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# Time to Enumerate the Slave Trade as a Distinct Provision in the Crimes Against Humanity Treaty

by [Patricia Viseur Sellers](#), [Jocelyn Getgen Kestenbaum](#) and [Alexandra Lily Kather](#)

November 15, 2023

*Editor's note: This is part of our [series](#) on gender in the draft crimes against humanity treaty.*

The proposed [Draft articles on Prevention and Punishment of Crimes against Humanity](#) under consideration at the United Nations General Assembly's Sixth Committee (Legal) are bereft of a distinct provision to address the international crime of the slave trade.

On Apr. 11, 2023, the Permanent Mission of the Republic of Sierra Leone to the United Nations submitted in writing a [proposal](#) to include the slave trade as an enumerated provision in the Draft Articles. Sierra Leone specifically cited the example of kidnapped children forcibly made soldiers and abducted – so-called “bush wives” – who would receive redress under the safeguards of a provision for the slave trade. Similarly, acts of the slave trade recently reported in [Sudan](#) or [Ethiopia](#), the systematic slave trade of Yazidi women and children expressly authorized by [Da'esh's Research and Fatwa Department](#), and the serial slave trading and enslavement of Black African migrants traversing [Libya](#) also clamor for the inclusion of a slave trade provision. The Draft Articles' current composition encompasses enslavement and sexual slavery as proscribed acts committed during a widespread or systematic attack against the civilian population. 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](#) with attendant *erga omnes* [obligations](#).

Early in its history, the U.N. recognized the legal prominence of the prohibition of the slave trade. Its predecessor, the League of Nations, promulgated the [1926 Slavery Convention](#), uniformly condemning the slave trade. Article 4 of the [Universal Declaration of Human Rights](#), a seminal U.N. instrument, prohibits slavery and the slave trade in all

their forms. The [1956 Supplementary Slavery Convention](#), drafted under the U.N.'s auspices, reiterated condemnation of the slave trade as an international crime. Article 8 of the U.N.'s [International Covenant on Civil and Political Rights](#) disallows any derogation from the prohibition of slavery and slave trade. The status of the slave trade stands uncontested as a [treaty-based and customary-based international crime](#). Regional human rights instruments such as Article 5 of the [African Charter on Human and Peoples' Rights](#) and Article 6 of the [American Convention on Human Rights](#) equally attest to the accepted status of the slave trade as a violation of international law.

We co-authored an [expert legal brief](#) advancing further reasons for the Draft Articles to incorporate a provision for the slave trade as a crime against humanity in support of Sierra Leone's proposal. As part of a [coordinated feminist effort](#) to strengthen gender-competent and intersectional approaches throughout the Draft Articles, the brief was sent to U.N. Member States for their consideration the week prior to the [scheduled debate](#) of the Sixth Committee in mid-October 2023. Notably, during that resumed session of the Sixth Committee, [Uganda on behalf of the African Group](#) and [Sierra Leone](#) addressed the importance of a comprehensive prohibition for of all slavery crimes, including the slave trade, in the Draft Articles. Likewise, other states such as [Mexico](#), [Latvia](#), [Malta](#), [Pakistan](#), and [Haiti](#) spoke about slavery crimes regarding the Draft Articles. U.N. Member States' pronouncements, combined with the [EU-CELAC declaration](#) of July 18, 2023, signed by 59 States underlining their "full support to the acknowledgment that slavery and the slave trade, are a crime against humanity," must be deemed State expressions of *opinio juris* with respect to recognizing the slave trade as a crime against humanity.

## **The Slave Trade's Definition**

The international legal prohibition against the slave trade affords protection against serious conduct that requires redress in all circumstances, including during a widespread or systematic attack against a civilian population. As defined in the [1926 Slavery Convention](#) and the [1956 Supplementary Slavery Convention](#), this prohibition proscribes any perpetrator's intent to reduce a (free) person into any situation of enslavement. The prohibition against the slave trade also forbids the acquisition, disposal, transfer, or transport of an (already) enslaved person to any other situation of enslavement.

Simply stated, the prohibition against the slave trade outlaws a person's reduction into, or maintenance in, enslavement, irrespective of the means, inclusive of abduction, kidnapping, gifting, transport, transfer, sale, exchange, inheriting or disposal of any kind. According to our expert legal brief, "the abduction, sequestering, or rounding up of children or adults with the intent to enslave them as porters or as fighters for a militia group are acts of the slave trade." The re-distribution of enslaved Black African migrants, or militia-held "bush wives" are acts of the slave trade, among others.

The international crime of the slave trade focuses on the perpetrator's intent and conduct. As set out in our expert legal brief, "from a legal perspective, it is irrelevant whether a person who is reduced to enslavement or an enslaved person who is further maintained in enslavement gives or could have given their consent." The slave trade is not conditioned upon a victim-survivor's consent or non-consent. Likewise, the expert legal brief clarifies that "the presence or absence of coercive circumstances is immaterial for establishing acts of the slave trade." The age of the victim-survivor or the duration of the period of slave trading, also, are irrelevant to the condemnation of this international crime. Although often gendered and driven by anticipated sexualized enslavement, the slave trade may be perpetrated regardless of whether the individual is caused to engage in an act of a sexual nature. Moreover, an act of slave trading is not abrogated when slave traders trade among themselves or when the person in receipt of the slave traded person decides not to enslave them or maintain them in enslavement. The slave trade is not dependent upon whether enslavement occurs. Instead, what is consequential is the intent and conduct of the slave trader. These are the operative elements to determine whether a perpetrator has committed the crime of the slave trade.

