

**Including the Slave Trade in the Draft Articles on Prevention and  
Punishment of Crimes Against Humanity**

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### I. Introduction

1. On April 11, 2023, the Permanent Mission of the Republic of Sierra Leone to the United Nations submitted in writing its proposal to include the slave trade as an enumerated provision in the Draft articles on Prevention and Punishment of Crimes Against Humanity (“Draft Articles”).<sup>1</sup>

2. In its current composition, the Draft Articles enumerate the prohibitions of enslavement<sup>2</sup> and sexual slavery.<sup>3</sup> The Draft Articles, however, omit the enumeration of the slave trade even though under international law the slave trade is a *jus cogens* or peremptory norm<sup>4</sup> with *erga omnes* obligations. The status of the slave trade stands uncontested as a treaty-based and customary-based international

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<sup>1</sup> Permanent Mission of the Republic of Sierra Leone to the United Nations, [Statement by H.E. Dr. Michael Imran Kanu, Ambassador and Deputy Permanent Representative](#), U.N.G.A. Res. Sess., Sixth Comm., Agenda Item 78: “Crimes Against Humanity” Second Cluster: Definition and General Obligations (Articles 2, 3 and 4), ¶ 10, 77th Sess. (Apr. 11, 2023).

<sup>2</sup> *Draft Articles on Prevention and Punishment of Crimes Against Humanity, With Commentaries, in Int’l Law Comm’n, Rep. on the Work of Its Seventy-First Session*, U.N. Doc. A/74/10, ¶ 44-45, art. 2(1)(c) (2019) [hereinafter ILC Draft with Commentaries].

<sup>3</sup> ILC Draft with Commentaries *supra* note 2, at art. 2(1)(g).

<sup>4</sup> See Restatement (Third) of Foreign Relations of the United States, § 702 cmts. d–i, § 102 cmt. K (1987); see also E.J. Criddle and E. Fox-Decent, [A Fiduciary Theory of Jus Cogens](#), 34 Yale J. Int’l L. 331, 331 (2009); M.C. Bassiouni, [International Crimes: Jus Cogens and Obligatio Erga Omnes](#), 59 L. CONTEMP. PROBS. 63, 70-71 (1996).

crime,<sup>5</sup> a crime against humanity,<sup>6</sup> and a nonderogable human rights violation.<sup>7</sup> The slave trade protects against serious conduct that requires redress in all circumstances, including during a widespread or systematic attack against a civilian population. This brief supports Sierra Leone’s proposal and advances the reasons for the Draft Articles to incorporate a provision for the slave trade as a crime against humanity.

## II. The Slave Trade’s Definition

3. As defined, the slave trade prohibits the intent to bring a person into a situation of enslavement or to acquire or dispose of an enslaved person with a view to maintaining them in a situation of enslavement.<sup>8</sup> Simply stated, the slave trade outlaws the abduction, kidnapping, or transfer of any person, regardless of, *inter alia*, age, race, gender, migration, refugee, or statelessness status from being reduced to or maintained in any form of enslavement. The structural factors driving the targeting for and perpetration of the slave trade, such as who is traded, why they are traded, for what purpose they are traded, and their eventual situation of enslavement, often is founded on intersecting discriminatory grounds, such as race, socioeconomic situation, age, nationality, refugee or migration status, ethnicity, gender, or disability.

4. Additionally, the slave trade condemns the transport, transfer, sale, exchange, or disposal by any means of an enslaved person to subsequent situations of enslavement. The abduction, sequestering, or rounding up of children or adults with the intent to enslave them as porters for a militia group are acts of the slave trade. The distribution and re-distribution of enslaved migrants, so-called “bush wives,” or child soldiers are acts of the slave trade.

5. As proscribed conduct, the focus is on the perpetrator’s intent to reduce an individual into, or maintain a person in, a situation of enslavement. From a legal perspective, it is irrelevant whether a person who is reduced to enslavement or further maintained in enslavement gives or could have given

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<sup>5</sup> Many of the 19th-century anti-slave trade treaties recognized the imposition of penal sanction for slave trading, 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., [Bassiouni](#), *supra* note 4, at 447–48, 456. *But see* C. Krefß, [International Criminal Law](#), in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (MPEPIL). Nonetheless, the *stricto sensu* conditions for international crimes appear to be met for the slave trade: (1) provisions provide for international individual criminal liability; (2) the norm against the slave trade has *ius cogens* status and, thus, proscription exists in all forms, under any circumstances, and bars immunities; and (3) the slave trade prohibition could be enforced directly under international criminal jurisdiction, or indirectly by a national court through international *ius puniendi*, exercised under universal jurisdiction.

