

BREAKING THE CHAINS:

THE INABILITY OF THE INTERNATIONAL CRIMINAL COURT TO COMBAT THE PERSISTENT PROBLEM OF SLAVERY AND THE INTERNATIONAL JUSTICE MISSION'S MODEL FOR ENFORCEMENT

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ABSTRACT: Slavery was one of the first human rights issues to arouse widespread international concern, and today, international human rights law unequivocally outlaws all forms of slavery. Despite these legal protections, slavery continues to be a persistent problem. Currently, "enslavement" as defined in Article 7 of the Rome Statute has yet to be interpreted by the International Criminal Court (ICC) to adequately cover contemporary models of slavery. This article seeks to educate readers about contemporary forms of slavery, to demonstrate the enforcement problems at the national level; to analyze the difficulties with using the ICC even with an expansive definition of enslavement to prosecute modern slavery; and to highlight the success of the International Justice Mission in working to gain convictions where nations have adopted, but are not enforcing domestic and international anti-trafficking laws and to endorse its model for addressing slavery around the world.

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“Sir, the nature and all the circumstances of this trade are now laid open to us; we can no longer plead ignorance, we cannot evade it, it is now an object placed before us, we cannot pass it. We may spurn it, we may kick it out of our way, but we cannot turn aside so as to avoid seeing it; for it is brought now so directly before our eyes that this House must decide, and must justify to all the world, and to their own consciences, the rectitude of the grounds and principles of their decision.”

~William Wilberforce, May 12, 1789 speech to the British Parliament advocating for the abolition of slavery¹

“The States Parties to this Statute, ... *affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, *determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”

~ Preamble to the 1998 Rome Statute of the International Criminal Court²

1 William Wilberforce, *Speech to Parliament, May 12, 1789*, in THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803 FROM WHICH THE LAST-MENTIONED EPOCH IT IS CONTINUED DOWNWARDS IN THE WORK ENTITLED, “THE PARLIAMENTARY DEBATES.” VOL. XXVIII COMPRISING THE PERIOD FROM THE EIGHTH OF MAY 1789, TO THE FIFTEENTH OF MARCH 1791 (T.C. Hansard 1816).

2 Rome Statute of the International Criminal Court, United Nations

“The Purposes of the United Nations are: ... to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. ...”

~ United Nations Charter, Article 1³

Vijayan and his wife spent thirteen years working seven days a week, eighteen hours a day in a rice mill.⁴ In return for their labor they received porridge made from spoiled rice incapable of being sold at the market.⁵ Instead of attending school or playing outside, their young children spent their days cleaning a cow shed, carrying husks or helping to spread rice to dry in the sun.⁶ When Vijayan and his family tried to escape, the owner of the rice mill tracked them down, forcibly dragged them back, and beat them with a belt from the mill machinery.⁷

When presented with these facts, one might assume he

Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, pmbi., 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3 Charter of the United Nations, 59 Stat. 1031, 3 Bevans 1153, (Oct. 24, 1945) Ch. 1 Art. 1.2.

4 Samantha Power, “A Reporter at Large: The Enforcer: A Christian Lawyer’s Global Crusade,” *THE NEW YORKER*, Jan. 19, 2009, at 61-62.

5 *Id.* at 62.

6 *Id.*

7 *Id.* Other slaves at the Rice Mill received even harsher treatment. For example, Bonda, was “placed in iron chains and kept in solitary confinement for a week. By the time he was released, he couldn’t stand up, and blood oozed out of his ears.” *Id.*

or she was hearing an account of slavery from the distant past. Regrettably, slavery is still far from being eradicated.⁸ Until 2006 Vijayan was a victim of bonded slavery, a practice that remains prevalent in India and other countries today.⁹ The International Justice Mission, a non-governmental organization, which was the catalyst behind the Indian police raid on the rice mill where Vijayan was enslaved, litigated fifty-six bonded slavery cases in the Indian Court system in Chennai, the capital city of the Indian state of Tamil Nadu, in 2009.¹⁰ Since 2003, the International Justice Mission's Chennai office has placed almost 2,500 freed slaves

8 See Organization for Security and Co-operation in Europe, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Combating Trafficking as Modern-Day Slavery: A Matter of Rights, Freedoms, and Security*, 2010 Annual Report of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings Presented to the Permanent Council, 9 Dec. 2010. Available at: http://www.ungift.org/doc/knowledgehub/resource-centre/OSCE_Annual_Report_2010.pdf. See also, L. SHELLEY, *HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE* (Cambridge 2010); Anti-Slavery, Transparency International, UNODC, *The Role of Corruption in Trafficking in Persons* 30 (2009); International Labour Office (ILO), Belser, P. and Danailova-Trainor, G., *Globalization and the Illicit Market for Human Trafficking: An Empirical Analysis of Supply and Demand*, Declaration Working Paper 53 SAP-FL (Geneva, 2006).

9 See 2010 Annual Report of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings Presented to the Permanent Council, *supra* note 9. Vijayan originally borrowed fifteen dollars or five hundred rupees from the rice mill owner as a loan, but because of the high rate of interest that is charged it would have been impossible for Vijayan to ever pay off the debt. *Id.* Bonded Slavery is further defined in this paper. See also, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Protection of Human Rights, Comm'n on Human Rights, Working Group Report: Contemporary Forms of Slavery at 23, U.N. Doc. E/CN.4/Sub.2/2000/23 (July 21, 2000). [Hereinafter UN Report]

10 Samantha Power, *supra* note 5, at 62; for more information about Chennai, India visit the official government website of Chennai District, <http://www.chennai.tn.nic.in/> (last visited Mar. 10, 2011).

in aftercare.¹¹ This number pales in significance compared to the estimate of human rights groups that between twenty-five and sixty million Indians live in a condition of slavery.¹² Even when convictions are won, the resulting sentences can be shockingly insubstantial.¹³ The sheer volume of Indian citizens currently enslaved in contravention to local and international law reveals the failure of the Indian legal system to provide an appropriate solution to the nation's problem of bonded slavery.

Slavery was one of the first human rights issues to arouse widespread international concern, and today, international human rights law unequivocally outlaws all forms of slavery.¹⁴ Over sev-

11 Samantha Power, *supra* note 5 at 62.

12 The estimates of the number of slaves in the world vary based on how slavery is defined and whether the statistics used are self-reported by national governments or compiled by human rights groups. *See, eg.* KEVIN BALES, *ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES* (2007), 9, 69. (He estimates 27 million live in slavery worldwide and that India has the largest number of slaves in the world, which he points out is "more than twice the number of people taken from Africa during the 350 years of the Atlantic Slave Trade."); U.N. Report, *supra* note 10, at 21 (The report reveals estimates that between 44 to 100 million people are subject to contemporary forms of slavery in India.); Human Rights Watch, *Small Change: Bonded Child Labor in India's Silk Industry* 18 (2003), <http://www.hrw.org/sites/default/files/reports/india0103.pdf> (This report estimates that at least 15 million child laborers in India are modern day slaves.).

13 Samantha Power, *supra* note 5 at 62. ("One slave owner spent only a day in jail.") *Id.*

14 *See* David Weissberodt, *Anti-Slavery Int'l. Office of U.N. High Comm'r for Human Rights, Abolishing Slavery and Its Contemporary Forms* 3 (2002), <http://www.ohchr.org/Documents/Publications/slaveryen.pdf>; Renee Colette Redman, *The League of Nations and the Right to be Free from Enslavement: the First Human Right to be Recognized as Customary International Law*, 70 *CHI.-KENT L. REV.* 759, 780 (1994); Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), 1970 *I.C.J.* 32 (Feb. 5); M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 *N.Y.U. J. INT'L L. & POL.* 445, 445 (1991) (Slavery and its more modern related practices are both a breach of international treaty law and *jus cogens* violations).

enty-nine major international documents were operative by the end of the twentieth century dealing with slavery, forced labor, slavery-related practices, and the slave trade.¹⁵ Yet despite these legal protections, slavery continues to be a persistent problem.¹⁶

As the preamble to the Rome Statute states, the International Criminal Court (ICC) was created to end impunity for perpetrators of the crimes deemed most serious by the international community.¹⁷ Wilberforce remains as correct today as he was in 1789. As the English Parliament of the time was aware of practice of slavery, neither can today's international community claim ignorance of slavery's continuance, and the ICC and the United Nations must justify to the world their action or inaction against this serious crime.¹⁸

15 Bassiouni, *supra* note 15 at 454.

16 Few countries are left untouched by the scourge of slavery. See U.S. DEP'T OF LABOR, 2004 FINDINGS ON THE WORST FORMS OF CHILD LABOR 25 (2005); A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social-Rights Based Approach*, 23 PENN ST. INT'L L. REV. 809, 829 (2005); THE POLITICAL ECONOMY OF NEW SLAVERY (Christien van den Anker ed. 2004); KEVIN BALES, NEW SLAVERY: A REFERENCE HANDBOOK 7 (2000); OFFICE OF THE HIGH COMM'R ON HUMAN RIGHTS, FACT SHEET NO. 14: CONTEMPORARY FORMS OF SLAVERY, <http://www.ohchr.org/Documents/Publications/FactSheet14en.pdf>.

