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The Slave Trade and the Right of Visit under the *Law of the Sea Convention:* Exploitation in the Fishing Industry in New Zealand & Thailand

Abstract

Severe exploitation of vulnerable persons is occurring in fishing industries globally. An overview of exploitation in New Zealand and Thailand highlights the incentive for states to downplay exploitation and underpins the appeal of a right of visit, which is provided for under the *Law of the Sea Convention* in regards to the slave trade. Although reported as forced labour, debt bondage, or human trafficking an examination of international jurisprudence reveals that current practices likely amount to slavery; primarily due to the inherent vulnerability of persons at sea. Two persuasive cases, *Kunarac* and *Tang*, provide guidance on interpreting the definition of slavery, particularly "the powers attaching to the rights of ownership". The operation of a right of visit is considered against the law of the sea regime, as are the implications in light of international attempts to control IUU fishing.

Over the last decade, extensive exploitation of vulnerable persons has been rife in fishing industries throughout the world. This essay focuses on exploitation occurring in Thailand and New Zealand, though practices of severe exploitation have been uncovered in many countries including: America, Britain[1], Ukraine, Scotland, Ireland[2], and Pakistan[3]. Supranational organisations often refer to this exploitation as forced labour, debt bondage, and human trafficking. However, the scope of the definition of slavery and the captive nature of high seas fishing means that these practices are more likely to amount to slavery.

This essay begins with an overview of exploitation in the fishing industries of New Zealand and Thailand. Comparing these two distinct nations demonstrates the pervasiveness of the phenomenon of exploitation at sea; the similarities between the process of recruitment, deception, coercion, and exploitation; and the difference between the underlying forces that drive how the issue is ultimately being addressed. Both case studies highlight that substantial

[1] Paul PEACHY, "Police Investigate Claims of Slavery in UK Fishing Fleet" *The Independent* (23 November 2014), online: The Independent <http://www.independent.co.uk/news/uk/crime/police-investigate-claims-of-slavery-in-uk-fishing-fleet-9877879.html>.
[2] *The Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, (entered into force 9 March 1927) [1926 Slavery Convention]
[3] Save the Children Sweden, *Commercial Sexual Exploitation of Children: A Situation Analysis of Pakistan* (2005) 49, available at http://www.wgcsae.org/publications/-artical- CSECPakistanSituationAnalysis.pdf, cited in UNODC, below n 7, 29-30.

financial incentives have lead states to deny the existence of exploitation; and, at the same time, how economic sanctions promise to drive rapid action in these areas. The fundamental difference between these two case studies is that New Zealand lacks enforcement capacity over foreign flagged fishing vessels, whereas Thailand is incentivised to fail in its treaty obligations to suppress exploitation. The need to independently ascertain the extent of exploitation in Thailand's fishing industry, thus gives rise to the consideration and appeal of a right of visit on the high seas.

A universal right of visit in regards to the slave trade is provided for by Article 110 of the *United Nations Convention on the Law of the Sea* (LOSC)[4]. Whether this right of visit extends to the exploitation occurring at sea, hinges on the meaning of the term *slave trade*. However, this question has multiple facets that need to be considered. The first being the meaning of slavery under international law, which although the accepted definition is contained within the *International Convention to Suppress the Slave Trade and Slavery* [5] (1926 Slavery Convention), the meaning of the "rights of ownership" is less straightforward. Another is the scope of the term *the slave trade*, which if confined to a historical sense of 'chattel'[6] slavery, excludes the extension of the right of visit to the exploitation examined in this essay. It is argued however, that international law is less clear. An examination of the terms historical development and its accepted definition is offered in counter to this assumption.

In any case, it is argued that the resulting ambiguity means that the maritime provisions pertaining to slavery have no effective legal worth. This essay criticises this situation, by suggesting that the scope of slavery is likely to cover severe exploitation at sea - including trafficking into debt bondage, or for the purpose of forced labour. In reaching this conclusion, this essay considers international jurisprudence from, *Kunarac* and *Tang*. The judgements from these cases lay the foundation for states to seek an authoritative legal determination regarding more practical definitions of slavery and the slave trade, in the context of the right of visit under the LOSC. This essay suggests ways to achieve this, and the implications of re-

[4] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397, (entered into force 16 November 1994), [*LOSC*].
[5] *1926 Slavery Convention*, *supra* note 2.
[6] On chattel slavery see Holly CULLEN, "Contemporary International Norms of Slavery" in Jean ALLAIN, ed., *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford University Press, 2012), at 307.

defining the phenomenon of exploitation at sea as slavery are then considered in light of the emerging international effort to control Illegal Unregulated and Unreported (IUU) fishing. The operation of a right of visit regime is also considered against the current law of the sea; by drawing on inspection regimes already in existence, namely the Regional Fisheries Management Authorities (RFMOs). This paper thus presents an opportunity to resurrect the maritime visitation provisions pertaining to the abolition of slavery beyond mere rhetoric.

> No one shall be held in slavery or servitude, slavery and the slave trade shall be prohibited in all their forms.[7]

I. THE EXTENT OF EXPLOITATION

A. *Exploitation in New Zealand's Fishing Industry*

The vulnerability of high seas fishers to exploitation is such that even well resourced countries with considerable enforcement capacity are not immune. For almost a decade, New Zealand's fisheries management regime has been marred by frequent reports of severe exploitation occurring on foreign chartered vessels (FCVs) licensed to fish its Exclusive Economic Zone (EEZ). In 2013, the University of Canterbury published a PhD thesis on the phenomenon of trafficking in New Zealand's fishing industry.[8] The author, Thomas Harre, published findings based on interviews with industry sources. He found significant evidence that at least two foreign commercial fishing companies, Southern Storm Fishing and the Sajo Oyang Corporation had shown, at the very least, reckless negligence towards crewmembers resulting in abuse and underpayment of wages.[9] His thesis documents that, between 2005 and 2011, at least ten Korean owned vessels and one Ukrainian vessel were involved in severe exploitation. The foreign crews, mostly from Indonesia but also Myanmar and Vietnam, cited a range of abuses including: injury; lengthy shifts; non-payment of wages; verbal, physical, and psychological abuse; and even death.[10]

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[7] *Universal Declaration of Human Rights*, GA Res. 217 (III), UN Doc. A/810 (1948), art. 4.
[8] Thomas D. A. HARRE, *Human Trafficking for Forced Labour at Sea: An Assessment of New Zealand's Response*, (Masters of Laws, University of Canterbury, 2013).
[9] *Ibid.,* at 83-4.
[10] *Ibid.,* at 64.

A detailed snapshot of the severity of this exploitation emerged in May 2011, when 23 Indonesian nationals walked off the South Korean flagged *Shinji*, after eight months of fishing in New Zealand's EEZ. In 2014, Glenn Simmons and Christina Stringer published a paper[11] detailing this severe exploitation after conducting some 300 interviews with crewmembers, observing officials, and industry personnel. Their findings showed that the men had been subject to forced labour through deception, debt bondage, and physical abuse. Their investigation detailed the process of exploitation from recruitment through to ultimate deportation. The recruitment process occurred through manning agents, who deceived impoverished Indonesians about their employment conditions and the minimum wage in New Zealand. Manning agents further abused the vulnerability of men, by coercing them to sign repressive contracts crafted to ensure their submission. They obtained guarantees of the men's services by requiring upfront payment of significant bonds (up to $300USD), demanding forfeiture of hard to obtain identity and education documents, and acquiring the identity documents of family members.

Whilst aboard the *Shinji,* the severe exploitation of the men took multiple forms. Financially, they incurred further debts through: arbitrary deductions, aggressive agency fees, and the manipulation of exchange rates. This meant that the men were averaging a pay of around $NZ1 an hour (the minimum wage in New Zealand is $12NZ an hour). The men were forced into dangerous conditions and severely overworked; commonly working 16 hour shifts and sometimes even up to 30 hours without rest. They were inadequately fed, abused for taking meal breaks and claimed to even having to resort to eating rotting fish-bait. They lacked protective clothing, suffered frostbite and freezer burn, whilst their pleas for medical attention went ignored. The men also claimed to have been subjected to sexual abuse, and ordered to give massages to the captain. Anyone who complained about their working conditions, was abused or threatened with deportation; non-payment of wages; termination of employment; and the withholding of their employment securities that their families had paid as part of their recruitment. Further coercion was achieved through the retention of men's identity documents, including their birth certificates and passports.

[11] Christina STRINGER, Glen SIMMONS, and Daren COULSTON, "Not in New Zealand's Waters Surely? Labour and Human Rights Abuses Aboard Foreign Fishing Vessels" New Zealand Asia Institute Working Paper Series No 11-01, University of Auckland 15 September 2011.

Of additional concern was the persistent public denial of the existence of trafficking by New Zealand officials. Despite this, the persistent media reports[12] and academic articles[13] [14] [15] finally prompted New Zealand to draft a bill requiring mandatory reflagging of all FCVs licensed to fish its EEZ.[16] After considerable delay, the Amendment finally passed into law on July 2014, and will come into force in May 2016. The Amendment overcomes the significant jurisdictional complexities present in New Zealand's current management regime. Whereby, minimum wages are currently regulated through a registration process under the Fisheries Act, and labour standards for foreign crews are monitored through the immigration process. This complexity has resulted in poor coordination between agencies, and thus a lack of enforcement.[17] In 2010, the limitations of New Zealand's jurisdiction were also highlighted with the sinking of the *Oyang 70*, which resulted in six deaths. Under the LOSC, there is no automatic jurisdiction to investigate the sinking of foreign flagged vessels.[18] In contrast, the Amendment will give government agencies the jurisdiction over FCVs in regards to employment; health and safety; and criminal law.[19] The increased enforcement capacity will effectively revoke the licence of FCVs to exploit vulnerable persons for economic gain in New Zealand's EEZ.

