Modern-Day Slavery?
A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev

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I. Introduction

Slavery and trafficking in persons continue to draw global attention, fostering debates in sociological, political, academic and legal circles. Governments, in particular, value being seen on the global stage as working to combat the trafficking of human beings to and from their territories. With prosecution of traffickers difficult in many jurisdictions, civil society organizations and others always welcome efforts by regional courts to hold governments accountable for their failure to fulfil their counter-trafficking international obligations, or those by domestic courts to find traffickers guilty.

What is at risk, however, in this desire to identify traffickers and grant remedies to victims, is a judicial interpretation of slavery and trafficking

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alien to their meaning in international law. The increasing tendency by academics and researchers,[1] journalists,[2] the United Nations,[3] governments,[4] civil society organisations[5] and other policy makers[6] to label human trafficking as a form of modern-day slavery is a powerful tool to attract support for this objective; but is also a concerning trend. In this conflation of trafficking and slavery the key elements that distinguish the two concepts are often lost, including in efforts to raise public awareness; to implement policies and programs designed to prevent trafficking; and to protect and provide reintegration assistance to its victims.

In this article, we look specifically at the judicial treatment of the concepts of slavery and trafficking, with a critical review of Australian and European case law. The case against Victorian brothel owner Ms Wei Tang was the first jury conviction under the slavery offences in Australia's *Criminal Code* (Cth).[7] This conviction was subsequently appealed (Court of Appeal of the Supreme Court of Victoria) and finally upheld by Australia's High Court in 2008.[8] The case of *Rantsev v Cyprus and Russia*[9] was the second time the European Court of Human Rights (hereinafter the European Court or ECtHR) addressed human trafficking, but its first substantive analysis of

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[1] Jonathan Martens, Maciej Pieczkowski & Bernadette van Vuuren-Smyth, *Seduction, Sale and Slavery: Trafficking in Women and Children for Sexual Exploitation in Southern Africa* (Pretoria: International Organization for Migration, 2003); Jennifer Burn, Sam Blay & Frances Simmons, "Combating Human Trafficking: Australia's Responses to Modern Day Slavery" (2005) 79 Austl LJ 543; Anne Gallagher, "Contemporary Forms of Female Slavery" in Kelly D. Askin & Dorean M. Koenig, eds., *Women and International Human Rights Law*, vol 2 (New York: Transnational Publishers, 2000) 487; Louise Brown, *Sex Slaves: The Trafficking of Women in Asia* (London: Virago, 2000).

[2] Benjamin E. Skinner, "The New Slave Trade", *Time* 175:2 (18 January 2010) 54.

[3] UNODC, *A Global Report on Trafficking in Persons* (2009), online: United Nations Office on Drugs and Crime <http://www.unodc.org/documents/human-trafficking/Global_Report_on_TIP.pdf> at 6.

[4] US White House Office of the Press Secretary, Media Release, Remarks by President Obama to the Australian Parliament (14 November 2011) online: White House <http://www.whitehouse.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament>; see also Ministerio de Justicia y Derechos Humanos de la Nación (Argentina) and UNICEF, *Trata de personas. Una forma de esclavitud moderna* (2012) at 1, online: United Nations Children's Fund <http://www.unicef.org/argentina/spanish/Trata2012%281%29.pdf>.

[5] HRW, A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand, online: Human Rights Watch <http://www.hrw.org/en/news/1994/01/30/trafficking-burmese-women-and-girls-brothels-thailand>; National Human Trafficking Resource Center, Human Trafficking Cheat Sheet (2009), online: Polaris Project <http://www.polarisproject.org/index.php>.

[6] European Commission, *Together Against Trafficking in Human Beings*, online: European Union Anti-Human Trafficking Website <http://ec.europa.eu/anti-trafficking> (Quoting Cecilia Malmström, the European Union Commissioner for Home Affairs, as stating that human trafficking "can be classified as a modern form of slavery".). To its credit the Group of Experts on Action against Trafficking in Human Beings of the Council of Europe has not used this expression in its two official reports published so far.

[7] Andreas Schloenhardt, Case Report on *R v Wei Tang*, (2009) 23 VR 332, online: University of Queensland, TC Beirne School of Law <http://www.law.uq.edu.au/documents/humantraffic/case-reports/wei_tang.pdf>.

[8] *The Queen v Tang*, [2008] HCA 39, 237 CLR 1, 82 ALJR 1334, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, rev'g [2007] VSCA 134.

[9] *Rantsev v Cyprus and Russia*, No 25965/04 [2010] ECHR 22, 51 EHRR 1 [*Rantsev*].

the issue.

Both the cases of *Tang* and *Rantsev* deal with cross-border movement of women for the provision of sexual services and are two of the few examples across the globe of superior courts adjudicating on the so-called issue of "modern day slavery". As we will explain, both cases involved facts that appeared, at face value, to contain some elements of the crime of human trafficking; yet neither Court was expressly adjudicating on the question of human trafficking but rather on the question of slavery. There are clear parallels in the experiences of the five Thai sex workers in Australia, discussed in *Tang*, and Ms Rantseva's experience in Cyprus, as well as an evident desire of both courts to protect migrant sex workers who find themselves in situations of exploitation. Both courts attempt to do so by using slavery provisions as the legal tool to find the States of Cyprus and Russia and the accused, Ms Tang, at fault. These cases, therefore, lend themselves to a comparative study of the facts and law.

From a victim's point of view, the outcome of the ECtHR's decision is a positive one, with Mr Rantsev receiving some form of recognition for the violations of his rights as the father of Ms Oksana Rantseva, who was found dead in Cyprus on 28 March 2001. The case of Tang is more difficult to couch in such terms. Indeed, while two of the five women who were sex workers in Ms Tang's Melbourne brothel stayed on to work in the brothel after their "debts" were paid, we do not know what happened to the other three. It is therefore difficult to discern the extent to which the ruling of the Australian High Court could be considered a victory for these women.[10] Nonetheless, both cases have received significant praise from various groups, particularly the human rights movement, for offering redress for crimes that are typically difficult to prosecute at the national level.[11]

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[10] See *VXAJ v Minister for Immigration & Anor* [2006] FMCA 234. One of the five women had applied for a Protection Visa on the basis that she assisted with the prosecution and feared for her own life and that of her family if she was forced to return to Thailand. It was held by Chief Magistrate Pascoe that the decision of the Refugee Review Tribunal to uphold an earlier decision denying her a visa was erroneous.

[11] INTERIGHTS' Legal Practice Director Andrea Coomber welcomed the judgment stating: "The European Court has confirmed that human trafficking is an affront to human dignity and fundamental human rights, and as such is prohibited by the European Convention". On the same web page INTERIGHTS, and third party intervener, calls the case a "historic first judgment." International Centre for the Legal Protection of Human Rights, *Rantsev v Cyprus and Russia*, online: INTERIGHTS <http://www.interights.org/rantsev/index.html>; Nina Vallins of Project Respect called *Tang* "the most crucial test of the effectiveness of our criminal laws against … slavery ever to come before an Australian court". Project Respect, Media Release, "Sexual Slavery Laws On Trial in Landmark High Court Appeal" (9 May 2008) online: Project Respect <http://projectrespect.org.au/files/wei_tang_media_release_2008_final_WEB.pdf>. Irina Kolodizner noted that "Tang is a welcome first step for the development of an anti-slavery jurisprudence in Australia and internationally". Irina Kolodizner, "Developing an Australian Anti-Slavery Jurisprudence R v Tang" (2009) 31:3 Sydney L Rev 487 at 497. The Group of Experts on Trafficking in Human Beings of the European Commission has stated that the Rantsev decision "offers important guidance on the human rights aspects of human trafficking" and has also commented that "[i]n general, the Group approves the decision of the court". Group of Experts on Trafficking in Human Beings of the European Commission, *Opinion N° 6/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission On the Decision of the European Court of Human Rights in the Case of Rantsev v. Cyprus and Russia* (22 June

Although several pieces have been written separately on each of these two cases,[12] the originality of this article lies in the comparison of these two globally significant – and often praised – cases. As noted, our main concern lies with the treatment by the Australian and European judiciaries of the concepts of slavery and trafficking when compared to the definitions articulated in international treaties. We use the facts in the Australian and European cases as the basis for our discussions of not only the intended meaning of slavery and trafficking in the relevant international instruments, but also how they should be understood in contemporary law.

In this article, we argue that both the Australian High Court and the ECtHR erred, respectively, in upholding the decision that Ms Tang's actions amounted to slavery, and in finding that there had been a breach of Article 4 of the *European Convention of Human Rights* (European Convention or ECHR) which prohibits slavery, servitude and forced or compulsory labour. As stated above, neither of the judicial bodies was looking explicitly at the question of trafficking. In the case of Tang, trafficking is treated at various points throughout the reasoning of the trial judge, Court of Appeal, and High Court, as tantamount to slavery. In *Rantsev*, given the lack of an explicit reference to trafficking in the European Convention, the ECtHR goes so far as to argue, without any substantiation, that trafficking is "by its very nature and aim of exploitation", modern-day slavery.[13] In our view, had either of these judicial bodies actually been looking at the question of trafficking, neither of the two cases could be accurately judged to be cases of human trafficking. This distinction becomes even starker when we introduce a third case, *R v Dobie*, the first conviction for human trafficking in Australia, in the latter part of this paper.

Our purpose in this article is to establish an interpretation of these principles that does not dilute the high standards required for slavery and trafficking in international law nor undermine future prosecutions. It is also our aim to provide a framework that does not exclude those who have been exploited but are not slaves. We intend to establish a standard that has a legally defined scope in order to protect the rights of defendants from instances where the concepts of slavery and trafficking are applied beyond their intended meaning. To do this, we demonstrate that labelling some

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2010), online: European Commission <http://ec.europa.eu/anti-trafficking/download.action?nodeId=9ee98429-1792-4f97-a965-a977bd16724d&fileName=Opinion+2010_06+of+the+Expert+Group+on+trafficking_en.pdf&fileType=pdf>.

[12] See Jean Allain, "R v Tang, Clarifying the Definition of 'Slavery' in International Law" (2009) 10 Melb J Int'l L 246.; Stephen Tully, "Sex, Slavery and the High Court of Australia: The Contribution of R v Tang to International Jurisprudence" (2010) 10 Int'l Crim L Rev 403; Jean Allain, "Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery" (2010) 10 Hum Rts L Rev 546; Roza Pati, "States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus & Russia" (2011) 29 BU Int'l LJ 79; Vladislava Stoyanova, "Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev case" (2012) 30 Nethl QHR 163.

[13] *Rantsev*, *supra* note 9 at para 281-282.

situations as "seriously oppressive employment relationships,"[14] borrowing from the minority reasoning of Honourable Justice Kirby in *R v Tang*, is an approach that is more applicable to what is typically evident in cases labelled as trafficking; that is, initially voluntary negotiations by the victim to enter into a (written or otherwise documented) employment agreement. Moreover, this approach draws on legal principles that exist in many jurisdictions in destination countries, in the form of workplace regulations. It calls for more vigorous application of such laws to cases that fall outside of the realm of trafficking or slavery but where victims are deserving of redress for labour exploitation.

