

Faculty of Law

## **Modern Slavery at Sea**

*An evolutionary interpretation of the right to visit*

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# 1. INTRODUCTION

The actual United Nations Secretary Ban Ki-Moon recently declared "In the 19th century, the international community came together to declare slavery an affront to our common humanity. Today, governments, civil society and the private sector must unite to eradicate all contemporary forms of slavery, including forced labor. Together, let us do our utmost for the millions of victims throughout the world who are held in slavery and deprived of their human rights and dignity<sup>1</sup>."

Even though slavery has been internationally abolished<sup>2</sup> a century ago, the United Nations (hereinafter UN) counts over 21 million women, men and children victims of slavery all over the world<sup>3</sup>: on the land, on the air and in the sea. This current slavery invented by the UN does not really fit with the traditional meaning of slavery. Indeed, it is defined in article 1(1) of the 1926 Slavery Convention that "slavery is a status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". The "right of ownership" though, does not exist anymore.

This is the reason why, the term 'slavery' has today lost consistency. In some extent it can be considered that it is null and void. Despite this suspected law related obsolescence of the term, the existence of practice similar to slavery is real. Hence the importance of finding another legal definition.

Consequently, through time and with the multiplication of guideline, UN protocol and NGO's reports, it has been noticed that the term the most suitable and used for modern slavery was 'human trafficking'. Human trafficking phenomenon is considered to be one of the worst of the twenty first century<sup>4</sup>. It has caught the International Community's attention these last decades and has created the adoption of several international protocols and guidelines.

Even the law of the sea which is traditionally not concerned with human rights<sup>5</sup> has enacted regarding this issue. The 1982 United Nations Convention for the Law of the Sea<sup>6</sup> has prohibited the practice of slavery on the High Seas and required "States to prevent and punish the transport of slaves in ships flying their flag"<sup>7</sup>.

This provision is supplemented with the "right of visit"<sup>8</sup> as enforcement measures. This right of visit settled in article 110(1) of UNCLOS provides that "where there is

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<sup>1</sup> Secretary-General Ban Ki-moon, Message for the International Day for the Abolition of Slavery, 2 December 2014, available at <http://www.un.org/sg/statements/index.asp?nid=8237>

<sup>2</sup> The abolition of slavery has not emerged from international agreements. The beginning of abolitions was national then international with the UN instrument.

<sup>3</sup> United Nation website, 2 December 2014, available at: <http://www.un.org/en/events/slaveryabolitionday/>

<sup>4</sup> Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery*. Oxford : Oxford University Press , 2008, p. 453

<sup>5</sup> Bernad H.Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 1997, p.415 available at Heinonline.org under the reference 36 Column. J. Transnat'l L. 899 1998

<sup>6</sup> Full reference hereinafter UNCLOS

<sup>7</sup> Article 99 UNCLOS : "Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free."

<sup>8</sup> Provided by article 110 (1) of the UNCLOS: "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 entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the

reasonable ground to suspect [...] piracy [...] the ship is engaged in the slave trade [...] unauthorized broadcasting“ it is possible to intercept and visit the ship. Piracy and unauthorized broadcasting are off topic and will therefore not be studied.

It appears however, that this mechanism is not really used nowadays. Indeed, despite much research, it is difficult to find any relevant case applying the right to visit in order to fight against contemporary slave trade on the High Sea. The right of visit is one of the mechanisms limiting the “freedom of the high seas” enshrined in article 87 of the UNCLOS<sup>9</sup>. This freedom rose out with *the mare liberum*<sup>10</sup> concept of Hugo Grotius making the sea “common to all”. Later on, it has been enacted by article 87 of 1982 UNCLOS under the High Sea section.

As highlighted by Ban Ki-moon, contemporary slavery represents a great issue today, causing millions of victims. Parts of these are trafficked on the High Sea left unprotected by national regulations occurring on territorial waters and exclusive economic zone relying therefore mainly on the UNCLOS.

What led me to consider this topic is the humanitarian aspect related to the law of the sea. It is important that human rights are protected on air, land as well as on sea. Then, since the UNCLOS provides protection for victims of slavery, can the convention also protect persons victims of trafficking? The two notions are define differently, but in the end don't they fight against similar activities?

The main question is can slavery be interpreted in a evolution manner so to include human trafficking?

To answer these questions I will try to demonstrate that the provisions of article 110(1) providing a right of visit in case of suspected activities of slavery or slave trade should be extended to human trafficking. Without the need of going through the difficult path of treaty or convention agreement, it could be possible if on a one hand the UNCLOS is a dynamic framework enough to handle an evolutionary interpretation (1). And on the other hand, if slavery can include in its definition contemporary slavery, such as human trafficking (2).

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slave. trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109”;

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

<sup>9</sup> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises,

inter alia, both for coastal and land-locked States:

(a) freedom of navigation;

(b) freedom of overflight;

(c) freedom to lay submarine cables and pipelines, subject to Part VI;

(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;

(e) freedom of fishing, subject to the conditions laid down in section 2;

(f) Freedom of scientific research, subject to Parts VI and XIII.

<sup>10</sup> *Mare Liberum*, Hugo Grotius, 1608 chapter V : Likening the sea to the air, which Grotius observed was not susceptible to occupation and whose use was destined for all, he argued:

“For the same reasons the sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries”.

If the demonstration of these two hypotheses succeeds it will mean the fulfillment of article 99 of the UNCLOS requirement, namely the suppression of slavery in the legal order of the oceans, and a better world to live in.

The purpose of this study will be to try giving a new birth to the notion of slavery settled in the UNCLOS. To this end, with the help of classical interpretation rules of the 1969 Vienna Convention, I will link human trafficking to slavery.

To be able to relate slavery to human trafficking it is important that the latter definition is carefully studied. Firstly because it is an expression difficult to encompass. Secondly because it can be confused with the definition of smuggling migrants.

## **1.1. The definition of Human Trafficking**

Human trafficking (hereinafter HT) is a scourge widespread all around the world. It is reflected in different level and forms depending on the place where it occurs. States concerned by this commerce can be the ones where the victims come from, the ones where they travel to, the ones where they transit by, or even a mix between these three. "HT is a global problem. It is estimated that as many as 27 million men; women, and children are currently victims of HT around the world."<sup>11</sup>

For a very long time, no legal and unique definition of HT was settled. Several definitions were used making it difficult to standardize information about the problem, most of all in statistics and also in identifying issues to overcome. The international community didn't manage to reach an agreement on a common definition of HT until 2000 with *United Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol)<sup>12</sup>. This protocol supplements the 2000 *United Nations Convention against Transnational Organized Crime* and is the first international instrument exclusively dealing with the HT problem and providing for a universal definition of it.

In the public mind, HT usually makes reference to the women and children trafficked into prostitution and sex work, even if it is generally the case, the term covers a broader aspect.

Since no common definition existed to describe rigorously the crime for many years, it was difficult to combat because difficult to identify. Indeed, it is obvious that to be capable of control and to forbid an international crime, it is necessary to be able to define what this crime is about. This is the importance of a uniform and a standard definition. So, the very first step towards this offence was, for the international community, to reach a standard definition of HT which everyone would agree with.

The definition settled by the Trafficking Protocol in article 3(a) defines trafficking in persons as:

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<sup>11</sup> United States Department of State (June 2012), Trafficking in Persons report 2012 [www.state.gov/documents/organization/192587.PDF](http://www.state.gov/documents/organization/192587.PDF) p.7

<sup>12</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, opened for signature Dec. 12, 2000, S. TREATY DOC. NO. 108-16, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Trafficking Protocol]

“The recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs”.