<sup>6</sup> [Declaration of the EU-CELAC Summit 2023](#) No. 12000/23 of 18 July 2023, ¶ 10.

<sup>7</sup> [International Covenant on Civil and Political Rights](#) art. 8(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; [Universal Declaration of Human Rights](#) art.4, Dec. 8, 1948 G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); Org. of African Unity, [African Charter on Human and Peoples’ Rights](#) art. 5, June 27, 1981, 1520 U.N.T.S. 217, OAU Doc. CAB/LEG/67/3 rev. 5 (1981) [hereinafter African Charter]; Org. of American States, [American Convention on Human Rights “Pact of San José, Costa Rica”](#) art. 6, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention]. As a fundamental human rights violation, the slave trade can also constitute evidence of persecution on any prohibited ground.

<sup>8</sup> [The Convention to Suppress the Slave Trade and Slavery](#) art. 1(2), Sept. 25, 1926, 46 Stat. 2183, 2191, 60 L.N.T.S. 253, 263 [hereinafter 1926 Slavery Convention]; [Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practice Similar to Slavery](#) art. 7(c), Apr. 30, 1957, 266 U.N.T.S. 3 [hereinafter 1956 Supplementary Slavery Convention]. The slave trade means “all acts involved in the capture, acquisition or disposal of a person with intent or knowledge to reduce that person to slavery; all acts involved in the acquisition of an enslaved person with a view to selling or exchanging that person; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of an enslaved person by whatever means of conveyance.”

genuine consent. Slave trading's occurrence is not at all conditioned upon an enslaved person's consent.

6. Likewise, the presence or absence of coercive circumstances is immaterial for establishing acts of the slave trade. Even when a perpetrator trades or gifts persons in situations of enslavement who willingly consign themselves to another perpetrator of enslavement who treats them well, the perpetrators commit acts of the slave trade. The slave trader's intention to reduce persons to enslavement, or to maintain them in situations of enslavement is not abrogated when the slave trade is conducted with another slave trader, or when the person in receipt of the person decides not to enslave them or maintain them in enslavement. These scenarios still would amount to acts of the slave trade.

7. The status of the slave trader is not circumscribed. Slave traders might originate from the same national group as the enslaved, such as in the case of Eritrean slave traders slave trading Eritrean migrants in Libya, or Boko Haram slave trading children in Nigeria. Lastly, as explained in the following section, a slave trader is not necessarily an enslaver, although an enslaver could engage in acts of the slave trade in addition to acts of enslavement.

### **III. The Slave Trade's Relation to Slavery, Enslavement, and Sexual Slavery**

8. The slave trade and enslavement are distinct international crimes. The slave trade includes those precursory acts committed against persons prior to their slavery subjugation as well as any subsequent acts of acquisition or disposal that occur during or after the span of a person's enslavement. Draft Article 2(2)(c) defines enslavement using the 1926 Slavery Convention definition of slavery: "the exercise of any or all of the powers attaching to the right of ownership over a person."<sup>9</sup> The ICC's Rome Statute's *Elements of Crimes* defines enslavement as occurring when "[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."<sup>10</sup> Although the Rome Statute definition of enslavement differs from the 1926 Slavery Convention and international customary law definitions by including *certain* slave trade conduct, such as purchasing, selling, lending, or bartering, the provision omits explicit reference to the slave trade. Thus, neither the Rome Statute nor the Draft Articles provisions cover acts of the slave trade that do not also include the exercise of powers of ownership over a person.

9. Similarly, although the Draft Articles do not define sexual slavery, the ICC's Rome Statute's *Elements of Crimes* outlines the elements of sexual slavery to require elements of the crime of enslavement<sup>11</sup> plus the additional element of causing a "person or persons to engage in one or more acts of a sexual

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<sup>9</sup> ILC Draft with Commentaries, *supra* note 2, at art. 2(2)(c). In addition to the definition of slavery from the 1926 Slavery Convention, the language of the draft includes conduct of human trafficking. The full definition under art. 2(2)(c) reads: "enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."

