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Fighting Modern Slavery

What role
for international
criminal justice?



Jinan, 18, an Iraqi Yazidi, survivor of the Islamic State (IS) jihadist group and co-writer of the book 'Esclave de daesh' ('Daesh's Slave', using an Arabic acronym for the jihadist group) poses on 31 August 2015, in Paris. Jinan was captured in early 2014 and held by IS jihadists for three months before she managed to flee, she said on a visit to Paris ahead of the publication on 4 September 2015 of a book about her ordeal. She told AFP on 1 September the Islamic State group is running an international market in Iraq where Christian and Yazidi women are sold as sexual slaves.

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Executive Summary

A crime that should shock the conscience

The prohibition of slavery is one of the very rare norms of international law that applies at all times, in all places, to all actors. Every state is obliged to every other state (erga omnes) to prevent, criminalize and punish slavery. And enslavement is a crime against humanity. Yet by the best estimates, between 21 million and 35.8 million people – or between one in every 206 and one in every 353 people currently alive – are trapped in a situation of slavery – a situation in which the powers of ownership are exercised over them by someone else, whether or not those powers are recognized by law.

This gap between theory and reality is wide and shocking – but almost wholly unremarked in the international criminal justice community. International criminal law and justice have in the last two decades focused on cataclysmic ‘atrocious crimes’, especially those associated with armed conflict, political violence and mass atrocity. Contemporary slavery, with its roots in social and economic marginalization, and often driven by economic factors, is different: it is pervasive, hidden – and all too often accepted, despite the staggering numbers of people affected. That does not make it any less atrocious nor, arguably, any less unjust. Why does international criminal justice have so little to say about this terrible scourge?

This Policy Report offers an in-depth exploration of these issues, presenting a series of practical recommendations for narrowing the gap between the strong international law against slavery and its weak enforcement. It draws on the discussions and conclusions developed in a joint project of United Nations University, the Freedom Fund and the Permanent Mission of Liechtenstein to the United Nations, which will culminate with the publication of a Special Issue of the Journal of International Criminal Justice on this topic, early in 2016. A list of the articles and their authors is annexed to this report. The report also serves as a companion to another policy report, *Unshackling Development: Why we need a global partnership to end modern slavery*, produced by the United Nations University with the support of The Freedom Fund.

Why does slavery persist?

The first section considers the nature and scope of modern slavery, and why it persists. Today no state formally sanctions slavery – but several states and non-state armed groups are involved in the practice. United Nations bodies have repeatedly expressed concern that the Democratic People’s Republic of Korea engages in enslavement and forced labour. Boko Haram and ISIS are actively promoting chattel slavery, organizing slave contract registries and markets and even issuing official ‘how-to’ manuals that sanction the enslavement and rape of children. The New York Times recently reported that at least 3,144 Yazidi women and girls are currently held in slavery by ISIS. Beyond this chattel slavery, millions of people around the world, made vulnerable by social exclusion, income shocks, conflict, displacement and inequality, are subject to conditions of work that are so exploitative as to constitute one of the illegal practices captured by the advocacy term ‘modern slavery’. The global economy remains replete with power imbalances that allow some people to exercise the powers of ownership de facto. Children are particularly vulnerable, making up 5.5 million of all those in slavery, in agriculture, artisanal industry, domestic work or the sex industry, or forced into marriage and the domestic work and sexual relations it entails. And slavery persists worldwide: the UK government, for example, estimates there are 10,000-13,000 people in modern slavery in that country.

All of this is the result of perverse incentives: the true social, economic and even ecological costs of slavery have not been factored into regulatory efforts. Slavery exists in places and supply-chains where its costs are externalized onto individuals (slaves), families and communities who cannot protect themselves, because governance and the rule of law are weak. This makes slavery a persistent phenomenon, not easily disrupted or prevented by criminal justice approaches. The US State Department estimates there are only around 10,000 prosecutions for human trafficking-related offences (including sex trafficking) worldwide, annually – and this appears to dwarf the number of prosecutions for other types of slavery. A recent case involving the arrest of a US-Belgian businessman for trial in Belgium for enslavement during the Sierra Leone civil war appears to be the first national prosecution of enslavement since World War Two.

The forgotten history of anti-slavery in international criminal law

Given the deep-seated nature of much slavery, the limited potential of modern international criminal justice to root it out may seem obvious. The tools of contemporary international criminal justice have been shaped to tackle political violence and mass atrocity, not economic injustice, multinational corporate malfeasance or the moral complicity of global consumers in weak labour market regulation. Anti-slavery has however played a much more important role in the development of modern international criminal justice than is often recognized. The report reviews the 'forgotten history' of the development of anti-slavery norms and jurisprudence from the first modern international courts - the anti-slavery Courts of Mixed Commission established around the Atlantic 200 years ago to punish slavery - through the Lieber Code during the American Civil War, into the Nuremberg and Tokyo trials after the Second World War, and finally in the more recent UN-backed international and hybrid tribunals. If international criminal justice already recognizes slavery as an international crime, the report notes, is the question really whether it is the 'right' tool, or in fact whether we are using the existing tools in the right way?

Slavery and the International Criminal Court

The third part of the report considers how slavery is being - and could be - handled within the International Criminal Court system. It explores recent and on-going prosecutions of enslavement, sexual slavery, forced marriage and enforced prostitution, and considers whether new investigations or prosecutions of slavery crimes could be brought against Boko Haram, ISIS or DPRK officials. The report considers a variety of possible jurisdictional and practical barriers to successful prosecution: sources of jurisdiction; questions of scale and gravity; the corporate veil; state and diplomatic immunity; and access to, and protection of, victims and evidence. The practical barriers, in particular, are notable, given the remoteness and vulnerability of many slavery victims, and the fact that much modern slavery is assisted - and protected - by powerful governmental or business figures. The trans-nationality of much contemporary slavery also poses its own investigative and prosecutorial challenges.

Beyond punishment

The fourth section suggests that there is a need to consider four roles for international criminal justice in the fight against slavery, beyond investigation and prosecution:

1. Clarifying and strengthening the taboo and norms against slavery

Individuals are criminally liable if they commit (or are complicit in) slavery, and states violate international law by failing to give effect to this prohibition. Yet these obligations clearly need more active promotion and reinforcement, to raise awareness and to thicken the understanding of how they apply in a range of different commercial, social and legal contexts. Additionally, with the rise of Boko Haram and ISIS, the global taboo against slavery is, for the first time in living memory, being openly contested on the international stage. It needs reinforcement. Strategic international criminal litigation could have a powerful demonstration and norm-reinforcing effect.

2. Clarifying states' duty to protect against slavery

International criminal justice can help to clarify the positive content of states' duty to protect against slavery. Recent jurisprudence suggests that states are not only required to criminalize all forms of slavery, but also to:

- vigorously investigate slavery, robustly prosecute alleged offenders, and impose proportionate penalties;
- cooperate with other states and international organizations to combat trans-border slavery that touch their territory; and
- in some cases, refrain from amnestying slavery crimes.

3. Encouraging business to protect human rights

The criminal enforcement of norms against slavery in commercial contexts remains very rare. There is a strong argument that statutory and regulatory measures encouraging companies to engage in 'due diligence' to eradicate slavery from their supply chains - while important - will lack real force, until such criminal enforcement occurs. As international criminal justice clarifies over time how the risk of commission of slavery-related crimes impacts criminal liability, this may reinforce the incentives for companies to undertake due diligence to identify and address slavery throughout the supply chain, and to provide remedies to victims of slavery.

4. Ensuring victims of slavery receive the support they need

The ICC Trust Fund for Victims has a potentially powerful role to play to not only highlight the plight of victims of slavery, but also to assist them - whether or not prosecutions of slavery crimes move forward at the ICC. The Trust Fund has a particular focus on sexual and gender-based violence (SGBV), and a resource base of \$10 million in July 2014 with which to provide monetary support and physical and psychological rehabilitation services to victims, their families and communities.

The final section presents ten recommendations for strengthening the contribution of the system of international criminal justice to the fight against slavery. These are reproduced below.



