CONTRIBUTION TO THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT ON SLAVERY CRIMES[1]

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ABSTRACT
This contribution, developed by researchers of the *Núcleo de Estudos sobre a Internacionalização do Poder Punitivo* (Study Centre on the Internationalisation of Punitive Power) of Universidade Federal do Paraná's Law School and Postgraduate Program in Law, concerns a public consultation launched by the Office of the Prosecutor (OtP) of the International Criminal Court (ICC) for its new Policy on Slavery Crimes. The input's objective is to enhance the OtP's approach to and effectiveness in the investigation and prosecution of slavery crimes (crime against humanity of enslavement and sexual slavery and war crime of sexual slavery) under the Rome Statute. The contribution is divided in three parts: first, it delves into contemporary manifestations of slavery, examining slave labour and the ICC's jurisdiction, advocating for a survivor-centred, broader and comprehensive understanding of slavery. Then, it explores individual criminal responsibility for omissions in slavery crimes as a means of eradicating impunity and guaranteeing that such offences do not go unpunished. Finally, it discusses the importance of prosecuting slavery crimes through a decolonial lens, emphasising that the ICC in general, and not just the OtP, should be cognisant of the fact that the majority of slavery victims hail from the Global South, each with their own cultural and historical contexts, something that may not be adequately understood and protected according to Western interests or standards and therefore may require specific, bottom-up approaches.

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KEYWORDS
International Criminal Court. Office of the Prosecutor. Slavery. Omission. Decoloniality.

The **Study Centre on the Internationalisation of Punitive Power**, a research, teaching and outreach group established in the Postgraduate Program in Law and School of Law of Universidade Federal do Paraná (UFPR), Brazil, hereby offers its submission and welcomes the opportunity to provide its comments on the Office of the Prosecutor (OtP)'s new Policy Paper on Slavery Crimes.

Slavery is not a crime for almost half the countries in the world today[3]. Because the Rome Statute criminalises such practice, the ICC faces the pressing task to ensure the protection of enslaved victims in contexts of armed conflict, crimes against humanity, or genocide, either by encouraging States to prosecute such crimes or by prosecuting them itself due to unwillingness or inability.

There are three international crimes related to slavery in the Rome Statute: article 7(1)(c), crime against humanity of enslavement; article 7(1)(g)-2, crime against humanity of sexual slavery; and articles 8(2)(b)(xxii)-2 and 8(2)(e)(vi)-2, war crime of sexual slavery. Our comments are related to all three crimes.

This input will highlight three critical issues that we believe the OtP should consider when crafting its forthcoming Policy Paper and prosecuting slavery crimes. Firstly, we will delve into contemporary manifestations of slavery, examining slave labour and the ICC's jurisdiction, advocating for a survivor-centred, broader and comprehensive understanding of slavery. Next, we will explore individual criminal responsibility for omissions in slavery crimes as a means of eradicating impunity and guaranteeing that such offences do not go unpunished. Lastly, we will briefly discuss the importance of prosecuting slavery crimes through a decolonial lens, emphasising that the ICC in general, and not just the OtP, should be cognisant of the fact that the majority of slavery victims hail from the Global South, each with their own cultural and historical contexts, something that may not be adequately understood and protected according to Western interests or standards and therefore may require specific, bottom-up approaches.

1 SLAVERY AND ITS CONTEMPORARY FORMS: SLAVE LABOUR AND THE JURISDICTION OF THE ICC

The concept of slavery encompasses various interpretations depending on the criteria applied for its definition, which have evolved over time. To elucidate the elements used to delineate what

[3] See the Antislavery in Domestic Legislation database, available at https://antislaverylaw.ac.uk/map/.

constitutes slavery in the context of international tribunals, we will examine rulings and treaties that address this offence.

The Slavery Convention, adopted on September 25, 1926, defines slavery in article 1 as a status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. Additionally, in Article 2, it outlines actions that could be qualified as slave trades. It is noteworthy that article 5 stipulates that forced labour for public purposes is exempt from the classification of slavery. The Supplementary Convention on the Abolition of Slavery of 1956 upholds the definition of slavery outlined in the Slavery Convention.

In 1950, the European Convention on Human Rights was adopted in Rome, explicitly prohibiting slavery and forced labour as two distinct elements in article 4.

In *Prosecutor v. Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic*, commonly referred to as the *Kunarac* case, adjudicated by the ICTY Appeals Chamber in 2002, slavery was defined as encompassing “the exercise of any or all of the powers attaching to the right of ownership over a person” (ICTY, 2002b, para. 116). Therefore, enslavement was interpreted primarily in terms of the powers of possession exerted over the enslaved. The ruling stemming from this case also signifies that the traditional notion of slavery, as delineated in the aforementioned Slavery Convention, has evolved to encompass contemporary forms of slavery, which may entail, in addition to powers of possession, “the destruction of the juridical personality” (ICTY, 2002b, para. 117) to some extent, along with the intention to do so. It is worth noting that in this case, the Court emphasised that the absence of consent does not constitute an element of the crime.

This decision supports the factors enumerated by the Trial Chamber in its *Kunarac* ruling, which serve as indicators of enslavement. These factors include the "include the 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labo[u]r'" (ICTY, 2002b, para. 119).