<sup>10</sup> Int'l Crim. Ct., *Elements of Crimes (as amended)*, 2nd November 2000 (ICC-ASP/1/3 (Pt II-B), UN Doc PCNICC/2000/1/Add.2), at art. 7(1)(c) [hereinafter *Elements of Crimes*].

<sup>11</sup> Under the Elements of Crimes, enslavement is when "[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty." *Elements of Crimes, supra* note 10, at art. 7(1)(c). As will be explained, *infra*, the elements include some *actus reus* of the slave trade but omit any slave trade criminal conduct that does not include the exercise of powers attaching to the right of ownership over a person.

nature.”<sup>12</sup> Given the identical phrasing of their first elements under treaty law, the *sine qua non* of slavery, enslavement, and sexual slavery resides in the exercise of any or all powers attaching to the rights of ownership over a person.

10. For example, the *Ongwen* case demonstrated the exercise of powers attaching to the right of ownership over these enslaved persons’ sexuality, sexual integrity, and sexual and reproductive autonomy. Ongwen exercised powers of ownership by perpetrating rapes against enslaved “bush wives,”<sup>13</sup> thus committing sexual slavery reliant on a narrow interpretation of the second element of sexual slavery<sup>14</sup> and grooming enslaved girl-child *ting tings* until the onset of menstruation to become “wives,”<sup>15</sup> thus committing sexualized enslavement reliant on the first element of enslavement. The *Ongwen* case also proved beyond a reasonable doubt that Ongwen exercised powers of ownership over those enslaved by directing their constant abductions and redistributions whether to other militia units or to the homes of other fighters.<sup>16</sup>

11. Under international treaty and customary law, however, such acquisition, distribution, and redistribution indicative of the slave trade does not require that a perpetrator exercise any powers of ownership over a person.<sup>17</sup> The slave trade is not premised on the exercise of any powers of ownership over any person prior to, during, or after enslavement. The slave trade is a distinct and separate crime from enslavement and sexual slavery. It is neither a lesser included offense nor merely a means of

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<sup>12</sup> *Elements of Crimes*, *supra* note 10, at art. 7(1)(g)-2.

<sup>13</sup> [Amici Curiae Observations on Sexual- and Gender-Based Crimes, Particularly Sexual Slavery, and on Cumulative Convictions Pursuant to Rule 103 of the Rules of Procedure and Evidence](#), Prosecutor v. Dominic Ongwen (ICC-02/04-01/15-1934), ¶ 18 [hereinafter Ongwen Amicus Brief]; [Ongwen Trial Judgment](#), ¶ 3086. The Rome Statute criminalizes enslavement as a crime against humanity but does not criminalize slavery as a war crime. While the Rome Statute does not include slavery (or the slave trade) under Article 8, slavery and the slave trade are war crimes. See [Lieber Code](#) (1863), arts. 42, 58; [IMT Charter \(Nuremberg\)](#) (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); Int’l Committee of the Red Cross, [Study on Customary International Humanitarian Law: Practice Related to Rule 94: Slavery and Slave Trade](#).

<sup>14</sup> Granted, sexual slavery includes a burden to prove an additional element – that the victim is caused to engage in one or more acts of a sexual nature – which discriminates against some victims-survivors of enslavement. See Ongwen Amicus Brief, *supra* note 13. Sexual slavery requires an “act” while enslavement does not (control over sexual autonomy, reproductive autonomy, sexuality is also included). Thus far, SS has been used to redress heteronormative male-on-female rapes during enslavement only – reductive and feminized, leading to impunity.

<sup>15</sup> [Ongwen Trial Judgment](#), ¶¶ 2819, 3073 (describing physical and sexual violence to find torture as a crime against humanity and war crime), 2100, 2146 (collecting young girls free of HIV or other diseases), 2249-50 (checking for breast development and menstruation), 2251 (“if a girl was still very young, she was ‘nurtured’, ‘kept to grow until when she’s fit to be given out to a man’ [... deciding] that a girl was ‘old enough to be given to a man as a wife.’”). The girl-child *ting tings* who were not subjected to rape or other “act of a sexual nature” were not characterized as sexually enslaved, nor were they characterized as sexual slaves as war crimes under Article 8. Article 8 provisions are not analogous to enslavement under Article 7 and, therefore, cannot precisely characterize such criminal conduct.

