

The Parameters of 'Enslavement' in International Criminal Law

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As a non-party to the Statute of the International Criminal Court, any move to consent to the Rome Statute by China should be prefaced by a clear understanding of the jurisdiction *ratione materiae* of the Court; so as to determine, upon accession to regime of the International Criminal Court, what obligations are being undertaken.

Where China may wish to get clarification from the Assembly of States Parties before acceding to the Rome Statute is with regard to the crimes against humanity of enslavement and sexual slavery, and the war crime of sexual slavery; as there appears to be a number of contradictions with regard to these crimes as between the Statute of the Court and the secondary legislation, the Elements of the Crimes. These contradictions appear to leave the notion of 'enslavement' open-ended to cover any and all types of human exploitation which, at minimum, might simply entail a systematic inability of a State to meet minimum international labour standards.

The fact that China is a growing, industrialising, State with a large population means that any failure to meet ILO standards will be magnified many times and the breach open to calls to action by the International Criminal Court. Ordinarily, breaches of ILO standards are dealt with through administrative sanctions; yet the manner in which the Statute and the Elements of the Crimes are set out allows for an interpretation which could raise such breaches from fines against transgressing companies to international criminal responsibility for ministers of government. This, surely, cannot be the object or purpose of the regime of the International Criminal Court.

This Paper considers whether there exists a distinction between the notions of 'enslavement' manifest in international criminal law as distinct from 'slavery' as found in general international law and international human rights law. It then consider two fundamental conflicts which emerge as between the 1998 Rome Statute of the International Criminal Court and the 2002 Elements of the Crimes adopted by the States Parties. The first of these is that while the Statute establishes that enslavement constitutes 'the exercise of any or all of the powers attaching to the right of ownership over a person'; the Elements of the Crimes provide examples of such powers – purchasing, selling – but then adds the following "or by imposing on them a similar deprivation of liberty". In so doing, the Elements of the Crimes introduce into the definition of enslavement lesser servitudes. This is done via a footnote which seeks to clarify this concept of 'deprivation of liberty', which in some circumstances, is meant to "include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention [...] of 1956" [i.e.: debt bondage, serfdom, servile marriage, child exploitation].

The second contradiction relates to the legal concept of trafficking. The full definition of 'enslavement' within the Statute of the International Criminal Court reads:

'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

Here we see that enslavement may manifest itself in the course of trafficking. This is accurate as the established definition of trafficking acknowledges that exploitation may

entail, *inter alia*, “forced labour or services, slavery or practices similar to slavery, servitude”, etc. Despite this approach in the Statute, the Elements of the Crimes via the same said footnote, establishes that enslavement “includes trafficking in persons, in particular women and children”. Here then, enslavement is not to be considered as possibly manifesting itself during trafficking, but under the Elements of the Crimes, it is now synonymous with trafficking.

The Paper concludes by prescribing the type of clarification which China should seek so as to ensure that the current open-ended crime of ‘enslavement’ is bracketed and allows for legal certainty, for those who might appear before the International Criminal Court charged with such a crime.

Slavery

In the 2008 case of *Mani v Niger*¹, the Court of Justice of the Economic Community of West Africa States (ECOWAS) in making a determination of *de jure* slavery, conflated the legal terms and concepts of ‘slavery’ with ‘enslavement’. Using as its basis for finding that Niger had failed in its positive obligation to protect its citizens from slavery, the ECOWAS Court looked to the *Kunarac* case before the International Criminal Tribunal for the former Yugoslavia. Yet, the Yugoslav Tribunal makes the distinction saying that where ‘enslavement’ is concerned, the “definition may be broader than the traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law”, but that the trials at Nuremburg, had expanded the notion of ‘enslavement’ to “included forced or compulsory labour under enslavement as a crime against humanity”.²

While it may be said that the evolution of international criminal law from Nuremburg through the Yugoslav Tribunal established enslavement as a crime which goes beyond the definition of slavery to include lesser servitudes; the same cannot be said for the International Criminal Court which sets out by treaty the definition of enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.³ As we shall see, this definition does not truly go beyond the definition of slavery as established by the 1926 Slavery Convention, even with the addition of the final phrase, “includes the exercise of such power in the course of trafficking in persons, in particular women and children”; which will be considered later in more detail.

The definition of ‘Slavery’ as established in general international law is found in Article 1(1) of the 1926 Slavery Convention and reads:

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.⁴

¹ See *Dame Hadijatou Mani Koraou contre La Republic de Niger*, La Cour de Justice de la Communauté Economique des Etats de l’Afrique de l’Ouest, Arrêt No. ECW/CCJ/JUD/06/08, 27 Octobre 2008. Note also Jean Allain, Case Note: *Mani v. Niger*, *American Journal of International Law*, Vol. 103, 2009, 6 pp. (forthcoming).

² *Kunarac et als.*, International Criminal Tribunal for the former Yugoslavia, (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, pp. 191 and 193.

³ Article 7(2)(c), Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

⁴ See League of Nations, Slavery Convention, 25 September 1926, League of Nations Doc. VI.B. Slavery, 1926. VI.B. 7 (1926).

That definition is to be understood as applying to both *de jure* and *de facto* slavery; that is: where in fact or law an individual exercises the powers which would ordinarily be considered as ownership if they were exercised over a thing as property.⁵ This understanding of slavery, consonant with the *Travaux Préparatoires*, establishes a definition which takes in both the legal ‘status’ and the factual ‘condition’ of slavery; while developing an understanding of what constitutes the ‘powers attaching to the right of ownership’ which is distinct from ‘ownership’. An analogy I have used previously, is that of a dispute between two dealers over illegal drugs. While neither party could have their right of ownership vindicated in a court of law, if appearing before a judge a determination would be made as to who was exercising powers which would normally be attached to ownership: who possessed the drugs. In a legal sense, neither dealer ‘owns’ the drugs, but possession would constitute a power of ownership but for the fact that such ownership is illegal. Or in other words, the powers attaching to the right of ownership as opposed to a right of ownership. In line with a consideration by the United Nations Secretary-General in 1953, it can be said that such powers attaching to the right of ownership include the ability to purchase or transfer a person; the absolute use of a person, their labour or the ownership of the product of that labour; as well as the indeterminacy or the inheritability of the status or condition of a person held in slavery.⁶ The authoritative nature of this 1953 pronouncement as to the powers attaching to the right of ownerships is evidenced in its use by the High Court of Australia, in the August 2008 *The Queen v Tang* case, wherein that Court grounded its finding of *de facto* slavery on the understanding put forward by the Secretary-General.⁷

The Evolution of Enslavement in International Criminal Law

Before turning to enslavement in contemporary international criminal law; it is worth recalling that historically, warfare was a primary means of enslaving people. In Roman Law, it was recognised that beyond the ability in civil law of selling oneself into slavery, it was established in *jus gentium* that “people become slaves on being captured by enemies”.⁸ For the Roman Empire, it was those captured in war and their off-spring which constituted the vast majority of slaves. Like the Greek City-States of antiquity and the New World of modern era, the Roman Empire was built on the back of slaves and reached the heights of its prosperity as

⁵ See High Court of Australia, *The Queen v Tang*, [2008] HCA 39, 28 August 2008; and more generally: Jean Allain, “The Definition of Slavery in International Law”, *Howard Law Journal*, Vol. 52, 2009, pp. 239-275.

