditional master's household."⁷⁵ In 2003, the Penal Code of Niger was amended, making slavery a crime punishable by a prison term of up to 30 years. In turn, forced labour is prohibited and the Labour Code makes provision for a prison sentence of up to one month.

4.2.1 Holding States Accountable:

Hadijatou Mani v. Republic of Niger, Community Court of Justice (27 October 2008)

Factual Background. Hadijatou Mani was born into an established slave class. In 1996, when she was 12 years old, she was sold to a man named El Hadj Souleymane Naroua.⁷⁶ Naroua forced her to work in the house and in the fields, and also repeatedly sexually assaulted her. She bore him three children, of whom two survived. In 2005, Naroua gave her a document entitled 'certificate d'affranchissement (d'esclave)'. This document stated that from the date of the signature, she was free and was no longer the slave of anybody. Nevertheless, her former master meant that she would remain his wife, according to the 5th wife tradition called *wahiya*. Hadijatou Mani sought her freedom at the local Tribunal Civil et Coutumier, which ruled that there was no marriage and that she was free. Naroua appealed, however, and the Tribunal de Grand Instance (TGI) reversed the lower court's ruling. The TGI held that under customary Nigerian law a slave girl such as Hadijatou Mani was married to her master upon release. Hadijatou brought the case before the Supreme Court, which remanded to a different TGI.

In the meantime, however, Hadijatou married a man she had chosen, with the consent of her brother. Naroua then filed a complaint for bigamy. Hadijatou, her husband and her brother were all sentenced to six months imprisonment. Hadijatou appealed and was granted a provisional release after serving two months of her sentence. In April 2008, Hadijatou filed suit before the ECOWAS Community Court of Justice arguing that Niger had failed to enforce its own law prohibiting slavery. Specifically, Hadijatou argued that Niger had violated its obligations under the Treaty of ECOWAS, the African Charter of Human and Peoples Rights, the ICCPR, the Convention on the Elimination of All Forms of Discrimination against Women, the Slavery Convention and the Supplementary Convention on the Abolition of Slavery. This was the first time in its history that the ECOWAS Court had heard a slavery case.

⁷⁵ *A Global Alliance against Forced Labour* at para. 203.

⁷⁶ This case history is based on Anti-Slavery International, *Briefing Paper: Hadijatou Mani Koraou v. Niger at the ECOWAS Court of Justice* (2008).

Legal Analysis. Before the ECOWAS Court, Hadijatou argued that she had been born into a slave class and treated as a slave during the whole time that she was under the roof of her former master, El Hadj Souleymane Naroua. Niger responded that she was not a slave but was Naroua's spouse and they had lived together, in greater or lesser happiness, like all other couples.

The Court held unequivocally that Hadijatou had been held as a slave during the almost ten years that she had been subjected to psychological abuse, physical violence, sexual exploitation, forced house and fieldwork, and control over her movements. Beyond the material aspects, the moral element of the slave condition was constituted by the fact that El Hadj Souleymane Naroua intended to exercise his property right over Naroua, even after releasing her as a slave. The characteristics of Hadijatou's condition met the definition of slavery found in the 1926 Slavery Convention and the indicators of enslavement, as interpreted by the ICTY Appellate Chamber in its Kunarac decision. The Court also cited the Nuremberg Military Tribunal for the holding that slavery can exist without torture or ill treatment.

Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill treatment, overlook the starvation, beatings and other barbarous acts, but the admitted fact of slavery – compulsory, uncompensated labour – would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery. The question of knowing the nature of the link between the accused and the victim is essential.⁷⁷

Noting the *erga omnes* nature of the obligation to prohibit slavery, the Court further held that Niger, by failing to protect Hadijatou, had tolerated or condoned the practice of slavery. The Court quoted the national judge who claimed that "the wedding of a free man to a slave was legal, provided he couldn't marry a free woman and if he fears to fall into fornication", and concluded that recognizing the slave status of Hadijatou without condemning it was a form of acceptance of, or at least of tolerance towards, this practice. Hadijatou had the right to be protected by the authorities of the Republic of Niger, either administrative or judicial, and this right had been denied her. Niger was responsible for failing to act.

⁷⁷ Para. 79 (citing Kunarac Judgment para. 525 (ICTY Trial Chamber, 22 February 2001)).



Remedy. Hadijatou was awarded compensation of 10 million francs CFA for her suffering.

**CEACR: Individual Observation concerning Convention No. 29, Niger
(ratification: 1961)
Published: 2008**

The Committee observed that in Niger, there was an archaic form of slavery found in nomadic communities and that slave status was still transmitted by birth to persons from certain ethnic groups. The slave is placed at the disposal of the master without charge or in exchange for payment. The relations between master and slave are based on direct exploitation. Slaves work for their masters without remuneration, largely as shepherds, agricultural workers or domestic employees. The Committee noted that the Government acknowledged that slavery had not been totally eradicated and that numerous actions had been undertaken to combat the forced labour of persons reduced to slavery. In terms of legislation, Act No. 2003-025 of 13 June 2003 amended the Penal Code by introducing a section on slavery... The Committee notes that in its report for 2005, the Government states that there have been no convictions by the courts as there were no complaints filed by victims.

QUESTIONS FOR DISCUSSION

(1) The Committee of Experts has emphasized that in order for penalties to be “really adequate” and “strictly applied”, the State must ensure that “the victims of such practices are able to complain to the competent authorities, have access to justice and obtain compensation for the harm they have suffered”.⁷⁸ To what extent should effective enforcement of criminal law depend on the willingness or ability of individual victims to file complaints?

(2) Hadijatou’s complaint was the first slavery case heard by the ECOWAS Community Court. She had the assistance of several human rights organizations, including Anti-Slavery International, Timidria Association and INTERIGHTS. Does her case make it easier for other slaves in Niger to bring complaints?

(3) Compare this decision with the decision of the European Court of Human Rights in *Siliadin v. France*. What should be the division of responsibility between national and international courts concerning effective prohibition of forced labour?

⁷⁸ *Eradication of forced labour*, General Survey of 2007, at para. 139.

5. FORCED LABOUR IN SOUTH ASIA

Forced labour jurisprudence in India and Pakistan is well worth examining for several reasons. First, both countries have constitutional provisions prohibiting forced labour. Article 23 of the Constitution of India provides that: "Traffic in human beings and begar and other similar forms of forced labour is prohibited and any contravention of this provision shall be an offence punishable in accordance with law." Article 11(2) of the Constitution of Pakistan provides that: "All forms of forced labour and traffic in human beings are prohibited."

Secondly, both have a tradition of activist public interest litigation that courts have fostered with a number of procedural innovations. For example, courts have developed an expansive and liberalized concept of standing which permits third-party organizations, such as trade unions and nongovernmental organizations, to bring suit. They have practiced procedural flexibility, such as when admitting writ petitions to enforce fundamental rights in the form of letters, telegrams or newspaper articles; and they have in some instances forsaken adversary fact-finding in favour of commissions of inquiry. Lastly, courts have assumed broad remedial powers in addressing issues of fundamental rights.⁷⁹

In addition, both countries share a deeply embedded practice of debt bondage, also known as bonded labour. Debt bondage is a specific form of forced labour, in which the element of compulsion is derived from debt.⁸⁰ The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery defines 'debt bondage' as "the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined".⁸¹ Although Convention 29 does not specifically refer to debt bondage, the Committee of Experts has included debt bondage within the ambit of forced labour.⁸²

79 For a discussion of public interest litigation in Indian courts, see Y.R. Haragopal Reddy, *Bonded Labour System in India* (Deep & Deep Publications 1995), pp. 67-69; Vijayashri Sripathi, "Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)", in *American University International Law Review*, Vol. 14, pp. 413, 453-458 (discussing expansion of locus standi, creation of epistolary jurisdiction, appointment of fact-finding commissioners, and ordering remedial measures) (1998). For a description of public interest litigation in Pakistani courts, see Parvez Hassan & Azim Azfar, "Securing Environmental Rights through Public Interest Litigation in South Asia", in *Virginia Environmental Law Journal*, Vol. 22, 2004, pp. 231-236 and n. 72

80 Ravi S. Srivastava, *Bonded Labour in India: Its Incidence and Pattern* (ILO Working Paper 2005), p.1. Article 1(a).

82 The preamble in Convention No. 105 refers to the Supplementary Convention on the Abolition of Slavery and notes that it prohibits debt bondage and serfdom. In addition, Convention No. 182 lists debt bondage as one of the worst forms of child labour.



5.1 India

5.1.1 Payment Below the Minimum Wage:

People's Union for Democratic Rights v. Union of India, A.I.R. 1982

S.C. 1473 (19 September 1982)

Factual Background. *People's Union for Democratic Rights*, also known as the Asiad Games Case, was brought by means of a letter addressed to Justice Bhagwati of the Supreme Court of India. The letter, sent by a public interest organization and based on an investigation by three social scientists, alleged violations of labour laws by the Union of India, the Delhi Development Authority and the Delhi Administration, based on their employment of workers on construction projects for the Asian Games. The letter was then treated as a writ petition for enforcement of a constitutional right – principally Article 23, which prohibited forced labour. The respondents and the petitioner both submitted affidavits and the petition was argued on the basis of these affidavits. The principal allegation was that the contractors paid wages to *jamadars* – crew bosses – who deducted a commission and then paid the actual workers less than the legal minimum wage of 9.25 rupees per day. The issue before the Supreme Court was whether the forced labour provision of Article 23 was applicable to a situation of workers being paid less than the minimum wage.

Legal Analysis. First, the Court referred to ILO Convention 29, the European Convention on Human Rights and the ICCPR, and noted that Article 23 “is in the same strain and it enacts a prohibition against forced labour in whatever form it may be found”. Citing two US peonage cases – *Bailey v. Alabama* and *Pollock v. Williams* – the Court held that Article 23 was intended to strike “at every form of forced labour even if it has its origin in a contract voluntarily entered into by the person obligated to provide labour or service”. The Court then devoted most of its analysis to an examination of what is meant by the term ‘force’ in ‘forced labour’.

► **What is Force?**

What Article 23 prohibits is ‘forced labour’ – that is labour or service which a person is forced to provide – and the ‘force’ that would make such labour or service ‘forced labour’ may arise in several ways. It may be physical force that can compel a person to provide labour or service to another, or it may be force exerted through a legal provision, such as a provision for imprisonment or fine in case the employee fails to provide labour or service. It may even be compulsion arising from hunger and poverty, want and destitution. Any factor that deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as ‘force’, and if labour or service is compelled as a result of such ‘force’, it would be ‘forced labour’. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children, or even to hide their nakedness, where utter, grinding poverty has broken his back and reduced him to a state of helplessness and despair, and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way,

even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. In doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances, and the labour of service provided by him would be clearly 'forced labour'. There is no reason why the word 'forced' should be read in a narrow and restricted manner so as to be confined only to physical or legal 'force', particularly when the national charter, a state's fundamental document, has promised to build a new socialist republic in which there will be socio-economic justice for all, and in which everyone will have the right to work, to education and to adequate means of livelihood.

► **Economic Compulsion**

The word 'force' must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstance, which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. We are therefore of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words 'forced labour' under Article 23.

Remedy. After considering and rejecting objections to the writ petition, the Court, by order dated 11 May 1982, directed that the minimum wage – or a higher wage if applicable – should be paid by the contractors to the workmen directly, without the intervention of the *jamadars*, and that the *jamadars* were not entitled to deduct or recover any amount from the minimum wage as commission. By the same order, the Court appointed three ombudsmen and charged them with making periodic inspections of the worksites to determine whether the labour laws were being carried out, and whether the workers were receiving the benefits and wages due to them.

The Supreme Court of India's conclusion – that work performed for less than the minimum wage is forced labour – has in general not been accepted by the ILO.⁸³ (It may no longer even be accepted, in absolute terms, by India. One government report indicated that not all cases of payment of wages below the minimum wage could be brought under the Bonded Labour System (Abolition) Act.⁸⁴) The Committee of Experts has rejected the proposition that economic constraints that pressure a worker to accept low or underpaid work could, taken alone, come within the scope

83 See Global alliance, op., cit., para. 13 ("Forced labour cannot be equated simply with low wages or poor working conditions. Nor does it cover situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives."); ILO, *Human trafficking and forced labour exploitation: Guidance for legislation and law enforcement*, Special Action Programme to Combat Forced Labour, Geneva, 2005, p. 19 ("Clearly, 'forced labour' encompasses activities which are more serious than the mere failure to respect labour laws and working conditions. For example, the failure to pay a worker the statutory minimum wage does not constitute forced labour. However, action to prevent the worker from leaving the workplace will normally come within the ambit of forced labour.").

84 See R.S. Srivastava, *Bonded Labour in India: Its Incidence and Pattern*, ILO Working Paper, 2005 at n. 7.



of the Convention. Thus, in response to an allegation from unions in Ireland that unemployed workers were coerced into accepting low-paying and unsuitable work in the government's Employment Action Plan, the Committee stated:

The problems of unemployment and scarcity of work in anything but low-level positions, which mean that persons perform work they may not wish to do in order to maintain themselves, do not usually qualify for consideration under the Convention.⁸⁵

In considering an Article 24 representation alleging non-compliance by Portugal with the Abolition of Forced Labour Convention, the Committee stated that, "the risk of not finding another job because of the general climate of rising unemployment cannot, in itself, be treated as the threat of a penalty designed to force a worker to remain in the service of his employer".⁸⁶

However, echoes of the Supreme Court's reasoning may be found in other statements by the ILO. If a situation of economic constraint exists and the government exploits that situation by offering very low wages, then it could "to some extent become answerable for a situation that it did not create."⁸⁷ When a trade union in Chile argued that the government had violated the Forced Labour Convention by paying workers enrolled in its official employment programmes less than the minimum wage, the Committee raised doubts concerning the "voluntary nature" of the programmes. The Committee noted that it would be reasonable to conclude that persons enrolled in these government programs were "driven to this by the lack of any better alternative, in order to obtain some income, however modest".⁸⁸

QUESTIONS FOR DISCUSSION

(1) Is 'economic constraint' alone a 'menace of any penalty'? Or must there be some exacerbation of the economic situation by the employer in order to come within the ILO definition of forced labour?

(2) In a case involving Sénégal, a tripartite committee set up to examine an allegation under Article 24 of the ILO Constitution stated that although "economic constraints may in practice be such as to be conducive to forced labour", there was no violation if the government "could not be held responsible for having created or exacerbated economic constraints, nor for having exploited them by offering people who had no other options employment on terms that would not normally be acceptable".⁸⁹ Why does the Committee impose a requirement that the perpetrator play some role in exploiting an existing economic situation?

⁸⁵ *Individual Direct Request by the Committee of Experts on the Application of Conventions and Recommendations Concerning Convention No. 29, Forced Labour, 1930 Ireland*, ILO, 2001.

⁸⁶ *Report of the Committee set up to examine the representation made by the General Confederation of Portuguese Workers under article 24 of the Constitution, 1985*, para. 97.

⁸⁷ *Report of the Committee set up to examine the representation alleging non-observance of Convention No. 105 by Senegal, 1995*.

⁸⁸ *Report of the Committee set up to examine the representation alleging non-observance of Convention No. 29 by Chile, 1985*.

⁸⁹ *Report on Senegal*, op. cit., para. 31.

(3) Could a worker freely and voluntarily agree to be paid less than the minimum wage? Might a worker voluntarily accept payment below the minimum wage “in return for steady employment in the face of an uncertain labour market”?⁹⁰ When should a court look behind the face of a contract to see if there is unequal bargaining power between the parties?⁹¹

Consider this quote from a later decision of the Supreme Court: “They are the weaker party and once they are in the trap of bondage the capacity to negotiate is gone. That is how exploitation thrives notwithstanding the intervention of this Court.”⁹²

(4) If the Asiad Games Case is analyzed according to the three elements of the ILO forced labour definition – work or service, menace of any penalty and involuntary offer – what conclusion would you reach?

(5) The Travaux Préparatoires of the UN Trafficking Protocol define ‘abuse of vulnerability’ as referring to a situation where the “person involved has no real and acceptable alternative but to submit to the abuse involved”. Is this the same as what the Court is discussing here in terms of the choice for the worker? Can force be defined as the absence of choice?

⁹⁰ See *Global alliance*, op. cit., n. 14.

⁹¹ Similarly, there are times when looking beyond the face of the contract is an acceptable method for determining the existence of an employment relationship. For further discussion, see ILO, *The Employment Relationship: An Annotated Guide to Recommendation No. 198*, 17 May 2007.

⁹² *Bandhua Mukti Morcha v. Union of India*, 1991 INSC 190, 1991 SCR (3) 524, 544.



5.1.2 **Creating a Rebuttable Presumption of Forced Labour:** ***Bandhua Mukti Morcha v. Union of India, A.I.R. 1984, S.C. 820***

Factual Background. The NGO Bandhua Mukti Morcha (Bonded Labour Liberation Front) addressed a letter to Justice Bhagwati alleging that there were large numbers of workers in the stone quarries of Haryana who were bonded labourers, in violation of the Bonded Labour System (Abolition) Act, and that in addition to being held in bondage they were working in inhumane conditions. The Court treated the letter as a writ petition and appointed two lawyers as commissioners to visit the stone quarries and to interview the workers named in the petition.

The commission found that the workers were not allowed to leave the quarries, had no clean water to drink, were living in huts made of straw, and had no blankets or even mats on which to sleep. Most of the workers interviewed stated that they “got very little by way of wages from the mine lessees or owners of stone crushers since they had to purchase explosives with their own moneys and they had to incur other expenses”. Other workers stated that they were “forcibly kept by the contractor and they were not allowed to move out of their place and they were bonded labourers”.

In order to evade the rehabilitation requirements for bonded labourers imposed on states by the Bonded Labour System (Abolition) Act, the State of Haryana argued that although the workers might be providing ‘forced labour’, they were not bonded labourers within the meaning of the Act.