In 2002, in *Krnojelac*, the ICTY Trial Chamber revisited the notion of slavery in alignment with the Appeals Chamber’s ruling in the *Kunarac* case, underscoring slavery as a violation of International Humanitarian Law and as a crime against humanity under the Nuremberg Charter and the Tokyo Charter (ICTY, 2002a, para. 352). Furthermore, the Trial Chamber affirmed that "the prohibition against slavery is customary in nature”, thereby establishing individual criminal accountability for those who perpetrate it (ICTY, 2002a, para. 353-355). The Trial Chamber also underscored the criteria for considering forced labour as a form of slavery, namely: i) the accused compelled detainees to work; ii) the exercise of any or all powers associated with the right of

ownership over them was present; iii) the accused intentionally imposed those powers. Additionally, the link between compulsory labour or service and slavery was reiterated, underscoring that it can serve as an indication of the occurrence or absence of slavery (ICTY, 2002a, para. 358; 2002b, para. 542).

Indeed, the *Kunarac* and *Krnojelac* cases highlight a significant historical aspect of the problem that the ICC could reinforce. It is evident that the context in which slavery treaties were formulated in the 1920s (and even in the 1950s) does not fully address the complexities of contemporary slavery currently. Therefore, updating the concept is not merely an expansion of its interpretation, but rather a necessary contextual, historical and systemic approach to a long-standing persistent issue. Had the ICTY Appeals Chamber ruled differently in *Kunarac*, it would have diminished the historical significance of the concept of slavery and represented a regression in the evolution of international criminal justice.

The significant step taken by the ICTY should be mirrored by the OtP. There are numerous situations that degrade the humanity of victims and should be amount to slavery, even if they may differ from the classical perspective of the crime established in international criminal justice jurisprudence and norms. Expanding the concept cannot not be taken as a violation of article 22(2) of the Rome Statute, which calls for a restrictive interpretation of crimes, because interpretation should not nullify the application of a legal provision. Hermeneutics seeks to clarify the law, not render it void or ineffective. Therefore, for an effective, systematic and functional interpretation as required by article 21(3) of the Rome Statute, the ICC must undertake a historical and case-specific understanding of the legal concept.

Hence, it is crucial to explore a broader array of definitions of this crime, as exemplified by the experiences of Global South countries. The notion of property as the determinant factor of slavery is inherently Eurocentric, as it frames the phenomenon from the perspective of the owner, thereby disregarding the viewpoint of the victim. Such a restrictive approach risks constructing an imperfect, incomplete and unrealistic concept of enslavement and slavery. Conversely, the OTP should opt for a pluralistic and comprehensive interpretation of these international crimes should it seek to align itself with effective human rights promotion and protection.

Some examples of these contemporary forms of slavery mentioned in international jurisprudence extend far beyond the “classic” manifestations of this international crime. Here are some examples.

In the 2008 case of *Hadidjatou Mani Koraou v. Republic of Niger*, the Community Court of Justice of the Economic Community of West African States (ECOWAS) indicated that “it is trite that

slavery may exist without the presence of torture" (ECOWAS, 2008, para. 79), emphasising that the legally relevant factor is the legal deprivation of freedom through force or other forms of restriction.

In the 2009 Special Court for Sierra Leone case of *Prosecutor v. Sesay, Kallon and Gbao*, it was stated that the elements of the crime of enslavement include not only the exercise of power attaching to the right of ownership over a person but also "the intent to exercise the act of enslavement or acted in the reasonable knowledge that this was likely to occur" (SCSL, 2009, para. 197).

In 2012, in *Prosecutor v. Kaing Guek Eav*, also known as the Duch Case, Extraordinary Chambers in the Courts of Cambodia stated, in agreement with *Kunarac* Trial Chamber ruling, that forced labour " is a sufficient but not necessary prerequisite for enslavement as a crime against humanity" (ECCC, 2010, para. 126). This assertion promotes an essential approach to the concepts of slavery and forced labour for formulating an expanded conception of the crime of slavery, as we will explore further.

Similarly, in the 2012 *Prosecutor v. Charles Ghankay Taylor*, consent is once again considered within the concept of slavery. In this instance, consent is required to establish forced labour as a form of slavery, although objective evidence is necessary to establish the connection between these crimes (SCSL, 2012, para. 448).

Finally, in *Workers of Fazenda Brasil Verde v. Brazil*, the Inter-American Court of Human Rights (IACrtHR) made it clear that the definition has evolved, no longer limiting itself to the ownership of the person but involving at least two other elements: (i) the condition of the victim, dispensing the existence of a formal document for its characterisation, and (ii) the sense of ownership/property over the victim (IACrtHR, 2016, para. 294 *et seq.*).

International case law on slavery, when defining it as the exercise of the attributes inherent to the right to property, links slavery to the exercise of control over the victim rather than to the right to ownership itself. In this sense, prohibition of slavery also encompasses situations of *de facto* slavery, where there are no legal structures guaranteeing people's property, but the material conditions demonstrate the exercise of power over victims in various situations, such as forced labour, forced marriage, and human trafficking.

"It is not about owning people in the traditional sense of the old slavery, but about controlling them completely" (Bales, 2012, p. 41). According to the standards of International Criminal Law and International Human Rights Law, (which is, to some degree, applicable according to article 21(3) of the Rome Statute), this control is not only manifested physically but also encompasses psychological and moral coercion.

