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## **Eradicating Modern Slavery: What Role for International Criminal Justice?**

### **Background Paper**

For a Policy Breakfast launching a Policy Research Initiative

Today, some 30 million people worldwide live in slavery, a significant portion of them children.<sup>1</sup> Yet slavery is strictly prohibited by international law. Under the Rome Statute of the International Criminal Court, enslavement is even in some cases prosecutable as a crime against humanity or, arguably in some narrower cases, a war crime. As Zeid Ra'ad al-Husseini, the UN High Commissioner for Human Rights, noted in his inaugural speech to the Human Rights Council, the exploitation of workers in a wide range of industries continues, apparently all but unimpeded by the shadow of domestic and international criminal liability. Slavery currently exists in every region of the world, including diverse states such as India, Brazil, Russia, and Ethiopia,<sup>2</sup> and in such diverse economic sectors as the farming, mining, manufacturing, domestic worker and personal-care service industries.<sup>3</sup>

Why is there such a gap between law and practice? What can be done to improve the contribution of international criminal justice norms and institutions to the eradication of modern slavery, whether through domestic or international courts, state peer review arrangements, civil litigation, corporate prevention efforts or the UN and ILO's supervisory machinery? This background paper highlights some of the key issues that will be discussed in a joint policy research initiative currently being carried out by UN University, the *Journal of International Criminal Justice*, the Freedom Fund and the Permanent Mission of Liechtenstein to the United Nations.

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<sup>1</sup> Global Slavery Index 2013, available at <http://www.globalslaveryindex.org/findings/#rankings>.

<sup>2</sup> Id.

<sup>3</sup> Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian, U.N. Doc. A/HRC/24/43, 1 July 2013, para. 21.

## 1. Slavery is illegal – but what is slavery?

Slavery is defined under customary international law as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>4</sup> In recent years, international courts have proposed that the existence of slavery is best determined on a case-by-case basis, considering factors such as control of a person’s movement and environment, force, and threat of the use of force or coercion.<sup>5</sup>

The forms of control that have been considered to be prohibited under international law include serfdom, debt bondage, forced labor, child labor (including conscription of child soldiers), human trafficking, domestic servitude, servile marriage, forced prostitution, and sexual slavery, though the definition of these categories is not without controversy.<sup>6</sup> These forms of conduct have been clarified in a range of international treaties, including the 1926 *Slavery Convention* and the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, the *Convention Concerning Forced or Compulsory Labour*, the *Worst Forms of Child Labour Convention*, and the UN *Convention against Transnational Organized Crime* and its Protocols against human trafficking and smuggling.

The prohibition on slavery is considered both to be a peremptory norm – i.e. a norm from which no derogation is permitted – and to create an *erga omnes* obligation – i.e. an obligation owed to the international community as a whole.<sup>7</sup> However, the controversy and continually-evolving jurisprudence surrounding the definition muddy the waters. While states uniformly recognize this overall prohibition, states’ conformity with the more precise standards regarding slavery is often lacking.<sup>8</sup> The international conventions recalled above often leave significant leeway to states for implementation of the rules they espouse. The result is that some forms of contemporary slavery are not prohibited with the vigor that should accompany an *erga omnes* prohibition.

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<sup>4</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23/1-T (ICTY 12 June 2002), para. 124; Elements of Crimes, Rome Statute, Art. 7(1)(c), U.N. Preparatory Comm’n for the Int’l Criminal Court, Nov. 2, 2000, U.N. Doc. PCNICC/2000/1/Add.2; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Art. 7(a), Sept. 7, 1956, 226 U.N.T.S. 3 (1957).

<sup>5</sup> *Kunarac Appeals Judgment*, supra note 4, para. 119; *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (*Eur. Ct. H.R. 2010*), para. 282; David Weissbrodt, Anti-Slavery Int’l, Office of U.N. High Comm’r for Human Rights, *Abolishing Slavery in its Contemporary Forms* 3 (2002), U.N. Doc. HR/PUB/02/4, paras. 21-22 (hereinafter “2002 OHCHR Report”).

<sup>6</sup> Rome Statute of the International Criminal Court, art. 7(2)(c), July 17, 1998, 2187 U.N.T.S. 3; Report of the Special Rapporteur, supra note 3, paras. 27-32; Kevin Bales & Peter T. Robbins, “No One Shall Be Held in Slavery or Servitude:” A Critical Analysis of International Slavery Agreements and Concepts of Slavery’, *Hum. Rts. Rev.*, Jan.-March 2001 at 32; 2002 OHCHR Report, supra note 5, paras. 30-154.