17 *Id.*

18 Rome Statute, *supra* note 2, art. 7(1) (listing "enslavement" and "sexual slavery" as crimes against humanity.) See e.g., Prosecutor v. Kunarac et al, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 117-18 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); CHILD SLAVERY NOW: A CONTEMPORARY READER 45 (Gary Craig ed. 2010); KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, SOURCES AND COMMENTARY, 328-29 (2002); William Schabas, *Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals*, in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF PROFESSOR IGOR BLISHCHENKO 98 (José Doria, Hans-Peter Gasser and M. Cherif Bassiouni eds. 2009).

Currently, "enslavement" as defined in Article 7 of the Rome Statute has yet to be interpreted by the ICC to adequately cover contemporary models of slavery. This impedes the ICC's ability to hold perpetrators' accountable. For the ICC to address the culture of impunity towards slavery present at the domestic level, the definition of enslavement must be interpreted expansively. However, even with an expansive definition, other problems inhibit ICC's ability to universally extinguish human slavery. This article seeks to educate readers about contemporary forms of slavery in Part I; in Part II, to demonstrate the enforcement problems at the national level; in Part III, to analyze the difficulties with using the ICC even with an expansive definition of enslavement to prosecute modern slavery; and in Part IV to highlight the International Justice Mission's success in both gaining convictions in nations that do not normally enforce anti-trafficking laws and their development of a model for addressing international slavery.

I. CONTEMPORARY FORMS OF SLAVERY

Slavery has undergone a significant transformation since William Wilberforce delivered his abolition speech to the British Parliament in 1789. The 1926 Slavery Convention of the League of Nations defined slavery as "the status or condition of a person over which any or all of the powers attaching to the right of ownership are exercised."¹⁹ The element of ownership is the crucial difference between the chattel slavery that Wilberforce opposed and the 1926 Slavery Convention targeted and modern day slav-

19 Slavery Convention of 1926, art. 1(1), Mar. 9, 1927, 60 L.N.T.S. 253.

ery.²⁰ Today, slavery involves less formal ownership and is more dependent on “a critical level of control over slaves.”²¹ The United Nations Working Group on Contemporary Forms of Slavery identified the major types of contemporary slavery in the world in 2006 where a critical level of control is exercised over victims as: bonded labor,²² forced prostitution and human trafficking,²³ child

20 Weissbrodt, *supra* note 14. (Traditional chattel slavery which possesses the element of ownership is becoming increasingly rare.)

21 Ashley V. Tomlinson, *Comment: Slavery in India and the False Hope of Universal Jurisdiction*, 18 TUL. J. INT'L & COMP. L. 231, 235 (2009). *See also*, KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 5 (2004).

22 Bonded Labor is specifically prohibited by The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608 (XXI), Sept. 7, 1956, Art. 1 (a), 226 U.N.T.S. 3, 7 C.T.S. 1963; The Abolition of Forced Labour Convention (No. 105), June 25, 1957, 320 U.N.T.S. 291; and the International Convention on Civil and Political Rights, art. 8(3), U.N. Doc. A/6316 (Mar. 23, 1976.).

23 Human Trafficking is specifically prohibited by the International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; the International Convention for the Suppression of White Slave Traffic, May 4, 1910, 2 U.S.T. 1997, 30 U.N.T.S. 23; the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979), <http://untreaty.un.org/English/TreatyEvent2001/pdf/01e.pdf>, and the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, U.N. Doc. A/55/383 (Nov. 15, 2000), [hereinafter the Palermo Protocol].

labor,²⁴ and children in armed conflict.^{25, 26}

Each type of modern slavery is defined by international law. The Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery defines debt bondage, also known as bonded labor, as:

[T]he status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.²⁷

24 Child labor is outlawed by the Convention on the Rights of the Child to which has been ratified by every country except Somali and the United States. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. See also, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182), June 17, 1999, 38 I.L.M. 1207 [hereinafter Convention 182] (adopted by the General Conference of the International Labour Organization at its eighty-seventh session.)

25 Forced conscription of children is specifically outlawed by the Palermo Protocol *supra* note 22, and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I, art. 3, U.N. GAOR 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 (2000) (Feb. 12, 2002) [hereinafter Children in Armed Conflict Protocol].

26 United Nations Economic and Social Council Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights Fifty-second session Item 6 of the provisional agenda, *Contemporary Forms of Slavery: Report of the Working Group on Contemporary Forms of Slavery on its twenty-fifth session Chairperson-Rapporteur: Ms. Halima Embarek Warzazi*, U.N. Doc. E/CN.4/Sub.2/2000/23, (July 21, 2000) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/143/98/PDF/G0014398.pdf?OpenElement>. See also, OFFICE OF THE HIGH COMM'R ON HUMAN RIGHTS, FACT SHEET No. 14: CONTEMPORARY FORMS OF SLAVERY, available at <http://www.ohchr.org/Documents/Publications/FactSheet14en.pdf>.

27 The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *supra* note 21.

This definition of debt bondage had also been incorporated into national legislation.²⁸ The general definition of human trafficking from the Palermo Protocol is:

[T]he recruitment, transport, transfer, harbouring or receipt of a person by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.²⁹

Exploitation is defined to include “the exploitation of the prostitution of others or other forms of sexual exploitation.”³⁰ The Interpretative note to this section of the text states that “the travaux preparatoires should indicate ... [t]he terms ‘exploitation of the prostitution of others’ or ‘other forms of sexual exploitation’ are not defined in the Protocol, which is therefore without prejudice to how State Parties address prostitution in their respective domestic laws.”³¹ Therefore, although forced prostitution is against international law, what constitutes forced prostitution is left to be determined by each sovereign nation.

The International Labour Organization (ILO) defines children as all persons under the age of eighteen.³² The ILO defines

28 See, e.g., the Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. 7101 §103 (4).

29 Palermo Protocol, *supra* note 22.

30 *Id.*

31 Interpretative Note (64) to the Palermo Protocol, *supra* note 22..

32 ILO, Convention 182 Worst Forms of Child Labor, *supra* note 23 at art.2.

the term “the worst forms of child labour” in Article 3 as:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.³³

Here the definition of child labor is expansive and extends beyond child slavery and slave-like practices. The most expansive definition of a child soldier is that of the Cape Town Principles from 1997:

33 *Id.* at art (3).

Any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore only refer to a child who is carrying or has carried arms.³⁴

Although the Cape Town definition existed when the Rome Statute was drafted, the drafters chose a narrower definition, which finds the use of child soldiers to be a war crime under Article 8, but does not include other categories of child soldiers who are not “active participants” in combat.³⁵

Of the four major contemporary forms of slavery to date, the ICC has concentrated most of its energy on combating the use of child soldiers.³⁶ Thomas Lubanga Dyilo is currently on trial for

34 UNICEF, *Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa* (Cape Town, 27-30 Apr. 1997), <http://iggi.unesco.or.kr/web/iggidocs/02/952579100.pdf> [hereinafter *Cape Town Annotated Principles*] (Adopted at the symposium on the prevention of recruitment of children into the armed forces and on demobilization and social reintegration of child soldiers in Africa).