From this perspective, the crime of slavery, as established in article 7 of the Rome Statute,

encompasses forced or slave labour, defined as “all work or service required of an individual under threat of any penalty and for which he did not volunteer voluntarily", as stated in article 2(1) of ILO Convention No. 29. This definition is further elaborated upon by Article 1 of ILO Convention No. 105, which delineates five scenarios:

> a) as a measure of coercion, or political education or as a sanction directed at people who have or express certain political opinions, or express their ideological opposition to the established political, social or economic order;
> b) as a method of mobilizing and using labour for economic development purposes;
> c) as a work discipline measure;
> d) as punishment for participation in strikes;
> e) as a measure of racial, social, national or religious discrimination.

The IACrtHR, in *Workers of Fazenda Brasil Verde v. Brazil*, defined forced labour as primarily characterised by the victim’s lack of voluntariness. This absence of consent may arise when an individual expresses opposition to the work, or when consent is compromised by coercion or deception, circumstances equivalent to the absence of consent in contemporary slave labour. The concept of the victim's freedom, viewed through the lens of human dignity, encompasses both physical and psychological freedom. The Inter-American Court recognised that situations of slavery entail a significant curtailment of an individual's legal personality and represent violations of rights such as personal integrity, freedom, and dignity, depending on the specific circumstances of each case.

Regarding forced labour, the ILO, in its ILO Indicators of Forced Labour document, established 11 indicators of the occurrence of forced labour: exploitation of vulnerability, fraud, restriction of movement, isolation, physical and sexual violence, threats and intimidation, confiscation of identity documents, retention wages, debt bondage, degrading working conditions and excessive working hours. The ILO asserted that the presence of any of these indicators in a particular situation may indicate forced labour, while in other cases, analysis of multiple indicators may be necessary. “Overall, the set of eleven indicators covers the main possible elements of a forced labour situation, and hence provides the basis to assess whether or not an individual worker is a victim of this crime” (ILO, 2012).

In Brazil, contemporary slave labour is criminalised in article 149 of the Penal Code, which outlines four distinct behaviours constituting the crime: forced labour, excessively long working hours, degrading working conditions, and debt bondage. Hence, Brazilian criminal law identifies scenarios that infringe upon the dignity and freedom of individuals. According to research on the stance of the Brazilian Superior Labour Court (SLC), as explained by Miraglia, contemporary slave labour stands in stark contrast to decent work, with cases involving degrading working conditions

forming the majority of those adjudicated by the SLC (Miraglia, 2020, p. 125-144).

According to the Walk Free Foundation, approximately 28 million people are victims of this type of crime, with women, migrants, young persons, and workers with low education being the most vulnerable. This egregious violation of human rights has prompted the mobilisation of States, civil society, and international organisations to combat it, with its eradication enshrined as Goal 8 of the United Nations 2030 Agenda.

By emphasising the substantive jurisdiction of the ICC concerning contemporary slave labour, a form of slavery, the role of the Court becomes indispensable in combating impunity and ensuring accountability for grave human rights violations that amount to international crimes as prescribed by the Rome Statute.

The Elements of Crimes guiding document seems to take a notably restrictive stance on the definition of slavery, lagging behind the evolved interpretation established by the ICTY. By stipulating that, for the purposes of the commission of the crime against humanity of slavery, the accused must exercise 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 people, or by imposing on them a similar deprivation of liberty, the Rome Statute and the Elements of Crimes seem to adopt a narrow stance, linking the concept primarily to property ownership as the basis for the crime.

As previously mentioned, such a constrained interpretation fails to reflect a satisfactory improvement of the crime (particularly when contrasted with that developed by International Law) and could significantly impede efforts to prevent such a grave crime. Both International Law and Criminal Law support broader definitions of slavery and enslavement that encompass the imposition of abusive, violent, or egregiously underpaid working conditions. After all, in light of the longstanding rejection of the notion of legal ownership of human beings, criminal actors often circumvent this prohibition by enforcing exploitative labour contracts that condemn workers to conditions of extreme poverty.

In this regard, the Elements of Crimes document makes a subtle reference – albeit in a footnote – to what should rightfully be an inclusive interpretation of slavery that acknowledges the expanded forms outlined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956[4]. The inclusion of this footnote, even

[4] See footnote 11 of the Elements of Crimes, which reads: "It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children".

if discreet, represents an open avenue for interpreting emerging realities that encompass labour exploitation as a concept criminalized by the Rome Statute.

In summary, adopting a historical and contextual hermeneutic approach that broadens the definitions of slavery and enslavement presents the most effective solution for the OtP to address this critical issue. Moreover, the language of the Rome Statute does not preclude such an expansive interpretation, providing the OtP with the opportunity to encompass a wide range of cases within the jurisdiction of the ICC.

2 INDIVIDUAL CRIMINAL LIABILITY FOR OMISSION IN SLAVERY CRIMES

Considering the gravity of slavery in its various forms, acknowledged by the international community, it is crucial to examine the individuals who lead and capture victims for enslavement in transnational criminal contexts, thus violating a positive duty to act within legal terms. Particularly in contexts of large-scale crimes, identifying individual criminal liability under the Rome Statute is challenging, especially when considering those who directly or indirectly benefit from the practice of slavery. Given the changing profile of slavery victims (as discussed above), international criminal tribunals should explore alternative modes of criminal liability, including liability by omission.

