Response to the Questionnaire on Access to Justice and Remedy of the United Nations Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences

Submission by

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Introduction

1. The following Submission is drawn from an ongoing Study facilitated by the Arts & Humanities Research Council (UK) grant entitled *The Antislavery Usable Past*.

2. The Study creates a dataset which considers the 193 Member States of the United Nations, and sets out, for each State, the international instruments in regard to forced labour, servitude, and/or slavery to which they have consented; and the domestic legislation each State has, or does not have, in place to give effect to those undertakings. While research for the dataset is ongoing, general global trends are discernible. The Preliminary Findings of the Study relevant to our consideration are included in this Submission.[1]

3. On the basis of the analysis of this dataset, this Submission wishes to assist the United Nations Special Rapporteur on Contemporary Forms of Slavery in elaborating her comprehensive report on access to justice and remedy for victims of contemporary forms of slavery by speaking specifically to Question 2 which reads:

> *A. Please characterise the legal and/or policy frameworks relevant to access to justice and remedy in place in the country or countries that your organisation works in, as well as any global trends you would like to highlight. Please include information about provisions criminalizing contemporary forms of slavery, those guaranteeing access to justice and remedy and measures to identify and support victims of contemporary forms of slavery.*
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> *B. Please include specific references to the source of law when possible.*

4. This Submission wishes to highlight the global trends which have evolved since the League of Nations era in regard to the criminalisation of contemporary forms of slavery.

Global Trends in regard to the Criminalisation of Contemporary Forms of Slavery

5. The culmination of the 19th Century abolitionist movement was the League of Nations 1926 Slavery Convention, the object of which was securing "the abolition of slavery and the slave trade". Yet the abolition of slavery and the slave trade was *the abolition of these institutions in law*.

6. The abolitionist movement, in general, was a movement *not* to make slavery and the slave trade illegal; rather it was a movement to ensure that slavery and the slave trade were no longer legal. In other words, the movement sought to repeal laws which allowed for slavery and the slave trade rather than to criminalise slavery and the slave trade.

7. As a result, State Parties to the 1926 Slavery Convention, and later the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and the 1966 International Covenant on Civil and Political Rights (ICCPR), operated under the assumption that they had fulfilled their obligations under these instruments if they did not have legislation in place which allowed for the enslavement of human beings.

[1] During the academic year 2016, the dataset was initiated by a Working Group comprised of Jean Allain (Chair), Andrew Chisholm, Amanda Kramer, Aisling Ledwith, Katarina Schwarz, and Egle Vasiliauskaite.

8. However, the language of the 1956 Supplementary Convention and the ICCPR shifted from abolition to prohibition, so that Article 8 of the Covenant requires that "slavery and the slave-trade in all their forms shall be prohibited". The distinction between abolition and prohibition is the distinction between abolition as a negative obligation (the State shall not allow slavery) and prohibition as a positive obligation (the State shall take measures to effectively prevent slavery).[2]

9. As a result, specifically with regard to the obligations of the 174 State Parties to the ICCPR – and if one accepts that the norm of the prohibition of slavery forms part of customary international law (its *jus cogens* nature speaks to this) then all States – are bound by the obligation to have in place measures to effectively prevent slavery.

10. While it is left to each State to determine what measures might be effective in the prohibition of slavery, it would appear very difficult for a State to achieve this end without having in place legislation criminalising contemporary forms of slavery.

11. As for the State Parties to the 1926 and 1956 slavery Conventions, the criminalisation of contemporary forms of slavery is obligatory. This is so as State Parties to the 1926 Slavery Convention (of which there are 118 – both through consent of the 1926 Convention and the 1953 Protocol) and 1956 Supplementary Convention (of which there are 123 State Parties) have agreed to criminalise slavery. Under the 1926 Slavery Convention, Article 6, States Parties "undertake to adopt the necessary measures in order that severe penalties may be imposed", while the 1956 Supplementary Convention requires that slavery be a "criminal offence under the laws of the States Parties" (Article 6(1)).

12. In light of the October 2016 determination of the Inter-American Court of Human Rights which recognised that the definition of slavery – first set out in the 1926 Slavery Convention and confirmed by its inclusion in substance in both the 1956 Supplementary Convention and the 1998 Statute of the International Criminal Court (ICC) – is applicable to the prohibition of slavery *de jure*, but also the prohibition of slavery *de facto*.[3] This requires States have in place stand-alone provisions criminalising contemporary forms of slavery (i.e. beyond human trafficking and ICC implementing legislation).

