ARTICLE

Prohibiting Slavery & The Slave Trade

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Slavery and the slave trade stubbornly persist in our time, but they receive insufficient attention in international human rights law. Even when courts adjudicate slavery violations, they often fail to characterize slave trade conduct that nearly always precedes slavery. Courts also characterize acts that meet the definition of slavery or the slave trade only as other human rights harms, such as forced labor or human trafficking. This failure to accurately characterize violations also as slavery and the slave trade perpetuates impunity and denies victims full expressive justice. This Article argues for reviving international human rights law's prohibitions of slavery and the slave trade. It also argues that a state responsibility complement to individual criminal accountability will assist to enforce or reform prohibitions of slavery and the slave trade in domestic laws, transform structures that perpetuate those harms, and dismantle systems that support them.

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INTRODUCTION

From antiquity to the present, in times of peace and in conflict, and in all corners of the globe, slavery[1] and the slave trade[2] have persisted.[3] While state-sponsored slave trades and *de jure* slavery institutions have been abolished, *de facto* slavery situations and the slave trades that support them continue.[4] As in some of the worst slave trades of the past—namely, the Trans-Atlantic and East African slave trades in which millions of Africans were abducted and forcibly removed to the Americas, the Middle East, and Asia between the 16th and early 20th centuries[5]—the global capitalist economy remains dependent upon the slave trade and slavery-related institutions, systems, and practices, in which perpetrators exercise ownership powers over human beings in order to concentrate wealth and resources for the benefit of societies' elites.[6]

Slavery and the slave trade also fuel war machines in conflicts around the world. Beginning in 2014, Islamic State of Iraq and the Levant (ISIL) fighters in Iraq and Syria have and continue to enslave and slave trade Yazidi

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1. Slavery is defined as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." Slavery Convention art. 1(1), Sept. 25, 1926, 46 Stat. 2183, 2191, 60 L.N.T.S. 253, 263 [hereinafter 1926 Slavery Convention]. "Status" is meant to cover *de jure* slavery, while "condition" prohibits *de facto* slavery. *See* Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *"Sexual Slavery" and Customary International Law*, *in* THE PRESIDENT ON TRIAL: PROSECUTING HISSÈNE HABRÉ 1, 366-67 (Sharon Weill et al. eds., 2022).

2. The slave trade is defined as:

> ". . . all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."

1926 Slavery Convention, art 1(2); *see also* 1956 Supplemental Slavery Convention (with slight revisions to include additional forms of transport and expand protections to persons not yet enslaved). Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 [hereinafter 1956 Supplementary Slavery Convention].

3. *See* Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *The International Crimes of Slavery and the Slave Trade: A Feminist Critique*, *in* GENDER AND INTERNATIONAL CRIMINAL LAW 157 (Indira Rosenthal, Valerie Oosterveld & Susana SáCouto eds., 2022).

4. JEAN ALLAIN, SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING 109 (2013); *see also* Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L.J. 239, 258 (2009).

5. OPPENHEIM'S INTERNATIONAL LAW 979 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 114–20 (1966); Seymour Drescher & Paul Finkelman, *Slavery*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 890, 890-97 (Bardo Fassbender & Anne Peters eds., 2012); U. O. Umozurike, *The African Slave Trade and the Attitudes of International Law Towards It*, 16 HOW. L.J. 334, 341 (1971).

6. *See, e.g.*, Fazenda Brasil Verde v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶ 301 (Oct. 20, 2016) (holding that Brazilians laborers were not entitled to pay and had no way to leave freely).

women and children.[7] The Committee for the Buying and Selling of Slaves organized slave markets to "distribute" (i.e., slave trade) captured Yazidis as property in the name of the Caliphate.[8] ISIL policies have permitted fighters to "buy, sell, or give as a gift female captives" who were considered to be "war spoils."[9] The policy intentionally reduced "non-believing" women and children of all genders into slavery.[10] This system of slave trading and slavery permitted sexualized violence in the course of enslavement[11] as individual ISIL fighters exerted various forms of ownership over the sexual autonomy

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7. YAZDA & FREE YEZIDI FOUNDATION, ISIL NATIONALS OF ICC STATES PARTIES COMMITTING GENOCIDE AND OTHER CRIMES AGAINST THE YAZIDIS 10-12 (2015) (redacted), https://www.freeyezidi.org/wp-content/uploads/Corr-RED-ISIL-commiting-genocide-ag-the-Yazidis.pdf; Letter to the ICC OCP as Global Justice Center Petitioners at 3, OTP-CR-397/15 (Dec. 17, 2015); Notably, IS has enslaved Muslim and other women and girls as well. This Article, however, focuses on the Yazidi experience. *See* HRGJ Clinic of CUNY Law School, MADRE & OWFI, COMMUNICATION TO ICC PROSECUTOR PURSUANT TO ARTICLE 15 OF THE ROME STATUTE REQUESTING A PRELIMINARY EXAMINATION INTO THE SITUATION OF: GENDER-BASED PERSECUTION AND TORTURE AS CRIMES AGAINST HUMANITY AND WAR CRIMES COMMITTED BY THE ISLAMIC STATE OF IRAQ AND THE LEVANT (ISIL) IN IRAQ, submitted Nov. 8, 2017, https://www.madre.org/sites/default/files/PDFs/CUNY%20MADRE%20OWFI%20Article%2015%20Communication%20Submission%20Gender%20Crimes%20in%20Iraq%20PDF.pdf. For a discussion on how enslavement may constitute a form of gender persecution, see Lisa Davis, *Dusting off the Law Books on Gender Persecution: Recognizing Gender-Based Crimes in Conflict and Atrocities*, 20 NW. J. HUM. RTS. 1, 6 (2021); *see also* Doughty Street Chambers, *German Court Convicts a Third ISIS Member of Crimes Against Humanity Committed Against Yazidis*, DOUGHTY STREET CHAMBERS (July 26, 2021), https://www.doughtystreet.co.uk/news/german-court-convicts-third-isis-member-crimes-against-humanity-committed-against-yazidis.

8. Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Missing in Action: The International Crime of the Slave Trade*, 18 J. INT'L CRIM. JUST. 517, 519 (2020); Notice On Buying Sex Slaves, Homs province (photograph), *in* ARCHIVE OF ISLAMIC STATE ADMINISTRATIVE DOCUMENTS (June 15, 2015), http://www.aymennjawad.org/2016/01/archive-of-islamic-state-administrative-documents-1 (last visited Sept. 27, 2019) [hereinafter Homs Notice]; Human Rights Council: *They Came to Destroy*, U.N. Doc. A/HRC/32/CRP.2, at 10-13 (June 15, 2016, 2007) [hereinafter *They Came to Destroy*]; UNAMI/OHCHR Report, '*A Call for Accountability and Protection: Yezidi Survivors of Atrocities Committed by ISIL*,' Aug. 2016, available online at http://www.ohchr.org/Documents/Countries/IQ/UNAMIReport12Aug2016_en.pdf (last visited Sept. 27, 2019) (hereinafter "UNAMI/OHCHR Report"). Yazidis reported that, prior to their enslavement, they were registered by officials at holding centers in Syria, loaded onto trucks, and moved to holding sites in Iraq. ISIS required fighters to pre-register for their slave purchases of females priced and sold according to their ages. ISIS fighters documented names, ages, and marital statuses, and photographed Yazidi women, girls, and boys at these holding sites. At times, ISIS auctioned Yazidi women and children online, replete with registration information, photos, and minimum purchase prices. Homs Notice; *They Came to Destroy*, *supra* note 8, at § 43, 57, 58, UNAMI/OHCHR Report. ISIS created the Islamic Caliphate and considered it a state ruled by Islamic Sharia law. Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (Mar. 2015), https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/ (last visited Jan. 7, 2020); *ISIS Fast Facts*, CNN (Dec. 4, 2019), https://www.cnn.com/2014/08/08/world/isis-fast-facts/index.html (last visited Jan. 7, 2020).

9. *See Islamic State (ISIS) Releases Pamphlet on Female Slaves*, M.D. E. MEDIA RES. INST. (Dec. 3, 2014), http://www.memrijttm.org/islamic-state-isis-releases-pamphlet-on-female-slaves.html (last visited Sept. 27, 2019).

10. *The Revival of Slavery Before the Hour*, 4 DABIQ 15. IS. D.013, IS D.014 (Sept. 2015) at 15; *They Came to Destroy*, *supra* note 8, at § 55. ISIS often presented Yazidi women and girls 'as a package' until girls reached the age of nine and, thereafter, sold them separately. *Id.* at §§ 81, 82.

11. *See* SELLERS & KESTENBAUM, *supra* note 1, at 366.

of Yazidi women and girls.[12] Yazidi boys, also enslaved, were forced to convert to Islam, to perform forced labor, and to train and fight with ISIL in military camps in Iraq and Syria.[13] Thousands of Yazidis remain in captivity or are among the missing at the time of this writing.[14]

Active since the 1980s, the Lord's Resistance Army (LRA) "abducted" and "transferred" (i.e., slave traded) Ugandan adults and children of all genders into slavery, including sexualized enslavement, to furnish the war effort.[15] Men were porters and boys were conscripted to serve as child soldiers.[16] Women were "gifted" as "wives" to LRA soldiers, while prepubescent girls, called "*ting tings*," cooked, cleaned, and performed domestic chores until they reached sexual maturity and could be "gifted" to LRA soldiers as "wives."[17] All ages and genders experienced slavery and slave trade harms; the children born to enslaved mothers were enslaved, i.e., owned and controlled in all aspects of their beings.[18]

Outside of conflict-related enslavement, a recent domestic criminal case in Lebanon alleges that sponsors under the *kafala* system subjected Meseret, an Ethiopian migrant domestic worker, to, among other crimes, slavery and slave trading.[19] Meseret's *kafeel* recruited and then held her captive in an

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12. Geraldine Boezio, *Escaping from ISIL, a Yazidi Sexual Violence Survivor Rebuilds Her Life*, OFF. OF THE SPECIAL REPRESENTATIVE OF THE U.N. SEC'Y GEN. ON SEXUAL VIOLENCE IN CONFLICT (July 10, 2018), https://www.un.org/sexualviolenceinconflict/escaping-from-isil-a-yazidi-sexual-violence-survivor-rebuilds-her-life/ (last visited Sept. 27, 2020).

13. *They Came to Destroy, supra* note 10, at §§ 40, 82, 93. *See also* Johanna Groß, *Negotiation Day — Main Trial Against Taha Al-J*, AMNESTY INT'L (June 9, 2020), https://amnesty-voelkerstrafrecht.de/9-verhandlungstag-hauptverhandlung-gegen-taha-al-j-09-juni-2020/.

14. Pari Ibrahim & Murad Ismael, *Seven Years After the Genocide, Yazidis are Still Waiting for Justice*, WASH. POST (Aug. 3, 2021), https://www.washingtonpost.com/opinions/2021/08/03/yezidis-are-still-waiting-justice-seven-years-later/; Margaret Evans, *Beekeeper Turned Spymaster Searches for Iraq's Missing Yazidis*, CBC NEWS (Apr. 16, 2021), https://www.cbc.ca/news/world/yazidi-iraq-syria-isis-1.5989166. Other human rights violations or international crimes, such as enforced disappearances, also could be alleged; however, my focus here is on slavery and the slave trade.

15. Prosecutor v. Ongwen, ICC-02/04-01/15, Trial Judgment, ¶ 67 (Feb. 4, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_01026.PDF; Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Conversations under the Rome Statute—Enslavement and Sexual Slavery*, OPINIO JURIS (June 11, 2021), http://opiniojuris.org/2021/06/11/conflict-related-sexual-violence-symposium-conversations-under-the-rome-statute-enslavement-and-sexual-slavery/.

16. Prosecutor v. Ongwen, ICC-02/04-01/15, Trial Judgment, at 1064-65 (Feb. 4, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_01026.PDF.

17. *Id.* at 1059.

18. *Id.* at 752. Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Conversations under the Rome Statute—Enslavement and Sexual Slavery*, OPINIO JURIS (June 11, 2021), http://opiniojuris.org/2021/06/11/conflict-related-sexual-violence-symposium-conversations-under-the-rome-statute-enslavement-and-sexual-slavery/.

19. Legal Action Worldwide (LAW), *I Was Kept a Slave for Seven Years in Beirut*, DALEEL MADANI (Oct. 8, 2020), https://daleel-madani.org/civil-society-directory/legal-action/press-releases/i-was-kept-slave-seven-years-beirut. For additional information on the *kafala* system, see LEGAL ACTION WORLDWIDE, POLICY BRIEF, THE KAFALA SYSTEM IN LEBANON: HOW CAN WE OBTAIN DIGNITY AND RIGHTS FOR DOMESTIC MIGRANT WORKERS? 5-6 (2020), https://acrobat.adobe.com/

apartment for more than seven years without pay; her captor subjected her to physical and verbal abuse and did not permit her to contact her family.[20] Unfortunately, Meseret's case is not an isolated one. Indeed, the *kafala* system's reliance on private sponsors and lack of labor protections make the system particularly susceptible to slavery and the slave trade, among other crimes.[21]

Despite these examples, slavery and the slave trade as international crimes rarely if ever are prosecuted at the domestic and international levels, due not only to outsized attention to human trafficking domestically and to structural deficiencies of the Rome Statute of the International Criminal Court (ICC), but also due to misapplication (slavery) or nonapplication (slave trade) of existing international law.[22] Additionally, while the International Court of Justice (ICJ) has determined that every state, as a member of the international community of states, has a legal interest in protecting certain fundamental human rights, "including protection from slavery [,] . . . ."[23] state responsibility to respect and "ensure respect" for international human rights—as well as third party states' obligations as members of the international community of states to eradicate slavery and the slave trade—is underutilized as a critical complement to pursuing domestic and international criminal prosecutions.[24]

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link/review?uri=urn:aaid:scds:US:c6df325f-0476-3f3b-b7ca-0fe04b7cd5da (arguing that the system amounts to slavery and slave trading under international law).

20. *Id.*

21. *See, e.g.*, *Lebanon: Abolish the Kafala (Sponsorship) System*, HUM. RTS. WATCH (July 27, 2020), https://www.hrw.org/news/2020/07/27/lebanon-abolish-kafala-sponsorship-system; Patrick Rak, *Modern Day Slavery: The Kafala System in Lebanon*, HARV. INT'L REV. (Dec. 21, 2020), https://hir.harvard.edu/modern-day-slavery-the-kafala-system-in-lebanon/.

22. Sellers & Kestenbaum, *supra* note 18; Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609, 609-49 (2014). Another reason for insufficient attention is because states themselves have rendered international criminal law accountability an exceptional undertaking, only for those most responsible for international crimes, and only when states are unwilling and unable to provide adequate redress at the domestic level. *See* Rome Statute of the International Criminal Court preamble, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. For an in-depth discussion of complementarity in international criminal law, see generally, MOHAMED EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW (2008).

23. Barcelona Traction, Light and Power Co. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 32, at 34 (Feb. 5). *See also* East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. Reports, 90, at 102, ⁋ 29 (June 30); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports, 226, at 258, ⁋ 83 (July 8); Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, 1996 I.C.J. Reports, 595, at 615–16, ⁋⁋ 31–32 (July 11).

24. Urmila Bhoola & Kari Panaccione, *Slavery Crimes and the Mandate of the United Nations Special Rapporteur on Contemporary Forms of Slavery*, 14 J. INT'L CRIM. JUST. 363, 368 (2016); *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 42(b), U.N. Doc. A/56/10 (2001), *reprinted in* [2001] Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter Draft Articles on State Responsibility]. The obligation to respect and to "ensure respect" for international law is well established. *See, e.g.*, Basic Principles and Guidelines on the Right to a Remedy and

Consequently, human rights violations of slavery and the slave trade rarely if ever have been brought before international judicial or quasi-judicial mechanisms even when those mechanisms explicitly are obligated to monitor state compliance with these prohibitions of most serious concern. Slavery and slave trade prohibitions are norms that are: non-derogable (meaning even in times of public emergency the rights cannot be suspended), peremptory or *jus cogens* (meaning that no justification exists to avoid state responsibility for a breach of such prohibitions) with *erga omnes* obligations (meaning states owe duties to all other states to eradicate these harms anywhere).[25] Related prohibitions of human trafficking and forced labor do not hold such super-normative status in international law.[26] As a result of inaction, victims have not received adequate and full expressive justice for these harms of fundamental concern to the international community.

The question that remains, however, is how recommitting to enforcing the human rights prohibitions of slavery and the slave trade more broadly under international human rights law (IHRL) would fill impunity gaps in accountability and justice for these harms. For some, it may be enough to argue that we have such legal tools and should therefore employ them where applicable; others, however, might regard such tools as no longer relevant, or even duplicative. In an era in which: (1) domestic and transnational criminal law, as well as human rights advocacy, focus on related harms of *inter alia* human trafficking and forced labor; and (2) the international community has established the world's first permanent international criminal court, the ICC, to hold individual perpetrators accountable for international crimes, why do we need to hold states accountable for slavery and slave trade human rights violations outside of domestic and international criminal law frameworks?