<sup>16</sup> Patrica Viseur Sellers & Jocelyn Getgen Kestenbaum, [Conflict-Related Sexual Violence Symposium: Conversations Under the Rome Statute—Enslavement and Slave Trade](#), OPINIOJURIS (Nov. 6, 2021); see Ongwen Amicus Brief, *supra* note 13, ¶¶ 10, 19. The undersigned advance that the meaningful congruence of the first elements of enslavement and sexual slavery (“The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”) makes these separate provisions redundant and confusing. The undersigned thus argue for enslavement to encompass the perpetrator’s exercise of any or all of the powers attaching to the right of ownership over sexual integrity, and sexual and reproductive autonomy, as well as any acts or omissions of a sexual nature in which the perpetrator causes an enslaved person to engage. Simply stated, “sexualized” enslavement encompasses all conduct that sexual slavery separately proscribes.

<sup>17</sup> 1926 Slavery Convention, *supra* note 8, at art. 1(2); 1956 Supplementary Slavery Convention, *supra* note 8, at art. 3.

aiding and abetting any form of slavery.<sup>18</sup> Critically, the slave trade and slavery, as envisioned under international treaty<sup>19</sup> and customary law,<sup>20</sup> function as a legal framework to prevent and condone the entirety of the reduction of a person to slavery, their enslavement and their further enslavement, regardless of the form of slavery to which a person is reduced.

**12.** While often functioning in tandem with slavery, the slave trade may be perpetrated without previous or subsequent enslavement<sup>21</sup> and regardless of whether the individual is caused to engage in an act of a sexual nature.<sup>22</sup> Pursuit of the slave trade as a separate prohibition can act to prevent enslavement and sexual slavery, or to cease their duration. Consequently, failure to enumerate a provision for the slave trade in the Draft Articles detrimentally impacts the redress of survivors who have endured the slave trade prior to, in between, or after enduring enslavement and/or sexual slavery. Neither the crime of enslavement nor the crime of sexual slavery under the Draft Articles provide an effective accountability avenue for the separate, yet interlinked, acts of the slave trade.

**13.** Thus far, international criminal law instruments and related jurisprudence have bifurcated slavery into enslavement (i.e., subjugated labor and as fighters mainly perpetrated against men and boys, or household or domestic work with women and girls) and sexual slavery (i.e., conjugal slavery, heteronormative rape perpetrated against cis-gender women and girls in captivity by cis-gender men), while falling short of accounting for the slave trade (i.e., kidnappings, abductions, transfers, etc. with the intent to enslave or maintain a person in slavery) as criminal conduct altogether.

**14.** This crucial oversight leaves an impermissible impunity gap—a gap that could be closed with respect to state responsibility if rectified through the Draft Articles inclusion of the slave trade provision—whenever the commission of the slave trade exists as part of a widespread or systematic attack against a civilian population. The absence of the slave trade in the Article 7 provisions for crimes against humanity in the Rome Statute can be viewed as a structural deficiency. The inability to access comprehensive redress for the totality of slavery and slave trade harms suffered by a population of enslaved victim-survivors also could be discriminatory on the basis of, *inter alia*, race, gender, and age.<sup>23</sup> As a distinct, identifiable group or collectivity of civilians, those victims-survivors of the slave trade have been persecuted, in that they have been severely deprived of the fundamental right to be free

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<sup>18</sup> Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *Missing in Action: The International Crime of the Slave Trade*, 18 J. Int'l Crim. Just. 517, 536–37; see Jocelyn Getgen Kestenbaum, *Disaggregating Slavery and the Slave Trade*, 16 FIU L. REV. 515, 542–54 (2022).

<sup>19</sup> 1926 Slavery Convention, *supra* note 8; 1956 Supplementary Convention, *supra* note 8; 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) art. 2(f), June 8, 1977, 1125 U.N.T.S. 609; ICCPR, *supra* note 7; Universal Declaration of Human Rights, *supra* note 7, at art. 4; African Charter, *supra* note 7; American Convention, *supra* note 7; European Convention on Human Rights art. 4, Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>20</sup> See [Lieber Code](#) (1863), arts. 42, 58; [IMT Charter \(Nuremberg\)](#) (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); Int'l Committee of the Red Cross, [Study on Customary International Humanitarian Law: Practice Related to Rule 94: Slavery and Slave Trade](#).

<sup>21</sup> Enslavement or slavery crimes can also occur without the slave trade in rare instances when a person is born into a situation of slavery.