However, an inevitable consequence of the Amendment is that many of New Zealand's lowest value fisheries may prove uneconomical. Indeed, this very point was argued by those vested interests who opposed the laws,[20] and thus remarkably echoed a prominent argument used by the American South in its opposition of the abolition of slavery.[21] Yet despite the

[12] Michael FIELD, "NZ Rated Harshly on Trafficking" *Fairfax Media*, online: Fairfax Media <http://www.stuff.co.nz/national/politics/8819518/NZ-harshly-rated-on-trafficking>.
[13] Stringer *et al*., *supra* note 11.
[14] Jennifer DEVLIN, "Modern Day Slavery: Employment Conditions For Foreign Fishing Crews In New Zealand Waters" (2009) 23 Australia and New Zealand Maritime Law Journal 82-98.
[15] Christina STRINGER and Glen SIMMONS, "New Zealand's Fisheries Management System: Forced Labour and Ignored or Overlooked Dimension?" (2014) 50 Marine Policy 74-80.
[16] *Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill* (No 75-2) 2013 (NZ) Bills Digest No 2070 (enters into force 1 May 2016) New Zealand Parliament online: <http://www.legislation.govt.nz/bill/government/2012/0075/latest/DLM4794406.html> [Foreign Charter Vessels and Other matters Amendment Bill].
[17] Ministry for Primary Industries "Regulatory Impact Statement: Government Response to the Ministerial Inquiry on Foreign Charter Vessels" (May 2012), online NZ Treasury <http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-mpi-mefcv-sep12.pdf>, at 48, 96, 40.
[18] *Ibid.,* at 51.
[19] *Fisheries Amendment Bill*, *supra* note 16*,* s.103.
[20] Michael FIELD, "Fishing Pay Fight Damaging NZ" Fairfax Media, (15 April 2014) <http://www.stuff.co.nz/business/industries/9943488/Fishing-pay-fight-damaging-NZ>.
[21] Mark M. SMITH, *Debating Slavery: Economy and Society in the Antebellum American South,* (Cambridge, United Kingdom: Cambridge University Press, 1998) at 10.

economic merits of slavery, the narrative of exploitation behind New Zealand's wild-caught fisheries has proven far too unpalatable.

A risk assessment prepared for New Zealand's Parliament, highlights how perceptions of overseas markets are a substantial concern for the country's seafood export industry. The report refers to concerns raised by the United States government over human rights abuses aboard FCVs, fearing that they could lead to import sanctions.[22] It also highlights the risks associated with the European Union's (EU) requirement for import certification, stating that the process is undermined by the foreign-state certification of fish caught in New Zealand. The report stresses that the lack of control over certification would damage New Zealand's reputation, and threaten the security of the seafood export market; leading to a loss of access to other markets; which could ultimately spread to non-fishing sectors.[23]

New Zealand therefore, has a significant financial incentive to address exploitation aboard FCVs. Since, failure to do so would have market repercussions that could not only impact local seafood exporters, but could also extend to unrelated export markets. In New Zealand's case, the approach to addressing exploitation has been to extend its enforcement capacity over the labour dimensions of the foreign flagged FCVs. Thus, whilst the denial of access to global markets may be driving significant action to address exploitation at sea; without enforcement jurisdiction, a state has limited means to achieve this.

Thailand in comparison, as the world's third largest producer of wild-caught seafood, has a substantial financial incentive to maintain the status quo. There, the profitability of severe exploitation continues to outweigh the need for significant action, making Thailand the primary destination for trafficked fishermen in South-East Asia. Given the underlying difference in economic incentives, the widespread exploitation occurring in Thailand is now considered, whereby the lack of reliable figures emerges as the most significant barrier to addressing this problem.

[22] Ministry for Primary Industries, *supra* note 17, at 55-8.
[23] *Ibid.,* at 13.

B. *Exploitation in Thailand's Fishing Industry*

In 2011, the United Nations Office on Drugs and Crime (UNODC) released a report on human trafficking across commercial fishing industries.[24] According to the UNODC, South-East Asia has the most well documented occurrences of trafficking into force labour in the global fishing industry. In this region, Thailand is not only known to be the main destination country, but is also a key transit country for men trafficked into the fishing industries in Indonesia and Malaysia.[25] In the last four years, both the International Labour Organisation (ILO) and the International Organisation for Migration (IOM)[26] have conducted extensive reviews into exploitation in Thailand's fishing sector. Both found evidence of extensive trafficking and forced labour in Thailand's commercial fishing sector. The 2013 ILO report also identified a number of child labourers amongst the fishers (33 children under the age of 18 and 7 under the age of 15).[27] Their reports found that most victims are trafficked from neighbouring countries: namely, Myanmar and Cambodia and, to a lesser extent, Laos.[28] In July 2013, Reuters published an investigation that found Rohingya Muslims being trafficked into forced labour on Thai fishing boats.[29]

The ILO report on Thailand surveyed some 600 fishers working in both national and international waters. The survey found that one third of respondents had been compelled to work between 17 and 24 hours a day. A larger percentage (40%) of workers had experienced deductions in their salaries without their knowledge. The report also identified a number of common practices: including the restriction of movement; retention of identity documents;

[24] *Transnational Organised Crime in the Fishing Industry,* United Nations Office on Drugs and Crime [UNODC], (2011), online UNODC: <http://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf>.
[25] Statement by Mrs Napa SETHAKORN, Deputy Director-General of Department of Social Development and Welfare (DSDW), Ministry of Social Development and Human Security (MSDHS), Thailand, at an ILO Forum in May 2009, quoted in Nieva, "Human Traffickers Resort to Kidnapping" in ABS.CBN, (16 May 2009), online: ABS CBN <http://www.abs-cbnnews.com/pinoy-migration/05/16/09/human- traffickers-resort-kidnapping> cited in UNODC, *ibid.*, at 45.
[26] *Trafficking of Fishermen in Thailand*, International Organisation for Migration (IOM), (January 14 2011).
[27] *Employment Practices and Working Conditions in Thailand's Fishing Sector*, International Labour Organisation (ILO), (2013) ILO Triparpate Actixon to Protect Migrants within and from the GMS from Labour Exploitation (TRIANGLE); Asian Research Centre for Migration, Institute of Asian Studies, Chulangkorn University, online: <http://www.ilo.org/asia/whatwedo/publications/WCMS_220596/lang--en/index.htm>.
[28] See also Kate HODAL and Chris KELLY, "Trafficked into Slavery on Thai Trawlers to Catch Food for Prawns" *The Guardian* (10 June 2014), online: The Guardian <http://www.theguardian.com/global-development/2014/jun/10/-sp-migrant-workers-new-life-enslaved-thai-fishing>.
[29] Pairat TEMPHAIROJANA, "Thailand Arrests Suspected Leader of Human Trafficking Gang" *Reuters* (9 August 2013), online: Reuters <http://www.reuters.com/article/2013/08/09/us-thailand-trafficking-idUSBRE9780HI20130809>.

threat of denunciation to authorities; physical and psychological violence; illegal wage deductions; and non-payment of wages. The ILO report also found that 10% of respondents had been severely beaten by their masters. Most concerning though are other reports claiming murder is commonplace.[30] In 2009, the United Nations Inter Agency Project on Human Trafficking (UNIAP) surveyed 49 Cambodian men who had been trafficked onto Thai fishing vessels. The survey found that 59% of the men had witnessed their boat captain commit murder.[31]

Another trend identified in the ILO report involved the recruitment process. The report found that recruitment was mostly voluntary but then later lead to a situation of debt-bondage and/or forced labour. Under the international definition of human trafficking, consent is negated by the use of coercive and deceptive means. The ILO report highlighted two further findings that indicated the men were subject to forced labour: first, that 66 respondents reported trying to escape, and second, that 24 respondents were sold or transferred to another boat against their will.

In 2008, a Laotian man was trafficked onto a tour boat that brought supplies out to, and catches back in from, deep-sea fishing vessels. After a week he was transferred onto a deep-sea fishing boat that went on to operate in Malaysian waters. He was told he would have to work for two years before he could return to shore. During his ordeal, he was transferred at sea three times and on each occasion the captain physically assaulted him. He eventually escaped only to be forced into working in a palm-oil plantation and then later charged by Malaysian officials for illegally entering the country.[32] Sadly, his story is telling of widespread enslavement throughout the region, operating through the complete control over the movement of vulnerable people.

According to Legal Support for Children and Women (LSCW), a Cambodian non-government organization (NGO), more than 100 Cambodians escaped from forced labour conditions on Thai fishing boats in 2012. Many of the men were forced to swim to shore under the cover of darkness in order to escape their ordeals. According to LSCW, the Thai

[30] Environmental Justice Foundation, "The Hidden Cost", (2013), online: <http://ejfoundation.org/shrimp/hiddencost> at 1.
[31] *Exploitation of Cambodian Men at Sea*, United Nations Inter-Agency Project on Human Trafficking (UNIAP), (2009), <http://www.no-trafficking.org/reports_ docs/siren/siren_cb3.pdf> at 5.
[32] *ILO, supra* note 27.

boats fish both legally and illegally off Indonesian waters. The boats unload their catch for processing at Ambon Island, but rarely dock in order to prevent their labourers from escaping. Instead they may stay at sea for several years, and receive supplies from other boats.[33]

Reports from NGOs are vital to understanding the scope of the phenomenon of exploitation. This is because NGOs are often more likely than government officials to have been approached by former victims of such ordeals. In some cases this may be the result of a general poor perception of enforcement officials in some South-East Asian countries. Thus, NGOs such as LSCW have been at the forefront of bringing instances of trafficking for forced labour to the public attention.

The reliability of estimates over the scope of the problem is, however, inevitably problematic. In August 2013, World Vision reported that Thai authorities had arrested three leaders of a trafficking ring in Myanmar. The NGO asserted that the gang was believed to have trafficked an estimated 700 Myanmar nationals into exploitation aboard Thai fishing boats.[34] Given the clandestine nature of trafficking, and the invisibility of fishing vessels, such figures can be hard to verify. Nevertheless, the consistent media revelations, the breadth of the media coverage, and the quantitative data produced by the ILO, indicate that the practice is likely more prevalent than there is data available. In light of this, the slavery provisions in LOSC are considered with regard to the various definitions of exploitation.