This is a broad and general definition encompassing “the experiences of both men and women in forced labor, servitude, slavery or slavery-like practices, and organ removal, within and beyond the borders of their countries of origin”<sup>13</sup>.

Accordingly, the definition set by the Protocol describes HT as to be consistent of three elements: “the act, the means and the purpose”<sup>14</sup>. The wording of the article implies that these conditions have to be met cumulatively to be considered as HT.

The act consists in the “recruitment, transportation, transfer, harboring or reception of persons”.

The means is “the threat or use of force or various forms of non-violent coercion, such as fraud or deception”. And the purpose is the “exploitation, predominantly for forced labor in one of the several sectors included in the article.

The most important aspect to keep in mind is that HT purpose is to exploit victims to generate profits. According to the protocol, “exploitation” can include prostitution and other sexual exploitation form, forced labor, slavery or practices similar to slavery, or other form of exploitation<sup>15</sup>. The way to reach this goal can be recruitment transportation, transfer, harboring or reception. To be considered as HT this exploitation has to be based on the “threat or use of force or various forms of non violent coercion, such as fraud or deception”<sup>16</sup>.

Accordingly, physical or psychological coercion has to exist and be related to the exploitation, moreover the three conditions have to be met and be related one to the other to be able to talk about HT.

Recently, a new aspect of the HT’s definition has been brought by the European Commission<sup>17</sup> to better prosecute traffickers and protect victims. Indeed the Commission has added to the Trafficking Protocol definition the notion of “vulnerability” and “consent”<sup>18</sup>.

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<sup>13</sup> A labor paradigm for HT, Hila Shamir

<sup>14</sup> What is Human Trafficking, United Nations Office on Drugs and Crimes

<https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html>

<sup>15</sup> Article 3 (a) Trafficking Protocol

<sup>16</sup> See *ibid* note 17

<sup>17</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, article 2§1, available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0036>

<sup>18</sup> See *ibid*, art 2§1: “The recruitment, transportation, transfer, harboring or reception of persons, including the exchange or transfer of control over those 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.”

One element of the definition is still difficult to assess even after twelve years of practice of the Protocol, it is the migration<sup>19</sup>.

HT involves a displacement of the victim within the same country or another one<sup>20</sup>. The victim is recruited or displaced to work in a place far from home. This isolation from a familiar place is a key element for the executor. He confuses the victim's mark to have total control upon them. This phenomenon is difficult to assess in the beginning of the process because a person can be moving from its usual place on his own account and become a victim of HT only later. It is the case of smuggled migrants, who after having crossed a country boundary can become victims of HT.

Indeed, the relation between smuggled migrant and trafficked people is very close and sometimes difficult to distinguish.

## 1.2. The difference with smuggling migrants

It is very difficult to affirm that human trafficking and smuggling migrants are so different one over the other. It is important to distinguish these two concepts because it causes great confusion.

Firstly, the two notions are dealt by different instruments. Smuggled migrant is governed by the Protocol against the 2000 Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter Migrant Protocol) whereas HT is handled by the Trafficking Protocol.

Even though many similarities in these two conventions can be found, they remain distinct one to another.<sup>21</sup>

The close link between these two concepts can be highlighted by simple examples of migrants' experience.

The 2008 *United States (US) Government's Trafficking in Persons Report* introduces the trafficking issues with the story of Lila, a 19 year-old Romanian girl who:

"Was introduced by an 'acquaintance' to a man who offered her a job as a housekeeper/salesperson in the UK. When she arrived in the UK, the man sold her to a pimp and Lila was forced into prostitution. She was threatened that she would be sent home in pieces if she did not follow every order. After an attempted escape, her papers were confiscated and the beating became more frequent and brutal"<sup>22</sup>.

Here is a clear example of HT, but by changing some few details in this story the offence can fall under the definition of smuggled persons.

Assuming that instead of being brought to the UK by her 'acquaintance' Lila had travelled by herself. She would have taken a debt to people to help her cross the border of UK illegally.

Once in the UK, she would have to reimburse the debt to the people that got her in the country. These latter to recover their debt would have sold her to a man whom forced her into prostitution.

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<sup>19</sup> Truc canadien

<sup>20</sup> According to the US protocols a trafficked person someone who is displaced from a country to another or within a state for the purposes of slavery or servitude

<sup>21</sup> Human trafficking and smuggling: crossover and overlap Benjamin S.Buckland ( strategies against human trafficking : the role of the Security Sector, Cornelius Friedsendorf (Ed), Vienna and Geneva, September 2009)

<sup>22</sup> United States of America, Department of State, Trafficking in Persons Report (Washington DC : Department of State, 2008) <http://www.state.gov/documents/organization/105501.pdf>

To sum up the situation she willingly got in UK in an illegal way and would have been forced into prostitution once on the British soil. In this case Lila would have the status of smuggled migrant.

The issue of the difference between these two concepts is important because it establishes a different regime of protection.

Indeed, the protection offered for smuggled people is far less protective than the protection offered for trafficked people by the Protocols.

The reason of this discrimination is because smuggled people are considered as of criminals. As a matter of fact they have crossed the border of a State even though it was against the immigration policy of the latter, whereas trafficked people are considered innocent victims because they were forced to cross the border.

The Protocol against Smuggling Migrants by Land, Sea and Air defines smuggling as: “The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident<sup>23</sup>”. Illegal entry here means the crossing of a national frontier without fulfilling the legislation requirement of the state.

The first difference between the two notions can be found in the source of profit.

According to the article, smuggling consists in the illegal transfer of migrants from a country to another in exchange or “financial or material benefit”.

The relation between the recruiter and the migrants ends normally after the crossing of the boundary while in the case of HT this step is only the start of the nightmare. So, profits made by the traffickers in this case “are derived from the transportation or facilitation of illegal entry or stay of a person in another country”<sup>24</sup>. In HT, profits come from the exploitation of trafficked people.

Another difference between the two concepts can be found during crossing borders.

For smuggled migrants it always consists of an illegal crossing whereas in the case of trafficked persons it can be illegal but also legal.

The main difference and feature are that human trafficking lays on the violation of the victim’s rights whereas for smuggled migrants, it is the violation of a state’s migration legislation.

This means that in one case there is a victim and the other case no. Indeed, the smuggled migrant has accepted the terms of the contract with the recruiter including, the means and the purposes of the crime. He has paid for it and knows that his action is illegal.

Meanwhile, the illegality of smuggled migrants does not make it possible to ignore the extreme bad conditions of their journey. In fact, a great majority of people trying to cross illegal a State border dies during its travel because of extreme travelling conditions<sup>25</sup>.

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<sup>23</sup> Article 3(a) Protocol against Smuggling Migrants by Land, Sea and Air

<sup>24</sup> Trafficking explained, europa.eu

<sup>25</sup> Only this last week of August 2015, forty deaths have been counted in the Mediterranean. This year more than two thousand people were found dead in the Mediterranean Sea.

See, Fresh Tragedy In Med, At Least 40 Migrants Die At Sea, 28 August 2015, available at

<http://www.middleeasteye.net/news/fresh-tragedy-med-least-40-migrants-die-sea-1416379650>

Moreover, the difference between these two crimes lies also upon the consent. In one case, the consent is given and in the other, it is not or partially. To give consent a person must have the choice to give it or not. And to be effective full it has to be given at each step occurring. If the person has accepted to give her consent to cross illegally a border, it doesn't mean that she has given her consent to be abused during the trip or to be forced into labor to repay its debt<sup>26</sup>.

It can accept the use of fake paper to enter a country, can accept to do an illegal job, but a person never gives consent to be forced into labor or to be treated like a slave<sup>27</sup>.