⁶ United Nations, Economic and Social Council, *Report of the Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude*, U.N. Doc. E/2357, 27 January 1953, p. 36, n. 1. As noted in this report the six powers attaching to the right of ownership read:

1. the individual of servile status may be made the object of a purchase;
2. the master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law;
3. the products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;
4. the ownership of the individual of servile status can be transferred to another person;
5. the servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;
6. the servile status is transmitted *ipso facto* to descendants of the individual having such status.

⁷ See High Court of Australia, *The Queen v Tang*, [2008] HCA 39, 28 August 2008, p. 12. Also Case Note: *The Queen v. Tang*, [2008] HCA 39, *Melbourne Journal of International Law*, Vol. 10, 2009, 10 pp. (forthcoming).

⁸ The Digest of Justinian (5 Marcan, Institutes, book 1) as reproduced in Stanley Engerman, Seymour Drescher, and Robert Paquette (eds.), *Slavery* (Oxford Readers), 2001, p. 99.

a result: despite the downplaying of classicists, its glory can not detached from the fact that it was slave society.

While the move to abolish slavery comes in the wake of the nineteenth century move to abolish the slave trade at sea⁹, the move to abolish slavery in war – the genealogical genesis of enslavement – emerges from a different source: The 1863 Instructions for the Government of Armies of the United States in the Field. Those Instructions – the so-called Lieber Code – issues during the United States Civil War, which in large part was found upon the very issue of slavery, declares as a war measure that “private citizens are no longer [to be] enslaved”. This war-time declaration made by US President Abraham Lincoln was meant to hold the Southern Confederacy troops to a declared standard should the Northern Union emerge victorious. The Instructions dismiss domestic law, instead stating that “there exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land”. That provision then given substance by first turning to the issue of slavery, and though it plays rather fast and loose with Roman Law, declares that any fugitive slave falling into the hands of United States’ troops will be deemed to be free with no future claim of compensation for lost property being entertained.¹⁰ Beyond this, the Lieber Code declares, at Article 58, that any enslavement of United States troops will be met with the ultimate penal sanction:

The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

It is here that we witness the genesis of provisions of what would come to be termed ‘enslavement’ in international criminal law. While the first Geneva Convention touching on the laws of armed conflict would emerge later in that same year of 1863, the issue of enslavement was not present, the scope of that treaty was related to wounded and sick soldiers in the field. Despite the emergence of both Geneva Law and Hague Law, no treaty provision dealing with enslavement was to emerge from these streams in treaty law until 1977.

Despite this, enslavement did find voice in international criminal law and evolved from Nuremburg onwards through pronouncements which sought to reflect (and it may be said:

⁹ 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.

¹⁰ See Article 42, United States of America, Instructions for the Government of Armies of the United States in the Field, General Order Number 100, 24 April 1893; which reads:

Slavery, complicating and confounding the ideas of property, (that is of a ‘thing’) and of personality, (that is of ‘humanity’) exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that ‘so far as the law of nature is concerned, all men are equal’. Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or State can have, by the law of postliminy, no belligerent lien or claim of service.

created) customary international law. The 1945 Charter of the International Military Tribunal sets out jurisdiction, *ratione materiae*, at Article 6, in the following terms:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or *deportation to slave labor* or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(c) Crimes against Humanity: namely, murder, extermination, *enslavement*, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.¹¹

While the Prosecutor's Indictment at Nuremburg included charges of enslavement and slave labour and convictions related to these crimes were secured in relation to thirteen defendants, the crimes themselves were not elaborated upon as the programme of slave labour was given little voice by the judges in relations to other crimes committed.¹² Where Article 6(b), is concerned the International Military Tribunal stated that such war crimes were already established under international law, as being covered by provisions of either the 1907 Hague Regulations or the 1929 Geneva Convention on the Treatment of Prisoners of War. Despite the fact that the notion of 'deportation to slave labor' is not found in either of these instruments, the Tribunal went on to say that "violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument".¹³ This final statement is difficult to reconcile as the deportation of Jewish people to slave labor during the National Socialist era was a rather unique phenomena and no mention of enslavement or this nebulous 'deportation to slave labor' found voice in provisions dealing with the laws of war, but for the tangential provisions of the 1863 Lieber Code previously mentioned.

Beyond the little consideration given by the International Military Tribunal, the issue of slave labour was given an airing at Nuremburg as a result of trials held by the United States of America in its zone of occupation, under the provisions of Control Council Law Number 10. Two of these cases – *Milch* and *Pohl* cases – dealt with the use of civilians as slave

¹¹ Article 6, Charter of the International Military Tribunal, 8 August 1945. Emphasis added.

¹² See International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23-T & IT-96-23/1-T) Judgment, 22 February 2001, 180.

¹³ *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10*, Volume I, 1947, p 253.

labour. In both cases, findings of guilt with regard to crimes against humanity were handed down; in *Pohl*, it being noted that “compulsory uncompensated labour” constituted slavery.¹⁴

The International Law Commission

The law itself was not tried in any significant manner at Nuremberg¹⁵; this being reflected in formulation of the 1950 Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal by the International Law Commission.¹⁶ When the United Nations General Assembly asked the Commission to formulate those Principles, it also requested that it prepare a consideration of international crimes under the heading of a ‘draft code of offences against the peace and security of mankind’.¹⁷ Jean Spiropoulos, the individual tasked by the International Law Commission to act as Special Rapporteur and develop a draft code put forward, in his second Report, in 1951, a provision which included enslavement:

Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.

“This paragraph”, Mr. Spiropoulos noted, “corresponds substantially to article 6, paragraph (c), of the Charter of the Nurnberg [sic] Tribunal, which defines ‘crimes against humanity’.¹⁸ That provision was adopted by the International Law Commission, in 1954 as Article 2(11) of the draft Code of Offences against the Peace and Security of Mankind.¹⁹

This is where things stood until 1981, when the UN General Assembly invited the “International Law Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind”.²⁰ In 1986, as part of his Fourth Report to the Commission, the new Special Rapporteur, Doudou Thiam, included the following provision without comment as part of his revamping of the draft Code:

Inhuman acts which include, but are not limited to, murder, extermination, enslavement, deportation or persecutions, committed against elements of a population on social, political, racial, religious or cultural grounds.²¹

In his Seventh Report of 1989, Mr. Thiam “had recast the draft articles on war crimes and crimes against humanity which he had submitted in his fourth report”, and focused in

¹⁴ *United States v Oswald Pohl and Others*, 3 November 1947, reprinted in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10*, Volume V, 1997, p 970.

¹⁵ In 1996, the International Law Commission noted that: “An initial formulation of crimes against humanity was provided in article 6, subparagraph (c), of the Charter of the Nurnberg [sic] Tribunal, although the Nurnberg Tribunal was very circumspect in applying it”.

¹⁶ United Nations, General Assembly, International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, UN Doc. A/1316 (A/5/12).

