

Emmanuel Decaux, *Les formes contemporaines de l'esclavage*, Martinus Nijhoff Publishers, 2009, 260pp.

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One would expect no less from this study of contemporary forms of slavery by Emmanuel Decaux, than that it identifies the fundamental puzzle at the heart of legal issues surrounding human exploitation, namely, that:

there is a permanent contradiction between the successive attempts focused on 'slavery in all its forms' as well as 'the practices and institutions similar to' – which are at the heart of international instruments, and the programmes of action of international organisations and non-governmental organisations –; and the criminal law approach which requires a precise definition to incriminate; either domestically, in the name of the determinacy of the crimes and of the penalty, or internationally to allow for criminal cooperation.¹

It is to this fundamental paradox that Decaux devoted his attention during his lectures at The Hague Academy of International Law in 2008. These lectures were published in *The Collected Courses of the Hague Academy* series and were also reproduced as part of a pocketbook series.²

The beauty of considering studies written in another language is to liberate oneself from assumptions – the given starting and end points of argument, and the continuity of well established discourses. If nothing else, surveying works in other languages opens the possibility of new revelations and discoveries – even for the most seasoned expert in an area – which come from narratives forged, in this case, in Paris, as opposed to a London or a Washington. With this in mind, *Les formes contemporaines de l'esclavage* does not disappoint.

More so than in a monograph, the chapters of a study emanating from the Hague Academy and stand alone, as each originates in a public lecture and thus must stand on its own merits. In seeking to work beyond the fundamental contradiction related to issues of human exploitation, the approach which Decaux utilises is to focus on the legal, but to consider it from four complementary perspectives: the *historical* move to abolish the slave trade and slavery in international law; the *formal construction* or positivist approach which considers the establishment of the international instruments related to human exploitation; the *substantive* perspective using the *obiter dictum* from the *Barcelona Traction case* as its pivot; and finally, the *operational* approach which examines the issue through the lens of responsibility, both of the individual and the State (pp. 33-34).

In the chapter that adopts the historical perspective, Decaux provides a narrative which is multilayered, taking the reader through the moves by the United Kingdom during the early 19th century to abolish the slave trade at sea to contemporary attempts to suppress trafficking in human beings. In so doing, he notes that the “continuity and consistency of the definition of slavery and trafficking are central both conceptually and in seeking to avoid a prejudicial dilution of the effectiveness of the fight against these phenomena” (p. 35). Decaux also

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¹ Emmanuel Decaux, *Les formes contemporaines de l'esclavage*, 2009, pp. 16-17.

² Académie de droit international de La Haye, Emmanuel Decaux, “Les formes contemporaines de l'esclavage”, *Recueil des cours*, Vol. 336, Martinus Nijhoff Publishers, 2008, pp. 9-197; and in the series *Les livres de poche de l'Académie de droit international de La Haye*: Emmanuel Decaux, *Les formes contemporaines de l'esclavage*, Martinus Nijhoff Publishers, 2009.

points out that, during the early 19th century, slavery itself was not being questioned.³ He refers to a fundamental element of the 1814 Treaty of Ghent, rarely mentioned in the English language discourse, which after the Anglo-American War of 1812 sought to restore the *status quo ante bellum* and provided for restitution for the loss of slaves. This was achieved through arbitration by the Russian Czar in 1818 and 1822 which led to an agreement in 1826 that the United Kingdom had to pay over US\$1.2 million dollars (or approximately 15 billion in contemporary terms⁴) to the United States of America for its citizens' loss of human chattel (p.44). A further interesting fact brought to the fore by Decaux is that the synod of the Reformed Church of France, in 1637, raised its voice against the slave trade. By contrast, most English-language scholars point to Quaker protestations against slavery in Pennsylvania and the creation, in 1784, of an abolition society as being among the first inchoate protests against the slave trade.