Recommendations

To states

1. **Prosecution:** States should encourage the investigation and prosecution of slavery crimes at the domestic – or international – level. The recent arrest of a US-Belgian businessman for trial in Belgium for enslavement during the Sierra Leone civil war is a positive development. Successful investigation and prosecution will require extensive international cooperation, and may require consideration of ad hoc prosecutorial mechanisms, such as a Special Tribunal to address ISIS' slavery crimes, or the enslavement crimes of the DPRK. States should share practice on the use of universal jurisdiction in anti-slavery cases.
2. **Slavery as a crime against humanity:** States should include references to slavery crimes, such as enslavement, when discussing crimes against humanity at the intergovernmental level. States should not amnesty slavery crimes, including during peace agreements. Enslavement should explicitly be recognized as one of the crimes against humanity that can give rise to Responsibility to Protect obligations, as the General Assembly has recognized in its consideration of the Democratic People's Republic of Korea.
3. **Working with business:** States should work with business actors to help them understand and discharge their Responsibility to Respect human rights, including by clarifying for business its potential exposure to criminal liability for involvement with slavery offences, and by explaining the relationship between human rights due diligence (HRDD) and criminal liability exposure. Where states identify evidence of corporate involvement in slavery, they should work with business to ensure those affected are able to access effective remedies, including criminal prosecution.

To the ICC Assembly of States Parties

4. **Mobilize on slavery issues:** Interested Member States should mobilize in the ICC Assembly of State Parties to encourage attention to slavery issues within the ICC system. This might include encouraging dialogue with the Office of the Prosecutor to focus attention on

slavery crimes, for example through the preparation of a policy paper on the prosecution of slavery crimes, and encouraging states to consider prosecuting slavery crimes under Rome Statute provisions incorporated at the domestic level. The ICC ASP could hold a formal discussion on criminal justice responses to slavery to allow interested Member States to share good practices in handling allegations of slavery, addressing such issues as remediation, witness protection, and the role of corporate responsibility. Given many slavery crimes take place outside the African context, a discussion within the ASP of the ICC's role in anti-slavery prosecution might have the added benefit of making clear the willingness of the ASP to promote investigation and prosecution of violations of the Statute outside Africa.

To the UN Human Rights Council

5. **Universal Periodic Review:** States should use the UN Human Rights Council's Universal Periodic Review Process to address not only allegations of modern slavery, but also states' efforts to investigate and prosecute slavery crimes – including by companies operating in their territory.
6. **UN-ICC engagement:** The Human Rights Council should encourage the UN Special Rapporteur on Contemporary Forms of Slavery, and other relevant UN human rights special procedures mandate holders, to engage regularly with the ICC to consider how they can best work together to address specific slavery crimes.

To the ICC Prosecutor

7. **Prosecute slavery crimes:** The ICC Prosecutor should identify a case suitable for strategic investigation and prosecution of slavery crimes, notably enslavement, in order to demonstrate the utility of the Rome Statute in the fight against slavery. This should include consideration of cases outside the context of armed conflict, and/or involving corporate actors. To this end, the ICC Prosecutor should conduct an examination of whether it has jurisdiction over Boko Haram or ISIS actors involved in enslavement.

8. **UN-ICC engagement:** The ICC Prosecutor should initiate a periodic dialogue bringing together the various international anti-slavery mechanisms covered by the UN-ICC Relationship Agreement (including the ILO, the UN Special Rapporteurs on Contemporary Forms of Slavery and on Human Trafficking, the SRSs on Sexual Violence and Children in Armed Conflict, and other members of the UN's Inter-Agency Coordination Group Against Trafficking) to discuss ways to strengthen the prosecution of slavery crimes.

To the ICC Trust Fund for Victims

9. **Help slavery victims:** The ICC Trust Fund for Victims should explore possibilities for providing assistance to victims of slavery-related offences in situations before the Court, including victims of enslavement and sexual slavery by Boko Haram in Nigeria.

To the activist community

10. **Strategic litigation:** Civil society, activists and donors should promote strategic anti-slavery litigation, through initiating cases, fostering information exchange (e.g. a case-note circulation system, or regular networking opportunities), and identifying particular legal doctrines that prevent accountability for slavery – such as diplomatic immunity – which may be ripe for challenge.

Introduction



By the best estimates, between 21 million and 35.8 million people – or between one in every 206 and one in every 353 people currently alive – are trapped in a situation of slavery – a situation in which one person exercising the powers of ownership over another, whether or not those powers are recognized by law.¹ Modern slavery – a term that encompasses a variety of situations in which one person is forcibly controlled by another for the purpose of exploitation² – takes many forms: forced servitude and forced labour, debt bondage, sexual slavery and forced marriage, and illegal exploitation of children, including during armed conflict. How is this possible, in a world in which the prohibition on slavery is a *jus cogens* norm of international law?³

The obligation to prevent, criminalize and punish slavery is one that every state owes to all others (*erga omnes*).⁴ The right to be free of slavery is a human right, codified in the International Covenant on Civil and Political Rights and the regional human rights conventions, and enjoyed by every human, everywhere, at all times.⁵ Slavery is not just illegal: it is an international crime that apparently attracts universal jurisdiction;⁶ and widespread or systematic enslavement and sexual slavery can constitute crimes against humanity.⁷ Yet the tragic reality is that despite the age, breadth and depth of international obligations to prevent, criminalize and punish slavery crimes, these practices not only persist but flourish. While the international norm against slavery prevents any state formally sanctioning slavery, these practices remain un-criminalized in many countries, and even where they are formally criminalized, huge gaps in enforcement are evident.⁸

Though this gap between the theoretical protection offered by international law and the reality of non-enforcement is wide and shocking, it remains largely unremarked by many international criminal lawyers. International criminal law and justice have in the last two decades focused on cataclysmic ‘atrocities’, especially those associated with armed conflict, political violence and mass atrocity. Contemporary slavery, with its roots in social and economic marginalization, and often driven by economic factors, is different: it is pervasive, hidden – and all too often accepted, despite the staggering numbers of people affected. That does not make it any less atrocious nor, arguably, any less unjust. Why does international criminal justice have so little to say about this terrible scourge?

This Policy Report offers an in-depth exploration of these issues, and closes with a series of practical recommendations for narrowing the gap between the strong international law against slavery, and its weak enforcement. The report is a companion to another policy report addressing the broader role of the international community in the fight against modern slavery, *Unshackling Development: Why we need a global partnership to end slavery*, produced by the United Nations University with the support of The Freedom Fund. This report on international criminal justice draws on the discussions and conclusions developed in a joint project of United Nations University, the Freedom Fund, the Permanent Mission of Liechtenstein to the United Nations, and the *Journal of International Criminal Justice*. The project will culminate with the publication of a Special Issue of the *Journal of International Criminal Justice* on this topic, early in 2016. The Special Issue is expected to include contributions from the UN Special Rapporteur on Contemporary Forms of Slavery, the Head of the International Labour Organisation's Special Action Programme to Combat Forced Labour, leading academics, international criminal law practitioners, and anti-slavery activists.

The first part of this Policy Report considers the nature and scope of modern slavery, and why it persists. The second part considers the treatment of slavery in international criminal law, reviewing the development of anti-slavery norms and jurisprudence from the first modern international courts - the anti-slavery Courts of Mixed Commission established around the Atlantic 200 years ago to punish slavery - through the American Civil War, the Nuremberg and Tokyo trials after the Second World War, and into the international criminal courts and tribunals of the last 25 years. The third part of the report considers how slavery is being - and could be - handled within the International Criminal Court system. It considers both obstacles to prosecution, and the potential for prosecution of slavery-related crimes concerning Boko Haram, ISIS, and the Democratic People's Republic of Korea. The fourth section considers what role international criminal justice might play beyond mere prosecution, pointing to five ways in which greater attention to slavery by international criminal justice actors might strengthen anti-slavery. The final section presents ten recommendations for strengthening the contribution of the system of international criminal justice to the fight against slavery.



