



# Policy on Slavery Crimes:

**Legal Action Worldwide Submission to the Office of  
The Prosecutor of the International Criminal Court**

30 April 2024





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# Introduction





**Legal Action Worldwide (LAW)** welcomes the opportunity to submit this comment to the International Criminal Court (ICC or Court) Office of the Prosecutor's (OTP) Policy on Slavery Crimes (Policy). LAW is encouraged by the OTP's initiative in developing the Policy as LAW has long supported survivors of slavery crimes, including sexual slavery and slave trade, around the globe. For example, in 2019, LAW initiated a groundbreaking slavery and slave trade criminal complaint in Lebanon, which case is ongoing.<sup>1</sup> LAW has also spent years investigating sexual slavery and gender-based crimes in Syria, South Sudan, Myanmar, and Ethiopia, advocating for survivors of such crimes.

Informed by its experience working on slavery crimes, LAW proposes the following three issues of consideration that would strengthen the OTP's current approach to investigating and prosecuting slavery crimes: (1) implementing a survivor-centered, trauma-informed, intersectional approach; (2) supporting amendment of the Rome Statute to include the slave trade as well as prosecuting slave trading through existing crimes and modes of liability; and (3) encouraging positive complementarity for domestic jurisdictions prosecuting slavery crimes. Each of these issues are discussed in turn below. Specific recommendations for the Policy are then enumerated in the conclusion.

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<sup>1</sup> Bel Trew, **Ethiopian domestic worker in Lebanon accuses employer of slavery in landmark case**, *The Independent*, 10 February 2022.





# 01 A Survivor- Centered Approach to Prosecuting Slavery Crimes

LAW encourages the OTP to implement a survivor-centered, trauma-informed, and intersectional approach (as defined below) to prosecuting slavery crimes through outlining and focusing on survivors' needs in proceedings and actively encouraging and supporting survivors' and survivor communities' participation in proceedings. The following addresses: (a) the definition of the term "survivor" (or "victim") in the context of slavery crimes, (b) the meaning of a survivor-centered, trauma-informed, and intersectional approach in relation to the ICC's work, and (c) the benefits of a successful survivor-centered approach.







## *Defining “survivor” / “victim”*

This submission uses the term “survivor” in a manner that is intended to have the same or similar meaning as “victim” in the ICC system.<sup>2</sup> Under the Rome Statute, the term “victim” is defined to include both individuals and organizations/institutions.<sup>3</sup> For slavery crimes, victims would include any natural person who has had the right of ownership attached to them, including through their purchase, selling, lending, bartering, or by a similar deprivation of liberty such as exacting forced labour or otherwise reducing a person to a servile status<sup>4</sup> It would also include persons, particularly women and children, subjected to human trafficking.<sup>5</sup>

The Policy should make clear that victims of slavery crimes should be considered broadly, and include

children born from sexual slavery and those born into enslavement. Akin to situations of enforced disappearance,<sup>6</sup> victims should also include the families of those who have been enslaved, especially where families of slaves have no knowledge or information about the whereabouts of their family members or who are not able to contact them. For example, in the Lebanese slavery case that LAW has been prosecuting, the survivor was not permitted to communicate with her family for four years and seven months.

Ultimately, the identification of survivors/victims of slavery crimes will require a contextual analysis based on cultural and societal factors viewed from a grassroots level, undertaken on a case-by-case basis.

<sup>2</sup> The term “victim” is customarily used to describe people whose human rights have been violated. The term also recognizes that not all who are subject to crimes survive. However, the term “survivor” better reflects the strength, agency and resilience of many people who have experienced crimes and is sometimes the preferred term for survivors of slavery crimes. We thus use both terms in this submission. The terminology used in this submission is without prejudice to how any individual person identifies and is not meant to overrule a person’s own experience of how they identify.

<sup>3</sup> “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. International Criminal Court, Rules of Procedure and Evidence, Rule 85(a). Victims may also include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes. Ibid, Rule 85(b).

<sup>4</sup> International Criminal Court, Elements of Crimes, Article 7(1)(c) and Article 7(1)(g)-2, providing in footnotes 11 and 18 (respectively) that “servile status” is as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.

<sup>5</sup> Ibid, Article 7(1)(c), footnote 11; and Article 7(1)(g)-2, footnote 18. Additionally, regarding slavery crimes, organizational/institutional victims under Rule 85(b) could include institutions that are unwillingly being utilized to house, groom, or traffic persons for the purpose of enslavement or sexual slavery. For example, perpetrators could use churches, refugee camps, hospitals, or educational facilities to access vulnerable individuals and subject them to slavery or slave trade, unbeknownst to the facility itself even where due diligence is practiced. International Criminal Court, Rules of Procedure and Evidence, Rule 85(b).

<sup>6</sup> The UN Working Group on Enforced or Involuntary Disappearance (WGEID) has noted that enforced disappearance of a direct victim can constitute an act of torture for the victim’s family. See WGEID, **General Comment on the Right to the Truth in Relation to Enforced Disappearances**.



## *Survivor-centered, trauma-informed, intersectional approach*

Ensuring an approach to justice that is survivor-centered, trauma-informed, and intersectional means empowering individual victims and prioritizing their needs, wishes, and interests. This approach is achieved in practice by (i) applying an intersectional analysis to all slavery crimes; (ii) ensuring survivors have access to appropriate services; (iii) utilizing the tools available to the Court to ensure protection for victims and survivors; (iv) ensuring survivors have appropriate information to inform their decision-making through a robust informed consent procedure; and (v) meaningfully engaging with victims and survivors early in proceedings, to gather their views and to ensure their interests are embedded within OTP decision-making and informs the development of case strategy. Each of these is addressed in turn below.