Ensuring state accountability for human rights violations of slavery and the slave trade matter for at least three reasons. First, within the human rights framework, slavery and the slave trade prohibitions enjoy the highest

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Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. No. 60/147 (Dec. 16, 2005). *But see, e.g.*, recent IACtHR cases *Fazenda Brasil Verde Workers v. Brazil* and *Lopez Soto y Otros v. Venezuela* in which slavery perpetration has been addressed as a violation of human rights. López Soto y Otros v. Venezuela, Funds, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 362, 43-44 (Sept. 26, 2018); Fazenda Brasil Verde Workers v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 318 (Oct. 20, 2016).

25. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (defining *jus cogens*). *See* Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 18 FL. INT'L U. L. REV. 515, 559-65 (2022) (examining the Human Rights Committee's lack of attention to slavery and complete failure to address the slave trade).

26. Human trafficking, for example, is a transnational crime and a human rights violation when perpetrated against women and children. *See* discussion in Part III, *infra* at 36-38.

protective status under international law and, consequently, open up additional legal avenues for state accountability and victim redress. Second, enforcing human rights prohibitions of slavery and the slave trade against states in addition to international slavery crimes against individual perpetrators will advance more fully expressive functions of international law while centering victims and more comprehensively redressing harms. Third, enforcing human rights norms prohibiting slavery and the slave trade will more directly address the structures and institutions that perpetuate slavery and the slave trade as an effective, preventive, and reparative complement to the international and domestic criminal legal responses that target individual perpetrators for retribution and punishment but are not designed to change existing domestic legal structures, policies, or practices. While challenges to combating impunity for slavery harms will continue given our current legal structures that support domination and subordination in many facets of the law and global economy, recommitting to holding states accountable for violations of slavery and the slave trade prohibitions will fill important gaps in efforts toward eradicating two of the oldest and most persistent harms prohibited under international law.

This Article proceeds in four parts. Part I explains the breadth and elevated normative status of slavery and the slave trade in international law to demonstrate how slavery and the slave trade prohibitions advance legal avenues for state accountability and victim redress in addition to prohibitions of human trafficking and forced labor. Part II builds upon theoretical explanations for state compliance with international law, including human rights treaty law, to offer reasons as to why the prohibitions of slavery and slave trade treaty regimes matter for accountability for slavery and the slave trade harms to states in addition to individual perpetrators under domestic and international criminal law frameworks.

Part III then turns to examining some critical gaps in international and domestic criminal law, as well as human rights law regimes' redress of slavery, the slave trade, and human trafficking to demonstrate the need to recommit to enforcing state compliance with the prohibitions of slavery and the slave trade. Part IV then also offers some challenges to recommitting to slavery and slave trade prohibitions despite the opportunities in expanding avenues for victim redress, confronting structural issues at domestic levels, and improving the expressive functions of international law.

I. SLAVERY AND SLAVE TRADE PROHIBITIONS IN INTERNATIONAL LAW

A. The 1926 Slavery Convention and the 1956 Supplementary Slavery Convention

The abolition of slave trading in the 19th and early 20th centuries preceded the development of the international proscription of slavery and the slave trade in the 1926 Convention for the Suppression of Slavery and the Slave Trade (1926 Slavery Convention).[27] In 1924, in response to continued *de jure* slave trading in Ethiopia and slavery practices in Africa,[28] the Council of the League of Nations constituted the Temporary Slavery Commission to develop an international treaty to eradicate the slave trade and slavery-related harms.[29] In its 1925 final report, the Commission urged states to "aboli[sh] the legal status of slavery."[30]

The 1926 Slavery Convention enumerates slavery's and the slave trade's elements while defining the prohibition broadly to govern all acts that slave owners and slave traders perpetrated and all harms that enslaved persons experienced,[31] including future enslavement and slave trading acts.[32] The 1926 Slavery Convention calls on states "to prevent and suppress the slave trade"[33] and "to bring about . . . the complete abolition of slavery in all its forms."[34] The 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"[35] and the slave trade as:

> . . . all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all

27. 1926 Slavery Convention, *supra* note 1. Although slave-raiding and large-scale dealing had all but ended in the African colonies by World War I, labor exploitation (i.e., forced labor) was extremely prominent and necessary for the colonial economy. *See* VLADISLAVA STOYANOVA, HUMAN TRAFFICKING AND SLAVERY RECONSIDERED: CONCEPTUAL LIMITS AND STATES' POSITIVE OBLIGATIONS IN INTERNATIONAL LAW 192-93 (2017); Suzanne Miers & Richard Roberts, *Introduction*, *in* THE END OF SLAVERY IN AFRICA 3, 21 (Suzanne Miers & Richard Roberts eds., 1988).

28. Jean Allain, *Slavery and the League of Nations: Ethiopia as a Civilized Nation*, 8 J. HIST. INT'L L. 213, 224 (2006).

29. *Id. See also* Temporary Slavery Commission, *Slavery and Other Systems Restrictive of Liberty,* League of Nations Doc. CTE 36, Memorandum by F. D. Lugard, Annex 3, "Conditions in Abyssinia," pp. 1-2 (1925).

30. *Report of the Temporary Slavery Commission adopted in the Course of its Second Session, 13th-25th July, 1925*, League of Nations Doc A.19.1925. VI (1925).

31. For an in-depth analysis of the gendered dimensions of slavery and the slave trade, see Sellers & Kestenbaum, *supra* note 3.

32. *But see* Research Network on the Legal Parameters of Slavery, *The Bellagio-Harvard Guidelines on the Legal Parameters of Slavery*, https://glc.yale.edu/sites/default/files/pdf/the_bellagio-_harvard_guidelines_on_the_legal_parameters_of_slavery.pdf (Mar. 3, 2012).

33. 1926 Slavery Convention, *supra* note 27, at art. 2.

34. *Id.*

35. *Id.* at art. 1(1).

> acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.[36]

The drafter's ambitions to advance broad legal definitions of slavery and the slave trade are clear in its' preparatory works,[37] the 1925 and 1926 Temporary Slavery Commission Reports,[38] and in the final treaty language.[39] The slavery definition's emphasis on "status" or "condition" served to extend the prohibition to both *de jure* slavery, evidenced by legal title or status, and *de facto* slavery, evidenced by customary practice or condition.[40] The broad array of means and modes of transport to reduce or maintain a person in a situation of slavery, as well as the exclusion of any requirement of exercise of powers attaching to ownership over a person, similarly defined the slave trade in a way that contemplated current and future perpetration

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36. *Id.* at art. 1(2). *See* also JEAN ALLAIN, SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING 95 (2012) (discussing how the 1956 Supplementary Convention broadens this definition by including "all acts of disposal by sale or exchange of a *person* acquired with a view to being sold or exchanged" as well as "by any means of conveyance.").

37. *See* Sellers & Kestenbaum, *supra* note 3; Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Sexual Slavery and Customary International Law*, *in* THE PRESIDENT ON TRIAL: PROSECUTING HISSENE HABRE 379 n.102 (Sharon Weill et al. eds., 2020); JEAN ALLAIN, THE SLAVERY CONVENTIONS, THE TRAVAUX PRÉPARATOIRES OF THE 1926 LEAGUE OF NATIONS CONVENTION AND THE 1956 UNITED NATIONS CONVENTION (2008) (hereinafter Allain, *Travaux Préparatoires*); Jean Allain, *A Legal Consideration Slavery in Light of the* Travaux Préparatoires *of the 1926 Convention* (2006), paper presented at the Twenty-First Century Slavery: Issues and Responses Conference, The Wilberforce Institute for the Study of Slavery and Emancipation (WISE).

38. *Slavery Convention: Report presented to the Assembly by the Sixth Committee*, League of Nations Doc. A.104.1926.VI (1926) (hereinafter "Temporary Slavery Commission 1926 Report").

39. Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Sexual Slavery and Customary International Law*, *in* THE PRESIDENT ON TRIAL: PROSECUTING HISSENE HABRE 379 n.102 (Sharon Weill et al. eds., 2020). *But see* Ramona Vijeyarasa & Jose Miguel Bello y Villarino, *Modern-Day Slavery – a Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of* Tang *and* Rantsev, 9 J. INT'L L. & INT'L REL. 38, 56 (2013).

40. Brief for Helen Duffy, 'Human Rights in Practice,' as Amici Curiae, Fazenda Brasil Verde v. Brazil, Inter-Am Ct. H.R. No. 12.066. *See also The Queen v Tang* [2008] HCA 39, Part III (Austl.) (examining the application of the 1926 Slavery Convention to both *de jure* and *de facto* slavery). In 1926, although slavery and the slave trade had been abolished in North and South America, Zanzibar, and other tributaries of the Arab East African slave trade, members of the League of Nations remained concerned, mainly, with ending *de jure*, chattel slavery and vestiges of the slave trade. Concerns that limited the scope of some discussions arose mainly from member states' own practices as colonizing powers who engaged in slavery ownership and exploitative labor practices. Temporary Slavery Commission 1926 Report, *supra* note 38. The initial objective was to banish *de jure* slavery and distinguish the practice of forced labor from slavery. *See* Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L. REV. 239, 244 (2009) (citing Viscount Cecil: "I do not think that there is any nation, civilised or uncivilised, which does not possess powers enabling the Government, for certain purposes and under certain restrictions, to require forced or compulsory labour on the part of its citizens."). *Report Presented by the Sixth Comm. On the Question of Slavery: Resolution,* 19th mtg. at 156, *in* LEAGUE OF NATIONS OFFICIAL JOURNAL (Special Supplement 33), (Sept. 26, 1925). Human trafficking, at the time, was pursued separately under the "white slave traffic" of women and girls into exploitation and prostitution.

in broad terms.[41]

The independent expert-members of the Temporary Slavery Commission endorsed a comprehensive definition of slavery that encompassed *de jure* and *de facto* situations whenever the exercise of powers attaching to the rights of ownership over a person was met.[42] For example, the 1925 Temporary Slavery Commission's report affirmed that "debt slavery," the enslaving of persons disguised as child adoption, and the acquisition of girls by purchase disguised as dowry payment, etc., constituted slavery whenever the intent plus the acts in question met the legal definition of slavery.[43] Thus, while the political realities of 20th century colonialism forced a legal delineation of slavery from "slavery-like practices," lesser servitudes, and forced labor,[44] the legal definition of slavery nonetheless remained inclusive of practices by other names, such as concubinage, when the elements constituted exercise of powers attaching to the rights of ownership over a person.[45]

The Temporary Slavery Commission 1926 Report's definition of slavery was enumerated as Article 1(1) of the 1926 Slavery Convention.[46] The definition of "slavery in all its forms"[47] does not refer to all of the various practices or manifestations of slavery; instead, "forms" refers to *de facto* cases that are absent of legal ownership, as well as *de jure* slavery, or slavery under law.[48] Factual circumstances that do not constitute an exercise of powers attaching to the right of ownership over a person are not slavery under international law, whether *de jure* or *de facto*.[49]

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41. Sellers & Kestenbaum, *supra* note 8, at 520.

42. *See* Sellers & Kestenbaum, *supra* note 39; JEAN ALLAIN, THE LAW AND SLAVERY 423–24 (2015) (hereinafter ALLAIN, THE LAW AND SLAVERY). Despite this fact, in the 1980s there was a perception that the definition of slavery was too narrow, leading to efforts to expand advocacy into slavery-like practices and human trafficking. *See* Michael Dottridge, *Trafficked and Exploited: The Urgent Need for Coherence in International Law*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 68 (Prabha Kotiswaran ed., 2017).

43. *Annex: Draft Convention, League of Nations Official Journal (Special Supplement 33) Records of the Sixth Assembly: Text of Debates*, League of Nations Doc. 439 (1925); *see also Minutes of the Second Session*, League of Nations Doc. C.426.M.157 1925. VI. ¶ 55 (1925), *available at* https://perma.cc/8FEP-CDBW [hereinafter Temporary Slavery Commission Second Session Minutes].

44. For a more in-depth look at the confusion in international law between slavery and forced labor, see Vladislava Stoyanova, *United Nations Against Slavery*, 38 MICH. J. INT'L L. 359, 370-72 (2017).

45. Temporary Slavery Commission Second Session Minutes, *supra* note 43, at 62.

46. 1926 Slavery Convention, *supra* note 27, at art. 1(1).

47. Temporary Slavery Commission 1926 Report, *supra* note 38, at 1–2, 4.

48. *Id.*

49. ALLAIN, THE LAW AND SLAVERY, at 423–24. The Temporary Slavery Commission's 1925 Report stated:

> In order to eradicate practices restrictive of liberty so far as they may occur in connection with marriage, concubinage, and adoption, the first object should be to strengthen the law so as to enable the courts to repress all abuses, and, secondly and more

As noted, the 1926 Slavery Convention separately prohibited the distinct, related crime of the slave trade, proscribing the procurement and placement of persons into slavery situations as well as the trade or transport of persons enslaved, under article 1(2). The slave trade prohibition sanctions perpetrators who possess the intention and who act to reduce a person into a condition of *de jure* or *de facto* slavery and—as importantly—perpetrators who exchange or transport an enslaved person to other slave traders or into other conditions of slavery. Even though a slave trader must intend to reduce a person to slavery, the slave trade crime definition does not require the enslavement to occur for the successful perpetration of the crime of the slave trade.[50] Additionally, the slave trader does not need to exercise powers attaching to the rights of ownership over a person to have committed acts of the slave trade.[51]

The 1926 Slavery Convention recognized the distinct nature of these crimes and the potential for individuals to perpetrate one, the other, or both crimes because these practices occur in tandem[52] and their institutions are interlinked.[53] The prohibition of slavery criminalizes the status or condition of slavery. Slave trading prohibits the intent to reduce a person into a situation of slavery or the transportation or transfer of an enslaved person.[54] Slave trading is precursory to slavery (except for individuals born into slavery) and can occur during or after slavery.[55] Slave trading is not a lesser

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> especially, to take measures in order that everyone should be fully aware that the status of slavery is in no way recognised by law.

The Second Session meeting minutes of the Temporary Slavery Commission in 1925 describe that "concubinage" fits squarely within the intended meaning of slavery as it is distinguished from wives. Temporary Slavery Commission Second Session Minutes, *supra* note 43, at 62.

50. Jeremy Prestholdt, *The Island as Nexus: Zanzibar in the Nineteenth Century*, *in* AFRICAN ISLANDS: LEADING EDGES OF EMPIRE AND GLOBALIZATION 317, 330 (Toyin Falola, R. Joseph Parrot, & Danielle Porter Sanchez eds., 2019) (recounting the experience of an Ethiopian girl who was slave traded at least four times before being bought by a master in Zanzibar). Trafficking scholars note challenges in attempted trafficking cases whereby traffickers caught at borders often are charged with related crimes, such as migrant smuggling. Migrant smuggling, however, implicates each person involved in the crime and denies trafficking victims' rights to remedy given the inchoate trafficking offense. In cases where the slave trade is present, slave trade charges would not deny victims their victimhood or rights to remedy. For a discussion of the trafficking and smuggling context, see Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 975-1004 (2001).

51. 1926 Slavery Convention, *supra* note 46, at art. 1(2).

52. Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Sexualized Slavery and Customary International Law*, *in* THE PRESIDENT ON TRIAL: PROSECUTING HISSENE HABRE 366 (Sharon Weill et al. eds., 2020).

53. Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. UNIV. INT'L L. REV. 884, 933-46 (2003).

54. Harman van der Wilt, *Trafficking in Human Beings, Enslavement, Crimes against Humanity: Unravelling the Concepts*, 13 CHINESE J. INT'L L. 297, 303 (2014); *see also* Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789-848 (2009).

55. Sellers & Kestenbaum, *supra* note 8, at 520.

offense, or a subset of slavery.[56] The slave trader is not a mere accessory to slavery, such as an aider or abettor.[57] Perpetrators who engage in slave trading—intending and, therefore, acting to reduce a person to the status of a slave—still commit the crime of the slave trade even if they learn that the intended buyer chose not to exercise powers of ownership over the person.[58] Under law, slavery and the slave trade are separately perpetrated crimes and often are perpetrated by separate individuals.[59]

The 1926 Slavery Convention's and 1956 Supplementary Slavery Convention's slavery and slave trade definitions are widely accepted prohibitions under international custom and treaty law.[60] Multiple subsequent international instruments that include definitions of slavery-related crimes mirror, with slight deviations, the Slavery Convention definitions of slavery.[61] Later human rights treaties have adopted the definitions of the slave trade and slavery promulgated by the 1926 and 1956 Slavery Conventions.[62] The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956 Supplementary Slavery Convention)[63] reinforces the international prohibitions that "slavery and the slave trade in all their forms" "are and shall remain prohibited at any time and in any place whatsoever."[64]

The *ad hoc* Committee on Slavery drafted the 1956 Supplementary Slavery Convention, recommending that slavery and the slave trade definitions "should continue to be accepted as accurate and adequate definition[s] of [these] term[s],"[65] while further broadening the prohibitions to forms of servitude—later enumerated as "practices similar to slavery."[66]

56. Sellers & Kestenbaum, *supra* note 3.

57. *Id.* at 34.