In the first section of this article, we provide an overview of the facts of the two cases. This overview is followed by a discussion on the meaning of trafficking and the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (UN Protocol).[15] In this same section we also touch upon trafficking-related domestic legislation in Australia and instruments of the Council of Europe. In the third section of this article, we explore the concept of slavery and the evolution of the 1926 *Convention to Suppress the Slave Trade and Slavery* (Slavery Convention)[16] and the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Slavery* (Supplementary Slavery Convention)[17] In this section, we also consider how the two Conventions' key concepts related to slavery have been incorporated into Australian law and the European Convention on Human Rights (European Convention). We briefly discuss here the different manifestations of the concept of "debt bondage". In the final section, we bring together the facts and the law and highlight the gaps in evidence necessary to prove the essential elements of the two crimes. We conclude that the experiences of the five Thai women in Australia and that of Ms Rantseva in Cyprus were not clear cases of slavery or trafficking. Such a finding is not inconsistent with our view that, in both cases, the women involved were victims of crimes worthy of redress. In support of this conclusion, we argue for an alternative legal framework that is better suited to address crimes of this nature that do not meet the legal standards set for trafficking and slavery.

It should be noted here that we recognise the limitations of comparing two cases that involved entirely different legal procedures. However, a key common factor was that both judiciaries, if they were to find in favour of the complainants, had to fit a set of facts that more closely resembled elements of the crime of human trafficking, within the concept of slavery.

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[14] See *The Queen v Tang*, *supra* note 8 at para 117, Kirby J.

[15] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime, GA Res 55/25, UNGAOR, 55th Sess, Supp No 49, UN Doc A/45/49, (2001) Annex 2 at 60 [hereinafter UN Trafficking Protocol]. It is commonly referred to as the Palermo Protocol.

[16] *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Can TS 1928 No 5 (entered into force 30 April 1957) [hereinafter "Slavery Convention"].

[17] *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, 3 UNTS 226, Can TS 1963 No 7 (entered into force 30 April 1957).

We are also aware of how the definitions of slavery at the Australian domestic level and in the European Convention differ from the international provisions and we discuss those differences. In fact, we argue that it is the particular failure of both Courts to use the international provisions to aid their "domestic" interpretation that caused flaws in the precedents that were established. In passing, we highlight the particular misunderstanding of the trial judge in the County Court of Victoria of the notion of being a victim of trafficking, that is, the scant attention given to the negotiations of the five Thai women with their traffickers and their voluntary entry into an agreement to work abroad, albeit under different conditions, in their assessment of whether Wei Tang exercised the "powers of ownership" involved in slavery.

Our key contribution to current legal debates lies in our identification of the failure of academic and legal circles to recognise how some experiences of the exploited migrant sex worker, regardless of how grave and exploitative, should not be classified as slavery or trafficking if the circumstances of the case fail to meet the legal requirements of these crimes; and yet, the victims still deserve legal redress. In these cases, we argue that courts can provide that redress by identifying and punishing exploitative labour conditions through tort remedies or, in some jurisdictions, even through criminal law.[18]

II. Tang and Rantsev: Comparative Jurisprudence on Trafficking and Slavery

1. Ms. Wei Tang and the Melbourne brothel

The now noted prosecution of Ms Tang was decided by the Australian High Court in 2008 and concerned Ms Tang's relationship with five sex workers of Thai nationality working at her licensed brothel[19] in Melbourne, Victoria. The Australian High Court upheld the judgment of the Victorian County Court that addressed allegations that, at various times between 10 August 2002 and 31 May 2003, Ms Tang possessed the five women as slaves. The Commonwealth Director of Public Prosecutions alleged that each of the five women, who had previously worked in the sex industry,[20] was understood to have voluntarily entered an agreement to work as a sex worker in Australia.[21] The agreement was engaged through a broker in

[18] Some countries have criminalized acts of exploitation of workers by employers or related persons. For example, in Spain criminal courts have jurisdiction to adjudicate such cases. *Criminal Code*, 1995 (Spain), Organic Law 10/1995, art 311, published in B.O.E. 281. Additionally, if so requested by the complainant, the court may grant civil compensation on the basis of tort law. *Ibid*, art 109. Another example is Australia, where imposing forced labour on migrant workers is punishable is an aggravated offence punishable by up to five years of imprisonment. *Migration Amendment (Employer Sanctions) Act* 2007 (Cth). Applicable employment conditions have also been established in the *Fair Work Act* 2009 (Cth), which is monitored by the Fair Work Ombudsman.

[19] Licensed pursuant to the *Prostitution Control Act 1994* (Vic).

[20] *R v Wei Tang*, [2007] VSCA 134, at para 5, Eames J, rev'd [2008] HCA 39.

[21] *Ibid*.

Thailand, with each woman incurring a debt of between AUD$40,000 and AUD$45,000 to be paid off by working at the Melbourne brothel.[22] The Thai recruiters, from whom the contracts had been purchased, were paid around AUD$20,000 for each of the women.[23] Ms Tang paid a percentage of that sum in respect to four of the women, with the remainder paid between Ms Donoporn Srimonthon, a recruiter of sex workers who had previously worked as a sex worker in Ms Tang's brothel, and another individual.[24] Ms Tang paid no money with respect to the fifth woman.[25]

Under the agreements, the five women had their travel expenses paid and were provided with accommodation, food and incidentals while they were in Australia. Although they travelled on valid tourist visas, they had been obtained without disclosure of the women's intention to work in Australia. There was conflicting evidence as to the extent of the knowledge of the five women concerning how those visas were obtained.[26]

On arrival in Australia, the women were advised that they would be known as "contract girls", to distinguish them from the other sex workers at Ms Tang's brothel.[27] Their passports and return airline tickets were taken and placed in a locker at the brothel, apparently in the event that the brothel was raided and documents were requested by Department of Immigration officials.[28] The prosecution later contended that the documents were retained so that the women could not run away.[29] There was also disputed evidence of the women's freedom of movement outside their places of residence.[30] Ms Tang, Ms Srimonthon and the brothel manager, Mr Pick, held keys to an apartment where some of the sex workers were living.[31] Others resided in the house of another brothel manager, with three or four women sleeping in each room.[32] The five Thai women had apparently been told to remain indoors so as not to be seen by immigration officials.[33]

The brothel charged clients a basic rate of AUD$110. Of this sum, the fee of AUD$110 was divided between Ms Tang (AUD$43) and the owners of the contract for the particular sex worker. The debt for each of the "contract girls" was reduced at the rate of AUD$50 per client. The women were allowed one "free" day per week but were permitted to work on that day if they chose, and they could retain any earnings they made. Two of the five women paid off their debts after approximately 6 months, at which time their passports were returned. These two women were subsequently free to choose their hours of work and accommodation and were paid for their sex

[22] *Ibid*.
[23] *Ibid* at para 10.
[24] *Ibid*.
[25] *Ibid*.
[26] *Ibid* at para 6.
[27] *Ibid* at para 7.
[28] *Ibid* at para 8.
[29] *Ibid*.
[30] *Ibid* at para 12.
[31] *Ibid* at para 11.
[32] *Ibid*.
[33] *Ibid*.

work.[34] This is a key fact discussed further below.

The brothel was raided on 31 May 2003. Ms Tang was found guilty of five counts of possessing a slave and five counts of using a slave, contrary to s 270.3(1)(a) of the *Criminal Code Act 1995* (Cth)[35] by the Victorian County Court. The Court of Appeal of the Supreme Court of Victoria rejected a number of grounds of appeal. If upheld, they would have resulted in an acquittal on all counts. The Court of Appeal did uphold one ground of that appeal: that the directions given to the jury were inadequate, quashed each conviction, and ordered a new trial on all counts. It held that the jury should have been instructed that the prosecution had to prove that Ms Tang had the knowledge or belief that the powers being exercised were through ownership, as well as proving an intention to exercise those powers. The prosecution appealed to the High Court and Ms Tang sought special leave to cross-appeal on three grounds against the order for a new trial, calling instead for an outright acquittal.

The primary point of contention for consideration by the High Court was whether or not the trial judge should have instructed the jury of the need to establish a certain state of knowledge or belief on the part of Ms Tang as to the source of the powers she was exercising, in addition to an intention to exercise those powers. On this point, the majority of the High Court concluded that the prosecutor did not need to prove what Ms Tang knew or believed about her rights of ownership or that she knew or believed that the women were slaves. The Court unanimously refused special leave on the third ground, which was that the Court of Appeal failed to hold that the jury's verdicts were unreasonable or could not be supported by the evidence; this is the ground mainly analysed in this article, as it is the one directly related to the concept of slavery.

2. Violations of the Rights of Mr Rantsev by Cyprus and Russia

The First Section of the ECtHR released its judgment in the case of *Rantsev v Cyprus and Russia* on 7 January 2010, six years after the filing of the original petition. The situation that led to the case concerned a Russian citizen, Ms Oxana Rantseva, who was found deceased on 28 March 2001 in Cyprus and whose father later filed a joint complaint against Cyprus and Russia for their responsibility for the violation of his rights.[36]

According to the narrative of the ECtHR, before her departure from Russia, X.A., the owner of a cabaret in Limassol, Cyprus, applied for an "artiste" visa and work permit for a new employee, Ms Rantseva, annexing a copy of Ms Rantseva's passport, a medical certificate, a copy of an employment contract (apparently not yet signed by Ms Rantseva) and a bond, signed by X.A., undertaking to pay Ms Rantseva's costs should she

[34] *Ibid* at paras 9, 14.
[35] Ms Srimonthon was also charged with two counts of slavery trading and three counts of possessing a slave. She pleaded guilty and was finally sentenced by the Victorian Supreme Court of Appeal to six years of imprisonment, with a non-parole period of two and a half years.
[36] *Rantsev*, *supra* note 9 at para 13.

require repatriation from Cyprus.[37]

After being granted a temporary residence permit in Cyprus, Ms Rantseva was rapidly granted a permit to work as an artiste in X.A's cabaret, which was managed by his brother, M.A. She commenced work on 16 March 2001.[38] It was only a few days later, on 19 March, that Ms. Rantseva, apparently tired and wanting to return to Russia, took all her belongings and left the apartment where she had been residing with several other cabaret workers. When told of her departure, M.A. informed the Immigration Office in Limassol that Ms. Rantseva had abandoned her place of work and residence, with the hope of having her expelled from Cyprus so that he could arrange for another woman to work in his cabaret.

On 28 March, Ms Rantseva was seen in a disco by another cabaret artist, who contacted M.A., the manager of the cabaret, who later came to the disco and collected her with a security guard. He took her to the Limassol Police station, told the police to deport her, and left Ms Ransteva at the station. However, the police found that she was not a wanted person[39] and noted that they had no record of the earlier complaint by M.A. concerning her disappearance on 19 March. Initially reluctant to return to the police station, M.A. later collected Ms Rantseva, along with her passport from the police who wrongly "confided" Ms Rantseva to his "custody".[40]

In the early hours of the morning of 28 March, M.A. took Ms Rantseva to the apartment of M.P., a male employee at the cabaret, where he lived with his wife. From here onwards, the ECtHR reports two contradictory versions. According to M.P.'s wife, Ms Rantseva was offered food and a place to rest, but other evidence suggested that she was detained against her will.[41] At around 6.30a.m. that same morning, Ms Rantseva was found dead on the street below the apartment. Her handbag was over her shoulder. The police found a bedspread looped through the railing of the smaller balcony adjoining the room in which Ms. Rantseva had been staying on the upper floor of the apartment building,[42] suggesting she had fallen to her death while trying to escape.