¹⁷ See United Nations, General Assembly, Resolution 177 (II), 21 November 1947.

¹⁸ United Nations, General Assembly, Report of the International Law Commission to the General Assembly, UN Doc. A/1858, 1951, p. 136.

¹⁹ See United Nations, General Assembly, Report of the International Law Commission to the General Assembly, UN Doc. A/2693, 1954, p. 151.

²⁰ United Nations, General Assembly, Resolution 106 (36), 10 December 1981.

²¹ See United Nations, General Assembly, Report of the International Law Commission to the General Assembly, UN Doc. A/CN.4/398, 1986, p. 86.

particular on, *inter alia*, inhuman acts, which special reference to slavery and forced labour.²² From hereon, but for the end product of his work on the draft Code, Mr. Thiam shifted focus dealing with the issue of ‘slavery’ as opposed to ‘enslavement’.

In turning to consider the issues as slavery, it was acknowledged that there “was general agreement in the Commission on the need to include slavery as a crime against humanity in the draft code”, and that it was deemed preferable to establish a separate article devoted to the issue.²³ As a result, the Special Rapporteur proposed that “Slavery and all other forms of bondage, including forced labour” should constitute a crime against humanity.²⁴ He did so by reference to the 1926 Slavery Convention, the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights (ICCPR); Mr. Thiam acknowledging that the latter two instruments “condemned the practice of slavery in the strongest terms”. Reference was also made to the ICCPR wherein it speaks of “servitude and forced labour”, with the Special Rapporteur noting that the “Covenant also followed the provisions of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which stated in its preamble that ‘no one shall be held in slavery or servitude’”. This final point is rather moot an circular in argument, as the 1956 Supplementary Convention is simply restating in its preamble the provisions (‘no one shall be held in slavery or servitude’) noted in the 1948 Universal Declaration of Human Rights.

This was followed by an approach by the Special Rapporteur – and endorsed by the International Law Commission – which was hardly consonant with a reading of the 1956 Supplementary Convention nor the object and purpose of that instrument as put forward by its drafters.²⁵ In its Report to the General Assembly, the Commission writes: “It was pointed out that the Commission had the choice between the traditional concept of slavery as it appeared in the 1926 Slavery Convention and the wider definition given in the Supplementary Convention, which referred to ‘slavery . . . and institutions and practices similar to slavery’”. In fact the 1956 Supplementary Convention, far from assimilating the two concepts, makes a clear distinction between slavery and institutions and practices similar to slavery.²⁶ Article 7 (a) picks up the definition of slavery as defined by 1926 Convention *verbatim*, with the addition of a final clause which reads: “and ‘slave’ means a person in such condition or status”; while the following provision, Article 7(b) defines ‘A person of servile status’ as meaning “a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention”, that is: the institutions or practices of debt bondage, serfdom, servile marriage, or child exploitation.

Mr. Thiam goes on to say, rather strikingly – making reference to the work of the Sub-Committee on the Prevention of Discrimination and Protection of Minorities – that the scope of the concept of slavery “had been widened in recent years” and “now covered debt bondage and a whole range of other forms of exploitation”. With regard to debt bondage, and specifically draft Article being put forward which spoke of “Slavery and all other forms of

²² United Nations, General Assembly, Report of the International Law Commission to the General Assembly, UN Doc. A/44/10, 1989, p. 86.

²³ United Nations, General Assembly, Report of the International Law Commission to the General Assembly, UN Doc. A/44/10 (Volume 2, Part 1), 1989, p. 86.

²⁴ United Nations, General Assembly, International Law Commission, *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER.A/1989/Add. 1 (Volume 2, Part 1), 1989, p. 86.

²⁵ See generally Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, 2008.

²⁶ In fact, a proposal by Portugal to define slavery together with institutions and practices similar to slavery under the heading of ‘servile status’ was expressly rejected at the Diplomatic Conference negotiating the 1956 Supplementary Convention. See Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, 2008, pp. 518-519.

bondage, including forced labour”, it “the general opinion in the Commission was that it lacked precision and that its content should be clarified”. Where forced labour was concerned, it was pointed out that Article of the 1926 Slavery Convention spoke of a need ‘to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery’; and thus that the 1926 “Convention dealt not so much with forced labour as with the risk of it turning into slavery”²⁷. As a result of these interventions, the Special Rapporteur said that the question would need further study.

That further study manifest itself in new provisions as part of the 1991 Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission, wherein Article 21 dealt with “Systematic or mass violations of human rights” including “establishing or maintaining over persons a status of slavery, servitude or forced labour”.²⁸ The shift from inhuman acts to systematic and mass violations of human rights was brought on by the “considerable development in the protection of human rights since the 1954 draft Code”. With regard to ‘establishing or maintaining over persons a status of slavery, servitude or forced labour’, “the Commission considered that, since there were specific conventions on these matters it was enough for the draft article to enumerate the crimes and leave it to the commentary to mention the principles of international law underlying these conventions”.²⁹

When the International Law Commission once more considered the issue of slavery, the landscape of international criminal law had been fundamentally altered, with the creation of the *ad hoc* tribunals for the former Yugoslavia and Rwanda by the UN Security Council. As a result, the Commission would revert to speaking of ‘enslavement’ as opposed to ‘slavery’. In its 1994 Report, the International Law Commission, noting Article 5 of the International Criminal Tribunal for the former Yugoslavia, wherein, as a crime against humanity, subparagraph (c) enumerated “enslavement”, stating that Article 5 covered, in substance, its own draft Article 21.³⁰ As a result, the Special Rapporteur proposed a new text of Article 21 of

²⁷ United Nations, General Assembly, Report of the International Law Commission to the General Assembly, UN Doc. A/44/10 (Volume 2, Part 2), 1989, p. 61.

²⁸ United Nations, General Assembly, Report of the International Law Commission on the work of its forty-third session, *Yearbook of the International Law Commission*, UN Doc. A/46/10 (Volume 2, Part 2), 1991, p. 103. The provision of Article 21, Systematic or mass violations of human rights, reads in full:

An individual who commits or orders the commission of any of the following violations of human rights:

- murder
- torture
- establishing or maintaining over persons a status of slavery, servitude or forced labour
- persecution on social, political, racial, religious or cultural grounds in a systematic manner or on a mass scale; or
- deportation or forcible transfer of population shall, on conviction thereof, be sentenced [to. . .].

²⁹ United Nations, General Assembly, Report of the International Law Commission on the work of its forty-third session, *Yearbook of the International Law Commission*, UN Doc. A/46/10 (Volume 2, Part 2), 1991, p. 104. The Commission provides examples of these specific conventions:

For example, slavery is defined in the Slavery Convention, of 25 September 1926, and in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 7 September 1956, which also defines servitude. Both slavery and servitude are also prohibited under article 8 of the International Covenant on Civil and Political Rights, of 16 December 1966. The article also prohibits forced labour, a concept which it spells out, and which also forms the subject of some conventions, such as ILO Conventions Nos. 29 and 105 concerning the Abolition of Forced Labour.