1. Slavery is illegal –
but flourishes worldwide

Modern slavery knows few bounds: no state avoids its scourge, and industries worldwide are tainted by it.⁹ We unwittingly feel its touch in our smartphones, whose magical powers are conjured by computer chips made out of minerals stripped from the central African soil by children forced to labour in dangerous mines.¹⁰ We adorn our faces with palm-oiled based cosmetics and mica-based sparkles, both materials routinely harvested with forced and illegal child labour.¹¹ Slavery taints our food: its poison finds its way into the seafood in Western supermarkets, harvested by destitute men and boys forced to work on floating fishing factories in South East Asia,¹² into many of Asia's rice-bowls, into the beef on dinner-plates across South America and into the chocolates given as signs of love worldwide on Valentine's Day.¹³ It is woven into the cotton clothes on our backs and forged into the steel spines of our buildings.¹⁴ Modern slavery pervades the sex industry from Bangkok to Berlin,¹⁵ and forms the foundation of many of the stadiums being built today for tomorrow's mega sporting events.¹⁶

No state formally sanctions slavery, today, but several come close. The strength of the international norm against slavery means that traditional, 'chattel' slavery - in which individuals are formally treated as legal property, to be bought and sold - is now so taboo that no state will openly sanction it. But United Nations bodies have repeatedly expressed concern that the Democratic People's Republic of Korea engages in enslavement and forces its citizens to labour on overseas construction sites, confiscating up to 90 per cent of their salaries.¹⁷ Courts in West Africa continue to sanction traditional, quasi-feudal forms of servitude that amount to illegal servitude and slavery.¹⁸

Yet this taboo seems to be weakening, not strengthening. Tragically, several non-state armed groups that control substantial populations, including Boko Haram and ISIS, are now actively sponsoring and promoting chattel slavery, organizing slave contract registries and markets, advocating for the revival of slavery through official policy and media outlets, and even issuing official 'how-to' manuals. These policy documents explicit sanction the enslavement and rape of children. The *New York Times* recently reported that at least 3,144 Yazidi women and girls are currently held by ISIS in organized slave market arrangements in Syria and Iraq.¹⁹

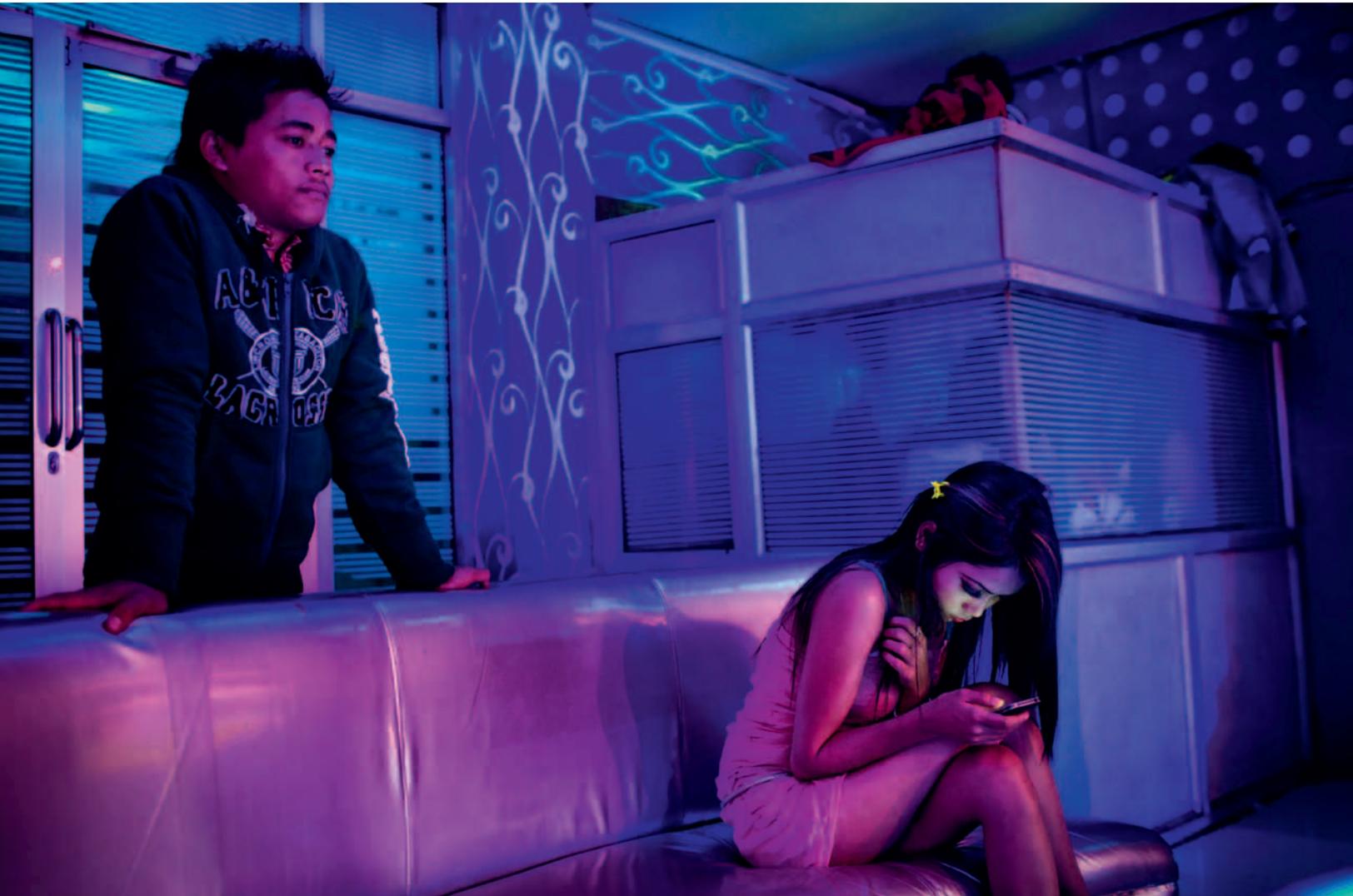
Beyond such chattel slavery, millions of people around the world are subject to conditions of work that are so exploitative as to place them in conditions that constitute one of the illegal practices captured by the advocacy term 'modern slavery'. Forced labour - work or service "exact[ed] from any person under menace of any penalty and for which the said person has not offered himself voluntarily"²⁰ - affects around 21 million people worldwide, primarily women and children, with roughly a quarter subjected to sexual exploitation. The International Labour Organization estimates that an additional 10 per cent of forced labour is state imposed.²¹ In many cases, forced labour is hidden within apparently legal bonded labour arrangements - when an individual, working in order to pay off a debt, provides services whose value is not reasonably applied towards the debt, or when "the length and nature of those services are not respectively limited and defined."²² It often coincides with human trafficking: traffickers lure workers to another location with promises of lucrative jobs, but upon arrival workers are informed that they have incurred enormous - and unrepayable - costs for housing, tools, and travel. Such forced labour is particularly prevalent in South Asia.²³

Children are particularly vulnerable. They are estimated to make up 5.5 million of all those in slavery - the same number today as in 2005.²⁴ They are particularly vulnerable to being illegally trafficked for the purpose of illegal exploitation of their labour,²⁵ whether that involves hauling dynamite in Bolivia,²⁶ forced prostitution in south-east Asia or western Europe,²⁷ or performing domestic work in Haiti.²⁸ Many men, women and children perform domestic work in conditions that constitute illegal servitude - unable to leave the home or workplace, lacking adequate pay or leave, being forced to hand over their identity documents to their employer, and threatened that the employer will contact the immigration authorities if the worker does not perform the job as requested. And as the UN General Assembly and Human Rights Council both now recognize, girls around the world are forced unwillingly into a marriage, in many cases not only forced into domestic work and sexual relations.²⁹

Why does slavery persist?

Though *de jure* ownership of other human beings has been driven to the very margins of the global economy, that economy remains replete with power imbalances that allow some people to exercise these powers of ownership *de facto*. In the kinds of cases described above, these arrangements have become socially sanctioned and informally institutionalized. The scope, social nature and economic function of these forms of modern slavery vary by context. So, too, may their legal characterization – as ‘human trafficking’, ‘forced labour’, ‘slavery’ or some other practice. What they share is the common thread of exploitation – for personal, commercial or state-building purposes – of deeply vulnerable people. Slavery is, in that sense, an extreme form of inequality, driven by economic, political, and social factors.

The economic logic that underpins slavery is, for many individuals and enterprises, a powerful one. Forced labour is thought to generate some \$150 billion annually in profits to those relying upon it.³⁰ Demand for cheap labour in industries subject to global competition creates a profit incentive for slavery and slave-like practices, encouraging producers to use coercion to extract value while keeping costs down.³¹ High labour supply in some economies encourages a view of labour as ‘disposable’, leading some employers to think that investment in human capital is unnecessary, encouraging coercion and exploitation.³² Transnational companies rely on the disarticulation of global supply chains to hide from consumers and markets the human costs that ‘disposable’ workers, their families and communities suffer to produce the fish, cosmetics, cotton, steel and stadiums we all enjoy.



Historically, some forms of slavery have also played a significant role in financial markets, as an important form of rent-creating capital against which banks and distant financiers can lend, borrow and speculate.³³ Slavery played an important role in the state-building project of the U.S., just as forced labour has been treated as a path to nation-building more recently in DPRK³⁴ and Myanmar³⁵. Of course, slavery also proved to be such an extreme and divisive form of inequality in the U.S. that a civil war was fought over it; it was arguably only after the southern states' political economies were liberated from dependence on slaveholding that the full power of the American consumer and capital markets was unleashed. Fighting slavery proved a boon to U.S. development.