An accused may be held liable for an omission when (a) there is a duty to act, (b) the accused has the ability to act, (c) they fail to act either intending the criminally sanctioned consequences or with awareness and consent that such consequences will occur, and (d) the failure to act results in the commission of the crime (ICTR, 2004, para. 659; ICTY, 2009, para. 90.). Omission as a mode of liability is recognised in most domestic criminal law jurisdictions (see *e.g.* van Sliedregt, 2012; Gosnell, 2013). The ICTY and ICTR acknowledged this mode of liability even though their Statutes did not explicitly provide a legal basis for it (Roth, 2019, p. 59).

As for the Rome Statute, the Preparatory Committee proposed a draft Article 28 addressing the *actus reus* of criminal responsibility for omissions (UN, 1998), which was rejected and removed from the final text. Consequently, due to delegates' failure to reach a consensus during deliberations, the Rome Statute lacks reference to a general omission liability clause. In general, individual criminal responsibility at the ICC has been reserved for positive acts or commission under article 25(3) of the Rome Statute; only in specific cases, such as command/superior responsibility, may an individual be held liable for their failure to act.

Arguably the most explored mode of omission in international criminal jurisprudence, superior or command responsibility was expressly discussed for the first time in the ICC in *Prosecutor*

v. Jean-Pierre Bemba Gombo. The Trial Chamber held that, even though Bemba did not commit war crimes and crimes against humanity himself, as President and Commander-in-Chief of the *Mouvement de Libération du Congo* (MLC), his omissive conduct revealed the causal link between the crimes committed, as "the crimes would not have been committed, in the circumstances in which they were, had the commander exercised control properly, or the commander exercising control properly would have prevented the crimes" (ICC, 2016, para. 213). It was also underscored that "the determination of whether a person has effective authority and control rests on that person's material power to prevent or repress the commission of crimes or to submit the matter to a competent authority" (ICC, 2016, para. 698).

In *Bosco Ntaganda*, despite having control over the UPC/FPLC and his orders being complied with almost automatically, the ICC emphasized that the defendant's failure to act was sufficient to contribute to the commission of war crimes and crimes against humanity, holding him individually responsible (ICC, 2019).

The ICTY Trial Chamber, in *Galic* (ICTY, 2003), also relied on the command responsibility doctrine, considering whether the defendant effectively controlled the actions of his troops and knew of the crimes committed by them through his commissive and omissive acts, as "he had a public duty to uphold the laws or customs of war. The crimes that were committed by his troops (or at least a high proportion of these) would not have been committed without his assent" (ICTY, 2003, para. 765).

In *Orić* (ICTY, 2006), the ICTY Trial Chamber ruled that the accused incurred in the modalities of aiding and abetting by omission and commission by omission. They recognised that there were failures, as a superior, to take reasonable measures to prevent wanton destruction of cities, towns or villages and to punish the perpetrators who committed such crimes, as well as his active involvement in the attacks during which such destruction was caused, instigating the commission of the crimes and aiding and abetting the perpetrators of these crimes.

In *Bagosora and Nsengiyumva* (ICTR, 2011), the ICTR Appeals Chamber reinforced that the duty to prevent arises for a superior from the moment they know or have reason to know that their subordinate is about to commit a crime, while the duty to punish arises after the commission of the crime, holding them expressly responsible for the violation of the legal duty to act.

Thus far, as demonstrated, international criminal tribunals have only resorted to omission individual criminal responsibility in contexts of command responsibility, overlooking the possibility of criminal liability for omissions for those who directly or indirectly benefit from the commission of crimes. This input underscores the need for the the OtP to also investigate persons who may not fit a military or paramilitary profile to hold them criminally liable for failure to act, ensuring that justice

is effective and comprehensive, and thereby promoting accountability of those involved in practices of modern slavery that amount to international crimes.

International non-criminal courts have already recognised the possibility of State responsibility for omission in cases of slavery. For instance, in the *Fazenda Brasil Verde Workers* case (IACrtHR, 2016), the Inter-American Court of Human Rights held Brazil responsible for failing to take reasonable, timely or diligent measures to comply with its duty to prevent and investigate possible situations of slavery, servitude, trafficking and forced labour, especially given the State's awareness of obligations under the American Convention on Human Rights and the *jus cogens* nature of the prohibition of slavery. In *Mani Kuraou* (ECOWAS, 2008), the ECOWAS held Niger responsible for failing to protect Hadijatou Mani from slavery, emphasising Niger's obligation to take active measures to protect its citizens from slavery due to the *erga omnes* nature of the obligations relating to slavery owed to the international community as a whole.

Similar findings have been issued by the European Court of Human Rights regarding the positive obligation of States to protect victims from slavery, servitude and forced labour (see *e.g.* ECrtHR, 2005; 2010; 2016). Despite these decisions concerning State responsibility rather than individual criminal responsibility, they nonetheless allude to the customary and peremptory nature of the prohibition of slavery (Bassiouni, 1991, p. 445). Therefore, prohibition of slavery and all its forms is an internationally recognised human right established in international human rights treaties such as the International Covenant on Civil and Political Rights (article 8), the American Convention on Human Rights (article 6), the African Charter on Human and Peoples' Rights (article 5) and the European Convention on Human Rights (article 4). Consequently, the application and interpretation of law must be consistent with the prohibition of slavery, as stipulated in article 21(3) of the Rome Statute. It could be argued, then, that if international human rights norms prohibit the violation of the right to the prohibition of slavery, including by omission, so should the ICC in cases of individual criminal responsibility for slavery crimes.