³⁰ See United Nations, General Assembly, Report of the International Law Commission on the work of its forty-sixth session, *Yearbook of the International Law Commission*, UN Doc. A/49/10 (Volume 2, Part 2), 1994, p. 40.

Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia reads:

the draft Code of Crimes against the Peace and Security of Mankind entitled ‘Crimes against humanity’, which in part stated that a “crime against humanity means the systematic commission of any of the following acts: [...]Reduction to slavery”³¹

This was followed, by the adoption of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, the culmination of the work of both Mr. Thiam as Special Rapporteur and the International Law Commission on the issue. At Article 18 of the 1996 Draft Code, crimes against humanity was defined, in part as “any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: [...] (d) Enslavement”³². In the commentary to that provision, it the Commission stated that:

Enslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law, such as: the Slavery Convention (slavery); the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude); the International Covenant on Civil and Political Rights (slavery and servitude); and ILO Convention No. 29, concerning Forced or Compulsory Labour (forced labour). Enslavement was included as a crime against humanity in the Charter of the Nurnberg Tribunal (art. 6, subpara. (c)), Control Council Law No. 10 (art. II, subpara. (c)), the statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Tribunal for Rwanda (art. 3) as well as the Nurnberg Principles (Principle VI) and the 1954 draft Code (art. 2, para. 11).

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

³¹ United Nations, General Assembly, Report of the International Law Commission on the work of its forty-seventh session, *Yearbook of the International Law Commission*, UN Doc. A/50/10 (Volume 2, Part 2), 1995, p. 25.

³² United Nations, General Assembly, International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind with commentaries, *Yearbook of the International Law Commission*, UN Doc. A/51/10 (Volume 2, Part 2), 1996, p. 47. Article 18 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind reads in full:

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group:

- (a) Murder;
- (b) Extermination;
- (c) Torture;
- (d) Enslavement;
- (e) Persecution on political, racial, religious or ethnic grounds;
- (f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- (g) Arbitrary deportation or forcible transfer of population;
- (h) Arbitrary imprisonment;
- (i) Forced disappearance of persons;
- (j) Rape, enforced prostitution and other forms of sexual abuse;
- (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

For Mr. Calero Rodrigues, the Chairman of the Drafting Committee which put the finishing touches on the 1996 Draft Code and introduced Article 18 to the Commission for its final consideration, the term ‘enslavement’ was a “simpler term”, one “found in many legal instruments, [which] had been used to refer to the crime of ‘establishing or maintaining over persons a status of slavery, servitude or forced labour’, which had been included in the article adopted on first reading”, that is: as found in Article 21 of the 1991 draft Code.³³

International Criminal Tribunal for the former Yugoslavia

With the work of the International Law Commission completed, it was the International Criminal Tribunal for the former Yugoslavia which would, in the *Kunarac* case, consider the parameters of the crime of enslavement by determining that “enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person”³⁴. This, despite the fact that in its consideration, the Trial Chamber made plain that enslavement went beyond the definition established of slavery established 1926 Slavery Convention, stating that this “definition may be broader than the traditional and sometimes apparently distinct definitions of slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law”.³⁵ The Trial Chamber continued:

Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator.

The Trial Chamber then added:

The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim’s position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.

The Trial Chamber, stated that the “‘acquisition’ or ‘disposal’ of someone for monetary or other compensation, is not a requirement for enslavement . Doing so, however, is a prime example of the exercise of the right of ownership over someone”.

The Trial Chamber then accepted the approach put forward by the Prosecutor, as to the factors “to be taken into consideration in determining whether enslavement was committed”:

These are the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour. The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor.³⁶

³³ United Nations, General Assembly, International Law Commission, *Yearbook of the International Law Commission*, UN Doc. A/CN.4/SER.A/1996 (Volume 1), 1996, p. 74.

³⁴ International Criminal Tribunal for the former Yugoslavia, *Kunarac et als.* (IT-96-23-T &-IT-96-23/1-T) Judgment, 22 February 2001, p. 192.

³⁵ *Id.*, 193.

³⁶ *Id.*, pp. 193. Footnote references have been omitted.

Where forced labour was concerned, the Trial Chamber added little, stating that such labour was not prohibited by the Fourth Geneva Convention, though “strict conditions” govern such labour.

For its part, the Appeals Chamber made no distinction between slavery and ‘enslavement’ as it accepted “the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as ‘chattel slavery’, has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership”³⁷. The Appeals Chamber appeared to make the distinction between *de jure* slavery (read: chattel slavery) and *de facto* slavery, though it does not express itself in those terms; instead it spoke of contemporary forms of slavery wherein “the victim is not subject to the exercise of the more extreme rights of ownership associated with ‘chattel slavery’, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of ‘chattel slavery’ but the difference is one of degree”³⁸.

The Appeals Chamber then noted that “the law does not know of a ‘right of ownership over a person’. Article 1(1) of the 1926 Slavery Convention speaks more guardedly ‘of a person over whom any or all of the powers attaching to the right of ownership are exercised.’ That language is to be preferred”. Repeating to the “factors or indicia” noted by the Trial Chamber, the Appeals Chamber, while indicating that the list was not exhaustive, stated that “the question whether a particular phenomenon is a form of enslavement” will be based on, *inter alia*:

the ‘control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour’.³⁹

The Appeals Chamber concluded its consideration of the law governing ‘enslavement’, stating that it was “of the opinion that the Trial Chamber’s definition of the crime of enslavement is not too broad and reflects customary international law at the time when the alleged crimes were committed”⁴⁰.

In the *Krnjelac* case before the Yugoslav Tribunal, while the Trial Chamber determined that the Prosecutor had failed to make the case that Milorad Krnojelac had enslaved individuals by means of forced labour, the Chamber did consider as to the law of enslavement. For the Trial Chamber, the case to be made by the Prosecutor was that individuals (in this case detainees) were forced to work and that there was an intentional exercise of any or all of the powers attaching to the right of ownership.⁴¹ Noting that labour was not prohibited by international humanitarian law, the Trial Chamber stated that “[g]enerally, the prohibition is against *forced* or *involuntary* labour”. It continued: “it is clear from the Tribunal’s jurisprudence that ‘the exaction of forced or compulsory labour or

³⁷ International Criminal Tribunal for the former Yugoslavia, *Kumarac et als.* (IT-96-23 &-IT-96-23/1-A) Judgment, 12 June 2002, p. 35..

³⁸ *Id.*, pp. 35-36. The Appeals Chamber felt compelled to add footnote 145 which states: “It is not suggested that every case in which the juridical personality is destroyed amounts to enslavement; the concern here is only with cases in which the destruction of the victim’s juridical personality is the result of the exercise of any of the powers attaching to the right of ownership.

³⁹ *Id.*, p. 36.

⁴⁰ *Id.*, p. 38.

