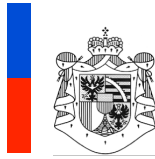




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## **Eradicating Modern Slavery: What Role for International Criminal Justice?**

**Policy Breakfast, 30 October 2014**

### **Meeting Note**

Today, over 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-Hussein, 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?

On 30 October 2014 the Permanent Mission of Liechtenstein hosted a policy breakfast to launch a new policy research initiative designed to consider these questions. The initiative is co-organized by UN University, the *Journal of*

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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.

*International Criminal Justice*, the Freedom Fund and the Permanent Mission of Liechtenstein to the United Nations. The breakfast brought together roughly 25 experts from the ICC, UN, UN Member States, advocacy community and academia. Later, the initiative will generate policy outputs and a Special Issue of the *Journal of International Criminal Justice*.

## **The causes of modern slavery**

**Mr. Nick Grono, CEO of The Freedom Fund**, opened the discussion by explaining three principal factors that underlie contemporary slavery.

First, demand for cheap labor creates a profit incentive for slavery and slave-like practices. Transnational companies rely on the disarticulation of the supply chain to insulate consumers, and themselves, from the role of slavery in the production of consumer goods. It remains extremely inexpensive to buy slaves; for example, a person can be trapped in bonded labor in India for around \$100. Slavery is thought to generate some \$150 billion annually in profits.

Second, the demand for cheap labor intersects with individual vulnerability, often caused by poverty, domestic discrimination and conflict and displacement. Any of these circumstances can lead individuals to take risks that they would ordinarily not take absent their lack of alternatives.

Third, that vulnerability is closely related to weaknesses in the rule of law, particularly related to corruption. The number of cases of slavery dwarfs prosecutions; the US State Department estimates there only around 8,000 prosecutions for trafficking-related offences (including sex trafficking) worldwide, annually. Weaknesses in the rule of law are only exacerbated during conflict, amplifying vulnerability and transforming economic slavery into practices such as the recruitment of child soldiers and sexual slavery.

Introducing the initiative, **Mr. James Cockayne, Head of Office at United Nations University** (“UNU”), asked ‘What does international criminal justice have to do with it?’. The international legal norm against slavery is incredibly strong – in theory - as a *jus cogens* norm creating *erga omnes* obligations. In practice, however, it is weakly enforced. Yet various mechanisms already exist to further this goal, including the UN Special Rapporteur on Contemporary Forms of Slavery, mechanisms under the International Labor Organization, regional human rights machinery, and domestic regulatory structures. Do international criminal justice norms and institutions (“ICJ”) have a productive role to play in the endeavor to eradicate slavery? Or are they too blunt to address the kinds of complex socio-economic and market forces explained by Nick Grono? It is possible that the involvement of ICJ in this endeavor could in fact hamper efforts to eradicate slavery, by politicizing slavery in ways that make some governments and corporations reluctant to cooperate with anti-slavery efforts.

It is also however possible, Mr Cockayne explained, that better connecting ICJ norms and institutions to existing enforcement systems could change incentive structures. The 'shadow' of ICJ might motivate improved enforcement at the domestic level, and could help improve cooperation and harmonization amongst other international enforcement mechanisms. Mr. Cockayne explained how the initiative would explore these issues, through the collective analytical efforts of a group of expert practitioners, academics and activists. Issues that were unlikely to be discussed at this breakfast in depth, but which will be considered in this initiative include the definition of slavery, the lack of domestic prosecutions, alternative compliance mechanisms, and interstate accountability.

### **What role for international prosecutions?**

The conversation then turned to the intricacies of slavery prosecutions in international criminal courts. **Ms. Karen Corrie of Fordham University** provided an overview of historical and recent international prosecutions of slavery at Nuremberg, the international criminal tribunals and the ICC. Enslavement has been prosecuted as an international crime since Nuremberg. The ICC has criminalized enslavement as a crime against humanity; further, sexual slavery, recruitment of child soldiers, and enforced prostitution are also criminalized by the ICC.

The ICTY has to date generated two seminal cases dealing with enslavement, *Prosecutor v. Kunarac*<sup>4</sup> and *Prosecutor v. Krjonejac*.<sup>5</sup> The Special Court of Sierra Leone, in three cases, and the Extraordinary Chambers in the Courts of Cambodia, in one case, have also prosecuted enslavement. While the ICC has no enslavement convictions to date, it has charged enslavement in four cases, all four of which were in the Uganda situation. Sexual slavery has been charged in several cases, though with no convictions to date. In the cases of *Prosecutor v. Katanga* and *Prosecutor v. Ngudjolo*, the court found that sexual slavery did in fact occur; however, the accused's individual responsibility in those cases was not proven.<sup>6</sup>

Ms. Corrie drew two conclusions from the jurisprudence to date. First, the jurisprudence on slavery issues from these courts has been fairly consistent, which is promising in terms of laying a normative basis for more effective enforcement, whether at the domestic or international level. Second, all cases where slavery has been charged have taken place in the context of a specific conflict which gave rise to the court's jurisdiction. Looking forward, the ICC is the only of these courts with the jurisdiction to prosecute slavery cases in non-conflict scenarios.

These remarks were followed by two interventions from personnel of the International Criminal Court: Ms. Shamila Batohi, Senior Legal Advisor to the Prosecutor of the ICC, and Ms. Patricia Sellers, Special Advisor to the Prosecutor of the ICC on International Criminal Law Prosecution Strategies.