<sup>22</sup> The enumerated crime of “sexual slavery” under the Rome Statute is defined as slavery or enslavement (a perpetrator exercises any of the powers attaching to the right of ownership over a person) plus the perpetrator causes a “person or persons to engage in one or more acts of a sexual nature.” Rome Statute of The International Criminal Court art. 7(1)(g), 2187 U.N.T.S. 90, entered into force July 1, 2002 [hereinafter ICC Rome Statute]; *Elements of Crimes*, *supra* note 10, at art. 7(1)(g)-2.

<sup>23</sup> Ongwen Amicus Brief, *supra* note 13, ¶¶ 13-21.

from the slave trade and/or to be free from slavery. If replicated in the Draft Articles, the structural omission of a slave trade provision will engender wide impunity gaps for state responsibility for slavery crimes perpetration. Adjudication of acts of the slave trade, redress for such acts, including pronouncement of liability and attendant reparations, should be viewed as part of a state's responsibility for its *erga omnes* obligations. The Draft Articles currently allow for state complacency, impunity for slave traders who do not exercise powers attaching to the right of ownership over persons, and the denial of unbearable harms to civilians who endure acts of the slave trade as part of a widespread or systematic attack.<sup>24</sup>

15. In recognition of their peremptory norm obligations to eradicate slavery and the slave trade, the undersigned recommend that States adopt the Republic of Sierra Leone's proposal and enumerate the slave trade as a distinct provision of the Draft Articles.<sup>25</sup>

#### IV. The Slave Trade's Relation to Trafficking in Persons

16. The Draft Articles in Article 2(2)(c) replicate the Rome Statute's Article 7(2)(c) description of enslavement that includes the phrase "trafficking in persons."<sup>26</sup> Trafficking in persons is not an international crime; rather, it is a transnational crime and a human rights violation.<sup>27</sup> Like the Rome Statute, the Draft Articles would not include jurisdiction over trafficking in persons as a transnational crime.

17. The ICC's Rome Statute's *Elements of Crimes* refers to trafficking in persons, especially women and children, not as a crime<sup>28</sup> but as an example of conduct that might be evidence of enslavement's exercise of any or all the powers attaching to the right of ownership over a person. Accordingly, trafficking in persons is neither a crime,<sup>29</sup> a separate provision, nor the equivalent of enslavement under the Rome Statute.<sup>30</sup> Given that the exact language is replicated in the Draft Articles, trafficking

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<sup>24</sup> These harms are and continue to be covered under customary international law.

<sup>25</sup> E.g., Dire Tladi (*Special Rapporteur on Jus Cogens*), Int'l Law Comm'n, Fourth Rep. on Peremptory Norms of General International Law (*Jus Cogens*), at 25 n.153.

<sup>26</sup> Compare ICC Rome Statute, *supra* note 22, at art. 7(2)(c) ("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"), with ILC Draft with Commentaries, *supra* note 2, at art. 2(2)(c) ("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").

<sup>27</sup> [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](#) art. 35, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>28</sup> *Elements of Crimes*, *supra* note 10. But see Women's Caucus recommendations that suggest not including the trafficking definition as the Palermo Protocol was being drafted concurrently with the Rome Statute of the ICC. [Recommendations & Commentary to The Elements Annex and Rules of Procedure and Evidence](#), WOMEN'S CAUCUS FOR GENDER JUST. (June 12, 2000).

<sup>29</sup> The ICC's Office of the Prosecutor (OTP) supports this conclusion, noting that the Court has jurisdiction over enumerated crimes, which does not include trafficking in persons. The OTP's 2016-2018 strategic plan states that "ICC crimes usually do not occur in isolation from ... other types of criminality, such as ... transnational organised criminal activity. ICC Office of the Prosecutor, [Strategic Plan 2016–2018](#), § 30 (6 July 2015); see ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, 16-17 (2014) (describing jurisdiction over enumerated crimes contained in article 7 in which trafficking in persons is not listed as an enumerated crime); N. Siller, "Modern Slavery" Does International Law Distinguish between Slavery, Enslavement and Trafficking?, 14 J. Int'l CRIM. JUST. 405, 415 (2016). As a transnational and domestic crime only, trafficking in persons is more limited in that the crime includes, for example, a statute of limitations.

<sup>30</sup> P. Viseur Sellers, *Q&A, The Nexus Between Conflict-Related Sexual Violence and Human Trafficking for Sexual Exploitation in Times of Armed Conflict During Court Proceedings: An Insider's View*, 3 J. TRAFFICKING HUM. EXPLOITATION (JTHE) 147-58 (2019).



in persons under the enslavement and sexual slavery provisions also is conduct that can be evidence of the exercise of powers attaching to the right of ownership over a person.