58. Sellers & Kestenbaum, *supra* note 8, at 527.

59. Allain and Bales illustrate the point of precursory conduct and distinctiveness of crimes: Jean Allain and Kevin Bales, *Slavery and Its Definition*, 14 GLOB. DIALOGUE 1, 5 (2012).

60. Jean Allain, *The Definition of Slavery in International Law*, 52 HOW. L.J. 239, 240 (2009); INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 328 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 1st ed. 2005), https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf. Rule 94 states that, "[t]he military manuals and the legislation of many States prohibit slavery and the slave trade, or 'enslavement.'" *Id.*

61. *See, e.g.*, 1956 Supplementary Slavery Convention, *supra* note 2; Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 3.

62. *See, e.g.*, International Covenant on Civil and Political Rights art. 8(1), Dec. 16, 1966, S. Exec. Rep. 102–23, 999 U.N.T.S. 171; European Convention on Human Rights art. 4, Nov. 4, 1950, 213 U.N.T.S. 221 (prohibiting slavery and forced labor, but not the slave trade).

63. 1956 Supplementary Slavery Convention, *supra* note 61, at 40.

64. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

65. Economic and Social Council, *Rep. of the* Ad hoc *Comm. on Slavery (Second Session)*, U.N. Doc. E/1988, at 19 (May 4, 1951).

66. *Id.* ¶¶ 13-19. The Committee listed debt bondage, serfdom, servile marriages, and child exploitation. *Id.*

Moreover, in 1953, the UN Secretary General reiterated that these and other servitudes could constitute slavery when factually "any or all of the powers attaching to the right of ownership [over a person] are exercised."[67] Thus, the law maintained the slavery definition as exercising powers attaching to the rights of *ownership*—as opposed to exploitation or compulsory labor, which may indicate such exercise of ownership.

Article 3 of the 1956 Supplementary Slavery Convention[68] updated the slave trade's definition, adding aircraft to the list of transportation means.[69] The 1956 Supplementary Convention, without explanation or debate, also expanded the slave trade definition by changing "all acts of disposal . . . of a *slave*" to "all acts of disposal . . . of a *person*," expanding protections, possibly unintentionally, to individuals who may be disposed of before entering into situations of slavery.[70]

B. Human Rights Treaty Prohibitions

Aside from the 1926 Slavery Convention and 1956 Supplementary Slavery Convention, slavery and the slave trade are prohibited in several international instruments, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR), and the

67. U.N. Secretary-General, *Slavery, the Slave Trade, and other forms of Servitude*, ¶¶ 36-7, U.N. Doc. E/2357 (Jan. 27, 1953). Jean Allain argues that the intent of the 1956 Supplementary Convention was to expand international law prohibitions to servitude. *See generally* Jean Allain, *On the Curious Disappearance of Human Servitude from General International Law*, 11 J. HIST. INT'L L. 303 (2009). The Secretary-General further enumerated evidence, or indicia, of the exercise of powers attaching to ownership rights, including: making an individual of servile status the object of a purchase; using the individual of servile status in an absolute manner without restriction unless expressly provided by law; appropriating products of labor without compensation; transferring ownership from one person to another; prohibiting the individual of servile status to terminate the status at will; and permitting the transmission of servile status to descendants of the individual having such status. U.N. Secretary-General, *Slavery, the Slave Trade, and Other Forms of Servitude*, ¶¶ 36–37, U.N. Doc. E/2357 (Jan. 27, 1953).

68. 1956 Supplementary Slavery Convention, *supra* note 61.

69. Article 3 reads:

> (1) The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory …
>
> (2)(a) The States Parties shall take all effective measures to prevent ships and aircraft … from conveying slaves
>
> (b) The States Parties shall take all effective measures to ensure that their ports, airfields and coasts are not used for the conveyance of slaves.

Id. at art. 3.

70. *Id.* (emphasis added); JEAN ALLAIN, SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING 95 (2012).

African Charter on Human and Peoples Rights (ACHPR).[71] The European Convention on Human Rights (ECHR) prohibits slavery, but not the slave trade.[72] Generally, the preparatory works of the regional instruments drew upon the UDHR and ICCPR drafting, which reflected the prohibitions defined under the 1926 Slavery Convention and 1956 Supplementary Slavery Convention and remain authoritative in international law today.[73]

C. Normative Status in International Law

In addition to broad definitions and scope under international law that cover all forms and manifestations of slavery and the slave trade, including as international human rights violations, slavery and the slave trade also have been endowed with a super-normative status under international law. Slavery and the slave trade enjoy *jus cogens* status[74] with state *erga omnes*

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71. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 8(1) (Dec. 16, 1966); Org. of African Unity [OAU], *African Charter on Human and People's Rights*, art. 5 (June 27, 1981); Org. of American States [OAS], American Convention on Human Rights, art. 6 (Nov. 22, 1969). For an in-depth look at the development of the prohibitions under the UDHR and ICCPR, see Kestenbaum, *supra* note 25.

72. European Convention on Human Rights art. 4, Nov. 4, 1950, E.T.S. 5. The European Convention on Human Rights (ECHR) prohibits slavery, servitude, and forced labor, but not the slave trade. *Id.* The preparatory works of the ECHR demonstrate that the exclusion of the slave trade prohibition was not debated and its omission, although intentional, was not understood as one limiting the scope of protection of Article 4. The replication of the debate over the ICCPR drafting suggests that the "traffic in human beings" and not the "slave trade as such" was the violation still occurring in the eyes of the ECHR drafters, but that the ICCPR explicitly excluded "traffic in human beings," thereby relegating the slave trade prohibition as no longer necessary or relevant. *See* Eur. Consult. Ass., *Travaux Preparatoires*, at 15–16, DH(62)10, (Nov. 15, 1962), https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART4-DH(62)10-BIL1712017.PDF. In the preparatory works of the ACHR, the representative from Guatemala suggested replacing the "slave trade" with "traffic in women." In the end, both prohibitions were included in Article 6, along with slavery and servitude. Org. of American States [OAS], *Conferencia Especializada Interamericana Sobre Derechos Humanos*, Ser.k/XVI/1.2, (Nov. 22, 1969), http://www.oas.org/es/cidh/mandato/Basicos/Actas-Conferencia-Interamericana-Derechos-Humanos-1969.pdf. The African Charter has incomplete and cursory travaux preparatoires. *See, e.g.*, Frans Viljoen, *The African Charter on Human and Peoples' Rights: The Travaux Préparatoires in the Light of Subsequent Practice*, 25 HUM. RTS. L.J. 315, 315–16, 325 (2004).

73. For an in-depth examination of the treaty drafting process of the ICCPR with regard to slavery and the slave trade, see Kestenbaum, *supra* note 25, at 544-65.

74. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 702 cmts. d-i, § 102 cmt. k (AM. L. INST. 1987); *see also* E.J. Criddle & E. Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 YALE J. INT'L L. 331, 331-87 (2009), http://digitalcommons.law.yale.edu/yjil/vol34/iss2/3; M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 LAW AND CONTEMP. PROBS. 63, 70-71 (1996), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=lcp; *see also* JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 12 (2012); *see also* TERJE EINARSEN, THE CONCEPT OF UNIVERSAL CRIMES IN INTERNATIONAL LAW 8 (2012), https://www.fichl.org/fileadmin/fichl/documents/FICHL_14_Web.pdf; *Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly*, [1966] Y.B. Int'l L. Comm'n, at 248,

obligations.[75] Norms that attain *jus cogens* status are peremptory norms in international law—similar to the concept of strict liability in domestic law—meaning that no justification exists to avoid state responsibility for a breach of prohibitions of slavery or the slave trade.[76] As *jus cogens* norms, slavery and the slave trade require attendant *erga omnes* obligations of states, which means "owed by everyone to all."[77] Thus, if breached, any state has a legal interest and may invoke state responsibility of another state for violations of slavery and slave trade prohibitions.[78] Neither human trafficking nor forced labor enjoys *jus cogens* status as a human rights violation, nor do states have *erga omnes* obligations to remedy violations of human trafficking or forced labor.

Adding to their peremptory status, slavery and the slave trade are core international crimes,[79] prohibitions and crimes under customary

U.N. Doc. A/CN.4/SER.A/1966/Add.1 (Vol. II). While no *jus cogens* norms are enumerated in Articles 53 or 64 of the Vienna Convention on the Law of Treaties, International Law Commission drafters set out "some of the most obvious and best settled rules of *jus cogens*" as being "trade in slaves, piracy or genocide." *Id.*

75. For an in-depth survey, see ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2008). The reverse is not necessarily true. *See Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/61/10 (2006), *reprinted in* [2006] Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/2006/Add.1 (Part 2). The ICJ explicitly has ruled that protection from slavery is an *erga omnes* obligation of states under human rights law. Barcelona Traction, Light and Power Co., Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, 32 (Feb. 5). The other human right so identified by the Court is freedom from racial discrimination. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 42(b), U.N. Doc. A/56/10 (2001), *reprinted in* [2001] Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

76. *See* Vienna Convention on the Law of Treaties arts. 53, 64, May 23, 1969, 1155 U.N.T.S 331; Draft Articles on State Responsibility, *supra* note 24, arts. 26, 40, 50. *See* Jean Allain, *Slavery*, *in* SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING 110 (2012) (likening *jus cogens* to the domestic law concept of strict liability).

77. *See* Draft Articles on State Responsibility, *supra* note 24.

78. *See id.*; Dire Tladi (Special Rapporteur), *Fifth Rep. on Peremptory Norms of General International Law* (jus cogens), 52, U.N. Doc. No. A/CN.4/747 (Jan. 24, 2022).

79. Rod Rastan, *Complementarity: Contest or Collaboration?*, *in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 123 (Morten Bergsmo ed., 2010), *available at* https://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf (last visited Aug. 4, 2020).

international law,[80] and humanitarian law prohibitions.[81] Under the Rome Statute of the ICC, "enslavement"—defined as slavery, and including acts of the slave trade as constituting evidence of exercising powers attaching to ownership rights over persons—is a constituent crime of crimes against humanity in international criminal law.[82] Slavery and the slave trade could also constitute acts of genocide[83] and fundamental human rights violations in cases of persecution.[84]

International law does not permit statutes of limitations for

80. Several 19th century anti-slave trade and slavery treaties recognized penal sanctions for slave trading and slavery, such as the Congress of Vienna Act, The Treaty of London, The General Act of Berlin, The Act of Brussels, The 1890 Treaty Between Great Britain and Spain for the Suppression of the African Slave Trade, and the Treaty of Saint-Germain-en-Laye. *See, e.g.*, M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445, 447-48, 456 (1991). *But see* Claus Kreß, *International Criminal Law*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *available at* https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1423?prd=EPIL (last visited Feb. 5, 2020). Nonetheless, the *stricto sensu* conditions for international crimes are met for slavery and the slave trade: (1) provisions provide for international individual criminal liability; (2) the norms against slavery and the slave trade have *jus cogens* status and, thus, proscription exists in all forms, under any circumstances, and bars immunities; and (3) slavery and the slave trade prohibitions could be enforced directly under international criminal jurisdiction, or indirectly by a national court through international *ius puniendi*, exercised under universal jurisdiction. *See* Sellers & Kestenbaum, *supra* note 8, 517-42 (regarding the slave trade).

81. General Orders No. 100 arts. 23, 42, 58, *available at* https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf?loclr=bloglaw (last visited Jan. 7, 2020) [hereinafter the Lieber Code]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609; The Commentary to Art. 4(2)(f) of the Additional Protocols emphasizes that the prohibition of slavery and the slave trade are "universally accepted." The phrase "in all their forms" in relation to slavery and the slave trade should be understood within the meaning of the 1926 Slavery Convention and the 1956 Supplemental Slavery Convention. International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), § 4541 (June 8, 1977) Commentary of 1987, *available at* https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CBB47A6753A2B77C12563CD0043A10B (last visited Sept. 27, 2019).

82. Rome Statute of the International Criminal Court art. 7(2)(c), July 1, 2002, 2187 U.N.T.S. 90. "'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." *Id.* "Sexual slavery" is also enumerated as a separate crime. *See infra* Part III for a discussion of the limitations of this separate enumeration. The slave trade is not enumerated or defined within the Rome Statute of the ICC. For an in-depth discussion as to the problems that this omission poses for international law, as well as justice and accountability for victims, see Sellers & Kestenbaum, *supra* note 8, at 517-42. Notably, these crimes are replicated *verbatim* in the draft Crimes Against Humanity treaty, now stalled in the UN General Assembly's Sixth Committee (Legal).

83. Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277.

84. Lisa Davis, *Dusting off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 NW. J. HUM. RTS. 1, 5-6, 39-40 (2021). *German Court Convicts a Third ISIS Member of Crimes Against Humanity Committed Against Yazidis*, DOUGHTY STREET CHAMBERS (June 18, 2021), https://www.doughtystreet.co.uk/news/german-court-convicts-third-isis-member-crimes-against-humanity-committed-against-yazidis; *German Court Hands Down a Fourth Conviction for Crimes Against Humanity Committed by ISIS Against the Yazidis*, DOUGHTY STREET CHAMBERS (July 26, 2021), (German cases convicting ISIS members of crimes against humanity, including aiding and abetting enslavement).

international crimes[85] and *jus cogens* norms;[86] thus, slavery and the slave trade can be prosecuted and otherwise remedied at any time, and a state's failure to provide redress for international crimes is an ongoing human rights violation.[87] Slavery and the slave trade crimes also can be adjudicated under the principle of universal jurisdiction, meaning that domestic courts with such powers could try such crimes based on the gravity of the offense, even when no other basis for jurisdiction (i.e., territory, nationality, etc.) exists.[88]

Further, slavery and slave trade prohibitions are non-derogable human rights.[89] The ICCPR's article 4(1) permits states to derogate from treaty obligations in times of "public emergency"; however, article 4(2) designates certain rights—including slavery and the slave trade prohibitions under article 8(1)—as exempt from suspension at any time, even in times of public emergency.[90] While human trafficking is prohibited as a human rights

85. *See, e.g.*, Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 153, 154 (Sept. 26, 2006); Org. of Am. States, Inter-American Commission on Human Rights [IACHR], *Statement on the Duty of the Haitian State to Investigate the Gross Violations of Human Rights Committed During the Regime of Jean-Claude Duvalier*, §§ 11-4, 39 (May 17, 2011) http://www.cidh.oas.org/pronunciamientocidhhaitimayo2011.en.htm. *See also* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 279 (2011); PRINCETON UNIV. PROGRAM IN LAW & PUB. AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 31 (2000) (principle 6); Jan Arno Hessbruegge, *Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes*, 43 GEO. J. INT'L L. 335, 348 (2012); Roberto Belelli, *The Establishment of the System of International Criminal Justice*, *in* INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 5, 42 (Roberto Belelli ed., 2010); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 319 (2003) (regarding war crimes, crimes against humanity, and genocide); William A. Schabas, *Article 29*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 848 (Otto Triffterer ed., 2008); Christine Van den Wyngaert & John Dugard, *Non-Applicability of Statute of Limitations*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 873, 887 (Antonio Cassese et al. eds., 2002); Gay McDougall (Special Rapporteur on Contemporary Forms of Slavery), *Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, 90, U.N. Econ. and Soc. Council, Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (finding an "internationally accepted principle that there are no statute of limitations barriers to the prosecution and compensation of serious violations of human rights and humanitarian law").

86. Prosecutor v. Furundija, Case No. IT-95-17/1-T, Judgment, ¶ 156 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Kallon, SCSL-2004-15AR72(E), SCSL-2004-16AR72(E), 1, 84, 85, 88 (Special Court for Sierra Leone Mar. 13, 2004); *see also* Barrios Altos v. Peru, Merits, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 75, 41 (Mar. 14, 2001); U.N. High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, 29, HR/PUB/09/1 (2009); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 312-16 (2003). *But see* Elizabeth B. Ludwin King, *Amnesties in a Time of Transition*, 41 GEO. WASH. INT'L L. REV. 577, 583 (2011).

87. *See* Draft Articles on State Responsibility, *supra* note 24, art. 14. Rep. of the Human Rights Committee, U.N. Doc. A/36/40 (1981), at 172, ¶¶ 10–11 (1981).

88. Rastan, *Complementarity: Contest or Collaboration?*, *supra* note 79, at 265; M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 48, 49, 62 (Stephen Macedo ed., 2004).

89. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 4 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 8, Dec. 16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

90. ICCPR, *supra* note 89, art. 4(1-2).

violation against women under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[91] against children under the Convention on the Rights of the Child (CRC),[92] and forced labor is prohibited under the ICCPR's article 8(3) and International Labour Organization (ILO) Convention No. 29,[93] these prohibitions have not been declared non-derogable international human rights.