But winning that argument requires overcoming the incentives of individual households and enterprises who see slavery as a shortcut to viability and profit. Moreover, as poor and marginalized communities in developing countries with growing labour forces are integrated into global markets, the price of slaves may actually be *falling*.³⁶ Today, a person can be trapped *permanently* in bonded labour in India through a mispriced loan involving an initial outlay of just \$100.³⁷ All of this makes for a powerfully attractive economic logic, seeming to offer high rewards for low up-front investments. In part this is because the *true* accumulated costs from slavery at the firm, community and national economic level, such as lost economic productivity, have not been well articulated.³⁸

The other major reason that slavery is a viable economic strategy for enterprises from local kiln operators in South Asia to major multinational construction firms involved in sporting mega-events is the absence of costs from enforcement. Slavery persists because we let it persist. The economic logic underpinning contemporary slavery is reinforced not only by police corruption, but also by social acquiescence and political norms and institutions. The economic drivers of slavery intersect with political and social vulnerabilities: susceptibility to slavery is, unsurprisingly, correlated with socio-political marginalization and disenfranchisement. The demand for cheap labour intersects with individual vulnerability, often caused by poverty, domestic discrimination and conflict and displacement. Caste continues to be a major correlate of vulnerability to slavery in South Asia and West Africa.³⁹ There is a clear connection between both poverty

and conflict, on the one hand, and vulnerability to human trafficking, as the current case of the Rohingya in south-east Asia makes tragically clear.⁴⁰

Slavery is, in other words, an extreme form of inequality. It is a key issue in the current sustainable development agenda – but also a deeply political one. While the moral dimensions of slavery are recognized by the international community, state sovereignty limits both the bargaining power of states in the face of international capital, and the reach of international supervisory mechanisms, such as the International Labour Organization, that work to prevent a race to the bottom. The economic and socio-political factors driving slavery are thus reinforcing. Slavery exists where the costs of slavery are externalized onto individuals (slaves), families and communities (and their environments), who cannot protect themselves, because governance is weak and the rule of law diluted, if present at all.⁴¹ At its root, the persistence of slavery signals a blindness not only to the suffering of others, but also to the loss of development potential that this represents. It represents not only a failure of empathy, but a collective failure of imagination and ambition. Even as we know that there are between 21 and 36 million people affected by slavery, we fail to punish those who perpetuate the system. The US State Department estimates there only around 9,000 prosecutions for human trafficking-related offences (including sex trafficking) worldwide, annually – and this appears to dwarf the number of prosecutions for other types of slavery.⁴² A recent case involving the arrest of a US-Belgian businessman for trial in Belgium for enslavement during the Sierra Leone civil war appears to be the *first* national prosecution of enslavement since World War Two.⁴³



2. The forgotten role of anti-slavery in the development of international criminal justice

Given these intersecting, deep-seated and reinforcing economic and socio-political logics underpinning slavery, the limited potential of modern international criminal justice to fight modern slavery may seem obvious. The tools of contemporary international criminal justice have been shaped to tackle political violence and mass atrocity, not economic injustice, multinational corporate malfeasance or the moral complicity of global consumers in weak labour market regulation. The limited reach of international criminal law beyond national borders, and its vulnerability to being blunted by blatant domestic politicking, becomes clearer with every successful effort by national governments to stymie the workings of the International Criminal Court. And there are social barriers to mobilizing political will for treating modern slavery in terms of international criminal law: even as consumer boycotts and anti-slavery campaigns begin to sensitize the public to the contribution we all make to slavery by patronizing producers who tolerate it, there are natural psychological limits to most consumers' and citizens' willingness to understand these questions of social responsibility through the lens of criminal liability. Who wants to think of themselves as complicit in slavery?

All of this seems to suggest that international criminal prosecution is not the right tool to reach for, if the aim is to fight modern slavery. Dismissing the inquiry into the potential of international criminal justice at this point would, however, overlook the fact that international criminal law recognizes both slavery and enslavement, and various related practices (notably sexual slavery) as crimes, in some cases attracting universal jurisdiction.⁴⁴ If international criminal justice already recognizes slavery as an international crime, is the question really whether it is the 'right' tool, or in fact whether we are using the existing tools in the right way? If this conduct is *already* criminalized, what signal do we send by failing to enforce this aspect of the law, but insisting on enforcing others?

The answer is illuminated by recognizing that the fight against slavery has not, in fact, been nearly so marginal a concern to international criminal justice as a myopic focus on the international criminal tribunals of the last two decades may lead us to think. Tackling slavery, it turns out, is *not* alien to international criminal justice, but rather an important part of what *created* international criminal justice in the first place. The strong norm in international criminal law against slavery is a product of the nineteenth

century effort, led by the United Kingdom, to overcome the brutal economic logic of the trans-Atlantic slave trade, and to civilize global markets.⁴⁵ Yet the role that international penal law played in this effort, and the spur that anti-slavery efforts provided to the development of international humanitarian – and later international criminal – law has largely been forgotten by contemporary scholars and practitioners of international criminal justice, who have focused instead on the cataclysmic crimes occurring in armed conflict and mass atrocity contexts. In this section, we highlight key moments in that forgotten history.

Trans-Atlantic slavery and the seeds of modern complementarity

Anti-slavery was an important spur to the development of international penal law, two hundred years ago. The anti-slavery efforts of William Wilberforce and other campaigners in Great Britain in the late Eighteenth Century were, some argue, the origins of the international human rights movement; Anti-Slavery International is sometimes said to be “the world’s oldest human rights organization”.⁴⁶ Once the campaign to end slavery had been won in Britain, Britain’s commercial interests forced its globalization. It was out of Great Britain’s diplomatic efforts to level the trans-Atlantic economic playing field by encouraging other states to copy its ban on the slave trade and slavery that the first recognizably modern inter-state courts emerged.

In the wake of Napoleon’s second defeat in 1815, the victorious powers adopted a Declaration Relative to the Universal Abolition of the Slave Trade,⁴⁷ which, amongst other things, led to the creation of Courts of Mixed Commission to enforce the abolition of slavery. In the Declaration, the contracting parties agreed “without loss of time” to find “the most effectual measures for the entire and definitive abolition of a Commerce so odious, and so strongly condemned by the laws of religion and of nature.” This provided the basis for the British to negotiate a network of bilateral treaties with the French, Dutch, Spanish, Portuguese, and eventually the United States, creating bi- and pluri-lateral courts, sitting in Freetown (Sierra Leone), Luanda (now in Angola), Cape Town (now in South Africa), Rio de Janeiro (Brazil), Paramaribo (Suriname), Kingston (Jamaica) and even New York (USA), to adjudicate cases of alleged slave trading. Applying

admiralty law, the courts were authorized to penalize the ships themselves by confiscating vessels, equipment, and merchandise, and releasing captives – but they could not exact penalties against individual crew members or owners. Slave traders would often repurchase the hardware at the subsequent prize auction, limiting the deterrent effect of the courts. However, in a precursor to the modern system of complementarity, the courts did have jurisdiction to arrest nationals from states backing the courts, who were then obliged to try them in their own criminal courts.⁴⁸

The Lieber Code and slavery in the law of war

The important role that slavery played in catalyzing the emergence of modern international humanitarian law – which provides the foundation of much substantive international criminal law – has also been largely forgotten. That moment came during the American Civil War.

The link was not just a general one – the fact that slavery was a central political controversy precipitating the War – but also specific to the codification of the rules governing military conduct during the war. After President Lincoln allowed African-American men to join the Union army in 1862, the Confederates instituted a policy of selling captured African-American Union soldiers into slavery. Discouraging such a practice by the Confederates was one of the reasons that Lincoln turned to a law professor at Columbia College (now Columbia University), Francis Lieber, to draw up a Code to govern Union personnel conduct during the war – especially their treatment of Confederate prisoners of war. Lincoln reasoned that he could not condemn Confederate abuses against Union prisoners, including their enslavement, if he did not require (and codify) humane treatment of Confederate prisoners by the Union Army.