35 Rome Statute, *supra* note 2, at Article 8(2)(xxvi) (declaring it a serious violation if “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities”). At the conference where the Rome Statute was drafted the crime was limited to the use of children in active hostilities and would “not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use as domestic staff.” Report of ICC Preparatory Committee, A/CONF/183/2/Add.1, 14 Apr. 1998.

36 See *Prosecutor v. Thomas Lubanga Dyilo*, Case No.: ICC-01/04-01/06, Warrant for Arrest (Feb. 10, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF>.

“enlisting and conscripting...children under the age of 15 years into the [Patriotic Forces for the Liberation of Congo (FPLC)] and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to 2 June 2003 which is punishable under article 8 (2)(b)(xxvi) of the Rome Statute” as a war crime.³⁷ Additionally, Germain Katanga and Mathieu Ngudjolo Chui are also on trial for among other charges, the war crimes of using child soldiers within the meaning of article 8(2)(b)(xxvi) of the Rome Statute, and sexual slavery under Article 8(2)(b)(xxii), and sexual slavery as a crime against humanity under Article 7 (1)(g) of the Rome Statute.³⁸ Thus far the ICC has focused on only two of the forms of modern slavery: children in armed conflict and sexual slavery. The ICC Prosecutor has also chosen not to bring charges against any of the individuals for enslavement using the crimes against humanity article 7(1)(C).³⁹ By failing to prosecute, the ICC is perpetuating the international culture of impunity that permits contemporary forms of slavery to flourish.

II. A CULTURE OF IMPUNITY ON THE NATIONAL LEVEL

On the surface, most countries appear committed to abolish-

37 *Id.* On March 14, 2012, in the first judgment of the International Criminal Court, the ICC convicted Lubanga of using child soldiers. Lubanga will be sentenced later this year. He could receive life imprisonment. Mike Corder, “In First for International Court, Warlord Convicted for Using Child Soldiers,” *THE ASSOCIATED PRESS*, Mar. 15, 2012.

38 Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Warrant of Arrest (July 6, 2007), <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0107/Democratic+Republic+of+the+Congo.htm>.

39 The Rome Statute, *supra* note 2, at Article 7(1) “enslavement.”

ing slavery, and worldwide many people erroneously presume it to be a long-extinct practice.⁴⁰ Domestic and International laws may theoretically prohibit it, but they lack meaningful enforcement.⁴¹ This allows slavery to persist in a blatant disregard for human dignity. India is an excellent example of a domestic culture that condones slavery through its inaction.

A. India's Experience with Bonded Labor

India has been identified by the International Labor Organization as the country with the largest number of bonded laborers.⁴² Furthermore, many of the contemporary forms of slavery such as child laborers, sexual slaves, and trafficking are all present

40 Numerous International treaties outlaw the existence of slavery. *See, e.g.*, 1815 Declaration Relative to the Universal Abolition of the Slave Trade [Congress of Vienna, Act XV], 2 Martens Nouveau Recueil 432, reprinted in 63 Parry's T.S. 473 (1969); The 1841 Treaty for the Suppression of the African Slave Trade (Treaty of London), 6 Martens Nouveau Recueil 139, reprinted in 92 Parry's T.S. 437; 1910 International Convention for the Suppression of the White Slave Traffic, 7 Martens Nouveau Recueil (ser. 3) 252, reprinted in 211 Parry's T.S. 45; The 1926 Slavery Convention of the League of Nations *supra* note 18; U.N. Charter art.2; The Universal Declaration of Human Rights, G.A. Res.217 (III) A, U.N. Doc. A/810 (1948); Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *supra* note 26; 1957 Convention (No. 105) Concerning the Abolition of Forced Labor, 320 U.N.T.S. 291; 1966 International Convention on Civil and Political Rights, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No.16) at 49, U.N. Doc. A/6316 (1967); 1989 United Nations Convention on the Rights of the Child, *supra* note 23, Rome Statute, *supra* note 2; Palermo Protocol, *supra* note 22; Children in Armed Conflict Protocol, *supra* note 24.

41 Beth Stephens, *Accountability for International Crimes: The Synergy Between the International Criminal Court and Alternative Remedies* 21 Wts. INT'L L. J. 527, 527 (2003).

42 Int'l Labour Org. (ILO), Stopping Forced Labour 35 (2001), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_088490.pdf.

in India.⁴³ In addition to contravening India's international treaty obligations, all of these practices are illegal under Indian law.⁴⁴

Article 23(1) of the Indian Constitution states, "Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law."⁴⁵ Article 24 prohibits labor in factories for children under the age of 15.⁴⁶ Article 39 (e) states "that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength."⁴⁷ The Indian Penal Code also criminalizes several acts of slavery.⁴⁸

Furthermore, in 1976, a federal Bonded Labour System (Abolition) Act (BLA) was enacted.⁴⁹ This federal act was to be implemented by vigilance committees which were to be estab-

43 Tomlinson, *supra* note 20 at 237.

44 See BHANDARY M. LEELADHARA, INDIA'S POSITION ON MULTILATERAL TREATIES DEPOSITED WITH THE UN SECRETARY GENERAL, STATUS AS OF 31 DECEMBER 2004, IN INDIA AND INTERNATIONAL LAW 345 (Bimal N. Patel ed, 2005) (India is a party to at least 10 treaties regarding slavery and slave related treaties that impose an obligation on the member state to take effective steps to criminalize, punish, and provide mutual assistance to other member states dealing with slavery.)

45 INDIA CONST. art.23(1).

46 *Id.* at art. 24.

47 *Id.* at art. 39(e).

48 Tomlinson, *supra* note 20 at 244. INDIA PEN. CODE §§ 363, 367, 370-71, 374 (prohibits unlawful compulsory labor).

49 The Bonded Labour System (Abolition) Act, No. 19 of 1976, INDIA CODE (1997), art. 4, http://ncpr.gov.in/Acts/Abolition_of_Bonded_Labour_System_Act_1976.pdf. (This act defines the bonded labor system as a "system of forced, or partly forced labour under which a debtor enters into, or is presumed to have entered into, an agreement with the creditor," to the effect that the debtor might forfeit certain basic rights).

lished by individual states.⁵⁰ This act requires the identification, release, and rehabilitation of all bonded laborers in the country and cancels their outstanding debts.⁵¹ Violators of the BLA are subject to up to three years imprisonment and an INR \$2,000 fine for each violation of the BLA.⁵² Numerous laws also proscribe Child Labor.⁵³ Laws have also been adopted on the state level in an attempt to eradicate the bonded labor systems particularly present in each state.⁵⁴

The justices of the Indian Supreme Court have further interpreted the definitions of forced labor and bonded labor to include those who are paid less than the minimum wage for their services.⁵⁵ In a subsequent case, the court created a legal presumption that once the court determines that a worker provided "forced labour," it is to be presumed that "he is required to do so in consideration of an advance or other economic consideration received by

50 For more in-depth information about the act, see, L. MISHRA: BURDEN OF BONDAGE (1997); and Y. REDDY: BONDED LABOUR SYSTEM IN INDIA (1995)

51 BLA, *supra* note 48, art. (6)(1), art.4.

52 *Id* at art. 18.

53 Specifically, The Children (Pledging of Labor) Act, The Juvenile Justice (Care and Protection) Act, The Factories Act, and the Child Labour (Prohibition and Regulation) Act. See, The Children (Pledging of Labor) Act, No.2 of 1933 (1933); INDIA CODE, art.2, <http://indiacode.nic.in/fullact1.asp?tfnm=193302>; The Juvenile Justice (Care and Prevention) Act, No. 56 of 2000; INDIA CODE, art. 26, <http://indiacode.nic.in/fullact1.asp?tfnm=200056>; The Factories Act, No. 63 of 1948; INDIA CODE (1993), arts. 67, 71, http://www.labour.delhigovt.nic.in/act/html_ifa/fa1948_index.html; The Child Labour (Prohibition and Regulation) Act, No. 61 of 1987; INDIA CODE (1993), sched. A, available at <http://www.bba.org.in/resourcecentre/clprohibition®ulationact.php>.