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<sup>4</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23/1-T, Judgment (ICTY 12 June 2002).

<sup>5</sup> *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment (ICTY 27 Sept. 2003).

<sup>6</sup> *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment (7 March 2014); *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/12, Judgment (18 Dec. 2012).

**Ms. Batohi** began by noting that the slave *trade* itself is not criminalized under the Rome Statute, but despite this, the Rome Statute should be seen as a very progressive instrument given that it explicitly establishes enslavement and sexual slavery as prosecutable crimes within the jurisdiction of the Court. Ms Batohi noted that in June 2014, the ICC OTP launched its Policy Agenda on Sexual and Gender-Based Crimes,<sup>7</sup> and it intends to next launch its policy agenda on children. Both of these agendas can be informed by the results of this initiative. However, positive complementarity is a crucial facet of the ICC and is indeed promoted by the OTP. Consequently, examining how domestic systems treat slavery and how they can be urged to do better is central to the ICC's operation. Similarly, the gravity of cases taken up by the Court is an important consideration, as signing and ratifying the Rome Statute by state parties was undertaken upon an understanding that the ICC was meant to prosecute only the most serious of crimes.

**Ms. Sellers** then considered the relationship between Articles 7 and 8 of the Rome Statute, in how they treat slavery. While there is an enslavement crime against humanity ("CAH") under Article 7, there is no analogous enslavement war crime – despite slavery having been outlawed in some of the founding documents of international humanitarian law, such as the Lieber Code. Additionally, prosecutors should carefully consider whether sexual slavery is best treated as a subset of enslavement or as an independent crime.

Ms. Sellers concluded by noting that most of international criminal law has developed during the aftermath of horrendous atrocities. The Prosecutor of the ICC is thankful for this initiative because this is a proactive effort to consider the utility of international criminal law in addressing slavery, which may help move us beyond the more reactive approach involved in international prosecutions to date.

### **International criminal justice, market forces and public policy**

The discussion then turned to the important role played by corporations in both fostering and preventing slavery. **Ms. Katie Shay of the International Corporate Accountability Roundtable** discussed the increased focus in recent years on the responsibilities of corporations to respect human rights. In June 2011, the United Nations Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights. Partly in response to this development, corporations have seen an increase in demand from investors and consumers to uphold human rights standards, and an increase in potential civil and criminal liability for failing to do so. This has led to important efforts to remove slavery from supply-chains and workplaces. Examples of progress in this arena include corporate commitments to purchase food items from suppliers that belong to the Fair Food Program, U.S. legislation regulating the use of conflict minerals, and the California

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<sup>7</sup> [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1011.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1011.aspx).

Transparency in Supply Chains Act, which requires corporations to disclose and post online their policies regarding fair labor practices.

Comparing these efforts to other compliance campaigns, the clear takeaway is that compliance increases in the shadow of litigation. Market forces alone do not produce compliance. Yet in this area relating to slavery and human trafficking, there remains a significant enforcement vacuum, both in the US and internationally. For example, not a single corporation has faced proceedings for failing to comply with U.S. conflict mineral requirements. Where litigation is pursued, liability is often avoided on procedural grounds. Lastly, little action has been taken against executives. It remains an open question as to whether aggressive prosecution of directors and officers would in fact help or hinder the eradication of slavery.

**Mr. Siddarth Kara of the Harvard Kennedy School** suggested that the different aspects of an effective enforcement regime are better understood through considering slavery a major global public policy problem. Effective public policy requires rigorous research and transparent methodology. It is clear that in the arena of slavery, there is an ongoing tension due to the lack of foundational research, including the lack of consensus on the definitions for the fundamental terms. In addition, more effective enforcement will flow from a civil right of action (increasing the shadow of justice), the ability to collect restitution, and penalties sufficient to vitiate the profit of the offense for slavers.

### **New departures?**

The floor was then opened to a period of interactive questions and answers.

One question asked how the initiative would relate to India – where some 50% of the world's slaves are currently thought to live, yet which is not party to the Rome Statute. Mr. Grono and Mr. Kara discussed the important and progressive jurisprudence on forced and bonded labor that has issued from the Indian Supreme Court, but noted the ongoing problems of enforcement in that country. There was some discussion of how the initiative might explore opportunities for international criminal justice norms and institutions to encourage more effective enforcement.

Another speaker raised questions about how the initiative could interact with a variety of different UN processes and initiatives, such as the UN Global Initiative to Fight Trafficking (UN-GIFT) and the Global Compact. This speaker suggested the initiative consider whether a Secretary-General's Guidance Note related to slavery might be useful, and if so, what shape it should take.

A third speaker raised the question of whether existing slavery businesses would meet the threshold for prosecution by the ICC – and whether states would see ICC prosecution of slavery as appropriate or an unwarranted departure from focusing on atrocity crimes. This speaker suggested this was an open question, on which the initiative might help to foster useful debate and discussion within the membership of the ICC Assembly of States Parties. ICC prosecution of slavery outside conflict

situations might, for example, help to counteract the charge that the Court was unduly focused on prosecuting crimes in Africa.

A final speaker noted the important difference in enforcement practice depending on whether the conduct in question relates to labor trafficking or sex trafficking. According to the U.S. State Department, there were only 1,199 forced labor prosecutions *globally* in 2013, while sex trafficking prosecutions numbered over 9,000. An effort must be made to recalibrate this disparity at both the domestic and international levels. This initiative, this speaker suggested, might help to raise awareness of this disparity and offer some ideas for how it might be addressed.