Legal Analysis. The Court first noted that the Act was “enacted with a view to giving effect to Article 23 of the Constitution which prohibits traffic in human beings and begar and other similar forms of forced labour”. The Court found self-evident the proposition that “bonded labour is a form of forced labour”. The Act itself authorized district magistrates to inquire whether “any bonded labour system or any other form of forced labour is being enforced” in their jurisdiction.⁹³ Although the “thrust of the Act was against the continuance of any form of forced labour”, the Court realized that it would be extremely onerous if every labourer had to prove that he had received an advance or other economic consideration from his employer. The labourer was likely to be illiterate and to have no documentary evidence of such an advance, and the employer was likely to deny ever having made the advance.

- ▶ **Impact of Power Disparity**
To insist that the bonded labourers must first prove that they are providing forced labour in consideration of an advance or other economic consideration received by them, and that only then will they be eligible for the benefits provided under the Act, is asking them to perform a task that is extremely difficult, if not impossible. The labourers would have no evidence at all to prove their case, and since employment of bonded labour is a penal offence under the Act, the employer would immediately, without any hesitation, deny having given any advance or economic consideration to the bonded labourers...

⁹³ Bonded Labour System (Abolition) Act 1976, Section 12.

► **Creation of Rebuttable Presumption**

It would be cruel to insist that a bonded labourer, in order to derive the benefits of this social welfare legislation, should have to go through a formal process of trial and the normal procedure for recording of evidence. Such a process would be quite futile because of the obvious fact that a bonded labourer cannot stand up to the rigidity and formalism of the legal process, due to his poverty, illiteracy and social and economic backwardness. If such a procedure were to be required, the State Government might as well erase this Act from its statute book. It is now statistically established that most bonded labourers are members of Scheduled Castes and Scheduled Tribes or other backward classes. In the ordinary course of human affairs – as judicial authorities may care to note – there would be no occasion for a labourer from such a background to be placed in a situation where he is required to supply forced labour for no wage or for nominal wage, unless he has received some advance or other economic consideration from the employer, and unless, under the pretext of not having returned such advance or other economic consideration, he is either required to render service to the employer, or is deprived of his freedom of employment or of the right to move freely wherever he wants. Therefore, whenever it is shown that a labourer is made to provide forced labour, a Court should make a presumption that he is required to do so in consideration of an advance or other economic consideration received by him, and that he is therefore a bonded labourer. This presumption may be rebutted by the employer, and also by the State Government if it so chooses, but unless and until satisfactory material is produced for rebutting this presumption, the Court must proceed on the basis that the labourer is a bonded labourer, entitled to the benefits of the provisions of the Act.

The Court further observed that the report of the commissioners had stated that some workers were not allowed to leave the quarries and were being forcibly kept there by the contractors. In addition, Bandhua Mukti Morcha had filed a large number of affidavits from workers stating that they were under heavy debts and were not permitted to leave without settling their accounts. Despite this evidence, the Court declined to make a finding that the workers whose names were given in the commission's report or in the petition were actually forced or bonded labourers. Instead, it appointed a labour expert to conduct an inquiry and, if necessary, release those workers who were found to be bonded labourers.



Remedy. Because bonded labourers who are identified and freed but not rehabilitated would be at risk of “slid[ing] back once again into serfdom even in the absence of any coercion”, the Court concluded its opinion with a list of 21 directives to be undertaken by the State of Haryana and the Central Government in order to ensure the release, rehabilitation and compensation of bonded labourers. The Court did not treat the writ petition as disposed of by its judgment and the matter was left open for further monitoring. In later stages of proceedings, the Court appointed labour experts to assess the implementation of its directives.⁹⁴ In a 1991 judgment, however, the Court noted that its power to “regulate such matters has inherent limitation”. “These are not schemes which could be conveniently monitored by a Court – much less the apex court.” The Court directed the State of Haryana to “ensure” that the workers continue “to work in improved conditions of service and facilities and such of them who want to go back to their native areas be treated as released from bondage”.⁹⁵

⁹⁴ *Bandhua Mukti Morcha v. Union of India*, 1991 INSC 190 (13 August 1991).

⁹⁵ *Ibid.*



5.1.3 Another Look at Peonage and Bonded Labour

The Supreme Court of India drew inspiration from two early American peonage cases, *Bailey v. Alabama* and *Pollock v. Williams*. In fact, the system of bonded labour prevalent in South Asia has often been compared to the peonage system that arose in the United States following the enactment of a constitutional prohibition on slavery.⁹⁷ Early US peonage cases noted that although peonage could be described as voluntary – in that it was based on a contract voluntarily entered into – the resulting condition was still servitude. The focus of the judicial inquiry was on the condition that resulted and not the means of producing it.

Clyatt v. United States, 197 US 207, 215 (US Supreme Court 1905)

What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness... Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, and none in the character of the servitude... But peonage, however created, is compulsory service – involuntary servitude. The peon can release himself therefrom, it is true, by payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor⁹⁸ or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service.

The Bonded Labour System (Abolition) Act (1976) defines 'bonded labour' as service rendered under the 'bonded labour system'. It defines 'bonded labour system' as:

The system of forced, or partly forced, labour under which a debtor enters, or has, or is presumed to have, entered, into an agreement with the creditor to the effect that:

- (i) in consideration of an advance obtained by him or by any of his lineal ascendants or descendants (whether or not such advance is evidenced by the document) and in consideration of the interest, if any, due on such advance, or
- (ii) in pursuance of any customary or social obligation, or
- (iii) in pursuance of any obligation devolving on him by succession, or
- (iv) for any economic consideration received by him or by any of his lineal ascendants or descendants, or
- (v) by reason of his birth in any particular caste or community,

⁹⁷ See Y.R. Haragopal Reddy, *op. cit.*, p. 75 (discussing growth of peonage in Southern States following the Civil War and noting that "American peonage is similar to that of Indian debt bondage"); Tobias Barrington Wolff, "The Thirteenth Amendment and Slavery in the Global Economy", in 102 *Columbia Law Review*, Vol. 102, 2002, pp. 963, 989 (describing 'bonded labour' as a traditional form of peonage "in which a laborer is compelled to work in order to pay off a debt").

⁹⁸ This document uses the spelling 'labor' as reflected in the source material.

he would:

- (1) render, by himself or through any member of his family, or any person dependent on him, labour or service, to the creditor or for the benefit of the creditor, for a specific period or for an unspecified period, either without wages or for nominal wages; or
- (2) forfeit the freedom of employment or other means of livelihood for a specified period or for an unspecified period; or
- (3) forfeit the right to move freely throughout the territory of India; or
- (4) forfeit the right to appropriate or sell at market value any of his property or product of his labour or the labour of a member of his family or any person dependent on him.⁹⁹

Section 4 of the Act abolishes the bonded labour system and provides that “no person shall... compel any person to render any bonded labour or other form of forced labour”. Professor Ravi Srivastava posits that bonded labour “refers to a long-term relationship between employee and employer which is cemented by a loan, by custom or by force, which denies the employee various freedoms including to choose his or her employer, to enter into a fresh contract with the same employer or to negotiate the terms and conditions of his/her contract”.¹⁰⁰ Thus “in the Indian context, a creditor-debtor relationship is not even a necessary condition of bondage, since the Indian legal definition of bondage incorporates various categories of forced labour”.¹⁰¹

99 The Bonded Labour System (Abolition) Act 1976, Section 2(g).

100 *Bonded labour in India*, op. cit., p. 2.

101 *Bonded labour in India*, op. cit., p. 4.



5.2 Pakistan

5.2.1 Court Decision Leading to Enactment of Legislation: *Darshan Masih v. State, P.L.D. 1990 S.C. 513*

Factual Background. One of the earliest public interest litigation cases in Pakistan began when the Chief Justice of the Supreme Court received a telegram in the summer of 1988 from brick-kiln workers pleading for the Court's assistance. The court treated it as a writ petition to enforce fundamental rights under the Constitution, including Article 11's prohibition on forced labour, traffic in human beings and child labour.

Clyatt v. United States, 197 US 207, 215 (US Supreme Court 1905)

Telegram: We plead for protection and bread for our family. We are brick-kiln bonded labourers. We have been set at liberty through the Court. And now three among us have been abducted by our owners. Our children and women are living in danger. We have filed complaint. No action taken. We are hiding like animals without protection or food. We are afraid and hungry. Please help us... We want to live like human beings. The law gives no protection to us. Darshan Masih (Rehmatay) and 20 companions with women and children, Main Market, Gulberg, Lahore.

Remedy. The Court ordered a police investigation to free the detainees and also appointed some senior members of the bar to assist in the judicial inquiry. The report of one of them is excerpted below. After receiving the reports of the appointed experts and holding a series of hearings, the Court issued a number of directives for long-term measures to prevent bonded labour practices. The Court attempted to dismantle the bonded labour system by prohibiting the system of advances (known as *peshgis*) and banning the use of coercion or police force to bring back escaped workers or retain them. Past *peshgis* were still valid but could only be enforced by legal means, and brick-kiln owners were specifically ordered not to use unlawful means for recovery, such as coercive methods or the police. The Court further ordered that brick-kiln owners could not deduct costs for bricks damaged or lost because of rain from workers' wages. Finally, the Court prohibited the use of intermediary contractors (known as *jamadars*).¹⁰² To ensure that the order was widely distributed and read, the Court issued it in Urdu as well as English.

¹⁰² See final order dated 15-3-1989 and titled "In the matter of Enforcement of Fundamental Rights re: Bonded Labour in Brick Kiln Industry".

**Excerpt from Report Submitted by the Advocate-General,
Punjab to the Supreme Court**

11. EMPLOYER-EMPLOYEE RELATIONSHIP

(g) The next menace emanating from this 'PESHGI' system is that this 'PESHGI' is advanced to the worker not for his benefit but in fact to enslave him for the rest of his life, and that this 'PESHGI' hardly ever comes to an end.¹⁰³ It is an 'ever-increasing' and 'never-diminishing' amount which goes on multiplying on one pretext or the other... This 'PESHGI' is carried by the concerned worker all his life and on his death his family inherits this liability...

(i) No worker is free to leave the employment of his employer. If he wishes to leave the job then he is obliged to adjust the amount of 'PESHGI' outstanding against him, which is always in thousands. Since the worker is not in a position to offer this kind of amount to his employer, he obviously has to take shelter under another employer who pays this amount of 'PESHGI' to the previous owner and takes this worker under his charge. This worker is thus traded like chattel by Brick-Kiln Owners all his life. If despite all these chains a worker still manages to escape, he is chased and hounded by the 'JAMADAR'¹⁰⁴ who brings him back to the employer, and in almost every case the escaped worker is traced and brought back...

12. HISTORICAL BACKGROUND

(A) The reasons for such a maltreatment of the workers in the Brick-Kilns appear to be embedded in history. The Brick-Kilns are situated away from the main cities and town. They are scattered. Consequently the workers at the Brick-Kilns are not exposed to those blessings of civilization that are available in the cities and the towns. Since they are scattered and located at quite some distances from one another, the workers on one Kiln have no contact with the workers of the other Kilns. Because of this non-communication between workers, the labour force in the Brick-Kilns could never get together to demand better living and working conditions for themselves... Most of the workers in this industry are Christians, and because they are a minority, they perhaps do not feel confident enough to challenge the maltreatment being meted out to them by the Brick-Kiln Owners, who belong to the majority class, with all its resources and political contacts at their disposal.

Legal Analysis. The Court assumed without discussion that bonded labour was forced labour. "The question as to whether this is a case of enforcement of Fundamental Right(s) has not been raised. Everybody accepted that it is so." (1990 PLD SC at 545.) At times, the Court and the parties discuss forced and bonded labour as interchangeable terms. Thus the Court noted that the "labourers complained about individual forced labour and the labour malpractices", and that these complaints and those of the brick-kiln owners were "dealt with so as to understand the depth and extent of the forced/bonded labour practice in the brick-kiln industry" (1990 PLD SC at 529). The Court did, however, suggest that in future legislation it might be

¹⁰³ *Peshgi* means a monetary advance.

¹⁰⁴ The *jamadar* is a middleman or crew boss.



“necessary to define the expression forced labour with illustrations of its different forms, in such a manner so as to minimize any confusion about its real purport” (Ibid. at 545).

Following the decision of the Supreme Court in *Darshan Masih*, the national legislature passed the Bonded Labour System (Abolition) Act of 1992. The Act provides in part that “the bonded labour system shall stand abolished and every bonded labourer shall stand free and discharged from any obligation to render any bonded labour”. The Act also extinguished any existing debts. The Committee of Experts has specifically noted that bonded labour, as defined in the Act, is a form of forced labour.

CEACR: Individual Observation concerning Convention No. 29 (1996)

Under the Convention, the Government has undertaken to suppress the use of forced or compulsory labour, which is defined in Article 2(1) as “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”. Bonded labour, as defined in section 2(e) of the Bonded Labour System (Abolition) Act, No. III of 1992 of Pakistan, is but one form of forced labour coming under Article 2(1) of the Convention.

5.2.2 Requiring Physical Restraint for Forced Labour: Judgment of High Court of Sindh, Circuit Court, Hyderabad (2002)

Factual Background. In Sindh Province, landlords are called *zamindars* and tenants are called *haris*. *Haris* are “share-tenants who till the land of others in exchange for either a physical share of the crop... or a share of the revenue”.¹⁰⁵ In a study on bonded labour in Sindh and Balochistan, the authors noted that different sharecropping relationships produced different levels of poverty and bondage. Some *hari* families working as tenant farmers did not incur debts, while nomadic *hari* families, who usually tended to be from minority communities, did owe money to their landlords. “A crucial aspect of the bonded labour story is that it highlights the use of apparently legitimate and voluntary economic transactions as the means of extracting forced labour.”¹⁰⁶

In 2000, 94 petitions for release were filed with the High Court of Sindh by *haris*. They were not brought under the Bonded Labour (Abolition) Act but rather under Section 491 of the Code of Criminal Procedure, essentially a habeas corpus provision that gives a court the power to set at liberty any person illegally or improperly detained in public or private custody. The High Court constituted a special bench and all the matters were consolidated. The Court described the petitions as alleging that individuals and sometimes whole communities were detained at the hands of “the owners of the land where the alleged detainees were working/tilling the soil...” “In most cases the persons who were allegedly detained were Haris. In most cases the Haris belonged to the Bheel/Kolhi tribes. In almost all cases there was no physical

¹⁰⁵ Maliha H. Hussein et al., *Bonded labour in agriculture: A rapid assessment in Sindh and Balochistan, Pakistan*, ILO Working Paper, March 2004, p. 3.

¹⁰⁶ *Bonded labour in agriculture*, op cit., p. 12.

detention but there seemed to be a dispute over money which was borrowed by the Haris from their landlords.”

Rasul Bux Palejo argued the petitioners’ case on behalf of the Sindh Haris Association. What follows is the Court’s summary of his argument.

Mr. Palejo gave a brief resume of the Bheel community who claim to be the original inhabitants belonging to the downtrodden and suppressed Hindu tribe and are private serfs. He further urged that though such persons may not be physically detained as understood in common parlance they are for all practical purpose under restraint which impedes their free movement... [I]t was contended that the Haris have remained virtual slaves of the Waderas (village chief or property owner) from the time they were born.

Mr. Palejo, as petitioners’ representative, further explained to the Court that the detention was more ‘mental’ than physical. He compared the *haris*’ situation to the boundary that is created in the mind of a child who is repeatedly told he cannot wander past a certain point. He argued that *haris* should not be stopped from moving away and there should be no restrictions on their movement “on the sole ground that they owed money to the landlord”.

Legal Analysis. The Court was not receptive to these arguments. It noted that when police raided places of private custody and freed *haris*, the detainees had no “physical signs or indications of improper or illegal detention”. Regarding Mr. Palejo’s description of ‘mental’ detention, the Court observed that it was “theoretically” interesting but presented problems for identifying such mental detention in practice.

On behalf of the landlords, counsel argued that the *haris* had taken loans and were to be dealt with in accordance with the provisions of the Sindh Tenancy Act. “It was contended that these applications were moved in order to defeat the provisions of [the] Sindh Tenancy Act.” Counsel further observed that the petitions for release were false because there was “no guard over the detain[ees] nor chains applied to them”.

The Court denied the petitions and held that the entire matter was regulated under the Sindh Tenancy Act and the Tribunal therein established. Where the relationship between detainee and the person against whom detention is alleged is regulated under law or by contract: “[T]hen the best course for the court is to leave the parties to have the dispute and differences resolved under the law regulating their relationship... In [the] instant petition, admittedly the relationship between the alleged detain[ees] and the private persons who are alleged to have detained them is that of Hari and Zamindar and their relationship is regulated under [the] Sindh Tenancy Act 1950.”

In reaching its conclusion, the Court emphasized that the allegations of confinement were false. “The detain[ee]s were neither under guard nor any kind of pressure was over them. No compound wall was found available around the houses of detain[ee]s. The aforesaid detain[ee]s are prima facie proved to be Haris of respondents and they are to be dealt with under the above stated law. The record, facts and peculiar circumstances of this case reveal that this application is vexatious and false.”



Remedy. The High Court of Sindh rejected the claims. This decision has been appealed to the Supreme Court by the Human Rights Commission of Pakistan.¹⁰⁷

QUESTIONS FOR DISCUSSION

(1) Why do the Supreme Court and the Federal Shariat Court recognize the situation of brick-kiln workers as one of bonded labour, but the High Court of Sindh does not perceive the situation of haris who owe debts to their landlords as one involving bonded labour?

Is the High Court of Sindh more receptive to the arguments of landlords because of concern about the timeliness of agricultural tasks such as planting and harvesting?

Does the relationship of tenant farmer to landlord look less like an employment relationship and more like an ongoing social relationship?

(2) The High Court of Sindh rejects the idea of a 'mental' detention, one that does not involve guards or walls. Is a mental detention akin to psychological coercion or abuse of vulnerability?

Is the High Court of Sindh right to be concerned with real-world applicability? How should a situation of mental detention be identified?