54 ILO, Stopping Forced Labour, *supra* note 41 at 38.

55 See, People's Union for Democratic Rights v. Union of India, AIR 1982 S.C. 1473.

him and is therefore a bonded labourer.”⁵⁶ These decisions have paved the way for an expansive definition of a “bonded labourer” for purposes of the Act.⁵⁷ Despite this expansive definition of bonded labourer, statistics reveal that the number of people living in bonded slavery in India is horrifyingly high. Shortly after the implementation of the Bonded Labor (Abolition) Act, a 1978-79 survey undertaken by the Ghandi Peace Foundation and the National Labour Institute, estimated that in the ten Indian States surveyed 2,617,000 Indians were living as bonded labourers.⁵⁸ Now roughly thirty years later, the 2009 U.S. Department of State Country Human Rights Reports show that forced or compulsory labor practices remain widespread and that successful prosecutions are rare.⁵⁹ It is hard to determine the actual number of those currently living in contemporary forms of slavery, but what is clear is that the number has not decreased since the implementation of the legislation against slavery or slave-like practices.⁶⁰ An October 1995 report submitted to the Indian Supreme Court by

56 *Bandhua Mukti Morcha v. Union of India*, AIR 1984 S.C. 802. *See also*, *Neeraja Choudary v. State of Madhya Pradesh*, AIR 1984, S.C. 1099 (There the court held that if a person provides forced labour for no remuneration or nominal remuneration, the presumption is that the person is a bonded labourer entitled to the benefits available under the provisions of the Act.).

57 ILO, *Stopping Forced Labour*, *supra* note 41, at 34.

58 Gandhi Peace Foundation and the National Labour Institute, *National Survey of the Incidence of Bonded Labour*, National Labour Institute, New Delhi, 1979, page 18 (The survey was based on a random sample of 1,000 villages in 10 different states).

59 *See* U.S. Dep’t of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices: India (2009)*, <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136087.htm> (last visited Mar. 10, 2011).

60 ILO, *Stopping Forced Labour*, *supra* note 41, at 36. The federal Government of India has openly recognized the difficulty of collecting reliable statistics on slavery and slavery like practices such as bonded labour. *Id.*

the Commission on Bonded Labour in Tamil Nadu estimated that there were 1,250,000 bonded labourers living in the single State of Tamil Nadu.⁶¹ As recently as March 11, 2011, Swami Agnivesh, Chairman of the Bonded Labour Liberation Front was quoted as saying at the National Convention on Bonded Labour in Chennai, India, "Instead of dying out, bonded labour is actually on the rise today, despite the government's claims to the contrary."⁶²

India is failing to enforce its antislavery legislation and failing to appropriately punish the violators when they do end up before a judicial figure in the courtroom. Some of the reasons for the failure to enforce the existing legislation are common plagues of civilization: greed, corruption, and apathy.⁶³ The Indian government has blamed its failure to eradicate bonded labor on a "lack of sensitivity and will to deal with the problem-particularly at the lower levels of public administration-and a shortage of resources at all levels for the total eradication of bonded labour."⁶⁴ The Bonded Labourer (Abolition) Act set up district Vigilance Committees to oversee and implement the Act at the lowest level of government. The National Human Rights Commission, tasked in 1998 with monitoring the Vigilance Committees' work in the thir-

61 ILO, *Stopping Forced Labour*, *supra* note 41, at 35.

62 TNN, *Bonded Labour: The Barbarity Continues in Tamil Nadu*, THE TIMES OF INDIA, Mar. 11, 2011, http://articles.timesofindia.indiatimes.com/2011-03-11/chennai/28679224_1_labour-irulas-rehabilitation-measures. (last visited Mar. 10, 2011).

63 Ravi S. Srivastava, *Bonded Labour in India: Its Incidence and Pattern* (Int'l Lab. Off. Working Paper No. WP43, 2005) at 35. *See also*, *AntiSlavery Int'l, Forced Labour in the 21st Century* 9 (2000), <http://www.antislavery.org/homepage/resources/forcedlabour.pdf>.

64 ILO, *Stopping Forced Labour*, *supra* note 41, at 38.

teen states with the highest prevalence of bonded laborers, found that the state governments failed to utilize the Vigilance Committees at all.⁶⁵ Moreover an investigation by the Parliamentary Committee revealed that "of the funds allocated for rehabilitation [of the newly freed bonded laborers] in 1996, only 38.9% had actually been used for that purpose."⁶⁶ Without the initial rehabilitation assistance that the laborers are to be provided with under the Bonded Labourer Abolition Act, even those who are officially set free often slide back into slavery.⁶⁷

Another reason for India's failure to enforce its laws and punish offenders is its culture of discrimination based on its people's entrenched belief in the caste system.⁶⁸ Many of the bonded laborers belong to the Dalits, the historically disadvantaged or "untouchables" caste.⁶⁹ This discrimination fuels the corruption such that the states of Gujarat and Rajasthan, which have the highest rates of bonded labor, deny the very existence of debt bondage within their territories.⁷⁰

65 ILO, Stopping Forced Labour, *supra* note 41, at 38-39.

66 Tomlinson, *supra* note 20, at 248. See also, Human Rights Watch, The Small Hands of Slavery: Bonded Child Labor in India 193 (1996), <http://www.hrw.org/sites/default/files/india969.pdf>.

67 ILO, Stopping Forced Labour, *supra* note 41 at 38-39.

68 Anti-Slavery Int'l, *supra* note 63 at 9.

69 U.S. Department of State Human Rights Report, *supra* note 59. Anti-Slavery Int'l, Contemporary Forms of Slavery Related to and Generated by Discrimination: Forced and Bonded Labour in India, Nepal, and Pakistan (2003), <http://web.archive.org/2003/701174628/http://www.antislavery.org/archive/submission/submission2003-discrimBL.htm> ("Many local officials continue to show a reluctance to implement legislation which prohibits bonded labour [...] because the individuals and institutions themselves are inherently discriminatory and sympathise with the idea that Dalits owe a duty of labour to landlords.").

70 Human Rights Watch, The Small Hands of Slavery: Bonded Child Labor

Although the Indian Supreme Court has embraced an expansive definition of bonded labor at the lower levels of the judicial system, judges often refuse to “issue a release certificate even after all the ingredients of bonded labour system have been proven beyond doubt.”⁷¹ Thus bonded laborers often lack effective legal remedies because the district magistrate is their only hope.⁷² The courts perform no better with regard to the Child Labor (Prohibition and Prevention) Act (CLA). The Indian Supreme Court in a straightforward ruling in *Mehta v. State of Tamil Nadu* (1996) delineated the remedies for victims and the sentences and fines to be given to offenders as well as setting out the obligations of the state governments under the Act.⁷³ As shown through statistical studies gathering data from the *Mehta* ruling until 2006, lower courts have refused to follow the court’s precedent and only 21,436 of the approximately 143,000 detected violations have resulted in convictions in the state courts, a mere 15% conviction rate.⁷⁴ Those offenders who are convicted often receive only light sen-

in India *supra* note 66 at 182.

71 Anti-Slavery Int’l, *Contemporary Forms of Slavery Related to and Generated by Discrimination: Forced and Bonded Labour in India, Nepal, and Pakistan* (2003), <http://web.archive.org/2003/701174628/http://www.antislavery.org/archive/submission/submission2003-discrimBL.htm> (Statement by the Former Indian Secretary of Labour)

72 “In a 2002 Case, a district magistrate refused to issue orders for the release of a family of bonded laborers, declaring that because they had borrowed money from the landowners, they were ordered to remain in the village until the debt was repaid.” Tomilinson, *supra* note 20, at 249. Bonded laborers cannot afford to appeal an adverse decision.

73 *Mehta v. State of Tamil Nadu*, A.I.R. 1996 S.C. para. 31.