### **Applying an intersectional analysis**

Intersectionality<sup>7</sup> recognizes that real or perceived identities are fixed in dominant hierarchies, whether they be political, social, economic, or cultural. An intersectional approach addresses the drivers of structural violence and the harm experienced by victims at the overlap of dominant hierarchies. This situation can arise when an individual inhabits multiple identity categories that expose them to discriminatory harm at the intersection of two or more hierarchies, for example when indigenous women and girls are raped during conflict.<sup>8</sup> It can also arise when discriminatory hierarchies are instrumentalized in such a way that victims are forced to occupy the

position of identity categories that would otherwise be inapplicable to them, such as when sexual violence is perpetrated against male detainees in an ethnic conflict to dehumanize and “feminize” them. Intersectionality is one of the foundations of a trauma-informed approach, because it impacts survivors’ ability to access relevant resources and provide quality evidence in proceedings.

Furthermore, intersectionality promotes an understanding of human beings as unique individuals whose experiences and needs are shaped by the interaction of different social categories. The social categories which impact a survivor’s needs at any given time are socially constructed through the interplay of different power structures, including the way in which forms of privilege are created and allocated in society. The simultaneous and complex interplay between different categories determines the relative social location of an individual, or group of individuals, and leads to inequities in political participation, education, opportunity, and health.

The overriding purpose of an intersectional analysis is to identify and surface overlapping discriminatory harms, which, in international criminal law terms, means establishing targeting based on intersectional identity factors. The Policy should acknowledge the multiple points of exposure to discriminatory harm that endanger slavery victims,<sup>9</sup> and it is crucial to note that modern slavery often exploits layers of vulnerabilities presented by victims. For example, as discussed below, LAW has been working on a case charging

<sup>7</sup> Intersectionality is a term that describes how particular identities, such as race, class, and gender, “intersect” with each other, to produce a particular experience, often discussed in the context of discrimination on the basis of those identities. See Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” University of Chicago Legal Forum: Vol. 1989: Iss. 1, Article 8.

<sup>8</sup> See e.g. Human Rights Council, Report of the Special Rapporteur on rights of indigenous peoples, Victoria Tauli Corpuz UN Doc. A/ HRC/30/41 (6 August 2015), paras. 51-53. See also *Ibid.*

<sup>9</sup> Such discriminatory harm, arising in the right fact pattern, would also necessarily amount to the crime against humanity of persecution – i.e. where the persecution deprives a victim of the fundamental right to be free from slavery or the slave trade. See, e.g. ICC Office of the Prosecutor, Policy on the Crime of Gender Persecution, 7 December 2022, at paras. 24, 91-93.



slavery and slave trading in a Lebanese criminal court. The survivor who was subjected to acts amounting to slavery and the slave trade in that case was especially vulnerable due to her race, her socio-economic status, her immigration status, and her nationality. Each of these intersecting vulnerabilities allowed perpetrators to take advantage of her. This is not unique. Another example is the ICC's recent Ongwen case, where the Trial Chamber found enslavement and sexual slavery had been perpetrated against women and children whose gender, tribal affiliation, socio-economic status, and age all made them more vulnerable to the defendant's criminal conduct.<sup>10</sup> The Policy should be explicit that race, ethnicity, socioeconomic status, nationality, gender identity, and sexual orientation can form the basis of discriminatory attacks against slavery victims. In addition, consideration of all such intersecting identities should be incorporated into all investigative plans and legal analysis to ensure establishment of criminal responsibility is as comprehensive and inclusive as possible.

### Competent referral pathways

The OTP should ensure that victims and survivors have access to appropriate services, including medical, psychosocial, and legal services, and ensure that those services are provided in a manner that is holistic, gender-competent, and trauma-informed. Competent referral pathways should be made available to survivors at all stages of proceedings. A survivor's intersecting identities (and associated discriminatory harms) can impact their ability to access needed resources. Any assessment of sufficiency of psychosocial and medical resources and referral pathways needs to account for cultural

specificities and vulnerabilities that arise from discrimination. Thus, investigation planning must be conducted in consultation with local experts. Consistent with the principle of "do no harm," localized and culturally relevant psychosocial support for survivors must be consistently available to survivors throughout the whole process. In some cultures, it can include members of the family and members of the community, and in others, a trusted third party, community member, or mediator may suffice.

### Utilizing protective measures

The OTP must consider the tools at its disposal to ensure that it protects survivors that engage with the Court, particularly those with intersecting vulnerabilities. Rule 87 of the Court's Rules of Procedure and Evidence outlines protective measures that the Court may utilize where a survivor is vulnerable to danger, such as using pseudonyms for testifying survivors or holding proceedings in camera.<sup>11</sup> Rule 88 offers special measures to "facilitate the testimony" of vulnerable survivors participating in proceedings.<sup>12</sup> Rule 88 specifically acknowledges that special measures may be necessary for survivors of sexual violence, traumatized survivors, or elderly or child survivors.<sup>13</sup>

Survivors of slavery crimes can be particularly vulnerable to threats and may also require accommodations to participate in proceedings. To ensure a survivor-centered approach, the OTP must keep in mind the tools at its disposal under Rule 87 and Rule 88 to ensure survivors that would like to participate in proceedings, or that are vital in the proceedings, are included and their voices heard.

<sup>10</sup> See ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15, Trial Judgement (4 February 2021), at paras. 205–225.

<sup>11</sup> International Criminal Court, Rules of Procedure and Evidence, Rule 87.

<sup>12</sup> *Ibid.*, Rule 88.

<sup>13</sup> *Ibid.*, Rule 88(1).



## Informed consent to participate in proceedings

Absent extraordinary circumstances, it is widely accepted that survivors should not be compelled to participate in justice proceedings that they do not consent to. Forcing a survivor to participate through a summons or domesticated subpoena may result in their alienation from the Court or animosity towards proceedings, and lead to poor quality evidence. Moreover, forced participation may lead to re-traumatisation or other unintended harms, such as reprisal, and is therefore inconsistent with a trauma-informed approach. Obtaining survivors' consent to participate in all stages of ICC proceedings is vital.