In his petition pursuant to Articles 2 (right to life), 3 (prohibition on torture or inhumane and degrading treatment or punishment), 4 (slavery, servitude and compulsory labour), 5 (right to liberty and security of the person) and 8 (right to privacy and family life) of the European Convention, Mr Rantsev contended that (i) Cyprus had not undertaken a "sufficient investigation into the circumstances of the death of his daughter"; (ii) the Cypriot police had not provided "adequate protection of his daughter while she was still alive"; and (iii) the Cypriot authorities had failed to take steps to

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[37] *Ibid* at para 15.
[38] *Ibid* at para 16.
[39] *Ibid* at para 17
[40] See *ibid* at para 298. The Court concludes that "…they did not release her but decided to confide her to the custody of M.A".
[41] *Ibid* at paras 21-24.
[42] *Ibid* at para 25.

punish those responsible for his daughter's death and ill-treatment.[43] Mr Rantsev also claimed that Cyprus had violated Article 6 (due process) because he did not have access to a court in Cyprus to obtain sufficient redress.[44] Regarding Russia, the petitioner complained under Articles 2 and 4 of the European Convention about the failure of the Russian authorities (i) "to investigate his daughter's alleged trafficking and subsequent death" and (ii) "to take steps to protect her from the risk of trafficking."[45] For the purposes of this discussion, we are only concerned with Article 4 of the European Convention, which provides: "(1) No one shall be held in slavery or servitude, and (2) No one shall be required to perform forced or compulsory labour."[46]

Before proceeding to analyse the legal norms relevant to both cases, it is important to note the existence of a significant procedural difference between *Rantsev* and *Tang*. *Rantsev v Cyprus and Russia* is a case brought by a victim – the father – who contended that the Governments of Cyprus and Russia had violated his human rights. It is not a civil complaint or criminal case against the alleged perpetrators of a crime. In fact, the ECtHR considered the absence of a proper criminal investigation a procedural violation of Article 4, inasmuch as Cyprus had failed to train law enforcement officials to initiate an investigation in cases where there were sufficient indicators of possible trafficking. Likewise, Russia's procedural failure to comply with Article 4 stemmed from its failure to undertake a criminal investigation into the recruitment aspect of cross-border trafficking. In contrast, Tang was a criminal prosecution brought by the state against Ms Tang, an individual, for her crimes against the five Thai women. The difference is important insofar as it reflects upon the limitations faced by the ECtHR in particular, whereby the Court was unable to find the individual cabaret owners – and others involved in Ms Rantseva's eventual death – criminally responsible. Put simply, the position of the ECtHR can be likened to a situation – one which does not exist – where the Australia High Court would be called to adjudicate on the responsibilities of the Government of Australia to prevent trafficking to and from its borders and to investigate instances of alleged trafficking as they came to light.

III. The Crime of Trafficking and the UN Protocol

In the following section, we focus on the concept of human trafficking and provide an analysis of the definition of trafficking in the UN Protocol, as well as its key flaws. We subsequently look at the enactment of Australian domestic law to address trafficking to, from, and within Australia and how these provisions compare with the UN Protocol's definition. Finally, we

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[43] *Ibid* at para 3.
[44] *Ibid*.
[45] *Ibid*.
[46] *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11*, 4 November 1950, 213 UNTS 221, Eur TS 5 (entered into force 3 September 1953) [hereinafter ECHR or European Convention].

consider the provisions on trafficking enacted by the Council of Europe.

1. The elements of the crime of trafficking: Means, method and purpose

Adopted in December 2000, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [UN Protocol] represents the most recent international consensus on the definition of the crime of trafficking and its elements.[47] The definition, although drafted to address trafficking from a criminal justice perspective, has repeatedly been cited in academic and non-academic circles, as an authoritative definition of what is entailed in the act of trafficking in human beings. In concrete terms, the UN protocol defines trafficking 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;…[48]

This definition revolves around three separate elements: first, the movement; second, the means; and finally, the purpose of the act of trafficking. Consent is noted as "irrelevant" if any of the means listed are used to achieve it, that is, coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits.[49] For a given situation to be deemed one of trafficking all three elements (action, means and purpose) must be present, with the exception of cases involving children (under 18 years of age), where none of the means listed need to be present.[50]

The UN Protocol's definition has been criticised extensively and has been the particular target of feminist theorists.[51] The appropriateness of this definition for importation into domestic law has also been questioned, given that it contains excessive burdens of proof and ambiguous language.[52] One

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[47] For a detailed discussion on the UN Protocol and debates between feminist theorists concerning the meaning of consent and exploitation, see Ramona Vijeyarasa, "Exploitation or Expectations: Moving Beyond Consent" (2010) 7 Women's Pol'y J of Harv 11.
[48] UN Trafficking Protocol, *supra* note 15 at 3(a).
[49] *Ibid* at 3(b).
[50] *Ibid* at 3(c).
[51] See e.g. Elizabeth M. Bruch, "Models Wanted: The Search for an Effective Response to Human Trafficking" (2004) 40 Stan J Int'l L 1; Beverly Balos, "The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation" (2004) 27 Harv Women's LJ 137; Jo Doezema, "Now you see her, now you don't: Sex workers at the UN Trafficking Protocol negotiations" (2005) 14:1 Soc & Leg Stud 61.
[52] Beate Andrees & Mariska N.J. van der Linden, "Designing trafficking research from a labour market perspective: The ILO experience" (2005) 43:1 Int'l Migration 55 at 58; see also Ann Jordan, "The annotated guide to the complete UN trafficking protocol" International Human Rights Law Group (2002), online: Organization of American States <http://www.oas.org/atip/Reports/Traff_AnnoProtocol.pdf>.

difficulty is the definition's focus on the movement of people through threats, force, coercion, fraud, or deception, which does not clearly address situations where a potential migrant voluntarily uses the services of a smuggler but later finds himself or herself in a situation of exploitation, with their initial consent now put into question. The definition therefore deflects attention from what is often a blurred and false distinction between trafficking and other forms of irregular migration, a problem heightened by the fact that smuggling is defined in a separate instrument, that is, the UN *Protocol against the Smuggling of Migrants by Land, Air and Sea*.[53]

Further, many of the means listed, such as fraud or coercion, are concepts defined elsewhere in domestic and international law. However, the phrase "abuse of power or of a position of vulnerability" is undefined and adds a further complication. The *travaux préparatoires* to the UN Protocol note:

> The reference to abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved (UNODC 2006, 347).[54]

The *UN Office on Drugs and Crime Model Law Against Trafficking* provides limited assistance in defining this phrase by listing a range of examples that constitute situations where an individual has "no real or acceptable alternative". These examples include pregnancy; any physical or mental disease or disability of the person, including addiction to the use of any substance; reduced capacity to form judgments by virtue of being a child, illness, infirmity or a physical or mental disability; promises or giving sums of money or other advantages to those having authority over a person; and being in a precarious situation from the standpoint of social survival.[55] This last example, in particular, offers no clarification given that it raises the question of what level of social inequality is required to render irrelevant a person's consent to engage in unsafe or illegal migration.

In addition, those who oppose the sex industry often argue that all forms of prostitution are, by definition, exploitative.[56] According to these views,

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[53] The UN Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organised Crime, GA Res 55/25, UNGAOR, 55th Sess, Supp No 49, UN Doc A/45/49, (2001) at 65 [hereinafter UN Smuggling Protocol]. It provides that the "'[S]muggling of migrants' shall mean 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", art 3(a). See also Vijeyarasa, *supra* note 47.

[54] United Nations Office on Drugs and Crime (UNODC), *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006), online: UNODC <http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf>.

[55] UNODC, *Model Law Against Trafficking in Persons* (2009), online: UNODC <http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf>.

[56] Balos, *supra* note 511; Melissa Farley, "Bad for the body, bad for the heart: Prostitution harms women even if legalized or decriminalized" (2004) 10 Violence Against Women 1087; Sheila Jeffreys, "Women Trafficking and the Australian Connection" (2002) 58 Arena Mag 44, 47.

even when sex work is a choice, it is driven by systematic inequality and lack of opportunities. Frequently, proponents of this view put all migration for sex work into the category of trafficking.[57] To the contrary, for those who advocate in favour of the legalisation of sex work, the migrant sex worker is seen as someone who has chosen to work in the sex industry, which can offer more income and freedom than the alternatives available to them at home. This latter argument draws a distinction between voluntary sex work and trafficking for sexual exploitation. In the context of this debate, the UN Protocol's definition leaves unanswered the question of how we should understand what is a "real and acceptable alternative".[58]

Finally, the term exploitation is defined without adequate clarity in the UN Protocol: "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".[59] Once again, the definition of some of these concepts can be located elsewhere in international law; for example, forced labour appears in a number of ILO Conventions, including No. 29 on *Forced Labour*[60] and No. 105 on the *Abolition of Forced Labour*.[61] However, "the exploitation of the prostitution of others" is an undefined concept that takes us back to the feminist divide noted above. As we will see later in this paper, this vague phrasing poses great difficulties when addressing cases involving potential migrant sex workers who face exploitative and trafficking-like labour conditions in destination countries like Australia and Cyprus.

2. *Application of the Protocol in Australia and European Jurisdictions*

A. Australia

Until 2005, Australia did not have any laws specifically addressing the issue of trafficking, with the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) criminalising only slavery, sexual servitude and deceptive recruitment for sexual services (Division 270). Those "slavery-specific" provisions are the ones applied in Tang, as we will see later in this article.

On 11 December 2002, Australia became a signatory to the *UN Trafficking Protocol* and ratified it on 14 September 2005. In July 2005, the *Criminal Code Amendment (Trafficking in Persons and Debt Bondage) Act 2005* (Cth) was introduced (Division 271) and inserted into Chapter 8 ("Crimes against

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[57] See e.g. Farley, ibid at 1094-1109; Sheila Jeffreys, "Challenging the Child/Adult Distinction in Theory and Practice on Prostitution" (2000) 2:3 Int'l Feminist J of Politics 368.
[58] See the discussions in Vijeyarasa, *supra* note 47; Balos, *supra* note 51.
[59] UN Trafficking Protocol, *supra* note 15 at 3(a).
[60] ILO Forced Labour Convention (No. 29), 1930, online: International Labour Organization <http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312174>.
[61] ILO Abolition of Forced Labour Convention (No. 105), 1957, online: International Labour Organization <http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312250>.

humanity and related offences").[62] The definition of trafficking in Division 271, however, differs in a number of respects from the UN Protocol's definition. Considered neither clear nor comprehensive, the Australian Human Rights Commission has highlighted that the domestic laws "may not reflect the full suite of Australia's international legal obligations in this area".[63]

Division 271 provides for general and aggravated offences of trafficking; the offence of international and domestic trafficking in children; the general and aggravated offences of domestic trafficking in persons; and the offence of debt bondage. The provisions define trafficking as where a person organises or facilitates the actual or proposed entry or exit or the receipt of another person into Australia and uses force or threats to obtain the other person's compliance. The provisions broaden the mens rea of trafficking by providing that a person commits the offence where they facilitate the entry or exit of another person, and "the person is reckless as to whether the other person will be exploited, either by the first person or another, after that entry or receipt".[64] The general offence of trafficking also includes deceit regarding the true purposes of the recruitment of the victim for entry into, or exit from, Australia.

Like the domestic slavery provisions, the provisions dealing with trafficking for sexual exploitation do not actually prohibit recruitment for the provision of sexual services in general but only under such situations as coercive recruitment. This distinction allows conformity with the legal status of prostitution in Victoria.[65] The provisions in fact suggest legislative recognition of the migrant sex worker who enters into a contract to provide sexual services in Australia.[66] Pursuant to Section 271.2 (2B), however, the making of such arrangements will be deemed an offence of trafficking in

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[62] Criminal Code Amendment (Trafficking in Persons and Debt Bondage) Act *2005* (Cth) at s 271.2(1).

[63] Bronwyn Byrnes, "Beyond Wei Tang: Do Australia's Human Trafficking Laws Fully Reflect Australia's International Human Rights Obligations?" (Workshop on Legal and Criminal Justice Response to Trafficking in Persons in Australia: Obstacles, Opportunities and Best Practice delivered at the Australian Human Rights Commission, 2009) online: Australian Human Rights Commission <http://www.hreoc.gov.au/about/media/speeches/sex_discrim/2009/20091109_trafficking.html>.

[64] Criminal Code Amendment, *supra* note 62 at s 271.2(1B)(b).