General Order No. 100, the famous ‘Lieber Code’, condemned the enslavement of captured soldiers as a “relapse into barbarism and a crime against the civilization of the age”. Article 58 specifically described “enslavement” as a “crime against the law of nations”, attracting the death penalty. The Code went further, however, not just criminalizing enslavement, but declaring slavery itself unlawful. Article 23 stated that “private citizens are no longer ... enslaved,” and Article 42 made clear that any person “held in bondage” by a belligerent who came

under Union protection was automatically “made free” and “under the shield of the law of nations”.⁴⁹ The Lieber Code was, of course, a major influence on the subsequent 1907 Hague Regulations and, through them, Allied Control Council Law No. 10, the Nuremberg Principles, the 1954 International Law Commission Draft Code of Offences against the Peace and Security of Mankind, and ultimately the *ad hoc* UN tribunals’ statutes and the ICC’s Rome Statute. Through this line of descent, distinct and separate from the 1926 Slavery Convention, the 1956 Supplementary Convention, the International Labour Organization’s forced labour regime and the subsequent Palermo Protocol (all discussed further below), enslavement and various related practices have been criminalized under international law.⁵⁰

Slavery in the post-WWII trials

Enslavement, forced labour and sexual slavery played important roles in the expansionist state-building programmes of the Axis Powers during World War II. Both the Nuremberg and Tokyo Military Tribunals had to wrestle with how to treat the close link between state military power, commercial enterprise and exploitation. The Nuremberg Military Tribunals handed down convictions for enslavement and deportation to slave labour by the Third Reich’s expansive forced labour regime. Fritz Sauckel, in charge of Nazi labour ‘deployment’ during the War, was sentenced to death for overseeing the forced recruitment of approximately five million persons who were subjected to slave labour.⁵¹ Martin Bormann was also sentenced to death for his supervision of slave labour matters, including the transfer of approximately 500,000 female domestic workers from Eastern Europe to Germany, ostensibly for exploitation of their labour, including in domestic settings.

The Military Tribunals also successfully held responsible the owners of several industrial corporations who participated in the slave labour program. While many avoided conviction, several were found guilty of enslavement and deportation to slave labour.⁵² The International Military Tribunal famously held in the *Pohl* case that a lack of torture or ill-treatment does not preclude a finding of slavery; even if well-treated, slavery can exist where persons are “without lawful process ... deprived of their freedom by forceful restraint.”⁵³ The Tokyo Tribunal also condemned the labour exploitation

regime of POWs and civilian internees in Japan during WWII, finding several defendants including Foreign Minister Shigemitsu and War Minister Hideki Tojo criminally liable.⁵⁴ However, it failed to consider the question of systematic forced prostitution of so-called “comfort women” constituted enslavement. While acknowledging the factual situation – that women were recruited and forced into prostitution with Japanese troops – it did not hold that such action was enslavement.⁵⁵

Slavery in the era of the UN tribunals

The international criminal tribunals set up in the last two decades with the backing of the United Nations have however, largely shied away from close examination of the connections between military power, organizational policy and commercial exploitation. Slavery-related issues have instead been explored through the lens of sexual slavery, forced marriage, and forced recruitment of children.

Perhaps the most important decision relating to these issues is the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kunarac* case, which helped to bridge the gap between the international criminal law of enslavement, stemming from the Lieber Code, and the law of slavery derived from Article 1 of the 1926 Slavery Convention. The Appeals Chamber of the ICTY held that the definitions of slavery and enslavement were fundamentally linked, and had both “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 rights of ownership.”⁵⁶ This made clear that even in states that have outlawed slavery, slavery may persist: the test is a factual one, not a question of the law on the books. It noted that the nucleus of slavery is “the destruction of the juridical personality” through another person’s exercise of the powers of ownership. The Trial Chamber had already identified several factors to be considered to determine when an exploitative condition rises to the level of slavery, which included control of movement, control of environment, use or threat of force, psychological control, and other forms of coercion that would diminish a person’s free will.⁵⁷ Further, the court held that lack of consent need not be specifically proven, but could be inferred from conditions of enslavement negating the possibility of free will and consent.⁵⁸

The decision in *Kunarac* has had a profound influence on subsequent case law, both in international criminal tribunals and beyond. The International Criminal Tribunal for Rwanda followed the lead of the ICTY, and in *Akayesu* clarified that enslavement could constitute a crime against humanity where it was part of – or even formed itself – a widespread and systematic attack against a civilian population.⁵⁹ In Sierra Leone, the Special Court for Sierra Leone built on this case law to develop a jurisprudence of sexual slavery and forced marriage. In the *AFRC*, *RUF* and *Taylor* cases, the court considered the cases of girls and women taken against their will and married to rebels, who exercised full control over the movements, labour and sexuality of the women.⁶⁰ The Extraordinary Chambers in the Courts of Cambodia have also dealt recently with enslavement in the form of forced labor, finding Kaing Guek Eav (‘Duch’) guilty of this crime against humanity for his treatment of detainees at execution re-education camps.⁶¹ And beyond these criminal tribunals, the *Kunarac* case has influenced decisions in regional human rights institutions⁶² and domestic prosecution⁶³.



3. The International Criminal Court and slavery

Where, then, does this leave the International Criminal Court? Should we expect it to become a notable force in the global anti-slavery movement? While the ICC is, in fact, already prosecuting some slavery crimes, its future role will depend on how ICC stakeholders approach the jurisdictional opportunities offered by the Rome Statute, and the many practical and political barriers to using it to prosecute slavery crimes.

What scope is there for anti-slavery prosecution?

The Rome Statute criminalizes, as crimes against humanity, enslavement, sexual slavery, and enforced prostitution.⁶⁴ As war crimes, it criminalizes sexual slavery and enforced prostitution.⁶⁵

The ICC's classification of enslavement is expansive. While the definition itself mimics the language used in the 1926 Slavery Convention regarding "powers attaching to the right of ownership," this explicitly includes human trafficking.⁶⁶ Moreover, the Elements of Crimes document explains that enslavement may include "exact[ing] forced labour or otherwise reducing a person to a servile status as defined in" the 1956 Supplementary Slavery Convention.⁶⁷ In accordance with enslavement jurisprudence from the *ad hoc* tribunals, scholars were confident at the time of the Rome Statute's codification that the ICC would not limit the crime of enslavement to the practice of traditional forms of slavery.⁶⁸ Throughout its emerging jurisprudence on slavery-related crimes, the ICC has indeed hewed closely to the expansive understanding of slavery reflected in *Kunarac*.

Yet 'enslavement' as a crime against humanity has been charged to date only in cases arising from the Uganda situation. There, four of the five accused, all alleged members of the Lord's Resistance Army (LRA), have been charged with enslavement committed as part of the armed LRA insurgency.⁶⁹ The fifth accused, as well as Joseph Kony, the alleged LRA Commander-in-Chief, are also charged with sexual slavery as a crime against humanity. Three of the accused remain at-large, and one is deceased.⁷⁰ Dominic Ongwen, alleged Brigade Commander within the LRA, surrendered to ICC custody and awaits a confirmation of charges hearing in 2016.⁷¹

Sexual slavery has received more prosecutorial attention to date. It has been charged in the cases against Katanga

and Ngudjolo arising from the DRC situation. The Katanga case has, significantly, confirmed that the ICC will follow the now well-established approach to 'ownership', treating it as a question of whether a situation of dependence arises that deprives the victim of all autonomy.⁷² The subsequent *Ntaganda* case has clarified that the exercise of 'ownership' can be shown by a "combination of factors" such as "the detention or captivity in which the victim was held and its duration, the limitations to the victim's free movement, measures taken to prevent or deter escape, the use of force, threat of force or coercion, and the personal circumstances of the victim, including his/her vulnerability".⁷³ While the court found that sexual slavery did in fact take place, Katanga and Ngudjolo were both acquitted on these counts both as a war crime and crime against humanity.⁷⁴ In Ngudjolo's case, the court found that the prosecution had failed to prove beyond a reasonable doubt that he had command responsibility over the rebel group that committed the acts in question.⁷⁵ In Katanga's case, the Chamber acquitted on the basis that the sexual slavery did not fall within the 'common purpose' of the attack, as required by Art. 25(3)(d) of the Rome Statute.⁷⁶ The recently commenced trial of Bosco Ntaganda includes charges of sexual slavery as a war crime and crime against humanity.⁷⁷ In contrast to this exploration of sexual slavery, however, the Court has not placed much emphasis on exploring 'forced marriage' as a separate crime; in Katanga and Ngudjolo, forced marriage was not charged, despite evidence that it occurred.⁷⁸

Three possible anti-slavery cases: Boko Haram, ISIS and DPRK

Several major opportunities for the court to substantially further develop its anti-slavery jurisprudence are however now looming, relating to situations in Nigeria; Syria and Iraq; and the Democratic People's Republic of Korea.

In Nigeria, which has been under preliminary examination by the ICC Prosecutor since 2012, the militant group Boko Haram has a clear policy of enslavement, child recruitment, sexual slavery and forced marriage. Its leader, Abubakar Shekau, has proclaimed that the hundreds of women and girls it has kidnapped will be forced into marriage with his fighters or Boko Haram "will sell them in the market".⁷⁹ This, and other evidence, suggests that Boko



Haram has an organizational policy of enslavement which may rise to the level of a crime against humanity. The Office of the Prosecutor determined in 2013 that “there is a reasonable basis to believe that crimes against humanity have been committed in Nigeria, namely acts of murder and persecution attributed to Boko Haram”, but its report on the issue did not appear to consider the possibility that enslavement was also occurring.⁸⁰ Even if the Prosecutor did reach such a conclusion, however, under the ICC’s system of complementarity, the first responsibility for the prosecuting these crimes will fall to Nigeria.