For consent to be genuine, survivors must have access to relevant information about the nature of their participation, the consequences of their participation, risks they may face because of their participation, including disclosure of their identities to the accused, and steps that can be undertaken to mitigate those risks. It is important that informed consent be discussed within the Policy.

The Policy should incorporate by reference the definition of consent in the 2022 Eurojust / ICC OTP Guidelines for Civil Society Organisations Documenting International Crimes and Human Rights Violations, which provides that consent should be informed, contemporaneous, voluntary, and explicit.<sup>14</sup> Consistent with the principle of being contemporaneous, the informed consent of survivors engaging in ICC proceedings should be identified as a live and continuing issue, noting that it can be withdrawn at any time. The informed consent of an individual survivor may change over time based on a wide range of factors, including factors not related

to the case. Reflecting this, the OTP should explicitly commit to continuously brief and obtain survivors' consent throughout the duration of their engagement with that survivor. It is also crucial that survivors know that they may withdraw their consent to engage in ICC proceedings at any time and for any reason, within the boundaries of the law.

The OTP should address any questions or concerns from survivors to ensure that they have all information that can inform their engagement with the Prosecutor or the Court. Informed consent must never be assumed based on a previous indication of consent, or consent to participate in a distinct part of proceedings. For example, where a survivor has agreed to participate in provision of information to a preliminary examination, this cannot be taken as consent for their participation in subsequent aspects of an investigation.

The OTP must inform survivors about any risks – physical, psychological, reputational, legal, etc. – related to their engagement with the ICC and measures taken to mitigate those risks. In particular, the OTP must ensure that the full range of security risks are explained to survivors engaging with the Office, including risks over time, in the near, medium, and long-term, as well as any contextual information that frames said risks. Where the Prosecutor is unable to provide such information, or where it identifies that it may not have the most up-to-date or accurate information (e.g. about relevant physical risks), the OTP should ensure that survivors are able to obtain this information from another source. In practice, this may be done through coordination with civil society operating on the ground in the same location as the victim in question.

<sup>14</sup> Eurojust & ICC OTP Guidelines for Civil Society Organisations Documenting International Crimes and Human Rights Violations (2022), p. 8.



In some contexts, it may be good practice for the OTP to recommend that survivors obtain independent legal representation to ensure that their interests are adequately represented and protected. Moreover, the power imbalances inherent to interactions between the Prosecutor, or other representatives of the ICC, and survivors and witnesses, should be identified and countered when possible. The OTP should seek to ensure that survivors and witnesses that participate in any aspect of proceedings do so freely, voluntarily, and with informed consent, and with cultural, SOGIESC (sexual orientation, gender identity and expression, and sex characteristics), and, as noted above, competent referral pathways for medical and psychosocial support.

### **Supporting survivor participation early in proceedings**

Engaging survivors at the earliest stages of proceedings is recommended, to ensure their justice priorities are being discussed and met. The OTP should encourage and support survivor participation early in proceedings, including during the investigation planning stages, and prior to the issuance of an arrest warrants. As discussed below, the inclusion of survivors of slavery crimes in judicial proceedings is also critical to broader community buy-in and can also generate support for the work of the Prosecutor and the legitimacy of the ICC with respect to these crimes.

Survivors can participate in the early stages of an investigation in a number of ways. At the outset of the judicial process, survivors, local advocates, grassroots actors, and survivor groups can be consulted

in formulating investigation plans and locating witnesses and survivors, which can be challenging in closed or war-affected societies. Survivors can also have their testimony taken before trial when unique investigative opportunities arise under Article 56 of the Rome Statute and their testimony might not be available at a trial that may be several years away. This tool can be particularly helpful for survivors who cannot testify at trial due to security risks, health complications, or risk of re-traumatization even with special measures in place. Survivors' views can also be considered under Rule 100(2) when considering whether pre-trial hearings can take place outside The Hague and closer to survivor communities. Such initiatives can generate substantially more positive survivor and community engagement. Early initiatives to overcome obstacles are more likely to bring about engagement with survivors and lead to a more fulsome evidence base.

Regarding the potential concern that the ICC engaging with survivors early in proceedings could generate expectations about a case that ultimately may not come to fruition, for example if an investigation does not automatically lead to a trial, nor to a conviction, this has not been borne out by survivor engagement with the ICC to date. Expectations are raised as soon as the Prosecutor considers any situation and indeed sometimes before it officially opens a preliminary examination. Thus, early engagement between survivors and the OTP is instead an opportunity to mitigate and manage expectations.



## *Benefits of a successful survivor-centered approach*

Implementing a successful survivor-centered approach is also central to the ICC's success. In addition to providing critical witness testimony about their experiences, survivors can deliver important background, contextual, and linkage evidence to investigators, prosecutors, and judges. Medical evidence secured from survivors, including DNA evidence, can play a role in strengthening the case against a defendant.


In the context of certain gender-based crimes, the survivor's proximity to the direct perpetrator may afford the opportunity to better understand their assailant's motivation – potentially contributing evidence establishing the mens rea of an accused. Importantly, survivors can describe the impact of criminal conduct on their lives, which can inform prosecutorial decision-making, sentencing, and reparations.

Survivors also play an important role in generating support or 'buy-in' from communities affected by international crimes. Their support for proceedings can strengthen grassroots perceptions that the ICC is meaningfully engaging the communities that international crimes affect through the prosecution of patterns of conduct recognisable to those communities. Survivor reinforcement of legitimacy of proceedings is vital for the success of international criminal justice.