These international legal obligations give rise to state responsibility for violations of slavery and the slave trade prohibitions as international wrongful acts. The International Law Commission's Draft Articles on State Responsibility for International Wrongful Acts include human rights obligations and do not permit under any circumstances states to abrogate responsibility with regard to breaches of peremptory (*jus cogens*) norms.[94] When states are in breach of international law obligations, responsibilities include: ceasing the wrongful acts (or omissions), offering guarantees of non-repetition, and providing full reparation for the injury.[95] Slavery and the slave trade prohibitions are among these rights that give rise to international law obligations of all states whether or not they have signed a treaty to respect and "ensure respect"—meaning whether or not state or private actors engage in slavery or slave trade violations[96]—for such rights of individuals within their borders.

Finally, while not settled law, compelling arguments exist that international state responsibility to other states for violations of slavery or the slave trade prohibitions attaches the moment that slavery or the slave trade has been found to have been perpetrated within the offending state's borders—regardless of whether the state is implicated in the wrongful acts

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91. Convention on the Elimination of All Forms of Discrimination against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13 ("States Parties shall take all appropriate measures, including legislation, to suppress all forms of *traffic in women* and exploitation of prostitution of women.").

92. Convention on the Rights of the Child art. 34 (sexual exploitation), 35 (abduction, sale or traffic), 36 (all other forms of exploitation), Nov. 20, 1989, 1577 U.N.T.S. 3.

93. Convention concerning Forced or Compulsory Labour (ILO No. 29), *adopted* June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932); ICCPR, *supra* note 89, art. 8(3).

94. Draft Articles on State Responsibility, *supra* note 24, arts. 26, 28 ("Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations of the State and not only those owed to other States. Thus, State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State.").

95. *Id.* arts. 30, 31.

96. Under the principle of international law to respect and ensure respect for *jus cogens* rights, not only must the state directly affected by a violation take measures to stop it, but all other states must take measures to stop the violations as well. *See, e.g.*, concept of injured State adopted by the International Law Commission in Art. 42 of the Draft Articles on State Responsibility. Draft Articles on State Responsibility, *supra* note 24, arts. 42, 48; Conference of States Parties to the Fourth Geneva Convention, experts' meeting on the Fourth Geneva Convention, *Chairman's Report, Experts' Meeting* (Oct. 27-29, 1998).

and regardless of whether the state has prohibited slavery and the slave trade at the domestic level—so long as the state has failed to act with due diligence to investigate, prosecute, and punish the perpetrators.[97] Thus, the state obligation to the international community is to never under any circumstances commit, be complicit in the commission of, or permit private actors to commit with impunity an act of slavery or the slave trade within its borders; if and when such perpetration is found, the state is fully responsible for the cessation and guarantee of non-repetition of the acts, as well as the redress to victims of slavery and slave trade harms, including through investigation, prosecution, and punishment of perpetrators.[98] The United Nations International Law Commission has found that, in cases of "serious breaches"—meaning gross or systematic failures—of peremptory, *jus cogens* norms of international law, all states must cooperate through lawful means to bring an end to the breach.[99] In practical terms, however, state responsibility for breaches and serious breaches of slavery and slave trade prohibitions still remains subject to jurisdictional limitations and enforcement challenges that exist in international law more generally.[100]

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97. *See* Lorna McGregor, *State Immunity and* Jus Cogens, 55 INT'L & COMP. L. Q. 437, 437 (2006) (finding the issue to be an evolving area of international law in a state of flux). For example, some courts have found that states waive sovereign immunity in the case of violations of *jus cogens* norms. Areios Pagos [A.P.] [Supreme Court] 11/2000, p. 514 (Greece) (allegations of forced labor); Bernard H. Oxman, Maria Gavouneli & Ilias Banterkas, *Sovereign Immunity-Tort Exception-*Jus Cogens *Violations-World War II Reparations-International Humanitarian Law*, 95 AM. J. INT'L L. 198, 200-01 (2001) (translating the judgment of the Court). Others have permitted sovereign immunity claims to prevail. *See* Al-Adsani v. Kuwait [1996] AC, [1998] 107 I.L.R. 536 (English Court of Appeal upheld the plea of immunity when allegations included torture); Bouzari v. Iran, [2004] 71 O.R. 3d 675 (Can. Ont. C.A.) (Ontario Court of Appeal granted the Islamic Republic of Iran immunity when allegations included torture). The Committee against Torture subsequently made clear in its consideration of Canada's State party report that its failure to provide a civil remedy to all victims of torture do not comport with its obligations under the Convention against Torture. U.N. GAOR, 34th Sess., 646th mtg. at 11-12, CAT/C/SR.646 (May 6, 2005). *See also* Anthony J. Colangelo, *Jurisdiction, Immunity, Legality, and* Jus Cogens, 14 CHI. INT'L L.J. 53, 61 (2013) (finding that immunities are jurisdictional barriers but do not determine the legality of the underlying conduct). *See, e.g.*, Jurisdictional Immunities of the State, (Ger. v. It: Greece intervening), Judgment, 2012 I.C.J. 38, 93 (Feb. 3,); Thomas Weatherall, Jus Cogens *and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEO. J. INT'L L. 1151, 1151-53 (2015). This inquiry into what exactly constitutes a breach and what the legal limits are to state responsibility *vis a vis jus cogens* norms is the subject of my current research and will be discussed in detail in a future publication.

98. State responsibility to other states is without prejudice to obligations to victims. *See* G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 7 (Dec. 16, 2005).

99. Draft Articles on State Responsibility, *supra* note 24, art. 41(1); Int'l L. Comm'n, Rep. on the Wrk of its Seventy-First Session, U.N. Doc. No. A/74/10, at 145-50 (Aug. 20, 2019).

100. *See, e.g.*, Anthony J. Colangelo, *Jurisdiction, Immunity, Legality, and* Jus Cogens, 14 CHI. INT'L L.J. 53, 61 (2013). For example, universal jurisdiction *permits* but does not *require*, states to apply substantive international law to particularly grave offenses, including slavery. A state would have to exercise prescriptive jurisdiction in order to then exercise universal jurisdiction to enforce against

II. INTERNATIONAL HUMAN RIGHTS LAW COMMITMENT AND COMPLIANCE WITH SLAVERY AND SLAVE TRADE PROHIBITIONS

Most international lawyers assume that international law matters.[101] In recent decades, international law scholars increasingly have questioned and some have empirically tested this assumption[102] alongside international relations scholars who have long debated conceptions of and compliance

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slavery and slave trade violations. *See* Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 186-98 (2006) (appendix detailing universal jurisdiction offenses under international law). However, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law requires states to implement appropriate provisions for universal jurisdiction. G.A. Res. 60/147, *supra* note 98, ¶ 5.

101. *See, e.g.*, LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 46-48 (2d. ed. 1979) (arguing that nearly all nation states observe nearly all norms of international law and nearly all obligations under international law nearly all of the time.); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); Andrew T. Guzman, *International Law: A Compliance-Based Theory*, 90 CAL. L. REV. 1823 (2002); Arlene S. Kanter, *Do Human Rights Treaties Matter: The Case for the United Nations Convention on the Rights of Persons with Disabilities*, 52 VAND. J. TRANSNAT'L. L. 577 (2019); Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 176 (1993); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2599-2600 (1997) (book review). *But see* Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 346 (1998) (pointing out that empirical data are lacking to determine whether states obey international law).

102. *See, e.g.*, ERIC POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014) (arguing that the continued existence of human rights violations globally constitutes sufficient evidence that human rights law has not worked and should be abandoned); SAMUEL MOYN, HUMAN RIGHTS IN AN UNEQUAL WORLD (Harvard Univ. Press, 2018); MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (Univ. of Pennsylvania Press, 2008) (finding that human rights do not work because they have not resulted in greater economic opportunities globally); Ingrid B. Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 284 (2017); Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 LAW & CONTEMP. PROBS. 147, 150 (2014); Eric Posner, *Have Human Rights Treaties Failed? Human Rights Law is Too Ambitious and Ambiguous*, N.Y. TIMES (Dec. 28, 2014), https://www.nytimes.com/roomfordebate/2014/12/28/have-human-rights-treaties-failed; Eric Posner, *The case against human rights*, THE GUARDIAN (Dec. 4, 2014), https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights; Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193 (1980) (finding international law to be unimportant in international relations); Robert H. Bork, *The Limits of International Law*, NAT'L INT., Winter 1989-1990, at 3; *Cf.* Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1937 (2002); Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121 (2001); Douglass Cassel, *Inter-American Human Rights Law, Soft and Hard*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NONBINDING NORMS IN THE INTERNATIONAL LAW SYSTEM 393 (Dinah Shelton ed., 2000); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE INT'L L.J. 335 (1989); Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361 (1999); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487 (1997); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996); Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75 (1998); MICHAEL BYERS, THE ROLE OF LAW IN INTERNATIONAL POLITICS (Michael Byers ed., 2000).

with international law.[103] When it comes to international human rights law compliance, scholars, such as Beth Simmons,[104] Kathryn Sikkink,[105] and others,[106] rightly have moved the conversation beyond (often symbolic)[107] ratification of human rights treaties to include the movements and normative processes of human rights law and practice over time. This theoretical discussion is especially important for slavery and slave trade prohibitions because these norms have attained customary international law status—state practice accepted out of a sense of legal obligation whether or not enumerated explicitly in a treaty that has the same force of law as a treaty obligation—thus, treaty ratification is not necessary to claim commitment or obligation of states.[108]

As Simmons would argue, the question to ask is not whether states who ratify human rights treaties then comply with human rights obligations, but rather, "*what* and *how* has [a specific treaty or instrument] contributed to . . .

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103. *See, e.g.*, MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 9 (1999) (discussing international law as dependent upon power and having little relationship to how states behave); George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996) (discussing the relationship between compliance and international cooperation among states); Beth A. Simmons, *Money and the Law: Why Comply with Public International Law of Money?*, 25 YALE J. INT'L L. 323, 323-24 (2000) ("[M]ost legal scholars and practitioners believe that the rules at the center of their analysis do indeed matter . . . Scholars of international relations . . . have been far more skeptical."); *See also* A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE (Oxford Univ. Press, 2001) (examining through case studies the relationship between treaty ratification and state behavior).

104. BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 317-35 (Cambridge Univ. Press, 2009).

105. KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK FOR THE 21ST CENTURY 20 (2017).

106. *See, e.g.*, Grainne de Burca, *Human Rights Experimentalism*, 111 AM. J. INT'L L. 277 (2017) (examining human rights law through a theory of experimentalist governance); Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925 (2005) (discussing the relationship between ratification of human rights treaties and compliance with treaty norms).

107. Arlene S. Kanter, *Do Human Rights Treaties Matter: The Case for the United Nations Convention on the Rights of Persons with Disabilities*, 52 VAND. J. TRANSNAT'L L. 577, 585 (2019); Joshua Keating, *Why Countries Make Human Rights Pledges They Have No Intention of Honoring*, SLATE (Oct. 21, 2014, 3:13 PM), https://slate.com/news-and-politics/2014/10/why-countries-make-human-rights-pledges-they-have-no-intention-of-honoring.html; *see also* Benjamin Mason Meier & Jocelyn Getgen, *Ratification of Human Rights Treaties: The Beginning not the End*, 374 LANCET 447, 447 (2009).

108. Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶¶ 33-34 (Feb. 5). The International Court of Justice stated in *Barcelona Traction*:

> In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, [and] also from the principles and rules the basic human rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; ... others are conferred by international instruments of a universal or quasi-universal character.

Id.

[enjoyment of] rights more fully than would have been the case in the absence of the major human rights treaties."[109] The international legal structure, and specifically treaties to which states have voluntarily committed themselves, therefore, are the "hooks" by which victims of rights violations and their allies can call on governments to change policy and practice.[110] As Robert Keohane has stated: regimes focus actors' expectations;[111] treaties, therefore, constrain states because they define the *expectations gap* and signal when governments do not comply fully with their human rights obligations.[112] Additionally, treaties that reflect or influence the development of customary international law norms expand the notion beyond commitment to treaties toward commitment to the norms themselves, irrespective of treaty ratification.

Many scholars rightly caution against too much faith in the emancipatory potential of international human rights law. Maxwell Chibundu, for instance, recognizes that human rights claims, especially in their domestic application, are susceptible to institutional and interest group capture.[113] Professor David Kennedy finds that human rights law tends to overpromise and underdeliver on its aspirational goals.[114] Most relevant to this discussion, Professor Karen Engle has offered that human rights law in its legal liberalist implementation—using Bush administration justifications for invading Afghanistan and decoupling anti-trafficking advocacy from sex workers' rights as examples—can detract attention from policy problems that oppressed peoples face toward policy interventions that benefit the politically powerful.[115] Other scholarship critiques the global human rights movement as imperialist in nature.[116] Critical feminist scholars problematize human rights as reifying patriarchal structures, including by an overemphasis on state actors.[117]

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109. BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 350 (2009) (emphasis in original).

110. *See id.* at 6.

111. ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 49-64 (1984); SIMMONS, *supra* note 109, 104.

112. KEOHANE at 49-64.

113. Maxwell O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1073 (1999).

114. DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004) (arguing that human rights are aspirational and lack effectiveness as an approach to complex global problem-solving).

115. Karen Engle, *Liberal Internationalism, Feminism, and the Suppression of the Critique: Contemporary Approaches to Global Order in the United States*, 46 HARV. INT'L L.J. 427, 427-41 (2005).

116. Makau Wa. Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201-46 (2001); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005) (connecting international law and Western imperialism).

117. Frances Olsen, Children's Rights: *Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, *in* CHILDREN, RIGHTS AND THE LAW 192-220 (Phillip Alston et al. eds., 1992).

While critical lenses are essential to human rights scholarship and practice, and while all of these critiques are valid with respect to various aspects of human rights, there remains a crucial place for international human rights law and advocacy toward improving human dignity and substantive improvements in rights conditions on the ground. Simmons provides a theoretical basis for stakeholders to utilize treaty provisions to improve human rights practice and state compliance.[118] She argues for a *domestic politics* theory of compliance; in other words, human rights treaty obligations alter the political calculus of domestic actors in several ways.[119] First, international treaty obligations can influence national political agendas.[120] Second, treaty commitments can spur human rights (strategic) litigation[121] at the domestic and international levels.[122] Third, attention to treaty norms can mobilize social movements and legitimate group demands for domestic law and policy change by increasing the value of the right as well as the chances for successful outcomes.[123] Simmons examines not only treaty ratification, but also subsequent legal commitments, such as protocols that permit individual human rights complaints[124] and expose states to greater international scrutiny.[125] Other scholars, such as Sally Engle Merry, examine legal literacy and its potential indirect effects on compliance with human rights norms.[126] The bottom line is that meaningful change through

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118. *See* SIMMONS, *supra* note 109.

119. *See id.*

120. *See id.*

121. For an excellent review of human rights strategic litigation, see HELEN DUFFY, STRATEGIC HUMAN RIGHTS LITIGATION: UNDERSTANDING AND MAXIMIZING IMPACT (2018). For scholars finding little to no impact of strategic litigation or "cause lawyering," see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feely and McCain*, 17 LAW & SOC. INQUIRY 761-68 (1992); Tomiko Brown-Nagin, *Elites, Social Movements and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1436-1528 (2005).

122. *See* SIMMONS, *supra* note 109 (cautioning, however, that the existence of a legal tool does not guarantee its use or fair use); *see generally* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991). Such litigation can instigate transjudicial dialogue. *See, e.g.*, Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 99-101 (1994). In the case of slavery and slave trade prohibitions, the existence of a legal tool does not guarantee its use or competent use. In fact, the slave trade is completely misunderstood as a separate prohibition under international law.

123. *See* SIMMONS, *supra* note 109.

124. For instance, the Human Rights Committee (HRC) monitors state compliance with the International Covenant on Civil and Political Rights (ICCPR) and, under the ICCPR's Optional Protocol I, states agree to allowing the HRC to hear individual human rights complaints called "communications" that allege state violations of treaty provisions and determine state responsibility. Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 302 (entered into force 23 March 1976).

125. SIMMONS, *supra* note 109.

126. SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 167, 177-202 (2006).

human rights treaty commitment and compliance happens, and it happens most effectively and meaningfully at the domestic, grassroots levels.

Translating international human rights law to domestic state compliance may also require a change in perceptions and understandings of deeply held beliefs, interests, and identities.[127] Compliance may depend on evolving understandings of state sovereignty and what it means to exercise state sovereignty.[128] In this way, human rights treaty language can serve to shape and change political discourse and struggle,[129] adding new ways of viewing rights holders' relationships to the state and to one another.[130] Merry describes goals of translating human rights norms "into the vernacular" as taking global principles and connecting them to everyday life as it is experienced in particular contexts.[131] This translation is increasingly multidirectional and iterative as groups—especially historically marginalized identity groups, such as Indigenous peoples and LGBTQIA+ people—demand rights and (rights *as*) remedies on the international stage.[132]

Even if commitment and compliance matter in human rights law generally, the case must still be made that a recommitment to slavery and the slave trade prohibitions matter under human rights law. What role do these "super norms" continue to play toward eradicating systems of slavery and the slave trade, as well as to provide remedies for slavery and slave trade harms?