The so-called ‘Islamic State’ of Iraq and al-Sham (ISIS) provides perhaps an even greater opportunity for the ICC to prosecute slavery crimes, if jurisdictional obstacles can be overcome. ISIS is actively sponsoring and promoting chattel slavery. It has distributed several instructional documents, one entitled “Questions and Answers on Female Slaves and their Freedom”, which set out, at length, the organization’s position that enslaving women and girls from non-Sunni communities is legally sanctioned by the Quran and *hadith*, and that these women and girls are “merely property”.⁸¹ ISIS has also taken institutional steps to promote slavery, organizing slave contract registries and markets, in which over 3,000 Yazidi women and girls are thought to be held.⁸² In March 2015, an inquiry initiated by the UN Human Rights Council found “information that points to ... crimes against humanity, and war crimes”, including sexual slavery.⁸³

The challenge for the ICC, however, would be to establish jurisdiction. The crimes appear to be occurring on the territory of Syria and Iraq, neither of which is an ICC State Party. Jurisdiction might be established if ISIS leaders involved in the crimes held the nationality of a state party, but as of early April 2015 the assessment of the Prosecutor was that this was not the case “at this stage”, and accordingly, her Office did not proceed, since it was obligated to focus on those “most responsible” for Rome Statute crimes.⁸⁴ This could, of course, change, as new information comes to light. The other route to jurisdiction would be via referral from the UN Security Council. But such referrals cannot, by law, be limited to specific parties to a conflict. For that reason, Russia and China have already blocked a Security Council referral of the situation in Syria to the ICC, in May 2014. The Security Council might, alternatively, legislate to create a *new* international criminal tribunal to try ISIS crimes – which would presumably extend well beyond slavery to encompass various crimes against humanity and violations of the laws of war relating to the protection of cultural property; but such a tribunal would face enormous practical – and arguably, political – obstacles to securing custody of defendants.

Similar obstacles have, to date, prevented the Security Council referring the slavery crimes alleged against the North Korean regime to the ICC. A UN Human Rights Council Commission of Inquiry has explicitly found reasonable grounds to believe that enslavement is being committed pursuant to policies established by the government, traceable up the chain to the head of state.⁸⁵ The Commission of Inquiry found slavery-related crimes in political prison camps, and reason to suspect that the regime forces some of its citizens into forced labour overseas, seizing up to 90 per cent of their salaries. The UN Special Rapporteur on human rights in DPRK, Marzuki Darusman, has indicated his intent to investigate these contract worker practices, particularly in relation to the construction of stadiums for the 2022 FIFA World Cup in Qatar.⁸⁶

On 17 April 2014, Australia, France and the US convened an Arria formula meeting of members of the Security Council with the Commission of Inquiry, and later produced a non-paper summarizing the discussions that was circulated as a Council document.⁸⁷ On 18 December 2014 the UN General Assembly decided to submit the Commission of Inquiry report to the Security

Council, encouraging it to consider referral of the situation to the International Criminal Court, and to consider targeted sanctions against those who appear to be most responsible for crimes against humanity. The Council has, controversially, taken up the matter as an ongoing agenda item, but is unlikely to vote on a referral since it would almost certainly be blocked by China. Nonetheless, it is in theory possible that the ICC could have territoriality or nationality jurisdiction over some of these alleged crimes. The extensive reporting of North Korean ‘contract workers’ operating on state-sponsored contracts outside DPRK suggests many of them work in ICC states parties, including Mexico, Mongolia and several European and African countries.

Practical obstacles

Even in those cases where the ICC has obvious jurisdiction, prosecutions face a variety of further legal and practical obstacles that are likely to severely limit the ICC’s contribution to anti-slavery efforts.

Scale and gravity

First, there are questions of scale and gravity. The ICC can only prosecute crimes against humanity where there is a “widespread or systematic attack” directed against a civilian population, which requires “a course of conduct involving the multiple commission of acts”.⁸⁸ Even a single act may be prosecuted as a crime against humanity when the link to a widespread or systematic attack is present,⁸⁹ and while there need not be a military attack,⁹⁰ there must be a “campaign or operation carried out against the civilian population”.⁹¹ This must also be carried out pursuant to a “State or organizational policy”.⁹² In cases like those discussed above – Boko Haram, ISIS, DPRK – this may be able to be made out on the evidence. But in many of the more common forms of slavery discussed earlier – relating to commercial exploitation of workers in situations of debt bondage, forced labour and human trafficking, this may be much harder to prove.

The corporate veil

Second, and closely related, it is unclear whether a business organization’s policy condoning slavery would constitute an “organizational policy” as that term is understood in the ICC system. The ICC itself has no jurisdiction over corporations, *per se*, and has not to date brought any prosecutions that have sought in any way

to pierce the corporate veil. Recent jurisprudence from the Court suggests that it may however be possible to bring prosecutions against individual actors, for their involvement in enslavement as a crime against humanity on the basis of their role in corporate or commercial conduct. The Court recently concluded that criminal gangs can constitute the kinds of organizations whose policies can lead to a crime against humanity under the ICC Statute. The Pre-Trial Chamber held in the Kenya Situation that the *formality* of the organization is not dispositive; the Court should determine this question on a case-by-case basis, taking into consideration several factors.⁹³ This suggests that it may be possible to point either to corporations themselves – or to informal, shadow networks within them – as the source of enslavement crimes, prosecutable under the ICC Statute. And while the ICC has no jurisdiction over corporations, some states that have domesticated the Rome Statute do recognize corporate liability, raising the prospect of domestic prosecutions of corporate involvement in – or complicity in – enslavement, human trafficking and forced prostitution.

Access to and protection of victims and evidence

Once jurisdictional hurdles are overcome, however, the ICC Prosecutor still faces huge practical challenges, particularly in gaining access to victims and evidence. In all its investigations, the Office of the Prosecutor must rely on the resources of local law enforcement or other intermediary organizations that can help it gain such access. It relies on them for familiarity with the area and people, for human resources, and for security. Slavery often occurs in areas where such access is very difficult to achieve, either because it takes place in remote, insecure locations, or because those locations – even when urban or easily reached – are protected by corrupt governmental elements. While state immunity cannot spare a head of state or government official of an ICC state party from prosecution,⁹⁴ there are various ways in which governmental resistance can impede the ICC’s efforts. The transnationality of much contemporary human trafficking and slavery multiplies these problems, posing huge challenges for the ICC’s investigative work, requiring multiple language skills, relationships with numerous different local law enforcement agencies, and incurring significant expense.

Even if witnesses and evidence are identified, protecting them can be extremely difficult, as the recent Kenya

Situation experience shows. Slaves and victims of slavery crimes will likely be particularly vulnerable to harm, particularly given the psychological trauma many of them have experienced at the hands of their slavers and captors. One possibility open to the Office of the Prosecutor, not yet fully explored, may be to access resources from the ICC Trust Fund for Victims, to help reduce victims' vulnerability before, during – and after – trial. The ICC Trust Fund provides assistance to victims and their families who have suffered physical, psychological and/or material harm as result of Rome Statute crimes, with a particular focus on sexual and gender-based crimes.⁹⁵ It does not, however, require those crimes to have been charged or proven at the ICC before assistance can be provided.⁹⁶

State and diplomatic immunity

Though no state today *officially* supports slavery, there is plenty of evidence available that government officials acquiesce in or even, on some occasions, participate in, slavery and human trafficking. Prosecutions at the ICC circumvent diplomatic immunity obstacles thanks to Article 27 of the Rome Statute.⁹⁷ But prosecutions of foreign government officials at the domestic level – even where they draw on domesticated provisions of the Rome Statute – may be more complex. Attention to diplomatic immunity seems particularly important in this field, given the evidence suggesting that there is a particular pattern of abuse of domestic workers by diplomats – fostered in part by those diplomats' immunity from prosecution.⁹⁸

Two recent cases – one in the US, one in the UK – point to the importance of state and diplomatic immunity. In late 2013 the United States charged the Indian Deputy Consul General in New York, Devyani Khobragade with visa fraud and providing false statements, charges arising from Khobragade's alleged exploitation of Sangeeta Richard, a nanny. Khobragade was transferred into the Indian Permanent Mission to the United Nations, and on that basis was able to avoid the charges on the grounds of diplomatic immunity.⁹⁹ Conversely, in early 2015, the UK Court of Appeal set aside the immunity of Libya and Sudan in a case brought by Moroccan nationals who were in domestic servitude in those countries' embassies in London.¹⁰⁰ The Court of Appeal held that provisions of the *State Immunity Act 1978* (UK) breach Articles 6 (fair trial) and 14 (discrimination) of the European Convention on Human Rights, and that the diplomats were not immune from suit, because this would breach the Charter of

Fundamental Rights of the European Union. This suggests there may be utility in exploring further strategic litigation – whether in domestic civil, criminal, or regional human rights jurisdictions – to identify and widen the chinks in the armour that allow states and their officials to be shielded from international anti-slavery norms.