74 Tomilinson, *supra* note 20 at 251. Ministry of Labour & Employment, *Figures on Child Labor*, <http://labour.nic.in/cwl/EnforcementFiguresonchildLabour.pdf>.

tences.⁷⁵ Employers of children in a hazardous occupation should under Article 3 of the CLA receive sentences of imprisonment, yet employers rarely spend even a day inside a jail.⁷⁶ Fines under article 3 of the CLA should range from INR \$10,000 to \$20,000 but are routinely decreased to a few hundred rupees.⁷⁷

Along with the dismal judicial conviction rate, India also suffers from a lack of inspectors to even initiate investigations that could result in convictions.⁷⁸ Members of the Vigilance Committees, which are to enforce the CLA and BLA, are characterized as “totally pro-employer,” overburdened, and susceptible to corruption.⁷⁹ For example, “the Secretary of Labour in Uttar Pradesh reported that there were only forty inspectors in the state to inspect 10,000 factories.”⁸⁰ The two million inspections that did occur over a nine-year period produced only 143, 804 detected violations.⁸¹ International efforts to encourage India to fulfill its

75 Asha Bajpai, ‘Right Against Economic Exploitation- -Child Labour’, *Child Rights in India*, in Weiner, Burra & Bajpai, *BORN UNFREE* 21, 33 (2006).

76 Bajpai, *supra* note 76 at 31-32.

77 Human Rights Watch, *The Small Hands of Slavery: Bonded Child Labor in India* 193, *supra* note 67. INR stands for Indian rupee which is the official currency of the Republic of India

78 Bajpai, *supra* note 76, at 33.

79 Human Rights Watch, *Small Change: Bonded Child Labor in India’s Silk Industry* 47 (2003) (quoting a member of the Varanasi Vigilance Committee in Uttar Pradesh, discussing his colleagues on the Committee), <http://www.hrw.org/sites/default/files/reports/india0103.pdf>.

80 Tomlinson, *supra* note 20 at 250; Myron Weiner, *The Child and the State in India: Child Labor and Education Policy in Comparative Perspective*, in Weiner, Burra & Bajpai *supra* note 76 at 54.

81 Ministry of Labour & Employment, *Figures on Child Labor*, *supra* note 75. This number is low and likely evidence of corruption and bribery. See, Ranjan K. Agarwal, *The Barefoot Lawyers: Prosecuting Child Labour in the Supreme Court of India*, 21 *ARIZ. J. INT’L & COMP. L.* 663, 691 (2004).

international obligations to outlaw and eradicate bonded labor and child labor will need to focus not only on eliminating corruption in the judiciary but also in encouraging the state-appointed inspectors to fulfill their obligations.

III. THE NEED FOR AN INTERNATIONAL SOLUTION TO RESTORE THE RULE OF LAW.

The International Criminal Court was created, for among other purposes, to have "jurisdiction over the most serious crimes of concern to the international community" and "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."⁸² One serious crime that has been of concern to the international community since the mid-1800s is enslavement.⁸³ It is surprising then that since the Rome Statute became operative on July 1, 2002, the ICC has not indicted a single suspect for the crime against humanity of enslavement.⁸⁴ Just as the British Parliament in 1789 could not plead ignorance of the nature and circumstances of the slave trade, neither can the ICC plead ignorance of contemporary slavery. It is true that the ICC should be a court of last resort and the principle of comple-

82 Rome Statute, *supra* note 2, at pmb1.

83 1815 Declaration Relative to the Universal Abolition of the Slave Trade [Congress of Vienna, Act XV] 2 Martens Nouveau Recueil 432, reprinted in 63 Parry's T.S. 473 (1969). ("This Declaration asserts that the slave trade had been viewed by just and enlightened men at all times as repugnant to the principles of humanity and universal morality. It notes that the governments resolved to put an end to the slave trade, and that all the Powers with colonies had recognized by legislative acts, treaties, and other formal undertakings, the obligation and necessity of abolishing it." Bassiouni, *supra* note 15 at 460.

84 See ICC Situations and Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>.

mentarity requires that victims initially turn to domestic courts for relief.⁸⁵ However, when the state fails to enforce its own standards and international law obligations, as in India, the ICC may intervene.⁸⁶ Additionally for child and bonded labor at the least, “international enforcement is necessary because as the forces of globalization perpetuate the widespread use of child labor, the burden of enforcing child labor norms should be shared by all nations.”⁸⁷ How then does the International Criminal Court justify its reticence to engage in ending the culture of impunity towards these enslavement violations? Are the ICC’s hands simply tied by jurisdictional obstacles or definitional difficulties or are there other reasons that the ICC is not addressing the problem of contemporary enslavement?

A. Subject Matter Jurisdiction: The Contextual Requirements for Crimes Against Humanity

An initial bar to the ICC’s ability to address the problem of enslavement is that the enslavement must satisfy the criteria in article 7 of the Rome Statute that the prohibited crime be committed in the context as “a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁸⁸ The use of the word “attack” does not indicate that the

85 Rome Statute, *supra* note 2, pmb1.

86 Rome Statute, *supra* note 2, pmb1.

87 Emily Camastra, *Note: Hazardous Child Labor as a Crime Against Humanity: An Investigation into the Potential Role of the International Criminal Court in Prosecuting Hazardous Child Labor as Slavery*, 15 GEO. J. POVERTY LAW & POL’Y 335 (2008).

88 Rome Statute, *supra* note 2, at art. 7 (1).

crime must have been committed in connection with an armed conflict.⁸⁹ Instead the Rome Statute interprets the phrase “attack directed against any civilian population” to mean “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack.”⁹⁰ While it may not be easy to satisfy any of these contextual requirements, the hardest portion of the chapeau requirement to meet is linking enslavement to “a State or organizational policy.”⁹¹

The requirement of a widespread or systematic attack is an attempt to ensure that “single, isolated, dispersed or random acts that do not rise to the level of crimes against humanity, cannot be prosecuted as such.”⁹² Contemporary forms of slavery can be considered a “widespread or systematic attack” because the relationship between the oppressor and the victim exemplifies ongo-

89 *Id.* at art. 7(2)(a); See also, ROY S. LEE, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 93 (2d.ed. 2002). (If an armed conflict was required then crimes against humanity would be redundant, as they would be covered by Article 8 war crimes) *Id.*

90 *Id.*

91 This was the point of disagreement between the majority and dissenting judge in the Pretrial Chamber decision on the situation in the Republic of Kenya. ICC-01/09, 34-40, 48-54, 63-76. The dissenting Judge failed to “see a State policy according to which the civilian population was attacked. Information that some local politicians were engaged in the organization of violent acts does not necessarily entail that a policy was established or at least endorsed at the high level of the State.” *Id.* at 75. The Majority found that planning by “local leaders, businessmen and politicians associated with the two leading parties” was sufficient. *Id.* at 49.

92 Amnesty Int’l, *The International Criminal Court Fact Sheet 4, Prosecuting Crimes Against Humanity*, <http://web.amnesty.org/library/Index?ENGIOR400052000?open&of=ENG-385>.

ing acts of oppression, as most modern forms of slavery involve exploitation over a long period of time.

Additionally, the widespread or systematic test is “disjunctive, a prosecutor need only satisfy one or the other threshold.”⁹³ Widespread, as defined by case law, focuses on the “large-scale nature of the attack and the number of victims.”⁹⁴ The huge number of Dalits living in bonded slavery in India could satisfy the widespread requirement.⁹⁵ Systematic has recently been defined as “the organized nature of the acts of vigilance and the improbability of their random occurrence.”⁹⁶ The large number of Dalits enslaved could also be categorized as an attack directed on a civilian population.⁹⁷ The employment of Dalits as bonded laborers is a consequence of continued targeting of members of that caste.

Under the Rome Statute another requirement for a crime against humanity is that it must be “pursuant to or in furtherance

93 ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON, ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, 236 (2d. ed. 2010).

94 Prosecutor v. Tadic, Case No. IT-94-1-I, Judgment, ¶ 206 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997); Kunarac et.al, *supra* note 106, at ¶ 428; and The Prosecutor v. Al Bashir, Case No. ICC -02/05-01/09, First Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ¶ 81 (March 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

95 U.S. Department of State Country Report for India, *supra* note 59. Choosing to focus on the plight of the Dalits would also satisfy the civilian population requirement as “the potential civilian victims of a crime under article 7 of the Statute are groups distinguished by nationality, ethnicity or other distinguishing features.” Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para.76.

96 See e.g., Nahimana, Case No. ICTR 99-52-A, Judgment ¶ 920 (Int'l Crim. Trib. for Rwanda Nov. 28, 2007), Al Bashir arrest warrant case, *supra* note 128, at ¶ 581.