¹⁰⁷ *Bonded agricultural labourers in lower Sindh Province – Pakistan: Submission to the UN Working Group on Contemporary Forms of Slavery*, Anti-Slavery International, May 2002.

6. FORCED LABOUR IN EUROPE

Member states of the Council of Europe are of course bound by the European Convention on Human Rights and Fundamental Freedoms and its interpretations by the European Court of Human Rights in cases such as *Siliadin* and *Van der Musselle*. In addition, members of the European Union are bound by the Framework Decision on Combating Trafficking in Human Beings, which follows the Trafficking Protocol definition. Member states were required to transpose the provisions of the Framework Decision into domestic law by August 2004. In addition, the Council of Europe Convention on Action against Trafficking in Human Beings, again largely tracking the Protocol definition, came into effect in 2008.

Although many European states had provisions criminalizing sex trafficking and migrant smuggling, the concept of trafficking for labour exploitation was relatively new. The three states whose decisions are discussed here have chosen different approaches to the concept of labour trafficking.

In Belgium, the legal elements of labour trafficking do not include 'means'. Thus a prosecutor need only prove the act and the purpose of exploitation. Exploitation is defined as conditions incompatible with 'human dignity'. In France, employing someone by abuse of vulnerability, in conditions incompatible with 'human dignity', is criminalized. A trafficking law was adopted in 2003 and further modified in 2007. In the Netherlands, exploitation is defined to include forced labour, but the actual meaning of exploitation is still the subject of much debate.

6.1 Belgium

By Law of 10 August 2005, Belgium added a new chapter to the Criminal Code, consisting of Articles 433d to 433h. Previously, Belgian law had limited the application of the offence of 'trafficking' to foreigners and did not make any distinction between 'trafficking' and 'smuggling'. The new definition of trafficking is provided in Article 433d. The 'acts' section of the definition is based on the UN Trafficking Protocol and the EU Framework Decision. Several 'purposes' are listed, including "to employ these persons in conditions incompatible with human dignity or to allow them thus to be employed". 'Means' or *modi operandi* – such as coercion, threats, violence or abuse of vulnerability – are not an element of the offence of trafficking under Belgian law. They are, however, listed separately as aggravating circumstances.

The legislative intent behind removing the 'means' from the definition of trafficking was to make offences easier to prosecute. The *travaux préparatoires* of the Law of 10 August 2005 indicate that the drafters disagreed with a 2001 decision by the Court of Appeal of Liège acquitting a couple of employing a young African girl as a domestic worker. In that case, the Court found that the defendants had not abused the worker's vulnerability, despite the fact that she received minimal payment and her passport was kept in a safe to which she did not have access.¹⁰⁸ In response, the new law was intended to focus the offence on the exploitation rather than the means.

¹⁰⁸ Liège Court of Appeal, 25 April 2001.



It is debatable whether the Belgian law extends the reach of the UN Trafficking Protocol's definition. Although the Trafficking Protocol and the EU Framework Decision offer non-exhaustive definitions of 'exploitation', some observers expressed concern that the Belgian law was potentially more limited. Rather than 'sexual exploitation', the Belgian law limits the purpose to prostitution and child pornography. Rather than forced labour generally, the Belgian law covers "employment in conditions incompatible with human dignity". Frédéric Kurz, Deputy General Public Prosecutor, nevertheless writes that the new law goes beyond the minimum requirements of the Protocol. "It is intended to cover forced labour and slavery, but also situations of very low salaries or of obviously unhealthy or dangerous conditions of labour."¹⁰⁹

Nevertheless, the concept of 'human dignity' may prove difficult. The Centre for Equal Opportunities and Opposition to Racism (CEEOR) has, for example, criticized the use of the term 'incompatible with human dignity' because it "is not a legal concept that is more effectively defined than the 'abuse of a vulnerable position'".¹¹⁰ In a 2006 case, the District Court of Bruges found conditions 'incompatible with human dignity' where one or more persons worked in conditions that did not comply with the standards set forth in the Act of 4 August 1996, an act of social legislation. In that case, Lithuanian workers worked for long hours for very low wages in unsafe and unhealthy living conditions and were accommodated in a hanger that was not designed for human habitation.¹¹¹

6.1.1 Finding Working Conditions Contrary to Human Dignity: ***Public Ministry v. Wang Li Kang, Wang Qi et al., Court of Appeal of Liège,*** ***Decision No. 2007/245 (24 January 2007)***

Factual Background. A Chinese couple bought a property that they intended to open as a restaurant. They relied on two other individuals, both surnamed Wang, who recruited two irregular Chinese migrants to do the work. At the time these men were hired, the restaurant building was still an open and unfinished construction site. The men lived at the construction site with nothing but a mattress on which to sleep. They ate off the ground because they were given no table and had no bathroom or hot water. They worked 12 to 13 hours per day every day, including weekends. They were paid irregularly and the amount of pay was disputed.

Legal Analysis. The Court found that all the elements of trafficking were present in this case. The workers were accommodated in extremely undignified and unsanitary living conditions. They were subjected to physical and moral mistreatment. One worker was hit several times. Furthermore, the workers did not speak French and had no identity papers. They were under pressure never to leave the building. The Court found that the offenders knew about their irregular status and even warned them to flee if the police should arrive.

¹⁰⁹ Frédéric Kurz, *Lutte contre le travail forcé, l'exploitation économique et la traite des êtres humains: des concepts légaux à l'application judiciaire*, *Chroniques de droit social*, 2008, 317-330

¹¹⁰ *Ibid.* at 35.

¹¹¹ *Correctionele rechtbank van Brugge, 14e Kamer, 25 April 2006* (described in Jill E.B. Coster van Voorhout, *Human trafficking for labour exploitation: Interpreting the crime*, *Utrecht Law Review*, Vol. 3, Issue 2 (December 2007)).

Remedy. The two lead defendants were sentenced to a year in prison each and a fine of 500 euros. In addition, each of the four defendants had to pay each of the civil parties the sum of 2,500 euros.

6.1.2 Abuse of a Condition of Vulnerability as Aggravated Circumstance:
Public Ministry v. Cengiz Yönel and Abdellah Bouassam,
Penal Court of Verviers, Decision No. 69.98.954/06 (15 January 2007)

Factual Background. For a two-month period, Mehmet Ormanci, an irregular migrant from Turkey, worked for Cengiz Yönel and Abdellah Bouassam in their bakery. His work consisted of emptying bags of flour and cleaning and sweeping the bakery. On the 24 January 2006, an inspector from social services discovered that Ormanci was working without authorization and that he was not being paid, receiving only unsold food as a form of remuneration.

Legal Analysis. The defendants were charged with violating the Law of 10 August 2005 by “recruiting, transporting, transferring, accommodating or receiving ORMANCI Mehmet in order to put him to work or permit him to be put to work in conditions contrary to human dignity”. Specifically, they recruited him to work in unsanitary conditions and at a wage that was below the guaranteed minimum wage. In fact, payment consisted exclusively of old fruit and vegetables. They committed this violation with the aggravated circumstance of abusing Ormanci’s vulnerability, which was due to his irregular status and precarious social situation.

The defendants admitted that they had recruited Ormanci to help bake bread, first under the supervision of Yönel and later under the supervision of Bouassam. The Court recognized that under the Law of 10 August 2005, employment in conditions contrary to human dignity could be established regardless of the consent of the worker. Ormanci stated that he worked 3 or 4 times per week, from 5 a.m. until noon or 1 p.m. He received as payment unsold food. Although Bouassam maintained that he had paid Ormanci 30 euros, the Court noted that there was no evidence of this and that such an amount was manifestly insufficient for the work performed.

The Court found that these elements “incontestably” established economic exploitation and that Ormanci was, furthermore, in a vulnerable situation. His demand for asylum had been refused, he had no longer the right to any social aid, and he had a wife and three children, one of whom was sick. “It is evident that this situation made him particularly docile to his employers.” The Court also emphasized that one of the defendants, Bouassam, had admitted to the social service inspectors that he did not think Ormanci would work for Yönel anymore if he had the choice.

The Court found that a violation of the law of 10 August 2005 had been established with regard to both defendants.

Remedy. Cengiz Yönel was sentenced to 14 months of prison and a fine of 5500 euros. Abdellah Bouassam received a 1 year suspended sentence and a 5500-euro fine. Ormanci chose not to participate as a civil party and thus there was no civil award of damages to him.



**Ministerial Directive:
Policy of Investigation and Prosecution Relating to Trafficking in Human Beings**

A list of indicators, developed by a trafficking working group, was attached to Ministerial Directive COL 20/06, which came into effect in January 2007. It was intended as a non-exhaustive list to allow investigators and prosecutors to conclude that a trafficking investigation should be opened. The indicators are grouped into topics related to movement, identity and travel documents, working conditions, housing, physical integrity, freedom to circulate and country of origin. The following is an excerpt from the list.

- working in very poor conditions or for long periods of time
- lack of social protection and benefits
- confiscation of identity papers by the employer
- threats, intimidation, insults and violence towards workers
- lack of sanitation facilities, heating or electricity in workplace
- living and working in the same place
- living in overcrowded and unhygienic places
- lack of a place to eat meals
- no salary or very little salary
- deductions for equipment, work clothing, food and housing
- unpaid overtime
- debts to employer

QUESTION FOR DISCUSSION

In *Yönel* and *Bouassam*, the worker, Mehmet Ormanci, apparently consented to these conditions and to being paid only with leftover food. The Court holds that under the law, consent is irrelevant. In the UN Trafficking Protocol, consent is irrelevant if one of the prohibited means is used, but under Belgian law the means are only a form of aggravated circumstance and not an essential element of the offence. Thus in Belgium a worker cannot consent to conditions that are incompatible with human dignity. Compare this holding with the definition of forced labour in Convention No. 29. The ILO, of course, sets minimum standards and countries are free to offer greater levels of protection. Does the Belgian law offer more protection for exploited workers?

6.2 France

In 2003, France enacted Article 225-4, which defines 'human trafficking' as: "[The] recruitment, transport, transfer, accommodation, or reception of a person in exchange for remuneration or any other benefit or for the promise of remuneration or any other benefit, in order to put him at the disposal of a third party, whether identified or not, so as to permit the commission against that person of offences of procuring, sexual assault or attack, exploitation for begging, or the imposition of living or working conditions inconsistent with human dignity, or to force this person to commit any felony or misdemeanour." It is punishable by seven years' imprisonment and by a fine of €150,000. However, Article 225-4 has not been used as much as two other provisions. Article 225-13 penalizes "obtaining the performance of unpaid services or services against which a payment is made which clearly bears no relation to the importance of the work performed from a person whose vulnerability or dependence is obvious or known to the offender". Article 225-14 penalizes "subjecting a person, whose vulnerability or dependence is obvious or known to the offender, to working or living conditions incompatible with human dignity". In *Siliadin*, the European Court of Human Rights criticized earlier versions of these laws for being too vague for application by the courts.¹¹² The concept of forced labour in French courts can be examined through the application of Articles 225-13 and 225-14.

In the ILO definition of forced labour, the voluntariness or willingness of the individual is a crucial but subjective criterion for determining a case of forced labour. The ILO Committee of Experts has observed that poor working conditions alone do not amount to forced labour, because working conditions vary from country to country depending on the level of economic development. However, while not proof per se of forced labour, certain working conditions that do not comply with labour legislation (because wages are considerably lower than those provided by law or collective agreement, or working hours are longer than what is authorized or the working environment is too demanding) must be examined as evidence. Thus working conditions are relative to the forced labour determination but not dispositive.

In Articles 225-13 and 225-14, French lawmakers apparently preferred to rely on more tangible circumstantial factors. Unpaid work obtained by taking advantage of the vulnerability of the person in question or the subjecting of a person to degrading working or living conditions constitutes an offence. Whether or not the victim performs the work voluntarily is irrelevant, since consent given by a person in vulnerable circumstances is not considered admissible. This is similar to the Trafficking Protocol, which provides that abuse of vulnerability is one of the means that renders consent irrelevant. Under the Forced Labour Convention, menace of a penalty and voluntariness are treated as two separate elements, but the Committee of Experts has recognized that these two factors overlap.

¹¹² *Siliadin v. France* at paras. 147-148.



6.2.1 Risk of Unemployment as Abuse of Economic Dependence:
Procureur de la République v. Monsieur B., Decision No. 97/8641,
Court of Appeal of Poitiers (26 February 2001)

Factual Background. Monsieur B. established a company in the textile sector in Vendée, France and employed several dozen workers. In the workshop, workers were not allowed to raise their heads, talk or smile. Monsieur B. watched over the workers for any signs of infraction and would punish them if they smiled or talked. In addition, Monsieur B. refused to open the doors in summer, despite the extreme heat. During the winter, he turned off the heating system in very cold weather, but he insisted that workers remove their coats. Monsieur B. constantly threatened the workers with closing the company and forcing them to lose their jobs.

Legal Analysis. The Court first examined the situation of dependence. It noted that Monsieur B. had hired unqualified workers and that the textile sector was seriously affected by the economic crisis. Moreover, the company was set up in the farmland of Vendée, a region severely affected by unemployment. “Therefore the workers of Monsieur B. were in a situation such that the loss of their jobs would have had catastrophic consequences for them.” Thus the Court found that the general economic situation could create a situation of dependence on the part of workers.

Next, the Court found that Monsieur B.’s workers were under extremely strict discipline and that they worked in difficult physical conditions, subject to various humiliations. They were constantly reminded that continuing their work depended on their employer. The Court concluded that, together, these elements characterized conditions of work incompatible with human dignity.

Remedy. Monsieur B. was sentenced to two years’ imprisonment and a fine of 100,000 francs. In the companion civil case, victims of the violation of Art. 225-14 were awarded 3,000 francs each.



6.3 Netherlands

In January 2005, the previous trafficking provision of the Dutch Criminal Code was replaced by a new and extended Article 273a. Its purpose was to implement obligations under the UN Trafficking Protocol and the EU Framework Decision. The 'means' portion of the new act is similar to the Trafficking Protocol and 'exploitation' is defined as comprising "at least the exploitation of another person in prostitution, other forms of sexual exploitation, forced or compulsory labour or services, slavery, slavery-like practices or servitude". According to the Dutch National Rapporteur, Article 273f does not cover "all wrongs" in an employment relationship.

[I]nsofar as there is no excessive abuse, the matter will have to be dealt with by means other than the THB provision. When assessing whether or not there has been excessive abuse, the determining factors are the circumstances in which the victim finds himself or herself, and under which he or she is put to work. The nature of the forced work is also relevant. In the light of international legislation, it is important whether the fundamental human rights of the victim have been violated (or are under threat of violation) by the conduct in question. If that is the case, then there is excessive abuse that can be classified as exploitation within the meaning of THB.¹¹³

As of October 2007, at least seven cases of labour trafficking have been brought before Dutch courts since the enactment of Article 273f. Five of these have resulted in acquittals. In the two cases where an offender was convicted, one concerned a case where the offenders were tried in absentia and the other concerned a case in which the victim had mental disabilities.¹¹⁴ The exact meaning of exploitation is still being debated by the courts, but it appears that the standard for exploitation is more exacting than either France or Belgium. Exploitation in Dutch case law appears to require serious abuses constituting violations of fundamental human rights. Thus in the case of Bulgarians who worked as hemp cutters, the District Court found no exploitation despite finding that the Bulgarians were treated poorly, were paid far below minimum wage and were performing illegal work.¹¹⁵

¹¹³ *Trafficking in Human Beings: Fifth Report of the Dutch National Rapporteur* (2007) at 12.

¹¹⁴ Email from Jonge van Ellemeet, Bureau of the Dutch Rapporteur on Trafficking in Human Beings, dated 28 October 2008.

¹¹⁵ District Court's-Gravenhage, LJN AZ2707

6.3.1 Abuse of Vulnerability but Not Exploitation:
***The Public Prosecution Service v. The Accused*, No. 07.976405-06,
District Court of Zwolle (29 April 2008)**

Factual Background. Indian workers, resident in the country illegally, were employed by a tofu factory. They had incurred substantial debts to finance the trip from India, they did not speak Dutch, nor did they have any identity documents. They worked long hours and were not paid for overtime. They had no health insurance, and taxes and social security contributions were not paid for them. They had found employment by offering their services as labourers at a Sikh temple in Amsterdam. The issue before the court was whether the defendants, brothers who owned the factory, had violated Article 273f of the Criminal Code.

Legal Analysis. The Court considered the charge as comprising two elements: (1) the means used; and (2) the exploitation. It framed the first issue as whether the defendants had abused the vulnerability of the workers because it did not see any evidence of coercion or deception in the record before it. In order to find that the defendants had abused the workers' vulnerability, the Court stated that the defendants had to act intentionally.

This presupposes a certain degree of initiative and action by the perpetrator or perpetrators whereby they deliberately abuse the weaker or more vulnerable position of the victims.

The Court noted that the workers were vulnerable by reason of their illegal presence in the Netherlands. They did not speak Dutch and carried no identity papers. It found that the accused "took initiative and acted with determination by transporting, housing, taking in (in their living and work environment) the illegal migrants, abusing [their] vulnerable position... with the intended object to thus gain advantage by recruiting cheap labourers for their factory".

The second issue was more difficult. The Court relied on criteria set forth in the Fifth Report of the National Rapporteur on Trafficking in Human Beings. The Fifth Report listed potential indicators of trafficking and then stated: "A situation amounts to exploitation if one of these problems exists and the victim is not free to leave the situation, or reasonably thinks that he or she is not free to do so."¹¹⁶ Citing this language with approval, the Court noted that the National Rapporteur had drawn on internationally accepted definitions, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and the ILO Forced Labour Convention. The Court then held that the situation, although "socially undesirable", did not amount to exploitation within the meaning of Article 273f.