[65] It should be noted that while the Criminal Code does not prohibit recruitment for the provision of sexual services, the Prostitution Control Act does prohibit advertisement that either induces a person to seek employment as a prostitute or encourages a person to seek employment with any business that provides prostitution services. *Prostitution Control Act*, *supra* note 19 s 17(3).

[66] This point is specifically made in the Explanatory memorandum to the 2004 amendment regarding section 270.7 on sexual servitude: "The amended offence criminalises activity that is essentially preparatory to sexual servitude *and is not designed to capture employment disputes in the context of legalised prostitution*. That is, the deceptive recruiting offence will not capture employment disputes in the sex industry where the sex worker disputing the particular contract or arrangement has not been trafficked into Australia" (emphasis added). Explanatory memorandum to the criminal code amendment (trafficking in persons offences) bill 2004, online: Australasian Legal Information Institute < http://www.austlii.edu.au/au/legis/cth/bill_em/ccaipob2004483/memo1.html>

persons if there are any indications of deceit. Indications include deceit concerning (i) the nature of the sexual services to be provided; (ii) the extent to which the other person will be free to leave the place or area of work; (iii) the extent to which the other person will be free to cease providing sexual services; (iv) the extent to which the other person will be free to leave his or her place of residence; and (v) if there is a debt owed or claimed to be owed by the other person in connection with the arrangement for the other person to provide sexual services – the quantum, or the existence, of the debt owed or claimed to be owed.[67]

Besides being an element of trafficking, today debt bondage in Australia is considered a crime in itself through a separate provision of the Criminal Code. It targets the use of contracts to which large debts are attached in order to coerce victims to enter into sexual servitude or forced labour, including expenses alleged to have been incurred for the victim's travel arrangements (although there is no need for any kind of movement of – or intention to move – the victim for the debt bondage provisions to apply).[68] [69] Yet, it is important to note that the specific "debt bondage" offence was only introduced into the Code (s 271.8) after the commission of Ms Tang's alleged offences. Consequently, the Court could not apply the debt bondage provisions to Ms Tang's case, which may be the primary explanation for Chief Justice Gleeson terming these provisions "immaterial".[70] It should also be noted that the maximum penalty for this offence is much less severe than the offences of possession and use as a slave (s 270). However, we believe that a discussion about the nature of the debt is relevant in the context of *Tang* as the definition of slavery (s 270.1), the offence that is actually discussed in the case, makes a specific reference to when it "results from a debt or contract made by the person". We will explore this point further when discussing "slavery" below.

B. Europe

The 47 member states of the Council of Europe include countries of origin, transit and destination for human trafficking. On 3 May 2005, the Committee of Ministers adopted the *Council of Europe Convention on Action against Trafficking in Human Beings* [Council of Europe Convention],[71] which entered into force on 1 February 2008. At the time of publication, it has been

[67] Criminal Code Amendment, *supra* note 62, at s 271.2(2B).
[68] Jennifer Burn, Sam Blay & Frances Simmons, "Combating Human Trafficking: Australia's response to modern day slavery" (2005) 79 Austl L J 543 at 548.
[69] The law sets out a number of circumstances that courts and judges may consider to determine whether a situation of debt bondage exists. These include evidence about the economic relationship between the accused and the alleged victim, evidence of any written or oral contract or agreement, the personal circumstances of the alleged victim including whether they are entitled to be in Australia under the *Migration Act 1958* (Cth), her or his ability to speak English, and her or his physical and social dependence on the accused. Criminal Code Amendment, *supra* note 62, s 271.8(2).
[70] *The Queen v Tang*, *supra* note 8 at 5, Gleeson CJ.
[71] Council of Europe, Committee of Ministers, *Convention on Action against Trafficking in Human Beings*, CETS No.197 16.V.2005 (2005).

signed by 43 states and ratified by 35.[72] The Council of Europe Convention, the first European treaty in the field of human trafficking, addresses prevention, prosecution and the protection of victims.[73] It also provides a mechanism for monitoring the implementation of the obligations it imposes.[74] It should be noted that, despite being a "European" instrument, this Convention, given its material scope, is open to the signature of non-member states.[75]

The UN Protocol's definition of trafficking was adopted in the Council of Europe Convention, although the latter's definition is seemingly broader in approach, applying "to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime."[76] To the contrary, the UN Protocol specifically supplements the UN Convention against *transnational* organised crime. The ECtHR may not use the UN Protocol as anything more than an interpretive tool, as it is bound by and may only apply the *European Convention on Human Rights* and no other international or domestic law.

At a more general level and importantly for this paper, the European Convention contains several provisions that are relevant to the issue of human trafficking, notably Article 3 (prohibition on torture or inhuman or degrading treatment), Article 4 (prohibition of slavery, servitude, forced and compulsory labour), Article 5 (right to liberty and security), and Article 8 (right to respect for private and family life). Inspired by the *Universal Declaration of Human Rights*, the European Convention in fact makes no reference to trafficking, a gap deemed "unsurprising" by the ECtHR in *Rantsev*.[77] As explained later in this paper, the ECtHR simply dismissed the absence of the term trafficking from the European Convention, opining that trafficking itself may be considered to run counter to the spirit and purpose of Article 4.[78] As such, the Court based its reasoning on the following line of thought: if trafficking goes against the very principles of Article 4, the legal standards that are applied to Article 4 can also be used to assess the alleged crime of human trafficking. If the standards required of States Parties to fulfil the requirements of Article 4 have not been met in that particular trafficking case (e.g. a thorough investigation of potential violations of Article 4), this would amount to a violation of Article 4, even though Article 4 makes no reference to trafficking itself, as we will see in Section 3.B.b below.

Before turning to the concept of slavery, it is important to recognise that

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[72] The status of ratifications is the responsibility of the Council of Europe Treaty Office. The current state of the process regarding the Convention on Action against Trafficking in Human Beings can be viewed on the Council of Europe's website. Council of Europe Treaty Office, *Council of Europe Convention on Action against Trafficking in Human Beings CETS No.: 197*, online: Council of Europe <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG>.
[73] Council of Europe Convention, *supra* note 71 at art 1.
[74] *Ibid* at Chapter VII, arts 36-38.
[75] *Ibid* at art 43(1).
[76] *Ibid* at art 2.
[77] *Rantsev*, *supra* note 9 at para 277.
[78] *Ibid* at paras 279, 282.

the judges in both instances applied the laws by which they were bound (mainly "pure" slavery-servitude provisions). However, we argue below that both the Australian High Court and the Strasbourg Court erred in their application. In the Australian case, the Court erred by overturning the orders of the Victorian Court of Appeal for a new trial and upholding the jury decision of Ms Tang's guilt for the offence of slavery. In the European case, the Court erred by finding the government of Cyprus responsible for failing to protect Ms Rantseva from trafficking and both the governments of Cyprus and Russia responsible for failing to investigate that incident of trafficking. These interpretations resulted in two decisions that involved a misapplication of the laws by which the Australian Lower and Appellate Courts and the ECtHR were respectively bound (slavery or servitude provisions); while at the same time not applying correctly the concepts and principles outlined in international law (such as slavery, servitude, trafficking). We believe that the relevant provisions in international law could have aided the interpretation of their "domestic" law and helped to establish a more solid precedent for future cases.

One could argue that this article should exclusively focus on the interpretation of slavery-servitude provisions, as both cases were purely adjudicated on that basis. However, both Courts, at some point or another in their reasoning, use the concept of trafficking, hinting at the fact that it may be somehow related to slavery. For example, the majority in the Australian High Court specifically mentions the Rome Statute of the International Criminal Court (ICC), which entered into force in 2002, and used it to support the view that the existence of trafficking does not exclude slavery.[79] In this instance, the specific provision cited by the Court refers to the definition of enslavement in the ICC context: [enslavement is] "the exercise of any or all of the powers attaching to the right of ownership over a person ... includ[ing] the exercise of such power in the course of trafficking in persons".[80]

However, one could follow the reasoning of the High Court *a contrario*. To adequately enhance its understanding of Ms Tang's slavery case, the Court could have looked into the concept of trafficking to see if Ms Tang was (or was not) a trafficker according to international law (in this case the UN Trafficking Protocol). After such an evaluation, had the Court found that Ms Tang's was not a case of trafficking according to international law, there would be further grounds to suggest that neither was it a case of slavery. In this respect we support the way the dissent in Tang explores the issue of trafficking in much more detail in order to use this concept to achieve a better understanding of the Australian provisions on slavery.

Regarding *Rantsev*, the ECtHR, as we will see several times in this article, simply equates the existence of trafficking with a violation of Article 4 of the ECHR, a position with which we disagree. To adequately determine if this

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[79] *The Queen v Tang*, *supra* note 8 at 24, Gleeson CJ.
[80] *Rome Statute of the International Criminal Court*, 12 July 1998, 2187 UNTS 900, art. 7(2)(b) [hereinafter Rome Statute].

equivalence between trafficking and slavery in Article 4 existed, the Court should have undertaken, at the outset, an analysis that allowed it to ask and answer whether this was a case of trafficking. As we will later explain, in our view the Court failed to use the UN Trafficking Protocol as an interpretive aid to assess whether Ms Rantseva was actually legally trafficked instead of simply assuming so.

IV. The Elements of the crime of slavery

In this section, we provide an overview of the elements of the crime of slavery as set out in the *1926 Convention to Suppress the Slave Trade and Slavery* and the *1956 Supplementary Convention to Suppress the Slave Trade and Slavery* (Slavery Convention and Supplementary Slavery Convention, respectively). We also analyse how these provisions have been incorporated into Australian domestic law and the European Convention on Human Rights.

1. The 1926 Slavery Convention and the 1956 Supplementary Convention

The prohibition of slavery was an essential element in the development of modern international law,[81] international criminal law[82] and international legal co-operation.[83] One of the key reasons for its standing as jus cogens is the general consensus in the Western world about the unacceptability of the practice, since at least the end of the 19th century.[84] As a result, it was relatively easy to build on this consensus in the 1920s, when a convention to prohibit slavery globally was canvassed,[85] including the existence of a right to be free from slavery and the absolute character of that right.[86] Those who refused to conform were labelled as deviants and condemned "not only by States but by most communities and individuals as well".[87] It is our belief that the existence of such an agreement about the core concept of slavery played a major role in facilitating the relatively quick development of the Slavery Convention.