97 Rome Statute, *supra* note 2, at art. 7(1).

of a State or organizational policy to commit such an attack."⁹⁸ Comment 6 to the ICC Elements of the Crimes states that a policy "may be implemented by a deliberate failure to take action which is consciously aimed at encouraging such attack."⁹⁹ Regarding bonded labor in India, governmental officials often turn a blind eye to the forced labor within their jurisdiction.¹⁰⁰ Additionally, the lower levels of the judicial system routinely refuse to enforce the legislation outlawing bonded labor and child labor, which could satisfy comment six of the elements.¹⁰¹ The lower level state investigators are often corrupted from owning slaves themselves or accepting bribes; they permit other civilians to continue exploiting Dalits in their region, and this may be enough to meet the state policy requirement.¹⁰² On the other hand, the upper levels of the Indian government has passed laws which appear to combat slavery but lack enforcement; this undermines the state organizational policy.¹⁰³

The ICC could then, with some difficulty, meet the Chapter 7 contextual requirements. As India is wary of the ICC, it has not yet signed the Rome Statute. Therefore, it is likely that if the ICC brought an indictment against an Indian citizen, India would

98 Rome Statute, *supra* note 2, art. 7(2)(a).

99 Elements of the Crimes, *supra* note 115, at footnote 6.

100 U.S. Department of State Country Reports India, *supra* note 59.

101 *Id.*

102 ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, 3 Mar. 2000, para. 204. (The policy "does not necessarily need to be conceived at the highest level of the State Machinery." See also, Pretrial Chamber II Situation in the Republic of Kenya, at 37 ("Hence, a policy adopted by regional or even local organs of the State could satisfy the requirement of a State policy.").

103 See *Infra* Part II.

attempt to improve its judicial system as quickly as possible, so that under the principle of complementarity the ICC would no longer have subject matter jurisdiction.¹⁰⁴

*B. Subject Matter Jurisdiction: The Prohibited Act:
An Uninterpreted Definition of Enslavement*

To be fair, the ICC is prosecuting the war crime of “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” and the crime of “committing rape, sexual slavery, enforced prostitution.”¹⁰⁵ The arrest warrant for Joseph Kony also includes a count for the crime against humanity of enslavement within the war context.¹⁰⁶ However, it is important for the ICC to send a message to those who practice enslavement outside of the context of war; they should fear prosecution, but no warrants have ever been issued.

i. The Term “Enslavement”

Article 7 (c) of the Rome Statute states that enslavement “means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular wom-

104 *Id.*

105 *See e.g.*, Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony, (Sept. 25, 2005), <http://www.icc-cpi.int/iccdocs/doc/doc97185.PDF>.

106 *Id.* Kony has recently become a common figure in the media and military advisors are being deployed to locate Kony and serve the arrest warrant which has been outstanding since 2005. *See*, “Joseph Kony,” THE NEW YORK TIMES, Mar. 25, 2012.

en and children.”¹⁰⁷ The first part of the definition is essentially borrowed from the 1926 Slavery Convention, which was the first international instrument to define slavery.¹⁰⁸

Crucial to the 1926 Slavery Convention is the formal ownership paradigm where the master exerts physical custody and ownership over the victim.¹⁰⁹ While the types of practices that constitute slavery or slave-related practices are expanded in the 1956 Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institution Similar to Slavery, the definitions still retain the concept of formal ownership rights.¹¹⁰ Other international agreements seem to be moving away from the formal ownership paradigm towards “a functional paradigm that takes into account extreme economic exploitation.”¹¹¹ A question that the ICC must address is which paradigm the term enslavement of Rome Statute article (7)(c) is meant to incorporate. If the court chooses to embrace the historical ownership paradigm, the term will be under inclusive and will bar the ICC from hearing cases involving many of the contemporary forms of slavery in which it is impossible to demonstrate complete physical control. As Pro-

107 Rome Statute, *supra* note 2, at art. 7(c).

108 Bassiouni, *supra* note 15, at 466; The 1926 Slavery Convention, 60 L.N.T.S. 253, reprinted in 21 AM. J. INT'L L. 171 (Supp. 1927) (art. (1)(a) states “Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”) *Id.*

109 Bassiouni, *supra* note 15, at 454-56.

110 Camastra, *supra* note 88 at 343. *See*, Supplemental Convention, *supra* note 26, at art. 1. (Slavery is expanded to include: debt bondage, serfdom, selling women into marriage, and child labor exploitation.) *Id.* (Child Labor exploitation includes “a child or young person under the age of 18 years, [who] is delivered by either or both of his parents or by his guardian to another person.” *Id.* at art. 1(d).

111 Camastra, *supra* note 88, at 342-43.

fessor Cherif Bassiouni explains, “whenever control is less than total, such as when it’s partial and limited in time, it is removed from the system of [slavery] protection developed by these international instruments.”¹¹² For example, by this definition, the use of children in sweatshops as forced labor would not be slavery because it is “‘disguised by legitimate or quasi legitimate labor practices’ in that the employer claims that the worker has agreed to work and to the terms of conditions of employment out of his/her own free will, and that the worker is ‘free’ to leave the ‘employment’ at any time.”¹¹³

Human Rights Case Law has been split over which paradigm to choose. In *Siliadin v. France* the European Court of Human Rights chose to follow the historical ownership paradigm. In that case a Togolese child living in France had been held as an unpaid domestic worker for more than four years, working fifteen hour days without any days off.¹¹⁴ The court did find against France, but it held that there was no violation pertaining to slavery because there had been no exercise of “a genuine right of legal ownership over the victim.”¹¹⁵ If the ICC were to endorse this definition of enslavement, many of the more modern forms of slavery would reside outside its jurisdiction.

Embracing the other functional paradigm was the International Criminal Tribunal of Yugoslavia (ICTY), demonstrated in

112 Bassiouni, *supra* note 15, at 454-456.

113 Bassiouni, *supra* note 15, at 458.

114 European Court of Human Rights, *Siliadin v. France*, Applic. No. 73316/01, 26 July 2005.

115 *Id.*

*Prosecutor v. Dragoljub Kunarac et. Als.*¹¹⁶ The case dealt with the “systematic detention and rape of women by Serbian Forces in the town of Foca, Bosnia in 1992.”¹¹⁷ The ICTY held, “The ‘acquisition’ or ‘disposal’ of someone for monetary or other compensation is not a requirement for enslavement.”¹¹⁸ The ICTY found that enslavement could occur where “the free will of the victim is rendered impossible or irrelevant by ‘psychological oppression or socio-economic conditions.’”¹¹⁹ The ICTY convicted Dragoljub Kunarac of gang rape, torture, and enslavement in Foca and rendered a 28-year imprisonment sentence.¹²⁰ Adoption of the ICTY’s definition of enslavement would permit the ICC to take cases involving modern day forms of slavery.

Working in tandem with the ICTY’s expansive reading of the definition of enslavement are the interpretations given to enslavement and slavery by United Nations Treaty bodies. Benjamin Whitaker, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated that “the phenomenon of slavery manifests several of the gravest forms of the violation of human rights: often it combines coercion, severe discrimination, and the most extreme form of economic exploitation.”¹²¹ The ILO Worst Forms of Child Labor

116 *Prosecutor v. Dragoljub Kunareac et. al.*, Case No. IT-96-22 & 23-/1-A, Judgment, ¶ 117-19 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

117 *Id.*

118 *Id.*

119 *Camasta*, *supra* note 88 at 344; *Dragoljub Kunareac et. al. supra* note 1.

120 *Id.*

121 Benjamin Whitaker, Special Rapporteur, *Updating of the Report on Slavery Submitted to the Sub-Commission in 1966*, U.N. Doc. CES E/CN.4/

Convention 182 also takes an expansive view of slavery. Article 3 outlaws (a) "all...practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labor, including forced or compulsory recruitment of children for armed conflict."¹²² The UN Working Group on the Contemporary Forms of Slavery has focused on defining slave-like practices rather than on what it means to exert formal rights of ownership over another person.¹²³ The ICC, although separate from the United Nations, should follow the U.N.'s lead in moving beyond formal ownership in defining enslavement.