II. THE DEFINITIONS OF EXPLOITATION

It is argued that many instances of exploitation at sea, most likely to fall within the scope of the accepted definition of the slavery. To demonstrate this, the meaning of the terms human trafficking, debt bondage and forced labour are first considered.

[33] Samean YUN, "100 escape from traffickers", *Radio Free Asia* (9 February 2013), online: Radio Free Asia <http://www.rfa.org/english/news/cambodia/traffickers-02092012154922.html>.
[34] World Vision, "Seafood industry traffickers caught in Thailand: Notorious human traffickers captured over slavery at sea" *World Vision* (26 August 2013), online: World Vision <http://campaign.worldvision.com.au/news-events/seafood-industry-traffickers-caught-in-thailand>.

A. *Human Trafficking*

Human trafficking occurs when a person's movement is controlled by some means, which may be subtle, for the purpose of exploitation. This statement is a distillation of the core elements of the definition contained in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol), which supplements the United Nations Convention against Transnational Organized Crime.[35] Article 3(a) of the Trafficking Protocol defines trafficking in people as:

> 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.[36]

The Trafficking Protocol does not seek to suppress severe human exploitation per se, as the crime is not actually constituted by exploitation alone. Instead the achievement of the Protocol is to deposit all other forms of exploitation in the one instrument.[37] Since people are trafficked for the purposes of forced labour, slavery or practices similar to slavery. This definition thus provides that an instance of trafficking can thus amount to slavery.

B. *Forced Labour*

Forced labour is the exploitation of a persons' *work or services*, whose ability to leave that employment is controlled by some means, which may be subtle. The term forced labour has been shaped in the context of international labour law.[38] Article 2(1) of the ILO Convention No 29 concerning Forced or Compulsory Labour of 1930 defines forced labour as: "all work

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[35] *United Nations Convention against Transnational Organized Crime,* 8 January 2001, A/RES/55/25 (entered into force 29 September 2003)
[36] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 15 November 2000, 2237 U.N.T.S. 319 (entered into force 25 December 2003) [*Trafficking Protocol*].
[37] Jean ALLAIN, "The legal definition of slavery in the twenty first century" in Jean ALLAIN, ed., *The legal understanding of slavery: from the historical to the contemporary* (Oxford University Press, 2012) at 215.
[38] FRIESENDORF, "The security sector and counter trafficking" in FRIESENDORF, ed., *Strategies against Human Trafficking: The Role of the Security Sector* (2009) 17, 27, online: <http://www.acrath.org.au/multimedia/downld/var/Strategies_Against_Human_Trafficking The_Role_of_the_Security_Sector_Vienna&Geneva_Sep2009.pdf>, cited in Trafficking, cited in *UNODC*, *supra* note 18 at 22-3.

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."[39] In respect to the definition of slavery, the 1926 Slavery Convention "considers it is necessary to prevent forced labour from developing into conditions analogous to slavery."[40] Therefore, the terms slavery and forced labour are not exclusive, instead they exist on the same continuum of exploitation.

C. *Debt Bondage*

Debt bondage occurs where one's value of work is not reasonably applied to the liquidation of a debt, or the length and nature of work is not limited nor defined. Under the definition of trafficking, debt bondage would constitute the means in which a person is held in a situation of exploitation. The ILO specifically recognises debt bondage as a method in which someone is kept in forced labour. Under the 1956 Supplementary Convention, debt bondage is defined 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.[41]

Debt bondage would not *ipso facto* constitute slavery unless other requirements were met, namely that any or all of the powers attaching to the right of ownership were exercised.

III. THE DEFINITION OF SLAVERY

The universal condemnation of slavery is deemed part of *jus cogens* and is referred to in forty-seven conventions between 1874 and 1996.[42] The definition of slavery as found in the 1926 Slavery Convention is universally accepted as obtaining the status of customary

[39] *Convention Concerning Forced or Compulsory Labour*, 28 June 1930, 14th ILC session (No 29, 1930) (entered into force 1 May 1932), art. 2(1).
[40] *1926 Slavery Convention, supra* note 2, art. 5.
[41] *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, 30 April 1956, Sec Council Res 608(XXI) (1956) (entered into force 30 April 1957). *[1956 Supplementary Convention]*.
[42] Cherif BASSIOUNI, "Universal jurisdiction for international crimes: Historical perspectives and contemporary practice" (2001-2002) 42:81 Va.J.Int'l L. at 112.

international law.[43] Slavery is therefore defined as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".[44] The interpretation of this provision is, however, less clear.[45] At the centre of the debate is the extent to which other forms of exploitation fall within the scope of this provision. Although it is now generally agreed that instances of trafficking and forced labour will be identifiable as slavery *only if* they have involved the exercise of "any or all of the powers attaching to the right of ownership" [46].[47] To elucidate a detailed legal definition from this provision thus requires a more detailed examination.

A. *The International Jurisprudence of Slavery*

Under the UN Charter, for a rule of international law to be applied, the International Court of Justice (ICJ) must show that it is the product of one of the three law-creating processes: treaties, international customary law or general principles of law recognised by civilised nations.[48] In the search for general principles of law, international rules of law can be found in their application by the judicial decisions of both international and domestic courts. According to Harris, the "persuasive character of [a] judgement and advisory [opinion] depends on the fullness and cogency of the reasoning offered".[49] With regard to this understanding of the location of international law, two of the most cogent judicial decisions regarding the scope of slavery, *Kunarac* and *Tang,* are considered.

These cases shed some light over whether the prohibition of slavery extends beyond *de jure* abolition to *de facto* suppression. In other words, does the meaning of "the status or condition attaching to the powers of the right of ownership"[50] extend to practices where the

[43] *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Trial Chamber II, Case No. IT-96-23 T and IT-96-23/1, Decision of 22 February 2001, online: < http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> *[Kunarac]*. The Tribunal in *Kunarac* determined that the definitions of slavery in the 1926 Convention had attained the status of customary international law. Cited Holly Cullen, 'Contemporary International Norms of Slavery' in Allain, *supra* note 47, at 306.
[44] *1926 Slavery Convention*, *supra* note 2, art. 1.
[45] Allain, *supra* note 47, at 220.
[46] *1926 Slavery Convention*, *supra* note 2, art. 1.
[47] Anne T. GALLAGHER, "Human Rights and Human Trafficking: A Quagmire" (2009) 49:4 Virginia Journal of International Law, at 810.
[48] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI (entered into force 31 August 1965) [UN Charter] art. 38.
[49] D.J. HARRIS, *International Law*, 6th ed., London, Sweet and Maxwell Ltd, 2004) at 51.
[50] *1926 Slavery Convention*, *supra* note 2, art. 1.

conditions of slavery exists, yet it is not legally possible to own a slave. In this respect, the cases considered support Bales' argument that a determination of a practice of slavery depends on a criteria inherent in the powers attaching to the rights of ownership in situations *where the rule of law is absent*.[51] In this way, the abolition of slavery is necessarily understood to extend to instances of *de facto* slavery.

1. Kunarac

In an extensive review of the international definition of slavery in *Kunarac*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia made a number of key findings that are specifically relevant to fishing, when we bear in mind the captive nature of high seas fishing. Specifically, a list made by the Trial Chamber for determining whether or not enslavement had occurred including:

> …control of someone's movement, control of physical environment, psychological measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.[52]

In considering this list, it becomes immediately apparent that the majority of these factors are both inherent and widespread in many fishing industries. Further to this, the Trial Chamber also noted that "forced labour… without remuneration… and often, although not necessarily, involving physical hardship [and] human trafficking"[53] may *indicate* enslavement. Such *indicators* are also identifiable in the majority of practices alleged in the fishing industry. As we have seen, the overwhelming majority of cases of exploitation involved a victim trafficked into conditions of physical hardship for the purposes of forced labour, with grossly inadequate remuneration or even without remuneration. The Trial Chamber also considered factors that negated the possibility of consent and thus also indicated slavery. These included: "the abuse of power, the victim's position of vulnerability, socio-economic status, and deception or false promises".[54] In the vast majority of instances of exploitation in the fishing industry, the victims were economic migrants, and invariably of a lower socio-economic status than their masters. The fact that they were migrants meant that a

[51] Kevin BALES, "Slavery in its Contemporary Manifestations" in Allain, *supra* note 41 at 285, chapter 15.
[52] *Kunarac*, *supra* note 43 at 543.
[53] *Ibid.*, at 542.
[54] *Ibid.,* at 542.

combination of language barriers, a lack of access to legal remedies, and differences in cultural norms are all relevant factors for identifying the abuse of power over a victim's position of vulnerability. Further, in all instances, deception and coercion was a key part of their recruitment. In accordance with this judgement the extensive presence of a multitude of these factors in the fishing industry therefore indicates that such conditions are likely to constitute enslavement.

The Trial Chamber also confirmed that the ability to trade in persons was *not* a requirement of slavery, noting that other *de facto* elements may instead be relevant, such as duration or coercion. In stating that the *"*'acquisition' or 'disposal' of someone for monetary or other compensation, is not a requirement for enslavement"[55] it conceded that to do so would be "a prime example of the exercise of the right of ownership over someone".[56] By this reasoning, the numerous accounts of on-selling of victims, especially amongst Thai vessels, is a clear indication of slavery. Nonetheless, the Trial Chamber confirmed that the ability to trade a victim may be irrelevant in the identification of slavery.

In refining what constitutes slavery, the Trial Chamber asserted that in certain situations, no single factor or combination is decisive and thus a multitude of factors may be required.[57] This caveat places emphasis on degrees of exploitation as the measure to identify a situation of slavery. The approach is symptomatic of the difficulty in providing legal certainty over what constitutes slavery. As Holly Cullen argues, the judgement also blurs the distinction between slavery and forced labour.[58] It is thus argued that in the practical application of these terms, there is no clear distinction, rather degrees of one amounting to the other. Perhaps most important though, was the conclusion of the Appeals Chamber, in noting 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.[59]

[55] *Ibid.*. at 542.
[56] *Ibid.*, at 542.
[57] *Ibid.,* at 542.
[58] See Cullen, *supra* note 6 ,at 307,.
[59] *Prosecutor v Kunarac, Kovac & Vukovic,* Case No. IT-96-23/l-T, Appeal Judgment at 117 (12 June, 2002) [*Kunarac* Appeal].