⁴¹ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Milorad Krnojelac* (IT-97-25-T) Judgment, 15 March 2002, p. 147. Note that on appeal, Milorad Krnojelac was found guilty of forced labour, but not on the grounds of enslavement, but of persecution. See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v Milorad Krnojelac* (IT-97-25-A) Judgment, 17 September 2003.

service' is an 'indication of enslavement', and a 'factor to be taken into consideration in determining whether enslavement was committed'".⁴² This understanding that the exaction of forced or compulsory labour or service is an indication of enslavement appears to be at variance with a reading of the 1930 Forced Labour Convention. While Article 2 of that Convention establishes that "the term 'forced or compulsory labour' shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". However, the Convention also establishes exception, which are deemed to have escaped the definition of forced labour. These include compulsory military service, normal civic obligations of the citizens, penal labour, and community service, but also "any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity [...]".⁴³ While the provision dealing with the normal civic obligations is directed to citizens, the provisions for wartime make no distinction between citizens and those who are prisoners of war or civilians under occupation, finding themselves in the hands of the enemy. Thus, *prima facie*, that forced labour will be an indication of enslavement appears rather stretched.

That said, for the Trial Chamber the question of determining enslavement fell to a question of fact as to whether the labour of protected persons (read: detainees) was involuntary or not. As a basis for making this determination, it reverted to the pronouncement of the Trial Chamber in *Kunarac* as being reflective of relevant circumstance:

The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions.

Stating that Article 5(1) of Additional Protocol II "sets out the applicable standard"⁴⁴ as to labour for detainees in armed conflict, the Trial Chamber stated that if the fundamental guarantees established by Article 4 of the Protocol II were to be "violated, the performance of that labour may be treated as an indication of enslavement. Article 4 Additional Protocol II, as quoted by the Trial Chamber, reads:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction [...]

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever [...]

(f) slavery and the slave trade in all their forms [...]

⁴² *Id.*, p. 147. Emphasis in the original.

⁴³ Article 2(2)(d), ILO Convention (No. 29) Concerning Forced Labour, 1930; reads:

Any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

⁴⁴ Article 5(1), Additional Protocol (II) to the Geneva Conventions of 1949, 1977 reads:

In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained; [...] (e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

This then is the test set out with regard to forced labour as enslavement. With reference to Article 4, the issue can not with regard to sub-paragraph (f), as this would be a circular argument: that a violation of that provisions in the performance of labour ‘may be treated as an indication of enslavement’. Instead, it appears that the Trial Chamber was saying that forced or involuntary labour exacted from protected persons ‘may be treated as a indication of enslavement’ where it fails to provide ‘respect for their person, honour and convictions and religious practices’. This appears to stray rather far from the exercise of any or all of the powers attaching to the right of ownership and to a determination on the sole basis of whether forced labour was extracted; not whether forced labour met the threshold of powers attaching to the right of ownership.⁴⁵

Regardless of the above interpretation, it may be said that the evolution of international law from Nuremburg through, the work of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind and culminating in the case-law of the Yugoslav Tribunal established enslavement as a crime which went beyond the definition of slavery to include lesser servitudes. For the International Law Commission enslavement was a “simpler term”, to be used instead of crime of ‘establishing or maintaining over persons a status of slavery, servitude or forced labour’; for the International Criminal Tribunal for the former Yugoslavia, ‘enslavement’ was a to be considered a “definition [which] may be broader than the traditional and sometimes apparently distinct definitions of slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law”.

The International Criminal Court

In the move to establish the International Criminal Court – which had its genealogy intertwined with the work of the International Law Commission and the Draft Code of Crimes as early as 1993 – A Preparatory Committee on the Establishment of an International Criminal Court (PreCom) was established in 1996. Where enslavement was concerned, the PreCom noted that:

Some delegations expressed the view that enslavement required further clarification based on the relevant legal instruments. There were proposals to refer to enslavement, including slavery-related practices and forced labour; or the establishment or maintenance over persons of a status of slavery, servitude or forced labour. The view was expressed that forced labour, if included, should be limited to clearly unacceptable acts.

There was clearly a lack of agreement as to what should be included with regard to the crime of enslavement. Thus for instance, in the Chairman’s informal texts of proposals and suggestions, slavery appeared (not enslavement) as a war crime, but also, though in square brackets other types of exploitation so as to read: “slavery [and the slave trade,] [slave-related practices, and forced labour] in all their forms”. Likewise, enslavement as a crime against humanity was also bracketed against the following: “[, including slavery-related practices and forced labour];[establishing or maintaining over persons a status of slavery, servitude or forced labour]”. Where ‘enslavement’ was concerned, the following definition was contemplated “Enslavement means intentionally placing or maintaining a person in a condition in which any or all of the powers attaching to the right of ownership are exercised

⁴⁵ Here it should be recalled that the preamble of the 1926 Slavery Convention states as an object of that instrument “that it is necessary to prevent forced labour from developing into conditions analogous to slavery”; while Article 5 reads in part that State Parties are “to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery”.

over him”.⁴⁶ By 1997, however, the PreCom had settled on the exclusive inclusion of the crime of ‘enslavement’ as a crime against humanity⁴⁷; though “slavery and the slave trade in all their forms” remained a live option as a war crime.⁴⁸ In fact, that provision remained a live until the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in summer of 1998; though it was ultimately not included in the Rome Statute.⁴⁹ Instead, the parties negotiating the Statute of the International Criminal Court established the ‘crime against humanity of enslavement’ at Article 7(1)(c) and defined that crime at Article 7(2)(c) in the following terms:

‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children⁵⁰

Enslavement as Slavery plus ‘Similar Deprivation of Liberty’?

Enslavement as defined in the Rome Statute is in substance the same definitions as found in the 1926 Slavery Convention (that is leaving aside the latter half of the definition dealing with trafficking for the moment).⁵¹ The definition reflecting the 1926 definition appears to be at odds with the development of ‘enslavement’ in customary international law via Nuremberg, the Draft Code of Crimes against the Peace and Security of Mankind and the International Criminal Tribunal for the former Yugoslavia. And yet, the States negotiating at Rome and those involved in the Preparatory Commission decide on the treaty-based definition to be applicable before the International Criminal Court. While consideration was given to adding such elements as ‘maintaining over persons a status of slavery, servitude or forced labour’ or speaking of ‘slavery and the slave trade in all their forms’; States settled on a definition of enslavement mirroring the 1926 Slavery Convention and decided to close any gap which – at least where the subject-matter of the International Criminal Court concerned – exists between enslavement in international criminal law and slavery in general international law and international human rights law.

That said, the secondary legislation of the International Criminal Court – the Elements of the Crimes – brings into questions this understanding of enslavement as being equal to slavery. This is so as Article 9 of the Statute of the International Criminal Court states that the “Elements of Crimes shall assist the Court in the interpretation and application” of the jurisdiction *ratione materiae*. Where enslavement is concern the Elements of the Crimes,

⁴⁶ United Nations, General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, UN Doc. A/AC.249/1, 7 May 1996, pp. 64, 69 and 70.

⁴⁷ See United Nations, General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, Working Group on definition of crimes, Draft Consolidated Text, UN Doc. A/AC.249/1997/WG.1/CRP.5, 20 February 1997, p. 1.

⁴⁸ See United Nations, General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5, 12 March 1997, p. 1.

⁴⁹ United Nations, United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, p. 24.