This argument about consent is very important because it is very usual that public opinion or local authorities misunderstand it. Indeed, people usually thinks that if the person stays and does not escape it means that the person is willing to stay.

As noticed through the example of Lila, the situation of the migrant can easily evolve from smuggled migrants to HT during its journey. When the boundary is crossed, it is often difficult to say whether it has been passed legally or illegally.

### 1.3. Overlap between the two terms

As explained previously, it is not rare for a smuggled person while travelling to be ambushed in exploitative working conditions due to the form of debt bondage incurred to those who take care of their passage. Beate Andrees and Mariska Van Der Linden fairly observed that “the forced labor process is perhaps best seen as an ever-narrowing labyrinth where one's perceived alternatives become less and less viable”<sup>28</sup>.

John Salt<sup>29</sup> agrees with this position and considers that defining clear categories between smuggled people and trafficking people is almost impossible.

Moreover, Ronald Skeldon agrees with this point of view. During his studies on trafficking in Asia, he points out that: “While the general intent of the term ‘trafficking’ may be clear, in practice it is difficult to apply. Networks of human smugglers have proved to be highly successful in moving large numbers of people illegally and in an amassing substantial profit. Violence, coercion and exploitation are an integral part of smuggling, and it is virtually impossible to discuss smuggling without trafficking. A critical examination of the whole process will reveal that a clear distinction between coercion and freedom of choice becomes blurred. In fact, a clear distinction between trafficking, smuggling and other forms of population movement also becomes blurred”<sup>30</sup>.

Skeldon links human trafficking to a “continuum of facilitation” meaning a continuous variation of features. This is mainly due to the fact that migrants ask assistance of intermediary to be able to cross a boundary for varied reasons. Because it is the bureaucratic migration procedures are too complex, because they just ignore how to do, or just because they are not eligible for a migration visa.

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<sup>26</sup> La Traite Des Etres Humains, Connaissances International Et Pratiques Locales, realised by European Forum for Urban Security marco Gramega and FESU

<sup>27</sup> La Traite Des Etres Humains, Connaissances International Et Pratiques Locales, realised by European Forum for Urban Security marco Gramega and FESU team para 1.1 p. 5

<sup>28</sup> Beate Andrees and N.J. Mariska, « Designing Trafficking Research from a Labour Market Perspective : the ILO Experience, » *International Migration* 43, no. 1-2 (2005): 65

<sup>29</sup> John Salt, « Trafficking and Human Smuggling » 33-4

<sup>30</sup> Ronald Skeldon, « Trafficking : a perspective from Asia, » special issue, *International Migration* 38, no. 1 (2000) :9



In the case of smuggled people, these intermediaries enjoy high interest on the debt incurred by migrants for several years. To pay back this debt they will usually be obliged to work “for free” and then will become victims of human trafficking.

The matter that arises from this fact is to be able to distinguish a “trafficked person from an irregular migrant submitted to exploitative working conditions and/or debt bondage”<sup>31</sup>.

Debt bondage has been defined by the *Supplementary Slavery Convention On The Abolition Of Slavery* as a “status or condition arising from a pledge by a debtor of his personal services or 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”<sup>32</sup>.

What is important to note is that these “loans” are usually contracted in an informal way and so the “reasonable assessment” has no effect here. Moreover, how the length and the nature of the services can be properly limited and defined? This question remains unanswered.

Now that the definition of human trafficking is established the problematic of the thesis can be developed. I would like to remember the corrector that the issue I will try to answer is whether the slave trade provision from article 110 can be interpreted in a way to include human trafficking. In this matter I will first study if the UNCLOS is a dynamic enough instrument to handle an evolutionary interpretation (2) then, I will interpret the slave trade argument in an evolutionary context (3).

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<sup>31</sup> Beate Andrees and N.J. Mariska, « designing trafficking research », 66 ; Claire Brolan, « Analysis of the Human Smuggling Trade, » 579-580.

<sup>32</sup> *Supplementary Slavery Convention on The Abolition Of Slavery, The Slave Trade And Institutions And Practices Similar To Slavery* 266 UNTS 3, 1956.

## 2. The LOSC as a dynamic framework able to evolve

« Les traités, voyez-vous, sont comme les jeunes filles et les roses: ça dure ce que ça dure »<sup>33</sup>.

This quotation of the famous President and instigator of the French fifth Republic highlights the difficulty for a treaty to last through time. Treaties and conventions are adopted in certain time and for special needs in order to solve contemporary issues. Since “the only thing that is constant is change”<sup>34</sup>, convention’s features are most likely going to be modified, giving rise to the need for other regulations than those established in earlier ones. Indeed, it is impossible for treaty’s authors to anticipate long term requirement of cooperation, countries, changing of scopes.

Nonetheless, through the use of several mechanisms, it is possible to avoid caducity of such legal framework. For example, the 1804 French Civil Code is still in effect today in France. This was made possible thanks constant efforts undertaken by the legislator to allow the text to evolve.

Alan boyle<sup>35</sup> in his research study has identified several mechanisms able to interpret in an evolutionary way the convention. To be able to answer my problematic I will consider mostly the classical rules of interpretation settled by the 1969 Vienna Convention. But first it is important to understand the background of the UNCLOS adoption because it has a lot to do with its dynamic aspect.

### 2.1. The background of the UNCLOS adoption

The adoption of the UNCLOS was laborious in the extent that it has encountered several failed attempt but has finally resulted by giving birth to a secure legal framework.

#### 2.1.1. A laborious adoption

The convention is the concretization of many years of negotiation and two failed attempt. The codification of the law of the sea was difficult because it involved agreements of States upon the regulation of their sovereignty. There are still some powerful states that are nowadays not party to the convention. For example the US through the Truman Proclamation<sup>36</sup> unilaterally established its own Sea regulation and denied the authority of the Convention by not being part of it.

The sea has always represented important interests for States. The first to emerge was security matters because of naval war threats. States were conscientious in protecting their maritime boundaries from attacks coming from the Sea. In this context, the first maritime zone implicitly established was the “three miles zones” from the land. In fact this distance represented the distance needed to reach a vessel with cannon balls from the land

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<sup>33</sup> « treaties are like young women and roses, they last while they last », Général de Gaulle about a treaty bounding France and Germany in 1963

<sup>34</sup> Heraclitus

<sup>35</sup> Boyle, Alan. « Further Development of the Law of the Sea Convention: Mechanisms for Change. » *The International and Comparative Law Quarterly* 54, n° 3 (1 juillet 2005): 563-84.

<sup>36</sup> With the Truman Proclamation ( proclamation 2667- Policy of the United States With Respect to the natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 28 september 1945) the US argued that ‘ the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the CS by the contiguous nation is reasonable and just on the basis that the CS shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it”.

The first attempt to codify the law of the sea arose with The 1930 League of Nations Codification Hague Convention in 1930 held in The Hague. The purpose of it was mainly to codify several matters of international including concerning the status of territorial waters, it failed to reach agreement on this matter however. The second attempt was initiated by the International Law Commission. It resulted with the adoption of four Geneva Conventions. These conventions entered into force but because of the lack of participation, they had no real impact. Nonetheless, there is still States today that follows these conventions because they did not accept to be part of the UNCLOS. Moreover, these conventions have largely influenced the redaction of the UNCLOS. Many of the Geneva Conventions provisions have been incorporated verbatim in the UNCLOS. The third Conference on the law of the sea started in 1973 and took ten years to be achieved. It finally entered into force in 1994.