**18.** The purpose of enumerating a provision of the slave trade in the Draft Articles is to eradicate the reduction of persons into slavery and the trade or transport of enslaved persons from one situation of slavery to another.<sup>31</sup> Certain instances of trafficking in persons governs the exploitation of persons into the slave trade and slavery. The slave trade similarly condemns the forms of reducing persons into slavery and the transporting of slaves.<sup>32</sup> While a thin and overlapping factual line exists between subjugation by the slave trade and exploitation by trafficking, there are important legal distinctions between the international crime of the slave trade and the transnational crime of trafficking in persons.<sup>33</sup>

**19.** Trafficking in persons resembles the slave trade; thus, trafficking has often been conflated or confused with slavery and the slave trade, which has led to an erasure of the slave trade.<sup>34</sup> Notwithstanding, the slave trade, unlike trafficking, does not require proof of a use of force or other coercive circumstances nor does the slave trade differentiate between the age of the victims to determine the relevance of consent. As discussed above, the consent of the victim/survivor is legally immaterial to establishing the slave trade.

**20.** Additionally, the slave trade, unlike trafficking, does not require a person to have citizenship of any state. The state's *erga omnes* obligation to prevent the slave trade exists irrespective of the migrant, refugee, or stateless person status of the traded person. Nor is this obligation subject to domestic statutes of limitations which create a structural barrier to redress under trafficking laws, especially for displaced and stateless persons.

**21.** Furthermore, the slave trade, unlike trafficking, does not require that a person be subjected to a form of exploitation. The slave trade is premised on the intent of perpetrators to act to reduce persons to enslavement, even if the enslavement does not occur. However, neither trafficking nor the slave trade requires the exercise of any powers of ownership over the person who is trafficked or slave traded. Therefore, as drafted, Article 2(2)(c) of the Draft Articles would describe conduct to satisfy enslavement when citing to trafficking acts *only if those acts* evince the exercise of powers attaching to the right of ownership. Consequently, the phrase that includes trafficking in persons under the Draft Articles is superfluous and ripe for removal.

**22.** Prosecutions in national courts of slavery crimes, such as those addressing slavery harms perpetrated against the Yazidi in Iraq underway in Germany and the Netherlands<sup>35</sup> or against migrants in Libya on trial in the Netherlands,<sup>36</sup> demonstrate how the conflation between trafficking in persons and the slave trade leads in practice to the prioritization of trafficking charges while slave trade harms

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<sup>31</sup> H. van der Wilt, *Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts*, 13 Chinese J. Int'l L. 297, 303 (2014).

<sup>32</sup> *Id.* The slave trade's *mens rea* aligns with slavery objective because the purpose of transportation is to reduce the victim to the ownership of another. *Id.*

<sup>33</sup> See Jocelyn Getgen Kestenbaum, *Prohibiting Slavery & The Slave Trade*, 63 Va. J. Int'l L. 51, 81-91.

<sup>34</sup> *Id.*

<sup>35</sup> Priyanka Shankar, [The Netherlands takes steps to prosecute crimes against the Yazidi](#), ALJAZERA (July 12, 2023); Kathryn Armstrong, [Islamic State: Woman jailed in Germany for keeping Yazidi woman as slave](#), BBC (Jun. 22, 2023).

<sup>36</sup> See [Ethiopia extradites trafficker to the Netherlands in criminal case on migration crime](#), NETHERLANDS PUB. PROSECUTION SERV. (Oct. 5, 2023); Lucas Mafu, [The Libyan/Trans-Mediterranean Slave Trade, the African Union, and the Failure of Human Morality](#), 9 SAGE OPEN, no. 1, 2019.



remain legally uncharacterized and thus unredressed. Even if a jurisdiction has a stand-alone provision outlawing the slave trade, such as Article 274 of the Dutch Criminal Code, it is rarely if ever used in cases that present a wealth of evidence on slave trade perpetration.<sup>37</sup> Including the slave trade as an expressed provision in the Draft Articles will render visible these harms as criminal conduct also of the slave trade and encourage national jurisdictions to pursue accountability for trafficking, slavery and slave trade harms concurrently through respective legal frameworks available to them.