While the ICC is first and foremost an instrument for investigating, prosecuting and punishing international crimes, its success cannot be determined solely by counting the number of convictions it achieves. On the contrary, a successful Court might actually have a minimal role in punishing slavery, because slavery violations of the Statute were being effectively deterred and prevented or, where they did occur, handled capably at the national level. The role for international criminal justice in fighting modern slavery may, therefore, go well beyond punishment.

That role arises from the precise legal framework offered by international criminal law, and the on-going interpretive function of international criminal courts and tribunals. The system of international criminal justice thus offers an important framework for mobilizing collective action against slavery. What forms would such mobilization take, beyond efforts to punish modern slavers? We suggest four: 1) clarifying and strengthening the taboo and norms against slavery; 2) clarifying states' duty to protect against slavery; 3) encouraging business to protect human rights; and 4) ensuring victims of slavery receive the support they need.

Clarifying and strengthening the norms against slavery

From a legal standpoint, the prohibition against slavery could hardly be more iron-clad. The prohibition against slavery is one of the very rare norms of international law that applies at all times, in all places, to all actors.¹⁰¹ Individuals are criminally liable if they commit (or are complicit in) slavery, and states violate international law by failing to give effect to this prohibition. Indeed, states are theoretically under enormous legal obligation to affirmatively act in relation to slavery: to criminalize, investigate, prosecute and punish slavery where it occurs. Yet this obligation clearly needs more active promotion and reinforcement, to raise awareness of the legal prohibitions and obligations, and to thicken the understanding of how they apply in a range of different commercial, social and legal contexts. Additionally, with the rise of Boko Haram and ISIS, the global taboo against slavery is, for the first time in living memory, being openly contested on the international stage. It needs reinforcement.

The international criminal tribunals have a crucial role to play here, as leading, authoritative voices on how

international law applies to contemporary circumstances. It is clear that strategic anti-slavery litigation can have a powerful demonstration effect. Litigation against the UK in the European Court of Human Rights contributed to a wide range of legislative and operational changes to improve protections for victims of slavery in that country, culminating in the *Modern Slavery Act* (2015).¹⁰² And litigation in the Inter-American Commission on Human Rights also helped to bring Brazilian laws on paper to life, mobilizing government to strengthen protections against slavery.¹⁰³ Prosecutions in the ICC, or in domestic jurisdictions using Rome Statute provisions, have the potential to replicate this impact. The anti-slavery jurisprudence of the international criminal tribunals over the last two decades has, as we saw in Part 2 above, already been significant in clarifying the relationship between the general international law of slavery and the specific provisions of international criminal law. This jurisprudence is steadily impacting human rights bodies' understandings of states' obligations in regard to slavery.¹⁰⁴ And in *R. v. Tang*, the High Court of Australia relied on that same jurisprudence to uphold the first slavery conviction in Australia, holding that slavery extends beyond 'chattel' slavery and citing definitions used by international criminal tribunals.¹⁰⁵ This suggests that international criminal jurisprudence may also directly influence national courts' interpretations of domestic provisions implementing international commitments to prohibit slavery.

Perhaps equally important, criminal investigation and prosecution can serve a powerful role to focus attention and mobilize civil society and political will to address a particular issue. Prosecutions of slavery crimes in the ICC, or at the domestic level under Rome Statute provisions, could help provide a focus for anti-slavery efforts and strengthen awareness of anti-slavery norms.

Helping to clarify states' duty to protect against slavery

States are obliged to take a comprehensive approach to tackle slavery. International human rights law requires states to comprehensively criminalize all forms of slavery, provide resources to vigorously investigate slavery, robustly prosecute alleged offenders, and impose penalties in line with the gravity of the offense.¹⁰⁶ Further, states must cooperate with other states and international organizations to combat trans-border slavery that touches its territory.¹⁰⁷

The strength of the norms against slavery also seems similar to those against other international crimes, such as war crimes and crimes against humanity, which cannot be amnestied.¹⁰⁸

International justice mechanisms can also provide a spur for states to reflect on the efficacy of their own efforts to suppress slavery, which may in turn have an important demonstration effect for other states. In the signal case of *Pereira v. Brazil* in the Inter-American Commission on Human Rights, a settlement was reached to resolve a complaint arising from the serious injury of a man attempting to escape horrendous forced labour conditions.¹⁰⁹ Brazil made a series of significant commitments, including monetary reparation, preventive measures, legislative change, monitoring and awareness-

raising measures, to counter the phenomenon of slave labour. The settlement contained a section addressed specifically to “the trial and punishment of individuals responsible”,¹¹⁰ undertaking to create federal criminal jurisdiction over slavery.¹¹¹ This was combined with the creation of a National Commission for the Eradication of Slave Labour, and the creation of an Inter-American monitoring mechanism to supervise implementation of the settlement, including through receiving information and site visits.¹¹² Such innovative responses to slavery may hold important insights for other states.

Strengthening corporate anti-slavery efforts

Companies are under increasingly high-profile public – and statutory – pressure to eradicate slavery from their



supply chains through human rights due diligence (HRDD). High-profile litigation such as the recent cases brought against Nestlé and CostCo, arising from allegations of slavery in the south-east Asian seafood industry, combine with statutory measures such as anti-human trafficking legislation in the US,¹¹³ and the *Modern Slavery Act* in the UK.¹¹⁴ Under the UN Guiding Principles on Business and Human Rights, businesses are expected to seek to mitigate or prevent any adverse impact on human rights that is directly linked to their operations, products and services through their business relationships – even if they do not have prior knowledge of the conduct that creates that impact.¹¹⁵ This expectation is now being enforced in different contexts not only through statute, but also through a range of securities exchange listing rules, investment guidelines, and even Security Council Resolutions.¹¹⁶ The new ILO Forced Labour Protocol also picks up this approach: Article 2(3) calls on states to adopt preventive measures aimed at supporting due diligence by the public and private sectors to respond to the risk of forced labour.¹¹⁷

Yet the *criminal* enforcement of norms against slavery in these commercial contexts remains very rare. There is a strong argument that statutory and regulatory measures encouraging companies to engage in ‘due diligence’ to eradicate slavery from their supply chains will lack real force, until such criminal prosecution occurs and begins to shine a light on the ways that different businesses may be, even unwittingly, involved in slavery.¹¹⁸ But as the ICC clarifies over time how the risk of commission of slavery-related crimes impacts on criminal liability, this may reinforce the incentives for companies both upstream and downstream to undertake HRDD to identify and address slavery throughout the supply chain.

Access to criminal justice may, in many cases, be essential to states and business meeting their obligations under both the UN Guiding Principles, and relevant national, regional and international instruments, to provide victims of corporate slavery access to effective remedies.¹¹⁹ It is far from impossible to imagine prosecutions at the national level, relying on the Rome Statute, targeting corporate actors for involvement in slavery; several important international projects are indeed currently exploring how to overcome barriers to effective prosecution of corporate involvement in serious human rights abuse.¹²⁰

Assisting victims and raising awareness of their plight

The ICC Trust Fund for Victims also has a potentially powerful role to play in helping the victims of slavery and their families and communities. Victims are defined as people who have “suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.¹²¹ The provisions governing the ICC Trust Fund for Victims’ support to victims permit the Trust Fund to assist victims in situations before the Court – whether or not a finding of individual criminal liability has been made.¹²² Victims and their families are eligible for both monetary support and physical and psychological rehabilitation services, regardless of the ultimate legal disposition of the particular accused in question.

To date, more than 100,000 victims have received assistance from the Trust Fund, including in several situations such as Uganda and DRC where slavery crimes are alleged.¹²³ It has a particular focus on sexual and gender-based violence (SGBV). With a resource base of \$10 million in July 2014, the Trust Fund has significant potential to not only highlight the plight of victims of slavery, but also assist them – whether or not *prosecutions* of slavery crimes move forward at the ICC.