States have held individuals responsible for omission in slavery crimes. Brazil has had significant experiences in its national jurisdiction that could be useful to the OtP. For instance, the Labour Prosecution Office of Salvador filed a public civil action against multinational corporation Cargill, which was convicted for engaging in slave and child labour practices in cocoa plantations operated by its suppliers in Brazil. Accountability would thus extend throughout the cocoa supply chain, including industries that purchase inputs from rural producers fined for irregularities. According to the prosecutors, Cargill failed in its legal duty to prevent and halt its suppliers from

using child labour or subjecting workers to conditions akin to slavery[5]. With the adoption of the new Corporate Sustainability Due Diligence Directive by the European Parliament, new cases related to the omission of corporations in supply chain in the face of slave labour are expected to arise.

In another significant, well-known case in the Netherlands, albeit not explicitly related to individual criminal responsibility for omission in slavery crimes, the Supreme Court overturned an appeal court acquittal, asserting that the lower courts employed an understanding that the intentionality of the crime of slave labour arises from exploitation rather than abuse. For the court, intent may arise from the circumstances themselves when the agent has, to a certain degree, awareness of the victim's vulnerability. Thus, it is necessary to consider factors such as the nature and duration of the work, limitations imposed on the individuals involved, and the economic result obtained by the employer (The Netherlands, 2009).

In addition to commission by omission, there are two other specific modes of liability the OtP should consider. First, the OtP should examine the possibility of aiding and abetting by omission for slavery crimes, although this mode of omission liability has faced criticism (Ingle, 2016). Aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime", and the required *mens rea* is "the knowledge that these acts assist the commission of the offense" (ICTY, 2000). The ICTY Appeals Chamber has explicitly acknowledged the possibility that "in the circumstances of a given case an omission may constitute the *actus reus* of aiding and abetting" (ICTY, 2000). In a later opportunity, the ICTY Trial Chamber has stated that aiding and abetting can occur by omission, in which case "under the given circumstances, the accused was obliged to prevent the crime from being brought about" (ICTY, 2006).

Aiding and abetting by omission was further discussed in *Mrksic and Sljivancanin*, in which the ICTY Appeals Chamber reaffirmed that the *actus reus* of aiding and abetting by omission would be fulfilled "when it is established that the failure to discharge a legal duty assisted, encouraged or lent moral support to the perpetration of the crime and had a substantial effect on the realisation of that crime". Both *Mrksic and Sljivancanin* and *Popovic et al.* (ICTY, 2009; 2010). have emphasised that the omission must constitute substantial assistance to the crime; however, as observed by Ingle, "an omission that equates to substantial assistance may still not be commensurate with the failure to fulfil a duty of guarantee" (Ingle, 2016, p. 757). This duty to guarantee should not be confined to a single standard, but should rather seek differentiated standards of aiding and abetting liability

[5] Information on this specific legal proceeding is sealed due to judicial secrecy. See *e.g.* Haidar, 2023.

according to different contexts (Hathaway, 2019).

The second specific mode of liability is joint criminal enterprise, which, although not expressly conceptualised in international criminal jurisprudence, was applied by the ICTY in the *Tadić* Appeal judgment (ICTY, 1997). The Chamber, interpreting article 7(1) of the Statute, recognised that the commission of the crimes of murder, stalking and beatings took place in "manifestations of collective criminality", taking into account the systematic context in which the individuals of a criminal group act with a common objective.

In 2021, the ICTY Appeals Chamber ruled in *Ratko Mladić* (ICTY, 2021) that in order to hold responsible by joint criminal enterprise liability, a trial chamber must be satisfied that the accused acted in furtherance of the common purpose of a joint criminal enterprise in the sense that they significantly contributed to the commission of the crimes involved in common purpose. In this case, the Court held that, in the jurisprudence of the ICTY, a failure to take effective and genuine measures to discipline, prevent, and/or punish crimes committed by subordinates, despite having knowledge thereof, has been taken into account in assessing, not exhaustively, an accused's *mens rea* and contributing to a joint criminal enterprise where the accused had some power and influence or authority over the perpetrators sufficient to prevent or punish the abuses but failed to exercise such power.

Although cases of omission in slavery crimes in national jurisdictions are few, these national cases demonstrate that this is a concern directly related to the full protection of human rights. Greater protection against slavery cases, from a historical perspective, is a growing demand, as seen in the meetings of the UN Permanent Forum on People of African Descent (see *e.g.* Halting…, 2023). In a contemporary perspective, the prohibition of slavery is part of customary international law and of the *jus cogens* domain. This creates an *erga omnes* obligation which is owed to the international community as a whole, but more so to States' peoples which have been ravished by slavery in the past and still continue to deal with slave-like labour, such as in Latin America, Asia and Africa, all regions with extensive acceptance of Rome Statute system.