⁵⁰ Article 7(2)(c), Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

⁵¹ *Note:* At this point, the latter half of the definition (‘and includes the exercise of such power in the course of trafficking in persons, in particular women and children’), is being put to the side, to be considered in the next section of this Paper. Here, what is important to note – and what will be demonstrated later – is that this half of the definition does not add to the substance to definition of enslavement as set out in Article 7(2)(c).

which were adopted in 2000 by the PrepCom, and latter endorsed by the Assembly of States Parties at its first session in September 2002, state the following at Article 7(1)(c):

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁵²

While Paragraph 2 and 3 of these elements speaks to establishing the threshold of the enslavement as a crime against humanity, Paragraph 1 sets out to elaborate on the definition of enslavement established by the Statute of the International Criminal Court. This paragraph provides examples of what would constitute powers attaching to the right of ownership including “purchasing, selling, lending or bartering such a person or persons”. These example are in line with those put forward by the United Nations Secretary-General in his 1953 Report mentioned earlier; though it should be emphasised that the Secretary General goes further in providing examples of what would constitute such powers with regard to, for instance, the use an individual or their labour in an unrestricted manner and gain the unfettered benefit of the product of that labour.⁵³ In passing it should be noted that the examples provided in the Elements of the Crimes of the powers attaching to the right of ownership as set out is not an exhaustive list (ie: the subordinate clause starting with “such as by purchasing, [etc. ...]”) and could well accommodate the wider understanding of those powers attaching to the right of ownership put forward by the UN Secretary-General and/or others.

Beyond providing examples of powers attaching to the right of ownership, Paragraph 1 adds a final clause which reads “or by imposing on them a similar deprivation of liberty”. An ordinary reading of this provision in the context of the overall provision of Paragraph 1 could lead to two readings, but both leading to the same interpretation of that provision. As this will be a rather technical consideration of the provisions, I am taking the liberty to reproduce Paragraph 1 here to have it at hand once more:

The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

The first reading of Paragraph 1 would be is that the examples given of the powers attaching to the right of ownership are subordinate to the first clause of the sentence and that, as such, their suppression would mean that the paragraph would read: The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons [...] or by imposing on them a similar deprivation of liberty. This reading, by reference to ‘imposing on *them*’ is speaking the ‘one or more persons’ over whom the perpetrator is exercising powers attaching to the right of ownership. By mention of ‘*similar* deprivation of liberty’, the deprivation of liberty which is being spoken of is a deprivation which would be similar to that

⁵² International Criminal Court, Assembly of States Parties, Elements of the Crimes, ICC-ASP/1/3, 9 September 2002, p. 117.

⁵³ For the six instance of powers attaching to the right of ownership set out by the Secretary General see footnote **XX** above; for an in-depth consideration see: Jean Allain, “The Definition of Slavery in International Law”, *Howard Law Journal*, Vol. 52, 2009, pp. 239-275.

of a person who had rights of ownership exercised against them. Thus the end point of this reading is that we are speaking of deprivations of liberty similar to that which would be manifest when a person exercises the powers attaching to the right of ownership over another.

The second reading would be that that the phrase ‘or by imposing on them a similar deprivation of liberty’ is but a continuation of the examples provided so as to be read as forming part of the following train of examples of powers attaching to the right of ownership “such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”. Such a reading would get us to the same end point, but by the medium first of a comparison to the other examples put forward. In this reading the ‘*similar* deprivations of liberty’ are those similar to manifest in the purchasing of a person, to selling of a person, or the lending or bartering of a person. Yet, as these are themselves examples of powers attaching to the right of ownership, the ‘similar deprivations of liberty’ would also be those similar to powers attaching to the right of ownership. As an end point then of a reading of the final element of Paragraph 1, a deprivation of liberty is a deprivation which is similar to that manifest when the powers attaching to the right of ownership are exercised against another human being.

However this is not the true end point as Paragraph 1 of Article 7(1)(c) of the Elements of the Crimes includes, at the end of its provisions, a footnote (footnote 11) which reads:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

Through this footnote what appears to have transpired is the expansion of enslavement to include, beyond the established definition of slavery, the lesser servitudes of forced labour, debt bondage, serfdom, servile marriage or child exploitation – the latter four being the servile statuses set out in the 1956 Supplementary Convention.⁵⁴ This is so, as deprivations of liberty would appear by way of this footnote to not only be similar to those powers attaching to the right of ownership are concerned but also via this footnote through the exacting of forced labour or the reduction of a person to a servile status through serfdom, debt bondage, serfdom, servile marriage or child exploitation. Through the addition of this footnote then, the gap closed by the definition of enslavement established by the Statute of the International Criminal Court has been reopened by a footnote to what William Schabas terms the “subordinate legislation” of the International Criminal Court: the Elements of the Crimes.⁵⁵

And yet, this reading of the provisions of the footnote added to Paragraph 1 of the elements of the crime of humanity of enslavement would not, *prima facie*, be able to hold; as Article 9 of the Statute of the International Criminal Court states that the “Elements of Crimes and amendments thereto shall be consistent with this Statute”. An interpretation which by the stealth of a footnote to subordinate legislation which purports to expand the definition of enslavement beyond slavery to include lesser servitudes would appear to stretch the notion of consistency with the Statute beyond the judicial horizon of sound interpretation of international law.

⁵⁴ For a consideration of the scope of these servile status – the practices or institutions similar to slavery – see Jean Allain, “On the Curious Disappearance of Human Servitude from General International Law, *Journal of the History of International Law*, Vol. XX, 2009, pp. XX-XX (*forthcoming*).

Note: the final sentence of Paragraph 1 dealing with trafficking is addressed in the next section of this Paper.

⁵⁵ William Schabas, *An Introduction to the International Criminal Court*, 2007, p. 91.

That said, a broader consideration of the first sentence of this footnote, given some depth of understanding, appears to establish enough leeway to have the provision interpreted in line with the Statute. However, as will be seen, in so doing, this interpretation negates the need to have the footnote at all, rendering it redundant and mandating its deletion through the amendment process envisioned by Article 9(3) of the Statute of the International Criminal Court.

The first saving grace found in the footnote is that its application to forced labour, debt bondage, serfdom, servile marriage or child exploitation, will take place only ‘in some circumstances’. Those circumstances, I would argue, would be when forced labour, debt bondage, serfdom, servile marriage or child exploitation, manifest powers attaching to the right of ownership and, despite their nomenclature and definition in law, slip their moorings to become enslavement. This is possible in law as both the 1926 Slavery Convention recognises that forced labour can degenerate into slavery and the 1956 Supplementary Convention foresees debt bondage, serfdom, servile marriage and child exploitation being, in law, either servitude or slavery.

Let us turn first to consider forced labour. Forced or compulsory labour is defined in the 1930 Forced Labour Convention as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.⁵⁶ Yet, before that definition was laid down, a provision dealing with forced labour was included in the 1926 Slavery Convention of which the introductory paragraph reads:

The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures *to prevent compulsory or forced labour from developing into conditions analogous to slavery*.