The *travaux preparatoires* indicate that, in order to obtain the broadest possible agreement, and with some states being reluctant to include in the scope of the Slavery Convention other situations akin to slavery but where no powers attaching to the right of ownership existed – such as domestic

[81] James Scott Brown, *The Spanish Origins of International Law: Francisco de Vitoria and His Law of Nations* (New Jersey: The Lawbook Exchange Ltd, 2000) at 232.
[82] Nuremberg Trial Proceedings, Vol. 1 Charter of the International Military Tribunal, online: Avalon Project Archive <http://avalon.law.yale.edu/imt/imtconst.asp>.
[83] Richard A Wright & J Mitchell Miller, eds, *Encyclopaedia of Criminology*, vol 2 (New York: Routledge, 2005) at 796 (refers to the 'International Agreement for the Suppression of White Slave Traffic' of 1904, very relevant here).
[84] See e.g. General Act of the Brussels Conference of 1889-90, cited in the Preamble of the Slavery Convention, *supra* note 16.
[85] Slavery Convention, *supra* note 16
[86] The right to be free from slavery is a non-derogable right, see *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, arts 4-8, Can TS 1976 No 47, 6 ILM 36.
[87] Ethan A. Nadelmann, "Global Prohibition Regimes: The Evolution of Norms in International Society" (1990) 44:4 Int'l Org 479.

slavery and similar conditions[88] – the final text of Article 1 was particularly restrictive. Rather than a compromise between opposite positions, Article 1 can been seen as a common denominator on which every state could agree. It reads:

> For the purpose of the present Convention, the following definitions are agreed upon:
>
> (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
>
> (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

However, this definition soon became insufficient, as it was not as comprehensive as the post-World War II international community required.[89] The States Parties involved in the adaptation to the UN structure of the Slavery Convention – developed under the aegis of the League of Nations – found that the definition of slavery in the Slavery Convention relied excessively on the "powers attached" to the legal concept of the "right of ownership", leaving other extremely exploitative conditions where there was no evidence of a master-property relationship without protection.[90] To address this shortcoming, a Conference of Plenipotentiaries was convened by Economic and Social Council Resolution 608(XXI) of 30 April 1956.[91] The Conference drafted a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which was adopted on 7 September 1956 and entered into force on 30 April 1957.[92]

The Supplementary Slavery Convention adopts a different approach altogether, listing "behaviours", such as the establishment of debt bondage, as opposed to legal concepts, such as "ownership". Article 1 provides that "whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention […] the States Parties […] shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible [the] complete abolition or abandonment" of four situations: (a) debt bondage, (b) serfdom, (c) servile marriage and (d) child servitude. Our concern in this paper revolves largely

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[88] Jean Allain, *The Slavery Conventions: The Travaux Preparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Boston: Martin Nihjhoff Publishers, 2008) at 67-68.
[89] Joyce A. C. Gutteridge, "Supplementary Slavery Convention, 1956" (1957) 6:3 Int'l and Comp LQ 449; see also Jean Allain, "The Definition of Slavery in International Law" (2008-2009) 52:2 Howard L J 239.
[90] Ved P. Nanda & M.C. Bassiouni, "Slavery and Slave Trade: Steps toward Eradication" (1972) 12:2 Santa Clara Lawyer 431.
[91] United Nations Conference of Plenipotentiaries held in Geneva August 13 - September 4, 1956.
[92] Supplementary Slavery Convention, *supra* note 17.

around the first situation, debt bondage,[93] defined in the Supplementary Slavery Convention as:

> (a) (…) [t]he 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;

What we see here is that "servitude" as a concept, is not actually defined in the Supplementary Slavery Convention. Instead, a "person of servile status" is defined in article 7(b) as "a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention", that is, either (a) debt bondage; (b) serfdom; (c) servile marriage; or (d) child servitude.

Therefore, to categorise something as slavery, we need to identify the exercise of "powers attached to the right of ownership". The Slavery Convention does not pay attention to how the relationship of master-slave is established, but focuses instead on whether or not a relationship of "owner and owned" exists and what powers are exercised on the basis of that relationship. Although a list of powers is not given, it would include, for example, the power to sell a person. On the other hand, a relationship will be defined as "servitude" (within the framework of the Supplementary Slavery Convention) if it can be placed within one of four pre-established situations listed in subparagraphs (a) to (d) of Article 1 discussed above. It is important to note that a situation of servitude could also be a case of slavery and vice versa. However, this will not necessarily be the case.

2. *Application of the Slavery Convention in Australia and European Jurisdictions*

A. Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)

As noted above, the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) "represented the first attempt by an Australian Parliament to legislate against slavery and in a general sense, address the issue of human trafficking."[94] Prior to that, slavery was governed in Australia by 19th century legislation,[95] which failed to address the realities of modern-day slavery.[96]

The 1999 Act inserted a new Division 270 setting out the offences of

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[93] This is particularly in light of the focus of the Australian courts at all levels in *R v Tang*. See discussion below.

[94] Andreas Schloenhardt (coord), *Slavery and Sexual Servitude and Deceptive Recruiting Offences* (2009) Human Trafficking Working Group, at 2, online: University of Queensland <http://www.law.uq.edu.au/documents/humantraffic/legislation/Criminal-Code-Cth-Div-270-sexual-slavery-offences.pdf.>.

[95] *Act for the Abolition of the Slave Trade*, 1807 (UK), c 36; Slave Trade Act, 1873 (UK), c 88.

[96] Austl, Commonwealth, Law Reform Commission, *Criminal Admiralty Jurisdiction and Prize* (Report No 48) (Canberra: National Capital Printing, 1990) at 83.

slavery (s 270.3), causing another person to remain in sexual servitude (s 270.6), and deceptive recruitment into sexual services (s 270.7). *Criminal Code* (Cth) Section 270.1 defines slavery as: "The condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including *where such a condition results from a debt or contract made by the person* [emphasis added]."

Since "chattel slavery", whereby someone is *legally* bound or *legally* owned by another, a state which is obviously impossible in Australia,[97] the addition of the final phrase – "result[ing] from a debt or contract", which does not appear in the 1926 Slavery Convention – is aimed at expanding the scope of the offence to modern forms of slavery such as debt bondage or extremely exploitative contracts. However, the *Criminal Code* falls short of the Supplementary Slavery Convention by failing to define the meaning of debt. We are therefore left with the question of whether this should be interpreted as any kind of debt, or only those debts that impose particularly onerous conditions. In turn, what will be considered particularly onerous is also left undefined.

R v Wei Tang is the only case heard by the Australian High Court on the basis of Division 270 and it provides limited assistance in understanding this concept of debt.[98] Chief Justice Gleeson considered that the word "including" does "not extend the operation of the previous words but make[s] it plain that a condition that results from a debt or a contract is not, on that account alone, to be excluded from the definition, provided it would otherwise be covered by it".[99] On that basis Chief Justice Gleeson argues that "the definition of 'slavery' in s 270.1 falls within the definition in Article 1 of the Slavery Convention, and the relevant provisions of Division 270 are reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under that Convention".[100]

A key question in *Tang* involves establishing what type of 'debt' can create a condition equivalent to the powers attached to the right of ownership. The obvious solution would have been to follow the reasoning Chief Justice Gleeson used for the Slavery Convention and to equate the term 'debt' from Division 270 to the concept of 'debt' from Article 1 of the Supplementary Slavery Convention quoted above, that is, "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". The majority of the Australian High Court did not make it clear, however, how they understood the concept of 'debt' in this context.[101] As noted above, the provisions on debt bondage (s 271.8) were

[97] Schloenhardt, *supra* note 7 at 3.
[98] In the judgment of the Victorian Court of Appeal, overturned by the High Court of Australia, Justice of Appeal Eames argues that this additional phrase simply means that "A volunteer slave, in other words, is no less a slave". See *supra* note 20, Eames JA.
[99] The Queen v Tang, *supra* note 8 at para 33, Gleeson CJ.
[100] *Ibid* at para 34.
[101] See *ibid* at para 79(5), Kirby J. In his analysis of the debt imposed on the five women, Justice Kirby pays attention to the structural inequalities possibly facing these women and how

only introduced after the alleged commission of Ms Tang's crimes, as was also the case for the trafficking provisions (s 273). Hence, the choice for the Australian courts in *Tang* was restricted to assess if Ms Tang's offences fitted into the legal definition of slavery or, alternatively, if she did not commit any crime at all.

We contend that the failure of the Australian courts to adjudicate on when and under what conditions such 'debt' will amount to the exercise of powers attaching to the right of ownership is a major shortcoming of this case. Moreover we argue that if the concept of 'debt' is not carefully contained by the definition offered by the Supplementary Slavery Convention, or another similar interpretative rule, it would be reasonable to argue that any person who receives a loan from his or her employer and in turn owes them a debt would always be in a situation of servitude. This is discussed in more detail in Section 4 below.

B. European Convention on Human Rights

The European Convention of Human Rights (European Convention) is cursory regarding slavery or servitude. Article 4, entitled "Prohibition of slavery and forced labour", simply states:

> (1) No one shall be held in slavery or servitude.
> (2) No one shall be required to perform forced or compulsory labour. [102]

Before *Rantsev*, the ECtHR had dealt with paragraph (1) of Article 4 in a substantive way only in *Siliadin v France*, a case concerning domestic service.[103] In *Siliadin*, the applicant had agreed that she would work at Mrs D's home until the cost of her air ticket had been reimbursed and that Mrs D would attend to her immigration status and find her a place at school. The Court determined that "[i]n reality, the applicant became an unpaid housemaid for Mr and Mrs D and her passport was taken from her."[104] The applicant specifically requested the ECtHR to look into the wording of the Slavery Convention and the Supplementary Slavery Convention to aid in the interpretation of the European Convention.[105] The ECtHR quickly dismissed the idea of naming this situation as "classic" slavery,[106] given that there was no evident right of ownership. When dealing with servitude, however, the Court departed from paragraph (a) of Article 1 of the Supplementary

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migration into sex work can act as a means of economic betterment to escape situations of inequality: "It would also arguably need to be judged in the context that the complainants voluntarily entered Australia aware of the type of work they were to perform, inferentially so as to make their lives better as a consequence and appreciating that it would result in a debt to those who had made the necessary arrangements to facilitate their travel and relocation." In this regard, the debt is partially justified, given the expenses incurred in transporting the women and arranging their visas.

[102] European Convention, *supra* note 46, art 4. Paragraph (3) details four types of labour that shall not be construed as forced or compulsory labour, which are not relevant to this discussion.

[103] *Siliadin v France*, No 73316/01, [2005] VII ECHR 545.

[104] *Ibid* at para 11.

[105] *Ibid* at para 91.

[106] *Ibid* at para 122.

Convention and considered that, for the purposes of the European Convention, "servitude" "means an obligation to provide one's services that is imposed by the use of coercion."[107]

This interpretation brings to mind the reasoning of the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) regarding the prosecution of Kunarac, Kovac and Vukovic for the crimes of (among others) "enslavement".[108] The case, famous for its definition of rape as a war crime, addressed the issue of enslavement as one of customary international law.[109] The ICTY Appeals Chamber accepted the argument that chattel slavery is impossible today,[110] but reasoned that the issue of control (understood in a general sense) over the slave – what the ECtHR identified as "coercion" or "physical or mental constraint"[111] – is what really matters.[112] To determine if that "coercion" existed – given the obvious difficulties faced in proving the existence of a threat of violence – the Appeals Chamber relied on the work undertaken by the Trial Chamber to establish a (non-exhaustive) list of "indicia of enslavement".[113] For the Appeals Chamber, the difference between chattel slavery in the Slavery Convention and enslavement in customary law would be "one of degree" of the level of destruction of the legal personality.[114]

In *Rantsev*, the ECtHR overturned in practice its position in *Siliadin* and, after noting that the European Convention does not refer to trafficking,[115] resorted to an interpretation "in the light of present-day conditions".[116] The Court continued by deciding to construe trafficking within the spirit of Article 4 of the European Convention.[117] The ECtHR therefore found "that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership"[118] and, on that basis, considered that it was then "unnecessary to identify whether the treatment about which the applicant complains constitutes 'slavery', 'servitude' or 'forced and compulsory labour'".[119] The Court avoided discussing the concept of ownership and instead labelled trafficking as something incompatible with a democratic society and the values expounded in the European Convention.[120]

This superficial judgment of the ECtHR is nothing short of surprising.

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[107] *Ibid* at para 124.
[108] *Prosecutor v Dragoljub Kunarac,* IT-96-23 & IT-96-23/1-A, Appeal Judgment (12 June 2002) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf >.
[109] *Ibid* at para 116.
[110] *Ibid* at para 118.
[111] *Rantsev*, *supra* note 9 at para 276.
[112] *Prosecutor v Dragoljub Kunarac, supra* note 108 at para 117-119.
[113] *Ibid* at para 119
[114] *Ibid* at para 117.
[115] *Rantsev*, *supra* note 9 at para 272.
[116] *Ibid* at para 277
[117] *Ibid* at paras 277, 279.
[118] *Ibid* at para 281.
[119] *Ibid* at para 282.
[120] *Ibid*.

