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# INCREASING CASE TRAFFIC: EXPANDING THE INTERNATIONAL CRIMINAL COURT'S FOCUS ON HUMAN TRAFFICKING CASES

*Nadia Alhadi\**

## I. INTRODUCTION

Article 7 of the Rome Statute of the International Criminal Court (the “ICC” or “the Court”) includes human trafficking<sup>1</sup>—both labor and sex trafficking—as an *actus reus* constituting a crime against humanity.<sup>2</sup> A widespread, pervasive crime afflicting millions around the globe,<sup>3</sup> trafficking generally consists of “[t]he recruitment, transportation, transfer, harbouring or receipt of persons” through force or coercion “for the purpose of exploitation.”<sup>4</sup> Trafficking is neither confined to a specific geographic area, nor to

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\* J.D., December 2018, University of Michigan Law School; Judicial Fellow, International Court of Justice. All views and mistakes are my own. I owe a huge thank you to the editors of the *Michigan Journal of International Law*, especially to Chris Opila and Annemarie Smith-Morris, for their thoughtful suggestions which helped me work through some serious knots in earlier versions of this note. Thank you to Professor Sonja Starr and her International Criminal Law seminar, which first gave me the opportunity to really think through this topic and provided initial feedback. I am also grateful to the University of Michigan Human Trafficking Clinic—where my interest in studying human trafficking began—and especially to Professor Elizabeth Campbell, a wonderful instructor, mentor, friend, and a tremendous resource for helping me reflect on prosecutable cases. Thank you to Sam for reading multiple iterations of this piece, endlessly supporting my endeavors, and keeping me laughing all along the way. And most of all, thank you to my parents, Taufiek and Theresa, who are real life superhumans, and to my brother, John. They made sure I made it to and through law school, and they have always encouraged me to go where my dreams take me, no matter how many miles or oceans away that may be.

1. Hereinafter the general term “trafficking” refers to human trafficking.

2. See *infra* Part IV.A for a discussion of how article 7’s provisions on slavery capture human trafficking.

3. *Human Trafficking by the Numbers*, HUMAN RIGHTS FIRST (Jan. 7, 2017), <https://www.humanrightsfirst.org/resource/human-trafficking-numbers>; *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, INTERNATIONAL LABOR ORGANIZATION, at 9 (2017), [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_575479.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf) [hereinafter *Global Estimates of Modern Slavery*].

4. G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime art. 3(a), Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol] (providing a widely-accepted definition for human trafficking). See *infra* Part III (review-

a particular social, political, or cultural climate. Nor does it only take one form: It can fester within one country's borders, or transcend state boundaries; it can crop up as a side effect of conflict, or occur during moments of peace;<sup>5</sup> and it can be perpetrated through complex statewide or cross-border networks or confined to micro-level interactions between an individual trafficker and a single victim.<sup>6</sup>

Given the internationality of many trafficking schemes, one might expect that trafficking cases would tend to come before the ICC. The Court, however, has never heard a trafficking case.<sup>7</sup> Neither has any other international criminal tribunal ("ICT"),<sup>8</sup> though some have heard related cases, such as those relating to forced labor in camps<sup>9</sup> and to forced prostitution.<sup>10</sup>

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ing the aims of the Trafficking Protocol and the obligations it places on States Parties). The full text of the article 3(a) reads:

The recruitment, transportation, transfer, harbouring or receipt of persons, 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 the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]

5. See *infra* Part II (providing an overview on the forms and causes of human trafficking).

6. *Id.*

7. Idil Atak & James C. Simeon, *Human Trafficking: Mapping the Legal Boundaries of International Refugee Law and Criminal Justice*, 12 J. INT'L CRIM. JUST. 1019, 1036 (2014); see also Corman Kenny & Nikita Malik, *Trafficking Terror and Sexual Violence: Accountability for Human Trafficking and Sexual Gender-Based Violence by Terrorist Groups Under the Rome Statute*, 52 VAND. J. TRANSNAT'L L. 43, 55 (2019). Notably, in a 2018 annual report to the United Nations Security Council, ICC Prosecutor Fatou Bensouda expressed that her office has begun focusing more on human trafficking, with a particular interest in investigating trafficking crimes in Libya. Office of the Prosecutor, Statement to the UN Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011), ¶ 38 (May 9, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180509-otp-stat-UNSC-lib>. That being said, the Court has yet to have any trials for trafficking crimes.

8. Kenny & Malik, *supra* note 7, at 55. Examples of other tribunals include the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda, the Special Tribunal for Lebanon, the Extraordinary Chambers for the Courts of Cambodia, the Special Court for Sierra Leone, the International Military Tribunal for Germany (the "Nuremberg Tribunal") and the International Military Tribunal for the Far East (responsible for the "Tokyo Trials").