Specifically, the Court found that there was no evidence of "an excess to such an extent that it would constitute a violation of fundamental human rights and freedoms". The Court also noted that: "[A]lthough the Indians had incurred debts that are related to their coming to the Netherlands, they did not owe these debts to the accused, so that there was no debt-labour relationship. Nor did the accused or his brothers

¹¹⁶ *Fifth Report of the Dutch National Rapporteur*, op cit., at 158.



have the Indians' identity documents at their disposal. Therefore this case cannot be said to constitute an excessive labour relationship, multiple dependence relationship or lack of freedom to such an extent that the Indians did not have any other choice but to work in the company of the accused and his brothers."

The defendant was convicted of offences relating to the facilitation of illegal residence and the commission of a criminal act by a legal entity. The acquittal on the trafficking charge is currently pending appeal.

QUESTIONS FOR DISCUSSION

- (1)** The Court finds that there was an abuse of the vulnerability of the victims, but that there was no exploitation. If these facts were examined under French law, what do you think the outcome would be?
- (2)** If these facts were examined under the Forced Labour Convention, what do you think the outcome would be?
- (3)** The Court assesses 'exploitation' in terms of a list of fairly objective factors, such as whether the workers owed a debt to their employer and whether the employer had confiscated their identity documents. It does not engage in a subjective inquiry into whether the work was done voluntarily or involuntarily. In other words, it never reaches the question of whether the workers believed that they were free to leave. Can you imagine another way of analyzing the issue? Do you think objective criteria should be considered before subjective criteria? Or can objective, externally visible factors function as a proxy for more difficult questions about the workers' state of mind?

Excerpt from Fifth Report of the Dutch National Rapporteur

The criterion for exploitation applied by [the National Rapporteur] is accordingly based on the combination of a lack of freedom, as a constant factor, and at least one of the following practices, which indicate forced or compulsory labour or services:

- force, including (threats of) physical or sexual violence or the reporting of illegal residence or employment; misuse of authority arising from the actual circumstances; or abuse of a vulnerable position;
- bad working conditions, including unreasonable working hours, underpayment and dangerous work without the requisite protection;
- multiple dependence, including working to pay off debts and being dependent on the same individual for employment and, for example, accommodation and identity papers.

A situation therefore amounts to exploitation if one of these problems exists and the victim is not free to leave the situation, or reasonably thinks that he or she is not free to do so. In practice, the constant factors and variable factors may overlap. The lack of freedom, for example, may be intertwined with excessive working conditions or the abuse of a vulnerable position may be so severe that the victim has no real choice but to suffer exploitation. When assessing a situation, all the particulars of the case, such as the duration, the degree of organization and the age of the victim, must be taken into consideration.¹¹⁷

¹¹⁷ *Fifth Report of the Dutch National Rapporteur*, op. cit., at 158.

7. FORCED LABOUR IN THE AMERICAS

7.1 Brazil

Although slavery was formally abolished in Brazil in 1888, the practice of forced labour resurfaced in the 1960s and is associated with the deforestation of the Amazon. Sectors of the economy plagued by forced labour include cattle-raising, charcoal production, logging and forestry, and agricultural crops. In 1994, the Governing Body of the ILO established a tripartite committee to examine a representation made under Article 24 of the ILO Constitution that Brazil had violated Conventions No. 29 and 105. The representation, made by the Latin American Central of Workers, alleged that workers were:

recruited on the basis of false promises, transported from their places of origin or residence, confined to workplaces which are isolated or difficult to reach, have their work papers (*carteiras*) taken away from them, are forced to work in subhuman conditions, in many cases without a wage and sometimes only in exchange for poor food, work long hours, are housed in precarious, unhealthy and unsafe accommodation, and are forcibly prevented from terminating their employment relationship by acts of physical and moral violence.¹¹⁸

After examining the representation, and the observations made by the Government of Brazil, the committee concluded that the allegations were well founded and that the situation was in violation of both Forced Labour Conventions.

Since then, government of Brazil has launched a series of campaigns against *trabalho escravo* or forced labour. It established a Mobile Group of Labour Inspection as a specialized agency within the Ministry of Labour. With the assistance and protection of the federal police, the teams visit *fazendas* (large estates) around the country, inspecting conditions and freeing workers. Although the mobile inspection teams cannot initiate criminal charges, they can impose administrative sanctions and fines. According to data from the Ministry of Labour, between 1995 and mid-July 2007, 25,064 workers were freed by Mobile Inspection Units.

Brazil has also amended its criminal provisions several times. Section 149 of the Penal Code prohibits imposing upon a person a condition similar to slavery. An amendment in December 2003 defined 'conditions similar to slavery' as including "the forced submission of workers to an exhaustive work schedule or to degrading work conditions through the restriction of the workers' freedom of movement by whatever means,

¹¹⁸ Report of the Committee set up to examine the representation made by the Latin American Central of Workers (CLAT) under article 24 of the ILO Constitution alleging non-observance by Brazil of the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), 1995, at para. 9.



including through the imposition of a debt".¹¹⁹ Yet conditions similar to slavery can exist without restriction of movements.¹²⁰ A situation where the debt is manipulated – leaving the workers without any money, and thus creating a situation of extreme dependency on the employer, in which workers are recruited from remote areas and are under pressure not to go back to their place of origin (by withholding their work papers) – is sufficient to qualify as a crime according to Section 149.¹²¹ As amended, Section 149 also penalizes other means of retaining a worker at the workplace, such as the use of armed guards or confiscation of identity documents. Recruiting or transporting workers into slavery is also punishable under Section 149. The range of imprisonment is 2 to 8 years. Section 207 of the Penal Code penalizes *aliciamento* (fraudulent recruitment), which means "to seduce [or] entice a worker into moving to another remote place".¹²² There is also a pending constitutional amendment, PEC 438/2001, that would allow the expropriation of lands on which slave labour is found. The constitutional amendment has not yet become law, but in 2004 in the case of *Public Ministry of Labour v. Jorge Mutran Export & Import Ltd.*, a labour court in Marabá ordered that an estate owner's land be seized. Slave labour had repeatedly been found to exist on the estate and the court held that the owner had violated provisions of the Federal Constitution requiring that the use of property fulfil certain social functions.¹²³ In that case, the defendant was also sentenced to pay 1,350,440 Reals for collective moral harm.

In addition, the government uses a 'dirty list' to publicize the names of landowners and companies who have been found to use slave labour. Employers on the 'dirty list' are barred from borrowing money from state financial institutions and some private lenders.

Nevertheless, very few cases are prosecuted and prison sentences are still rare. The low minimum prison sentence for Section 149 permits courts to suspend sentences or substitute community service, as has happened regularly. Between 1995 and 2003, only a few convictions were obtained under Section 149 and none of the offenders served prison time.¹²⁴ Some labour courts, however, have been active in awarding administrative sanctions and ordering the payment of both moral (pain and suffering) damages as well as back wages. The cases below illustrate two different outcomes in forced labour cases. The first was brought by the Ministry of Labour in a labour court. The second is a criminal case prosecuted in federal court.

119 Act No. 10803 of 11 December 2003; see *Report of the Committee of Experts: Individual Observation on Brazil*, 2005. James L. Bischoff, "Forced Labour in Brazil: International Criminal Law as the Ultima Ratio Modality of Human Rights Protection", in *Leiden Journal of International Law*, Vol. 19, 2006, at p. 172.

120 Código Penal e sua Interpretação Jurisprudencial, RT, São Paulo, 5ª edição, 1995, p. 1832 in Public Federal Ministry v. Carlos Alberto de Oliveira, 10 June 2005.

121 Federal Public Ministry v. Carlos Alberto de Oliveira, 10 June 2005.

122 *Código Penal Interpretado*, Júlio Fabbrini Mirabete, 3ª Ed., Atlas, comentários ao artigo 207 do Código Penal, p. 1508, in Federal Public Ministry v. Carlos Alberto de Oliveira, 10 June 2005.

123 See Leonardo Sakamoto, "Trabalho Escravo no Brasil do Século XXI", ILO, 2005, at F.1.1.

124 Bischoff, op cit., at p. 171-172.

7.1.1 Using a Company Store to Create 'Chains':

***Public Ministry of Labour v. Lazaro Jose Veloso (Fazenda Sao Luiz),
Judgment No. 218/2002, 30 April 2003***

In January 2001, a Mobile Inspection Unit visited Fazenda Sao Luiz and reported that the workers were "working in subhuman conditions, with no freedom of movement at all". The workers were not paid, were given no medical treatment, drank the same water as the cattle and were being kept in debt bondage by the landowner. A preliminary verdict that the landowner, Lazaro José Veloso, was in violation of provisions of the Federal Constitution prohibiting 'inhuman or degrading treatment' as well as Section 149 of the Penal Code was issued by the Ministry of Labour in November 2002, in order to give the landowner time to comply with his obligations. Nevertheless, he did not bring conditions on the estate into compliance and the Regional Labour Tribunal of the 8th Region (Para and Amapa) upheld the preliminary verdict.

In its analysis, the Court emphasized the fact that the workers were kept in perpetual debt because the landowner was the sole supplier of food, clothing and working tools. Although the landowner argued that such practice was widespread in rural areas, the Court dismissed this defence. It found that the landowner was not using the shop to help workers but rather to "create indebtedness and thus keep the workers chained to his land". Thus the shop itself constituted the means of creating and maintaining debt bondage.

The Court reasoned that a production system based on the indebtedness of the worker had a harmful impact on three levels. Firstly, the workers suffer from degrading working conditions and are not paid their wages. Secondly, society is harmed because the employer does not pay any taxes or social contributions. Thirdly, the State must invest significant public resources to eradicate a production system based on debt servitude.

Remedy. The Court ordered that the landowner pay 50,000 Brazilian Reais to compensate the workers for their collective moral damage, in addition to the penalties for failure to pay wages.



Public Federal Ministry v. José Gomes dos Santos Neto, Judgment N°2007.5101.811659-4 (Criminal Court Rio de Janeiro, 22 Abril 2008)

How can debt be used as a means to keep a worker in bondage? José Gomes dos Santos Neto was found guilty of maintaining workers in slave-like conditions. Workers had been recruited on the false promise of earning 600 Reais per month by selling fishing nets. They were working every day from 7 a.m. until 11 p.m., a total of 112 working hours per week. One of the workers, Jarbel, was initially charged 4000 Reais as 'recruitment fees' (including transport and advance on wages for the family). When the labour inspection brought the *fazenda* under control, 4 years later, his debt had not merely failed to decrease but had, on the contrary, increased to 4190 Reais. Another worker had an initial debt of 2000 Reais that had increased to 3000 Reais. As in the Veloso case, workers had to buy all their food provisions, clothes, medicine and working tools in the shop owned by the employer, where prices were 25% above market prices. Such employers play with the moral obligation felt by workers who don't want to leave before having paid back what they owe. If that alone proves insufficient leverage, such employers will also threaten the workers or their families. In this particular farm, labour inspectors found workers with debts ranging from 2000 to 8000 Reais. All workers said they could not leave this employer until they were able to pay back the debts.

7.1.2 First Prison Sentence for Forced Labour:

Federal Public Ministry v. Gilberto Andrade, Judgment

N°2000.37.00.002913-2, Penal Court of Maranhão State, 23 April 2008

In November 2004, a Mobile Inspection Unit visited the Fazenda Boa-Fe Caru and found 19 workers, including a 16 year-old boy, in slave-like conditions. Most of the workers were illiterate. They had no access to drinking water, no sanitation, inadequate accommodation and no safety equipment. They had to buy all their food and working tools at the estate store, and the amounts were deducted from their wages. In addition, unidentified corpses were found buried on Andrade's land, but determination as to cause of death was investigated in a separate procedure.

Legal Analysis. The Court stated that the Federal Justice was competent to judge slavery crimes, because they violate not only fundamental human rights, including the constitutional right to human dignity, but also the relevant societal values and the rules of labour organization.

Labour inspectors testified that the conditions they observed in that *fazenda* were among the worst they had ever seen. Workers were living in shelters of canvas or straw, without walls or floor, which did not protect them efficiently from the rain. They had no access to drinking water and would drink water from the river. They had no sanitation and therefore had to use the same place both to satisfy their physiological needs and as a source of water for cooking. Their work papers were not signed and, at the time of the inspection, some workers had not received any salary for 5 months. They were working from dawn 'til dusk, without the right to rest on Sundays. If they did not work, their hours would be deducted at double the daily rate. They did not have the right to send or receive letters. They did not have first aid kit.

Workers were prohibited from leaving the farm, and regularly threatened to discourage them from attempting to do so. Escape was made all the more difficult by the extremely isolated position of the farm, which was about 220 kilometres from the nearest city. This distance constituted an unquestionable obstacle to the freedom of movement of the workers, who were entirely subjected to the will of the defendant. Combined with the fear factor, the distance involved cancelled in practice any possibility of escape.

Workers incurred an initial debt towards the employer when recruited. The debt was then artificially maintained, because they had to pay for their transport to the farm and, subsequently, buy everything (garments, food, medicine and even working tools) in the farm shop, at prices far above those of the market.

The Court found Gilberto Andrade guilty of fraudulent recruitment through false promises of paid work, submission to degrading living and working conditions, and restriction of their freedom of movement. The Court insisted that he committed those crimes freely, consciously and deliberately, submitting workers to humiliating conditions purely in order to make financial profits by the exploitation of free manpower.

► **Aggravating Circumstances**

The Court found aggravating circumstances in the behaviour of the defendant, who kept the workers in a climate of fear and violence, conspicuously wearing a gun to intimidate them. He fostered his reputation for being a violent man, used to beating workers. As a consequence, workers were afraid to escape. The workers freed by the labour inspectors were even scared to remain in the same city because they feared retaliation. The defendant displayed proof of selfishness and lack of compassion regarding the fate of the workers, when he could have behaved according to the law.

Remedy. Andrade was convicted of violating Sections 149 (slave labour), 211 (hiding cadavers) and 207 (fraudulent recruitment), and sentenced to 14 years in prison. The Court stated that he was technically a primary offender but nevertheless would not be freed pending appeal because of the number of other cases pending against him for similar instances of forced labour. He was also ordered to pay days of penalty, or *dia multa*, a remedy commonly applied in forced labour cases. First, the Court decides to how many days the defendant should be condemned, depending on the seriousness of the crime. The value of the day is then determined according to the wealth of the defendant. In the absence of proof of the wealth of the defendant, the value of the day can be set at between one and 30 times the minimum wage¹²⁵. In the case of Gilberto Andrade, the Court took into account that he owned 7 farms, 2 apartments and one house in deciding that the value of the day should be 5 times the minimum wage. He was therefore sentenced to pay 7,200 minimum wages.

¹²⁵ Federal Public Ministry v. Jonas Gomes do Nascimento, Judgement N°2008.00005-0-5, Penal Court of Pará, 18 Abril 2008.



QUESTIONS FOR DISCUSSION

(1) Forced labour in Brazil is characterized by the extreme remoteness and isolation of the estates and the use of a 'company store' to create chains of debt bondage. Given the rural location of the worksite, however, some form of company store would seem to be a necessity. How should courts view the operation of a company store that allows workers to purchase items on credit and keeps tabs on the amounts owed? Could such a practice ever be legitimate?

(2) In addition to criminal prosecutions, the government has tried to combat forced labour through shaming – the use of the 'dirty list' to name offenders – and through identifying and liberating workers. Many commentators, however, view such efforts as insufficient. In fact, the defendants in the cases discussed here had been found in violation of slave labour prohibitions on previous occasions. The ILO has stated that Article 25 of Convention No. 29 imposes an obligation on governments to ensure that the penalties imposed by law are really adequate and are strictly enforced. In order to be adequate, they must be "sufficiently dissuasive to put an end to such practices".¹²⁶ How would you assess Brazil's compliance with Article 25? How should repeat offenders be treated?

(3) Convention No. 29 prohibits forced labour and requires states to criminalize the practice, but the Convention is silent on the issue of compensation to the exploited worker. In Brazil, offenders are more frequently ordered to pay compensation to workers than to serve prison terms. In your view, which is more important? Which is more likely to deter the practice of forced labour?

(4) Compare forced labour as it is practiced in Brazil with the indicia of enslavement listed by the *Kunarac* Trial Chamber (see Section 3.2.1). At least one commentator has argued that the conditions experienced by these workers in Brazil should give rise to a prosecution for the crime of enslavement under the Rome Statute of the International Criminal Court.¹²⁷ How would you compare the Brazilian experience of forced labour with the international crime of enslavement?

¹²⁶ *Eradication of forced labour*, General Survey of 2007, at para. 135.

¹²⁷ Bischoff, op cit., at p. 190.

Consider the comments of the ILO Committee of Experts on Brazil and similar practices in Peru.

Report of the Committee set up to examine the representation made under Article 24 of the ILO Constitution alleging non-observance by Brazil of the Forced Labour Convention

24. The [union] alleges that, after their transfer to regions far from their places of origin or residence, workers find that they have contracted a 'debt' in respect of the advance partial payment made, their transportation, tools, etc. At the workplace the debt increases because the only source of food is the company store. The repayment of the debt means that workers can be kept working for months or even years without a wage.

25. The allegations made by the complainant organization contain a wealth of information about the situation of workers subjected to slave labour. Common to all these situations is the complete dependence of the worker, the impossibility of terminating the employment relationship because of the debt contracted, and deceitful recruitment practices based on false promises about the amount of the wage. Wages, which in many cases are below the legal minimum, are not paid... or are paid only partially and their amount is not sufficient to cover the debt, which continues to increase... Many accounts contained in the allegations refer to the common practice of physical punishment... the makeshift nature of the accommodation, the deplorable sanitary conditions and excessively long hours of work (12 to 16 hours per day), and the torture inflicted on workers who attempt to escape (according to reports from workers who escaped from the hacienda). In the case of the CACHOEIRA alcohol manufacturing enterprise (Rio Brilhante), the reports refer to the deceitful recruitment; the withholding of documents; the non-payment of wages; the use of physical violence (by torture) by armed guards against workers who dared to complain; subhuman working and housing conditions; food being served (rice and flour) once a day, in unwashed tins, the cost of which is deducted from their wages; and the exploitation of minors and indigenous persons. In the case of the CASTANHAL (Aripuaña) hacienda, workers said that it was impossible for them to leave their place of work before paying the 'debt' which had been contracted with the employer under threat of death, and that they were obliged to get food from the enterprise store, the cost of which was deducted from their wage – which was never sufficient to cover the debt.