### *2.1.2. A reliable text*

The 1982 Convention was negotiate as a ‘package deal’<sup>37</sup> and was intended to be as complete and universal as possible. It means that its provisions constitute a whole set, the states parties must agree with everything. In that extent, the convention set a prohibition of reservation and a ban on incompatible inter se agreements<sup>38</sup>.

The purpose of the ban of “reserve or exception” not enshrined in the Convention is to preserve the unitary character of the instrument<sup>39</sup>. Even though this article is balanced with article 310 which allow States to make declaration, the purpose of this system is to strengthen the convention. This target is very clear and is illustrated by the declaration of the President of the conference, H. Shirley Amerasinghe. He declared to the working group that:

“We must seek to preserve intact, and protect the efficacy durability of the body of law which we are trying to create in the form of a Convention encompassing all issues and problems relating to the law of the sea as a package comprising certain elements that constitute a single and indivisible entity<sup>40</sup>.”

The compulsory dispute settlement protects even more the convention<sup>41</sup>.

Even though the legal instrument has been built to be reliable and stable this does not preclude that it does not able to evolve through time.

Indeed, the UNCLOS has been designed to adapt its provisions to change. This is made possible by amendments<sup>42</sup> or the possibility to be completed by generally accepted international agreement and standards<sup>43</sup>. Moreover, like every sustainable text it can be subject to interpretation. This interpretation, like every convention or treaties is subject to the classical rules of interpretation edicted by the 1969 Vienna Convention.

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<sup>37</sup> The international law of the Sea, Rothwell and Stephens, Hart publishing: Oxford? 2010

<sup>38</sup> Article 279-99, 309, 311(3) of the UNCLOS

<sup>39</sup> L.Lucchini and M. Voelckel, Droit de la mer, t. 1: La mer et son droit-Les espaces marins, Paris, Pedone, 1990, p.90,§114

<sup>40</sup> Note by the President on the Final Clauses, 23 july 1979, DC/1. Reproduced in S.W.P new Yorker Session 1979, p.191.

<sup>41</sup> Section V of the UNCLOS

<sup>42</sup> Article 312-14

<sup>43</sup> Art 21(2), 119, 207-12.

## 2.2. Evolutionary interpretation supervised by classical rules of the 1969 Vienna Convention

### 2.2.1. The prior compliance with “*pacta sunt servanda*” principle

First of all it is necessary to recall that every international agreement is subject to the *pacta sunt servanda* principle. It is settled in article 26 of the VC and implies that a treaty agreement shall be set with full consent and good faith by parties.

*Pacta sunt servanda* is a Latin phrase meaning that conventions must be respected. Parties to an agreement have to respect all obligations deriving from it and cannot escape from it.

It is a principle that bounds parties to conduct in good faith. According to the dictionary, “the basis of good faith indicates that a party to the treaty cannot invoke provisions of its domestic law as a justification for a failure to perform. The only limit to *pacta sunt servanda* is the peremptory norms of general international law known as “*jus cogens*” which means compelling law”<sup>44</sup>.

This means that the only reason leading states parties to deviate from a traditional interpretation based on article 31 is the incompatibility with a *jus cogens* norm.

### 2.2.2. The subject of interpretation

It is important to understand the clear dissimilarity between “definition” of a concept and the “law” applicable to this concept.

This matter has been encountered by the ICJ in the Namibia Case. The court was supposed to interpret the notion of “sacred trust”. Initially, this notion had been conceptualized within a colonization period and was not complying to a contemporary use anymore. The different era between the time of conception of the notion and the contemporary time was completely incomparable. The court then decided to consider the notion “sacred trust” has “not static, but by definition, evolutionary”<sup>45</sup>.

In such circumstances, the court decided to use the *method of the mobile reference*. This method of interpretation, also called rule of effectiveness<sup>46</sup>, provides the use of new contemporary law as reference<sup>47</sup>. This position was important to avoid the use of “archaic elements”<sup>48</sup> reminiscent of another era.

The court took this position due to the specificity of the case. This can be seen as an exception due to the particular character of the term to be interpreted, in that extent the court has not raised this interpretation method to become “mandatory and extend to cases of interpretation”<sup>49</sup>.

Indeed, the particular use of it is due to the evolutionary features of the “sacred trust” notion. The “law” applicable to this concept must be the “law” corresponding to the era of which we interpret it to<sup>50</sup>. This means that even though the content of the term changes, the law that regulates it does not.

Some definitions on the contrary are not inclined to evolve. For example the notion of “environment” will always encompass air, water, earth and vegetation. It will never

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<sup>44</sup> Dictionary available at :<http://definitions.uslegal.com/p/pacta-sunt-servanda/>

<sup>45</sup> I.C.J. Namibia Case report 1971, p31

<sup>46</sup> Rule of effectiveness See H Thirlway, ‘The Law and Procedure of ICJ, 1960-89, (Part Three)’ 62 BYIL (1992) 43, 44.

<sup>47</sup> Individual opinions Bedjaoui

<sup>48</sup> See *ibid*

<sup>49</sup> See *ibid*

<sup>50</sup> See *ibid*



change even though its components may experience modification such as degradation, pollution and so on and so forth.

### **2.2.3. Difference between interpretation and revision of treaties**

The Interpretation that would result in the substitution of provisions changing the scope of the original intention given to a treaty would be a “distorted revision”. Parties to a treaty have agreed upon certain terms, they have been negotiating upon it and they have finally reached an agreement. So the interpretation here is very important and very different from substitution.

In the Gabčíkovo<sup>51</sup> case, judge Bedjaoui made this statement about interpretation:

An interpretation of a treaty which would amount to substituting a completely different law to the one governing it at the time of its conclusion could be a distorted revision. The “interpretation” is not the same as “substitution”, for a negotiated and approved text, of a completely different text, which has neither been negotiated nor agreed. Although there is no need to abandon the “evolutionary interpretation”, which may be useful, not to say necessary in very limited situations, it must be said that it cannot automatically be applied to any case<sup>52</sup>.

The evolutionary interpretation is very important for the continuity of a legal framework, but it has to be applied in very specific cases. It should be noted that this practice cannot be automatically applied in every scenario.

In general, the classical rules of interpretation do not ask for a treaty to be interpreted in “any circumstances in the context of the entire legal system prevailing at the time of the interpretation”. The very important thing though is for the interpretation to be in conformity with “the intention of the parties at the time the treaty was concluded”.

The rules of interpretation are strict but they do give room to evolutionary interpretation. Alan Boyle has written an article exploring all instruments that could make evolve the law of the sea convention.

## **2.3. The LOSC ability to evolve**

In his research study Alan Boyle<sup>53</sup> identifies several interpretative mechanisms adapted to the LOSC. Considering, the purpose of this study, focused on the slave trade right of visit provisions of article 110, I will develop only the relevant instruments.

It is common for doctrine to refer to the UNCLOS as a “constitution” of the sea, this has not occurred by accident and attests from a great interpretation potential. The “living” instrument approach given to the convention is nonetheless measured.

### **2.3.1. The ‘constitution of the sea’**

The interest of this question is to be able to know if ever article UNCLOS is capable of extensive interpretation to be able to answer if article 110 and the ‘slave trade’ legal basis for interception at sea could be employed for human trafficking at sea.

The UNCLOS has been described as a ‘constitution for the oceans’<sup>54</sup>. A constitution cannot last if it’s not evolving. Indeed it must be capable to adapt through time.

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<sup>52</sup> (1997) ICJ Reports 7, separate opinion, at para 12. Separate individual opinion of judge Bejaoui.

<sup>53</sup> Boyle, Alan. « Further Development of the Law of the Sea Convention: Mechanisms for Change. » *The International and Comparative Law Quarterly* 54, n° 3 (1 July 2005): 563-84.