### **A Distinct International Crime**

While the Draft Articles include a provision for enslavement, the slave trade and enslavement are distinct international crimes. The treaty-based proscriptions of the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention envisioned the slave trade as constituting the precursory acts committed against persons prior to their slavery subjugation as well as any intermittent or subsequent acts of acquisition or disposal that could occur during enslavement. The slave trade is not a lesser included offense nor merely an accessory mode of slavery or 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.” The Draft Articles also parrot the definition of enslavement as contained in the [Rome Statute](#)’s Article 7(2)(c) and [Elements of Crimes](#), which lists certain slave trade conduct, such as purchasing, selling, lending, or bartering. Although the expanded definition of enslavement appears to encompass acts similar to the slave trade, in actuality, these descriptions are examples of *how* powers of ownership may be exercised over a person. They, therefore, qualify as acts or *indicia* of enslavement. Thus, under the Draft Articles, the actual prohibition of the slave trade is missing from the enumerated crimes against humanity.

Such conduct of enslavement cannot be equated with the slave trader’s intent and acts that bring a person into or maintains a person in enslavement. The slave trader is comparable to the conductor of cargo on a train, who holds no semblance of property interest in the cargo. The slave trade is not premised on the exercise of any or all of the powers attaching to the rights of ownership over a person prior to, during, or after enslavement. The *sine qua non* of slavery, enslavement, and sexual slavery – given the identical phrasing of their first elements under treaty law – contrastingly, resides in the exercise of powers attaching to the rights of ownership.

As our expert legal brief highlights, “the slave trade is a *distinct and separate crime* from enslavement and sexual slavery,” aiming to protect different interests, including prevention of any form of slavery. Thus, in the absence of a specific provision, the Draft Articles fail to govern acts of slave trading wherein the perpetrator does not also exercise any or all of the powers attaching to the rights of ownership over a person – an untenable legal lacuna.

Another crucial aspect to consider is the international crime of the slave trade’s relationship to trafficking in persons. The Draft Articles’ Article 2(2)(c) replication of the Rome Statute’s definition of enslavement includes the phrase “trafficking in persons.” The reference to trafficking is not analogous to – nor does it substitute for – a provision on slave trading. Trafficking is descriptive of conduct that could evince the exercise of powers of ownership over a person and, thus, establish an element of the crime of enslavement. Unlike the slave trade, trafficking in persons is not an international crime; rather, it forms part of the transnational organized crime category as defined in the

[Palermo Protocol](#) that supplements the [UN Convention against Transnational Organized Crimes](#). The Draft Articles clearly do not safeguard against acts of the slave trade by including a reference to human trafficking.

## **Legal Gaps Leading to Impunity for Acts of the Slave Trade**

Neither the enslavement nor sexual slavery provision under the Draft Articles effectively provides accountability avenues for the separate, yet interlinked, acts of the slave trade. Consequently, the Draft Articles contain crevices of impunity for slave traders who do not exercise powers attaching to the right of ownership over persons. They deny a precise characterization of harms for civilians who endure acts of the slave trade as part of a widespread or systematic attack. These legal gaps result in a lack of accountability and redress for victim-survivors who have been subjugated to slave traders prior to, during, or after enduring enslavement and/or sexual slavery. Removing this impunity gap can function to prevent enslavement and sexual slavery, or to cease their duration. As an identifiable part of the civilian population, victim-survivors of the slave trade deserve full accountability under the persecution provision of the Draft Articles, wherein “[the intentional and severe deprivation of](#)” their fundamental right to be free from the slave trade could be adjudicated in connection with the slave trade as a distinct crime against humanity provision. In the absence of an enumerated provision of the slave trade their comprehensive judicial remedy under persecution is restricted.

## **Drafting with Foresight**

The Draft Articles’ omission of the international crime of the slave trade must now be rectified. It stands in the stark shadow of a similar legal lacuna under crimes against humanity in the Rome Statute. Significantly, in May 2023, Sierra Leone [circulated](#) among the [Assembly of State Parties Working Group on Amendments](#) a proposal to amend the Rome Statute to include the slave trade as a crime against humanity, as well as slavery and the slave trade as war crimes. The Rome Statute’s omissions of slavery crimes under Articles 7 and 8 likely represent in part a drafting oversight. Most critically, they are structural deficiencies resulting in [unredressed slavery crimes](#). Accordingly, several ASP representatives have signaled support for the WGA’s proposed amendments.

The failure to enumerate a provision for the slave trade in the Draft Articles would detrimentally repeat and widen the dearth of protection that disregards international

law's highest values. The omission is carried over from the Rome Statute, the initial template of the Draft Articles. U.N. Member States now have an opportunity to exercise foresight and rectify this juridical void. Any extension of this oversight is impermissible. The Draft Articles' inclusion of the slave trade provision complies with and promotes international law. U.N. Member States have a responsibility to prevent and suppress the commission of the slave trade as part of a widespread or systematic attack against a civilian population. An enumerated provision in the Draft Articles, grounded in *jus cogens* and customary international law, would underscore these *erga omnes* obligations within the framework of crimes against humanity.

Given Sierra Leone's committed and proactive diplomatic leadership among the African group and as [a member of the Security Council](#), the Draft Articles stand a solid chance to incorporate a provision for prohibition of the slave trade. The Sixth Committee's resumed April 2024 session foresees in-depth substantive discussions on all issues. The ASP WGA, now, is presented with the opportunity to reach consensus on the slavery crimes amendments, including the slave trade as a crime against humanity and as war crimes. Hence, 2024 will be a prominent year to extend complete legal protection to victims-survivors of all slavery crimes and, in particular, the slave trade in the Draft Articles.

IMAGE: [Grada Kilomba's O'Barco/The Boat](#) installation of 140 blocks of charred wood outlining a slave ship displayed at Somerset House in [London, October 2022](#), photographed by [Gabi de Luca](#). Photo provided by the authors, courtesy an agreement with the artist and photographer.

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