(b) Tang

In 2008, the High Court of Australia considered the application of the international definition of slavery in *The Queen v Tang* case. Prior to this case, the scope of slavery had been untested under Australian law.[60] The *Tang* decision illuminates two major findings relevant to slavery in the fishing industry. The first is the intention of the 1926 Slavery Convention by applying the Vienna Convention. The second regards the interpretation of the "status or condition of any or all the powers attaching to the right of ownership".[61]

The High Court interpreted the intention of the 1926 Slavery Convention by applying the standards set out in the Vienna Convention with regards to: made in good faith, according the ordinary meaning of the words, taking into consideration of their context, and the object and purpose of the treaty. The application of these standards and the cogency of the Court's reasoning, support Jean Allain's claim that the *Tang* judgement is perhaps the most accurate interpretation of the definition of slavery.[62] Indeed, the decision by the Australian High Court is recognised as an authoritative interpretation of international law by proponents on both sides of the debate regarding the scope of definition of slavery.

> The decision of the Australian High Court in *R v. Tang*... represents another step forward in clarifying the parameters of slavery in contemporary international law.[63]

The Court considered that prior to the 1926 Slavery Convention, many countries had already abolished the legal right of ownership. It followed then that the declared aim of the parties to the Convention was to secure the complete suppression of slavery in all its forms. It was also the stated aim of the Convention to prevent forced labour from developing into conditions analogous to slavery.[64] The Court argued that the Convention's aim would have been pitiful had it only dealt with the question of legal status, or *de jure* slavery.[65] Particularly relevant to the argument of this essay, and thus to the purpose of the slavery

[60] Irina KOLODIZNER, "R v Tang: Developing an Australian Anti-Slavery Jurisprudence" (2009) 31 Sydney Law Review 487, at 497.
[61] *1926 Slavery Convention*, *supra* note 2, art. 1.
[62] Allain, *supra* note 41 at 217.
[63] Anne T GALLAGHER, "A Response to Jean Allain and Rysrd Piotrowicz" (8 June 2009) online: Opinio Juris < http://opiniojuris.org/2009/06/08/a-response-to-jean-allain-and-ryszard-piotrowicz/> and for the article this was in response to see Jean ALLAIN, " A Response to Anne Gallagher by Jean Allain", (8 June 2009) online: Opinio Juris http://opiniojuris.org/2009/06/08/a-response-to-anne-gallagher-by-jean-allain/.
[64] *The Queen v Tang* [2008] HCA 39 (decision of 28 August 2008) [*Tang*], para. 25.
[65] *Ibid*.

provisions in LOSC, was the Court's affirmation that "[it] is one thing to withdraw the legal recognition of slavery; it is another thing to suppress it. The Convention aimed to do both".[66]

The relevance of the Court's observations are paramount. It is one thing to claim, "any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free"[67]; it is another to give effect to efforts to achieve that end. If there exists, as argued in this essay, slavery occurring extensively throughout the fishing industry, then it follows that in order to give effect to the slavery provisions of the LOSC, there must be greater certainty over what constitutes slavery in the form of an accessible and accurate definition. In other words, the current need to interpret the meaning of the "powers attaching to the right of ownership",[68] desperately needs to be made practicable. Further, the failure to do so has resulted in the lack of legal significance of the slavery provision in the LOSC.

Tang also sheds some light on the meaning of the "powers attaching to the right of ownership". In its consideration, the Court referred to a 1953 UN report of the Secretary General who listed such powers as including:

> …the capacity to make a person an object of purchase, the capacity to use a person and a person's labour in a substantially unrestricted manner, and an entitlement to the fruits of the person's labour without compensation commensurate to the value of the labour.[69]

The Court considered this list useful in identifying the *de facto* condition of slavery and emphasised the need to develop a practical working definition. Stating that it is unnecessary "to draw boundaries between slavery and cognate concepts such as servitude, peonage, forced labour, or debt bondage"[70] as "the various concepts are not all mutually exclusive. Those who engage in the traffic in human beings are unlikely to be so obliging as to arrange their practices to conform to some convenient taxonomy".[71] The Court offered a method for distinguishing between slavery and harsh and exploitative conditions. Suggesting that the answer depends on the *nature* and *extent* of powers exercised, and considering that:

[66] *Ibid*., para. 25.
[67] *LOSC*, *supra* note 4, art. 99.
[68] *1926 Slavery Convention*, *supra* note 2, art. 1.
[69] *Tang, supra* note 64, para. 26.
[70] *Ibid*., para. 29.
[71] *Ibid.,* para. 29.

> …capacity to deal with a complainant as a commodity, an object of sale and purchase, may be a powerful indication that a case falls on one side of the line. So also may the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances, and absence or extreme inadequacy of payment for services.[72]

The scope of slavery is therefore determined by the degree of control and the severity of the exploitation. This view is consistent with more recent academic analysis. In a recent paper considering the powers attaching to the right of ownership, Cullen argues that international courts tend to focus on the degree of control over a victim of slavery.[73] For Cullen, control is both the denial of freedom and the indicator that a person is subject to possession by another. This places slavery on a continuum with forced labour, human trafficking and debt bondage. It provides a likely benchmark for assessing whether such practices found within the fishing industry would be considered slavery. Although there is no definitive answer, it is argued that the high degree of control exercised over migrant fishers trafficked into exploitative conditions on the high seas would likely be considered slavery in international law. This is partly due to the fact that there is no greater control of movement, physical environment or ability to escape than on the high seas. . These unavoidable factors increase the likelihood that an instance of exploitation will amount to slavery, especially when coupled with other factors such as: the use or threat of force, threat of penalty, and/or some other form of coercion. In other words, a number of factors that indicate enslavement although inherent to *being at sea* are nonetheless significant.

> We are always thinking about escaping… There was no way, though. We were powerless. The sea itself was our prison.[74]

IV. HISTORY - SUPPRESSING THE SLAVE TRADE & THE RIGHT OF VISIT

A. *The History of Efforts to Suppress the Slave Trade*

The history of efforts to suppress the slave trade, in many regards, centres on the reciprocal right of visit against foreign flagged vessels. A brief examination of this history is instructive on two accounts; first it clearly emerges that the reciprocal right of visit was fundamental to

[72] *Ibid.,* para. 44.
[73] Cullen, *supra* note n 6, 321.
[74] Michael FIELD, *The Catch*, 1st ed. (Wellington, New Zealand: Awa Press, 2014) at 25.

realising 'effectual' suppression as opposed to 'nominal' abolition. Second, the historical evolution of the term provides some indication as to the current status of the right of visit under the LOSC.

1. *The History of the Right of Visit.*

The universal abolition of slavery on the high seas that persists today is largely credited to the global agenda of Great Britain in the nineteenth century.[75] By 1839, Britain had forged bilateral treaties with nearly all of the major maritime states. These treaties established reciprocal rights of search and seizure on the high seas against vessels suspected of engaging in the African slave trade.[76]

Although the slave trade persisted in many of these countries, generally outside of the geographical limitations of the bilateral treaties; the main obstacle to the effectual suppression of the Atlantic slave trade was the absence of a visitation treaty with the United States;[77] and to a lesser extent with France, Portugal and Brazil.[78] Without such treaties, the Atlantic slave trade continued to grow as slave ships, looking to avoid capture, gravitated towards hoisting these flags.[79]

> …when no flag a slaver might hoist could secure him from the exercise of the right of search, the slave trade had rapidly diminished; but now that the right could no longer be exercised, it had revived. [80]

In an effort to close this loophole and secure a right of visit, Britain employed various strategies. In Brazil and Portugal, Britain did not rely upon a right of maritime jurisdiction by any existing agreements; rather she justified the search and seizure of vessels engaged in the slave trade by concluding that "under the circumstances she had a right to obtain by her own

[75] Britain's agenda was driven in part by both the populist and philanthropic movements of the nineteenth century, but also in part by the recognition that its industries could not compete against the Industries that still relied on slave labour see Allain, *infra* note 83.
[76] Howard Hazen WILSON, "Some Principle Aspects of British Efforts to Crush the African Slave Trade, 1807-1929" (1950) 44 American Journal of International Law 505.
[77] *Ibid.,*at 509-10
[78] *Ibid.*.
[79] William Law MATHEISON, *British Slavery and its Abolition, 1823-1838* (Longmans: Green and Company Limited, 1926) at 131, cited in Wilson, *supra* note 76, at 517.
[80] Hugh Graham SOULSBY, *The Right of Search and the Slave Trade in Anglo American Relations* (Baltimore: John Hopkins Press, 1904) at 25.

means the results which she had been promised."[81] In other words, because the slave trade continued to grow under the guise of exclusive flag state jurisdiction, Britain declared Brazil and Portugal to have failed in their treaty obligations. Britain felt her justification for maritime interdiction was vindicated through the success she obtained in uncovering and seizing slave trade vessels. This rapidly led both Portugal and Brazil to accept bilateral treaties of reciprocal rights of visit – ultimately ending their slave trade at sea.[82]

In another approach, Britain sought to establish a universal right of search and seizure by equating the slave trade to piracy. The association with piracy had been established elsewhere, including in treaties with Brazil[83] and Portugal[84]. However, French and American opposition to Britain's claim to a right of visit, meant this approach ultimately failed. In response, Britain was forced to change tact. Needing an innovative solution, Great Britain advocated for the separation of the right of visit from the right of search.[85]

Against the United States, the proposal to separate the right of visit would eventually prove successful, although it was not until the American Civil War that the first Anglo-American bilateral treaty was concluded. The *Treaty between the United States and Great Britain for the Suppression of the Slave Trade*[86] was proclaimed by President Abraham Lincoln on 7 July, 1862 and conceded a reciprocal right of visit, albeit limited.[87] The Treaty proved a turning point in efforts to suppress the slave trade by sea; and by the 1870's Great Britain had totally abolished the Atlantic Slave Trade.[88]

[81] Wilson, *supra* note 76, at 525.
[82] On Britain's gunboat diplomacy, see also Jean ALLAIN, *Law and Slavery: Prohibiting Human Exploitation* (Leiden, Holland: Brill, 2015) at 76.
[83] *Anglo-Brazilian Anti-Slave Trade Treaty*, 23 November 1826, (entered into force 13 March 1830) cited in Wilson, *supra* note 76.
[84] *Anglo-Portuguese Anit-Slave Trade Treaty,* 3 July 1842, cited in Wilson, *supra* note 76, at 512.
[85] Jean ALLAIN, "The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade" (2008) 78 The British Yearbook of International Law 342, at 371. The separation of search and visit was an innovation originally negotiated as part of the *Treaty between Great Britain, Austria, France, Prussia, and Russia, for the suppression of the African Slave Trade,* 20 December 1841, 30 *BFSP 273*. [*Quintuple Treaty*]
[86] *Treaty between the United States and Great Britain for the Suppression of the Slave Trade*, 7 April 1862, 12 Stat 1225, TS NO. 126. [Lyons-Seward Treaty]
[87] Soulsby *supra* note 80, at 174-6.
[88] Allain, *supra* note 85, at 375-6.