It cannot be overlooked that attributing criminal responsibility based on omission can pose a challenge for the OtP as there is no guarantee that such a stance would be readily accepted by the jurisdictional organs of the ICC. However, the option of holding individuals accountable for aiding and abetting, particularly when there is full knowledge and intent to profit from slavery – especially when this "omission" is the factor driving the continuation of slavery, as seen with large companies that benefit from slave-akin labour in developing countries – represents a highly significant form of responsibility that should not be difficult to prove. Such actions would yield a crucial deterrent effect,

compelling companies to exercise extreme caution when operating in regions where slavery may occur. This type of accountability would also compel corporations to implement compliance measures aimed at drastically reducing the risks of facilitating and promoting this international crime.

Whether by encouraging States to prosecute slavery crimes within their domestic jurisdictions based on the principle of complementarity or by acting to ensure that there is no impunity for such crimes, the ICC has a legal duty, as well as a political and moral obligation, to ensure that slavery crimes are duly prosecuted and punished. However, it is not enough to only punish those who actively engage in slavery, as this would ignore the evidence that there are chains benefiting economically from contexts of slavery. The responsibility for omission in slavery crimes is a way to break this chain and make it clear to the world that slavery will no longer be tolerated. However, in addition to expanding the concept of slavery victims and punishing for omission, it is up to the OtP to consider one last aspect: ensuring that the international criminal justice system is not alienated by hegemonic interests and serves as an efficient justice paradigm for the Global South.

3 THE NEED FOR A DECOLONIAL APPROACH TO SLAVERY

It is widely acknowledged that contemporary legal systems have been developed within the European framework. As a result of the expansionism of the Old Continent and colonial endeavours pursued by countries in the Global North, they have exerted significant influence over global legal landscape. The current diversity in legal frameworks primarily reflect a blend of a few local experiences rationalised through the logic of Common Law or Civil Law.

A similar trajectory is evident within the international legal system. Having evolved since 1648, with particular development in the post-war era, international legal norms predominantly reflect the experiences of European legal frameworks. Any technical conflicts within it typically arise from internal tensions. This pattern extends to the international criminal legal system, which operates within the Eurocentric paradigm, guided by principles of law and punishment, utilitarian preventive measures, the liberal paradigm, the metaphysical-natural rationalism of natural law and or the logical-instrumental positivism of legal positivism, alongside a set of principles common to European models.

It is crucial to recall that the contemporary legal framework is essentially a product legal design developed by the conqueror who colonises territories and suppresses diversity. This is evident in the fact that the current penal model cannot accommodate alternative approaches that challenge its principles: methods like negotiation, settlement, amnesties or other forms of conflict resolution are

largely disregarded within the international penal system, if not outright rejected as unacceptable in the current context. Of course, the gravity of behaviour rationalised under the existing criminal justice model is not overlooked, and there is no suggestion of adopting less stringent measures against such international crimes. However, it is important to recognise that there is a dominant model of criminal justice being prioritised, a model rooted in European ideals that imposes itself on other realities and lead to any alternatives being swiftly dismissed.

Yet, there are a multitude of perspectives on the legal realm that elude the coloniser's gaze. Legal experiences are diverse, and legal truths extend beyond those defined by European norms. The many contradictions and issues inherent to the dominant legal system become more apparent to outsiders, highlighting the shortcomings of Eurocentric international criminal justice when confronted with the unique circumstances of the regions where it is enforced. It is unsurprising, then, that occasional discreet and hesitant resistance emerges against the actions of institutions like the ICC and the European standards it employs to 'address' conflicts, which often fail to truly resolve them.

This is not an attempt to justify the irrational resistance posed towards the ICC by major criminals or to question human rights principles. Rather, the point being made is that European standards of justice are hardly universally applicable when confronted with the diversity of contexts in which they are enforced. Consider the example of slavery: reducing the phenomenon to a matter of property overlooks the profound physical and moral domination of one human being over another, reducing it to mere financial and economic terms. In contexts marked by severe exploitation of labour relations, such a narrow perspective falls short. Moreover, in certain situations, the economic rationale behind property ownership fails to capture the essence of the issue altogether. In essence, the European perspective on this matter is restrictive and oversimplifies the complexity of the problem – much like the attempt to ‘address’ it solely through punitive measures.

If it is indeed the case that the truths supporting contemporary legal rationality – an inherently Eurocentred rationale – no longer adequately address the challenges faced by Law (Wolkmer, 2015, p. 25), then there are two viable options: either these truths are discarded in favour of novel approaches to problem-solving, which is certainly not feasible for the OtP or the ICC and could endanger the entire progression of International Law, or these truths must be acknowledged as limited, requiring an adaptation to the new reality.

It is therefore imperative that the key concepts underpinning the Eurocentric model of international criminal justice evolve to accommodate the diverse contexts in which it is implemented. Examining the issue from the periphery is essential for international legal institutions to grasp the full extent of the challenges they confront. Naturally, this requires a degree of humility from international

organisations such as the ICC and the OtP. However, such efforts are crucial steps towards horizontalization, not only deepening comprehension of the challenges at hand but also enhancing the democratisation of international criminal justice.

We are not encouraging the OtP to abandon punishment. What we seek to underscore is the need for reconceptualization of concepts. Specifically, regarding slavery, it is crucial to perceive this phenomenon as more than just an economic issue. Recognising slavery as a system of dehumanization, characterised by the vertical power dynamics between enslaver and enslaved and the subjugation of victims to degrading conditions that deny their inherent human rights-based equality, is a pivotal step towards genuine universalisation of the concept.