A constitution is a comprehensive package of legal text defining institutions and organizing their relation. The constitution is considered to be placed at the very top of the hierarchy of norms. It is usually an instrument difficult to amend. It can be subject to interpretation but it is done by a competent court, usually the highest one.

To a certain extent these features can be related to the LOSC. Most of all the convention distinguishes from other treaties because it “enjoys a strong degree of pre-eminence by virtue of its integral status”<sup>55</sup>. Indeed, states parties to the convention are not free to derogate unilaterally from its provisions, nor can they do it multilaterally. These limitations make the convention stronger and consolidate the package deal agreed. If no restriction were made state parties would be free to choose whatever they agree upon but most important they would be free to make reservations on the provisions they are not agreeing with. This would result in a ‘forum shopping’.

### 2.3.2. Interpretation of the convention

According to Alan Boyle, “the idea that treaties can have a dynamic or living interpretation is an important contribution to the process of evolutionary change in international law”<sup>56</sup>. It avoids obsolescence and permit to a legal framework to be ‘up to date’.

The starting point is the 1969 Vienna Convention on treaties. It provides guidelines to the interpretation of treaties. First of all the interpretation of a treaty shall be in “good faith” and in “accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Indeed an evolutionary interpretation is not changing the wording or the meaning of a provision it is mostly to adjust the term to the present.

Article 31 (3) (c) provides legal basis to interpret a text within its context and with the help of relevant rules of international law. It is this part of the Vienna convention that allows in a certain extent an “evolutionary interpretation”. It has been used by the ICJ to interpret some concept or terms but in the extent that it is “within the framework of the entire legal system prevailing at the time of the interpretation”. The court has also precised that “the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion”.

The international court of justice has been giving guidelines for “evolutionary interpretation” in the context of article 31 (3) (c) of the Vienna convention. The Court considers that it is adequate to take into account “the framework of the entire legal system prevailing at the time of the interpretation”. Then the interpretation process can consider the contemporary changes of the law, a modern accept of a term or expression through modern instruments. Nevertheless, this basis has to be in accordance with the interpreted convention.

Indeed, “the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion”<sup>57</sup>. These instructions about how to interpret in an evolutionary way a convention has been brought inter alia by Namibia Advisory Opinion, Aegan Sea Case and Oil platforms Case. In these case, the court

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<sup>54</sup> Remarks by TB Koh, reproduced in UN the law of the Sea : official text of the UNCLOS (London 1983) xxxiii. See further the analysis by S Scott ‘the UNCLOS as an international regime’, 3<sup>rd</sup> Verzijl Symposium, Utrecht, 2004.

<sup>55</sup> Boyle, Alan. « Further Development of the Law of the Sea Convention: Mechanisms for Change. » *The International and Comparative Law Quarterly* 54, n° 3 (1 juillet 2005): 563-84.

<sup>56</sup> See *ibid*

<sup>57</sup> Article 31 Vienna Convention

considered that “the concept and term in question were by definition evolutionary”<sup>58</sup> so they needed some updates to not be obsolete.

In the Shrimp turtle decision<sup>59</sup>, the WTO Appellate body has adequately used this technique to get a wider and up-to-date definition of ‘exhaustible natural resources’ of 1947 GATT and to be more current and exact. In this matter the organization used several more current convention or instrument such as the 1992 Rio declaration, the 1982 UNCLOS, the 1973 CITES Conventions, the 1979 Convention on conservation of migratory Species and the 1992 convention on biological diversity.

The case quoted previously were all dealing with the lack of modernity of particular provision, or word. The “evolutionary interpretations in these cases were not of a whole instrument, but just some details. Moreover it is not constant revision meaning that it is not because a new treaty have just been done that the related conventions on the same point has to be change and up date through this new one.

In Boyle’s point of view “there is no doubt than UNCLOS need not to be interpreted as if it were a static instrument, cast in stone somewhere around 1982”. According to the professor, most of UNCLOS terms are “inherently evolutionary”. To support this opinion the author relies on the examples of the use of article 74 and 83 of the UNCLOS. These two articles require the delimitation of boundaries to be effected ‘by agreement on the basis of international law’. In this extent, delimitation principle has changed with time and interpretation of the courts. So, UNCLOS concerning the delimitation of boundaries of the EEZ and the continental has been affected by “evolutionary interpretation”.

There are also the “special circumstances” of article about territorial boundary delimitation food for his argument that the UNCLOS is capable of experiencing evolutionary interpretation.

### 2.3.3. *Limits of interpretation*

Respect of *pacta sunt servanda* has to remain the first objective in interpretation of the treaty. The parties have agreed upon certain terms, if the interpretation changes these terms the parties may not be bound by the treaties anymore.

There has been some failed tries to interpret the convention. The most significant example of this can be found in the 2003 Mox Plant Arbitration. In this case, Ireland tried to “rewrite” the convention by “cross-fertilized” it with later treaties. Caution with the application of article 31 3 c VC in relation with the integrity of the convention.

Of course, a treaty adopted to implement UNCLOS is more likely suitable to interpret terms or articles of the convention. The 1995 Fish Stock Agreement is the perfect example illustrating this point.

According to Boyle, the agreement has, for example, significantly changed the purpose of article 116-9 and particularly “in regard to access to high seas stocks and enforcement

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<sup>58</sup> Boyle, Alan. « Further Development of the Law of the Sea Convention: Mechanisms for Change. » *The International and Comparative Law Quarterly* 54, n° 3 (1 juillet 2005): 563-84

<sup>59</sup> Import Prohibition of Certain Shrimp and Shrimp Products, WTO Appellate Body (1998)WT/DS58/AB/R, at paras 130ñ1. See R Howse in J Weiler (ed) *The EU, the WTO and the NAFTA*(OUP Oxford 2000) at 54

jurisdiction on the high seas”<sup>60</sup>. Problem to know if it does bound the states non party to the Agreement but party to the Convention

#### 2.3.4. *Soft law and interpretation of UNCLOS*

Soft law can be considered as “non binding but potentially normative instruments”. “Soft law refers to rules that are neither strictly binding in nature nor completely lacking legal significance. In the context of international law, soft law refers to guidelines, policy declarations or codes of conduct which set standards of conduct. However, they are not directly enforceable »<sup>61</sup>. This concept can be defined in contrast to hard law, designing binding laws which create enforceable obligation and rights for states parties.

It can be UN general Assembly resolutions, conference declarations, codes of conduct or guidelines. This source of law constitute “agreed interpretation of a treaty, and to that extent it must be applied under article 31 (3) (a).

According to Boyle, soft law instrument may also be used in an interpretative way through the implementation of treaties. According to the professor, it is “common practice for conferences of parties to adopt agreed interpretations in this way, and there is no reason in principle why the parties to UNLCOS should not do so”.

Another possibility to use soft law to bring new perspectives to a convention would be to consider general principles adopted in the soft law. Indeed, article 31 3 c of the Vienna Convention seems to be including general principle as a possible support to interpret treaties.

In that extent, the 1948 Universal Declaration of Human Rights or the 1992 Rio Declaration which both states general principles agreed by States could be taken into consideration in the interpretation of treaties. In the Gabcikovo case for example, the report of the ICJ shows the great eagerness to use the sustainable development principle. Judges stresses the need to take into account this concept to interpret and apply treaties<sup>62</sup>.

Nonetheless, the best example so far to assess this practice is the use if the precautionary principle rose by the Rio Declaration in its principle 15.

In the southern Bluefin Tuna Case, Boyle considers that the fisheries conservation provisions of the 1982 UNCLOS may have already been mutated by the precautionary principle.