First, as explained *supra*, *de facto* slavery and the slave trades that support such slavery conditions persist globally; thus, human rights law continues to play an important role in abolishing these harms. Today, however, slavery prohibitions rarely are enforced and the slave trade remains completely absent from human rights treaty implementation and enforcement.[133] The

127. *See* PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE, LANGUAGE AND LEGAL DISCOURSE 43 (1998).

128. *See, e.g.*, M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study*, 53 NETH. INT'L L. REV. 399, 399-438 (2006) (finding that, while states often cling to sovereignty claims to reject direct application of human rights treaties in domestic courts, the act of engaging in treaty making is an exercise of sovereignty).

129. *See* Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J. LAW & SOCIETY 309, 309-28 (1990).

130. SIMMONS, *supra* note 109, at 141. *See also* CAMBRIDGE UNIV. PRESS, THE POLITICS OF INTERNATIONAL LAW 3 (Christian Reus-Smit ed., 2004); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000) (discussing the importance of these relationships for transitional societies).

131. *See generally* MERRY, *supra* note 126 (uncovering the tensions between international law at the global level and its implementation and realization at the local levels); *see also* Sally Engle Merry, Peggy Levitt, Mihaela Çerban Rosen & Diana H. Yoon, *Law from Below: Women's Human Rights and Social Movements in New York City*, 44 L. & SOC'Y REV. 101 (2010) (discussing a specific case study of human rights realization in New York City).

132. *See, e.g.*, Grainne de Burca, *Human Rights Experimentalism*, 111 AM. J. INT'L L. 277, 281 (2017).

133. But see a few regional human rights cases that adjudicate slavery but not the slave trade as human rights violations, albeit incorrectly conflating trafficking with slavery. *See infra* Part III, at 36-38. For an in-depth exploration of the HRC and ICCPR, see Kestenbaum, *supra* note 25, at 515.

focus has moved away from human rights prohibitions on slavery and the slave trade to focus on prosecuting enslavement and sexual slavery (but not the slave trade) under international criminal law (and mostly focused on conflict-related slavery crimes in states subject to the jurisdiction of the ICC),[134] human trafficking prosecutions under transnational criminal law,[135] and, to a lesser extent, bringing individual claims for violations of human trafficking prohibitions and slavery under human rights law.[136] While this inability to focus on monitoring human rights compliance with prohibitions of slavery and the slave trade may have stalled efforts to combat *de facto* practices of slavery and slave trade where they exist today, the diversion also has led to this inflection point, pushing conversations among human trafficking scholars and slavery and slave trade scholars to turn to the emancipatory potential of international human rights law despite the framework's own limitations and flaws.

Under the Draft Articles on State Responsibility, states are required not only to respect, but also to *ensure respect*, for human rights within their borders.[137] This means that the state itself through its officials must not only refrain from committing slavery or slave trade acts, but it must also ensure that private actors are not enslaving or slave trading individuals within their borders. Slavery and slave trade practices, however, may offer benefits in supply chains and international markets (i.e., free labor and cheaper goods); thus, focusing more on the application of normative and expressive theoretical models of compliance may assist in overcoming compliance challenges in human rights enforcement in this area.

In the case of slavery and the slave trade, more emphasis on the state responsibility of the international community of states (i.e., states that are willing and able to bring violating states to account) to ensure that violating states are held responsible for their internationally wrongful acts is critical. Strong civil society actors pushing for full expressive accountability are necessary to shift the calculations of all states presently acting in self-interest and perpetuating slavery and slave trade harms.

Second, human rights law matters for slavery and the slave trade because the international criminal law regime was not designed and, thus, is not

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134. *See, e.g.*, Prosecutor v. Ongwen, ICC-02/04-01/15, Judgment (Feb. 4, 2021); Prosecutor v. Ntaganda*,* ICC-01/04-02/06-2359, Judgment (July 8, 2019). For an in-depth look at the limitations of enslavement and sexual slavery crimes under the ICC, see Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Conflict-Related Sexual Violence Symposium: Conversations under the Rome Statute—Enslavement and Sexual Slavery*, OPINIO JURIS (June 11, 2021).

135. *See* Paulette Lloyd & Beth A. Simmons, *Framing for a New Transnational Legal Order: The Case of Human Trafficking*, *in* TRANSNATIONAL LEGAL ORDERS 401 (Terence C. Halliday & Gregory Shaffer eds., 2015).

136. Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609, 609-49 (2014).

137. Draft Articles on State Responsibility, *supra* note 24.

equipped to provide complete accountability or full expressive justice for survivors of slavery and the slave trade. International criminal law concerns itself with individual criminal liability, while international human rights law centers on state responsibility and survivor redress/reparations for harms endured as a result of such state failures to comply with treaty obligations. In addition, the permanent international criminal court, the ICC, does not have jurisdiction over all slavery and slave trade harms protected under customary international law; thus, domestic and universal jurisdiction, as well as human rights law, still must fill gaps in accountability.[138] Further, as will be explained in Part III *infra*, the international criminal law treaty regime is structurally limited as compared to customary international law, thereby offering fewer avenues for expressive justice for survivors of slavery and especially slave trade crimes under the ICC.[139] While customary international law provides the same broad protections as does human rights law, the focus of international criminal law has been on strengthening the ICC and, thus, the cases addressing slavery crimes have yielded limited, reductive, and legally untenable results.[140]

Human trafficking scholars have argued that domestic and transnational criminal legal responses winning out over international human rights prohibitions' enforcement has positioned advocacy not toward victim-centered responses but toward plucking out bad actors while maintaining the structures that perpetuate exploitation.[141] Others, including Janie

138. For example, the International Criminal Court is not an option for individual criminal accountability for the slave trade as it is not enumerated in the Rome Statute. *See* Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90. For an analysis of general concerns on outsized focus on international criminal law, see James J. Silk, *International Criminal Justice and the Protection of Human Rights: The Rule of Law or the Hubris of Law?*, 39 YALE J. INT'L L. ONLINE 94, 102 (2014).

139. For a detailed analysis on the "missing" crimes of the slave trade under the Rome Statute, see Sellers & Kestenbaum, *supra* note 8, at 517-42.

140. *See* Prosecutor v. Ongwen, ICC-02/04-01/15, Trial Judgment, ¶ 67 (Feb. 4, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_01026.PDF; Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Conflict-Related Sexual Violence Symposium: Conversations under the Rome Statute–Enslavement and Slave Trade*, OPINIO JURIS (June 11, 2021), http://opiniojuris.org/2021/06/11/conflict-related-sexual-violence-conversations-under-the-rome-statute-enslavement-and-slave-trade/; Jocelyn Getgen Kestenbaum & Magali Maystre, *Symposium in Pursuit of Intersectional Justice at the International Criminal Court: Group One–Sexual Slavery is Enslavement*, OPINIO JURIS (May 2, 2022), http://opiniojuris.org/2022/05/02/symposium-in-pursuit-of-intersectional-justice-at-the-international-criminal-court-group-one-sexual-slavery-is-enslavement.

141. *See, e.g.*, Julia O'Connell Davidson, *The Right to Locomotion? Trafficking, Slavery and the State*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 157-78 (Prabha Kotiswaran ed., 2017); Chantal Thomas, *Immigration Controls and "Modern-Day Slavery," in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 212-37 (Prabha Kotiswaran ed., 2017); Janet Halley, *Anti-Trafficking and the New Indenture*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 179-211 (Prabha Kotiswaran ed., 2017); Kerry Rittich, *Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking*, *in* REVISITING THE LAW AND

Chuang, argue that expansionist views of human trafficking under international law have made trafficking prosecutions and civil suits for damages more difficult; at the same time, the conflation with slavery (i.e., modern slavery rhetoric) has moved the trafficking conversation away from sexual exploitation only toward important confrontations about global economic organizational and structural factors of exploitative labor practices more generally and toward exploring alternative responses to the criminal legal paradigm that has "long dominated anti-trafficking law and policy."[142] Both of these camps are correct, and similar attention to enslavement and sexual slavery under international criminal law—which exposes the Rome Statute's structural limitations—has led to similar confrontations about the boundaries of the international and domestic criminal justice projects to combat slavery and especially the slave trade harms that nearly always precede slavery.[143]

In addition to concerning itself with individual criminal liability and not with state accountability/responsibility, international criminal justice serves different expressive functions than does human rights in international law. Several scholars have employed expressivist theories, concerned with the way that social practices carry meaning and transmit messages apart from their consequences,[144] to justify, analyze, and critique international criminal justice and international criminal courts.[145] For instance, some expressivist scholars focus on the punishment of perpetrators as deterring future international criminals by expressing the international community's moral condemnation, establishing collective memory, or reinstating global

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GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 238-72 (Prabha Kotiswaran ed., 2017); Joel Quirk & Julia O'Connell Davidson, *Introduction and The Rhetoric and Reality of 'Ending Slavery in Our Lifetime,' in* POPULAR AND POLITICAL REPRESENTATIONS 16, 20-25 (Joel Quirk & Julia O'Connell Davidson eds., 2016) (ebook). For an account that describes the human rights concerns not as central, but rather as an impetus—or possibly even cover—for collective action to address trafficking and smuggling, see Gallagher, *supra* note 50, at 976.

142. Janie A. Chuang, *Contemporary Debt Bondage, "Self-Exploitation," and the Limits of the Trafficking Definition*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 112-13 (Prabha Kotiswaran ed., 2017).

143. Most scholars and practitioners consider human trafficking and slavery along a continuum of exploitation, with trafficking somewhere in the middle and slavery being on the extreme; to me, this understanding, while useful rhetorically, is not reflective of their definitional differences in kind under law. Janie A. Chuang, *Contemporary Debt Bondage, "Self-Exploitation" and the Limits of the Trafficking Definition*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 122 (Prabha Kotiswaran ed., 2017).

144. *See, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2045 (1996).

145. *See, e.g.*, MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 174 (2007); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 65-72 (1997); Barrie Sander, *The Expressive Turn of International Criminal Justice: A Field in Search of Meaning*, 32 LEIDEN J. INT'L CRIM. L. 851, 851-72 (2019).

values.[146] Other expressivists emphasize international criminal punishment's vindication for the victim's human dignity that the perpetrator's crime denied.[147] Either way, the expressivist concerns herself with strengthening faith in the rule of law over deterrence or retributive justifications.[148]

As Paul Roberts reminds us, international criminal justice can only serve as part of the justice picture.[149] Professor Mark Drumbl asserts that, though atrocities are "universal evils," such crimes against humanity can be sanctioned in diverse manners.[150] What matters, he posits, is the universal condemnability of the underlying substantive harm and the notion that perpetrators of that harm must be held to account.[151] Slavery and the slave trade are harms with such requisite universal condemnation. Moreover, Drumbl finds value in classifying atrocities, including slavery and the slave trade, as "*more than just* crimes."[152] In addition to private law, such as tort or contract, and quasilegal initiatives, such as truth commissions,[153] international human rights law, despite its limitations discussed *supra*, enhances accountability and furthers transformative justice for slavery and slave trade prohibitions.

Indeed, human rights law can round out additional aspects of achieving justice and accountability. In contrast to international criminal justice, the international human rights framework expresses the moral condemnation of *states'* failures to uphold contractual legal obligations to other states to respect, protect, and fulfill human rights of individuals within their borders

146. *See generally* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY (1990) (arguing that punishment is a complex social institution affecting social relations and cultural meanings); EMILE DURKHEIM, MORAL EDUCATION: A STUDY IN THE THEORY AND APPLICATION OF THE SOCIOLOGY OF EDUCATION (1961) (explaining the sociology and socialization of morality while interrogating the meanings of the term "society"); EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1933) (offering an evolutionary approach to the development of moral norms in society); Salif Nimaga, *An International Conscience Collective? A Durkheimian Analysis of International Criminal Law*, 7 INT'L CRIM. L. REV. 561, 590-617 (2007). Even if victims are vindicated as a consequence of international criminal trials, full expressive vindication is not possible at the ICC given the structural omissions of slavery as a war crime and the slave trade as a war crime and crime against humanity. *See infra* Part III.

147. Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 111, 122-43 (Jeffrie G. Murphy & Jean Hampton eds., 1988); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1991-1992). *But see, e.g.*, Alexander Zahar, *Witness memory and the manufacture of evidence at the international criminal tribunals*, *in* FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 600, 603 (Carsten Stahn & Larissa van den Herik eds., 2010) (demonstrating limitations in fact-finding and defects in witness testimony that undermine effective criminal punishment and thereby detract from vindicating human dignity of victims).

148. *See, e.g.*, DRUMBL, *supra* note 145, at 173.

149. *Id.* at 181 (citing Paul Roberts, *Restoration and Retribution in International Criminal Justice: An Exploratory Analysis*, *in* RESTORATIVE JUSTICE AND CRIMINAL JUSTICE 115, 119 (von Hirsch et al. eds., 2002)).

150. *Id.* at 182.

151. *Id.* at 183 (emphasis in original).

152. *Id.*

153. *Id.*

(or anywhere they are violated for *erga omnes* obligations such as slavery and the slave trade).[154] Additionally, while international human rights law similarly expresses vindication or restoration of victims' human dignity, the legal framework centers victims of human rights violations—generally as petitioners or parties in litigation and direct voices in advocacy—providing a complementary and structurally comprehensive expressive function of vindication of dignity and value denied by the violations. Further, state responsibility under human rights law obligates states to provide reparations for harms suffered, thereby expressing a reparative, restorative signal to victims that society owes for failing to respect and to "ensure respect" for slavery and the slave trade prohibitions under international human rights law.[155]

Moreover, international human rights law focuses on domestic law reform toward changing legal, economic, and other institutional structures perpetuating systems of harms, such as slavery and the slave trade. As trafficking scholars have argued with regard to centering the criminal law response to combat exploitation harms, centering the international criminal law response to combat ownership harms of slavery and slave trade similarly may deter real, structural changes.[156] More attention to comprehensive legal responses, including a recommitment to international human rights law implementation specifically for slavery and the slave trade, may provide the necessary avenues for structural change.

Finally, as I have argued elsewhere,[157] human trafficking enforcement just does not do all of the legal work necessary to lend full expressive justice for slavery and slave trade harms. These prohibitions are legally distinct and must not be conflated or misapplied.[158] Even in the human rights law regime, human trafficking is enumerated only in the CEDAW, protecting women and girls, and in the CRC, protecting children of all genders, but neither purports to address human trafficking against adults of all other genders, including men.[159] Slavery and the slave trade, when also present, can address some of the harm not picked up by trafficking as slavery and slave trade definitions are broader and offer higher normative protections for all persons regardless of age or gender.

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154. Draft Articles on State Responsibility, *supra* note 24, at art. 3.

155. *Id.* at art. 31.

156. Anne T. Gallagher, *The International Legal Definition of "Trafficking in Persons": Scope and Application*, in REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 83, 83-111 (Prabha Kotiswaran ed., 2017).

157. Kestenbaum, *supra* note 25.

158. *Id.*

159. Convention on the Elimination of All Forms of Discrimination Against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child arts. 34 & 35, Nov. 20, 1989, 1577 U.N.T.S. 3.

III. GAPS IN INTERNATIONAL AND DOMESTIC LAW APPLICATION TO SLAVERY AND SLAVE TRADE HARMS

Through an examination of some limitations of current international law enforcement—focusing on human trafficking in domestic/ transnational criminal law and, to a lesser extent, state accountability in human rights law, and enslavement and sexual slavery in international criminal law—this section demonstrates the continued need for enforcement and state compliance with the human rights prohibitions of slavery and the slave trade. A renewed focus on slavery and especially on the slave trade in the international human rights law regime can, in a complementary way, bring accountability, victim redress, potential for structural reform and even transformational change at the domestic levels, where international human rights law matters most.

Additionally, attention to enforcement of slave trade prohibitions brings an opportunity to prevent slavery, the crime that nearly always follows slave trading. An examination of the current international human rights advocacy and jurisprudence at the regional levels demonstrates the current challenges and opportunities in restoring states' human rights commitments and compliance with slavery and the slave trade prohibitions in international law.

A. Human Trafficking and Transnational Criminal Law

In questioning the need for a renewed focus on slavery and the slave trade prohibitions in international law, the conversation tends to center on the relative success of the "modern day slavery" abolitionist movement to eradicate human trafficking.[160] Today's campaign to end "modern slavery" centers on the international law on human trafficking,[161] not on slavery and slave trade prohibitions. Professor Chantal Thomas calls this strategic positioning of "new abolitionists" the "slavery-trafficking nexus."[162] Ariela Gross and Thomas speak to the dangers of conflating slavery and the slave trade with human trafficking, from both historical and legal advocacy

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160. Kestenbaum, *supra* note 25. As I have argued, the human trafficking regime should remain distinct from slavery and the slave trade prohibitions because human trafficking as a transnational crime and human rights violation does not adequately prevent, punish, and redress slavery and slave trade harms. Moreover, distinguishing the slave trade and slavery from human trafficking affords additional avenues for redress, maximizing full expressive accountability for states' obligations to prohibit slavery and the slave trade at the international and domestic levels.