For example, LAW's engagement with Rohingya survivors in refugee camps in Cox's Bazar, Bangladesh, following their displacement from Myanmar during the 2016 and 2017 'clearance operations,' has revealed increasing frustration with the apparently slow progress made by the OTP in the years since opening an investigation into the situation in 2019. This frustration has been exacerbated by the accelerated progress in other situations, such as Ukraine, where public arrest warrants have already issued. Rohingya survivors have expressed concern that their case has been forgotten, overlooked or de-prioritised. Meaningful OTP engagement with survivors (both through LAW and independently) has helped assuage some of these concerns. Increased OTP engagement with Rohingya survivors would likely strengthen enthusiasm and support for the ICC process among the Rohingya population.

Thus, LAW suggests that the Policy outline the needs of victims and survivors, their participation in proceedings, and the practical implementation of a survivor-centred, trauma-informed, and intersectional approach in the work of the OTP.





# 02 Accountability for the Crime of Slave Trading

While slavery defines who is a slave and who is a slave owner, the slave trade defines how one is reduced to slavery, transported as a slave, or maintained in slavery, and by whom.<sup>15</sup> The Rome Statute has been criticized for not criminalizing the offense of slave trading.<sup>16</sup> LAW supports explicit criminalization of the slave trade in the Rome Statute through a statutory amendment. However, acknowledging that such an amendment could take years to construct and approve, LAW also proposes using existing crimes and modes of liability to investigate and prosecute slave trading within the existing Rome Statute framework.

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<sup>15</sup> Patricia Viseur Sellers and Jocelyn Getgen Kestenbaum, Missing in Action: The International Crime of the Slave Trade, 18 *Journal of International Criminal Justice* Issue 2 (May 2020), at 527 [Sellers and Kestenbaum].



## *Criminalizing the slave trade*

LAW endorses explicit criminalization of the slave trade in the Rome Statute. The Policy should reflect that the slave trade is a *jus cogens* crime against humanity and war crime.<sup>17</sup> Slave trading has been outlawed under international humanitarian law as far back as the 1863 Lieber Code, which prohibits the enslavement and selling of captured persons.<sup>18</sup> Subsequently, the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention both explicitly prohibit slave trading<sup>19</sup> and obligate States to address the practice of slave trading, whether that be through prevention and suppression<sup>20</sup> or criminalization.<sup>21</sup> Additional Protocol II to the Geneva Conventions expressly prohibits the slave trade,<sup>22</sup> and the slave trade's prohibition constitutes customary international humanitarian law applicable to both

international and non-international armed conflicts.<sup>23</sup> The foundational international criminal courts at Nuremberg and Tokyo outlawed enslavement as a crime against humanity,<sup>24</sup> and contained explicit and implicit prohibitions of the slave trade as war crimes.<sup>25</sup> While numerous subsequent ad hoc international and hybrid criminal tribunal statutes also enumerated enslavement as a crime against humanity,<sup>26</sup> they did not explicitly prohibit the slave trade as a crime against humanity. Only the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) reasonably could be construed as implicitly having jurisdiction over the slave trade as a war crime (and so far, prosecutors have not charged the slave trade as a war crime at the ad hoc tribunals).<sup>27</sup>



<sup>16</sup> See e.g. *Ibid.*, 517–542.

<sup>17</sup> See Restatement (Third) of Foreign Relations of the United States, § 702 cmts. d–i, § 102 cmt. K (1987); International Committee of the Red Cross, Rule 94. Slavery and Slave Trade; 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).

<sup>18</sup> Lieber Code (1863) Article 58.

<sup>19</sup> See Convention to Suppress the Slave Trade and Slavery (1926), Article 1(2); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956), Article 3(1)–(2)(b).

<sup>20</sup> Convention to Suppress the Slave Trade and Slavery (1926), Article 2(a).

<sup>21</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956), Article 3(1).

<sup>22</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article. 4.

<sup>23</sup> Sellers and Kestenbaum, *supra* note 15, at 529.

<sup>24</sup> Charter of the International Military Tribunal (1945), Annexed to the London Agreement, 8 August 1945, 59 Stat. 1544, 1547, 82 UNTS 279, 288, Article 6(C) (the “London Charter”); Charter of the International Military Tribunal for the Far East (1946), Article 5(c) (the “Tokyo Charter”).

<sup>25</sup> Tokyo Charter, Article 5(b); London Charter, Article 6(b).

<sup>26</sup> See Statute of the International Criminal Tribunal for the former Yugoslavia, Article 5(c); Statute of the International Criminal Tribunal for Rwanda, Article 3(c); Statute of the Special Court for Sierra Leone Statute, Article 2(c); Rome Statute, Article 7(c); and The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Article 5; Sellers and Kestenbaum, *supra* note 15, at 517, 530–531.

<sup>27</sup> *Ibid.*, Sellers and Kestenbaum, at 517, 530–531.



While the prohibition against the slave trade remains outlawed under customary international law, it has so far not been explicitly addressed in the Rome Statute. Accordingly, a gap exists in the slave trade as an enumerated and adjudicated crime within

international criminal courts. LAW therefore endorses an explicit codification of the slave trade as a crime against humanity and war crime. In line with this view, the Policy should reflect this stance clearly.

### *Prosecuting slave traders within the existing Rome Statute framework*

In the absence of an amendment to the Rome Statute outlawing the slave trade, the OTP should acknowledge in its Policy that it can still combat impunity for the slave trade. The Prosecutor's ability to characterize and investigate specific facts amounting to certain criminal conduct within the jurisdiction of the Court is a key factor. In particular, through the application of certain modes of liability in Article 25(3), the OTP can hold slave traders accountable for co-perpetrating, aiding and abetting, facilitating, or contributing to the crime of enslavement even when they themselves do not exercise rights of ownership. Additionally, the Prosecutor could prosecute the slave trade as an "other inhumane act" under Article 7(1)(k) of the Rome Statute.

#### **Applying modes of liability to capture slave trading**

The Prosecutor can rely on existing modes of liability under Article 25(3) to prosecute conduct amounting to the slave trade, when for example, slave traders make an essential contribution to a person's enslavement under 25(3)(a), aid and abet enslavement under 25(3)(c), or contribute to enslavement having a common purpose with the enslavers under 25(3)(d).