Article 5 of the 1926 Slavery Convention which placed the first limitation on forced labour, reserving it for public purposes only, acknowledges that forced labour could develop into conditions analogous to slavery. As such, it would be in these circumstances, when forced labour became analogous to slavery that it could then be included as a deprivation of liberty in line with footnote attached to the element of the crime of against humanity of enslavement.

Where debt bondage, serfdom, servile marriage and child exploitation are concerned as servile status, Article 7(b) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery states that “‘A person of servile status’ means a person in the condition or status resulting from any of the institutions or practices mentioned in article 1 of this Convention”. Thus institutions or practices, as defined in Article 1 of the 1956 Supplementary Convention are:

(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

⁵⁶ Article 2(1), ILO Convention (No. 29) Concerning Forced Labour, 1930.

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person;
- (d) Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

There is an introductory paragraph to this Article 1, which states that 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 [these] institutions and practices”. That introductory paragraph, however, continues by stating that the abolition or abandonment of these institutions and practices should take place “where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926”. Thus, it was recognised in 1956 that debt bondage, serfdom, servile marriage or child exploitation, while they should be abolished in their own right could, if they manifest powers attaching to the right of ownership be already covered by the definition of slavery found in the 1926 Slavery Convention. This understanding was confirmed some ten years later when the League of Nations Committee of Experts on Slavery considered the issue of serfdom in 1936 and sought to emphasise the distinction between slavery as defined in the 1926 Convention and other forms of servitudes:

It is important, however, to keep the fundamental distinction clearly in mind, and to realise that the status of ‘serfdom’ is a condition ‘analogous to slavery’ rather than a condition of actual slavery, and that the question whether it amounts to ‘slavery’ within the definition of the Slavery Convention must depend upon the facts connected with each of the various systems of ‘serfdom’⁵⁷.

The Committee of Experts on Slavery was more explicit when it turned to debt bondage, addressing it as ‘debt slavery’, and stating that it “is right, perhaps, that one should realise quite clearly that the system – whatever form it may take in different countries – is not ‘slavery’ within the definition set forth in Article 1 of the 1926 Convention, unless any or all the powers attaching to the right of ownership are exercised by the master⁵⁸. Thus, while an institutions or practices may be considered as child exploitation or servile marriage; if powers attaching to the right of ownership are exercised, such institutions or practices would also be “covered by the definition of slavery” found in the 1926 Convention.

The footnote which seeks to clarify the term ‘deprivation of liberty’ in the Paragraph 1 of the Elements of the Crimes covering enslavement as a crime against humanity recognises that, *in some circumstances*, such deprivation may include forced labour, debt bondage, serfdom, servile marriage or child exploitation. Yet, Paragraph 1 of the Elements of the Crimes covering enslavement requires that such deprivation of liberty be similar to that manifest when the powers attaching to the right of ownership are exercised against a human being. This is required by a reading of Paragraph 1; but more importantly it is imperative as Article 9 of the Statute requires that Elements of Crimes “be consistent with this Statute”, and Article 7(2)(c) of the Statute of the International Criminal Court defines enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person [...]”.

⁵⁷ League of Nations, Slavery: Report of the Advisory Committee of Experts, Third (Extraordinary) Meeting of the Advisory Committee, C.189(I). M.145.1936, VI, 13-14 April 1936, p. 27.

⁵⁸ *Id.*, pp. 24-25.

Thus, only when a perpetrator exacts forced labour, or reduces a person to debt bondage, serfdom, servile marriage or child exploitation to such an extent that, in such circumstances, the action degenerates into the exercise of any or all of the powers attaching to the right of ownership will the interpretation of the footnote be in line with the Elements of the Crimes and the Statute of the International Criminal Court.

If this be the case, the footnote serves no purpose, as it confirms what we already know by a simple reading of Paragraph 1 of the Elements of the Crimes covering the enslavement: that deprivations of liberty must manifest powers attaching to the right of ownership to be consistent with this Statute. That said, if the final clause of Paragraph 1 of the Elements of the Crimes – ‘or by imposing on them a similar deprivation of liberty’ – is either an example of a power attaching to the right of ownership or manifestly similar in its deprivation of liberty as a power attaching to the right of ownership, then it begs the question: why have the clause? By the drafting of the provisions, it is clear that the notion of deprivation of liberty was included to seek to expand the notion of enslavement to included lesser servitudes; yet this is not possible as the definition of enslavement found in the Rome Statute is that of slavery. Only when perceived lesser servitudes manifest powers attaching to the right of ownership will they be considered enslavement; but not because they have been included by stealth in the Element of the Crimes, but because they correspond to the definition of enslavement established in the Statute of the International Criminal Court.

Enslavement as Trafficking in Persons?

In both the definition of enslavement found in the Statute of the International Criminal Court and its elaboration via a footnote added to the Elements of the Crimes, the phrase ‘trafficking in persons, in particular women and children’ appears. As with the considerations of the previous section, it appears that where the issue of trafficking is concerned a contradiction exists as between the primary and secondary legislation of the International Criminal Court. While the primary legislation of the Court, its Statute, provides that enslavement may take place in the course of trafficking where the powers attaching to the right of ownership are exercised; the Elements of the Crimes through the footnote go much further, in making trafficking synonymous with enslavement. Where, in the previous section, in the case of ‘deprivation of liberty’, the Elements of the Crimes could be reconciled with the Statute; here, with regard to trafficking in persons, the subordinate legislation goes beyond the confines of the established definition of enslavement as set out in the Statute to include elements which have no relation to the exercise of powers attaching to the right of ownership.

It will be recalled that Article 7(2)(c) of the Statute of the International Criminal Court reads:

‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

As set in that definition, the latter half of the definition – ‘and includes the exercise of such power in the course of trafficking in persons, in particular women and children’ – does not add to the substance of the definition of enslavement but simply confirms that the powers attaching to the right of ownership may be found in instance of trafficking in persons. In the 2008 *The Queen v Tang* case before the High Court of Australia a similar constructed definition was considered, in the context of a case dealing with the finding of *de facto* slavery of ten Thai women working as prostitutes by a Melbourne brothel owner. The Australian Criminal Code defines slavery in the following terms at Section 270.1:

For the purposes of this Division, *slavery* is 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.