Against France, until 1892, the right of visit remained strictly confined to confirming whether a vessel had the authority to hoist a French Flag.[89] An 1845 Anglo-French Convention abrogated the mutual right of visit to suppress the slave trade, which had existed in two treaties of 1831 and 1833. The 1845 Convention required a French naval squadron to actively suppress the slave trade. This situation essentially persisted until 1889 when, following Britain's blockade of the slave trade out of Zanzibar, the need for an international treaty become overwhelming. In 1890, mediation between Britain and France successfully agreed on a regime for a reciprocal right of visit. The compromises reached during this mediation became part of the *Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous* 1890 *(General Act of Brussels)*.[90]

2. *Importance of the Right of Visit*

The General Act of Brussels was the most comprehensive international agreement concerning the suppression of the slave trade by sea.[91] It was signed and ratified by eighteen States including France and the United Stated. Although confined to a specific maritime area where the slave trade still persisted, the General Act of Brussels was a culmination of Britain's persistent efforts to suppress the slave trade. It's entering into force ultimately achieved "a universal right, established by treaty and accepted as international law, to visit ships on the high seas to suppress the slave trade"[92]. History shows, that the right of visit, which was at the heart of Britain's web of bilateral treaties, and the General Act of Brussels brought about the effectual end to the slave trade at sea. The lesson to be drawn from international relations in the nineteenth century is then; that the enforcement of the right of visit against foreign flags was fundamental to suppressing the slave trade.

> The lack of a developed multilateral system during the nineteenth century, however, was not the determining factor in the slow pace by which the slave trade on the seas was outlawed. At the heart of the matter was states' understanding of the nature of the high seas. The challenge was not the slave trade *per*

[89] See James B SCOTT "*The Muscat Dhows,* Award of 8 August 1905"*,* in James B SCOTT, ed., *The Hague Court Reports, 1916*. On the determination of France's ratification of the General Act of Brussels by the Permanent Court of Arbitration, cited in Allain, *supra* note 85, at 386.
[90] *Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors*, 2 July 1890, 27 Stat 886 (entered into force 31 August 1891) [General Act of Brussels]
[91] *Official Records of the United Nations Conference on the Law of the Sea, Volume I (Preparatory Documents)* "The relation Between the Articles Concerning the Law of the Sea Adopted by the International Law Commission and International Agreements Dealing With the Suppression of the Slave Trade", A/CONF.12/7 (2009) [UN Conference on the Law of the Sea], para. 10 – 11.
[92] Allain, *supra* note 85, at 376.

se but rather the conflict between the Grotian notion of freedom of the seas and the right to visit ships suspected of involvement in the slave trade.[93]

B. *The Right of Visit under the LOSC*

The right of visit achieved in the nineteenth century was then atrophied somewhat by the treaty law of the early twentieth century.[94] The 1919 *Convention of Saint Germain-en-Lay*[95] abrogated the General Act of Brussels as between parties to that treaty, providing no right of visit and only an obligation to secure the suppression of slavery in all its forms.[96] Following that, the 1926 Slavery Convention and the 1956 Supplementary Convention failed to re-reinstate reciprocal rights contained with the General Act of Brussels. These failures are regarded as having reduced the international means for the control over slavery that existed at the end of the nineteenth century.[97]

The 1958 Geneva Convention on the High Seas and the LOSC however, do include a limited, but universal, reciprocal right of visit in regards to the slave trade.[98] A review of the *travaux préparatoires* of these Conventions show that there was, at the very least, some intention to equate the slave trade to piracy. A report of the International Law Commission in 1956 on the law of the sea provides commentary on the provision of right of the visit.

> The right to visit in this latter case was recognized by the treaties for the repression of slavery, especially the Brussels Act of 2 July 1890. For purposes of repression, this Act assimilated slavery to piracy, with the proviso that the right in question could only be exercised in certain zones clearly defined in the treaties. The Commission felt that it should follow this precedent, so as to ensure that the exercise of the

[93] Allain *supra* note 85, at 342.
[94] UN Conference on the Law of the Sea, *supra* note 91, para. 12.
[95] *Convention Revising the General Act of Berlin, February 26, 1885, and the General Act and Declaration of Brussels, July 2 1890*, 8 LNTS 27 (entered into force 31 July 1920) ([*Convention of Saint Germain-en-Laye*]
[96] Susan MIERS, *Slavery in the Twentieth Century: The Evolution of a Global Problem* (California: AltaMira Press, 2003) at 61-2.
[97] John C COLOMBOS, *The International Law of the* Sea, 6th ed. (Great Britain: Longmans Geen & Ltd., 1967), at 462. Colombos states:

> It is a matter for regret that the British proposal to effect that the convening of slaves on the high seas should be assimilated to piracy was not adopted in this Supplementary Convention. It would have ensured the effective international control of slavery which is lacking at present

[98] Douglas GUILFOYLE, *Shipping Interdiction and the Law of the Sea* (New York: Cambridge University Press, 2009) at 76

> right of control would not be used as a pretext for exercising the right of visit in waters where the slave trade would not normally be expected to exist;[99]

The *travaux préparatoires* of the LOSC provides some insight as to debate that occurred over the right of visit, and as to the final the negotiation from earlier drafts article of UNCLOS. Opponents argued that the right of visit would infringe on principle of freedom of navigation and raised the concern that if it was abused it would threaten international peace and security. Interestingly, these opponents also argued that the proposed limited geographical application of right of visit was discriminatory. In response, proponents noted that such a concern was groundless, since the long recognised right to visit, in respect to piracy, had not given rise to abuses. The articles contained in the LOSC are then an agreed compromise of these positions. The LOSC extended the right of visit beyond the confines of any geographical region; and settles on a construction the of Article 110, which leaves no distinction between the application of the right of visit in respect to piracy and the slave trade; although the LOSC requires that in both cases, the rights of visit has limitations, which are considered below.

V. THE RIGHT OF VISIT UNDER THE LOSC

A. *The Slavery Provisions of the LOSC*

As a peremptory norm of international law, the prohibition of slavery is reflected through three provisions of the LOSC. The first is contained within the principle of exclusive flag state jurisdiction as provided for by Article 92, which states that

> … ships shall sail under the flag of one State only and, [*save in exceptional cases expressly provided for in international treaties or in this Convention]*, shall be subject to its exclusive jurisdiction on the high seas.[100]

The importance of exclusive flag-state jurisdiction on the high seas cannot be understated. However, the focus of this paper is whether exploitation at sea falls within the

[99] *Yearbook of the International Law Commission, Vol. II: "*Articles Concerning the Law of the Sea" Text adopted by the International Law Commission at its eighth session. (2005) at 284, para. 23.
[100] *LOSC supra* note 4, art. 92.

meaning of the "exceptional cases expressly provided for… in this Convention"[101]. The exceptional cases are then expressed in a second provision:

> *Article 110*
>
> *Right of visit*
>
> 1. Except where acts of interference derive from powers conferred by treaty, [*a warship which encounters on the high seas a foreign ship*], other than a ship entitle to complete immunity in accordance with articles 95 and 96, [*is not justified in boarding unless there is reasonable grounds for suspecting that*]*:*
>
> (a) the ship is engaged in piracy;
>
> (b) [*the ship is engaged in the slave trade*]…
>
> .5. These provisions also apply to any other duly authorized ships or aircraft marked and identifiable[102] as being on government service.[103]

Under the LOSC then, a vessel's navigational freedoms on the high seas are not subject to interference from non-flag states *except* in regards to universally prohibited acts including piracy, and the slave trade.[104]

The third provision of the LOSC that reflects the prohibition of slavery is Article 99, which contains two parts. The first provides that "every state shall take effective measures to prevent and punish the transport of slaves in ships authorised to fly its flag"[105]. This first part creates the obligations for flag states to *effectively* address the slave trade. The second part provides that "any slave taking refuge on board [*any*] ship, *[whatever its flag*], shall *ipso facto* be free"[106], which implies that freedom from slavery transcends the principle of flag state jurisdiction. Article 99 then, reconciles exclusive flag state jurisdiction with the absolute prohibition of slavery. The latter part of Article 99 also provides a justification for asserting the universal right to visit, against a ship that is suspected of being engaged in the slave trade. Had the drafters of the LOSC envisioned that all states would effectively take measures to ensure the freedom of slaves at sea - there would've been no reason to include a provision

[101] *LOSC supra* note 4, art. 92
[102] Donald ROTHWELL and Timothy STEPHENS, *The International Law of the Sea,* (Oxford and Portland Oregon: Hart Publishing, 2010. Extends to clearly identifiable vessels e.g. Coast Guard, Fisheries and Customs Vessels, at 166.
[103] *LOSC*, *supra* note 4, art. 110.
[104] Rothwell and Stephens, *supra* note 102, at 164.
[105] *LOSC*, *supra* note 4.
[106] *Ibid*., art. 99

that regardless of their flag-state, the freedom of slaves is absolute. The failure to effectively meet this obligation, gives rise to the right of visit, which must now be reconsidered.