Slave traders could be prosecuted for enslavement via direct co-perpetration under Article 25(3)(a), which requires that each co-perpetrator jointly committed the crime, such that each perpetrator, working in a coordinated manner, contributed an essential element to the criminal common plan.<sup>28</sup> The ICC Appeals Chamber has held that if co-perpetrators make an essential contribution to the criminal common plan with intent and knowledge, it is not necessary that they make an essential contribution to each criminal incident.<sup>29</sup> Accordingly, slave traders who make an essential contribution to the common plan to enslave others (without exercising rights of ownership) could still be liable for the enslavement as direct co-perpetrators. For example, ISIS Caliphate administrators of slave markets and slave holding centers in Iraq, who themselves did not exercise rights of ownership, nevertheless made essential contributions to the common plan to enslave Yazidis and could therefore in theory be prosecuted as co-perpetrators under Article 25(3)(a).

Complicity under Article 25(3)(c) requires that a person "... for purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission."<sup>30</sup> To be held liable under this mode of liability, an accused must

<sup>28</sup> ICC, Prosecutor v. Gicheru, Decision on Confirmation of Charges against Paul Gicheru, ICC-01/09-01/20-153-Red (15 July 2021), paras. 171-172.

<sup>29</sup> ICC, Prosecutor v. Bemba, et al., Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Narcisse Aido against their conviction, ICC-01/05-01/13-2275-Red A A2 A3 A4 A5 (8 March 2018), para. 812.

<sup>30</sup> Rome Statute, Article 25(3)(c).



have provided practical assistance, encouragement, or moral support that had a substantial effect on the perpetration of the crimes.<sup>31</sup> This mode of liability is dependent on the principal's commission of the crime, but the principal need not be identified, charged, or convicted.<sup>32</sup> For example, where an individual participates in slave trading (such as by driving a vehicle that transports a victim purchased from one enslaver to another), they are providing practical assistance to the crime of enslavement or sexual slavery, even where they are not exercising rights of ownership over the victim. Accordingly, assuming the requisite intent and knowledge, the OTP could prosecute that person under Article 25(3)(c) for aiding and abetting the commission of enslavement or sexual slavery, even if the enslaver is not convicted.

Another possibility would be to prosecute slave traders under Article 25(3)(d), which involves, "... [intentionally] contribut[ing] to the commission or attempted commission of [a crime] by a group of persons acting with a common purpose," either with the aim of furthering the criminal activity or criminal purpose of the group or in the knowledge or the intention of the group to commit the crime.<sup>33</sup> The application of Article 25(3)(d) requires the existence of a group of persons driven by and acting with a common purpose, and the person committing the crime must belong to the group.<sup>34</sup> Further, the accused's contribution must be significant and connected to the commission of the crime and not solely to the activities of the group in a general sense.<sup>35</sup> For example, soldiers who capture or kidnap victims who are subsequently enslaved or subjected to sexual slavery by those soldiers'

superiors, could be held liable for contributing to the crimes of enslavement or sexual slavery, assuming the requisite intent and knowledge, since their assigned tasks were significant and connected to commission of the crime(s). Thus, such soldiers, who were acting as slave traders, could be prosecuted for contributing to enslavement under Article 25(3)(d) given their common purpose with the principal perpetrators.

Additional modes of liability under Article 25 could also be explored, including for example inducing or soliciting crimes. The Policy should indicate the various ways in which the Prosecutor could rely on existing modes of liability under Article 25(3) to creatively prosecute conduct amounting to the slave trade.

### **Slave trading as an "other inhumane act"**

In addition to prosecuting slave trading conduct under existing modes of liability, the OTP could also prosecute the slave trade as the crime against humanity of "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" under Article 7(1)(k) of the Rome Statute. The great "suffering, or serious injury" charged under Article 7(1)(k) is to be analysed on a case-by-case basis with due regard for individual victims' circumstances.<sup>36</sup> Great suffering and serious injury have been found in situations where victims have been subjected to mutilation; assault causing injury; beatings; forced marriage; brutal living conditions in detention facilities; persecutory, humiliating, or degrading treatment; forcible transfer; and other violations of internationally protected

31 ICTY, *Prosecutor v. Vojislav Šešelj*, Judgement – Volume 1 (TC), IT-03-67-T (31 March 2016), para. 353. For example, providing engineering machinery and personnel for burial operations can have a substantial effect on the commission of mass executions. ICTY, *Prosecutor v. Vujadin Popovic*, Judgement (AC), IT-05-88-A (30 January 2015), para. 1784, citing *Blagojević and Jokić Appeal Judgement*, paras 180, 196.

32 ICC, *Prosecutor v. Bemba, et al.*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/13-1989-Red (19 October 2016), para. 84; See also ICC, *Prosecutor v. Bemba, et al.*, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Narcisse Arido against their conviction, ICC-01/05-01/13-2275-Red A A2 A3 A4 A5 (8 March 2018), para. 1330.

33 Rome Statute, Article 25(3).

34 ICC, *Prosecutor v. Germain Katanga*, Trial Judgment, ICC-01/04-01/07 (7 March 2014), para. 1624.

35 Ibid, para. 1632.

36 ICTY, *Prosecutor v. Kordić & Čerkez*, Appeals Judgement, IT-95-14/2-A (17 December 2004), para. 117; ICC, *Prosecutor v. Katanga & Chui*, Decision on the confirmation of the charges, ICC-01/04-01/07 (30 September 2008), paras. 453-454.





human rights.<sup>37</sup> “Other inhumane acts” include “serious violations of international customary law” drawn from norms of international human rights law.<sup>38</sup> As noted above, slave trade is a *jus cogens* crime against humanity and war crime in customary international law.<sup>39</sup> Thus, the Court can and should viably consider it an “other inhumane act” for the purposes of Article 7(1) (k) where the facts of the case show “great suffering, or serious injury” have occurred.