In considering this provision the High Court noted that “the concluding words of the definition in s270.1 (‘including where such a condition results from a debt or contract made by the person’) do not alter the meaning of the preceding words because it is only where ‘such a condition’ (that is, the condition earlier described in terms of the 1926 Slavery Convention) results that the words of inclusion apply”.⁵⁹ This same approach would hold for Article 7(2)(c) of the Statute of the International Criminal Court, where in the concluding words (‘includes the exercise of such power in the course of trafficking in persons, in particular women and children’) would not alter the meaning of the first part of the definition as – to paraphrase High Court – it is only where ‘such powers’ (that is, the powers earlier described as attaching to the right of ownership) “results that the words of inclusion apply”. The High Court, in *The Queen v Tang*, went on to say that this was “a common drafting technique”; that the “words following ‘including’, therefore, do not extend the operation of the previous words but make it plain that a condition that results from a debt or a contract [or with regard to definition of enslavement in the Statute, the exercise of the powers attaching to the right of ownership in the course of trafficking] is not, on that account alone, to be excluded from the definition, provided it would otherwise be covered by it”.⁶⁰

Thus, the International Criminal Court, in applying the provisions of Article 7(2)(c) of its Statute, would not be able to exclude *ipso facto* cases of trafficking from its jurisdiction, but could consider such cases “provided it would otherwise be covered” by the definition of enslavement as demonstrating the exercise of the powers attaching to the right of ownership. This is an accurate reflect of the law as it has evolved since the Rome Diplomatic Conference which negotiated the Statute of the International Criminal Court as an international consensus has emerged as to the definition of ‘trafficking in persons’, which is reflect in its appearance in both the 2000 United Nations Palermo Protocol and the 2005 Council of Europe Convention in the following same terms:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁶¹

As will be noted from that definition, trafficking in persons consists of three elements, the methods (‘the recruitment, transportation, transfer, harbouring or receipt’), the means (threat or use of force, other forms of coercion, abduction, fraud, deception, abuse of power, position of vulnerability, etc.) and the purpose (exploitation; of which examples are then given). Of the types of exploitation enumerated, slavery appears, as does lesser servitudes, including those found in the 1956 Supplementary Convention (via: ‘practices similar to slavery’), forced labour and ‘servitude’ (which has its own standing in international human rights law, see for instance Article 8 of the ICCPR). If then, these three elements are present, then

⁵⁹ *The Queen v Tang* [2008] HCA 39, 28 August 2008, para. 33.

⁶⁰ *The Queen v Tang* [2008] HCA 39, 28 August 2008, para. 33.

⁶¹ See Article 3(a), 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and Article 4(a), 2005 Council of Europe Convention on Action against Trafficking in Human Beings.

trafficking in persons will be deemed to have taken place. If, however, the intended purpose was to exploit so as to exercise the powers attaching to the right of ownership, then this act of trafficking could be considered as enslavement as defined in Article 7(2)(c) of the Statute of the International Criminal Court. That is, as the definition states, ‘the exercise of such power in the course of trafficking in persons’.

Having considered the notion of trafficking in persons as it relates to the Statute of the International Criminal Court, it is now time to turn to the Elements of the Crime. It will be recalled that Paragraph 1 of Article 7(1)(c) of the Elements of the Crimes reads:

The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

Here, no mention is made of trafficking in person. However, as will be recalled, at the end of Paragraph 1 there is included a footnote which reads:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

That last sentence appears to extend the definition of enslavement to not only those powers attaching to the right of ownership which might be present in a case of trafficking to actually equating trafficking to enslavement.

The final sentence which appears in the footnote does not address the notion of ‘deprivation of liberty’ which is at the heart of the first sentence. Instead, the second sentence found Footnote 11 of the Elements of the Crimes speaks directly to the element of the crime of enslavement found in Paragraph 1 and more specifically: ‘The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons’. As the second sentence reads: “it is understood that the conduct [the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons] [...] includes trafficking in persons”. In essence then trafficking in persons is enslavement. This is a rather a different proposition than found in the definition of enslavement found in the Statute, wherein if powers attaching to the right of ownership are exercised during a case of trafficking in persons, then this should not *ipso facto* exclude the Court from asserting its jurisdiction.

Yet the Elements of the Crimes applicable to the crime of humanity of enslavement and specifically Paragraph 1 with its attached footnote, go much further by deeming that where – as per a reading of the definition of trafficking in persons – a method and a means of trafficking is present, that any type of exploitation used would then amount to enslavement. Take the following as an example: where a perpetrator recruits a person by means of fraud for the purpose of the removal of organs, this would amount to enslavement as per the Elements of the Crimes. This expanded understanding of enslavement does not conform to the limits of the definition as set out in Article 7(2)(c) of the Statute; and are thus not – in the words of Article 9 of the Rome Statute – “consistent with this Statute”. By equating trafficking with enslavement, the Elements of the Crimes seek to, by stealth, include within the jurisdiction of the International Criminal Court lesser types of exploitation where trafficking is present. This expansion of the definition of enslavement appears to be open-ended as it will be noted that the types of ‘exploitation’ enumerated are but examples (i.e.: “shall include, at a minimum ...”) and appear to be the most egregious types of exploitation. This would leave

the possibility of other, lesser, types of exploitation within the context of trafficking in persons open to the jurisdiction of the International Criminal Court. One such example might be the receipt of person via the abuse of their position of vulnerability, say the lack of working documents, and paying them less than minimum wage. While the paying of less than minimum wage would ordinarily invoke an administrative sanction – the paying of back pay and say a fine in the domestic context; under the Elements of Crime, other elements being present, lifts this example to a crime against humanity; as this would appear – being exploitation – to constitute enslavement before the International Criminal Court.

Conclusion

Where issues of slavery/enslavement are concerned international criminal law is distinct from general international law (in the guise of the 1926 Convention and the 1956 Supplementary Convention) and international human rights law (manifest in the 1948 Universal Declaration and the 1966 International Covenant on Civil and Political Rights). In both general international law) and international human rights law, slavery is accompanied by lesser servitudes (see Article 8 of the ICCPR which speaks of slavery, the slave trade, servitude and forced labour); whereas international criminal law knows only ‘enslavement’. From Nuremberg to the Yugoslav Tribunal, judges have sought to expand the notion of enslavement to include not only slavery but also lesser servitudes, the most obvious being forced labour. However this approach, whether consciously or not, was discarded for Article 7(2)(c) of the Statute of the International Criminal Court with the definition of enslavement corresponding, in essence, to the definition of slavery established by the 1926 Slavery Convention as the powers attaching to the right of ownership.

This Paper has sought to show how the addition of the phrase ‘deprivation of liberty’ and Footnote 11 in the Elements of the Crimes seeks to expand the crime of enslavement to being applicable to lesser servitudes than slavery and to trafficking in persons whether or not there is the exercise of powers attaching to the right of ownership. In so doing, it appears that the secondary legislation of the International Criminal Court creates an open-ended crime, one which lacks the legal certainty necessary to protect the rights of the accused to know the charges against them. Further, in so doing, it appears that the Elements of the Crimes in the case at hand are inconsistent with the Statute and thus in breach of Article 9 of the Statute of the International Criminal Court. As such, if China were to contemplate acceding to the Statute of the International Criminal Court, it should consider insisting on the following. It should require the Assembly of States Parties to amend the Elements of the Crimes (as per Article 9(2) of the Statute), by deleting Footnote 11 and amending Paragraph 1 of Article 7(1)(c) of the Elements of the Crimes by deleting the provision which reads: “or by imposing on them a similar deprivation of liberty”. As has been shown, both of these elements are inconsistent with the definition of enslavement as established by the Statute of the International Criminal Court which has narrowed the understanding of that term (by treaty law as opposed to the customary-based understanding developed in international criminal law) to being synonymous not with trafficking or forced labour or other, lesser, servitudes but with slavery as first defined in the 1926 Slavery Convention. That definition is, however, broad enough to incorporate forced labour and the servile status mentioned in the 1956 Supplementary Convention, but only where there manifests ‘any or all of the powers attaching to the right of ownership over a person’ are present.