B. *Definition of 'the Slave Trade'*

The definition of the *slave trade* as contained in the *1926 Slavery Convention* is considered to have attained the status of customary international law, Article 2 of the Convention.

> The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves. .[107]

The inclusion of the words: "*all acts involved* in the… *acquisition*... of a person with the intent *to reduce him to slavery",* broadens the scope of the slave trade beyond the mercantile sense of trading and transporting slaves.[108] Furthermore, having earlier established that slavery extends to the *de facto* condition, and that it exists on a continuum with other forms of severe exploitation, it is argued then - that the slave trade thus encompasses the acquisition of vulnerable persons, through manning agents, with the intention to reduce them to conditions amounting slavery. This is the very process documented throughout the fishing industry, not least in Thailand and New Zealand. The broad definition of slavery, which must apply *mutatis mutandis* to the definition of the slave trade, is intended to deal with all forms of slavery that would emerge under the guise of new legal technicalities. Indeed, historian Howard Hazen Wilson made this very point,

> In drafting Article 1 of the Geneva Slavery Convention of September 25, 1926, the Government of the United Kingdom provided a means for penetrating such disguises…. The word "any" makes both definitions very broad. They have been considered extensive enough to include (a) *de facto* slavery, or "the treatment of a human being as if he were a chattel," and (b) the transportation of labor under compulsion.[109]

In other words, for a person at sea to find themselves under conditions that amount to slavery, it must follow that at some previous juncture they were *acquired* by the person

[107] *1926 Slavery Convention*, *supra* note 2*,* art. 2.
[108] Cullen, *supra* note 6, at 306.
[109] Wilson, *supra* note 76, at 522-3.

whom now exercises over them, the powers attaching to the right of ownership. Furthermore, the control of that person, through any act of coercion, implies the intent to reduce them to slavery, and therefore such a vessel is engaged in the slave trade.[110] In this way, it is argued that a limited right of visit, under the LOSC, likely extends to suspicion of a vessel engaged in the severe exploitation occurring in the fishing industry.

C. *The Limitations of the Right of Visit*

The right of visit extends to the examination of a ship where it may be needed to confirm or remove the suspicion that it is engaged in the slave trade.[111] However, under Article 110 (2), the right of visit is limited to boarding and inspecting documents. Only if the suspicion remains after the documents have been checked, may the inspection proceed with further examination. As Article 110(2) does not specify what documents may be inspected, it is instructive to consider what this may entail. In regards to the exploitation described at the beginning of this essay, it could be argued that an inspecting official would gain much from viewing, at the very least, the identity documents and working contracts of all seafarers.

Indeed historically, a similar approach had been enforced under the General Act of Brussels 1890. Although this Treaty established far broader reciprocal rights beyond visitation, to include search and seizure, its provisions are nevertheless informative; especially in regards to examining documents under a limited right of visit. The General Act required that vessels had to be authorised to carry the flag of their said power. Such authorisation could only be given if certain conditions were met, including the payment of a *bona fide* security that guaranteed the owners could pay any fines incurred under the Treaty.[112] The Treaty also required the flag-state to issue vessel captains with a crew list, which had to visible, and renewed either annually or at every fresh departure.[113] Although specific to African slaves, the Treaty also essentially required vessels to have evidence that its seafarers had wilfully entered into their working contracts, and that such contracts had

[110] The legal requirement for establishing intent in criminal offences was considered by the Trail Chamber in *Kunarac.* The Chamber considered that, the *mens rea* of enslavement was the intentional exercise of the powers attaching the right of ownership over a person. See *Kunarac*, *supra* note 43, at 37, para. 122.
[111] Rothwell and Stephens, *supra* note 102, at 166.
[112] General Act of Brussels, *supra* note 90, art. XXXII.
[113] *Ibid.*, art. XXXV.

been cited by their governments. [114] The requirement to deposit and carry these documents, directly relates to the historical objectives of the right of visit; a right, which although is now somewhat undefined, still persists under the modern law of the sea regime.

Ultimately though, despite the obligation to prevent and punish slavery, the LOSC confers no right of interference beyond boarding and examining documents; and does not extend to the exercise of seizure jurisdiction.[115]

D. *Considerations within a Coastal State's Exclusive Economic Zone*

In order to analyse the utility of a universal right of visit, it is necessary to consider its likely application. As discussed earlier, the slavery provisions under the LOSC clearly operate on the high seas. However, a more interesting problem posed is when considering how the provisions apply within the EEZ[116] of a coastal state by another state.

Part V of the LOSC is relevant to the slavery provisions, as it lays out the foundations of the EEZ regime in international law. Under Part V, the legal regime that governs the EEZ borrows aspects from both the territorial waters and the high seas, without being analogous to either. In the EEZ, the jurisdiction of a coastal state is restricted to three specific categories: 1) the establishment and use of artificial islands, installations and structures, 2) marine scientific research, and 3) the protection and preservation of the marine environment.[117] Hence, as the prohibition of slavery falls outside of these three categories, the coastal state has no special jurisdiction over its enforcement within the EEZ. Likewise, in regards to the navigational freedoms of the EEZ, Article 58(1) adopts the same regime as employed on the high seas. Rothwell and Stephens point out that the provisions of LOSC relating to the high seas that apply in the EEZ include: the duties of flag states, the immunity of warships, and the suppression of piracy. [118] Given that LOSC makes no distinction between application of slavery and piracy in regards to what waters the provisions apply to, it follows that the slavery provisions apply within the EEZ.

[114] *Ibid.*, art. XXXV.
[115] GUILFOYLE, *supra* note 98, at 76.
[116] *Generally 200nm from the coastal state, unless the coast of another state is within 400nm.
[117] Rothwell and Stephens, *supra* note 102, at 90.
[118] *Ibid.,* at 93.

However, despite the existence of a universal right of visit with regards to the slave trade within a coastal state's EEZ, there still remains substantial differentiation between state-practice and the rights asserted by coastal states in the EEZ. The current ambiguity between treaty law and state-practice arises as an increasing number of states enact legislation that departs from Part V. This is most commonly through states legislating to interfere with the navigational rights and freedoms of foreign states. This creeping jurisdiction of coastal states into the EEZ has gone beyond resource orientated policies and pollution into considerations of environmental and military security.[119] Therefore, it could be argued that the EEZ remains an evolving international law regime where jurisdiction is increasingly uncertain.

E. *Considerations within the Contiguous Zone.*

The contiguous zone also supports a universal right of visit under the LOSC. The contiguous zone covers the area that is "contiguous" to the coastal state's territorial sea (12nm), extending out to a maximum of 24nm from the shore baseline. Within the contiguous zone, states have some jurisdictional rights and duties that relate to enforcement in regards to customs, fiscal immigration, and sanitary matters. However, these rights operate only in respect to inward and outward-bound ships; they do not confer jurisdiction of the coastal state, nor extend the operation of its laws and regulations. For example, the contiguous zone provides jurisdiction for the coastal state to interdict and remove a vessel involved in people smuggling, although that vessel would not be subject to the coastal state's laws and regulations.[120] Outside of these parameters, the freedom of navigation that is afforded to the high seas also applies within the contiguous zone.[121] Therefore, as all other aspects of the contiguous zone fall under the high seas regime, it is likely that a universal right of visit with regards to the slave trade exists against vessels within the contiguous zone for authorised non-coastal state vessels.

[119] *Ibid*., at 97.
[120] *Ibid*., at 427.
[121] See *LOSC*, *supra* note 4, art. 58 and Rothwell and Stephens, *ibid*., at 80.

VI. REINVIGORATING THE DEFINITIONS OF SLAVERY & THE SLAVE TRADE

A. *Obtaining an Authoritative & Practicable Interpretation*

Over the last three centuries, numerous international treaties have reaffirmed the abolition of slavery and the slave trade. However, the ambiguities highlighted in this paper have meant that such declarations support only its nominal abolition - at least in respect to all forms of slavery.

In regards to the definition of slavery, the fact that "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" [122] requires extensive interpretation to decide whether or not it applies in any given case, means that any claim to an authoritative interpretation of slavery inevitably becomes problematic. Instead, authors working in this field make tentative suggestions as to the *likely* or *possible* scope of slavery. This may also explain the preference of international agencies for using more concisely defined terms such as forced labour and trafficking.[123] The effect of an inchoate definition of slavery has thus been to weaken its legal worth.

In respect to *the slave trade*, this paper challenges the assumption that this term only extends to the historical sense of 'chattel' slavery; however, much ambiguity still remains. For this reason, a practicable interpretation of the slave trade is needed.

Such authoritative clarifications could be sought through an advisory opinion of the ICJ.[124] An advisory opinion would need to be requested by a body authorised under the UN Charter, such as the General Assembly or the Security Council, as states do not qualify.[125] Although not legally binding, advisory opinions are usually accepted and acted upon. The

[122] *1926 Slavery Convention*, *supra* note 2, art. 5.
[123] Of four reports into trafficking and forced labour in the fishing industry (IOM, *supra* note 26, UNODC, *supra* note 24, ILO, *supra* note 27) only one, *Caught at Sea: Forced labour and trafficking in fisheries,* International Labour Organisation [ILO] (2013) Governance and Tripartism Department – Special Action Programme to Combat Forced Labour, online: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_214472.pdf> includes any definition of slavery. That ILO report did, however, not consider the meaning of the *1926 Slavery Convention* and thus did not identify any instance of slavery.
[124] *UN Charter*, *supra* note 48, art. 65.
[125] Harris, *supra* note 49, at 1076.

ICJ's parallel jurisdiction to the International Tribunal for the Law of the Sea (ITLOS)[126] over law of the sea issues would further add weight to the Courts findings.