Whenever a term is ambiguous, the Vienna Convention on the Law of Treaties directs interpreters to look to "supplemental means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."¹²⁴ The Rome Statute Elements of Crime, indicate that the drafters had an expansive view of enslavement; in the first element they declared that "the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."¹²⁵ Comment

Sub.2/1982/20/rev.1 (July 5, 1982).

122 Convention 182, *supra* note 23, art. 3(a).

123 See A. Yasmine Rassem, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights Based Approach*, 23 PENN. ST. INT'L L. REV. 809, 833 (2005).

124 Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331.

125 United Nations Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court Addendum Part II Finalized draft text of the Elements of Crimes, Enslavement (7)(c)(1), (2 Nov. 2000) U.N. Doc. PCNICC/2000/1/Add.2,

11 states that:

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.¹²⁶

Interestingly, although the last sentence about “trafficking in persons, in particular women and children” is included in the actual Rome Statute, the section mentioning forced labor and similar deprivation of liberty is not.¹²⁷ When the Summary of Statements devised in a plenary session in connection with the adoption of the report of the Working Group on the Rules of Procedure and Evidence and the report of the Working Group on Elements of Crime is consulted to see if any countries commented on the interpretation of the elements of enslavement, it is discovered that enslavement was not mentioned.¹²⁸ It does not require a tortured reading

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement>. [hereinafter Elements of Crimes]

126 *Id.* at Comment 11.

127 Rome Statute, *supra* note 2, at art. 7(2)(c).

128 United Nations Preparatory Commission for the International Criminal Court, Summary of Statements Made in Plenary in Connection with the Adoption of the Report of the Working Group on the Rules of Procedure and Evidence and the Report of the Working Group on Elements of Crime, (13 July 2000) U.N. Doc. PCNICC/200/INF/4, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N00/531/40/PDF/N0053140.pdf?OpenElement>.

of enslavement to interpret it as encompassing the more modern forms of slavery. If the ICC interprets enslavement as including more than just formal ownership, then the current definition of enslavement will not be a bar to the ICC hearing cases involving contemporary forms of slavery.

ii. Criticisms/Critiques to Expanding the Definition

The trend of interpreting enslavement expansively to include contemporary forms of slavery has not developed without criticism. Suzan Miers claims that that using the term “slavery” in a way that covers such a wide range of practices renders it “virtually meaningless.”¹²⁹ Certainly no one advocates detracting from the ICC’s task of prosecuting systemic enslavement of entire populations by belligerent states. Others agree with Miers stating, “[T]he inclusion of a wide array of exploitative practices under the rubric of contemporary forms of slavery dilutes its meaning to the extent that international law has no power to deal with real slavery.”¹³⁰ While this is a legitimate concern, slavery has undergone such a metamorphosis that very few instances of traditional chattel slavery exist, while the contemporary forms of slavery are omnipresent.¹³¹ These exploitative practices should be addressed by the international community when domestic judicial systems fail to

129 SUZANNE MIERS, *SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM* 453 (2003).

130 Rassam, *supra* note 113, at 853.

131 Ashley V. Tomlinson, *Comment: Slavery in India and the False Hope of Universal Jurisdiction*, 18 *TUL. J. INT’L & COMP. L.* 231, 235 (2009). *See also*, KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 5 (2004).

adequately prosecute them. Therefore, the ICC should interpret enslavement to include more than just legal ownership to enable the ICC to fulfill its purpose in ensuring that “the most serious crimes of concern to the international community as a whole” do not go unpunished.¹³²

iii. Personal Jurisdiction

Even after the case for subject matter jurisdiction has been tenuously made, prosecutors will have a difficult time establishing personal jurisdiction over some of the worst modern day slavery offenders. India, Nepal, and Pakistan, three of the main countries with widespread enslavement, are not signatories to the Rome Statute.¹³³ Prosecution is to be initiated under the Rome Statute by: (a) referral to the Prosecutor by a State Party in accordance with article 14, (b) referral by the Security Council acting under Chapter VII of the Charter of the United Nations, or (c) by the prosecutor’s own initiative based on information of crimes being committed within the jurisdiction of the court.¹³⁴ Article 12, however, limits the court’s jurisdiction to parties of the statute, where the state in which the crime occurred is a party to the statute, or where the accused is a national of a state which is a party to the statute.¹³⁵ Therefore, the only avenue for the ICC to exert jurisdiction over

132 Rome Statute, *supra* note 2, at prmb1.

133 Rome Statute, *supra* note 2. For a list of the State Parties to the Rome Statute see <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Mar. 10, 2011). (“As of 12 October 2010, 114 Countries are State Parties to the Rome Statute of the International Criminal Court.”) *Id.*

134 Rome Statute, *supra* note 2, arts. 13-14.

135 Rome Statute, *supra* note 2, arts. 12.

an Indian national would be if the matter is referred to the prosecutor by the U.N. Security Council.¹³⁶ A U.N. Security Council referral would require considerable political will to accomplish, especially since three of the five permanent members of the U.N. Security Council (China, Russia, and the United States) are not signatories of the Rome Statute.¹³⁷ In order for the U.N. Security Council to make such a referral, it would have to find that modern day slavery in India constituted a threat to "international peace and security."¹³⁸ This threat is not immediately observable, and on the surface bonded labor may appear to be a purely internal matter that should be dealt with by domestic law. However, looking closer at the situation, it is an example of a country flagrantly disregarding its treaty obligations.¹³⁹ When countries become comfortable flouting treaties, international peace and security are threatened, particularly when the practices undermine the value of human life. Although not likely, it is possible that the U.N. Security Council would refer the matter to the prosecutor. Therefore, jurisdiction, while perhaps a deterrent, is not a technical bar to the ICC's involvement in dealing with the contemporary forms of slavery. However, other countries with significant child labor, child conscription, bonded labor, and human trafficking problems are parties to the Rome Statute, and the ICC could start enslave-

136 Rome Statute, *supra* note 2, arts. 13-14.

137 U.N. Charter, Ch. V, art.23. (China, the Russian Federation, and the United States are not parties to the Rome Statute).

138 U.N. Charter, Chapter VII.

139 See *Infra* part A referencing the 79 international treaties about Slavery and Slave like practices.

ment prosecutions in one of those countries.¹⁴⁰

iv. Criticisms/Critiques to Using the ICC to Address the Contemporary Forms of Slavery

One argument against using the ICC to prosecute enslavement violations perpetrated in India is that while it might achieve justice in an individual case, the ICC will not appropriately deter other Indian citizens from engaging in similar behavior. As Ashley Tomlinson explained:

The prosecution of Indian Nationals in distant courtrooms, in countries with no comprehension of Indian cultural traditions, is unlikely to yield a paradigm shift in Indian social and labor practices. In order to eradicate modern forms of slavery in India, there must be an internal movement to dismantle caste bias and antiquated notions that value work over education. A distant courtroom is not the proper forum to bring these issues to the Indian masses, who are the ones that must instigate that change.¹⁴¹

While this criticism is directed specifically at addressing the enslavement problem in India with its caste system, it can easily be extended to other developing countries whose leaders may view the ICC's involvement as legal imperialism and resent the

140 See The State Parties to the Rome Statute, *supra* note 85. Bolivia, for example, is a party to the Rome Statute and has a large number of child laborers. See, Kurt Henne & David Moseley, *Combating the Worst Forms of Child Labor in Bolivia*, 32 HUM. RTS. 12, 13 (2005).

141 Tomlinson, *supra* note 20, at 259-60.

ICC's interference.¹⁴² Governments may actually move slower in their eradication of slavery if they resent the intrusion into their domestic sovereignty. However, not prosecuting because it may not deter future crimes sells the justice system short. Deterrence is just one of many objectives of international criminal law, and, thus, the ICC should not be ruled out as a solution purely because it may not be a deterrent.¹⁴³

Another overarching concern is funding. It may be too costly for the ICC to police private acts of enslavement in domestic countries. The travel costs of bringing the evidence and parties before the ICC could be substantial.¹⁴⁴ Expenses would also accumulate when prosecutors travel to the countries to conduct the investigation.