61. In light of Conventions No. 29 and 105 on forced labour, and after examining the allegations submitted by the complainant organization... the Committee has reached the conclusion that the allegations that thousands of workers, including minors, in certain regions and types of enterprise, are subjected to forced labour by means of debt bondage are well founded and that this situation is in violation of Conventions No. 29 and 105 ratified by Brazil.



**CEACR: Individual Observation Concerning Convention No. 29 (1930)
(commenting on the system of *enganche* in Peru) Published: 1991**

[T]he Committee notes that... certain communities are subjected to debt bondage on large and medium-sized agricultural and/or forestry estates, and constitute an unpaid or only partly paid workforce, being subject to the mechanisms of the system of 'advances' or *enganche*. In many cases, this bondage shows characteristics of slavery.

The Committee takes note of the indications concerning *enganche*, to the effect that it is a system whereby the indigenous workforce is exploited by means of the so-called 'advances' given by the employer to the worker and which may take the form of tools, food or money, so that the worker may fell the wood and, in theory, use it to pay back the initial debt and earn an income to provide for his family. Compelled to pay back the original advance plus interest, the indigenous workers are thus trapped in a vicious circle in which exploitation and poverty are a permanent way of life.

**CEACR: Individual Observation Concerning Convention No. 29 (1930)
(commenting on Peru) Published: 2008**

In the observations that it has been making for many years, the Committee has referred to the existence of forced labour practices (slavery, debt bondage or actual bondage) affecting members of indigenous communities, particularly in the Atalaya region, in sectors such as agriculture, stock-raising and forestry.

[T]he final report of the Multisectoral Committee... indicated that: "[T]he indigenous communities in Atalaya, who are known as 'captives', are subject to servitude in large and medium-sized stock-raising and/or timber estates, providing free or semi-free labour under the system of 'advances' (*habilitacion* or *enganche*). This system consists of advances provided by an employer to an indigenous worker in the form of work utensils, meals or money, in order to obtain the wood with which, in theory, he can subsequently repay the initial debt and obtain income. Thus obliged to repay the original advance, as well as interest on it, the indigenous workers are caught in a vicious circle of exploitation and poverty which becomes their permanent condition."

The Committee notes that, in reply to its previous observation, the Government indicates that it has not received denunciations concerning the exaction of forced labour. In view of the fact that the existence of such situations has been confirmed, the absence of penalties is indicative of the incapacity of the judicial system to prosecute such practices and penalize those who are guilty.

7.2 The United States

There are a significant number of forced labour prosecutions in the United States, a reflection of the country's history of classic slavery, and of its legislative and judicial efforts since the late nineteenth century to eradicate slave-like practices. In addition, due to certain unique procedural and statutory features, the United States courts have played host to civil actions brought to combat forced labour in other countries. Such actions have been brought directly under the Forced Labour Convention or international customary law. Forced labour therefore appears in US courts in two very different contexts. It is litigated both as a norm of customary international law, with either explicit or implicit reference to the ILO standard, and it is litigated under the various domestic statutes prohibiting involuntary servitude, debt peonage and forced labour. This section will discuss American forced labour jurisprudence in both the international and domestic contexts.

7.2.1 Forced Labour as a Norm of International Customary Law: Individual Liability for Violations of International Law

The United States is not a party to the Forced Labour Convention, 1930 (No. 29), although it has ratified the Abolition of Forced Labour Convention, 1957 (No. 105). Nevertheless, foreign forced labour claims have been raised directly in US courts through the use of the Alien Tort Statute (also known as ATS).¹²⁸ Although enacted by Congress in 1789, the statute was largely ignored for most of two centuries. In 1980, the Court of Appeals for the Second Circuit decided the case of *Filartiga v. Pena-Irala*. In *Filartiga*, the sister and father of a murdered student filed suit alleging that *Pena-Irala*, a police officer, was responsible for his torture and death. As one commentator has noted: "The significance of this decision cannot be overstated. *Filartiga* took a statute that had basically no previous application and used it to establish a civil remedy in US federal court for severe human rights violations rising to the level of customary international law."¹²⁹

Since *Filartiga*, human rights activists have used the statute as a vehicle for redress of wrongs committed overseas, arguing with some success that it both confers subject matter jurisdiction in US courts and provides a cause of action to litigate human rights norms reflected in customary international law. US courts have recognized a variety of international norms as within their jurisdiction.¹³⁰ There are three requirements for a suit under the Alien Tort Statute: (1) the plaintiff is an alien; (2) a tort

128 This statute is also sometimes referred to as the Alien Tort Claims Act or ATCA. It provides that American federal courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". 28 U.S.C. § 1350.

129 Virginia Monken Gomez, "The Sosa Standard: What Does it Mean for Future ATS Litigation?", 33 in *Pepperdine Law Review*, Vol. 33, January 2006, pp. 469, 473.

130 For decisions recognizing cognizable international norms, see *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (torture); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996) (arbitrary detention, torture); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (summary executions, torture, arbitrary detention); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (genocide, war crimes); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (torture, summary execution, disappearances and arbitrary detention). In *Filartiga* itself, the defendant defaulted when the case was remanded to the trial court. The trial court entered a judgment in favor of the *Filartiga* family and awarded \$10 million in damages, but efforts to collect have been unsuccessful. Since *Filartiga*, plaintiffs from countries as diverse as Argentina, Bosnia, Chile, El Salvador, Ethiopia, Guatemala, Haiti, Myanmar and the Philippines have filed suit. For articles discussing ATS litigation, see Beth Stephens, "'The Door is Still Ajar' for Human Rights Litigation in US Courts", in *Brooklyn Law Review*, Vol. 70, 2004-2005 p. 533; Virginia Monken Gomez, op. cit.; Elizabeth Defeis, "Litigating Human Rights Abuses in United States Courts: Recent Developments", in *ILSA Journal of International & Comparative Law*, Vol. 10, 2004, p. 319.



is alleged; (3) it is committed in violation of the law of nations, meaning customary international law.¹³¹ It is the last element that has most perplexed US courts, and that has been partially clarified by a recent decision of the US Supreme Court – *Sosa v. Alvarez-Machain*, 542 US 692 (2004). The two most important forced labour decisions under the Alien Tort Statute are *Doe I v. Unocal Corporation*, a case alleging forced labour in Myanmar, and *Roe v. Bridgestone*, a case involving workers on a rubber plantation in Liberia and the first forced labour case decided after the Supreme Court’s *Sosa* decision. We will examine these cases in depth, and we will also review other key American forced labour decisions.

7.2.2 Forced Labour as a Violation of Customary International Law: ***Iwanowa v. Ford Motor Co.*, 67 F. Supp 2d 424 (D.N.J. 1999)**

Factual Background. This was one of several lawsuits challenging the use of forced labour by German and/or Japanese authorities and corporations during World War II.¹³² Although the Court ultimately dismissed the lawsuit on multiple grounds – including statute of limitations, nonjusticiability and international comity – it first reached the issue of whether it had jurisdiction over Ford Motor Company and its German subsidiary, Ford Werke AG, as private parties, for plaintiff’s claims of forced labour.

Plaintiff alleged that she was abducted by Nazi troops in Rostov, Russia, and transported to Germany, where a representative of Forde Werke purchased her and transported her to the Ford Werke plant in Cologne.

Once in Cologne, Ford Werke placed Iwanowa with approximately sixty-five Ukrainian deportees in a wooden hut, without heat, running water or sewage facilities. They slept in three-tiered bunks without bedding and were locked in at night. From 1942-1945, Ford Werke required Iwanowa to perform heavy labour at its Cologne plant. Iwanowa’s assignment consisted of drilling holes into the motor blocks of engines for military trucks. Ford Werke security officials supervised the forced labourers, at times using rubber truncheons to beat those who failed to meet production quotas.¹³³

Iwanowa relied upon the Hague Convention and the Fourth Geneva Convention as evidence of customary international law, but she asserted her claim directly under customary international law.

Legal Analysis. The Court held that: “[T]he use of unpaid, forced labor during World War II violated clearly established norms of customary international law. The Complaint alleges that Iwanowa ‘was literally purchased’... Such assertions suffice to support an allegation that Defendants participated in slave trading... [A]ll of the

¹³¹ *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

¹³² *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d. 1160 (N.D. Cal. 2001) (dismissing on statute of limitations grounds); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003) (finding unconstitutional a state statute that extended the statute of limitations for such claims).

¹³³ 67 F. Supp. 2d at 433-434.

sources of international law expressly provide that enslavement of civilians during wartime violates the law of nations."¹³⁴ In support of its conclusion on enslavement, the Court cited the Nuremberg Principles and the Rome Statute of the International Court.

The Court next addressed the defendants' argument that the Alien Tort Statute only applied to state actors. The Court stated that it was "inclined to agree" with other courts that had found that slave trading was a crime to which the law of nations attributed individual responsibility. It noted that both sections 702 and 404 of the Restatement (Third) of Foreign Relations prohibited slavery and the slave trade. In the end, however, it declined to reach this issue. Rather, it held that Iwanowa had pleaded sufficient state action on the part of Ford. "[T]he Complaint alleges that Defendants acted in close cooperation with Nazi officials in compelling civilians to perform forced labor. This constitutes an allegation that Defendants were de facto state actors and are therefore liable under all possible interpretations [of the Alien Tort Statute]."¹³⁵

Remedy. The defendants' motion to dismiss on subject matter grounds was denied, but the motion to dismiss on statute of limitations grounds was granted. Accordingly the complaint was dismissed in its entirety.

QUESTIONS FOR DISCUSSION

(1) The Restatement prohibits slavery and the slave trade but does not mention forced labour. Note that the Court recasts the allegation of 'forced labour' as one of slave trading. Is this necessary to its conclusion?

(2) Should a distinction between slavery on the one hand, and forced labour on the other, be preserved by courts and commentators? What implications does this distinction have in practice?

¹³⁴ Ibid. at 440.

¹³⁵ Ibid. at 445-446.



7.2.3 Debts Not Owed to Employer mean no Forced Labour:
Doe I v. The Gap, 2001 WL 1842389 (D.N. Mar. I. 2001)

Factual Background. Plaintiffs, all Chinese garment factory workers in the American territory of Saipan, filed suit against the factories (referred to as contractor defendants) and the clothing companies (referred to as retailer defendants) that purchased their garments, alleging violations of a variety of labour laws as well as claims of forced labour in violation of the Alien Tort Statute. The workers alleged that they were compelled to labour as a result of the debts owed to their employers. The Complaint stated in part:

They live in constant fear of termination by their employers, which would result in their inability to work, deportation to their home country, and acceleration of the large recruitment fee debt they incurred at the outset of their employment.¹³⁶

Legal Analysis. Although plaintiffs also alleged that they were restricted to the factory compounds, that some class members had been subject to false arrest, and that one defendant threatened employees with physical retribution and retribution against their families in China, the Court found that they did not sufficiently plead a claim of involuntary servitude. Rather, what was key was the debt that they owed their employers. The Court highlighted the following excerpt from the plaintiffs' Complaint:

[Defendants] threaten them with termination or dock their pay, in large part not for legitimate, work-related reasons but to ensure continued domination and control over the [plaintiffs'] lives by reinforcing the message that the Contractor Defendants have absolute power over the Class members. Any appearance of workers standing up for their rights or protesting bad treatment is dealt with harshly; workers are often removed from the factory and penalized with between one and four days' restriction to their barracks without pay, or even fired, placed on a plane and deported to their homeland. The economic consequences of such action makes the [plaintiffs] economically and psychologically beholden to the Contractor Defendants, because if Class members are terminated, their recruitment fee is not returned or it automatically becomes due and payable, so that their deposits are forfeited.

Noting that the plaintiffs "made a choice to work" and that they repeatedly renewed their one-year employment contracts, the Court reasoned that they were compelled to do so by the debt and not by the alleged threats and use of physical and legal coercion.

¹³⁶ 2001 WL 1842389 at * 21.

- ▶ **Owing a Debt**
Courts have repeatedly held that the financial consequences attending the quitting of one's job make the choice between continuing to work under adverse conditions and quitting employment an unpleasant choice, but nevertheless a choice. However, when the labour is tied to a debt owed to the employer and the employer [either] physically coerces the worker to labour until the debt is paid or the consequences of failing to work to pay off the debt are so severe and outside the customary legal remedy that the worker is compelled to labour, a condition of peonage results, and this is the essence of plaintiffs' allegations.

Although the Court concluded that the plaintiffs had pleaded sufficient facts to establish peonage, it rejected their claim of forced labour under the Alien Tort Statute. Implicit in its reasoning is a distinction between 'slavery' and 'forced labour'. The Court noted that other courts had held that only "genocide, war crimes, piracy and slavery" could result in liability for individuals. Because the Court found that the plaintiffs had failed to make out a claim "for the less egregious act of involuntary servitude", it did not need to consider whether forced labour was equivalent to slavery.

After denying in part the defendants' motion to dismiss the plaintiffs' first amended complaint, the plaintiffs filed a second amended complaint. The Court then heard argument on the defendants' motion to dismiss this complaint, and it reversed its earlier conclusion on peonage, finding that the debts were owed to recruiting agencies and not to the defendants.

- ▶ **Debt Owed But Not to Employer**
[T]he court now finds that the plaintiffs have not properly alleged a common law peonage claim against the defendants... Previously, the court found that a debt to the recruiter was essentially a debt to the employer. However, the SAC [Second Amended Complaint] does not contain sufficient allegations that show or from which may be inferred that a debt to the recruiter is a debt to the employer... The plaintiffs' argument that the performance bonds compel the plaintiffs to work the full term of their employment contracts, due to the alleged economic duress they will suffer if they do not, is insufficient for a claim of peonage because the plaintiffs have still not showed that there is a debt owed to the defendants and that the plaintiffs have no choice but to work off the debt.¹³⁷

¹³⁷ *Does I v. The Gap*, 2002 WL 1000068 (D.N.Mar.I.) at * 17.



Remedy. Following the dismissal of peonage and involuntary servitude, the case went forward on the other claims. The parties eventually settled for a \$20 million fund to pay back wages to 30,000 workers and develop an independent monitoring system to end sweatshop abuse. Of the \$20 million fund, about \$5.8 million is earmarked for direct pay to workers.¹³⁸

QUESTIONS FOR DISCUSSION

(1) The Court finds very significant the fact that plaintiffs repeatedly renewed their employment contracts. Essentially, it holds that they showed they had made a choice to work. On the other hand, it still finds that this could constitute peonage, provided the debts were owed to the employers. If renewing an employment contract under the compulsion of a debt could constitute peonage, why is it not sufficient to show involuntary servitude?

(2) Consider the quote from *Clyatt* above. There, the Supreme Court equates peonage and involuntary servitude. Consider also the definition of debt bondage in the Supplementary Convention on the Abolition of Slavery. Does the Court reasoning reflect a misunderstanding of peonage?

(3) The Court states that continuing to work in unpleasant conditions rather than face the financial consequences of being without a job is a choice made by the worker. Do you think the Committee of Experts would agree with this statement? What about the Supreme Court of India? Do you agree?

¹³⁸ For a full description of the case, see www.globalexchange.org/campaigns/sweatshops/saipan ("The Saipan Victory"). For a description of what has happened since the settlement, see Rebecca Clarren, "Paradise Lost: Greed, Sex Slavery, Forced Abortions and Right-Wing Moralists", in *Ms. Magazine*, Spring 2006. A large part of the reason for the settlement was the fact that the Court concluded that the plaintiffs had sufficiently alleged that the clothing retailers were part of a joint manufacturing enterprise such that conspirator liability could be imposed on the other civil law claims. The retailer and manufacturing defendants formed a single enterprise and that through contracts and agreements, the retailer defendant had joint control and participation in the operation of the individual garment factories.

7.2.4. Intersection of Trafficking and Forced Labour:

Jane Doe v. Reddy, 2003 WL 23893010 (N.D.Cal. 2003)¹³⁹

Factual Background. This case is a good example of how trafficking and forced labour claims merge in a single case.¹⁴⁰ It is also an unusual Alien Tort Statute case because most of the events occurred within the United States. Eleven plaintiffs, all girls and young women, alleged that Lakireddy Bali Reddy and members of his family and employees in his real estate business fraudulently induced them to come to the United States from India on false promises that they would be provided an education and employment opportunities. Once there, however, the defendants allegedly forced them to work long hours under arduous conditions, sexually abused them and physically beat them. “Defendants allegedly exploited plaintiffs’ youth, fear, caste status, poverty, unfamiliarity with the American legal system, inability to speak English and immigration status, for defendants’ personal pleasure and profit.”¹⁴¹ Among other claims, plaintiffs alleged that defendants’ actions violated the Thirteenth Amendment (the provision of the US Constitution prohibiting slavery) and international law relating to forced labour, debt bondage and human trafficking. In Count IV, they use the Forced Labour Convention’s definition of the requisite elements of forced labour. In Count V, they cite the Forced Labour Convention, as well as other international instruments, on their claims of forced labour, involuntary servitude and peonage in violation of the law of nations.

Excerpt from Second Amended Complaint

Count IV (For Peonage, Involuntary Servitude and Forced Labor of Plaintiffs)

150. As alleged herein, defendants used force, threats and intimidation to hold [plaintiffs] in captivity, forcing them to work for defendants without receiving full or adequate compensation as required by law. Defendants indentured plaintiffs to extract their labor under the menace and threat of penalties of actual and threatened physical, sexual, economic, legal and psychological harm to plaintiffs.

¹³⁹ Because this is an unpublished decision, it has no precedential value in US courts. It is presented here simply as an example of judicial reasoning on the subject of forced labour.

¹⁴⁰ A companion criminal case was charged under 18 U.S.C. § 1584 (involuntary servitude) and the defendants pleaded guilty.

¹⁴¹ 2003 WL 23893010 at * 1.