The International Law Commission (ILC) could also possibly provide an authoritative review. This is particularly relevant, as ITLOS has cited draft articles produced by the ILC.[127] However, the Commission's reluctance to progress international law in areas that are politically contentious may preclude its involvement in clarifying the interpretation of slavery and the slave trade.[128]

B. *Suppressing All Forms of Slavery and the Right of Visit*

The LOSC makes no reference to forced labour, debt bondage nor human trafficking; therefore, the question to whether the Article 110 extends to these practices hinges on the meaning of the slave trade. In considering the most extreme cases of human trafficking, Douglas Guilfoyle concedes that the limited right of visit could possibly be exercised, although there is little recent state practice.[129] This suggests that enforcement officials have assumed that human trafficking, debt bondage, and forced labour are not slavery in a legal sense. In acknowledging this overriding ambiguity, the value of this papers' analysis is then - that the claim to a universal right of visit remains problematic and thus a more practicable definition is needed. In approaching the modern phenomenon of exploitation at sea, the lessons to be drawn from history is that a right of visit is a practical means of pressuring states into meeting their treaty obligations, namely the suppression of slavery in *all its forms*. In this way, the right of visit is a diplomatic tool that could be used to provide the impetus for multilateral interdiction regimes on the high seas to combat severe exploitation. Such interdiction regimes are especially relevant to other efforts to combat IUU fishing and exploitation in supply chains.

[126] *Ibid.,* at 503.
[127] *M/V Saiga* (No.2) case, (1999) 38 I.L.M. 1323, at 98, 133 & 171, cited in Harris, *supra* note 49 at 64.
[128] The ILC is not composed of representatives of states and is unlikely to engage in political contentious areas of international law, see Harris, *supra* note 49 at 65.
[129] Guilfoyle, *supra* note 98, at 76.

VII. IMPLICATIONS OF REDEFINING THE PHENOMENON AS SLAVERY

A. *The Appeal of a Right of Visit*

One appeal of a right of visit stems largely from the need to obtain independently verified instances of slavery. As governments are incentivised to to deny that their own industries rely on slave labour, it is a right that may instead appeal to injured states that require reliable information over the extent of abuse against their nationals working abroad. The evidence provided in this essay provides a strong case for those countries whose workers are most commonly exploited, namely Cambodia, Myanmar, Indonesia, the Philippines, China, and Laos.[130] Considering the importance of migrant remittances for these developing economies coupled with the large numbers of migrant workers in Thailand's fishing industry, it is likely that a latent level of support for the independent verification of slavery already exists within the domestic political arena of these injured states.[131]

The current difficulty in verifying slavery is driven by the economic incentive for governments to maintain the status quo. That is, despite the international condemnation of slavery it remains a practice that is nevertheless lucrative. Indeed, Thailand's historical reluctance to deal with exploitation in its fishing industry is telling of this wider lack of substantive action. The need for a right of visit was most prominent in 2012, when the Royal Thai Navy was scrutinised for claiming that it was unable to locate a single instance of trafficking in 1000 inspections.[132] At that time, further scrutiny came through repeated allegations in the media implicating the Royal Thai Navy in the physical trafficking of Myanmar's Rohingya Muslims.[133] Even more troubling, is that the journalists who brought the claims to light are now facing potential jail terms under controversial new defamation

[130] UNODC, *supra* note 24.
[131] Portia LARLEE, "We Need to Shorten the Verification Process" *Mizzima* (18 December 2014), online: Mizzima <http://www.mizzima.com/opinion/features/item/16285-we-need-to-shorten-the-verification-process/16285-we-need-to-shorten-the-verification-process>.
[132] David BOYLE, "No Movement for Thailand, Malaysia in Human Trafficking Report," *The Phnom Penh Post* (21 June 2012), online: The Phnom Penh Post <http://www.phnompenhpost.com/national/no-movement-thailand-malaysia-human-trafficking-report>.
[133] Amy Sawitta LEFEVRE, "Thai Navy Denies Allegation of Rohingya Muslim Smuggling", *Reuters* (19 July 2013), online: Reuters <http://www.reuters.com/article/2013/07/19/us-rohingya-exodus-reaction-idUSBRE96I09S20130719. See also Zoe DANIEL, "Thai Navy Allegedly Involved in Trafficking, Beating of Rohingya Refugees" *ABC news* (13 June 2013), online: ABC News <http://www.abc.net.au/news/2013-06-13/thai-navy-rohingya-refugees/4751896>, and BBC, "Thai navy denies shooting Rohingya refugees", *BBC* (March 2013), online: BBC < http://www.bbc.com/news/world-asia-21796825>.

laws.[134] At the end of 2014, as a result of a combination of forces (discussed below), Thailand indicated a change in its policies in an effort to demonstrate its willingness to address the issues within the fishing industry.

Thailand's historical record highlights the impact that corruption has on compounding the phenomenon of human trafficking. The UN special rapporteur on "Trafficking in Persons, Especially Women and Children", Joy Ngozi Ezeilo, noted that Thailand is affected by deeply rooted corruption, which is coupled with the infamous brokerage systems that recruit trafficking victims.[135] As a consequence of corruption, real change is unlikely whilst the practice of slavery remains profitable. The concern over the involvement of the Royal Thai Navy in trafficking highlights the appeal for the independent verification of slavery. In reality, countries will downplay the extent of exploitation in order to avoid market repercussions.

The problem with obtaining reliable data about the extent of trafficking, even from government sources, can be compounded inadvertently by foreign anti-trafficking programs. The United States' annual Trafficking in Persons Report (TIP) ranks countries according to their response to trafficking. A poor grading from the TIP report can result in sanctions and interference for that countries relationship with international banks and financial institutions.[136] The inadvertent consequence of these reports is that they provide added incentive to avoid the publication of damaging research. However, TIP reports themselves are in turn criticised as being unscientific, inconsistent and incomplete.[137] It is easy to see how this problem is compounded even further when it involves vessels at sea. Thus, the inevitability of uncertainty in trafficking data at sea further highlights the appeal of a right of visit.

[134] Kate HODAL, "Australian Journalist Faces Jail after Refugee Report Angers Thai Navy", *The Guardian* (10 March 2014), online: The Guardian <http://www.theguardian.com/world/2014/mar/10/australian-journalist-facing-jail-thailand>.
[135] Joy Ngozi EZEILO, "Thailand Must Do More to Combat Human Trafficking Effectively and Protect the Rights of Migrant Workers who are Increasingly Vulnerable to Forced and Exploitative Labour" display news, United Nations Office of the High Commissioner for Human Rights (OHCHR) (19 August 2011), online: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11319&LangID=E>.
[136] *Victims of Trafficking and Violence Protection Act* 2000 [VTVPA] § 110 (2000), cited in Anne T Gallagher and Paul Holmes, "Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line" (2008) 18:318 *International Criminal Justice Review* 319.
[137] Janie CHUANG, "The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking" (2006) 27 *Michigan Journal of International Law* at 437-494. See also Anne T Gallagher, "Human Rights and Human Trafficking in Thailand: A Shadow TIP report" In K.D. BEEKS & D. AMIR, eds., *Trafficking and the Global Sex Industry* (Lanham, MD: Lexington Books, 2006).

B. *Verifying Slavery as Coupled with Controlling Access to Markets*

The right of visit is not a panacea to systemic exploitation on the high seas. Rather, the diplomatic pursuit of a right of visit scheme is instead suggested as a complimentary mechanism to pressure flag state action in countries that have historically turned a blind eye to exploitation.

The principal mechanism for driving states to take appropriate action to curb severe exploitation is instead the threat to restrict access to lucrative markets. Here I consider two prominent mechanisms for controlling access to markets: the EU community system for combatting IUU fishing and the Californian Supply Chain Transparency Laws. A brief consideration of these mechanisms demonstrates how they would be bolstered, by establishing schemes for a right of visit. The EU regulations are considered in respect to their ongoing influence on Thailand, whereas the supply chain laws are evaluated as an emerging global trend with the potential to impact on fisheries worldwide.

1. *European Union Regulation (EC) NO 1005/2008*

The EU community system is a market-based tool to control IUU fishing activities occurring in nations that export to the EU market. The system is established under regulation No EC 1005/2008[138], and uses graded alerts to give countries a specified warning time to either comply with the EU's demands or be restricted from exporting to the EU. Far from being a diplomatic exercise, "red card" bans are already in place in Cambodia, Sri Lanka[139] and Guinea. The system also appears to be having a profound impact on Thailand's willingness to address issues within its fishing industry. On 28th of October 2014, the EU directorate general of Maritime Affairs and Fisheries issued Thailand a "yellow card" warning, giving Thailand only three months to curb IUU fishing before it would be banned from exporting fish to the

[138] *Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004,* Council Regulation (EC) No 1005/2008 of 29 September 2008, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:286:0001:0032:EN:PDF>.

[139] The EU ban on Sri Lankan fishing imports has enormous implications for Sri Lanka, and highlights the strength of market-based responses to issues of unregulated fishing, see The Colombo Gazette, "EU Begins Sri Lanka Import Ban" *The Colombo Gazette* (15 January 2015), online: The Colombo Gazette <http://colombogazette.com/2015/01/15/eu-begins-sri-lanka-import-ban/>

EU. The potential for economic loss is estimated at around $641million (USD), being the annual value of Thailand's fisheries exports to the EU.[140] The threat of major economic loss has been followed by a dramatic shift in Thailand's rhetorical acceptance of its issues.

Whilst the on-the-ground impact of this market approach on the widespread exploitation in the fishing industry remains to be seen, initial reports indicate that Thailand may be turning a corner in addressing the issues within its fishing industry. Authorities in Thailand have indicated an intention to introduce a number of measures including: deploying GPS on large fishing boats; introducing fines and terms of imprisonment for non-registration; increasing the minimum working age on fishing boats from 15 to 18 years; mandating for fishers to have a minimum of 10 hours rest per day and 30 days annual leave: and hiring 700 anti-corruption staff to combat anti-trafficking.[141] It would be imprecise to wholly accredit Thailand's recent policy shift to the EU's issuing of a yellow card, instead a wide-range of pressures must also be considered including from NGOs, from reports by several United Nations (UN) organisations, and from ongoing public pressure as a result of domestic and international media reports. Another factor to consider is the renewed deadline from the US State Department, demanding that Thailand demonstrate an improvement in dealing with trafficking. Despite these additional pressures, the haste with which Thailand is acting following the threat of losing access to the lucrative EU market clearly demonstrates the exceptional leverage of the market-based approach.