The interpretation of the ECtHR provides no differentiation between the three categories of Article 4, because trafficking is simply against the spirit of the European Convention and, particularly, Article 4 as a whole.[121] We contend here that this interpretation is inadequate for its purpose and incorrect from a legal point of view, particularly given that the Court did not evaluate if the conduct at stake was actually trafficking according to the relevant domestic or (primarily) international provisions, but simply assumed so in order to continue with its evaluation of whether there was a violation of the European Convention of Human Rights, for example, by Russia for not protecting its own citizens against the risk of slavery – understood by the court as being equivalent to the risk of trafficking.

Furthermore, by virtue of determining that this was a case of trafficking and since "trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership,"[122] this newly established standard was met in relation to Ms Rantseva's relationship with the cabaret owner and manager. As such, the standards for slavery were reached and the conduct of Mr X.A., the owner of the cabaret, as well as that of the other owners of cabarets using "artiste" visas, should be considered as slave trade within the meaning of the Slavery Convention.[123] However, we do not see in the ECtHR's analysis such evidence of the powers attaching to the right of ownership. By attempting a very brief and inadequate analysis of a relationship akin to ownership by applying interchangeably the concepts of trafficking and slavery and by relying on a very general application of these concepts to Ms Rantseva's situation,[124] the court brushes over an issue which we believe is central when applying the language of slavery to this case.

V. Defining the Limits of Exploitative Labour, Trafficking and Slavery: Rethinking Tang and Rantsev

Chief Justice Gleeson noted in *R v Tang*, "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".[125] In the following section, we attempt to situate the cases of *Tang* and *Rantsev* in the terms of the UN Trafficking Protocol and Slavery Conventions. As noted above, we

[121] *Ibid* at para 279
[122] *Ibid* at para 281.
[123] See *Ibid* at paras 83-90, 94 (referring to reports from Cypriot Ombudsman and Council of Europe Commissioner for Human Rights).
[124] *Ibid* at paras 281-282. The Court described these general elements as follows:

> It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions.

[125] *The Queen v Tang*, *supra* note 8 at para 29, Gleeson CJ.

undertake this assessment while recognising that the UN Trafficking Protocol was not directly applicable at the domestic level in any of the relevant jurisdictions. Nonetheless, it is important to recognise the ways in which both cases fall short of the internationally agreed-upon standards of what constitutes trafficking. Our principal concern here particularly lies with the risk of diluting the gravity of the crimes of slavery and trafficking in international law and in undermining the rights of the defendant in *Tang*. As such, our purpose is to demonstrate that not only do the cases not amount to slavery, despite the reasoning of the Australian Courts and ECtHR, but nor is their evidence sufficient to unquestionably conclude that they are cases of trafficking or debt bondage.

Before continuing, it is important to note that the legal contexts in which both Courts operated have substantially changed. In the case of Australia, there were no trafficking laws in place at the time of Ms Tang's alleged crimes and the government was yet to ratify the UN Protocol. Again, in the case of Russia and Cyprus, while the Council of Europe Convention on Action against Trafficking in Human Beings models the UN Protocol in many respects, it entered into force only in 2008 and neither Russia nor Cyprus had domestic provisions to address trafficking at the time that Ms Rantseva was engaged to work in Cyprus.

To take this shift into account when analysing Tang, we briefly consider whether the trafficking provisions subsequently introduced into the Criminal Code would have applied to this case. To aid this analysis, we incidentally introduce *R v Dobie*,[126] Australia's first, and thus far only, conviction under the trafficking provisions (Division 271) of the Criminal Code (Cth). This comparison helps us to highlight the differences between a case that meets the legal requirements of trafficking (Dobie) and one (Tang) that is presumed to be trafficking, with no transparent assessment against the law (the term is used 23 times in the High Court decision) in an investigation focused on the crime of slavery.

Keith Dobie was the first person to be convicted in Australia on charges of trafficking in persons pursuant to the Criminal Code Amendment (Trafficking in Persons and Debt Bondage) Act 2005 (Cth), which was introduced in Australia in July 2005 (Division 271). He was also charged with four counts of presenting false information to an immigration officer and one count of dealing in the proceeds of crime. Dobie organised the entry of two Thai women into Australia to provide sexual services. He was charged with trafficking offences in relation to the first woman for the period 13 November 2005 and 23 January 2006, and to the second woman, from 11 February 2006 to 17 April 2006. The judgment of the Supreme Court of Queensland reflects recognition of the two victims' voluntary negotiations with Dobie, including by text and email. The Court found that he deceived the first woman about how much work she would have to perform in Australia, and the second woman about her work schedule. The Supreme Court of Queensland

[126] *R v Dobie*, [2009] QCA 394, Fraser JA.

determined that Dobie "intended to pressure them to provide sexual services on demand, that is to say, whenever a customer called and on any day of the week".[127] The Court also drew upon the fact that the women were sex workers in Thailand and were led to believe that they would work in Australia with levels of freedom similar to what they had experienced in Thailand. Dobie's appeal was dismissed by the Court of Appeal on 26 February 2010.

In regard to Rantsev, there is no need to perform a parallel analysis incorporating the Council of Europe Trafficking Convention because, as we noted above, the ECtHR could not have used this Convention as the legal basis for its decision and can only still apply the ECHR. It is true, however, that the ECtHR could potentially peruse the Trafficking Convention to assess the positive obligations that both states had in relation to the prevention of violations of the ECHR. As the ECtHR has established that any case of trafficking goes against the spirit of the Europe Convention, it would be reasonable to derive from here that failing to prevent trafficking is a violation of the ECHR itself.[128]

1. *Contextualising Tang and Rantsev in the Trafficking Protocol and Australian Trafficking Provisions*

As indicated above, the UN Protocol conceptualises trafficking as involving three key elements: some action related to the movement, the means of moving the individual, and the purpose for which the individual is recruited, moved, harboured in the process or recieved.

A. Movement

In both *Tang* and *Rantsev*, the movement of the women involved is easily demonstrated. All had been moved across international borders, having been recruited to work (albeit in *Tang*, under falsely obtained visas). Accommodation was arranged in the destination countries and the women and their movements were monitored, to varying degrees, in the destination countries.

B. Means

The UN Protocol links means and consent. If any of the means listed had been used, any consent of the five Thai women and of Ms Ransteva would be irrelevant. Regarding *Tang*, there was no deception involved in the recruitment of the five Thai women, as Justice Kirby notes,[129] and nothing in

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[127] *Ibid* at para 4.

[128] Mr Rantsev in fact contended that the Cypriot authorities were under an obligation to adopt laws to combat trafficking and to establish and strengthen policies and programmes to combat trafficking. On 13 July 2007, the Government of Cyprus prohibited trafficking for the purpose of sexual exploitation and forced labour through Law 87 (I)/2007, which also contains protection measures for victims. Amendments to the Criminal Code of the Russian Federation, effective from 16 December 2003, introduced provisions criminalising the trafficking of persons (article 127(1)) and the use of slave labour (127(2)).

[129] *The Queen v Tang*, *supra* note 8 at paras 79-81, Kirby J.

the case hints at the possibility that the five women's consent was induced by threats, force, or other forms of coercion; or that abduction or fraud existed. Indeed, there are only two means that are potentially relevant here and, in our view, they are insufficiently substantiated to constitute trafficking under the UN Protocol's definition.

First, while it is arguable that the women's consent was obtained by giving payments to the recruiters in Thailand, it is equally arguable, and in our view more accurate given the facts, that the women were informed consenting adults and that their consent was not extracted as a result of the payments made by Ms Tang and her colleagues to the recruiters in Thailand. One relevant fact in this regard is the way in which each of the five women negotiated the size of her debt with Ms Tang and her colleagues.[130]

Second, it is also arguable that the five women faced situations of poverty, economic need and inequality in Thailand, that is, what could constitute positions of vulnerability. In this regard, it could be argued that the relevant means was "abuse of power or of a position of vulnerability" of the five women. This is the only interpretation that suggests that the situation was one of trafficking under the UN Protocol, as opposed to the exploitation of the labour of migrant sex workers. Yet we still face the problem of the undefined nature of the phrase "abuse of power or of a position of vulnerability", as noted earlier in this article. Justice Kirby's dissent acknowledges the economic decision-making involved in some cases of trafficking, but does so in a process of reasoning designed to highlight that such movements would not amount to slavery "if undertaken with appropriate knowledge and consent by an adult person who was able to give such consent".[131] In our view, given the uncertainty regarding Article 3(a)'s reference to abuse of a position of vulnerability, and the lack of evidence to show that the women's consent was extracted in exchange for payments given to the recruiters in Thailand, there are insufficient facts to establish any of the relevant means required by the UN Protocol.

The case of Ms Ransteva differs slightly when it comes to assessment of means because of the lack of information concerning her recruitment. The facts provided are simply too scant to determine exactly what Ms Ransteva was therefore what she expected before she entered Cyprus. We can find evidence in the report of the Cypriot Ombudsman on the situation of "artistes" in Cyprus, cited by the European Court.[132] The report recognises that, although women travelling to Cyprus on these visas are often aware that they will be required to work in prostitution, they do not always know about the nature of the working conditions. However, from the perspective of the legal evidentiary burden, this report is insufficient to determine the specific experience of Ms Ransteva. If, from a legal perspective, the facts on record are too limited for us to reach a conclusion as to whether or not this

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[130] *Ibid* at para 10, Gleeson CJ (regarding the facts) and para 45, Gleeson CJ (regarding the legal implications the High Court attaches to the existence of a contract).
[131] *Ibid* at para 79, Kirby J.
[132] *Rantsev*, *supra* note 9 at para 85.

was a case of trafficking, they were similarly too scant for the European Court. Indeed, the absence of facts was the very consequence of the lack of investigation of which the governments of Cyprus and Russia were being accused. We therefore cannot be sure if and to what extent Ms Ransteva was deceived about her future work in Cyprus.

C. Purpose

The final question to consider is that of exploitation. The question of what does and does not constitute "exploitation" in the context of sex work has divided feminist scholars and activists for decades, as noted above.[133] Is prostitution inherently a form of exploitation, or should a distinction be drawn between voluntary sex work, on the one side, which poses some risks of exploitative conditions, and forced sex work, on the other, which is always coercive and falls squarely within the realm of 'trafficking'? This question is not settled by the wording of the UN Protocol's definition of 'exploitation': "Exploitation shall include, at a minimum, the exploitation of the prostitution of others".[134] We can interpret this definition of exploitation in two ways: first, exploitation for economic benefit (i.e. to make money), or secondly, abuse of an individual. The *travaux préparatoires* offer (again) limited assistance, highlighting instead the intention of drafters to provide an open-ended definition of exploitation in the UN Protocol, with priority given to domestic legal sovereignty:

> The protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the protocol, which is therefore without prejudice to how States parties address prostitution in their respective domestic laws.[135]

What we can discern, however, is that the definition is not intended to be a statement about the sex industry. Therefore, a key consideration is how the sex industry is regulated in domestic law. In order to determine whether the women were trafficked for the purpose of exploiting their prostitution, it would be important to confirm that the five women in *Tang* were above the legal age of consent and that the brothels were legal places of work under Victorian law.[136] Justice Kirby suggests that an attempt to use the slavery provisions to suppress commercial sex work "based upon individual repugnance towards adult sexual behaviour" would be a contradiction of the laws of the Victorian Parliament which deem the participation of adults in the sex industry to be lawful. To do so, Justice Kirby argues, "risks returning elements of the sex industry to operate, as was previously the case, covertly, corruptly and underground".[137]

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[133] See generally Vijeyarasa, *supra* note 47.
[134] UN Trafficking Protocol, *supra* note 15 at 3(a).
[135] UNODC 2006, *supra* note 54 at 347.
[136] *The Queen v Tang*, *supra* note 8 at para 79, Kirby J.
[137] *Ibid* at para 121, Kirby J.