13. Our Study, which will be completed and released by August 2017, draws on publicly available sources. At this preliminary stage, it would appear that more than 50% of State Parties to the 1926 Slavery Convention do not have stand-alone domestic legislation in place which specifically criminalises slavery. Likewise, in regard to the 1956 Supplementary Convention, more than half of State Parties do not have criminal legislation in place prohibiting slavery. As for the 174 State Parties to the 1966 International Covenant on Civil and Political Rights, it appears that more than half of these States do not have domestic criminal legislation in place prohibiting slavery.

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[2] See the parallel reading of the 'prohibition of torture' in United Nations, Committee against Torture, General Comment Number 2, "Implementation of article 2 by States parties", UN Doc. CAT/C/GC/2, 24 January 2008, para. 2.

[3] *Caso Trabajadores de la Hacienda Brasil Verde vs. Brasil*, Corte Interamericana de Derechos Humanos, Sentencia de 20 Octubre de 2016, (Excepciones Preliminares, Fondo, Reparaciones y Costas), para. 270.

14. Under Article 8 of the ICCPR, State Parties have also undertaken obligations in regard to servitude and forced labour. Our Study indicates that approximately two-thirds of States do not have provisions criminalising forced labour. The same holds true for criminal provisions in relation to servitude, that is: that approximately two-thirds of State Parties do not have provisions in place domestically.

Conclusion

15. The global trend which has emerged over the 90 years since the conclusion of the 1926 Slavery Convention is that States considered that their legal obligations were negative: to repeal any laws which allowed for slavery or the slave trade.

16. However, in light of the recognition of the 2016 Judgment of the Inter-American Court of Human Rights that *de facto* slavery is captured by the internationally established definition, and the requirements of the ICCPR that State Parties *prohibit* slavery and the slave trade, it may be said that States have a positive obligation to have in place measures to effectively prevent slavery.

17. Our Study demonstrates that, to-date, at least half of State Parties to the instruments meant to prohibit contemporary forms of slavery have yet to put in place provisions criminalising forced labour, servitude, and/or slavery as stand-alone offences at the domestic level.

18. In this regard, it should be noted that it has been more than 50 years[4] since the United Nations Secretary-General has acted upon the provisions of Article 7 of the 1926 Slavery Convention and Article 8(2) of the 1956 Supplementary Convention, and sought to gather the legislation in place in regard to contemporary forms of slavery. In light of the evolution of human rights obligations touching on both access to justice and the right to a remedy, it would appear incumbent upon the United Nations to once more remind States – at the highest level – of their obligations and to call upon those States which have yet to do so to put in place effective measures meant to ensure the prohibition of contemporary forms of slavery. The foremost amongst these is the criminalisation, in domestic law, of the stand-alone offences of forced labour, servitude and slavery.

[4] See the United Nations, *Report on Slavery*, (Mohamed Awad Report) UN Doc. E/4168/Rev.1, 1966.

Preliminary Findings: States' International Obligations and Domestic Legislation in regard to Slavery, Servitude, and Forced Labour (10 March 2017)

Preliminary Findings: States' International Obligations and Domestic Legislation in regard to Slavery, Servitude and Forced Labour (10 March 2017)		Constitutional Provisions: Slavery	Criminal Provisions: Slavery	Constitutional Provisions: Servitude	Criminal Provisions: Servitude	Constitutional Provisions: Forced Labour	Criminal Provisions: Forced Labour	Total Number of Parties
Parties to either the original or the amended 1926 Convention	with provisions	40	54	31	30	52	37	118
	% with provisions	34%	46%	26%	25%	44%	31%	
Parties to either the original or the amended 1926 Convention	without provisions	78	64	87	88	66	81	
	% without provisions	66%	54%	74%	75%	56%	69%	
Parties to the 1956 Convention	with provisions	42	52	31	22	50	32	123
	% with provisions	34%	42%	25%	18%	41%	26%	
Parties to the 1956 Convention	without provisions	81	71	92	101	73	91	
	% without provisions	66%	58%	75%	82%	59%	74%	
Parties to the ICCPR	with provisions	59	74	48	38	72	45	174
	% with provisions	34%	43%	28%	22%	41%	26%	
Parties to the ICCPR	without provisions	115	100	123	136	102	129	
	% without provisions	66%	57%	71%	78%	59%	74%	
Non-parties to the 1926 and 1956 Conventions, and the ICCPR	with provisions	7	6	6	3	6	6	12
	% with provisions	58%	50%	50%	25%	50%	50%	
Non-parties to the 1926 and 1956 Conventions, and the ICCPR	without provisions	5	6	6	9	6	6	
	% without provisions	42%	50%	50%	75%	50%	50%	