Legal Analysis. The defendants argued that forced labour claims must amount to 'actual slavery' in order to be cognizable. The Court disagreed, noting that many cases and international instruments made clear that "modern forms of slavery violate *jus cogens* norms of international law, no less than historical chattel slavery".¹⁴² Defendants also argued that "there are no allegations that the [plaintiffs] were held prisoners in brothels or subjected to a life of hard labor in sweatshops". The Court rejected this assertion as well:

It is clear that the complaint herein alleges forced labour, which is prohibited under the law of nations... [T]he complaint meets [due process] requirements by its assertions explaining that plaintiffs were brought to the United States and forced to work involuntarily and how defendants reinforced their coercive conduct through threats, physical beatings, sexual battery, fraud and unlawful substandard working conditions. These allegations are sufficient to state claims for forced labour, debt bondage and trafficking.

Remedy. The parties eventually settled before trial for \$8.9 million. In the related criminal case, Reddy pleaded guilty to conspiracy and transporting minors for illegal sexual activity and paid \$2 million in criminal compensation to four victims.¹⁴³

7.2.5 Individual Non-State Actor Liability for International Crime: *Doe I v. Unocal Corporation*, 395 F.3d 978 (9th Cir. 2003)

Factual Background. Burmese villagers filed suit against the Myanmar government and Unocal, an American oil company, alleging human rights violations perpetrated by the Myanmar military in furtherance of an oil pipeline project.¹⁴⁴ In the district court, the defendants' motion for summary judgment was granted.¹⁴⁵ The main issue was the liability of Unocal for torts committed against the plaintiffs by the Myanmar military for the benefit of a gas pipeline project. The pipeline project was a joint venture by Total, a French oil company, and the Myanmar government. Whether Unocal was liable to the plaintiffs depended in turn on whether there was individual liability for the offence of forced labour. Every court that considered the issue, however, agreed that forced labour was an established norm of international customary law.

¹⁴² Ibid. at * 8.

¹⁴³ For a description of the civil settlement, see Matthew Artz, "Reddy Victims Sue Their Own Lawyers", in *Berkeley Daily Planet*, 28 June 2005; "Civil Lawsuit Settled in Reddy Sex-Slave Case", in *Berkeley Daily Planet*, 9 April 2004. For a description of the criminal plea, see "California Man Admits He Brought Indian Girls to US for Sexual Exploitation, Pleads Guilty to Federal Charges", Department of Justice Press Release, 7 March 2001.

¹⁴⁴ In the district court, there were two related actions. In *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), the district court dismissed claims against the Burmese government under the Foreign Sovereign Immunities Act but held that the court had jurisdiction over claims against the American oil company under the Alien Tort Claims Act. In a related case, *Nat'l Coalition Gov't of the Union of Burma v. Unocal*, 176 F.R.D. 329 (C.D. Cal. 1997) ("*Roe I*"), the court dismissed the claims of the Burmese government-in-exile for lack of standing but ruled that claims of Burmese labour organizations had standing to bring negligence claims and that the claims of one of the individual plaintiffs for forced labour could proceed.

¹⁴⁵ *John Doe I et al v. Unocal Corp; John Doe III et al v. Unocal Corp*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (two consolidated actions).

Excerpt from *National Coalition Government of the Union of Burma v. Unocal*,
176 F.R.D. 329 (C.D.Cal.1997)

Plaintiff John Doe I, now a refugee in Thailand, alleges that, on several occasions, SLORC has subjected him to forced labor, without compensation and under threat of death, on various railroad and pipeline projects in connection with and in the ordinary course of business of the Project. Specifically, he alleges he was forced to clear jungle along the path of the Ye-Tavoy railroad; forced to build military barracks for a SLORC camp in the pipeline region; and forced to build barracks and helipad facilities, clear jungle and land, break rocks for construction, and carry sand and rocks for construction on the Heinze Boke Island, where facilities for supporting the Project are allegedly located (Ibid. at ¶ 48). He alleges he frequently witnessed physical abuse and brutality against other forced laborers, including one worker who was beaten until he vomited blood and was then tied to a stake for 15 hours.

Legal Analysis in District Court. The District Court first noted that individual liability may be established for acts rising to the level of slavery or slave trading. Relying extensively on the work of the ILO and especially the Commission of Inquiry's Forced Labour in Myanmar Report, the Court appeared to accept the proposition, advanced by the plaintiffs, that forced labour is 'modern slavery' for which there exists individual liability. In other words, had a private actor such as Unocal committed acts of forced labour, it could be held liable. Nevertheless, plaintiffs still had to allege that Unocal was legally responsible for the military's forced labour practices. The Court held that for liability to extend to Unocal, there had to be active participation by the oil company.

In this case, there are no facts suggesting that Unocal sought to employ forced or slave labour. In fact, [the oil companies] expressed concern that the Myanmar government was utilizing forced labour in connection with the Project. In turn, the military made efforts to conceal its use of forced labour. The evidence does suggest that Unocal knew that forced labour was being utilized and... benefited from the practice. However, because such a showing is insufficient to establish liability under international law, Plaintiffs' claim against Unocal for forced labour under the Alien Tort Claims Act fails as a matter of law.¹⁴⁶

¹⁴⁶ 110 F. Supp. 2d at 1310.



Excerpt from Complaint

Second Claim for Relief (Forced Labor)

167. Defendants forced plaintiffs... to provide their labor to defendants under menace of the penalties of actual and threatened physical and psychological harm to themselves and members of their families and communities. Defendants also removed plaintiffs from their usual places of residence.

168. Defendants' use of plaintiffs' forced labor constitutes a violation of the prohibition against slavery and slave-like practices and the prohibitions against forced labor, in violation of the laws described in paragraph 155 [which lists international instruments on slavery and forced labor as well as customary international law].

Legal Analysis in Appellate Court. The US Court of Appeals for the Ninth Circuit reversed, holding that summary judgment could not be granted because there were issues of fact as to whether the oil company aided and abetted the Myanmar military's perpetration of forced labour.¹⁴⁷ Firstly, and significantly, the court held that forced labour "is so widely condemned that it has achieved the status of a *jus cogens* violation".¹⁴⁸ Secondly, the court took up the issue of individual liability. Was forced labour the kind of crime for which state action was not necessary in order for liability to attach? Reviewing a series of involuntary servitude and peonage cases, as well as more recent cases brought under the Alien Tort Statute, the Ninth Circuit concluded that "forced labor is a modern variant of slavery that, like traditional variants of slave trading, does not require state action to give rise to liability" under the Alien Tort Statute.¹⁴⁹

As for whether Unocal itself was liable for acts of forced labour committed by the military, the Court rejected the district court's 'active participation' standard. Instead, the Court held, what was required was "practical assistance or encouragement that has a substantial effect on the perpetration of the crime".¹⁵⁰ Finding that there were issues of material fact as to whether Unocal's conduct met this standard, the Court of Appeals reversed the District Court's grant of Unocal's motion for summary judgment on plaintiffs' forced labour claims.

Remedy. The Court of Appeals' decision was rightly heralded as a huge victory for workers' rights and the advancement of international human rights law in US courts.¹⁵¹

147 *Doe I v. Unocal Corporation*, 395 F.3d 932 (9th Cir. 2002).

148 A *jus cogens* norm is a peremptory norm "from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.

149 395 F.3d 932, 947.

150 Interestingly, the Ninth Circuit relied on decisions of the ICTR and ICTY, including *Prosecutor v. Kunarac*, for formulation of the aiding and abetting standard in international criminal law.

151 A recent Westlaw search turned up 393 law review and journal articles that mention *Doe v. Unocal*. See, for example, Armin Rosencranz, "Doe v. Unocal, Holding Corporations Liable for Human Rights Abuses on their Watch", in *Chapman Law Review*, Vol. 8, (Spring 2005), p. 135; John Haberstroh, "The Alien Tort Claims Act & Doe v. Unocal: A Paquete Habana Approach to the Rescue", in *Denver Journal International Law & Policy*, Vol. 22, Spring 2004, p. 231.

Then the Ninth Circuit granted Unocal's motion to rehear the case *en banc*.¹⁵² After oral argument but before the Ninth Circuit issued an opinion, the parties reached a settlement out of court.

QUESTION FOR DISCUSSION

One academic commentator has noted that the lower court opinion "improperly blurred the distinction between slave trade and forced labor".¹⁵³ He nevertheless argues that forced labour stands independently as a norm of customary international law and that the court would have been on sounder footing if it had proceeded on the basis. Another commentator critiques the Ninth Circuit opinion for doing much the same thing – improperly expanding the definition of slavery to include forced labour – but reaches the opposite conclusion. Because international agreements, including Convention 29, "sanction exceptional situations where nations may subject their citizens" to forced labour, it is not a norm from which no derogation is permitted. If the international community agrees that derogations are permissible, "forced labor has not independently risen to the level of a *jus cogens* norm".¹⁵⁴ Is it true that international instruments permit derogations from the prohibition on forced labour when it is exacted by private individuals? Does it matter that Convention 29 explicitly defines forced labour not to include any of the five exceptions contained in Article 2(2)? Could forced labour have the character of a *jus cogens* norm when applied to individuals but not to states?

152 Rehearing *en banc* granted by *Doe I v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003). A rehearing *en banc* is when the entire membership of the court hears the case, rather than just a quorum. In US Courts of Appeals, a quorum is composed of a panel of three judges. After the panel hands down a decision, a party may request a rehearing *en banc*. The entire court then votes on whether to rehear the case *en banc*. Only especially important cases are granted rehearing *en banc*. This gives the entire court the opportunity to decide an issue. An *en banc* decision can overrule a panel decision.

153 H. Knox Thames, "Forced Labor and Private Individual Liability in US Courts", in *Michigan State University DCL Journal International Law*, Vol. 9, Spring 2000, p. 153.

154 Tawny Aine Bridgeford, "Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism", in *American University International Law Review*, Vol. 18, 2003, pp. 1009, 1046.



7.2.6 Myanmar and the Status of the Forced Labour as a Norm of International Law

In June 1996, twenty-five workers' delegates presented a complaint under article 26 of the ILO Constitution against Myanmar for non-observance of the Forced Labour Convention. The Governing Body referred the matter to a Commission of Inquiry, which received communications from the parties and visited the region to take testimony from more than 250 witnesses. In its report, the Commission undertook a detailed review of general international law as it related to slavery, forced labour and other slavery-like practices.¹⁵⁵ The Commission concluded that there now existed in international law "a peremptory norm prohibiting any recourse to forced labour".¹⁵⁶ Any state which "supports, instigates, accepts or tolerates forced labour on its territory commits a wrongful act for which it bears international responsibility".¹⁵⁷ As for individual liability, the Commission stated that any person "who violates this peremptory norm is guilty of a crime under international law and thus bears individual criminal responsibility".¹⁵⁸

In light of the fact that Article 1, paragraph 2, of Convention 29 permitted a 'transitional period' during which states could have recourse to forced or compulsory labour, the Commission of Inquiry observed that Committee of Experts had stated the transitional period was no longer available for states to invoke as a defence for forced labour practices.¹⁵⁹ The Commission agreed with this view, having found that the prohibition against forced labour was a "peremptory norm from which no derogation was permitted".¹⁶⁰

Consider this excerpt from the ILO Report on Myanmar.

**Excerpt from *Forced Labour in Myanmar (Burma):
Report of the Commission of Inquiry Appointed Under Article 26
of the Constitution of the ILO to Examine the Observance by Myanmar
of the Forced Labour Convention***

528. There is abundant evidence before the Commission showing the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military for portering, the construction, maintenance and servicing of military camps, other work in support of the military, work on agriculture, logging and other production projects undertaken by the authorities or the military, sometimes for the profit of private individuals, the construction and maintenance of roads, railways and bridges, other infrastructure work and a range of other tasks, none of which comes under any of the exceptions listed in Article 2(2) of the Convention.

¹⁵⁵ *Forced labour in Myanmar*, Report of the Commission of Inquiry, op. cit., at Part IV (Examination of the Case by the Commission).

¹⁵⁶ Ibid. at para. 203.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid. at para. 204.

¹⁵⁹ Ibid. at 218.

¹⁶⁰ Ibid.

530. Failure to comply with a call-up for labour is punishable under the Village Act with a fine or imprisonment for a term not exceeding one month, or both, and under the Towns Act with a fine. In actual practice, the manifold exactions of forced labour often give rise to the extortion of money in exchange for a temporary alleviation of the burden, but also to threats to the life and security, and extrajudicial punishment of those unwilling, slow or unable to comply with a demand for forced labour; such punishment or reprisals range from money demands to physical abuse, beatings, torture, rape and murder.

536. In conclusion, the obligation under Article 1, paragraph 1, of the Convention to suppress the use of forced or compulsory labour is violated in Myanmar in national law, in particular by the Village Act and the Towns Act, as well as in actual practice in a widespread and systematic manner, with total disregard for the human dignity, safety and health and basic needs of the people of Myanmar.

7.2.7 Court Finds No Forced Labour for Adult Plaintiffs:

Roe v. Bridgestone, 492 F. Supp. 2d 988 (S.D. Ind. 2007)

Factual Background. Shortly after the Ninth Circuit’s decision in *Unocal*, the Supreme Court decided the case of *Sosa v. Alvarez-Machain*. In *Sosa*, the Supreme Court held that the Alien Tort Statute only conferred jurisdiction over certain kinds of customary international norms. The Supreme Court concluded that in 1789, the year that the Alien Tort Statute was enacted, the only kinds of offences Congress intended to recognize were violation of safe conducts, infringement of the rights of ambassadors and piracy. With appropriate judicial caution, courts could still recognize new offences provided they had widespread acceptance by the civilized world and were defined with a specificity comparable to those 18th-century torts.¹⁶¹ In the instant case, the claim of Alvarez-Machain for arbitrary detention failed to meet this standard.

[T]he judicial power [to recognize new claims under ATS] should be exercised on the understanding that the door is still ajar subject to vigilant door-keeping, and thus open to a narrow class of international norms today... [W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the Alien Tort Statute] was enacted.¹⁶²

The Court noted with approval that this standard was consistent with the reasoning followed by some courts. It also offered nothing concrete on the issue of whether private actors had liability for a given norm, but observed in passing that this was an issue for consideration.¹⁶³

¹⁶¹ 542 US 692, 725 (US Sup. Ct. 2004).

¹⁶² *Ibid.* at 729, 732.

¹⁶³ *Ibid.* at n. 20.



The first post-*Sosa* case to raise the question of forced labour as an actionable norm under the Alien Tort Statute was *Roe v. Bridgestone*. The complaint was brought by adult and child workers – called ‘tappers’ because their primary task is tapping rubber trees – on the Firestone Rubber Plantation in Liberia.¹⁶⁴ It alleged violations of international law, including forced labour violations, under the Alien Tort Statute. It is especially significant for two reasons. Firstly, it is the first post-*Sosa* decision to recognize that some instances of forced labour could be a violation of customary international law. Secondly, both plaintiffs and defendants, and ultimately the Court, relied heavily on ILO materials. The parties accepted the ILO as the authority for interpreting forced labour, and the contested issue was how ILO statements applied to the facts of this case.

Excerpt from the *Roe v. Bridgestone* Complaint

I. Nature of the action

3. The Plantation workers allege, among other things, that they remain trapped by poverty and coercion on a frozen-in-time Plantation operated by Firestone in a manner identical to how the Plantation was operated when it was first opened by Firestone in 1926. The Plantation Workers are stripped of rights, they are isolated, they are at the mercy of Firestone for everything from food to lodging, they risk expulsion and certain starvation if they raise even minor complaints, and the company makes willful use of this situation to exploit these workers as it has since 1926...

4. The Plantation Child Laborers are all minor children whose fathers are Plantation Workers. They are forced by poverty and coercion to work full-time under hazardous conditions with their fathers in order to meet the daily quota of tapped trees that the Defendants impose upon each family knowing that the quota can only be met if children join their fathers and, in many cases, mothers, and work from dawn to dusk...

5. Both groups of Plaintiffs, on behalf of themselves and others similarly situated, assert claims under the Alien Tort Statute... for forced labor, the modern equivalent of slavery...

IV. Facts relating to plaintiffs’ injuries

42. Liberians initially were forcibly conscripted at gunpoint [at] the outset of the Plantation’s operations. For decades afterwards, Firestone maintained a de facto system for buying able-bodied men from tribal chiefs. Benevolent in name if not in purpose, Firestone developed the ‘Paramount Chiefs Assistance Plan’, through which tribal chiefs were given quotas of laborers to deliver up to the Plantation in return for a payment per man. In 1955 alone, Firestone reported paying over \$90,000 for this kind of conscripted labor.

¹⁶⁴ The problem of forced labour has plagued Liberia, and the Firestone Plantation, since the 1920s. A three-member commission of inquiry visited Liberia in 1930 and found practices of pawning and conscripted labour. At the Firestone Plantation, it noted both voluntary and forcible recruitment practices. See *Report of the International Commission of Inquiry into the Existence of Slavery and Forced Labor in the Republic of Liberia*, US Department of State, 1931, pp. 133-135.

43. Many, if not most, of the present tappers on the Firestone Plantation, including Plaintiffs herein, are descendants of the original, forcibly conscripted laborers recruited at gunpoint to work on the Firestone Plantation. Many of the current tappers are the 3rd or 4th generation of laborers on the Firestone Plantation, and have rarely, if ever, set foot off the Firestone-controlled property.

46. ...The daily quotas are so high now that to get the minimum daily pay, tappers work 12-14 hours per day, and they are obligated to bring their family members, including children, to meet the daily 'family quota' that will allow the family to earn enough to at least buy food from the company store.

47. ...To get the daily wage of \$3.19 (before deductions), a tapper must tap... at least 1,125 trees. If the tapper completes 750 trees... he would get only \$1.59. And that is the heart of the system of forced labor and child labor. The difference between \$3.19 and \$1.59 is the difference between barely surviving and starving...

48. There is no tapper working at the Firestone Plantation who could possibly tap 1,125 trees in a day, and also clean the cups, treat the trees, and make the three deliveries a day carrying 150 pounds of latex each trip... [I]t is clear that no single worker could complete the daily quota in a day, and must use family members, including children, to avoid starvation...