161. Chantal Thomas, *Immigration Controls and "Modern-Day Slavery,"* in REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 212 (Prabha Kotiswaran ed., 2017); *see also* Janie Chuang, *The Challenges and Perils of Reframing Trafficking as "Modern-Day Slavery,"* 5 ANTI-TRAFFICKING REV. 146, 146-49 (2015). Slavery is defined as an exploitative purpose of trafficking under the Palermo Protocol, so in that way the definitions are connected.

162. Thomas, *supra* note 161.

perspectives.[163] They argue that drawing legal and conceptual connections between slavery as it manifested prior to late 19th century abolition and human trafficking is problematic, not only because the origins of these two prohibitions is different, but also because it impedes progress toward combating both of these legally distinct harms.[164] Relatedly, Janie Chuang uncovers what she calls "exploitation creep:" human trafficking's problematic doctrinal expansion in international and domestic U.S. law into other legal terrain, including forced labor and slavery prohibitions.[165] As I have detailed in previous writings, the legal prohibition of human trafficking developed on a parallel track, distinct from slavery and the slave trade prohibitions in international law.[166]

Several reasons exist to ensure that human rights harms are characterized correctly as slavery, the slave trade, trafficking, and/or other related prohibitions in international law. First, as outlined above, the slave trade and slavery continue today despite clear prohibitions under international law and should be pursued as such in addition to—or, at times, instead of—human trafficking. There are times when the exercise of ownership powers may not include exploitation (slavery but not human trafficking) or there may be times when there is an intent to bring a person into or maintain them in a situation of slavery without exercising ownership powers or exploitation (slave trade, but not slavery or human trafficking).

Second, the elevated status of prohibitions of slavery and the slave trade as non-derogable rights, *erga omnes* obligations, and *jus cogens* norms under customary and treaty law ensure the broadest legal protections for victims-survivors. Erasing or disabling the peremptory status of slavery and the slave trade is to renounce binding obligations and possibly alter customary international law through either or both state practice and *opinio juris*.[167]

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163. Ariela J. Gross & Chantal Thomas, *The New Abolitionism, International Law, and the Memory of Slavery*, 35 L. & HIST. REV. 99, 100 (2017); *see also* Kestenbaum, *supra* note 25 (discussing this issue from the slavery and slave trade angle and the need to keep slavery, the slave trade, and human trafficking distinct and disaggregated as crimes).

164. Gross & Thomas, *supra* note 163, at 104.

165. Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609, 609-49 (2014).

166. Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. REV. 515, 528-42 (2022).

167. Customary international law (CIL) is a source of international law and refers to the international obligations of states arising from general and consistent practice of states (state practice) followed from a general sense of legal obligation (*opinio juris*). Statute of the International Court of Justice (ICJ), art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. *See, e.g.*, MALCOLM N. SHAW Q.C., INTERNATIONAL LAW 68-80 (5th ed., 2003) (providing a treatise on international law, including custom as a source of international law); William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. 19 (2007) (finding that an article arguing for Congressional action for courts to apply customary international law misinterprets international law).

Altering customary international law consequently may limit these broad protections that exist under current international law.

Third, human rights law offers additional, complementary state responsibility accountability mechanisms to individual criminal liability for more comprehensive harm redress. Fourth, characterizing the precursory acts to slavery not as human trafficking but as the slave trade—or, if the factual circumstances permit, as both the slave trade and human trafficking—allows a surfacing of these harms and perpetrators for judicial redress at the domestic and international levels.[168] Correct delineation of these prohibitions untangles the conflations and confusions of juridical safeguards to ensure full redress to survivors of human trafficking, slavery, and the slave trade.[169] In many domestic contexts, perpetrators are getting away with committing acts of slavery and the slave trade, and victims are not receiving full redress for these harms, even when human trafficking or other crimes, such as material support for terrorism, is prosecuted and punished.[170] Labels matter for expressive value and victims' perceptions in receiving adequate justice.

International law on human trafficking mainly centers on the transnational organized crime frame over the human rights frame. Legal realist critiques, such as those offered by Paulette Lloyd and Beth Simmons, find that many developed countries' state interests aligned in globalization's

168. In fact, the increased attention to these harms as international crimes has led to a few cases in domestic and international human rights law courts. *See, e.g.*, Potentially Groundbreaking Case Against Lebanon's Kafala System, FREEDOM UNITED, Feb. 13, 2022, https://www.freedomunited.org/news/slavery-case-lebanon-kafala/; C.N. & V. v. France*,* App. No. 67724/09 (Oct. 11, 2012); C.N. v. the United Kingdom*,* App. No. 4239/08 (Nov. 13, 2012) (discussing obligations to investigate in slavery cases, but conflating trafficking with slavery harms and ultimately striking the case out); Hadijatou Mani Koroua v. The Republic of Niger, Judgment, ECW/CCJ/JUD/06/08 (Oct. 27, 2008); Maya Indigenous People v. Guatemala*,* Petition 844/05, Inter-Am. Comm'n H.R., Report No. 13/08, OEA/Ser.L/V/JJ.134, doc. 5 rev. 1 (2008) (finding *erga omnes* obligations to open an investigation into acts of slavery of children); Fazenda Brasil Verde v. Brazil*,* Petition 12.066, Inter-Am. Comm'n H.R., Report No. 169/11, OEA/SER/l/V/J.143, doc. 53 (2011). *But see* Siliadin v. France, App. No. 73316/01, §122 (July 26, 2005) (finding servitude and forced labor but, rather controversially, that harms, including confiscation of passport, forced labor without pay or time off for many years, and control over autonomy, did not amount to slavery). For a review of regional human rights jurisprudence on slavery and related harms, see Helen Duffy, *Litigating Modern Day Slavery in Regional Courts*, 14 J. INT'L CRIM. JUST. 375, 375-403 (2016). Duffy's analysis, which includes a regional human rights case on human trafficking (Rantsev v. Cyprus and Russia) demonstrates the conflation and confusion between slavery and human trafficking at the regional human rights level. *Id.* In Rantsev v. Cyprus and Russia, for example, the European Court of Human Rights reads the prohibition of human trafficking into the European Convention's article 4 prohibition on slavery and servitude. *See* Rantsev v. Cyprus and Russia*,* App. No. 25965/04, § 276 (Jan. 7, 2010).

169. Sellers & Kestenbaum, *supra* note 3.

170. *See, e.g.*, HUM. RTS. WATCH, FLAWED JUSTICE: ACCOUNTABILITY FOR ISIS CRIMES IN IRAQ 27 (2017).

wake,[171] arguing that a "broad coalition of states had much to gain by choosing a prosecutorial model over one that makes human rights or victim protection its top priority."[172] Like other transnational criminal law regimes, concerns of Western hegemony at both points of commitment and compliance remain in human trafficking enforcement.[173] Many scholars have critiqued the ideological foundations of human trafficking, finding that the transnational criminal law approach permits the perpetuation of the myth that a few "bad apples" (traffickers) commit these acts while supporting the continuation of harmful structures, such as global capitalism, to the detriment of migrants and other vulnerable populations.[174]

Many of these criticisms are valid and resonate from the perspective of anti-slavery and anti-slave trade law. Indeed, the recognition that slavery and the slave trade manifest today as such is a recognition that abolition as eradication of the practice was not successful, that the narrative of "slavery to freedom" has not been historically accurate, and that the debt of slavery has not been paid.[175] To focus on human trafficking as "modern slavery" is to decouple past slavery crimes from racial injustice and necessary but politically fraught conversations about reparations for past *de jure* systems of slavery and the slave trade.[176] Instead of rhetorical connections to slavery and the slave trade, as Gross and Thomas suggest, today's trafficking advocacy should connect to the actual origins of human trafficking and should not envelop slavery and the slave trade.[177] Further, they opine that addressing human trafficking harms through the lenses of international

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171. Prabha Kotiswaran, *From Sex Panic to Extreme Exploitation: Revisiting the Law and Governance of Human Trafficking*, in REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 126 (Prabha Kotiswaran ed., 2017).

172. Paulette Lloyd & Beth A. Simmons, *Framing the New Transnational Legal Order: The Case of Human Trafficking*, in TRANSNATIONAL LEGAL ORDERS 400-38 (T.C. Halliday & G. Shaffer eds., 2015).

173. *See* Neil Boister, *Transnational Criminal Law?*, 14 EUR. J. INT'L L. 953, 957-58 (2003).

174. *See, e.g.*, Julia O'Connell Davidson, *The Right to Locomotion? Trafficking, Slavery and the State*, in REVISITING THE LAW AND GOVERNANCE ON TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 157-78 (Prabha Kotiswaran ed., 2017); Chantal Thomas, *Immigration Controls and "Modern-Day Slavery,"* in REVISITING THE LAW AND GOVERNANCE ON TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 212-37 (Prabha Kotiswaran ed., 2017); Janet Halley, *Anti-Trafficking and the New Indenture*, in REVISITING THE LAW AND GOVERNANCE ON TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 179-211 (Prabha Kotiswaran ed., 2017); and Kerry Rittich, *Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking*, in REVISITING THE LAW AND GOVERNANCE ON TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 238-72 (Prabha Kotiswaran ed., 2017); Joel Quirk & Julia O'Connell Davidson, *Introduction*, in E-BOOK ON POPULAR AND POLITICAL REPRESENTATIONS 16, 20-25 (Joel Quirk & Julia O'Connell Davidson eds., 2016).

175. *Cf.* Gross & Thomas, *supra* note 163 at 106-08. Today's renewed discussions to provide reparations for the Transatlantic Slave Trade and domestic slave trades in countries like the United States are evidence of this need to combat false narratives and center victims and descendants of slavery harms.

176. *See id.*

177. *Id.* at 102-03. (*See also* Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. REV. 515, 542-55 (2022)).

labor law and migration law as opposed to transnational criminal law may better address the structures that support such coercive practices for the purpose of exploitation of (sex and) labor.[178]

Scholars and practitioners alike also have criticized the human trafficking transnational criminal law focus for targeting sex workers and for not addressing labor exploitation.[179] Other critics have pointed out the overreliance on criminal law to further the agendas of border control, state sovereignty, and national security has prioritized powerful interests and undermined the rights of migrants, asylum seekers, sex workers, and trafficking victims.[180] In addition, the nearly exclusive focus on enslavement and sexual slavery in international criminal law and human trafficking in domestic criminal law has stymied conversations about the continued perpetration, state complicity, and economic structures that perpetuate systems of slavery and the slave trade as these harms manifest today.

B. Enslavement, Sexual Slavery, and the Slave Trade in Domestic and International Law Forums

1. Domestic Criminal Law Forums

The strength and breadth of slavery and the slave trade "super norms"[181] prohibitions in international law provide additional and varied legal avenues for accountability and redress in domestic and international forums alike. Take the case of the slavery and slave trade crimes perpetrated against the Yazidis, for example. Multiple failed attempts of the United Nations Security Council to refer the situations in Iraq and Syria to the ICC[182] elude justice and accountability for individual perpetrators of

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178. *Id.*

179. Prabha Kotiswaran, *From Sex Panic to Extreme Exploitation: Revisiting the Law and Governance of Human Trafficking*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 17 (2017); *see also* K. Skrivankova, *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation* (Joseph Rowntree Found., programme paper, 2010), https://www.jrf.org.uk/report/between-decent-work-and-forced-labour-examining-continuum-exploitation.

180. Anne T. Gallagher, *Human Rights and the New U.N. Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 994 (2001); Mike Dottridge, *Introduction*, *in* COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD 1-27 (Global Alliance Against Traffic in Women ed., 2007).

181. Jean Allain, *Slavery*, *in* SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING 110 (2012). This term was originally coined by James Crawford. James Crawford, *Multilateral Rights and Obligations in International Law*, *in* 319 COLLECTED COURSES OF THE HAGUE ACADEMY 452 (2006).

182. The veto power of the permanent five (P5) members of the UN Security Council has impeded an international criminal investigation by the Office of the Prosecutor of the International Criminal Court. *But see generally* JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL

genocide, crimes against humanity, and war crimes in these atrocity contexts. Given that all of these international crimes include slavery and slave trade perpetration, as well as state responsibility for human rights violations of slavery and the slave trade, accountability also could be addressed in other forums for other forms of redress.

In Germany, prosecutors have taken the lead in advancing cases of *inter alia* genocide and enslavement against Yazidi victims under universal jurisdiction statutes[183] that permit such criminal cases given the gravity of the offenses when the perpetrators are found in the territory of the state even when the crime occurred in another state. First, universal jurisdiction cases reflect third party state compliance with their state responsibility to address violations of *jus cogens* norms.

While these cases have advanced criminal accountability and third party state responsibility in monumental ways, human rights litigation and advocacy recognizing state accountability for violations of slavery and slave trade prohibitions by offending states additionally could improve access to justice for the range of harms experienced by Yazidis and other victims.[184] Further, pressing for state responsibility under international law has the potential to address more directly the domestic structures of the violating state that perpetuate slavery and the slave trade institutions, systems, and practices.

To illustrate, the recent *Taha Al J.* case in the Higher Regional Court (*OLG*) of Frankfurt convicted the defendant, a former ISIL member, of genocide, crimes against humanity, and war crimes for enslaving a Yazidi woman, Nora B., and her five-year-old daughter, Reda, after purchasing

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VETO POWER IN THE FACE OF ATROCITY CRIMES (Cambridge Univ. Press eds., 2020) (making the case that there are certain circumstances in which states are violating international law by exercising the veto power to block international action against atrocity crimes).

183. Customary international law is less settled, but treaty law does explicitly and implicitly permit jurisdiction under the universality principle. *E.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; *see* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (Cambridge Univ. Press eds., 8th ed. 2012). *But see, e.g.*, Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS, July-Aug. 2001, at 86 (giving a broad general critique of universal jurisdiction); Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, DAEDALUS, Winter 2003, at 47 (discussing the general concept of universal jurisdiction and warning that it has the potential to engender international conflict). Universal jurisdiction enables states to prosecute and try—under certain conditions—suspects of international crimes regardless of where the crimes were committed and the nationality of the perpetrators and victims. *See* Völkerstrafgesetzbuch [CCAIL] [Code of Crimes against International Law], https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html (Ger.).

184. Alexandra Lily Kather & Johanna Groß, *Truly Historic, The World's First Conviction for Genocide Against the Yazidi*, VÖELKERRECHTSBLOG (Dec. 17, 2021), *available at* https://voelkerrechtsblog.org/truly-historic/. This case was also the first universal jurisdiction trial to charge the crime of genocide under the Code of Crimes against International Law (CCAIL, "Völkerstrafgesetzbuch") in Germany. Völkerstrafgesetzbuch [CCAIL] [Code of Crimes against International Law], https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html (Ger.).

them at a slave market in Raqqa in 2015.[185] The *OLG* convicted *Taha Al J.*, sentencing him to life in prison and ordering him to compensate Nora B. EUR 50.000 in reparations for the pain and suffering she endured and continues to endure as a result of her and her daughter's enslavement, as well as the shackling and torture of her daughter, which led to the child's foreseeable death.[186]

This criminal court decision, while critically important, is only one part of the larger justice and accountability picture. Here, the slave trading and slavery system factually was proven in court. They formed the foundation enabling many if not all international crimes perpetrated against the Yazidis who were captured and not immediately executed on Mount Sinjar.[187] The states of Iraq and Syria have permitted the system to continue today.[188] Thus, the demand for state accountability for human rights violations is an important complement to redress these harms and reform domestic laws and institutions to prevent future enslavement systems' perpetuation within state borders.

Indeed, once slavery and slave trade crimes are proven in a domestic universal jurisdiction case, obligations for state reparations to victims are required next steps under human rights law.[189] Under customary international law and treaty law—the ICCPR in this case—Iraq is obligated to prohibit slavery and the slave trade; thus, victims of slavery crimes must receive redress from the state's failure to protect individuals within its borders.[190] And Germany has *erga omnes* obligations to enforce these *jus cogens* human rights obligations as well.[191] All of these efforts could improve accountability and address the very structures that cause perpetuation of slavery and slave trade institutions, systems, and practices in offending states.

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185. Ordentliche Gerichtsbarkeit Hessen, *Higher Regional Court Frankfurt/Main sentences Taha Al-J. to lifelong imprisonment for genocide and other criminal offences* (Nov. 30, 2021), https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/higher-regional-court-frankfurtmain-sentences-taha-al-j-to-lifelong-imprisonment (last visited Feb. 5, 2022). Notably, criminal conduct that constituted the *actus reus* of the slave trade was not charged or prosecuted as such due to structural limitations in the domestic statute.

186. *Id.*

187. *See They Came to Destroy*, *supra* note 8, at § 55.

188. *See* Pari Ibrahim & Murad Ismael, *Seven Years After the Genocide, Yazidis are Still Waiting for Justice*, WASH. POST (Aug. 3, 2021), https://www.washingtonpost.com/opinions/2021/08/03/yezidis-are-still-waiting-justice-seven-years-later/ (finding that thousands of Yazidis are unaccounted for, and many are likely still in captivity); Margaret Evans, *Beekeeper Turned Spymaster Searches for Iraq's Missing Yazidis*, CBC NEWS (Apr. 16, 2021), https://www.cbc.ca/news/world/yazidi-iraq-syria-isis-1.5989166.