In sum, the Policy should reflect that prosecutorial practice can include pursuing conduct that amounts to the slave trade under the OTP’s existing tools. LAW believes that the Policy should also encourage the use of such tools to combat impunity for the crime of slave trading.

<sup>37</sup> ICTY, *Prosecutor v. Blaškić*, Trial Judgement, IT-95-14-T (3 March 2000), para. 238; ICTY, *Prosecutor v. Tadić*, Opinion and Judgement, IT-94-1-T (7 May 1997), para. 730; ICC, *Prosecutor v. Ongwen*, Trial Judgement, ICC-02/04-01/15 (4 February 2021), para. 2751; ICTY, *Prosecutor v. Krnojelac*, Judgement, IT-97-25-T (15 March 2002), para. 133; ICTY, *Prosecutor v. Kupreškić et al.*, Trial Judgement, IT-95-16-T (14 January 2000), para. 566.

<sup>38</sup> ICC, *Prosecutor v. Katanga & Chui*, Decision on the confirmation of the charges, ICC-01/04-01/07 (30 September 2008), para. 448.

<sup>39</sup> See e.g. Convention to Suppress the Slave Trade and Slavery (1926), Article 1(2); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956), Article 3(1)-(2)(b).



# 03 Encouraging Positive Complementarity for Slavery Crimes

The Policy can build on the OTP's recent Draft Policy on Complementarity and Cooperation by supporting positive complementarity and empowering domestic jurisdictions to pursue slavery crimes. LAW is well-placed to advocate for this practice as it has led a groundbreaking case in Lebanon based on enslavement and the slave trade, and therefore understands how domestic jurisdictions are well placed to take on such cases and pave a path towards justice for slavery crimes.





## *Complementarity framework*

Complementarity is a core principle on which the ICC is built. The Rome Statute's Preamble and first Article both emphasize complementarity, while Article 17 outlines the situational analysis for complementarity with regards to a particular case and Part 9 outlines the Court's cooperation with national jurisdictions. Part 9 includes Article 93(10), which provides that the Court can assist domestic courts trying crimes within the jurisdiction of the Court or other "serious crimes under [] national law" by, inter alia, sharing evidence.<sup>40</sup> Article 93(10) allows such support to be delivered even to non-State Parties of the Rome Statute upon request. Such support can be characterized as positive complementarity, where the Court and a local jurisdiction work together to end impunity for specific crimes.

The Court has openly acknowledged being overstretched and underfunded.<sup>41</sup> In such an environment, where the Court struggles to maintain its ongoing investigations and cases, positive complementarity may be its most vital resource to fighting impunity for international crimes. This approach was acknowledged and emphasized in the OTP's recent Draft Policy on Complementarity and Cooperation<sup>42</sup> and in its Strategic Plan 2023–2025.<sup>43</sup>

The Draft Policy Complementarity and Cooperation has four pillars of engagement with local authorities: (1) creating community practice; (2) technology as an accelerant; (3) bringing justice closer to home; and (4) harnessing cooperation mechanisms.<sup>44</sup> The first and the last pillar are most relevant here in that they focus on the sharing of information and collaboration efforts between national jurisdictions and the OTP. They call for, among other things, a new "Cooperation and Complementarity Forum,"<sup>45</sup> "promoting knowledge transfer between practitioners and legal professionals,"<sup>46</sup> the use of joint investigations,<sup>47</sup> and coordination with local rule of law and accountability actors.<sup>48</sup>

The OTP is unambiguous in its vision for deeper positive complementarity. The Prosecutor's policies at large, and in particular this Policy, should incorporate this vision. Indeed, the Prosecutor's call for public comment on this Policy includes encouragement for "... proposals as to how the ICC Office of the Prosecutor (OTP) can enhance its approach to and pursuit of slavery crimes, including through complementarity efforts." The Policy should thus reflect exactly how the Prosecutor intends to both learn from and support national efforts to prosecute slavery crimes.

<sup>40</sup> Rome Statute, Article 93(10).

<sup>41</sup> See e.g. the Prosecutor's comments to Reuters in March 2022. Antony Deutsch & Toby Sterling, **Insight: ICC faces "myriad challenges" to prosecute war crimes in Ukraine**, Reuters (4 March 2022).

<sup>42</sup> International Criminal Court Office of the Prosecutor, DRAFT Policy on Complementarity and Cooperation (September 2023), para. 4.

<sup>43</sup> International Criminal Court Office of the Prosecutor, Office of the Prosecutor Strategic Plan 2023–2025 (13 June 2023), para. 32–41.

<sup>44</sup> International Criminal Court Office of the Prosecutor, DRAFT Policy on Complementarity and Cooperation (September 2023), para. 23.

<sup>45</sup> Ibid, paras. 33–35.

<sup>46</sup> Ibid, paras. 42–46.

<sup>47</sup> Ibid, paras. 89–98.

<sup>48</sup> Ibid, paras. 99–101.



## *Complementarity for slavery crimes*

The Policy should reflect the Prosecutor's renewed ambitions for positive complementarity vis-à-vis slavery crimes. In the wake of Ongwen's conviction for enslavement and sexual slavery,<sup>49</sup> Ntaganda's conviction of sexual slavery,<sup>50</sup> and Al-Hassan's sexual slavery charges<sup>51</sup> slavery crimes have been centered in international precedent. Simultaneously, what has been termed "modern day slavery" has motivated large social movements against the practice.<sup>52</sup> Today, there exists a unique opportunity to support positive complementarity to enhance domestic courts' practices against slavery crimes.