The facts do not indicate that the women were forced against their will to provide sexual services.[138] Justice Kirby also notes the absence of violence or rape, which are frequently indicators of trafficking for the purpose of sexual slavery or sexual debt bondage.[139] Particularly important is Justice Kirby's analysis of the complainant's working arrangements, with a "free day" each week to rest or to earn money. Therefore, with regard to the test for "the exploitation of the prostitution of others," and in light of the legal nature of sex work in Victoria, it is difficult to establish that the exploitation experienced by the women would give rise to a finding of exploitation under the UN Protocol.

In contrast, the case of Ms Ransteva is more complex given the lack of facts. The judgment indicates an increasing recognition that the situation of artistes in Cyprus is unacceptable. Cyprus's penal code criminalises prostitution in general, including soliciting, living off the profits of prostitution and maintaining or managing a brothel.[140] Indeed, the extracts of the report of the Council of Europe Commissioner for Human Rights' visit to Cyprus in July 2008, cited in the judgment, suggest that the nature of prostitution in Cyprus could constitute in many instances the "exploitation of the prostitution of others".[141] The European Court also concluded that there could "be no doubt that the Cypriot authorities were aware that a substantial number of foreign women, particularly from the ex-USSR, were being trafficked to Cyprus on artiste visas and, upon arrival, were being sexually exploited by cabaret owners and managers".[142] While it appears that Ms Ransteva was aware that she would work in the realm of the sex industry in Cyprus and that she obtained a legal visa for this purpose, the evident inability of the Cypriot authorities to ensure artiste visas were not used for trafficking or forced prostitution,[143] and the facts accepted by the Court suggest that the cabaret owners and managers could have tried to 'exploit the prostitution of Ms Ransteva' (following the wording of the Protocol).

D. General Evaluation

The following table sets out these elements in relation to the two cases under discussion in this article.

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[138] See *ibid* at para 16, Gleeson CJ. In the case of The Queen v Tang, while the trial judge found that in totality the facts suggest that the women were restricted to the premises, the High Court noted that the "complainants were not kept under lock and key" and that for some of the contract workers, as time passed, "they were at liberty to go out as they wished".

[139] *Ibid* at para 79, Kirby J.

[140] See Mediterranean Institute of Gender Studies, *Mapping the Realities of Trafficking in Women for the purpose of sexual exploitation in Cyprus (Final Report)* (October 2007) at 15, online: Mediterranean Institute of Gender Studies <http://www.medinstgenderstudies.org/wp-content/uploads/migs-trafficking-report_final_711.pdf>.

[141] *Rantsev*, *supra* note 9 at para 103.

[142] *Ibid* at para 294.

[143] See *Ibid* at para 100, citing Council of Europe, Committee of Ministers, *Follow-up report on Cyprus (2003 - 2005): Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights*, CommDH (2006)12 at paras 57-60, online: Council of Europe <https://wcd.coe.int/ViewDoc.jsp?id=984105>.

Table 1: The UN Trafficking Protocol and Its Elements

UN Trafficking Protocol	***R v Tang***	***Rantsev v Russia & Cyprus***
A. Movement	√	√
B. Means — Consent is irrelevant if any of the following are evident:		
1. Threat/Force/Coercion	**X**	**?** (Factually uncertain, Ms. Rantseva may have been forced while in Cyprus)
2. Abduction	**X**	**X**
3. Fraud	**X**	**X**
4. Deception	**X**	**X** (Factually uncertain, Ms. Rantseva may have been made to believe that the employment conditions of "Artistes" were different from what she faced in Cyprus.)
5. Abuse of Power or a Position of Vulnerability	**?** (Factually uncertain, it is not clear what the legal threshold of vulnerability should be)	**?** (Legally and factually uncertain, it is not clear what the legal threshold of vulnerability should be and factually uncertain, as facts do not explain Rantseva's personal economic circumstances).
6. Payment in relation to a person in control of another (giving or receiving)	**?** (Legally uncertain, there was a payment but its legal effect was not explored)	**X**
C. Purpose — Explotation		
1. Prostitution of others / Other forms of sexual explotation	**?** (Legally uncertain, not clear if there was "exploitation" of – the otherwise legal – prostitution)	**?** (Factually uncertain, not clear if there was explotation or even prostitution)
2. Forced Labour / Services	**X**	**X**

3. Slavery, or Practices Similar to Slavery	**?** (Factually uncertain, not clear if there was explotation or even prostitution)	√ (Factually uncertain but accepted by the ECtHR, with no distinction between slavery and servitude)
4. Servitude	**X**	√ (Factually uncertain but accepted by the ECtHR, with no distinction between slavery and servitude)
5. Removal of Organs	**X**	**X**

In summary, the proven facts in both *Tang* and *Rantsev* fall short of meeting the definition of trafficking outlined in the UN Protocol. In the case of *Tang*, neither the means nor purpose can be clearly established. In the case of *Rantsev*, the facts suggest that, if an investigation had been undertaken, Ms Ransteva's case might have met the UN Protocol's evidentiary burden; that is to say, it could have been proven that Ms Ransteva had entered a contract, but was deceived as to what she could expect from her conditions of work in Cyprus. Yet, the lack of proven facts, resulting indeed from both governments' failures to investigate, leaves many questions unanswered.

As we said before, both Courts were adjudicating on cases of slavery and not trafficking. However, reading the judgements, we get a sense that the arguments of the Lower and Appellate Australian courts and of the ECtHR were premised upon the assumption that both cases (in non-legal terms) were trafficking, a practice considered by these judicial bodies to be "modern day slavery". It is then very concerning that both cases, taking only into account the proven facts, would not even qualify as instances of trafficking according to the definition of the UN Protocol.

Furthermore, we argue that Tang would also not easily sit within the Division 271 provisions on trafficking introduced into Australian law in July 2005, after the slavery charges were laid against Ms Tang. As noted above, in the context of sexual exploitation, deception is established where the recruited person was deceived concerning either the nature of the sexual services; freedom of movement from the place where the sexual services are provided; freedom to cease providing sexual services; freedom to leave their place of residence; or concerning the quantum, or the existence, of any debt owed or claimed to be owed. As discussed above, the five Thai women had some freedom to leave their place of work and residence, together with a "free day" each week. In regard to the question of debt bondage, two of the women had paid off their debts within six months of arrival[144] and each of the women was involved in negotiating the quantum of her debt with Ms Tang.[145]

One might attempt to argue that facts will rarely fit neatly within

[144] *The Queen v Tang*, *supra* note 8 at para 79 (8) (Kirby J).
[145] *Ibid* at para 79 (10).

Division 271's provisions on trafficking. However, as demonstrated by the 2009 conviction of Mr Keith Dobie for – among others – offences relating to trafficking, it was proven that some cases fit squarely within the domestic understanding of trafficking. Mr Dobie organised the entry into Australia of two Thai women to provide sexual services in Australia. He deceived one of the women in telling her that it would be up to her to determine how much work she did in Australia, and he deceived the second in telling her that she would have two days off work every week. The Supreme Court of Queensland held that Mr. Dobie intended to pressure them to provide sexual services on demand, that is, whenever a customer called and on any day of the week.[146] The facts clearly establish the basis for a conviction under Section 271.2 (2B).

One could finally conjecture that the Australian High Court's ruling in *Tang*, even if it was not very solid in its *obiter dicta* reasoning, was mainly motivated by a desire to send a message about trafficking and, that the majority in the High Court simply did not want to allow a trafficker, in the only case to reach the highest judicial authority in Australia, to go free or risk this eventuality through a re-trial. However, the Court already knew that the new provisions on trafficking (Section 271) had been enacted and, as it was the case, that it could potentially only take a few more years to establish a strong and legally accurate precedent in Australian law for cases of human trafficking. We are not suggesting that the five Thai women in Tang were not living under a situation of exploitation, particularly in light of their rights to decent work. What we argue here is that the women were exploited, but not under conditions that could give rise to a finding of slavery – or even trafficking.[147]

2. *Contextualising Tang and Rantsev in the Slavery Convention and the Supplementary Convention*

As mentioned above, there are two different concepts within the broader idea of slavery: "slavery" and "servitude". Some situations of servitude can fit into the definition of slavery. Others may only be servitude or slavery but not both. Finally, there are other situations that can be considered to be exploitative labour but that are not tantamount to slavery or servitude.

In this section, we follow the same pattern of reasoning to compare the facts of both cases with the international legal standards for slavery. First, we use the definition of "slavery" from the Slavery Convention and that of "servitude" from the Supplementary Slavery Convention to dissect their different elements. Second, we discuss in detail how the facts from the two judgments meet those elements. Finally, we create a matrix outlining the key elements of both in the same way we did to summarise the findings of the previous section.

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[146] *R v Dobie*, *supra* note 126 at para 4 (Fraser J).
[147] Further discussion in Ramona Vijeyarasa, "The Impossible Victim: Judicial Treatment of Trafficked Migrants and their Unmet Expectations" (2010) 35:4 Alternative LJ 219-220.

Slavery: Any powers Attaching to the Right of Ownership

Slavery is arguably the more complicated concept to convert into factual elements, particularly because chattel slavery no longer exists. We must therefore define the concept of ownership, which is a legal concept. This ownership, albeit not physical, manifests itself through a series of capacities – powers – that are exercised on the basis of that ownership. Historically, the concept of property had an obvious manifestation where the slave owner possessed the legal title (as in chattel slavery).[148] However, today, at a minimum, a finding of slavery requires that the slave owner has some degree of control over the object which is possessed; in this case, the slave.

In the case of *Rantsev*, even if we were to apply the broadest interpretation of the concept of ownership, the fact that Ms Rantseva left her job and residence with no initial obstacles and that the key goal of the owner of the cabaret (M.A.) was to have her deported, implies an element of free will on the part of Ms Rantseva that is incompatible with the idea of property. However, the fact that the police requested for M.A. to collect Ms Rantseva when he failed to have her deported and gave him her passport, does suggest that, from the point of view of the Cypriot police, M.A. actually had some degree of "possession" over Ms Rantseva. However, this dimension of the idea of possession is not discussed by the ECtHR.

In regard to *Tang*, Ms Tang bought a part of the debt that the five Thai women had with their Thai recruiters. This could have been a key element of the case, as the acquisition of a personal debt could have been understood as implying some degree of ownership. Yet, Chief Justice Gleeson considered that it was irrelevant to construct what he termed a "false dichotomy" between employment and ownership as the source of the powers being exercised in relation to the existence of a debt.[149] However, it appears inaccurate to deem this a "false" dichotomy, given that the concept of servitude from the Supplementary Slavery Convention specifically refers to a debt and precisely establishes the requirements for a relationship between the services provided and nature of the debt to qualify as servitude, as explained in the following sections. Given the explicit reference to debt in Australian law (Section 270.1), the Australian Courts should have relied on the relevant international provisions to determine if the debt Ms Tang bought could give rise to a situation of slavery, or akin to slavery, as provided for in the Supplementary Slavery Convention. Hence, we contend that the Australian High Court should have undertaken a more precise legal analysis of Australian law, and interpreted the concept of debt in Section 270.1 through the lens of Article 1 of the Supplementary Convention, in order to determine whether or not a situation of slavery according to Australian law (servitude in international law) existed.

[148] See *supra* note 97.
[149] *The Queen v Tang*, *supra* note 8 at para 45, Gleeson CJ.