According to the doctrine, several definition of the LOSC including the definitions of pollution in article 1, the obligation to do an environmental assessment in article 206 and many others has been profoundly altered by the principle 15.

This is the proof that soft law could bring something important to treaty. And in some way, can be used to avoid amendment and bring a new aspect to a notion.

Alan Boyle wrote an article wondering what the evolutionary potential of the LOSC was. I will relied on his legal argumeent to to demonstrate the dynamism of the convention and its ability to evolve. Acoording to this demonstration it is quite clear that the UNCLOS is ” a living convention” that can handle evolutionnary interpretation.

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<sup>60</sup> See note 58 Boyle talks about Article 8 (4) and 21 of the Fish Stock Agreement

<sup>61</sup> Dictionary <http://definitions.uslegal.com/s/soft-law/>

<sup>62</sup> See *Gabcikovo Case* (1997) ICJ Reports 7, at para.140. The point is very cogently developed by Lowe, in Boyle and Freestone (eds.), *International Law and Sustainable Development*, at p. 31



### 3. Evolutionary interpretation of the right to visit in case of slavery

The right to visit is a mechanism settled by the LOSC which could be in great use for the human trafficking combat.

This chapter has been inspired by the research work undertaken by Efthymios Papastavridis<sup>63</sup> <sup>64</sup>in his attempt to link the slave prohibition on the sea, provided by the UNCLOS, to human trafficking. As far as I know, it is the first attempt ever to relate those two notions in the UNCLOS context, precisely under the provisions of article 110 (1) of the Convention. As studied previously, the “constitution of for the ocean”<sup>65</sup> can be considered as a dynamic framework capable of evolution. To that extent, I will try to interpret, in an evolutionary way, the slave trade argument raised to legitimate the right to visit in order to bring it up to date.

Firstly, I would like to stress that this position is a novel theory developed in doctoral research in Interception of Vessels in the High Seas<sup>66</sup>. Indeed, there is no actual State practice or judicial decision using this basis for interception of vessel on the High Seas.

Even though, it is frequent to find such linkage between slave trade and human trafficking mostly in the doctrine. In the course of my research, this regeneration of slave trade notion into human trafficking has not been very much developed on the sea. The relationship between the two crimes is mostly considered on earth and only within soft law instrument<sup>67</sup>.

This study has very high interest, first it implies to focus on the slave trade legal basis of article 110(1) in its traditional context. , how slavery is considered within contemporary ‘slave trade’ *ie* human trafficking. Secondly, we use only existing instruments without the need to amend, revise or adopt a whole new instrument.

This study interest aims at suppressing human trafficking at sea so in some ne fulfils the content of article 99 LOSC.

#### 3.1. The provisions of the LOSC

The right of visit is important to encompass because it is the starting point of the evolutionary interpretation attempt.

Enshrined in article 110, the right of visit provides legal bases to intercept vessels in the High Sea. It is a very important enforcement mechanisms established by the Convention. It has to be used with caution in the extent that it limits, the “freedom of the High Seas” concept, is carefully protected since the time of Grotius. Different activities can be the ground for interception there is: a) piracy, b) slave trading, c) unauthorized broadcasting d) absence of nationality of the ship or e) vessels flying no flag or refusing to identify themselves.

Article 110 has two parts, one concerning the interception and another one concerning the right to investigate.

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<sup>63</sup> Papastavridis, Efthymios. « Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law. » *Syracuse Journal of International Law and Commerce* 36 (2009 2008): 145. And

<sup>64</sup> Papastavridis, Efthymios. *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans*. Bloomsbury Publishing, 2014.

<sup>65</sup> See note 48

<sup>67</sup> Un protocols, NGO's report, Un watch list...

In this study we will be considering only the right to visit through the ground of 110 (1)b) slaves trading.

Nonetheless, in none of these two articles, slave trade is defined. Therefore, to define the legal term it is necessary to refer to the relevant international law namely, the 1926 Slavery Convention.

The latter convention defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>68</sup> It also defines slave trade as “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery”<sup>69</sup>.

Later on, these definitions were reiterated verbatim into article 7 of the 1956 Supplementary Slavery Convention<sup>70</sup>.

Moreover, the convention complements the prohibition and sets the “abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926 including among other thing debt bondage<sup>71</sup> and serfdom<sup>72</sup>.”

The LOSC however, only mentions slave trade. As it is defined in these two conventions it represents an outdated definition. As a matter of fact, “the right of ownership” circumstance is a very old notion and is not relevant nowadays.

This definition, of course, does not correspond to our 21th century reality. There are no more ownership circumstances; it has been banned by probably most of States legislation all around the world.

Because of that it is then not possible to relate the victims of human traffic to slavery<sup>73</sup>, at least not in a classical interpretation manner. Since slavery has been abolished all around the world it is then unlikely to find such legislation allowing “ownership” over a person.

However, as stressed out by the doctrine “all situations where an individual exercises the right of disposal or that of enjoyment of another person, in a way that it is reasonably suitable to withdraw personal freedom and the capacity of self-

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<sup>68</sup> Convention on Slavery, signed 25 September 1926, 60 LNTS (1927), 253. The first multilateral effort to call for suppression of slave trade generally was the Declaration of the Eight Courts relative to the Universal Abolition of Slave Trade, annexed as Act XV to the 1815 General Treaty of the Vienna Congress, done 8 February 1815, 63 CTS 473. Article 1(1)

<sup>69</sup> See *ibid* Article 1(2)

<sup>70</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956  
Entry into force: 30 April 1957, in accordance with article 13

<sup>71</sup> 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

<sup>72</sup> the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status

<sup>73</sup> See per this view G Bastid Burdeau, ‘Migrations Clandestines et Droit de la Mer’, in *La Mer et Son Droit* (Paris: Pedone, 2003) 59. Cf also Guilfoyle, *Shipping Interdiction*, 76–77.

determination of the victim, entails a violation of the international prohibition of slavery<sup>74</sup>”.

Thus, it could be argued that the act of selling and buying a human being could be referred to as an act of ownership<sup>75</sup> then the traditional definition could be extended.

However, this argument is not consistent with the wording of article 1 of the Slavery Convention.

To support this position it would be necessary to be able to prove that some countries do not forbid in their national legislation the sale of a human being. This is obviously not possible in this century. Therefore, the argument is not convincing.

The slave trade notion included in the UNCLOS does not have a definition. It has then to be related to relevant sources of law, namely the Slavery Convention. The definition established by this Convention includes a condition of a “right of ownership”, right which does not exist anymore. Thus, if the slave trade notion of the UNCLOS can only be related to the Slavery Convention then this part of article 110 will never be use again, because outdated.

This is the reason why I will try to interpret in an evolutionary the Slavery Convention and through that the LOSC article 110.

### **3.2. An evolutionary interpretation of slavery**

The first question to be answered is whether or not trafficked persons can be qualified as modern slaves, then, if the article 110(1) (b) can afford such interpretation.

The first point that has to be clear to develop this theory is whether “the slavery argument exists only within the legal parameters of the 1926 Convention”<sup>76</sup>.

In accordance with the relevant rules of interpretation namely article 31 to 33 of the Vienna Convention, the content of “ownership” has to be the beginning of the argumentation. This word has a particular importance; it is the key point to be able to relate the two concepts.

To clarify the essence of the word, it has to be taken into account the context, the object and purposes of the treaty. In this end the ICJ brought further details about humanitarian Convention special importance. In the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Case, the advisory opinion of the Court stresses that the object and purpose in the case of a humanitarian treaty has great importance<sup>77</sup>. It is obvious to note that the main purpose of the Slavery Convention humanitarian. Indeed its goal is to prohibit bad treatment on human beings through their sale as an “outil animé”<sup>78</sup> and thus improve its general condition. This abolition is supposed to be worldwide and concerns slavery and slave trade in every possible manifestations of it.