<sup>7</sup> *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, Judgment of 5 February 1971, I.C.J. Reports, 1970, paras. 33-34; Oscar Schachter, *International Law in Theory and Practice* 343 (1991).

<sup>8</sup> Report of the Special Rapporteur, supra note 3, paras. 33-34.

*Eradicating Modern Slavery* will explore how these definitional debates affect international efforts to address slavery using criminal justice norms and institutions, and consider what steps might be useful to alleviate any resulting obstacles to effective enforcement.

## **2. Slavery prosecutions remain exceptional**

Despite the clear criminal prohibitions against slavery, prosecutions remain exceptional at both the national and international levels.

### ***Domestic prosecution***

While the number of slavery prosecutions at the national level has been increasing in recent years, the numbers remain remarkably low. Moreover, such prosecutions are often difficult and unsuccessful endeavors.<sup>9</sup> The barriers to effective investigation and prosecution of slavery are increasingly well understood. They include:

- impediments to accessing victims and their testimony, including the reluctance of victims themselves to cooperate for fear of further harm, imprisonment or deportation;<sup>10</sup>
- low incentives for the conduct of costly, time-consuming and often dangerous transnational investigations, reflected for example in low sentences;<sup>11</sup>
- social acceptance of slavery, despite its formal illegality, creating disincentives for investigation and prosecution;<sup>12</sup>
- a lack of political will to investigate and prosecute slavery crimes, for example because significant political or commercial actors are involved.<sup>13</sup>

### ***International prosecution***

Nor do international mechanisms currently fill the gaps in effective national prosecution. Following several convictions for enslavement and deportation to slave labor during the Nuremberg prosecutions, the Rome Statute of the International Criminal Court recognizes both enslavement and sexual slavery as discrete crimes against humanity. There is no specific provision for slavery as a war crime, except

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<sup>9</sup> Emma J. Finney, 'Breaking the Chains: the Inability of the International Criminal Court to Combat the Persistent Problem of Slavery and the International Justice Mission's Model for Enforcement', 3 *Grove City C. J. L. Pub Pol'y* 25 (2012).

<sup>10</sup> Linda Smith & Mohamed Mattar, 'Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges', 28 *Fletcher F. World Aff.* 155, 160-162 (2004); Jennifer M. Chacon, 'Misery and Myopia: Understanding the Failures of US Efforts to Stop Human Trafficking', 74 *Fordham L. Rev.* 2977 (2006).

<sup>11</sup> Smith & Mattar, *supra* note 10.

<sup>12</sup> Ashley Tomlinson, 'Slavery in India and the False Hope of Universal Jurisdiction', 18 *Tul. J. Int'l & Comp. L.* 231, 247-254 (2009).

<sup>13</sup> Report of the Special Rapporteur, *supra* note 3, at paras 33-45; Tomlinson, *supra* note 12, at 247-254.

when it takes the form of sexual slavery, though the underlying conduct may in some cases be prosecutable under other war crime provisions.<sup>14</sup> The Court has brought enslavement charges in four of its twenty-one cases; all four accused remain at-large.<sup>15</sup> It has also brought sexual slavery charges in five cases, although there have not yet been any convictions for this crime.

The *ad hoc* tribunals have had marginally more experience with such charges. The Special Court for Sierra Leone has convictions for enslavement by way of forced labor, and one conviction for forced marriage as a crime against humanity, distinct from sexual slavery.<sup>16</sup> The International Criminal Tribunal for the former Yugoslavia has seen convictions for enslavement, including by way of forced labor, as a war crime and crime against humanity.<sup>17</sup> Kunarac and Kovac, leaders within the Army of the Republika Sprpska (“VRS”), a military unit comprised of mostly Bosnian Serb forces, represent the only two enslavement convictions. They were convicted for treating certain Muslim female victims as their property; Kovac imprisoned his victims in his home for four months.<sup>18</sup> Krnojelac, leader of a prison camp called “KP Dom,” was initially charged with enslavement by way of forced labor, but that charge was eventually replaced by persecution by way of forced labor, of which Krnojelac was convicted.