LAW has been at the forefront of efforts to prosecute slavery crimes at the domestic level with its supporting for a groundbreaking criminal investigation in Lebanon. The case involves an Ethiopian migrant domestic worker who was brought to Lebanon through the existing "Kafala System" framework. The Kafala System is a culturally rooted structure for imported labor that holds those subjected to it outside of normal domestic labor laws, making them exceptionally vulnerable to their employers, or "Kafeels."<sup>53</sup> The Kafala System exists in different forms across the Middle East and Arabian Gulf and has long been identified as being rampant with abuse.

In Lebanon alone, there are an estimated 250,000 migrant domestic workers.<sup>54</sup> Migrant domestic workers in Lebanon are by law excluded from domestic labor laws that protect minimum wage rights, working hour restrictions, vacation days, overtime pay, and freedom of association.<sup>55</sup> One study estimated that

93% of Kafeels confiscate migrant workers' passports on arrival; less than 50% of employers allow workers to have a day of rest every week; 20% of Kafeels lock workers inside the houses they work in; 40% of employers do not pay their employees regularly; and, about 30% of Kafeels beat their workers.<sup>56</sup> In September 2020, the Lebanese Labor Ministry adopted a "standard unified contract" for migrant workers that guaranteed basic safeguards; however, Lebanon's top administrative court swiftly, in response to a complaint from migrant worker recruitment agencies, suspended the application of the unified contract.<sup>57</sup>

Within this context, LAW has been working to support the legal rights of migrant workers in Lebanon for the last five years. This has included seeking to initiate strategic litigation against the Kafala System, which LAW in Lebanon describes as often enabling slavery and slave trading. In this pursuit, on behalf of a migrant worker, "MH," LAW initiated criminal proceedings against MH's Kafeel and the recruitment agency that brought MH to Lebanon for, inter alia, crimes amounting to slavery and slave trading.

MH was employed for eight-and-a-half-years as a migrant worker in Lebanon but was only paid 13-months' worth of her wages. MH was forbidden from leaving the home in which she worked alone, she was never given a full day off, and often worked 15-hour days. MH's employer regularly verbally abused her, sometimes physically assaulted her, and at one point even forced MH to cut her hair. In Autumn 2019,

50 ICC, Prosecutor v. Ntaganda, Judgement, ICC-01/04-02/06 (8 July 2019), at 536.

51 ICC, Prosecutor v. Al Hassan, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18 (13 Novembre 2019), para. 228.

52 See Anti-Slavery International, **What is modern slavery?**; International Labour Organization and Walk Free Foundation, *Global estimates of modern slavery: forced labour and forced marriage* (2017).

53 Amnesty International, 'Their House is my Prison': Exploitation of Migrant Domestic Workers in Lebanon (24 April 2019), at 12-15.

54 Aya Majzoub, **Lebanon's Abusive Kafala (Sponsorship) System**, Human Rights Watch (4 January 2022).

55 Ibid.

56 Sumayya Kassamali, *The Kafala System as Racialized Servitude*, POMEPS Studies No. 44 (September 2021), at 102, 105.

57 Amnesty International, **Lebanon: Blow to Migrant Domestic Worker Rights** (30 October 2020).

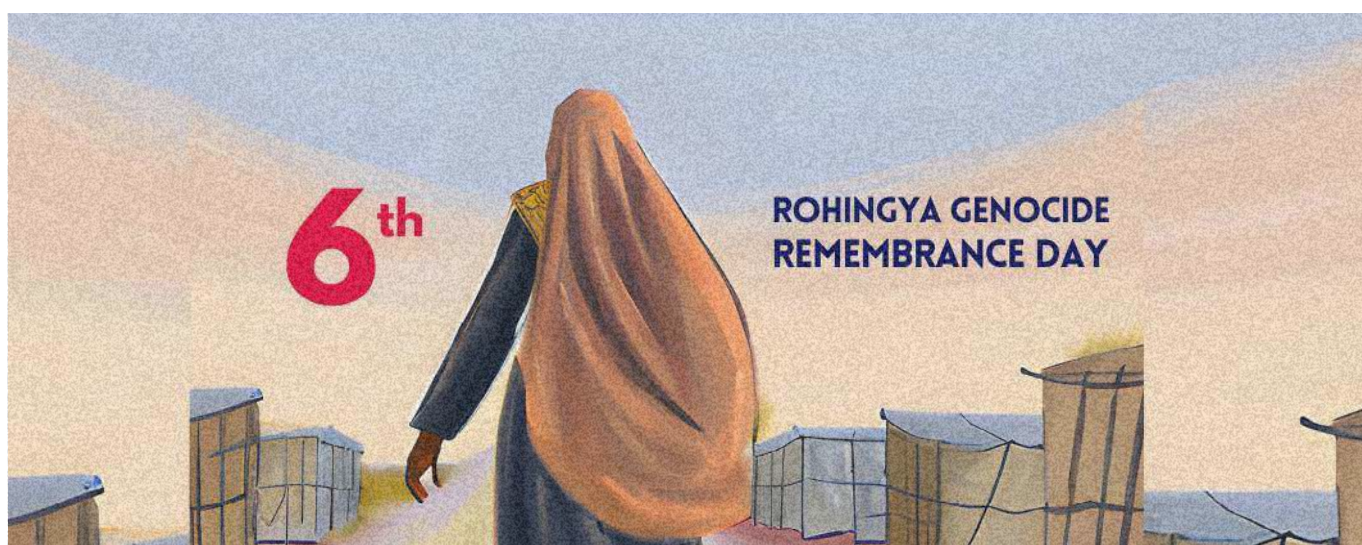
MH was able to get into contact with LAW's staff, who assisted her in leaving her Lebanese employer and returning safely to her home in Ethiopia. LAW also assisted MH in initiating a criminal complaint in Lebanese criminal court against her recruiter and employer.

The MH criminal complaint asserts that MH was subjected to the slave trade as outlawed in Article 586(1) of the Lebanese Criminal Code and slavery banned as *jus cogens* customary international law, including in the International Covenant on Civil and Political Rights, which Lebanon is party to. Lebanon's constitution establishes that ratified treaties constitute Lebanese domestic law.