49. ...The extremely high unemployment rate in Liberia, in the rural areas above 80%, allows Firestone to say with confidence that anyone who wants to leave can do so and join the ranks of the starving unemployed.

64. The Plantation Workers are modern day slaves, forced to work by the coercion of poverty, with the prospect of starvation just one complaint about conditions away. They are isolated on the Plantation by design, and are completely dependent upon the Firestone Plantation for access to food and for the only homes they have ever known, the one-room shacks in filthy shanty towns provided by the company. The paltry net wage the workers receive ensures that they also do not have the resources for transportation to escape the Plantation. Succeeding generations were kept on the Plantation by poverty, fear and ignorance of the outside world, living in a cycle of poverty and raising their children to be the next generation of Firestone Plantation Workers.

66. All of the Plantation Workers seek the simple justice of the freedom to choose whether to work, the opportunity to work free of coercion, the security of a proper employment relationship, the benefit of wages that do not leave them in malnourished poverty, and the meagre benefits provided under the law of Liberia, including rest days and holidays. Most of all, they seek the cessation of conditions that formed the premise of the Firestone Plantation, and that have left them in the same situation as their own fathers, watching their own children join them as tappers with no future other than the misery they have experienced their entire lives.

XII. Claims for relief

Count 1: Forced Labor By All Plantation Workers

88. The Plantation Worker Plaintiffs were placed in fear for their lives, were deprived of their freedom, and were forced to suffer severe physical and/or mental abuse designed to coerce them into working on the Firestone Plantation despite the horrible conditions they faced.



In a supplemental brief, the plaintiffs fleshed out their arguments that forced labour met the *Sosa* standard for Alien Tort Statute litigation.¹⁶⁵ Specifically, plaintiffs cited the inclusion of forced labour in the ILO Declaration on Fundamental Principles and Rights at Work as evidence that there was universal consensus on the prohibitions against forced and child labour. The plaintiffs also relied on the Commission of Inquiry's report *Forced Labour in Myanmar (Burma)* in support of the argument that there existed a preemptory norm against forced labour.

The defendants moved to dismiss the complaint, arguing that the workers were free to leave the rubber plantation whenever they chose. In response, plaintiffs maintained that their work was not voluntary. Rather, they were 'coerced' by a climate of fear that included a "notorious security force" headed by a former general of "war criminal Charles Taylor".¹⁶⁶ Plaintiffs also alleged that they were "born into a system of forced labour", and noted that the ILO had recognized that lack of consent can arise when a person is born or descended into slave or bonded status.¹⁶⁷ Plaintiffs specifically identified "threats of dismissal, exclusion from future employment, and deprivation of food, shelter or other necessities" as constituting the 'menace of penalty element' under the ILO definition of forced labour.¹⁶⁸ In countering the defendants' charge that the workers could simply walk away, the plaintiffs wrote:

[T]he added lifetime isolation, the lack of the possibility of outside help, the mentality of being born into forced labour, the abject poverty and inhumane working conditions, all with the climate of fear created by Firestone's security forces working in the background, combine to allow the inference that Plaintiffs experienced coercion that forced them to provide their labour on the Firestone Plantation against their will.¹⁶⁹

The defendants, in their reply memorandum, also made extensive use of ILO materials. First, they cited the *Global Report* for the proposition that forced labour was not a well understood concept and that "the line dividing forced labour in the strict legal sense of the term from extremely poor working conditions can at times be very difficult to distinguish".¹⁷⁰ As for the menace of any penalty, the defendants maintained that a penalty could not be the...

**...'threat of dismissal' or 'exclusion from future employment.'
No one can be subjected to forced labour – however defined – by 'penalty' of having the employment relationship terminate. Indeed, if plaintiffs' allegations were true, they would welcome the end of their employment, not fear it. As to alleged loss of food and shelter, forced labour does not include situations where employees have a choice whether to work, even if the economic consequences of quitting would be dire.¹⁷¹**

¹⁶⁵ Plaintiffs' Supplemental Brief in Reply to Defendants' Supplemental Brief, Case No. 1:06-cv-00627-DFH-VSS (7 Aug. 2006).

¹⁶⁶ Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss (20 March 2006).

¹⁶⁷ *Ibid.* at 10.

¹⁶⁸ *Ibid.* at 7 n.2.

¹⁶⁹ *Ibid.* at 12-13.

¹⁷⁰ Defendants' Reply Memorandum in Support of Motion to Dismiss Plaintiffs Complaint at 4 (citing *A global alliance* at para. 31.)

¹⁷¹ *Ibid.* at 4 (citing *A global alliance* at para. 13).

Legal Analysis. Ultimately, the Court found the defendants' arguments more compelling and granted the motion to dismiss with respect to the *adult* workers. The Court found that plaintiffs' allegations of forced labour were undermined by their own statements "that they are afraid of losing the same jobs they claim they are being forced to perform".¹⁷² When the Court asked plaintiffs' counsel what would need to change so that plaintiffs' labour would no longer be forced: "[T]he principal answer was to reduce the daily quota for [rubber] production and thus to raise effective wages on the Firestone Plantation. Plaintiffs' counsel also said that the remedy would include providing information to workers about their rights, upgrading equipment, including safety equipment and changing the security force." The Court felt that, apart from the comment about the security force, these matters of "wages and working conditions" fell outside the prohibition against forced labour.¹⁷³ The Court also rejected the contention, advanced by the plaintiffs as well as the ILO, that threat of dismissal from current employment could constitute 'menace of any penalty'. "Neither the ILO report nor the plaintiffs explain how a threat of dismissal from current employment is a 'menace of a penalty' that forces labor in the same job. It would seem that the expressed fear of losing one's current employment is a clear indicator that the current employment is not forced labor."¹⁷⁴

► **Plaintiffs Have Freedom to Leave their Jobs**

The relief that plaintiffs seek, however, and the changes that would resolve their complaints, show that the conditions about which they complain are not 'forced labour' as that term is used in any specific, universal and obligatory norm of international law.

Plaintiffs have not alleged that Firestone fails to pay them. They do not allege that Firestone is using physical force to keep them on the job. They do not allege that Firestone is using legal constraints to keep them on the job. Plaintiffs do not allege that they could not freely quit their jobs if they felt they had better opportunities elsewhere in Liberia. Plaintiffs do not allege that they have been held against their will, tortured, jailed or threatened with physical harm. Plaintiffs do not allege any form of ownership or trafficking in employees.

Plaintiffs allege instead that they are being kept on the job by the effects of poverty, fear and ignorance. Powerful as these forces may be, they are qualitatively different from armed troops keeping kidnapped and deported workers in labour camps. Higher wages, rest days and holidays, and the security of a proper employment relationship, better housing, education and medical care are all understandable desires. But better wages and working conditions are not the remedy for the forced labour condemned by international law. The remedy for truly forced labour should be termination of employment and the freedom to go elsewhere. Yet the adult plaintiffs allege that they are afraid of losing the very jobs they say they are forced to perform.

¹⁷² *Roe v. Bridgestone*, 492 F. Supp. 2d 988, 991 (S.D. Ind. 2007).

¹⁷³ *Ibid.* at 1016.

¹⁷⁴ *Ibid.* at 1014.



[T]he fact that the plaintiffs face worse prospects elsewhere in Liberia cannot be equated with an employer's use of force or coercion to keep the workers on the job.

- ▶ **No Allegations of Physical Force or Threats**
[T]he Complaint does not allege a single incident of physical force, physical threat or intimidation by those security forces directed against these plaintiffs or other Plantation workers. In the absence of such allegations or other indications of forced labour, the court cannot conclude that the presence of the current security force could transform the alleged circumstances at the Plantation into a violation of a specific, universal and obligatory international norm against forced labour. Recall also that plaintiffs alleged repeatedly that they are afraid of losing the same jobs they say they are forced to work.

- ▶ **Employer Not Responsible for External Economic Situation**
Plaintiffs also argue that they are so isolated on the Plantation that they have no realistic prospect of leaving if they want to do so. Plaintiffs argue that there is no transportation available and that they would starve if they left their jobs. The principal problem with the argument is that those circumstances are not the creation of defendants. Defendants are operating a commercial enterprise in a war-torn nation that is one of the poorest and most dangerous on Earth. The court is not aware of a basis in international law for stating that an employer must provide transportation or food or other necessities to a worker who wishes to leave his job.

The court assumes that the plaintiffs do not have better choices available to them as a practical matter. But the absence of those better choices is not the legal responsibility of these defendants. This basic distinction between harsh conditions for which an employer is or is not responsible is recognized in the ILO definition of forced labour dating back to ILO Convention 29 in 1930. Forced labour is '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.

- ▶ **Menace of any Penalty**
The phrase 'menace of any penalty' does not refer to the harm a person would suffer if he leaves a job and is unable to earn a living elsewhere. The concept of a penalty is a punishment deliberately inflicted (whether justly or not) by some authority or other actor for some perceived wrongdoing, not the consequences of being homeless and penniless in one of the poorest and most dangerous nations on Earth. Without that element of deliberately inflicted harm, the definition of forced labour would expand to reach many people who work at poor jobs to support themselves simply because they have no better alternative. The ILO Director General's 2005 report clearly cautions against such a broad definition: forced labour does

not cover situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives.

If the working conditions for adults on the Firestone Plantation violate international law, then international law would extend without identifiable boundaries to exploitive working conditions and low wages all over the world. Plaintiffs' basic reasoning – with conditions this bad, why would we stay if we could leave? – could apply all over the world to people who face no good alternatives for earning a living.¹⁷⁵

The Court concluded that although there was “a broad international consensus that at least some extreme practices called ‘forced labor’ violate universal and binding international norms”, the labour practices at issue on the Firestone Plantation lay “somewhere on a continuum that ranges from clear violations of international law (slavery or labor forced at the point of soldiers’ bayonets) to more ambiguous situations involving poor working conditions and meager or exploitive wages”.¹⁷⁶ The Court did, however, deny the motion to dismiss with respect to the child labour claims. “At least some of the practices alleged with regard to the labor of very young children at the Firestone Plantation in Liberia may violate specific, universal, and obligatory standards of international law, such that Count Two should not be dismissed on the pleadings.” Citing specifically ILO Convention 182 (Elimination of the Worst Forms of Child Labour), the Court permitted the child labour claims to go forward.¹⁷⁷

Remedy. This case has not yet reached a conclusion. The child labour claims are still pending.

175 Ibid. at 1016-1019 (excerpts).

176 Ibid. at 1010.

177 Ibid. at 1022.



QUESTIONS FOR DISCUSSION

- (1)** In this Court’s view, the fact that plaintiffs did not want different jobs and were only asking for improvements to their current jobs meant that they were free to leave and were not forced to labour at Firestone. The Court rejects the idea of economic constraints. Can you imagine this case reaching a different conclusion in another court? How would the Committee of Experts view this case?
- (2)** Might plaintiffs have been more successful if they had avoided the forced labour definition contained in Convention 29 and instead argued that they were held in servitude or that they had descended into slavery? Are the norms of slavery or servitude clearer than the prohibition against forced labour?
- (3)** Both plaintiffs and defendant use ILO materials, including promotional materials. What legal effect is given by the Court to ILO promotional materials? Do either the parties or the Court distinguish between the sources of ILO materials?
- (4)** The Court seems to require physical force or threats of force. What legal support is there for this as an element of the offence of forced labour?

The practice on the Firestone Plantation is not unique. Consider the following comments about Peru, where the Committee found violations of the Convention. Note, however, that the Peruvian workers were not free to end the employment relationship.

**CEACR: Individual Observation Concerning Convention 29 (1993)
(commenting on Peruvian Government report on situation of indigenous
communities on stock-raising or timber estates)**

According to the report which was supplied by the Government: “[T]here exists a population which remains from generation to generation, with their servile condition being passed on from father to son. The violent abduction of children occurs frequently, or they are kidnapped under cover of patronage for their baptism, only to be held for life as servants.” Other means of obtaining labour are ‘advances’... The report adds that “by being violently subjected to conditions of work based on the depriv[ation] of their free will, the Indians are submerged in a system of slavery and are deprived of all liberty and their constitutional rights”

With regard to their conditions of work, the report states that the Indian workers: “...work between 10 and 12 hours every day, which is made worse by the fact that they are not paid the minimum living wage and are certainly not compensated for overtime... Nor are the provisions of labour legislation observed with regard to rest periods, social security and occupational health and safety.” Furthermore, the report also points out “the difficulty or impossibility for the Indians to move freely outside the estate or camp and their imprisonment for debt in improvised prisons on the estates”

The Committee notes that the situations examined above represent important violations of Conventions Nos. 29 and 105. The subjection of the workers in their employment relationship, the fact that it is impossible for them to end the employment relationship, and the very bad conditions of work are all in contravention of the principles of convention No. 29.

7.2.8 When Does Overtime Become Forced Labour?

The Court in *Roe v. Bridgestone* rejected the idea that work performed under threat of dismissal counts as work performed under menace of a penalty. In fact, the Committee of Experts has held that in some situations, the threat of dismissal might be sufficient. The Firestone plaintiffs might have had more success with the Court if they had argued that only one aspect of their work was forced labour – the compulsory overtime. Although a requirement to work overtime “does not affect the application of the Convention so long as it is within the limits permitted by the national legislation or collective agreements”,¹⁷⁸ the Committee of Experts has also noted that overtime performed under the threat of dismissal is an “exploitation of the worker’s vulnerability that amounts to a penalty”. In the 2007 General Survey on Forced Labour, *Eradication of forced labour*, the Committee noted that in some cases an obligation to do overtime above the limits permitted by national legisla-

¹⁷⁸ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, Report III (Part 1A), International Labour Conference, 85th Session, Geneva, 1998, para. 107.



tion or collective agreements might violate Convention No. 29 in certain circumstances. “[A]lthough workers may in theory be able to refuse to work beyond normal working hours, their vulnerability means that in practice they may have no choice and are obliged to do so in order to earn the minimum wage or keep their jobs, or both.” The Committee has considered that, in cases in which work or service is imposed by exploiting the worker’s vulnerability, under the menace of a penalty, dismissal or payment of wages below the minimum level, such exploitation ceases to be merely a matter of poor conditions of employment and becomes one of imposing work under the menace of a penalty and calls for the protection of the Convention.¹⁷⁹

Consider the following observations of the Committee on Guatemala and El Salvador.

**CEACR:
Individual Observation Concerning Convention No. 29 (Guatemala) (2004)**

**Unpaid work performed after the normal working day and the definition
of forced labour for the purposes of the Convention**

In cases of enterprises which determine pay by setting performance targets, the obligation to work beyond the normal working hours is based on the need to be able to earn the minimum wage... the worker has the possibility to “free her or himself” from such imposition but only by leaving the job or accepting dismissal as a sanction for refusing to perform unpaid work.

The Committee notes the vulnerability of workers who in theory have the choice of not working beyond normal working hours, but for whom in practice the choice is not a real one in view of their need to earn at least the minimum wage and retain employment. This then results in the performance of unpaid work or services. The Committee considers that in such cases the work or service is imposed through the exploitation of the worker’s vulnerability, under the threat of a penalty, namely dismissal or remuneration below the minimum wage rate.

CEACR: Individual Observation Concerning El Salvador (2006)

The Committee noted in its previous observation the comments made by the Inter-Union Commission of El Salvador on the situation of the many workers in maquilas who are required, under threat of dismissal, to work overtime in excess of the limits laid down in the national legislation and without pay. The Committee noted that, according to the above organization, maquila companies set production targets that require employees to work beyond the ordinary working day, without pay and under threat of dismissal.

The Committee requested the Government to provide information on the average number of additional hours worked by workers in the maquila sector, and to indicate the measures taken or envisaged to protect workers in this sector against the imposition of compulsory labour.

¹⁷⁹ *Eradication of forced labour*, General Survey of 2007, at para. 134.

7.2.9 Involuntary Servitude and Forced Labour Under Domestic Law

Because of the American history of classic chattel slavery, there have been a significant number of prosecutions for servitude and forced labour in US courts.¹⁸⁰ Although US courts have heard forced labour claims brought directly as a violation of international customary law, prosecution under one of the statutes that criminalize peonage, involuntary servitude, or forced labour is a far more common avenue for litigation of forced labour claims.¹⁸¹ All these statutes are commonly referred to as trafficking statutes, but the peonage and involuntary servitude statutes predated the UN Trafficking Protocol by more than a century, and were the result of American efforts to eradicate slavery and slave-like practices. Only the forced labour statute, which was adopted as part of the Trafficking Victims' Protection Act in 2000, was clearly influenced by the global trafficking debate. Before reviewing cases, however, a brief survey of the legal landscape is in order.

In 1865, Congress ratified the Thirteenth Amendment to the Constitution, which provides that: "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." From the very beginning, it was understood that 'servitude' had a larger meaning than slavery. Writing in 1872, the Supreme Court held that "the obvious purpose" of the Thirteenth Amendment was to "forbid all shades and conditions of African slavery".¹⁸² "[T]he term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."¹⁸³

Of course, as in any country, labour is not either enslaved or free. Rather, there are various kinds and degrees of unfree labour. The Thirteenth Amendment outlawed the most egregious forms of unfree labour, but that did not mean that labour itself was completely liberated. As one commentator notes: "[A] hierarchical structure of labor conditions existed both before and after enactment of the Thirteenth Amendment, from slavery, peonage, indentured servitude, apprenticeships and sharecropping, to various types of wage work... Following the abolition of slavery, the southern labor system quickly adopted peonage to force former slaves to perform needed labor."¹⁸⁴ Although peonage avoided some of the worst features of slavery (there was no property right in the peon; the peon could not be sold; and peonage could not be inherited by the children of the worker), it did reproduce "many of the immediate practical realities of slavery – a vast underclass of laborers, held to their jobs by force of law and threat of imprisonment, with few if any opportunities for escape".¹⁸⁵ To implement the Thirteenth Amendment and combat these abuses, Congress quickly passed the Anti-Peonage Act (1867), which not only declared laws enforcing

180 There was a wave of peonage cases in the early twentieth century, but during the latter half of the twentieth century almost all the cases involved farm labour. For early peonage cases, see *Pollock v. Williams*, 322 US 4 (1944); *Bailey v. State of Alabama*, 219 US 219 (1911); *Clyatt v. United States*, 197 US 207 (1905). For farm labour cases, see *United States v. Harris*, 701 F.2d 1095 (4th Cir. 1983); *United States v. Bibbs*, 564 F.2d 1165 (11th Cir. 1977); *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981); *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964); *United States v. Warren*, 772 F.2d 827 (11th Cir. 1985).