Servitude: Existence of a Debt

As noted before, the Supplementary Convention identifies four cases of servitude, with the existence of a debt being the only relevant concept for our discussion. In the case of Ms Rantseva, it is not clear if a debt existed. Naturally, this makes our analysis impossible, as we cannot discuss the characteristics of a debt that may have never existed. However, there is no doubt from the narrative of *Tang* that a debt did exist. As mentioned above, at the moment of entering Australia each of the five women had incurred a debt with the Thai recruiters, which they were required to pay off by working at the Melbourne brothel. Ms Tang, D.S., and another person had paid the recruiters a total of AUD$80,000 for four of the five women (AUD$20,000 each).

Whatever inequalities pushed the women to enter into their contracts with the recruiters, which "result[ed] in a debt to those who had made the necessary arrangements to facilitate their travel and relocation",[150] it is clear nonetheless that a debt (i) existed and (ii) that it had its origin – even if at an extortionate price – in the services provided to them, that is, arranging the visas and buying their tickets to Australia. Hence, we should analyse now what type of debt that was, discussing if it met the legal requirements to constitute the basis of servitude.

A. If the value of services is not applied to the liquidation of the debt

Paragraphs 8 to 14 of the judgment of the majority in *Tang* detail how the value of the five women's sexual services applied to the liquidation of their debt. In fact, in the case of two of the women who paid off their debts, "the restrictions that had been placed on them were then lifted, their passports were returned, and they were free to choose their hours of work, and their accommodation."[151] It seems then clear that the debt could be liquidated through the provision of the services on which they had previously agreed and that the five women were already providing in Thailand.

B. If the value of services is applied, but not reasonably assessed

This is a challenging point to analyse from a moral and legal point of view and takes us back to the earlier discussion concerning what is exploitation and whether all forms of prostitution are exploitative. We should also recall the legality of prostitution in Victoria and the need to ascertain what would be a "reasonably assessed" fair payment for sexual services. Given that there are no hints in the summary of facts or reasoning of the High Court, this issue escapes the scope of this article.

The only conclusion we could extract from the facts is that two complainants paid their debts during the period in which they worked for Ms Tang. We cannot say what is "reasonable" regarding the value of the services provided, but it could be argued that, given the time taken to cancel

[150] *Ibid* at para 79, Kirby J.
[151] *Ibid* at para 17, Gleeson CJ.

the debt (six months[152]), their value may not be "unreasonable".

C. If the length of services is not limited

Based on our interpretation, the length of the services could be considered as "not limited" in two ways: (i) if the person is bound to provide services in a continuous manner, for example, if there were no agreed schedule or a limited number of services per day; or (ii) if the duration of the contract is indefinite and the provider of services cannot estimate when he or she would fulfil the contractual commitment.

Australian legislation has a general limit of 38 hours of work per week, plus "reasonable additional hours".[153] While we could use the criteria in the *Fair Work Act 2009*[154] to assess the reasonableness of those additional hours, it would wrongly place the analysis in terms of what is "unfair" – meaning unreasonable – and not what is "unlimited", which is what the Supplementary Convention requires in order to qualify the relation as servitude. As noted, the women were required to work six days per week and were offered a free day on which they could rest or earn their own income. Obviously, the desire to have their own source of income suggests there was limited choice in whether or not to work on this day off. However, a schedule did exist, and the fact that two workers had paid off their debt suggests that the term of completion of the contractual commitment could be estimated. In fact, Justice Kirby, does this estimation for us: "[a]ssuming that they worked every day of the week (as most did), [cancelling the debt in six months] would mean attending to an average of five clients a day."[155] We can then conclude that the length of services was determinable, i.e. limited, in terms of number of clients and the time required to pay off the debt.

D. If the nature of the services is not defined

It would be extremely difficult to argue that the nature of the services provided by the five Thai women was not defined, particularly given that they were already working in that sector in Thailand. Justice Kirby specifically refers to the fact that "they were not tricked into employment in Australia on a false premise or led to believe that they would be working in tourism, entertainment or other non-sexual activities."[156]

However, the court could have taken a more nuanced view to assess the nature of the services and how "undefined" they should have been to meet the standard of servitude, if it had focused on the precise conditions of the sexual services. For example, if forced to have unprotected sex, the health risks involved would directly affect the definition of the nature of the agreed services. This approach would expand the concept of sexual servitude, but

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[152] *Ibid* at para 79, Kirby J.
[153] *Fair Work Act 2009* (Cth), *supra* note 18 at s 6.
[154] *Ibid* at s 62-3.
[155] *The Queen v Tang*, *supra* note 8 at para 79, Kirby J.
[156] *Ibid* at para 79, Kirby J, citing Anna Dorevitch & Michelle Foster, "Obstacles on the Road to protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law" (2008) 9 Melb J Int'l Law 1.

not unreasonably so. Such an approach would mean that undocumented migrants providing sexual services would be placed in a situation of vulnerability that could be deemed servitude if they are forced to provide a service that puts their health at risk. However, no evidence on this point was provided in the case at either the Lower Court or Appellate levels.

General Evaluation

In the following table we have compiled the elements of the definitions of both slavery and servitude:

Table 2: The Slavery Convention and Its Elements

Elements in Conventions	R v Tang	Rantsev v Russia & Cyprus
1. Slavery (1926): Any powers attaching to the right of ownership	**X**	**X**
2. Servitude (1956): Existence of a debt	√	**?** (Factually uncertain)
a. If value of services are not applied to the liquidation of the debt	**X**	**?** (Factually uncertain)
b. If they are applied, but they are not reasonable assessed	**?** (Factually uncertain but Justice Kirby provides some reasoning, in his minority opinion as to why they may be reasonable)[157]	**?** (Factually uncertain)
c. If the length of services is not limited	**X**	**?** (Factually uncertain)
d. If the nature of the services is not defined	**?** (Factually uncertain but noted that the five women were sex workers in Thailand and not tricked into employment as sex workers, suggesting that, to some degree, the nature of the services was defined)[158]	**?** (Factually uncertain)

As we have shown, we are convinced that the judgment in *Tang* wrongly established that the situation of the five women constituted one of the universal offenses against humanity and believe that, based on the evidence, had a jury been properly directed, it should not have concluded that the case

[157] *The Queen v Tang*, *supra* note 8 at para 79 (5) (Kirby J).
[158] *Ibid* at para 79 (1) (Kirby J).

was one of slavery. In this sense, we would support the Cross-Appeal of Ms Wei Tang in that the jury verdicts were unreasonable or could not be supported having regard to the evidence.[159]

Nonetheless, we also think that Justice Kirby errs too when he states that the test for the jury to evaluate the existence of slavery/servitude was "to conclude that such circumstances bore no comparison or analogy to (even harsh) employment conditions as understood in Australia".[160] As seen before, this is not what the legal concept of servitude requires, especially in the context of servitude arising from a debt. Yet, he is right to hint to the fact that the experiences of the five Thai women constituted exploitative employment relationships, which, we argue, deserve legal redress.[161] To find that those were exploitative employment relationships and not slavery would not have exempted Ms Tang of her responsibility, but would have undoubtedly attenuated her sentence. We also argue that this should not be seen as diminishing the rights of the victims of exploitation, because this finding would evidence inadequate protection of the rights of migrant workers to decent work, including those in the sex industry, placing that burden on the Victorian authorities.

In the words of Justice Kirby, these women were economically vulnerable in Thailand and particularly vulnerable once they arrived in Australia.[162] Having legalised the sex industry in Victoria, it is unacceptable to consequently fail to provide adequate legal protections for those most vulnerable in this industry, the sex workers themselves.

Regarding *Rantsev*, the ECtHR's decision is even more problematic as one is left to wonder what really is covered now by Article 4 of the Europe Convention. Are States Parties going to be condemned on the basis of slavery-servitude provisions even in cases where none of the elements of the crime, as defined by international law, are evident, but there is just some "appearance of trafficking"? Are some legitimate decisions by foreign workers, such as the one initially taken by Ms Rantseva to accept work in Cyprus, going to be automatically prevented due to the risk they may be conducive to exploitative situations? Will countries restrict movement (typically entry but perhaps also exit) in such circumstances, as this movement risks giving rise to situations that would be a violation of the anti-slavery provisions of the ECHR? The reasoning in *Rantsev* suggest that States Parties could be indeed condemned in those circumstances and, therefore, they are obliged to prevent anything that could potentially be conducive to trafficking as this would be against Article 4. It is not easy to see how these positions really promote the advancement of human rights if they may be easily used by some Governments to deny economic migrants access to foreign labour markets.

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[159] See *The Queen v Tang*, supra note 8 at para 2, Gleeson J (outlining the grounds of appeal).
[160] *Ibid* at para 81, Kirby J.
[161] Criminal or civil remedies, such as the ones presented *supra* in note 18, could be viable options to address these situations.
[162] *The Queen v Tang*, supra note 8 at para 81, Kirby J.

VI. Conclusion

In this article, we have critiqued the legal standards applied by the Australian High Court and the European Court of Human Rights in *Tang* and *Rantsev* respectively. At first glance, one might see these judgments as leading to positive outcomes. Indeed, successful prosecutions for trafficking cases are rare and what may be thousands of victims are left with no legal redress. In the case of *Rantsev*, the lack of a sufficient investigation into the death of Ms Rantseva was a violation of Mr Rantsev's rights and the case also served to show the "turn a blind eye" approach of the Government of Cyprus and, to an extent, the Government of Russia to the problem of human trafficking. The case of *Tang* has shed light on the failure of Australian law to provide adequate legal protections for migrant sex workers and to prevent an individual or group of individuals from obtaining large economic gains by organising this type of work.

With both decisions revealing a series of human rights violations, it may seem unpopular to conclude that the judicial reasoning was flawed and that key legal concepts have been misapplied. Nonetheless, a deeper analysis of the key concepts in international law defining trafficking and slavery and the judicial reasoning, or gaps in reasoning, in both judgements, raises doubt as to whether either case can be considered an example of slavery or even one of trafficking.

The ECtHR did little to distinguish between trafficking and slavery, and tangential facts suggest that Ms Rantseva's experience could have constituted a case of trafficking had the necessary fact-finding taken place. However, in the case of the five Thai women working in the Victorian brothel, based on our assessment, it is unlikely that this situation could accurately be deemed trafficking under Australia's domestic provisions had they actually been in place at the time of the crimes. Had the Australian provision on slavery been interpreted according to international law, it was highly unlikely that any jury would have convicted Ms Tang.

Our concern with the judicial reasoning and findings in both cases is that what has resulted from these two judgments are precedents that distort the meaning of slavery and trafficking, as articulated in international law, which in the case of trafficking was already fairly imprecise. As Suzan Miers notes, the use of the term "slavery" now covers such a wide range of practices that we risk making it "virtually meaningless".[163] Following the path set in *Tang* and *Rantsev*, we risk extending this problem to trafficking, and finding ourselves in the trap of violating the human rights of the defendants in pursuit of the noble aim of ensuring better protection of victims of exploitation.

We cannot highlight the errors of the courts without asking ourselves what alternatives lay open to them. In the case of *Rantsev*, the apparent detention of Ms Rantseva in the apartment from which she fell to her death

[163] Suzanne Miers, *Slavery in the Twentieth Century: the Evolution of a Global Problem* (Walnut Creek, CA: AltaMira Press, 2003) at 453.

suggests a *prima facie* case of inhumane or degrading conduct or, at least, some type of illegal detention that should have been properly investigated. In the case of the Australian laws on migrant workers, documented or not, insufficient attention has been paid to their labour rights and protections, which creates a high risk of exploitation. More and better protection is needed for migrant workers risking exploitative conditions of work, including providers of sexual services, whose right to legal redress should be guaranteed in law. The distortion of established legal concepts, which have already been well consolidated in international agreements, is not the best way of achieving this goal.