There are clear reasons for this absence of international prosecutions to date. The most obvious is that enslavement and slavery have been charged incidentally, only in the context of larger war crimes and crimes against humanity prosecutions. No international jurisdiction has deliberately targeted organized slavery for investigation and prosecution. There may be several reasons for this:

- the conduct in question may have occurred in places in which the court or tribunal does not have jurisdiction, or where it does have jurisdiction, may not have been considered to meet other threshold tests;
- the conduct may be attributable to corporate actors over which jurisdiction may be unclear or absent;
- the *ad hoc* international criminal tribunals were created to address the crimes arising out of particular conflicts, rather than targeting broader patterns of criminal conduct;

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<sup>14</sup> “Outrages upon personal dignity” is a prosecutable war crime for international and non-international armed conflicts. Rome Statute Art. 8(b)(xvi); 8(c)(ii). In the “FOCA” case, the ICTY found Kovac guilty of outrages upon personal dignity as a war crime for his conduct in selling three women and otherwise degrading them. He was also found guilty of enslavement. *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23-T and IT-96-23/1-T, Trial Chamber II, (ICTY 22 Feb. 2001). Additionally, sexual slavery, enforced prostitution, and “compelling the nationals of the hostile party to take part in operations of war directed against their own country” are explicit war crimes. Rome Statute, Art. 8(b)(xxii), 8(e)(vi); and 8(b)(xv).

<sup>15</sup> One accused, Raskia Lukwiya, is deceased and proceedings in that case have been terminated.

<sup>16</sup> *Prosecutor v. Sesay, Kallon & Gbao* (RUF case), Case No. SCSL-04-15-T, Appeals Chamber Judgment, (26 Oct 2009).

<sup>17</sup> *Prosecutor v. Kunarac, Kovac, & Vukovic*, Case No. IT-96-23 & 23/1-A, Trial Chamber Judgment (22 Feb. 2001).

<sup>18</sup> *Id.*

- there may be practical obstacles to effective investigation and prosecution, such as access to victims, witness protection, the transnationality of the conduct, or its concealment through complex corporate arrangements; or
- there may be political obstacles to effective investigation and prosecution, due to corruption or otherwise.

*Eradicating Modern Slavery* will consider what policy and practical measures might help to alleviate these obstacles at both the national and international level.

### **3. Alternative compliance mechanisms**

Though criminal investigation and trial may face obstacles to success in enforcing international norms against slavery, there is a range of other mechanisms that may be useful in encouraging compliance with criminal law norms. *Eradicating Modern Slavery* will explore these possibilities and how they may be strengthened, including through collaboration with each other, and with domestic and international criminal law enforcement actors.

#### *ILO and UN supervisory mechanisms*

First, the ILO and UN both offer avenues for encouraging national enforcement in certain cases.

Given the delicate questions of market forces and economic regulation involved, a forum such as the ILO, in which not only governments but also workers and employers are represented, may prove particularly useful in working through the complex practical questions raised by application of global anti-slavery norms in specific national and industrial contexts. The ILO reviews periodic reports from member states on labour standards, investigates complaints through *ad hoc* Commissions of Inquiry, and is endowed with the power to impose sanctions upon failure to fulfill the recommendations of a Commission Inquiry.<sup>19</sup>

The new ILO Forced Labour Protocol, adopted overwhelmingly in June 2014, specifically extends the ILO's supervisory role in this area to forced labour practices in the private sector, adds 'trafficking in persons' to the definition of forced labour, extends rights to victims regardless of immigration status, and pledges states to support business due diligence to prevent and respond to forced labour in their operations. An accompanying non-binding Recommendation picks up key language from the UN Guiding Principles on Business and Human Rights, emphasizing the role of both states and the private sector in providing remedies for forced labour, and calling for improved cooperation between labour-sector regulatory bodies and

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<sup>19</sup> Applying and Promoting International Labour Standards, at <http://ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang-en/index.htm>. The ILO has to date imposed sanctions only once: Myanmar, 2000.

criminal law enforcement bodies, as well as improved international criminal cooperation.

There may also be scope for the United Nations' special procedures and treaty bodies to encourage compliance with international criminal norms. The UN Special Rapporteur on Contemporary Forms of Slavery has a mandate from the Human Rights Council to promote the application of international norms and standards on slavery by cooperating with states and other international mechanisms operating in this sphere, such as the Special Rapporteur on Trafficking in Persons, or the Working Group on Business and Human Rights.<sup>20</sup> To this end, the Special Rapporteur carries out country visits and reports her findings, conclusions and recommendations to the Human Rights Council. The UN treaty bodies, such as the Human Rights Committee, may also have a role to play in clarifying the responsibilities of states to prevent and punish slavery and slavery-like practices in some cases.

### *Regional human rights mechanisms*

Second, regional human rights mechanisms may offer an important avenue for litigation of slavery and slavery-like practices. In *Siliadin v. France* and *Rantsev v. Russia and Cyprus*<sup>21</sup>, the European Court of Human Rights found France, Russia and Cyprus in violation of Article 4 of the European Convention on Human Rights, for failing to protect persons from slavery, servitude and forced labour. France had failed to criminalize conduct that the Court found amounted to slavery, and Russia and Cyprus failed to adequately protect from and investigate slavery. Notably, the ECtHR declared unequivocally in *Rantsev* that human trafficking constitutes a form of servitude and falls within the ambit of Art. 4.