## V. Recommendations

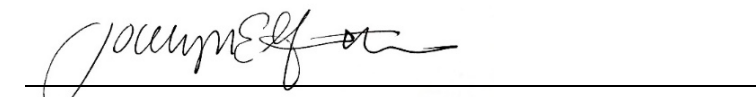
23. The proposals by the Republic of Sierra Leone to enumerate a provision for the slave trade in the Draft Articles are meritorious. Enumeration of the slave trade as a crime against humanity will quickly and significantly rectify a drafting oversight and its consequent impunity gap. Most importantly, such an enumeration will provide redress for the serious acts of the slave trade. Such a provision, based in *jus cogens* and customary international law, underscore state obligations to protect the civilian population from violations of the slave trade while reinforcing the prevention and suppression of all forms of slavery under crimes against humanity.<sup>38</sup>

Accordingly, the visual graphic representing this change is set forth in Annex A and the suggested revised drafting language is set forth in Annex B.

Signed:



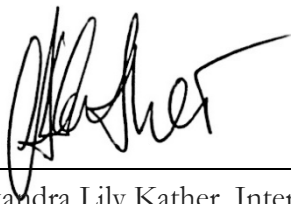
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<sup>37</sup> See *supra*, Section II, for examples of the slave trade.

<sup>38</sup> The undersigned are grateful to Brett Jones, Charles E. Scheidt Human Rights Clinical Teaching Fellow of the Benjamin B. Ferencz Human Rights and Atrocity Prevention Clinic, for their research and editing support.



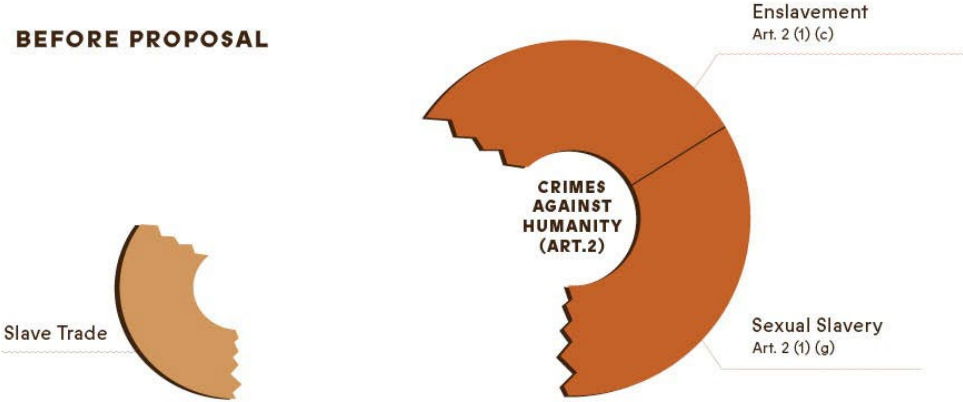
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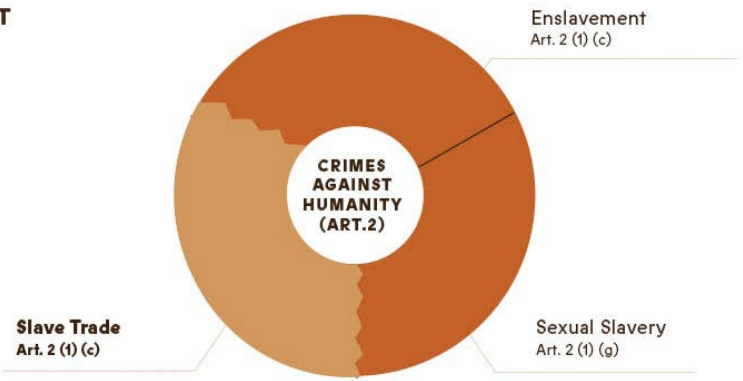
Dated this 15th day of September 2023

Annex A: Graphic

**BEFORE PROPOSAL**



**AFTER REDRAFT**



## Annex B: Suggested Revised Language

### Article 2

#### Definition of crimes against humanity

1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(...)

- (c) enslavement, and/or the slave trade;

(...)

2. For the purpose of paragraph 1:

(...)

(c) “the slave trade” means “all acts involved in the capture, acquisition or disposal of a person with intent or knowledge to reduce that person to slavery; all acts involved in the acquisition of an enslaved person with a view to selling or exchanging that person; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged, and, in general, every act of trade or transport of an enslaved person by whatever means of conveyance; and “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.~~

(...)