As concerns the *formal construction* of the international regime related to human exploitation Decaux sees it as having been framed over successive periods of international law. As a result, Decaux writes, an "incontestable norm of *jus cogens* has resulted, on par with the prohibitions against genocide and apartheid" (p. 82). Moreover, Decaux notes that the regime creates a variable geometry wherein a growing number of instruments deal with very diverse forms of exploitation. Even though the different instruments are linked logically and legally, they have led to a fragmentation of the law on human exploitation. Unique characteristics have developed with respect to slavery, forced labour, servitude and human trafficking. "We are in", Emmanuel Decaux notes "a universe of three if not four dimensions" and thus cannot speak of a common genealogy (p. 82). Decaux examines the evolution of these various dimensions on the basis of the treaties related to human exploitation: the 1926 Slavery Convention, the 1930 Forced Labour Convention, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, the 2000 UN Palermo Protocol relating to Trafficking in Persons. He also considers other international instruments like the 1999 ILO Convention on the Worst Forms of Child Labour which, while not focusing exclusively on human exploitation, add to the subject-matter. This growth in the overall regime of human exploitation includes the various instruments, but also terms of art such as 'slavery in all its forms', 'slavery-like practices', and 'contemporary forms of slavery' which leads Decaux to conclude that it becomes more and more difficult to define the core of the prohibition of 'slavery' which is often ritually invocation as *jus cogens*" (p. 116).

Chapter 4 of *Les formes contemporaines de l'esclavage* engages in a *substantive* reading of the legal norms. The author uses the pronouncement in the *Barcelona Traction* case as basis of a thesis which revolves around a lost opportunity to bring coherence to overall regime of human exploitation by utilising *obiter dictum* as a catalyst for change. Having set out the legal regime of human exploitation in the previous Chapter, Decaux uses the thesis of a lost opportunity to examine the content of the relevant legal norms. For Emmanuel Decaux, there is a "step missing", between the treaties of 1926, 1930 and 1956 related to slavery, forced labour, and servitude, and what comes afterwards in the guise of instruments which, in a substantive manner, go no further than the earlier three instruments. Take for instance, the Universal Declaration on Human Rights or the European Convention of Human Rights which simply prohibit slavery, servitude and forced labour; without adding any content to these terms. "Paradoxically, while the United Nations works in vain to multiply instruments with reference to these old conventions", Decaux writes, "it neglects an

³ For 19th century issues of slavery and the slave trade see Jean Allain, "Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade", *British Yearbook of International Law* 2007, Vol. 78, 2008, pp. 342-388.

⁴ Determined using Consumer Price Index at: www.measuringworth.com.

otherwise important innovation” manifest in the *Barcelona Traction* case, “a legal revolution which was in effect based on the Charter of the United Nations” (p. 117).

That revolution in his view is to be found in the pronouncement of the International Court of Justice in the 1970 *Barcelona Traction* case which emerged with the end of Empire, as part of a “new universal *Nomos*, founded on the equality of human beings and States which rejected the hierarchy of peoples and races” (p. 118) inherent in European-inspired colonialism. Decaux uses the determination by the International Court as a starting point, that all States can be held to have a legal interest in the protection of obligations towards the international community, that the latter are obligations *erga omnes*. The Court in this judgment continues:

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.⁵

Building on this, Decaux considers the evolution of this concept in treaty law, manifest in the International Covenant of Civil and Political Rights, Protocol II to the 1949 Geneva Conventions, and regional instruments which make freedom from slavery a non-derogable right. Decaux also considers the unsuccessful bid by the International Law Commission to create criminal responsibility of States in Article 19 of the 1996 Draft Articles on State Responsibility which stated that the prohibitions against slavery, genocide and apartheid were to be considered as *jus cogens* imperatives. Having completed this survey, Decaux notes that, while appearing as a progressive development of international law in 1970, the *jus cogens* nature of the protection from slavery does not seem to be contested today. However, it is difficult to discern the exact content of the *jus cogens* nature of the protection from slavery “because the imperative to protect is at risk of being diluted by prohibitions of ‘contemporary forms of slavery’”.⁶