Similarly, in the first case of its kind, *Hadijatou Mani v. Niger*<sup>22</sup>, the Economic Community of West African States Community Court of Justice condemned Niger for its failure to uphold the *erga omnes* prohibition against slavery, embodied in Article 5 of the African Charter of Human and Peoples' Rights. The Court found that Niger had failed to condemn slavery when the applicant's claim was brought to the attention of the Niger judiciary.

### *Inter-state accountability and cooperation*

Various peer review systems that address compliance with international anti-slavery norms are currently in place. The most prominent is the US Trafficking in Persons Report. This annual report, issued by the US State Department, assesses the status of trafficking in 188 states, and considers whether governmental efforts to eradicate trafficking are sufficient to meet the minimum standards set by US legislation. States are ranked, and those that fail to meet this minimum standard are

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<sup>20</sup> Human Rights Council Resolution, U.N. Doc. 6/14 (28 Sept. 2007).

<sup>21</sup> *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (Eur. Ct. H.R. 2010).

<sup>22</sup> *Hadijatou Mani Koraou v. Niger*, Case No. ECW/CCJ/APP/08/07, Judgment, (27 Oct. 2008).

subject to economic sanctions.<sup>23</sup> While positive results may be suggested by the movement of states from lower to higher tiers within the ranking system, actual impact is difficult to discern.<sup>24</sup> Further, the TIPS system has proven controversial, both with countries affected by it and amongst activists who see it as overly politicized and insufficiently targeted to change the incentives of slavery organizers. States have systems for mutual legal assistance and extradition in place, but again, these have to date had limited effect on domestic prosecutions, absent external incentives encouraging those prosecutions. Strengthening these systems would reduce some of the obstacles states face in preventing and prosecuting slavery.

#### *Corporate compliance and prevention initiatives*

The private sector, increasingly steered by the UN Guiding Principles on Business and Human Rights,<sup>25</sup> may play a significant role in preventing abuses of international human rights and criminal law relating to slavery. The Guiding Principles provide that business has a Responsibility to Respect human rights, and clarify the expectation that business will contribute to effective remedy for violations of human rights. Corporative initiatives can, in theory, have a considerable impact by targeting those responsible for or contributing to enslavement and incentivizing corporate cultures and behaviors that ensure that abuses do not take place. But the role of corporations in supporting and cooperating with effective remedy of violations where they have occurred requires further exploration and policy development. So, too, does the role of international criminal norms and institutions in incentivizing prevention by business.

#### **4. Participants**

*Eradicating Modern Slavery* brings together a wide range of expert practitioners, academics and activists. To date, confirmed participants in this initiative include:

- Beate Andrees –International Labour Organization
- Cecile Aptel – UN Office of the High Commissioner for Human Rights / Tufts University
- Kevin Bales – University of Hull, founder of Free the Slaves
- Urmila Bhoola – UN Special Rapporteur on Contemporary Forms of Slavery
- Shamila Batohi – Head, Legal Advisory Section, ICC Office of the Prosecutor
- Rafael da Bustamente – EU External Action Service
- James Cockayne – UN University and Journal of International Criminal Justice
- Karen Corrie – Fordham University, former Advisor to the President of the ICC Assembly of States Parties, Associate Trial Lawyer ICC OTP

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<sup>23</sup> Trafficking in Persons Report, US State Department, at <http://www.state.gov/j/tip/rls/tiprpt/>.

<sup>24</sup> Anne T. Gallagher, "Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports," *Human Rights Review* 12.1 (2010).

<sup>25</sup> Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie).

- Martyn Day – Leigh Day
- Helen Duffy – Interights
- Anne Gallagher – Monash University
- Nick Grono – The Freedom Fund
- René Holbach – The Permanent Mission of Liechtenstein to the UN
- Florian Jessberger – University of Hamburg/ JICJ
- Siddarth Kara – Harvard Kennedy School
- Amol Mehra – International Corporate Accountability Roundtable
- Aryeh Neier – President Emeritus, Open Society Foundations
- Patricia Sellers – Special Advisor to the ICC Prosecutor on International Criminal Law Prosecution Strategies
- Rupert Skilbeck – Open Society Justice Initiative
- Nicole Siller – University of Groningen
- Katie Shay – International Corporate Accountability Roundtable
- Harmen van der Wilt – University of Amsterdam
- Myria Vassiliadou – EU Anti-Trafficking Coordinator
- Philippa Webb – King’s College of London / JICJ
- Ambassador Christian Wenaweser – The Permanent Mission of Liechtenstein to the UN
- Salvatore Zappala - JICJ