189. *See* Draft Articles on State Responsibility, *supra* note 24.

190. ICCPR, art. (8)(1) (ratification by Iraq); G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005).

191. *See* Draft Articles on State Responsibility, *supra* note 24.

Further, slavery and the slave trade's "super-normative" status in international law is important for broader avenues for justice and accountability that would not exist in characterizing harms as transnational crimes only. For example, one case against cement company LaFarge in France and its subsidiary LaFarge Cement Syria has survived motions to dismiss on the evidence that the company, through direct payments to ISIL totaling at least EUR 13 million in order to continue operations in Syria, is complicit in crimes against humanity and genocide.[192] Between 2012 and 2014, LaFarge is alleged to be complicit in crimes against humanity, including slavery and slave trade crimes, perpetrated as part of a widespread or systematic attack against the civilian population, including the Yazidis, in Syria.[193] The *jus cogens*, international criminal nature of the harms of slavery and the slave trade have sustained these actions before France's Court of Cassation. Legally characterizing these harms as human trafficking or other domestic or transnational crimes would not permit this case for corporate accountability to proceed as per the international nature of the crimes and normative status of slavery and slave trade prohibitions. In this case, France must hold this corporate actor to account as part of its obligation not to breach *jus cogens* norms and incur state responsibility for international wrongful acts.[194]

2. International Criminal Law Forums

In addition to the general limitations of the international criminal law regime discussed in Part II.B *supra*—i.e., that individual criminal accountability targets only a few, albeit possibly the worst, "bad apple" perpetrators and that it is not centered on victims, state-sponsored redress in the form of reparations, structural transformation, or restorative justice—the Rome Statute of the ICC poses additional structural limitations that make international human rights law a significant and necessary

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192. European Center for Constitutional and Human Rights (ECCHR), *Historic victory before French Supreme Court on the indictment of multinational Lafarge for complicity in crimes against humanity in Syria* (Sept. 7, 2021), *available at* https://www.ecchr.eu/en/press-release/historic-victory-before-french-supreme-court-on-the-indictment-of-multinational-lafarge-for-complicity-in-crimes-against-humanity-in-syria/. Cases are also being brought against LaFarge corporate executives for financing a terrorist organization, deliberate endangerment, and undignified labor conditions. Sherpa & European Center for Constitutional and Human Rights, *Press Release: Submission from Sherpa and ECCHR on an Indictment of LaFarge for Complicity in Crimes Against Humanity* (May 15, 2018), https://www.ecchr.eu/fileadmin/Pressemitteilungen_englisch/PR_CP-CCH_Lafarge-EN_150518.pdf.

193. ECCHR, *Case Report*: *Lafarge in Syria: accusations of complicity in war crimes and crimes against humanity* (last updated Nov. 2016), https://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_Lafarge_Syria_ECCHR.pdf.

194. Guiding Principles on Business and Human Rights (Ruggie Principles), *available at* https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf; Draft Articles on State Responsibility, *supra* note 24.

complement to retributive, carceral frames of justice for slavery and slave trade harms.[195]

While customary international law,[196] including humanitarian law,[197] criminalizes slavery and the slave trade as per the 1926 Slavery Convention definitions,[198] the Rome Statute of the ICC diverges significantly from custom in this regard. The Rome Statute criminalizes enslavement—defined as slavery and including some of the *actus reus* of the slave trade—as a crime against humanity but not as a war crime.[199] Additionally, the Rome Statute includes sexual slavery as a crime against humanity and war crime, which is encompassed by slavery and enslavement in customary international law.[200] The slave trade is not enumerated under the Rome Statute. Consequently, international criminal law under the Rome Statute is limited structurally to address the breadth of slavery and slave trade harms. Human rights law prohibitions can fill such structural lacunae in opening additional avenues for expressive justice.

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195. Sellers & Kestenbaum, *supra* note 8, at 532-36.

196. Customary international law is a binding source of public international law consisting of "general practice accepted as law." Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. For a rule to be considered law under customary international law, two elements must be present: state practice and the belief that such practice is required as a matter of law (*opinio juris*). The North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, ⁋ 77 (Feb. 20).

197. *See* Lieber Code, 1863, arts. 42, 58; IMT Charter, 1945, art. 6 ("deportation to slave labor"); Allied Control Council Law No. 10, 1945, art. II(1) ("deportation to slave labor"); 1977 Additional Protocol II, art. 4(2)(f) ("slavery and the slave trade in all their forms" are and shall remain prohibited); International Committee of the Red Cross, 'Study on Customary International Humanitarian Law,' Practice Related to Rule 94: Slavery and Slave Trade; *see* Sellers & Kestenbaum, *supra* note 8, at 517-42.

198. For an in-depth discussion of slavery and the slave trade under customary international law, see Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Sexual Slavery and Customary International Law*, *in* PROSECUTING THE PRESIDENT (Sharon Weill et al. eds., 2020); Sellers & Kestenbaum, *supra* note 8, at 517-42.

199. The term "war crimes" refers to serious breaches of international humanitarian law committed against civilians or others outside of combat during an international or non-international armed conflict. In contrast, "crimes against humanity" encompasses crimes, such as murder, extermination, rape, persecution, and all other inhumane acts of a similar character (willfully causing great suffering, or serious injury to body, or to mental or physical health), committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" in times of peace or conflict. *See* Rome Statute, arts. 7 & 8.

200. Patricia Visseur Sellers, *Wartime Female Slavery: Enslavement?*, 44 CORNELL INT'L L.J. 115, 115-43 (2011); Sellers & Kestenbaum, *Slavery and the Slave Trade*, *supra* note 3. The most recent ICC judgment, Prosecutor v. Dominic Ongwen, illustrates the Rome Statute's structural limitations for accountability for slavery/enslavement and the slave trade in international law. *See* ICC-02/04-01/15, Judgment (Feb. 4, 2021); Patricia Viseur Sellers and Jocelyn Getgen Kestenbaum, *Ongwen*, OPINIO JURIS, June 11, 2021; Prosecutor v. Ongwen, ICC-02/04-01/15, Amicus Curiae brief by Ashraph et al. (Dec. 23, 2021), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.icc-cpi.int%2FCourtRecords%2FCR2021_11909.PDF&clen=579371&chunk=true. Further, though not a structural deficiency, the Rome Statute includes language on human trafficking but confers jurisdiction only over international crimes, not transnational crimes. Human trafficking is a transnational crime.

3. Regional Human Rights Law Forums

Finally, the regional human rights law systems of state responsibility for domestic failures continue to provide an important backstop for victim redress and possibilities for structural reform when states fail to ensure respect for human rights. Two recent slavery cases adjudicated before the Inter-American Court of Human Rights against Brazil[201] and Venezuela[202] provide examples of the potential—and the challenges—in achieving full accountability for states' failures to ensure respect for prohibitions of slavery and the slave trade.

In the 2016 case of *Fazenda Brasil Verde v. Brazil*, for example, the Inter-American Court of Human Rights (IACtHR) found Brazil responsible for the human rights violations of *inter alia* slavery and the slave trade.[203] The IACtHR ordered the state to provide reparations in the form of investigation, prosecution, punishment, compensation to victims, and domestic law reform to ensure that statute of limitations do not apply to slavery crimes in future cases in Brazil.[204] In 2018, in the case of *López Soto v. Venezuela*, the IACtHR found Venezuela responsible for violations of *inter alia* (sexual) slavery prohibitions under the American Convention.[205]

Even in the few regional human rights slavery cases adjudicated, there is a need to recommit to state responsibility for violations of slave trade prohibitions. In each of these cases, slave trade conduct was described, but never legally characterized as such, even when Brazil and Venezuela criminalized the slave trade as "reduction into slavery" in domestic law.[206] Instead, the Inter-American Commission regarded the phrase "slave trade and traffic in women" as "human trafficking" as defined under the Palermo Protocol.[207] The Court also overlooked abductions and kidnapping (*actus reus* of the slave trade) as part of the slavery crimes perpetrated.[208] Recommitting to enforcement of slave trade prohibitions will better ensure

201. Fazenda Brasil Verde v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 318 (Oct. 20, 2016).

202. Lopez Soto v. Venezuela, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 362 (Sept. 26, 2018).

203. Fazenda Brasil Verde v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 318 (Oct. 20, 2016). This was the first case to find a violation of Art. 6(1) of the American Convention on Human Rights.

204. *Id.*

205. Lopez Soto v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 362, ¶ 149 (Sept. 26, 2018).

206. Facts in each case include "abductions" and "transports." The Court even takes note of article 149 of the Brazilian Penal Code, which prohibits "reducing a person to conditions analogous to slavery," but does not discuss the slave trade explicitly. Artículo 149 del C.P. Brasileño. Lopez Soto v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 362, ¶ 107 (Sept. 26, 2018) (citing the Criminal Code of the Bolivarian Republic of Venezuela, Official Gazette No. 915 of June 30, 1964, art. 174).

207. Fazenda Brasil Verde v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶¶ 289-90 (Oct. 20, 2016).

208. *See* Lopez Soto v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 362, ¶ 145 (Sept. 26, 2018) (kidnapping or disappearance).

that all violations are redressed, at least with regard to state responsibility, under regional human rights law and domestic criminal law.

IV. RECOMMITTING TO SLAVERY AND THE SLAVE TRADE PROHIBITIONS: OPPORTUNITIES AND CHALLENGES

International human rights law institutions and advocacy can accomplish several important goals, including: (1) expanding accountability to addressing state responsibility in addition to individual criminal liability; (2) expanding avenues for victim redress, including by addressing structural violence; and (3) improving the expressive functions of international law. While international human rights law matters, misconceptions about slavery and the slave trade have led to uneven implementation—if any—in the modern international human rights law regime. This Part reviews opportunities for recommitting to slavery and the slave trade under international human rights law, arguing for a cautious implementation and enforcement of the human rights prohibitions of slavery and the slave trade while exploring challenges toward these goals.

A. ICCPR and Human Rights Committee

Despite the clear enumerations of slavery and slave trade prohibitions in the ICCPR, and despite their "super-norm" status in international law, the Human Rights Committee (HRC), the ICCPR's treaty monitoring body, has yet to issue a General Comment[209] to interpret state obligations on Article 8's prohibitions of slavery and the slave trade.[210] Moreover, the HRC, through the language of General Comment 28, seemingly ignores the slave trade as a distinct prohibition in international law.[211] Possible slave trade acts instead are characterized as perpetrators "recruiting," "taking," and "receiving" victims, and human trafficking (and, notably, only of women and children) is inserted without explanation given that it is a different, albeit

209. *See, e.g.*, Helen Keller & Leena Grover, *General Comments of Human Rights Committee and their Legitimacy*, *in* U.N. HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 116, 124 (Helen Keller & Geir Ulfstein eds., 2015).

210. In General Comment No. 28, interpreting Article 3 (Equality Rights between Men and Women, 2000), however, the Committee has made explicit reference to Article 8 obligations, but has conflated human trafficking and forced prostitution with slavery and slave trade harms. Human Rights Comm., General Comment No. 28 on Article 3: The Equality of Rights Between Men and Women, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000). (For an in-depth analysis of this conflation, see Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. Rev. 515 (2022).

211. Human Rights Comm., General Comment No. 28 on Article 3: The Equality of Rights Between Men and Women, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

related, prohibition that is not even among the enumerated rights provisions of the ICCPR.[212]

The Human Rights Committee also has issued quasi-judicial individual communications that overlook state responsibility for slavery and the slave trade violations, even when the facts suggest that slavery and slave trade harms have occurred.[213] Further, HRC's concluding observations have conflated and confused slavery, the slave trade, and human trafficking while overlooking the slave trade as a separate human rights violation.[214]

While some of these factual circumstances also may constitute human trafficking, the slave trade prohibition is the human rights violation within the HRC's purview given the ICCPR's explicit enumeration of the slave trade in article 8. Where slavery violations exist, slave trade violations nearly always accompany such harms.[215] State parties have a legal obligation to address the precursory acts to slavery through the prohibition of the slave trade; thus, the petitioners and the HRC should characterize the harms correctly as acts of the slave trade.

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212. Author Vladislava Stoyanova argues that this insertion implies that the Human Rights Committee has brought human trafficking of women and children into the scope of Article 8 of the ICCPR. She finds that such an insertion requires explanation given the ICCPR drafter's explicit rejection of human trafficking within the purview of Article 8. *See* Vladislava Stoyanova, *United Nations Against Slavery: Unravelling Concepts, Institutions and Obligations*, 38(3) MICH. J. INT'L L. 359, 406 (2017). This reasoning, however, would further confuse and conflate these related but distinct prohibitions in international law. To correct course, the Human Rights Committee should draft a general comment on Article 8 and clearly delineate the legal definitions of slavery and the slave trade without referencing human trafficking, while recognizing explicitly that human trafficking is not included within the scope of Article 8.

213. Human Rights Comm., Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2556/2015, U.N. Doc. CCPR/C/125/D/2556/2015, ¶¶ 2.2, 2.5, (May 22, 2019). One recent example from 2019 is the case of *Fulmati Nyaya* against Nepal in which 300 Royal Nepalese Army and Armed Police Force officers entered a village during the civil war in 2002 and arrested the communication's author, a 14-year-old girl at the time, allegedly suspecting her of being a Maoist. The soldiers dragged her into a truck; blindfolded and handcuffed her; detained and interrogated her incommunicado; repeatedly beat, sexually assaulted, and raped her; and forced her to "work in the barracks, such as carrying bricks and sand, making cement for the construction of a temple, and watering the garden." The HRC characterized the harms to include *inter alia* violations of forced labor under Article 8(3) of the ICCPR. *Id.* These facts are similar to the Sepur Zarco case from Guatemala in which sexual slavery was charged. Tribunal de Mayor Riesgo, 2016 "Guatemala c. Esteelmer Francisco Reyes Girón y Heriberto Valdez Asig," Sentencia C-01076-2012-00021.

214. For example, in its 2020 Concluding Observations on the Central African Republic, in addressing trafficking in persons, forced labor and child soldiering, the HRC was "alarmed that children are being *recruited* by armed groups for exploitation as combatants, *sex slaves* or workers in the mining sector." Human Rights Comm., Concluding Observations on the Third Periodic Rep. of the Central African Republic, U.N. Doc. CCPR/C/CAF/CO/3, ¶¶ 29-30 (Apr. 30, 2020); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Comm.: Mali, U.N. Doc. CCPR/CO/77/MLI, ¶ 17 (Apr. 16, 2003); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Comm.: Sudan U.N. Doc. CCPR/C/SDN/CO/3, ¶ 18 (Aug. 29, 2007).

215. Generally, unless individuals are born into slavery, they have in one way or another been brought into, or maintained in, a situation of slavery.

Furthermore, the HRC in its 2019 Concluding Observations on the Czech Republic[216] and 2011 Concluding Observations on Kuwait[217] evaluated compliance with article 8, but only examined trafficking in persons. Thus, recent concluding observations demonstrate that the HRC not only has overlooked the slave trade prohibition, but also has taken on the issue of human trafficking,[218] a human rights violation not explicitly enumerated under the Covenant. Overlooking slavery and the slave trade violations denies the full expressive functions of international human rights law for the victims-survivors of these harms. Further, addressing factual circumstances accurately under slavery and slave trade violations would assist in recommitting to the implementation of these human rights norms for substantive and possibly structural, transformative change at the domestic levels.

The HRC is undermining institutional legitimacy in the short term by incorrectly applying its legal mandate in assessing state compliance with international treaty obligations under the ICCPR. In the long term, the HRC's non-application of slavery and slave trade provisions in cases in which these violations are present results in inadequate justice and accountability for victims of these harms while possibly leading to disabling the customary international legal status of these harms.[219]

B. Regional and International Courts

Relevant international human rights treaty enforcement through the courts also has ignored the slave trade and has focused very little attention on slavery prohibitions. Where subsequent international human rights enforcement has occurred for treaties that prohibit slavery, enforcement bodies have drawn upon the 1926 Slavery Convention's slavery definition, replicated in the 1956 Supplementary Slavery Convention, and its subsequent interpretations under international and domestic criminal law.[220]

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216. Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of Czechia, U.N. Doc. CCPR/C/CZE/CO/4, ¶ 30 (Dec. 6, 2019).

217. Human Rights Comm., Concluding Observations on the Second Periodic Rep. of Kuwait, U.N. Doc. CCPR/C/KWT/CO/2 , ¶ 17 (Nov. 18, 2011).

218. *See, e.g.*, Human Rights Comm., Concluding Observations on the Fifth Periodic Rep. of Portugal, U.N. Doc., CCPR/C/PRT/CO/5 (Apr. 28, 2020); Human Rights Comm., Concluding Observations on the Sixth Periodic Rep. of Tunisia, U.N. Doc., CCPR/C/TUN/CO/6 (Apr. 24, 2020); Human Rights Comm., Concluding Observations in the Absence of the Initial Rep. of Dominca, U.N. Doc., CCPR/C/DMA/COAR/1 (Apr. 24, 2020).