5. Ten ways to strengthen the role of the system of international criminal justice in the fight against slavery

Based on the analysis above, we offer ten recommendations to states, UN actors, the ICC Prosecutor, the ICC Trust Fund for Victims, and the activist community:

To states

1. Prosecution: States should encourage the investigation and prosecution of slavery crimes at the domestic – or international – level. The recent arrest of a US-Belgian businessman for trial in Belgium for enslavement during the Sierra Leone civil war is a positive development. Successful investigation and prosecution will require extensive international cooperation, and may require consideration of *ad hoc* prosecutorial mechanisms, such as a Special Tribunal to address ISIS' slavery crimes, or the enslavement crimes of the DPRK. States should share practice on the use of universal jurisdiction in anti-slavery cases.

2. Slavery as a crime against humanity: States should include references to slavery crimes, such as enslavement, when discussing crimes against humanity at the intergovernmental level. States should not amnesty slavery crimes, including during peace agreements. Enslavement should explicitly be recognized as one of the crimes against humanity that can give rise to Responsibility to Protect obligations, as the General Assembly has recognized in its consideration of the Democratic People's Republic of Korea.¹²⁴

3. Working with business: States should work with business actors to help them understand and discharge their Responsibility to Respect human rights, including by clarifying for business its potential exposure to criminal liability for involvement with slavery offences, and by explaining the relationship between human rights due diligence (HRDD) and criminal liability exposure. Where states identify evidence of corporate involvement in slavery, they should work with business to ensure those affected are able to access effective remedies, including criminal prosecution.

To the ICC Assembly of States Parties

4. Mobilize on slavery issues: Interested Member States should mobilize in the ICC Assembly of State Parties to encourage attention to slavery issues within the ICC system. This might include encouraging dialogue

with the Office of the Prosecutor to focus attention on slavery crimes, for example through the preparation of a policy paper on the prosecution of slavery crimes, and encouraging states to consider prosecuting slavery crimes under Rome Statute provisions incorporated at the domestic level. The ICC ASP could hold a formal discussion on criminal justice responses to slavery to allow interested Member States to share good practices in handling allegations of slavery, addressing such issues as remediation, witness protection, and the role of corporate responsibility. Given many slavery crimes take place outside the African context, a discussion within the ASP of the ICC's role in anti-slavery prosecution might have the added benefit of making clear the willingness of the ASP to promote investigation and prosecution of violations of the Statute outside Africa.

To the UN Human Rights Council

5. Universal Periodic Review: States should use the UN Human Rights Council's Universal Periodic Review Process to address not only allegations of modern slavery, but also states' efforts to investigate and prosecute slavery crimes – including by companies operating in their territory.

6. UN-ICC engagement: The Human Rights Council should encourage the UN Special Rapporteur on Contemporary Forms of Slavery, and other relevant UN human rights special procedures mandate holders, to engage regularly with the ICC to consider how they can best work together to address specific slavery crimes.

To the ICC Prosecutor

7. Prosecute slavery crimes: The ICC Prosecutor should identify a case suitable for strategic investigation and prosecution of slavery crimes, notably enslavement, in order to demonstrate the utility of the Rome Statute in the fight against slavery. This should include consideration of cases outside the context of armed conflict, and/or involving corporate actors. To this end, the ICC Prosecutor should conduct an examination of whether it has jurisdiction over Boko Haram or ISIS actors involved in enslavement.

8. UN-ICC engagement: The ICC Prosecutor should initiate a periodic dialogue bringing together the various international anti-slavery mechanisms covered by the UN-

ICC Relationship Agreement (including the ILO, the UN Special Rapporteurs on Contemporary Forms of Slavery and on Human Trafficking, the SRSOs on Sexual Violence and Children in Armed Conflict, and other members of the ICAT) to discuss ways to strengthen the prosecution of slavery crimes.

To the ICC Trust Fund for Victims

9. Help slavery victims: The ICC Trust Fund for Victims should explore possibilities for providing assistance to victims of slavery-related offences in situations before the Court, including victims of enslavement and sexual slavery by Boko Haram in Nigeria.

To the activist community

10. Strategic litigation: Civil society, activists and donors should promote strategic anti-slavery litigation, through initiating cases, fostering information exchange (e.g. a case-note circulation system, or regular networking opportunities), and identifying particular legal doctrines that prevent accountability for slavery – such as diplomatic immunity – which may be ripe for challenge.



Notes

1. The centrality of the powers of ownership in the concept of slavery was codified by the 1926 Slavery Convention: 1926 Slavery Convention, Signed at Geneva on 25 September 1926, 212 U.N.T.S. 17. A 1956 Supplementary Convention outlawed 'institutions and practices similar to slavery', which includes debt bondage, serfdom, servile marriage, and the exploitation of children: Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, 226 U.N.T.S. The key cases clarifying this central aspect of contemporary slavery are discussed later in this report. One particularly important decision was handed down by the High Court of Australia: *R v. Tang* [2008] HCA 39 (Unreported, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 28 August 2008). See further: J. Allain, "R. v. Tang: Clarifying the definition of slavery in international law", 10(1) *Melbourne J. International Law* (2009), pp. 246-257.
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6. See *Rio Negro Massacres v. Guatemala*, Judgment, Series C No. 250 (IACtHR), 4 September 2012, at 225; see M. Robinson, 'Foreword', *The Princeton Principles on Universal Jurisdiction* (Princeton: Princeton University Press, 2001) at 16.
7. Arts 7(1)(c) and (g) ICCSt; Art. 5(c) ICTY St; Art. 3(c) ICTR St; Arts 2(c) and (g) SCSL St; Art. 5 ECCC St.
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 63. See *R v. Tang*, *supra*.
 64. Arts 7(1)(c), 7(1)(g)-2, and 7(1)(g)-3 ICCSt.
 65. Arts 8(2)(b)(xxii)-2, 8(2)(b)(xxii)-3, 8(2)(e)(vi)-2, and 8(2)(e)(vi)-3 ICCSt.
 66. Art. 7(2)(c) reads, "[e]nslavement" 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.' The 1926 Slavery Convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'
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Images

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Child soldiers are forced to work and fight by armed forces. [Image: AP Photo/Karel Prinsloo](#)

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Khanpur, India. Rita Devi, 25 years old and mother of two children has followed a candle making workshop organized by PRAYAS and can now earn a living for herself and use the candles for her own house. Her plan is to open a big candle producing company. [Image: Alice Smeets \(c\) Legatum Limited 2015.](#)

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Women who were rescued after being held captive by Boko Haram sit as they wait for medical treatment at an internal displaced persons' camp near Mubi, northeast Nigeria 29 October 2015. [Image: Stringer/Reuters/Corbis](#)

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Girls work at a "dancing club" in the Tamel neighborhood of Kathmandu, Nepal. [Image: Katie Orlinsky \(c\) Legatum Limited 2015.](#)

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1947: German Nazi industrialist Friedrich Flick, accused of using slave labour in his factories, seizing private properties and belonging to Hitler's 'Circle of Friends', in the dock at the Palace of Justice, Nuremberg during a post-war trial. [Image: Keystone/Getty Images](#)

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Congolese warlord Bosco Ntaganda sits in the courtroom of the International Criminal Court (ICC) during the first day of his trial in the Hague, on 2 September 2015. [Image: Michael Kooren/AFP/Getty Images](#)

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Top: Cotton pickers in Uzbekistan are coerced into service. [Image: Legatum](#)

Bottom: Former bonded labourers take stitching lessons alongside a non-formal education centre in a hamlet in Sharbatkhani Village in Bhadohi district in Uttar Pradesh, India. [Image: Sanjit Das \(c\) Legatum Limited 2015.](#)

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Yazidi women hold banner and chant slogans during demonstration against the attacks of Islamic State (IS) in Iraq in front of the European Parliament at the Luxembourg square in Brussels, Belgium on 8 September 2014. [Image: Dursun Aydemir/Anadolu Agency/Getty Images](#)

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[Image: Pangea \(c\) Freedom Fund](#)

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A 27-year-old Yazidi woman, who escaped from captivity by Islamic State (IS) militants, is pictured at Sharya refugee camp on the outskirts of Duhok province 4 July 2015. The woman and her sister were among one hundred women, men and children taken by IS as prisoners after the militants attacked their village of Tal Ezayr in the northern Iraqi province of Mosul close to Syrian border last year. In an interview with Reuters TV, the sisters talked about their horrific ordeal, treatment of women by the militants, and their eventual escape. Picture taken 4 July 2015. [Image: Reuters](#)

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63 year old Hiralal works as a weaver in a small carpet weaving workshop in Dattipur Village in Bhadohi district in Uttar Pradesh, India. [Image: Sanjit Das \(c\) Legatum Limited 2015.](#)