181 See 18 U.S.C. § 1583 (peonage); 18 U.S.C. § 1584 (involuntary servitude); 18 U.S.C. § 1589 (forced labour). There is also a statement that criminalizes sex trafficking – 18 U.S.C. 1591 – which will not be discussed here.

182 *Slaughter-House Cases*, 83 US 36, 68 (1872).

183 *Butler v. Perry*, 240 US 328, 332 (1916).

184 Julie A. Nice, "Welfare Servitude", in *Georgetown Journal on Fighting Poverty*, Vol. 1, 1994, p. 340.

185 Tobias Barrington Wolff, op. cit., p. 982.



peonage null and void but also provided criminal penalties.¹⁸⁶ Although enforcement was sporadic at first, it gradually became more vigorous, resulting in a series of important cases defining peonage.

In 1948, Congress passed 18 U.S.C. § 1584, the Involuntary Servitude statute. This was a consolidation of two much older statutes – the Slave Trade statute of 1909 and the Padrone statute of 1874. The Slave Trade statute was one of several measures originally passed for the purpose of ending the African slave trade, but the 1909 version removed the racial restriction. The Padrone statute was motivated by the “practice of enslaving, buying, selling or using Italian children”, and making them work as beggars or street musicians. The statute, however, was framed broadly in terms of “any person” held in “involuntary servitude”. Following the enactment of the Involuntary Servitude statute, American courts engaged in a struggle to determine the degree and kind of coercion needed to show that a worker’s labour was involuntary.

A disagreement developed among the Courts of Appeals over the appropriate standard to apply in an involuntary servitude case. At one end of the spectrum stood the Second Circuit decision in *United States v. Shackney*, which was followed by several other Circuits. At the other end, representing a far more liberal reading of the statute, was the decision of the Ninth Circuit in *United States v. Mussry*.

In *Shackney*, the government alleged that the defendant had held a Mexican family of seven in involuntary servitude and peonage on his chicken farm in Connecticut. Upon arrival, the family found the living conditions much worse and the work much harder than they had been led to expect. The five children did not attend school and the defendant did not pay the family any wages; instead, he deducted their wages from the amount he had originally loaned to them for travel from Mexico. The family wished to leave the chicken farm, but none of them “ever communicated this desire to Shackney”, nor were they ever “restrained from leaving either by force or the threat of force”.¹⁸⁷

The Government’s case was that the Oros’ did not dare avail themselves of the easy methods of release admittedly available because their wills were overborne by the fear that Shackney had engendered... Of prime importance was the fear of deportation if they left.

The Court rejected the government’s argument that holding a person to ‘service by duress’ amounted to involuntary servitude. The threat of deportation, the Court reasoned, was not the same as ‘a credible threat of imprisonment’. “[A] holding in involuntary servitude means to us action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement... not a situation where the servant knows he has a choice between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad.”¹⁸⁸ The Second Circuit concluded that Section 1584 only prohibited “service compelled by law, by force or by the threat of continued confinement of some sort”.¹⁸⁹

¹⁸⁶ Act of March 2, 1867, 14 Stat. 546.

¹⁸⁷ *United States v. Shackney*, 333 F.2d 475, 479 (2d Cir. 1964).

¹⁸⁸ *Ibid.* at 486.

¹⁸⁹ *Ibid.* at 487.

In *Mussry*, on the other hand, the government charged the defendants with holding several Indonesian domestic servants in peonage and involuntary servitude. The indictment alleged that the defendants held the servants against their will “by enticing them to travel to the United States, paying them little money for their services, and withholding their passports and return airline tickets, while requiring them to work off... the debts resulting from the costs of their transportation”.¹⁹⁰ The district court dismissed all the counts that failed to allege that the defendants used or threatened to use law or force to hold the workers against their will.

On appeal, the Court of Appeals for the Ninth Circuit reversed, noting that “the methods of subjugating people’s wills have changed from blatant slavery to more subtle, if equally effective, forms of coercion”.¹⁹¹ Referring to *Shackney*, the Ninth Circuit wrote: “[W]hile a test that looks to the use of law or physical force attempts to draw a clear line between lawful and unlawful conduct and has the apparent advantage of simplicity, it is too narrow to fully implement the purpose of the 13th amendment.” The Ninth Circuit held:

Conduct other than the use, or threatened use, of law or physical force may, under some circumstances, have the same effect as the more traditional forms of coercion – or may even be more coercive... The crucial factor is whether a person intends to and does coerce an individual into his service by subjugating the will of the other person. A holding in involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labour.¹⁹²

Although the Ninth Circuit recognized that coercion might not be the result of physical or legal force, it was quick to point out that not all forms of pressure satisfied the involuntary servitude statute.

We recognize that economic necessity might force persons to accept jobs that they would prefer not to perform for wages they would prefer not to work for. Such persons may feel coerced into labouring at those jobs. That coercion, however, results from societal conditions and not from the employer’s conduct. Only improper or wrongful conduct on the part of an employer subjects him to prosecution.¹⁹³

In order to resolve the split among the courts on the meaning of involuntary servitude, the Supreme Court granted certiorari in the case of *United States v. Kozminski*.

¹⁹⁰ *United States v. Mussry*, 726 F.2d 1448, 1450 (9th Cir. 1984).

¹⁹¹ *Ibid.* at 1452.

¹⁹² *Mussry*, 726 F.2d at 1453.

¹⁹³ *Ibid.*



7.2.10 Psychological Coercion Alone not Involuntary Servitude:
United States v. Kozminski, 487 US 931 (1988)

Factual Background. In 1983, two mentally handicapped men were found working on a dairy farm in Michigan. The men were in poor health and lived in squalid conditions. They had not been paid in years. One had been working at the farm since 1967. The other, who had previously spent time in a state mental hospital, had been there since the early 1970s. The government charged Ike and Margarethe Kozminski and their son John with violating Section 1584 and the defendants were convicted at trial. The jury instructions stated, in part, that involuntary servitude could “include situations involving either physical and other coercion, or a combination thereof, used to detain persons in employment”. The jury was further charged that it had to determine if there “was a means of compulsion used, sufficient in kind and degree, to subject a person having the same general station in life as the alleged victims to believe they had no reasonable means of escape and no choice except to remain in the service of the employer”.¹⁹⁴ The defendants appealed on the grounds that the trial court had incorrectly instructed the jury that acts of psychological coercion would violate the statute.

Although a panel of the Sixth Circuit affirmed the convictions, the case was then reheard *en banc*, and the *en banc* court reversed the convictions and remanded the case for a new trial. The majority of the Sixth Circuit agreed with the defendants that the trial court’s definition of involuntary servitude would bring cases involving general psychological coercion within the reach of Section 1584. The case then went up to the Supreme Court.

Legal Analysis. Based on the brutal and violent history of African slavery in the United States, the Supreme Court easily concluded that the Involuntary Servitude Statute could be violated by the use of physical coercion. Based on the early peonage cases, where debtors were compelled to work or faced imprisonment, the Supreme Court found that legal coercion also violated the statute. Psychological coercion alone, however, did not violate the statute.

The Government has argued that we should adopt a broad construction of ‘involuntary servitude’, which would prohibit compulsion of services by any means that, from the victim’s point of view, either leaves the victim with no tolerable alternative but to serve the defendant or deprives the victim of the power of choice. Under this interpretation, involuntary servitude would include compulsion through psychological coercion as well as almost any other type of speech or conduct intentionally employed to persuade a reluctant person to work.

¹⁹⁴ 487 US 931 at 937 (quoting jury instructions).

The Supreme Court found the Government's interpretation rendered the offence overly subjective. "[T]he type of coercion prohibited would depend entirely upon the victim's state of mind."¹⁹⁵ An employer should not face criminal sanction "whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare, but as to which he still has a choice, however painful".¹⁹⁶

Nevertheless, the Supreme Court left the door open for an assessment of the individual's reaction to the coercion used. In reviewing the history of the Padrone statute, the Supreme Court noted that the victims of the Padrone system were: "[Y]oung children [who] were literally stranded in large hostile cities in a foreign country... [T]hese children... had no choice but to work for their masters or risk physical harm. The *padrones* took advantage of the special vulnerabilities of their victims, placing them in situations where they were physically unable to leave."¹⁹⁷

[A] victim's age or special vulnerability may be relevant in determining whether a particular type or a certain degree of physical or legal coercion is sufficient to hold that person to involuntary servitude. For example, a child who is told he can go home late at night in the dark through a strange area may be subject to physical coercion that results in his staying, although a competent adult plainly would not be. Similarly, it is possible that threatening an incompetent with institutionalization or an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude.

Thus, according to the Supreme Court, involuntary servitude means: "[A] condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." But evidence "of the victim's special vulnerabilities" was still relevant "in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve". Furthermore "evidence of other means of coercion or of extremely poor working conditions" might be relevant to corroborating disputed issues of fact or of the defendant's intent.

Justice Brennan wrote separately to emphasize his disagreement with the Court's decision to add a *physical or legal coercion* limitation to the Involuntary Servitude Statute. He pointed out that the statute criminalized holding another person in a condition of involuntary servitude, but did not specify the manner in which involuntary servitude is created. And he critiqued the majority opinion for describing the victims of the Padrone system as subject to physical coercion when the coercion involved was, "even as the Court describes it... obviously psychological, social and economic in nature..." "Although it is heartening that the Court recognizes that strange environs and the lack of money, maturity, education or family support can establish coercion necessary for involuntary servitude, labeling such coercion 'physical' is at best strained."¹⁹⁸

¹⁹⁵ Ibid. at 949.

¹⁹⁶ Ibid. at 950 (quoting *Shackney*, 333 F.2d at 487).

¹⁹⁷ Ibid. at 948.

¹⁹⁸ 487 US at 958 & n. 5 (Brennan, J., concurring).



Remedy. Because there was sufficient evidence of other kinds of coercion, the Supreme Court did not acquit the defendants. Instead, it remanded the case. After remand to the trial court, the Kozminskis were allowed to plead guilty to one count each of violating labour law. They were ordered to pay \$34,000 to the two men.¹⁹⁹

QUESTIONS FOR DISCUSSION

(1) Compare the *Kozminski* opinion's description of the coercion experienced by the Padrone victims with the way that the European Court of Human Rights describes the threat that confronts Siliadin. Does extreme vulnerability essentially mean the same thing as physical compulsion or, in Siliadin's case, menace of a penalty? Or can the former be established at a lower evidential threshold?

(2) Recall that in *United States v. Clyatt* (see Text Box), the Supreme Court emphasized that whether an individual had voluntarily undertaken a debt was not relevant to whether the condition that resulted was peonage. "Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, and none in the character of the servitude."²⁰⁰ Do you agree with Justice Brennan that the focus of the inquiry should be on the condition produced – involuntary servitude – rather than the means used to achieve it? If so, what evidence is required to show involuntary servitude?

(3) One commentator argues that *Kozminski* was the result of the Supreme Court's "normative concern that any test of psychological coercion would be simply too subjective and amorphous to evidence a violation of involuntary labor".²⁰¹ The ILO has stated that an "external constraint or indirect coercion" might interfere with a "worker's freedom to offer himself voluntarily", and has noted that "where migrant workers are induced by deceit, false promises and retention of identity documents... such practices represent a clear violation of the Convention".²⁰² Would these practices amount to psychological coercion? Does identifying these practices appear overly subjective?

(4) The UN Trafficking Protocol defines trafficking as a series of three stages: recruitment or movement; prohibited means; and exploitation. The prohibited means are "threat or use of force or other means of coercion, of abduction, of fraud, of deception, of abuse of power, or of a position of vulnerability."²⁰³ The *travaux préparatoires* state that: "[T]he reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved."²⁰⁴ Such language encompasses non-physical coercion. Is this a problematic definition or is it just a comprehensive one? How should it be applied in practice?

199 Suzanne H. Jackson, "To Honor and Obey: Trafficking in Mail-Order Brides" in *George Washington Law Review*, Vol. 70, June 2002, p. 527.

200 *Clyatt*, 197 US at 215.

201 Kathleen Kim, "Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revising *United States v. Kozminski* and Understanding Human Trafficking", in *University of Toledo Law Review*, Vol. 38, Spring 2007, pp. 941, 955.

202 *Eradication of forced labour*, General Survey of 2007, op. cit., at para. 39.

203 UN Trafficking Protocol Art. 3(a).

204 A/55/383/Add.1 at para. 63



In the years following *Kozminski’s* narrow interpretation of the Involuntary Servitude Statute, and amid growing international concern over the phenomenon of trafficking, the US Congress took up the Supreme Court’s invitation to draft a legislative response. The result was the Trafficking Victims Protection Act of 2000.²⁰⁵ The legislative history indicates that Congress wanted to broaden the kinds of cases that could be reached by criminalizing psychological coercion.²⁰⁶ The Trafficking Victims Protection Act added several new ‘trafficking’ statutes to the criminal code – including Forced Labor, 18 U.S.C. § 1589.²⁰⁷ The congressional findings noted that Section 1589 was intended to address “the increasingly subtle methods of traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence”.²⁰⁸ The first appellate court to consider the reach of Section 1589 was the First Circuit in the case of *United States v. Bradley*.

205 Pub. L. 106-386.
206 See H.R. Conf. Rep. 106-939 (5 Oct. 2000).
207 18 U.S.C. § 1589 provides that: “Whoever knowingly provides or obtains the labor or services of a person – (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process, shall be [guilty of a felony offense].” Section 1589 is a part of the Chapter of the criminal code titled “Peonage, Slavery and Trafficking in Persons”.
208 H.R. Conf. Rep. 106-939 at 101. Also, Congress explicitly referenced a number of international instruments on human rights, including the Convention on the Abolition of Forced Labour. *Ibid.* at 6.



7.2.11 Defining Forced Labour in Terms of Individual Vulnerabilities:
United States v. Bradley, 390 F.3d 145 (1st Cir. 2004)

Factual Background. The two defendants, Bradley and O’Dell, recruited seasonal workers from Jamaica for the tree cutting company that they operated in New Hampshire. The workers were promised wages of at least \$11 per hour as well as housing. Upon arrival, their passports were confiscated by O’Dell, who explained that a worker had run away the previous year and that Bradley would hire someone to “destroy” that man. The men were housed in poor conditions and badly treated. They were paid \$8 per hour and also charged \$50 per week in rent. One worker was told by Bradley that he only needed to stay long enough to pay the \$1,000 spent on his air fare. Although the men did travel independently throughout the neighbourhood, Bradley and O’Dell kept tabs on their whereabouts. Eventually the workers ran away, and Bradley and O’Dell were charged with forced labour. After being convicted at trial, they argued on appeal that the trial court’s instructions on the forced labour counts were legally flawed.

The trial court had charged the jury as follows:

The term ‘serious harm’ includes both physical and non-physical types of harm. Therefore, a threat of serious harm includes any threats – including threats of any consequences, whether physical or non-physical – that are sufficient under all the surrounding circumstances to compel or coerce a reasonable person in the same situation to provide or to continue providing labour or services.²⁰⁹

The defendants contended that the trial court’s instruction would apply “to a broad range of innocent conduct, such as employers who legitimately convince their ‘victims’ to continue working, for example, by threatening to withhold future pay that is sorely needed by a worker”.

Legal Analysis. The appellate court found aspects of the defendants’ argument convincing and appeared to recognize potential problems with the use of psychological coercion.

We do agree that the phrase ‘serious harm,’ as extended to non-physical coercion, creates a potential for jury misunderstanding as to the nature of the pressure that is proscribed... [It] could be read to encompass conduct such as the employer’s ‘threat’ not to pay for passage home if an employee left early. Depending on the contract, surely such a ‘threat’ could be a legitimate stance for the employer and not criminal conduct.

Thus, in an appropriate case, we think that the court in instructing the jury would be required to draw a line between improper threats or coercion and permissible warnings of adverse but legitimate consequences.²¹⁰

²⁰⁹ 390 F.3d at 150.

²¹⁰ Ibid. at 151.

Nevertheless, the appellate court did not find this to be an appropriate case. Although a standard instruction should arguably include “qualifying language explaining that some warnings from the employer could be legitimate”, the defendants’ had failed to preserve this objection for appeal. In the trial court, they had not asked for an instruction excluding “innocent warnings from the class of threats that would violate the statute”.²¹¹ In this case, there was no evidence that the defendants had “made legitimate threats, so there is no risk that the jury convicted them for such threats”. Therefore there was no plain error warranting reversal.²¹²

Remedy. Both defendants were sentenced to 70 months in prison and ordered to jointly pay a total of \$13,052 in cash to their victims.

QUESTION FOR DISCUSSION

Bradley advises that courts distinguish between criminally coercive threats and warnings of legitimate but adverse consequences? How should a fact-finder “draw the boundary between unlawful coercion and lawful pressures”? Compare this with *Roe v. Bridgestone* and the workers who were warned that if they left their jobs they would “join the ranks of the starving unemployed”. Is that a threat of a legitimate but adverse consequence?

²¹¹ Ibid.

²¹² Kim, op. cit., p. 970.

LIST OF ACRONYMS

CEACR	Committee of Experts on the Application of Conventions and Recommendations
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Labour Conference
ILO	International Labour Organization
SAP-FL	Special Action Programme to Combat Forced Labour
UN	United Nations
UNODC	United Nations Office on Drugs and Crime



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