Nevertheless, it is likely that any real progress will be slow given the widespread reliance on slave labour in Thailand's fishing industry, as well as the difficulty of dealing with systemic corruption. In addition to these challenges, the ongoing threat of significant economic sanctions inevitably increases the incentive for Thailand to overstate its progress in addressing exploitation. Therefore, in order to ensure the integrity of Thailand's claims over any substantive improvements, a means to independently verify instances of slavery is critical. A right of visit is one such mechanism.

[140] Nattha THEPBAMRUNG, "Phuket Scrambles to Dodge the Red Card on Seafood Exports" *The Phuket News* (12 January 2015), online: The Phuket News <http://www.thephuketnews.com/phuket-scrambles-to-dodge-eu-red-card-on-seafood-exports-50510.php>.
[141] Alisa TANG, "Thailand to Adopt Fines, GPS, to Eradicate Slave Trade", *Reuters* (12 January 2015), online: Reuters <http://www.trust.org/item/20150112170430-5ua8v/?source=jtOtherNews3>.

2. *The Californian Transparency Supply Chain Act*

The *California Transparency Supply Chain Act 2010* requires large companies to report on actions they have taken to address labour exploitation within their supply chains. As western consumers increasingly seek more ethically sourced products, such laws are likely to become an emerging trend in the developed world. Similar legislation is currently being considered in the United Kingdom (UK).[142] However, one foreseeable problem with transparency laws is that unreliable government figures will inevitably enter into reporting of large companies. By enabling the independent verification of slavery, a right of visit would significantly increase the integrity of such systems.

The potential of supply chain laws to facilitate change in business models that rely on slavery is enormous. This is especially true of Thailand, considering that its seafood exports reached over $USD 7.3 billion in 2011.[143] The extent of Thailand's economic reliance on exploitation was made evident by its plan to replace illegal migrant workers with convicts,[144] which a government official had claimed was necessary in order to meet the growing labour shortages in the seafood industry.[145] Following mass outcry, the plan was eventually discarded. The desperation of such a measure however, highlights two distinct realities in Thailand: the depth of Thailand's economic reliance on exploitation; and Thailand's inability to drive the changes needed to eradicate severe exploitation. The transparency laws thus present a mechanism for denying market access to exploitative industries that seem incapable of addressing slavery. As with the EU system, supply chain transparency laws represent a powerful tool for overcoming the widespread reliance on industrial slavery in fishing, a practice that has thus far proved too lucrative for meaningful reform.

[142] Alan TRAVIS, "UK Firms to Face New Rules Aimed and Ending Slavery in Supply Chains", *The Guardian* (14 October 2014), online: The Guardian <http://www.theguardian.com/world/2014/oct/13/uk-firms-new-rules-ending-slavery-supply-chains>.
[143] Charlie CAMPBELL, "Child Slaves May Have Caught the Fish in Your Freezer", *Time* (5 March 2014), online: Time <http://time.com/12628/human-trafficking-rife-in-thai-fishing-industry/>.
[144] BBC, "Thailand Scraps Plans to Put Prisoners on Fishing Boats" *BBC Asia,* (20 January 2015), online: BBC <http://www.bbc.com/news/world-asia-30892733>. Only one day after receiving a letter from 45 NGOs condemning the proposal, Thailand officials stated that they no longer intended to use prisoners on fishing vessels
[145] The Bangkok Post, "Thailand Struggles with Dark Side of Vital Fishing Industry" *Bangkok Post* (25 December, 2014), online: Bangkok Post <http://www.bangkokpost.com/news/security/452072/thailand-struggles-with-dark-side-of-vital-fishing-industry>.

C. *Market Solutions in the Absence of a Right of Visit*.

Controlling access to the market is however only part of the solution. On its own, market control may lead to an increase in incentives for countries to deny the extent of exploitation. Those countries who are forthcoming about their inability to combat entrenched exploitation will face market sanctions, whilst those whose own governments effectively deny exploitation may benefit. This would increase incentives for corruption and would invariably worsen the fate of those most vulnerable. However, when coupled with a right of visit, a market-based solution provides a much stronger incentive for changing the status quo. This dual-approach works by providing an economic incentive to deter exploitation, whilst facilitating a means to authoritatively measure that progress, at least insofar as the inspecting country is concerned. Furthermore, the verification of just a few instances of slavery by an authorised government body, coupled with the threat of market sanctions against both the state and the specific companies involved, favours transparency and substantive change over rhetoric and secrecy. This is perhaps the greatest appeal of the right of visit. In accepting this desirability, I now consider how such a scheme might operate within the international system.

VIII. A MULTILATERAL RIGHT OF VISIT SCHEME

In the short term however, the invocation of right of visit to identify *de facto* slavery in the fishing industry may prove too politically unappealing; primarily on account of the tendency of states to prioritise the freedom of navigation over other concerns, but also, the perception that universal visitation might jeopardise the general comity as between states. Nonetheless, the analysis of the *jus gentium* right of visitation is still useful. In that it may instead form the foundation and impetus for developing more effective bilateral, and multilateral, agreements providing for the reciprocal right of visit between states. In regards to the fishing industry, numerous multilateral interdiction regimes are already in force. Guilfoyle lists eight Regional Fisheries Management Organisations (RFMOs) with interdiction schemes including: the International Commission for the Conservation of Atlantic Tunas; the North Pacific Anadromous Fish Commission (NPAFC); the North-East Atlantic Fisheries Commission; the Northwest Atlantic Fisheries Organisation; the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR); the Annual Conference of the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea; the South

East Atlantic Fisheries Organisation; and the Western and Central Pacific Fisheries Commission.[146]

Of the RFMOs, the NAPFC provides perhaps the most relevant example of a multilateral interdiction regime, as it involves South-East Asian nations. The NAPFC was created under the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean (NPAF Convention) and came into force in 1993. It operates between Japan, the United States, Canada and Russia and was later acceded to by South Korea.[147] It aims to prevent the trafficking in fish taken in contravention to the NAPF Convention and is closely tied up to the UN General Assembly's driftnet fishing moratorium. The Convention lays out reciprocal boarding and inspection schemes for duly authorised vessels of any state party. It permits boarding of any other state's fishing vessel upon the reasonable suspicion that it is contravening the Convention, provided the flag-state is promptly notified. The flag-state must investigate and prosecute appropriate cases and take action immediately. Although the success of the Convention has relied largely on the voluntary compliance of non-member parties, especially China, it is an example of how multilateral interdiction regimes can be used to achieve practical ends. Despite not being a member, China has an agreement with the NAPFC for member parties to board and inspect its vessels.

Whilst RFMOs provide a working example of how multilateral systems of inspection currently operate; the specific challenges of invoking the slavery provisions of the LOSC are considered through the examination of the historical approach. Specifically in regards to Article 99, wherein "any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free"[148]. The international community addressed this question through the General Act of Brussels. Article XXVII provided that "any slave who has taken refuge on board of a ship of war, shall be immediately and definitively set free"[149]. The treaty then went on to provide for repatriation, protection and assistance for freed slaves. A later incarnation of this provision was carried forward during the initial drafting of the 1956 Supplementary Convention. The *ad hoc* committee drafted an article that stated, "Any slave who is found on board a vessel shall immediately be set at liberty"[150], though this was altered in the final

[146] Guilfoyle, *supra* note 98, at 117-159.
[147] *Ibid.,* at 118.
[148] *LOSC*, *supra* note 2, art. 99.
[149] General Act of Brussels, *supra note* 90*,* art. XXVIII.
[150] UN Conference on the Law of the Sea, *supra* note 91, para. 168.

Convention to reflect the wording of the current provision of the LOSC. Although it is difficult to speculate how states would best put into practice a system of freeing slaves; it is nonetheless incumbent on states to give effect to this provision beyond mere rhetoric.

IX. CONCLUSION

Slavery, as it has been interpreted in international jurisprudence, is occurring extensively throughout the world's fisheries. It is an industry where migrants are trafficked for the purpose of forced labour, held in sub-human conditions and coerced under threat of financial penalty and physical violence. The captive nature of high seas fishing provides the inherent control over the movement of seafarers; as coupled with all the other elements of coercion, forced labour, and debt bondage are the elements that elevate these vulnerable persons into the category of slaves. Under the current regime, the negligent reliance on official figures of this exploitation from flag states, leaves the responsibility for identifying such practices with countries that are both hampered by corruption and driven by the incentives to deny its existence. The appeal of a right of visit therefore stems from the need to independently verify the extent of such exploitation, and the extent that a state is complying with its international treaty obligations. When coupled with existing market-based solutions, the right of visit provides a meaningful diplomatic tool for ensuring accountability and driving real change in an inherently exploitative industry. The fact that prosecution would rest with the flag states is inconsequential, as the independent verification of only a few instances slavery may be sufficient for informing the mechanisms that already threaten to prevent states having access to lucrative markets.

However, the ongoing ambiguity of the definition of slavery and the slave trade negates the legal worth of the provisions of the LOSC. Therefore, a priority for states wishing to suppress slavery in all its forms is to seek an authoritative clarification over the meaning of the "powers attaching to the right of ownership"[151] and the scope of the term the slave trade. Such clarity is fundamental for enforcement officials to operate in a system where to date exclusive flag-state jurisdiction has dominated the legal psyche. The capacity to independently verify instances of slavery will thus find its meaning as states work to exclude

[151] *1926 Slavery Convention*, *supra* note 2, art. 5.

exploitation from their markets, and it is with the combination of these tools that we are to realise the desire to abolish slavery in all its forms.