In his final substantive chapter, Decaux moves from an analysis of legal texts to the consideration of legal practice by examining instances of State and individual responsibility manifest in determinations by courts of law. In the context of shared responsibility, Decaux speaks of the ‘red line’ drawn by the European Union at the 2001 Durban Conference between responsibility and reparation with respect to calls for compensation that are linked to the African slave trade which was abolished by international law in 1890. (p. 118). While there was an acknowledgement of an historical wrong, the red line was drawn firmly within the confines of public international law which does not allow for attribution of responsibility *ex post facto*. While there was an unwillingness to accept that what was legal at the time was now to be deemed in violation of international law, Decaux goes on to consider the contrition of various States involved in the transatlantic slave trade. Such recognition of the historical wrong was manifest in the 2001 *loi Taubira* in France, in British Prime Minister Tony Blair’s 2007 declaration of “how shameful the slave trade was”, and in US President, George Bush’s declaration on Gorée Island of the slave trade as one of the largest crimes of history.

Decaux then turns to consider a number of cases where the State was found in breach of international law and responsibility determined. These include the 2005 *Siliadin* case⁷ before the European Court of Human Rights, and also the rather interesting case of 2005

⁵ *Case concerning the Barcelona Traction, Light and Power Company, Limited*, International Court of Justice, 5 February 1970, p. 32. Consider the misuse of this *dictum* in a case related to slavery as noted in Jean Allain “Hadijatou Mani Koraou v. Republic of Niger”, *American Journal of International Law*, Vol. 103, 2009, p. 311-317.

⁶ Emmanuel Decaux, *Les formes contemporaines de l’esclavage*, 2009, pp. 131-132.

⁷ *Siliadin v. France*, 73316/01, Council of Europe: European Court of Human Rights, 26 July 2005.

*Moiwana Community v Suriname*⁸ before the Inter-American Court of Human Rights which related to maroons who had negotiated a peace treaty in 1760 which “established their freedom from slavery, a century before slavery was formally abolished in the region”. In *Montero-Aranguren v Venezuela*, we move from the historical to the contemporary, when the Inter-American Court notes:

Inside Detention Center of Catia ‘the strongest dominated the weakest’. This was condoned by prison officers. In addition, this type of dominance was represented graphically by branding inmates who served as slaves. There were two types of slavery: labor slavery and sexual slavery. Labor slaves were branded with a burner, like cattle brands, which identified who owned the slave, i.e. who was the head prisoner of the hall. If they were branded on the buttocks, they were sexual slaves.⁹

Having considered instance of State Responsibility, Decaux turns to individual responsibility. After investigating a number of domestic cases he examines, in depth, the 2001 *Kunarac* case¹⁰ before the International Criminal Tribunal for the former Yugoslavia.

Decaux notes the different approaches taken in *Kunarac* and *Siliadin*, where, in the first instance, the Yugoslav Tribunal engaged with the 1926 definition of slavery and set out *indica* which might assist in determining whether there was an exercise of powers which would normally be attached to the ownership of a thing, but were in fact being exercised against a person; and in the second instance, the determination in *Siliadin*, where the European Court of Human Rights determined that the 1926 definition of slavery applied only in situations of *de jure* ownership. With these two pronouncements in mind, Emmanuel Decaux brings us back once more to the fundamental paradox at the heart of the study of human exploitation and the manner in which courts have interpreted slavery both widely and narrowly by asking: “is slavery everywhere or is it nowhere?”.¹¹ He concludes his study by noting the emergence of soul searching, both with regard to the historical and the contemporary. But, alas, Decaux recognises, in this rich study, the requirement to go beyond words and work towards assuming obligations to respect, protect and to realise the human rights of persons who find themselves in a state of exploitation whatever the nomenclature one may choose to use.

⁸ Case of the *Moiwana Community v. Suriname*, Inter-American Court of Human Rights (IACrHR), 15 June 2005.

⁹ Emmanuel Decaux, *Les formes contemporaines de l’esclavage*, 2009, p. 219.

¹⁰ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001; and *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Appeal Judgment)*, IT-96-23 & IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 12 June 2002.

¹¹ Emmanuel Decaux, *Les formes contemporaines de l’esclavage*, 2009, p. 230.