Striving to universalise a concept by submitting the socio-cultural matter to the perspective of the accuser and the judge simply perpetuates the colonising dynamics that shaped the evolution of International Law. While this approach may satisfy Europeans seeking conformity to their legal standards, it fails to encapsulate the human experience of slavery in universal terms.

Hence the urge for a decolonial reassessment of the concepts delineated in the Rome Statute. While the drafting process in Rome can be viewed as a collective endeavour, it is equally evident that employing European linguistic structures to elucidate the acts being criminalised – a framework that, even amidst expanding criminalisation, remains circumscribed – is inherently limiting and diminishes diversity. Merely adhering to this framework is insufficient unless it embodies progress and openness: it is crucial to heed the voices of the ‘historically absent’ (Santos, 2000, p. 28). What is being sought from the OtP, therefore, is a humility that acknowledges openness to reality and an understanding that legal concepts are not synonymous with the European legal narrative.

CONCLUSION

After centuries of barbarism, the twentieth century marked a turning point in humanity's resolve to eradicate the scourge of slavery. Through consolidated efforts against this problem, the international community developed a complex understanding of slavery that extends beyond the ownership of one human being by another. Thanks to the collective efforts of numerous courts, national legislatures, international organisations, jurisprudence and case law, the concept of slavery now encompasses a wide range of situations, including forced labour, human trafficking, sexual servitude and more.

It is undeniable that the conventional understanding of slavery predominantly derives from the Slavery Convention of 1926, which defines slavery as a situation where an individual is subject

to any or all of the powers inherent in the right of ownership. While this concept, rooted in a "classical" form of slavery, remains relevant and influential, courts have dealt with cases that transcend this limited notion of ownership. As a result, there has been a need to broaden the definition of this international unlawful act.

To illustrate the consolidation of this expanded conceptualisation of slavery, this report initially examined cases ruled by international courts, outlining the revisions made to the "classical" definition of enslavement. As emphasised in the text, significant elements were incorporated into the traditional 1926 definition, particularly through the decisions of the ICTY in the *Kunarac* and *Krnojelac* cases. This pivotal case law established new parameters for the concept of slavery and evolved its criminal definition into a version far more attuned to contemporary realities.

Indeed, this contribution aims to underscore the profound interrelation between the crime of enslavement and forced labour or emerging forms of subjugation, asserting that physical control and ownership should not be regarded as the sole manifestations of this crime. Numerous other forms of control stem from the intricate nature of economic relations, which may give rise to novel forms of coercion and psychological manipulation. International courts grappling with these issues must acknowledge this evolving issue.

It is therefore proposed that the OtP consider the importance of closely examining omission as a crucial element of this crime. Although there is no general provision in the Rome Statute for criminal liability for omission, such a mode of criminal responsibility has been acknowledged in national jurisdictions and by international tribunals, such as the ICTY and ICTR. Furthermore, it is well known that the Rome Statute includes provisions for responsibility through omission concerning commanders and other superiors. As demonstrated, this Court and other international tribunals have recognised such responsibility in numerous cases, such as in *Bemba Gombo*, *Orić*, *Bagosora and Nsengiyumva* and *Gálic*, indicating that leaders can be held responsible for crimes committed by subordinates if they fail to prevent or punish such crimes.

This is an important step, but it is not sufficient. The OtP must also consider other forms of responsibility that may arise from different modes of omission, such as aiding and abetting and joint criminal enterprise. These situations have been recognised in the jurisprudence of international courts, indicating the need for the ICC to propose changes and hold individuals accountable who knowingly and willingly contribute to crimes, despite not directly committing them. Indeed, criminal responsibility through this type of omission is essential to hold accountable not only those who actively commit these crimes but also those who benefit from the practice and thus indirectly support the crime, including multinational companies that profit from slave labour.

In this regard, this input proposes a new approach based on a decolonial interpretation of the Rome Statute. This perspective interprets the Statute from the standpoint of Global South countries, seeking to contextualise international crimes within their specific cultural and historical realities. It emphasises how the international legal system reproduces power imbalances and often privileges the interests of Global North countries. The traditional notion that slavery is based on ownership tends to criminalise only those directly involved in the crime, typically individuals or middlemen in Third World countries. If the OtP reinforces this trend, it will underscore the asymmetry in the application of the law and signal to the international community the arrogantly selective nature of International Criminal Law.

In summary, this contribution aims to advise the Office of the Prosecutor that the International Criminal Court must ensure the proper prosecution and punishment of slavery crimes. This involves not only targeting direct perpetrators but also holding accountable corporations and economic entities that directly or indirectly benefit from slavery. Such an approach is crucial to prevent the domination of the international criminal justice system by economic hegemonic interests but, centrally, to ensure that international slavery crimes do not go unpunished and that redressing wrongdoings against victims remains the main concern of International Criminal Law.

REFERENCES

Bales, Kevin. **Disposable People: new slavery in the global economy**, 3th ed. Berkeley: University of California Press, 2012.

Bassiouni, M. Cherif, "Enslavement as an International Crime," **New York University Journal of Law and Politics** 23, no. 445 (1991): 445-517.

Cosnell, Christopher. "Damned if You Don't: Liability for Omissions in International Criminal Law." In **The Ashgate Research Companion to International Criminal Law: Critical Perspectives**, edited by William A. Schabas, Yvonne McDermott and Niamh Hayes 101-31. London: Ashgate, 2013.