The fact that most of the slave "owners" are frequently individual mill owners, or brick kiln owners, also creates a problem in that the ICC Prosecutor has a stated policy of prosecuting those bearing greatest responsibility for crimes.¹⁴⁵ Although the owners

142 Kate Allan, *Prosecution and Peace: A Role for Amnesty before the ICC?*, 39 DENV. J. INT'L L. & POL'Y 239, 290 (2011). See also, Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 FORDHAM INT'L L. J. 343, 354 (2008) and Catalino Echiverri, "International Justice as Legal Neo-Imperialism? The African Union's Problem with Universal Jurisdiction," Paper presented at the annual meeting of The Law and Society Association, Grand Hyatt, Denver, Colorado, May 25, 2009, http://www.allacademic.com/meta/p303754_index.html.

143 CRYER, at 22-39 (Listing some of the goals to be retribution, deterrence, rehabilitation of the offenders, incapacitation, denunciation, education, justice for victims, recording history, and post-conflict reconciliation.)

144 Due to the widespread nature of modern day slavery in many countries as discussed in *Infra Part A* a solution for India would only be a beginning of a solution for eradicating contemporary slavery.

145 Situation in the DRC, ICC A. CH. 13, paras. 66-82 (July 2006). Cryer points out however that neither the Prosecutor or the Court see "this as a legal

often bear sole responsibility for their actions, they are not high-ranking officials. These “small fish” do not attract the attention of the world compared with senior governmental officials who commit genocide, and it is appropriate for the ICC to address these pressing problems first.

V. CONCLUSION: HOW THE INTERNATIONAL COMMUNITY SHOULD
ADDRESS NATIONAL CULTURES OF IMPUNITY TOWARD
MODERN DAY ENSLAVEMENT

A solution is needed to reduce the domestic culture of impunity that many nations hold towards contemporary forms of slavery. The ICC provides one possible avenue for relief, assuming it chooses to interpret its enslavement provision to include more than just chattel slavery by relinquishing the formal element of ownership, and that it can overcome the jurisdictional hurdles.¹⁴⁶ However, the ICC is not the most practical forum for producing long-lasting change in the countries plagued by the contemporary forms of slavery; a more permanent answer must be sought elsewhere.

Another alternative solution may be found in the model used by the International Justice Mission (IJM). IJM seeks to combat “victimization and violence on the level of the individual, and supports functioning public justice systems where the poor urgently need an advocate.”¹⁴⁷ Their mission enables their staff (lawyers,

limitation on the power of the Court” but rather a sensible view of “of the limitations of resources of the international court.” CRYER, at 161.

146 Bassiouni, *supra* note 15, at 454.

147 International Justice Mission: Who We Are, *available at* <http://www.ijm.org/who-we-are> (last visited Mar. 4, 2012).

investigators, social workers, etc.) to come alongside countries such as India and work with the national governments to reduce the victims of modern day slavery community by community. The highest levels of the Indian government, for example, have demonstrated a commitment to ending bonded labor and child labor through the legislation it has passed and the judicial decisions the Supreme Court has rendered.¹⁴⁸ However, the enforcement of the legislation and judicial decisions fails at the lower levels of government.¹⁴⁹ IJM addresses this problem “[b]y pushing individual cases of abuse through the justice system from the investigative stage to the prosecutorial stage...determin[ing] the specific source of corruption, lack of resources, or lack of good will in the system denying victims the protection of their legal systems.”¹⁵⁰ IJM collaborates with local authorities to best address the problems and meet victims’ needs. Its goals are to provide victim relief, perpetrator accountability, survivor aftercare, and structural transformation.¹⁵¹ The four-pronged approach enables IJM to alleviate an individual’s immediate slavery, deter his or her oppressor from enslaving others, assist the former slave so that he or she will not slide back into bondage, and transform the local court and law enforcement so that similar situations in that area will be dealt with in accordance with the anti-slavery legisla-

148 See, CLA *supra* note 53; BLA, *supra* note 48; and the Indian Supreme Court Decisions *supra* notes 55 and 56.

149 See, *infra* Section 2.

150 International Justice Mission: What We Do, <http://www.ijm.org/our-work/what-we-do> (last visited Mar. 4, 2012).

151 *Id.*

tion.¹⁵² Allaying the fears of the Indian government officials that they will be forced to relinquish control over their affairs, IJM employs national advocates who receive training in advocating for slaves and using the governing Indian law on the modern forms of enslavement, which strengthens the legal system in India.¹⁵³ As more cases are filed and the judges become more familiar with the existing anti-slavery laws and see advocates speaking for the weak and poor who had no previous voice, reduction of corruption and non-enforcement should follow in the lower levels of the Indian justice system.¹⁵⁴ Holding trials in the local Indian courts as opposed to the ICC, counters Tomlinson's criticism that justice in a distant courtroom will not effectuate meaningful change in the Indian society.¹⁵⁵ The efforts of IJM are highly visible to the Indian people and, therefore, are more likely to be more successful than the work of the ICC even if it adopts a better definition of enslavement. The demonstrated success of IJM's model in the

152 Where IJM was involved with Project Lantern battling underage sex trafficking in the Philippines a five year assessment of the impact and change in the public justice system found that [a]t an overall level, Project Lantern's law enforcement-based approach to combating sex trafficking in Metro Cebu has demonstrated its merit by contributing to significantly enhanced police operations, services to rescued victims, and prosecution of criminals as well as to a public justice system that is increasingly capable and mobilized to track down on and deter sex traffickers. The evidence points to more vigorous and sustained law enforcement and criminal justice as crucial elements of a broader, comprehensive response to a phenomenon that is clearly deep-seated, multi-dimensional, and resistant to simple, short-term solutions." Andrew Jones, Rhonda Schlangen and Rhodora Bucoy, *An Evaluation of the International Justice Mission's "Project Lantern,"* (October 2010), <http://www.ijm.org/sites/default/files/resources/120610-Project-Lantern-Impact-Assessment-AJ.pdf>.

153 Statute, Art. 2(a). The Statute is set out in Security Council Resolution 1757 (2007).

154 ILO, Stopping Forced Labour, *supra* note 41, at 38.

155 Tomlinson, *supra* note 20, at 259-60.

Philippines, Cambodia, and India, offers hope of a solution for combating modern day slavery. Other non-governmental organizations interested in alleviating modern day slavery can follow IJM's model and partner with other countries with high rates of contemporary enslavement such as Nepal and Pakistan.¹⁵⁶

As another British statesman, Edmund Burke stated 200 years ago, "[W]hen bad men combine, the good must associate; else they will fall, one by one, an unpitied sacrifice in a contemptible struggle."¹⁵⁷ Or, as it is more famously remembered, "All that is necessary for the forces of evil to triumph is for enough good men to do nothing."¹⁵⁸ When people defy the law and show no fear of its consequences by enslaving others, those who claim to minister in the law's name must not allow the flagrant disregard of the law as the lower levels of the Indian judicial system have done. Rather, they should rally to defend the laws, treaties, and *jus cogens* norms protect human beings essential dignity. If the national culture of impunity is allowed to continue unchecked in those areas of the world where modern day slavery is most prevalent, millions of fellow human beings will languish in bondage. Whatever solution the international community chooses to employ, various international organizations and individuals will need to "justify to all the world, and to their own consciences, the rectitude of the grounds and principles of their decision."¹⁵⁹ As

156 ILO, *Stopping Forced Labour*, *supra* note 41 at 34-39.

157 EDMUND BURKE, *THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENTS* 106 (1770).

158 EDMUND BURKE: *APPRAISALS & APPLICATIONS*, DANIEL E. RITCHIE ED. xiii (1990).

159 William Wilberforce, *supra* note 1, at 63.

Gary Haugen, president and founder of the International Justice Mission states in *Terrify No More*:

What would this nation look like if we began to lead with riches of compassion, grandness, or purposes, and an abundance of hope? Indeed I think the God of history takes attendance. And he convenes a tribunal of our grandchildren, who will someday ask us, "Where were you?" "Where were you Grandpa, when the Jews were fleeing Nazi Germany and seeking safety on our shores?" "Where were you, Grandma when our African-American neighbors were being beaten for registering to vote?" ... Likewise when our grandchildren ask us where we were when the weak and the voiceless and the vulnerable of our era needed a leader of compassion and purpose and hope---I hope we can say that we showed up, and that we showed up on time.¹⁶⁰