The MH case currently sits with an Investigating Judge, who has questioned MH's employer and is now seeking to question MH, after years of practical hurdles arising from Lebanon's local political and financial crises. LAW continues to try to bring MH's recruitment agency into the investigative process, which has avoided summons to date.

This case has been recognized as making history for its characterization of the Kafala System as a structure that enables slavery and slave trade (as defined by international as well as domestic law), in a region where the Kafala System remains widely accepted with little question<sup>58</sup>

As Lebanon itself is not yet party to the Rome Statute, there are two pathways towards ICC jurisdiction in this particular context. First, Lebanon could file a declaration under Article 12(3) accepting the Court's jurisdiction, as Lebanon's Council of Ministers recently instructed its Foreign Affairs Ministry to do for crimes committed on its territory since 7 October 2023.<sup>59</sup> Second, Lebanon could request assistance under Article 93(10) to engage with the Prosecutor's office. Under the first scenario, for example, assuming the relevant factual and legal thresholds were met for crimes against humanity, the OTP could be empowered to investigate and prosecute those companies or organizations committing a widespread of systematic attack against the migrant domestic worker civilian population and enslaving them through the Kafala system. Under the second scenario, cases



<sup>58</sup> Mellies, Romain, **What the Kafala system continues to reveal about Lebanon's alarming history with Migrant Labour**, Lebanese American University School of Arts and Sciences (25 October 2022).

<sup>59</sup> Alexis Boddy, **Lebanon takes major step towards accepting ICC jurisdiction**, JURIST news (27 April 2024).





like MH are exactly the kind of case that would benefit from partnership with the OTP pursuant to positive complementarity. For example, the OTP could provide Lebanese prosecutors or investigative judges with expertise on international law as it relates to slavery and slave trading and guidance on procedural safeguards for cases involving international crimes, such as supporting remote hearings and technological solutions for the issues that Lebanon's mostly analog court system presents. Liasing with the OTP could also create continuity in a legal investigation that has been continually interrupted by civil strife and conflict in Lebanon, including by preserving and cataloging evidence in a manner to ensure compliance with international standards. OTP engagement with this

case could also raise the international profile and significance of the case.

Even if the OTP cannot engage Lebanon on this matter as non-State Party, this case is indicative of the ways in which the OTP could engage other national jurisdictions investigating and prosecuting slavery crimes, and an indicator of the many ways it would benefit from the OTP's expertise.

In the Policy, the Prosecutor should indicate that it will identify similar cases trying international slavery crimes in jurisdictions already within the Rome Statute framework pursuant to which the OTP could practice positive complementarity for slavery crimes.





## 04 Conclusion & Recommendations

In conclusion, the Policy should incorporate a survivor-centered, trauma-informed, and intersectional approach, encourage codification of the slave trade and OTP practice to prosecute conduct amounting to the slave trade, and promote positive complementarity to support domestic jurisdictions already trying slavery crimes. Each of these proposals would strengthen the Prosecutor's approach to combatting impunity for slavery crimes in a holistic and comprehensive manner while considering the impacts of the crimes on survivors. As slavery proliferates around the globe still today, the OTP has an opportunity, through this Policy, to re-center a comprehensive campaign against perpetrators of slavery crimes.



*In sum, LAW proposes the following recommendations for the Policy*

1. Commit to a survivor-centered, trauma-informed, and intersectional approach to prosecuting slavery crimes;
2. Explicitly acknowledge the intersecting identities, including race, ethnicity, age, socioeconomic status, nationality, gender identity, and sexual orientation, that can form the basis of discriminatory attacks against slavery victims and ensure such analysis is incorporated into the OTP's legal and strategic work;
3. Ensure vulnerable survivors, particularly with intersecting sensitivities, are protected and accommodated by ensuring availability of competent referral pathways at all stages of proceedings and utilizing protective measures under the Court's Statute and Rules of Procedure and Evidence;
4. Explore how the OTP can engage with and involve survivors at all stages of the investigative and trial process for slavery crimes, ensuring survivors' views and interests are incorporated throughout, designing a robust informed consent procedure for all victims and survivors engaging with the OTP, and encouraging engagement early in the process;
5. Support amending the Rome Statute to include the slave trade as a crime against humanity and war crime;
6. Outline practical guidance that encourage the OTP to prosecute the slave trade even when the crime itself is not enumerated in the statute, such as through modes of liability in Article 25(3) and prosecuting the slave trade as the crime against humanity of an "other inhumane act" under Article 7(1)(k); and
7. Use the Court's existing complementarity framework to support, facilitate, and enhance domestic investigations that involve the international crimes of enslavement and slave trading.







## *About LAW*

LAW is an independent, non-profit organisation comprised of human rights lawyers and jurists who specialise in providing legal information, assistance, and representation in fragile and conflict-affected areas. LAW has represented thousands of victims globally and currently supports survivors in South Sudan, Somalia, Ethiopia, Bangladesh/Myanmar, Sri Lanka, Ukraine, Lebanon, Syria, and occupied Palestine. LAW works with diverse constituencies of stakeholders, first and foremost survivors, including survivors' groups that have come together to collectively seek justice and accountability. Our areas of collaboration and partnerships include

strategic litigation, client representation, legal aid and assistance, capacity-building and technical advice, and research and advocacy. LAW works with, represents, and advocates on behalf of lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) individuals. LAW supports survivors to engage and participate in truth seeking investigations and justice processes. LAW also builds and disseminates the evidence on how conflict and fragility settings affect women and girls, men and boys, LGBTQI+ people, and barriers to them accessing support and services, as well as legal assistance and representation.





# Policy on Slavery Crimes:

## **Legal Action Worldwide Submission to the Office of The Prosecutor of the International Criminal Court**

30 April 2024



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