ECOWAS, **Hadijatou Mani Koraou v. Niger**, ECW/CCJ/JUD/06/08, 27 October 2008.

ECrtHR. **L.E. v. Greece**, No. 71545/12 [2016], I ECrtHR 192.

ECrtHR, **Rantsev v. Cyprus and Russia**, No. 25965/04 [2010], I ECrtHR 126.

ECrtHR, **Siliadin v. France**, No. 73316/01 [2005], II ECrtHR 77.

ECCC. **Kaing Guek Eav alias Duch,** Trial Judgment, Case File No. 001/18-07-2007/ECCC/TC [2010].

Haidar, Daniel. “Cargill convicted for neglecting slave and child labour at cacao farms.” **Repórter Brasil**, 27 September 2023. https://reporterbrasil.org.br/2023/09/cargill-convicted-for-neglecting-slave-and-child-labour-at-cacao-farms/.

“Halting and Reversing the Lasting Consequences of Slavery, Colonialism, Genocide and Apartheid Are Critical to Addressing Racism against People of African Descent”, **Permanent Forum Tells Human Rights Council**, UN Information Service, 06 October 2023. https://www.ohchr.org/en/news/2023/10/halting-and-reversing-lasting-consequences-slavery-colonialism-genocide-and-apartheid.

Hathaway, Oona A. *et al*. “Aiding and Abetting in International Criminal Law.” **Cornell Law Review** 104, no. 6 (2019): 1593-641. https://scholarship.law.cornell.edu/clr/vol104/iss6/4/.

IACrtHR. **Fazenda Brasil Verde workers v. Brazil**, Preliminary objections, merits, reparations and costs [2016].

ICC. **Prosecutor v. Bosco Ntaganda**, Trial Chamber VI, Case No. ICC-01/04-02/06 [2019].

ICC. **Prosecutor v. Jean-Pierre Bemba Gombo**, Trial Chamber III, Case No. 01/05-01/08-3343 [2016].

ICTR. **Prosecutor v. Ntagerura, Bagamkibi and Imanishimwe**, Trial Chamber III, Case No. ICTR-99-46-T [2004].

ICTR. **Prosecutor v. Thdoneste Bagosora and Anatole Nsengiyumva**, Appeals Chamber, Case No. ICTR-98-41-A [2011].

ICTY. **Prosecutor v. Blaskić**, Trial Chamber, Case No. IT-95-14-T [2000].

ICTY. **Prosecutor v. Galić**, Trial Chamber, Case No. IT-98-29-T [2003].

ICTY. **Prosecutor v. Krnojelac**, Trial Chamber, Case No. IT-97-25-T [2002].

ICTY. **Prosecutor v. Kunarac, Kovac and Vukovic,** Appeal Chamber, Case No. IT-96-23& and IT-96-23/1-A [2002].

ICTY. **Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević and Lukić**, Trial Chamber, Case No. IT-05-87-T [2009].

ICTY. **Prosecutor v. Mladić**, Appeal Chamber, Case No. MICT-13-56-A [2021].

ICTY. **Prosecutor v. Mrksić and Sljivancanin**, Appeal Chamber, Case No. IT-95-13/1-A [2009].

ICTY. **Prosecutor v. Orić**, Trial Chamber, Case No. IT-03-68-T [2006].

ICTY. **Prosecutor v. Popović, Beara, Nikolić, Borovcanin, Miletić, Gvero and Pandurević**, Trial Chamber II, Case No. IT-05-88-T [2010].

ICTY. **Prosecutor v. Tadić,** Appeal Chamber, Case No. IT-94-1-T [1997].

ILO. **"ILO indicators of forced labour."** Geneva: ILO, 2012. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf.

Ingle, Jessie. "Aiding and Abetting by Omission before the International Criminal Tribunals." **Journal of International Criminal Justice** 14, no. 4 (2016): 747-69.

Miraglia, Lívia Mendes Moreira. "O Trabalho Escravo na perspectiva do Tribunal Superior do Trabalho." **Revista da Faculdade de Direito da UFMG** 77 (2020): 125-44. 10.12818/P.0304-2340.2020v77p125.

Roth, Robert. "Improper Omission." In **Modes of Liability in International Criminal Law**, edited by Jérôme de Hemptinne, Robert Roth and Elies van Sliedregt, 58-81. Cambridge: CUP, 2019.

Santos, Boaventura de Sousa. **Crítica da Razão Indolente: contra o desperdício da experiência**. São Paulo: Cortez, 2000.

SCSL. **Prosecutor v. Charles Ghankay Taylor**, Trial Chamber, Case No. SCSL-12-01-T [2012].

SCSL. **Prosecutor v. Sesay, Kallon and Gbao**, Trial Chamber, Case No. SCSL-04-15-T [2009].

The Netherlands, Den Bosch Court of Appeal, **LJN: BN7215,** 08/03895 [2009].

UN, **Report of the Preparatory Committee on the Establishment of an International Criminal Court**. A/CONF.183/2/Add.1. New York: UN Headquarters, 1998.

van Sliedregt, Elies. **Individual Criminal Responsibility in International Law**. Oxford: OUP, 2012.

Wolkmer, Antônio Carlos. **Introdução ao Pensamento Crítico Moderno**, 9th ed. São Paulo: Saraiva, 2015.