219. *See* Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. REV. 515, 515, 581 (2022). Customary law status depends upon state practice and *opinio juris*. *See supra* note 20.

220. *See, e.g.*, Fazenda Brasil Verde v. Brazil, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 318, ¶ 249 (Oct. 20, 2016).

Generally, cases addressing human rights prohibitions of slavery have been adjudicated at the regional and subregional human rights courts. The IACtHR and the Economic Community of West African States (ECOWAS) Court have interpreted their slavery provisions, but have not addressed the slave trade as a separate human rights violation, except to say that it should be read as human trafficking as defined under the Palermo Protocol.[221] While the ECOWAS Court in *Hadijatou Mani v. Niger* set important precedent to uphold the prohibition against slavery in Niger, the ruling similarly overlooked that the Applicant was sold, slave traded from one situation of slavery to another, at age 12 to a local chief in addition to her being subjected to slavery and related human rights violations.[222]

Similar to the Rome Statute, the European Convention on Human Rights includes slavery but does not include the slave trade definition among its enumerated prohibitions.[223] Furthermore, although the European Court of Human Rights (ECtHR) applied the 1926 Convention slavery definition in its first slavery case, *Siliadin v. France*, the Court incorrectly limited the definition's scope to *de jure* slavery.[224]

The ECtHR dismissed the allegation of slavery as not relevant to the facts of the case, finding that Article 4 is limited to *de jure* slavery situations only.[225] Receiving heavy criticism, the Court narrowly interprets the

221. Fazenda Brasil Verde v. Brazil, Inter-Am. Court H.R. (ser. C) No. 318 (Oct. 20, 2016); Lopez Soto v. Venezuela, Inter-Am. Court H.R. (ser. C) No. 362 (Sept. 26, 2018).

222. Hadijatou Mani Koroua v. The Republic of Niger, Judgment, ECW/CCJ/JUD/06/08 (Oct. 27, 2008).

223. Notably, the slave trade is not enumerated as a distinct prohibition under the European Convention. Commentators and scholars have posited that the ECHR Article 4 drafting was modeled after Article 4 of the UDHR and Article 8 of the ICCPR. For an in-depth analysis of the development of these articles, see Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. REV. 515, 554-71 (2022). That analysis is overlooking and ignoring the slave trade. While the language of slavery, servitude, and forced labor seems nearly identical, the slave trade does not make its way as an explicit prohibition into the ECHR. Thus, the ECHR structurally omits the slave trade without debate or discussion and, as a consequence, the Convention does not explicitly require states parties to prohibit the slave trade.

224. Siliadin v. France, App. No. 73316/01 (July 26, 2005). Siliadin was a girl from Togo who traveled to France at 15 years-old with "Mrs. D." The agreement was that Siliadin would work in Mrs. D.'s home to pay for the cost of Siliadin's airfare, while Mrs. D. would assist with immigration status and school registration. Instead, Mrs. D. confiscated Siliadin's passport and forced her to work as her housemaid. When Siliadin confided to a neighbor, the French authorities were alerted to her case and prosecuted Mr. and Mrs. B. The French courts, however, acquitted Mr. and Mrs. B. Siliadin subsequently complained to the European Court of Human Rights (ECtHR), alleging a violation of Article 4 of the ECHR. Siliadin v. France, App. No. 73316/01 (July 26, 2005).

225. "The Court notes at the outset that, according to the 1927 Slavery Convention [*sic*] 'slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.' . . . this definition corresponds to the 'classic' meaning of slavery as it was practiced for centuries. Although the applicant was . . . clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr[.] and Mrs[.] B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an 'object.'" Siliadin, App. No. 73316/01, ¶¶ 122, 26 (July 26, 2005).

definition of slavery as requiring legally sanctioned ownership, focusing on the status (*de jure*) and not condition (*de facto*) situation of slavery.[226] As noted *supra*, the Temporary Slavery Commission reports reveal the intent of the slavery prohibition definition to address both of these forms of slavery and in all of its manifestations.[227]

When the ECtHR revisited the issue in *Rantsev v. Cyprus and Russia*, the Court corrected course to include *de facto* situations of slavery within the scope of the international law definition of slavery.[228] At the same time, however, the Court confused and conflated human trafficking with slavery, finding that ". . . trafficking in human beings, by its very nature and aim of exploitation, *is based on the exercise of powers attaching to the right of ownership*."[229] While the Court's jurisprudence correctly characterizes facts of the "transfer of ownership" as evidence of slavery, the Court is structurally limited from also characterizing such harm as an act of the slave trade, a separate human rights violation in other regional human rights treaties and in customary international law.[230] Structurally, however, the European Human Rights system would need to add the slave trade to its treaty provisions to address the illicit conduct of the slave trade as a separate human rights violation as it generally exists in international law.[231]

Despite these shortcomings, the positive aspect of such human rights litigation is the potential for legal reform at the domestic level. In *Siliadin v. France*, for example, the ECtHR agreed with the Applicant that France violated Article 4 of the European Convention on Human Rights because French criminal law did not adequately prohibit slavery, servitude, or forced labor.[232] The ECOWAS case instigated dozens of additional cases at the

226. Several scholars have criticized the judgment for this oversight of the 1926 Slavery Convention's intention to prohibit both the status (*de jure*) and condition (*de facto*) situations of slavery. *See, e.g.*, VLADISLAVA STOYANOVA, HUMAN TRAFFICKING AND SLAVERY RECONSIDERED: CONCEPTUAL LIMITS AND STATES' POSITIVE OBLIGATIONS IN EUROPEAN LAW 245-46 (Cambridge University Press, 2017); Ryszard Piotrowicz, *States' Positive Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations*, 24(2) INT'L J. REFUGEE L. 181, 189 (2012).

227. *See supra* Part II. For an in-depth discussion of these nuances in the drafting of the 1926 Slavery Convention, see also Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Sexualized Slavery' and Customary International Law*, *in* THE PRESIDENT ON TRIAL: PROSECUTING HISSÈNE HABRÉ (Sharon Weill et al. eds., 2020).

228. Rantsev v. Cyprus and Russia, App. No. 25965/04, ¶¶ 275, 278-79 (Jan. 7, 2010).

229. *Id.* (emphasis added).

230. M. and Others v. Italy and Bulgaria, App. No. 40020/03 (July 31, 2012).

231. Later, Mrs. D "lent" Siliadin to "Mr. and Mrs. B." who forced her to cook, clean, and take care of the children for long hours, seven days per week without pay. Siliadin v. France, App. No. 73316/01, ¶ 12 (July 26, 2005). While these facts could evince the exercise of ownership powers over Siliadin, the illicit act could be characterized as the slave trade. As explained, however, the European Court is limited by ECHR Article 4's omission of the slave trade as a separate human rights prohibition.

232. Siliadin v. France, App. No. 73316/01, ¶¶ 142, 145, 148-49 (July 26, 2005).

domestic level to enforce the prohibition of slavery and compensate victims for harms suffered.[233]

Finally, while enforcement of state responsibility for international wrongful acts by other states has been underutilized, suits before the ICJ have been employed to haul offending states into court to account for other international crimes, such as genocide, occurring within their borders. Recent examples of successful use of this enforcement mechanism under international law include the case of *Bosnia and Herzegovina v. Serbia and Montenegro*[234] and the ongoing case of *The Gambia v. Myanmar*.[235] Given that there exists no hierarchy among international crimes, states can and should also consider international crimes of slavery and the slave trade, which also can be considered as acts constituting genocide, triggering *erga omnes* obligations of the international community to enforce peremptory norms of international law, including international human rights law.

C. Challenges

One challenge with the recommitment to dormant human rights prohibitions of slavery and the slave trade is the rhetorical (over)use of the word "slavery" or the term "modern slavery" for emotive purposes rather than legal accuracy.[236] Though the rhetoric raises funds for combatting exploitative practices, such as human trafficking and forced labor, its misuse causes definitional confusion and incoherence to the detriment of compliance with international law and, thus, against the interests of victims of both ownership and exploitation crimes.[237]

A second related challenge is the reluctance of states and courts to label harms that fit under the slavery and slave trade definitions as slavery and the slave trade. Decisionmakers regard slavery as occurring in only the most exceptional cases (while overlooking entirely the slave trade).[238] Indeed, Michael Dottridge argues that new laws protecting against "slavery" will

233. Hadijatou Mani Koroua v. The Republic of Niger, Judgment, ECW/CCJ/JUD/06/08 (Oct. 27, 2008), https://www.law.cornell.edu/women-and-justice/resource/hadijatou_mani_koraou_v_republic_of_niger. Also available at: http://www.worldcourts.com/ecowasccj/eng/decisions/2008.10.27_Koraou_v_Niger.htm.

234. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26) (finding violation of the Genocide Convention).

235. Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), Verbatim Record (Feb. 23, 2022), https://www.icj-cij.org/public/files/case-related/178/178-20220223-ORA-01-00-BI.pdf (ongoing case alleging violation of the Genocide Convention).

236. *See* Michael Dottridge, *Trafficked and Exploited: The Urgent Need for Coherence in International Law*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 77 (Prabha Kotiswaran ed., 2017).

237. *See id.*

238. *See id.*

likely benefit very few actual victims of slavery.[239] For all of the reluctance to understand the true breadth of the prohibition of slavery under law, there is little to no attention paid to the definitional parameters of the slave trade.[240]

Whether states are overusing the rhetorical force of slavery or underusing the legal prohibitions to address slavery and the slave trade to instances where the practices are most visibly and physically violent (i.e., female sexualized enslavement or male forced labor exploitation), such myopic human rights law implementation has ignored the breadth of slavery harms in their historical and contemporary manifestations. As a result, slavery is misunderstood and mischaracterized legally, while the slave trade is completely overlooked. The confusion over definitional parameters may in part come from refusals to confront past and present colonial violence and continued structures that benefit from slavery and slave trade practices in situations of conflict and so-called peacetime.

One further challenge is that many of the states in which slavery and slave trade violations are widespread and/or systematic in nature are states that practice compliance with human rights law more commonly in the breach. In other contexts, especially those suffering protracted armed conflict and violence, even willing states are unable to ensure justice and accountability at the domestic level. International law's *erga omnes* requirements of other states in the international community to step in and provide redress when violations of *jus cogens* norms occur, however, provide an important stopgap for accountability in the case of slavery and the slave trade.[241] Because these violations offend all of humanity, no state should permit impunity for such harms.

While international criminal law's engagement with individual criminal liability for enslavement is helping to surface and clarify the definitions to uncover the true nature and scope of these legal prohibitions, much work is yet to be done in human rights treaty implementation.[242] Through human rights law implementation and enforcement, the international community may begin to confront these underlying structures and provide more

239. *See id.*

240. *But see* Sellers & Kestenbaum, *supra* note 3.

241. Draft Articles on State Responsibility, *supra* note 94.

242. Michael Dottridge, *Trafficked and Exploited: The Urgent Need for Coherence in International Law*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 59, 77 (Prabha Kotiswaran ed., 2017); Anne T. Gallagher, *The International Legal Definition of "Trafficking in Persons": Scope and Application*, *in* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR AND MODERN SLAVERY 83 (Prabha Kotiswaran ed., 2017). Compare to human trafficking, where definitional discussions and divergence in the human trafficking arena have served as proxies for the more complicated debates on related issues of sex work and migration. *See id.* at 85-86.

effective and complete redress to victims-survivors of one of the oldest and most persistent abuses prohibited under international law.

CONCLUSION

Abolitionist movements have worked over the past two centuries to prohibit the slave trade, slavery, and other servitudes—which has included "slavery-like practices" of forced labor, debt bondage, serfdom, servile marriage, and child trafficking—in international law.[243] In the 19th century, states began taking concrete legal steps toward abolition, first by suppressing the slave trade, prohibiting the Trans-Atlantic and East African Slave Trades through unilateral declarations and bilateral or multilateral treaties.[244] As examined above, slavery and the slave trade definitions are intentionally broad to prohibit these harms *in all their forms*. Additionally, these international law prohibitions provide the highest form of juridical and

243. *See, e.g.*, 1926 Slavery Convention; 1956 Supplementary Slavery Convention; JEAN ALLAIN, SLAVERY IN INTERNATIONAL LAW: OF HUMAN EXPLOITATION AND TRAFFICKING 105 (2012); JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2012) (examining the origins of international human rights law through the lens of slavery and the slave trade). Each of these harms in international law has a relationship to slavery and the slave trade, and to a greater or lesser extent has been confused or conflated with slavery (rarely the slave trade), but such analysis is beyond the scope of this Article. Legal distinctions have often coincided with continuing to legitimize some practices over others due to colonizers' or States' economic interests. *See generally* SUZANNE MIERS, SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM (2003) (tracing the international anti-slavery movement over time).

244. *See, e.g.*, Declaration Relative to the Universal Abolition of the Slave Trade ('Congress of Vienna, Act XV') 2 Martens 432 (Feb. 8, 1815), reprinted in 63 Parry's 473; Treaty for the Suppression of the African Slave Trade ('Treaty of London') 10 Martens 392 (Dec. 20, 1841), reprinted in 92 Parry's 437; Declaration Respecting the Abolition of the Slave Trade ('Congress of Verona') 16 Martens 139 (Nov. 28, 1822), reprinted in 772 Parry's 32; General Act of the Conference Respecting the Congo ('General Act of Berlin') 10 Martens (2d) 414 (Feb. 26, 1885), reprinted in 3 ASIL 7 (1909); June 5, 1873 Treaty between her Majesty and the Sultan of Zanzibar, Suppression of the Slave Trade, https://www.pdavis.nl/FrereTreaty.htm; Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors ('General Act of Brussels') 17 Martens (2d) 345, 27 Stat. 886, T.S. No. 383 (July 2, 1890), reprinted in 173 Parry's 293; Treaty between Great Britain and Spain for the Suppression of the African Slave Trade, 18 Martens (2d) 168 (July 2, 1890), reprinted in Parliamentary Papers, 1892, vol. XCV, 735, T.S. No. 3 (1892); 1919 Convention Revising the General Act of Berlin, 26 February 1885, and the General Act of the Declaration of Brussels ('Treaty of Saint-Germain-en-Laye') 8 L.N.T.S. 25, 49 Stat. 3027, T.S. 877 (Sept. 10, 1919), reprinted in 14 Martens (3d) 12. *See generally* JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS (2012) (stating that the abolition movement became important for British politics in the late eighteenth and early nineteenth centuries); *see also* Jean Allain, *Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, 2007 BRIT. Y.B. INT'L L. 342-88 (2008) (stating that Great Britain made efforts during the nineteenth century to prevent the slave trade). Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Missing in Action: The International Crime of the Slave Trade*, J. INT'L CRIM. JUST. (2020) (praising the efforts made in the nineteenth century to abolish the slave trade). M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL'Y 454 (1991) ("In making the trade an international crime, treaties allowed states to search and detain vessels if the ships were thought to be carrying slaves.").

jurisdictional protections of any human rights norms.[245] While concrete reasons may explain their dormancy in recent decades, new shifts have highlighted a need to recommit to enforcing these international human rights law prohibitions toward survivor-centered approaches that call for structural changes in addition to criminal legal responses that target individual bad actors.

Realist and critical legal scholars often have pointed out that over-legalization and over-judicialization are inappropriate, expensive, and possibly even counterproductive ways to address human rights violations.[246] Little evidence exists, however, to suggest that international human rights law is over-legalized or over-judicialized.[247] Rather, the strength and legitimacy of human rights law is that it is instrumentalized by social movements that are inspired and guided by treaty guarantees.[248] Human rights is more than law—it is a discourse and movements that are nearly universally understood by all human beings—that, by virtue of being human, they have rights that the state has agreed to protect and uphold. Thus, human rights law permits the people to push for change and effective solutions—international and domestic criminal law take much of this agency away and place power in the hands of experts and legally trained prosecutors and judges. The human rights regime, and the justice it provides, must remain accessible to average people.

This is not to say human rights law should stop focusing on human trafficking or other human rights harms. This Article posits widening and shifting the lens, but not at the expense of exploitation. Exploitation is also a harm we want to combat. It is time to commit to using all of the tools in the human rights and international law toolbox toward the enforcement of slavery and slave trade prohibitions. Given that the human rights legal regime protecting against slavery and the slave trade is structurally robust, and, given that human rights law enforcement matters and may have broader, more effective messaging capacity toward transformative change than does the carceral approach under international criminal law, this Article argues for a recommitment to enforcing these prohibitions toward full redress of harms against individuals enslaved and slave traded today.

245. *See supra* Part I.

246. Karen Engle, *Liberal Internationalism, Feminism, and the Suppression of the Critique: Contemporary Approaches to Global Order in the United States*, 46 HARV. INT'L L.J. 427, 427-41 (2005) (realist view); Jack Snyder & Leslie Vinjamori, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SEC. 5, 5-44 (2004) (critical legal studies views).

247. *See* SIMMONS, *supra* note 109.

248. *See* Lisa Hajjar, *Human Rights in Israel/Palestine: The History and Politics of a Movement*, 30 J. PALESTINE STUD. 21, 21-38 (2001).

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