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<sup>74</sup> F Lenzerini, ‘Suppressing Slavery under Customary International Law’ 10 IYIL (2000) 145, 160.

<sup>75</sup> See note 63 and 64

<sup>76</sup> See *ibid*

<sup>77</sup> ICJ in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports (1951) 23.

<sup>78</sup> An « animated tool » Aristote (Éthique à Nicomaque, VI, chap. VIII-XIII)

This aspect is in conformity with the *jus cogens* and *erga omnes* obligations bounding all States to prohibit slavery and slave trade, supported by ICJ “the basic rights of the human person, including protection from slavery”<sup>79</sup>.

Furthermore, the Slavery Convention also reflects other purpose and objectives such as values of morality and justice, social goals and human rights<sup>80</sup>.

This is the context of the adoption of the convention and it has to be taken under great consideration in the perspective of an evolutionary interpretation.

Article 31 (3)<sup>81</sup> also requires to consider “any subsequent agreement or practice of the parties regarding the interpretation of the treaty”.

Moreover, the ICJ in 1971 Namibia case adds that “interpretation cannot remain unaffected by the subsequent developments of the law. [...] Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”<sup>82</sup>.

The compendium of all these opinions leads us to the conclusion that the “notion of slavery should not remain static, but, in contrast, is evolutionary and should be informed by the subsequent treaty and customary developments as well as by the exigencies of slavery in the twenty-first century”. Accordingly, I will now identify the possible extent that could be brought to the term.

### **3.3. Slavery and slavery like practices today**

Although the worldwide abolition of slavery reality shows practices similar as slavery remains.

It exists under different forms and victims can be anyone, as far as they are vulnerable persons. It can even happen on the sea. the Thai fish sector is great example to illustrate slavery like practice occurring on the Sea. The Environmental Justice Foundation<sup>83</sup> has reported the conditions of human trafficking in this sector, forced labor, murder, torture and so on and so forth<sup>84</sup>. Indeed, Thailand has spent four consecutive years on a special

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<sup>79</sup> Barcelona traction case, ICJ reports (1970), p.32, paragraph 34

<sup>80</sup> “According to its architect, A Barak, purposive interpretation is a general system of interpretation, whose goal is to achieve the purpose that the legal text is designed to achieve. It is based on three components: language, purpose and discretion. As far as the second is concerned, the purpose is the values, goals, interests, and policies and aims that the text is designed to actualise. See A Barak, Purposive Interpretation in Law (Princeton, NJ) : Princeton University Press 2005.” Cited by Papastavridis see note 55, p.269 in its footnotes.

<sup>81</sup> Vienna convention

<sup>82</sup> Legal Consequence For States Of The Continued Presence Of South Africa In Namibia (south west Africa notwithstanding security council resolutions 276 (1970), advisory opinion, ICJ reports 1971, p.16, at para 53.

<sup>83</sup> UK based nonprofit organization working internationally to protect the environment and defend human right.

<sup>84</sup> See The Hidden Cost, Human Rights Abuses in Thailand’s Shrimp Industry, Environmental Justice Foundation (EJF), 2013. Sold to the Sea, Human Trafficking in Thailand’s Fishing Industry, EJF, 2013; Slavery at Sea, the Continued Plight of trafficking Migrants in Thailand’s Fishing industry, EJF, 2014. Available at : <http://ejfoundation.org/fr>



list called the Watchlist of the US Department of State's Trafficking in Persons. This list classifies by degree of urgency, States facing major issues in HT<sup>85</sup>.

Moreover, in 2010 the office of the High Commissioner for Human Rights<sup>86</sup> seized of the issue has established a scope of what is consistent with practices similar to slavery. According to the High Commissioner, it encompasses a variety of definitions as studied previously such as forced labor, trafficking in people for purposes of prostitution, exploitation of immigrant workers as domestic servants or slaves.

However, he stressed that debt bondage was of particular relevance in the context of trafficking. Debt bondage is the employment of a person's labor in the repayment of a debt. It is defined in article 1(a) of the Supplementary Convention on Slavery as "the status or condition arising from a pledge by a debtor of his personal services or 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."

However, this debt and the duration of the time required to repay it are often undefined. Accordingly it is difficult to assess.

'Forced labor'<sup>87</sup> is also part of practice similar to slavery it is consistent with "all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntary".

Accordingly all of these activities mentioned by the High Commissioner but also present many

The preamble of the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, stated the "trafficking in human beings may result in slavery for victims"<sup>88</sup>.

### **3.4. Other treaty prohibitions of slavery and slavery like practices**

The prohibition against slavery can be found in several international treaties, most of all in human treaties but also in statutes of international criminal tribunals.

Indeed, there is article 8 of the ICCPR<sup>89</sup>, article 4 of the ECHR<sup>90</sup> and article 6 of the ACHR<sup>91</sup>;

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<sup>85</sup>United States Department of State (June 2013). Trafficking in Persons report 2013\_ Country Narrative T-Z <http://www.state.gov/documents/organization/210742.pdf>

<sup>86</sup> Office Of The High Commissioner For Human Rights (2010), 'Recommended principles and guidelines on human rights and human trafficking' UN : New York/Geneva. [http://www.ohchr.org/documents/publications/commentary\\_Human\\_Trafficking\\_en.pdf](http://www.ohchr.org/documents/publications/commentary_Human_Trafficking_en.pdf) p.36

<sup>87</sup> see *ibid* and the 1930 Forced Labour Convention and the 1957 Abolition of Forced Labour Convention, article 2.

<sup>88</sup> Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16 May 2005); Preamble; available at <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>. The Explanatory Report accompanying this Convention states emphatically: "Trafficking in human beings, with the entrapment of its victims, is the modern form of the old worldwide slave trade. It treats human beings as a commodity to be bought and sold, and to be put to forced labour, usually in the sex industry but also, for example, in the agricultural sector, declared or undeclared sweatshops, for a pittance or nothing at all" (emphasis added); available at [www.coe.int/T/E/human\\_rights/trafficking/PDF\\_conv\\_197\\_trafficking\\_e.pdf](http://www.coe.int/T/E/human_rights/trafficking/PDF_conv_197_trafficking_e.pdf).

Moreover, enslavement in general is explicitly prohibited and punished as a crime against humanity. Article 5 c of the statute of the International Criminal Tribunal for the former Yugoslavia, article 3c of the statute of the International Criminal Tribunal for Rwanda and article 7 2 c of the Rome statute of International Criminal Court.

Accordingly judges of international court of justice are using these provisions.

Indeed, several judicial decisions have taken side to interpret in an evolutionary way the concept of slavery. This happens in international criminal context and in human right context.

#### 3.4.1. International criminal context

The *Milch*<sup>92</sup> case is the first case judging the Jewish conditions during the Second World War and this before the Nuremberg Military Tribunal. Among all the charges, they studied the validity of slavery accusations. By assessing the conditions in which they were treated by Nazis they considered their situations the Jewish conditions and compared it to slavery<sup>93</sup>.

Approximately at the same period, judges of the Nuremberg Tribunal reached to the same conclusion.

The US Military tribunal in the case *Pohl and Others*<sup>94</sup>, related forced labor to enslavement. This was about the judgment of the instigator of the “final solution” during the Second World War. Judges amongst others things qualified the conditions of Jewish people has slavery stating that “slavery may exist without torture. Slaves may be well fed and well clothed and comfortably housed, but they are slaves if without lawful process they are deprived of their freedom by forceful restraint”<sup>95</sup>.

The ICTY in two different cases stated that enslavement was a crime against humanity and that it could include practice of human trafficking<sup>96</sup>.

#### 3.4.2. Human right context

The European Court on Human Rights in the *Siliadin v France*<sup>97</sup> case had to appreciate fact of domestic servitude. It concerns the displacement of a 15 years old girl from Togo to France. She had to take care of domestic work without being paid and with her passport confiscated. Even though the European Convention does not refer the modern

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<sup>89</sup> It sets forth that ‘No one shall be held in slavery or servitude; slavery and the slave trade in all their forms shall be prohibited; no one should be held in servitude. No one shall be required to perform forced and compulsory labour.’

<sup>90</sup> No one shall be held in slavery or servitude

<sup>91</sup> No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.

<sup>92</sup> *US v Milch*, Judgement of 31 July 1948, reprinted in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No.10, Vol II* (1997), p.773.

[http://www.worldcourts.com/imt/eng/decisions/1947.04.15\\_United\\_States\\_v\\_Milch.pdf](http://www.worldcourts.com/imt/eng/decisions/1947.04.15_United_States_v_Milch.pdf)

<sup>93</sup> See *ibid*

<sup>94</sup> Trial of Oswald Pohl and Others, US Military Tribunal, Nuremberg, Germany, 3 November 1947, TWC, (1950)

<sup>95</sup> See *ibid* §958 quoted in M.M. Whiteman, *Digest of International Law* (US Dept. of State, 1968

<sup>96</sup> According to article 5 c of the statute, para 515, “Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.”

*Prosecutor v. Kunarac*(Trial Judgement) IT-96-23 (22 Feb 2001), para 542 And *Gagovic and Others*, Case No. IT-96-23 (Indictment of 26 June 1996), paras. 10.6 10.8 <http://www.icty.org>

<sup>97</sup> See *Siliadin v France* App no 73316/01 (ECtHR, 26 July 2005), para 124.

crime of trafficking in persons, it does punish forced labor, slavery and servitude through the application of article 4 of the ECHR. The court recognized the reality of modern day slavery even though it has been abolished more than 150 years ago<sup>98</sup>.

“It follows in the light of the case-law on this issue that for Convention purposes “servitude” means an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of “slavery” »<sup>99</sup>. This clear case of human trafficking was appreciated by the court as a crime of slavery.

More recently, in 2010, the same court specified its point of view about human trafficking considering it within the scope of article 4 of the Convention<sup>100</sup>.

Regarded as a “historic first judgment concerning cross border human trafficking in Europe”<sup>101</sup> the present case concerned the death of a twenty year old Russian woman, who was trafficked from Russia to Cyprus for the purpose of sexual exploitation.

Rantsev v Cyprus and Russia “in view of its obligation to interpret the convention in light of present –day conditions, the court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes ‘slavery’, ‘servitude’ or ‘forced and compulsory labor’. Instead, the court concludes that trafficking itself, within the meaning of article 3 (a) of the Palermo Protocol and article 4 (a) of the anti trafficking convention, falls within the scope of article 4 of the convention.”<sup>102</sup>

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<sup>98</sup> Trafficking in Persons and the European Court of Human Rights, Strasbourg Observer, October 26 2011, Guest Blogger

<http://strasbourgoobservers.com/2011/10/26/trafficking-in-persons-and-the-european-court-of-human-rights/>

<sup>99</sup> see note 88, para 124 available at

[http://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22siliadin%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-69891%22\]}](http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22siliadin%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-69891%22]})

<sup>100</sup> Rantsev v Cyprus and Russia [2010] ECHR 25965/04 (7 January 2010) available at

[http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/CAR\\_Serbia/ECtHR%20Judgements/English/RANTSEV%20v%20CYPRUS%20%20RUSSIA%20-%20ECHR%20Judgment%20\\_English\\_.pdf](http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/CAR_Serbia/ECtHR%20Judgements/English/RANTSEV%20v%20CYPRUS%20%20RUSSIA%20-%20ECHR%20Judgment%20_English_.pdf)

<sup>101</sup>The International Center For The Legal Protection Of Human Rights , available at

<http://www.interights.org/rantsev/index.html>

<sup>102</sup> See *ibid*, para 281

## 4. GENERAL CONCLUSION

Slavery still exists today but is reflected in contemporary form different from the traditional notion. Ownership over persons is not relevant term anymore at least not. The obvious link between “old” and “modern” slavery is the people are forced into doing something, and held against their will.

The law of the sea has considered the slave trade issue but it need some updates to be relevant with the modern slavery.

The UNCLOS is a dynamic framework capable to evolve through times. This has demonstrated through several cases as in the Shrimp Turtle decision where judges gave an evolutionary interpretation of the notion of “exhaustible natural resources” of the 1947 GATT. Some articles of the UNCLOS has also experienced evolution such as article 74 and 83 on the delimitation of the exclusive economic zone and the continental shelf.

The UNCLOS as other major international treaty like the European Convention on Human Rights are “living instruments which must be interpreted in the light of present day conditions”<sup>103</sup>.

Nonetheless, interpretation does not mean revision<sup>104</sup>. Consequently any attempt to rewrite the UNCLOS is not doable<sup>105</sup>.

Evolutionary interpretation is supervised by the classical rules of interpretation of the 1969 Vienna Convention. The context of the adoption of the Convention to understand what were the intentions of the parties and its respect is of primary importance.

Moreover the relevant rules of international law applicable in the relations between the parties has also to be taken into consideration<sup>106</sup>.

It has to be noted that during the adoption of article 110, some disagreement appeared between the International Law Commission(ILC) drafter and the Special Rapporteur. The latter explicitly invoke the Supplementary Convention as “in conformity with the relevant parts of the drafts”<sup>107</sup> whereas ILC “was mindful of the existence of other institutions and practices analogous to slavery”<sup>108</sup>.

Then the intention of State parties at the time of the adoption is not clear.

Nonetheless, the purpose of the Slavery Convention as well as article 99 of the UNCLOS is the improvement of human condition. In this way slave trade should be interpreted as an evolutive notion.

The provision of article 110(1)(b) of the UNCLOS could be relevant as a legal basis for the right to visit vessels navigating on the high seas and suspected to practice modern slavery. Indeed, the interpretation of the relevant rules of international law led to the conclusion that even though slavery and human trafficking are not synonyms, the latter may often end as slavery. As J. Allain noted: ‘where the elements of the definition of trafficking in persons overlap with the definition of slavery, then the act of trafficking

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<sup>103</sup> Case of Tyrer v. the UK, ECHR, app no 5856/72, judgment of 25 april 1978, para 15

<sup>104</sup> See Judge Bedjaoui, individual opinion, note

<sup>105</sup> Mox plant Arbitration

<sup>106</sup> Article 31(3)(c) 1969 Vienna Convention

<sup>107</sup> See the preliminary Report of the Special Rapporteur in 1950, which invoked the pertinent provisions of the 1890 Brussels Act, of the Convention of Saint Germain (1919), as well as of the 1926 Convention; see YbILC (1950 II), 41 and see papastavridis note 57 p.276

<sup>108</sup> See note 57 p.276 and See Report of the International Law Commission to the GA, 11 GAOR Supp (No 9), 37.



will breach a *jus cogens* norms, but not because it is manifestly an act of trafficking in persons, but because it is slavery”<sup>109</sup>.

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<sup>109</sup> Jean Allain, ‘Book Review of S Scarpa , Trafficking in Human Beings: Modern Slavery ’ 20 EJIL (2009) 456.

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