9. See, e.g., *Slave Labor—Count Three, United States v. Krupp Von Bohlen und Halbach et al., Military Tribunal III*, 9 Trials of War Criminals Before the Nuernberg [Nuremberg] Military Tribunals Under Control Council Law No. 10, ch. VIII, ¶¶ 46–63 (1950), [http://www.loc.gov/r/frd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-IX.pdf](http://www.loc.gov/r/frd/Military_Law/pdf/NT_war-criminals_Vol-IX.pdf) (discussing Krupp's role in forcing over 100,000 people into labor); *Prosecutor v. Krnojelac, Case No. IT-97-25, Appeal Judgment*, ¶¶ 189–207 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002) (reviewing the trial court's acquittal of the accused for enslavement and slavery of forced laborers and reversing the trial court's acquittal of the accused for persecution in the

That being said, the ICC, in conjunction with other international prevention mechanisms,<sup>11</sup> has the potential to provide a macro-level response to this crime, especially to trafficking schemes entangled with states or state-like powers.

This note tackles two main questions. First, has either the unusual way trafficking is codified in the Rome Statute or ICT case law prevented the Court from prosecuting trafficking as a crime against humanity? Second, if the ICC were to develop an interest in introducing the first trafficking cases in international criminal law (“ICL”), what should such cases look like? Should they be confined only to cases of trafficking in armed conflict, or might they also cover certain kinds of systemic trafficking occurring in times of relative peace?

The current scholarship falls short in addressing these questions.<sup>12</sup> In an effort to fill this gap, this note examines whether and how the ICC could

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form of forced labor for the same behavior); *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Further Amended Consolidated Indictment, ¶ 66 (Special Court for Sierra Leone Feb. 18, 2005) (indicting the accused for forced labor as a crime against humanity); *Prosecutor v. Ongwen*, ICC-02/04-01/14, Decision on the Confirmation of Charges, ¶ 23 (Mar. 23, 2016), ¶ 157 (same, for forced labor as enslavement, a crime against humanity).

10. See, e.g., *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, Appeal Judgment (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002) (charging the accused with enslavement as a crime against humanity); *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on the Confirmation of the Charges, ¶¶ 53–57, 74 (June 9, 2014), (confirming that there are grounds to prosecute the accused for sexual slavery as a crime against humanity); *Prosecutor v. Brima et al.*, Further Amended Consolidated Indictment, at 14 (indicting the accused of sexual slavery and forced marriage as crimes against humanity); *Prosecutor v. Katanga*, ICC-01/04-01/07, Decision on the Confirmation of Charges (Oct. 14, 2008), at 211 (same, for sexual slavery as a crime against humanity); see also Kenny & Malik, *supra* note 7, at 55–56. As Kenny and Malik explain, the ICTY Trial Chamber in *Prosecutor v. Kunarac* referenced trafficking in discussing the definition of enslavement. The ICTY Prosecutor, however, never formally charged the three persons accused in that case of trafficking. *Id.*

11. See, e.g. Trafficking Protocol, *supra* note 4; Convention of the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; G.A. Res. 44/25, the Convention on the Rights of the Child (1989); G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (1966); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (1966); Council of Europe Convention on Action against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197 (entered into force Feb. 1, 2008), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197> [Council of Europe Convention on Action against Trafficking in Human Beings]; SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution pmb., Jan. 5, 2002, [http://saarc-sec.org/digital\\_library/detail\\_menu/saarc-convention-on-preventing-and-combating-trafficking-in-women-and-children-for-prostitution](http://saarc-sec.org/digital_library/detail_menu/saarc-convention-on-preventing-and-combating-trafficking-in-women-and-children-for-prostitution).

12. See generally Kenny & Malik, *supra* note 7 (arguing for the need to judicially address the link between human trafficking, sexual and gender-based violence, and terrorism); Harmen van der Wilt, *Trafficking in Human Beings, Enslavement, Crimes against Humanity: Unravelling the Concepts*, 13 CHINESE J. INT’L L. 297 (2014) (arguing that jurisdiction over the crime of enslavement belongs to the ICTs while other forms of trafficking are better left to national courts); Loring Jones et al, *Globalization and Human Trafficking*, 34 J. SOC. & SOC.

begin to introduce, investigate, and prosecute trafficking cases—particularly in peacetime situations,<sup>13</sup> where most instances of trafficking occur.<sup>14</sup> Focusing on three archetypal peacetime trafficking situations to which the Office of the Prosecutor (the “OTP”) could direct resources, it finds that there is space for the ICC to play a greater role in the international effort to combat this crime. And endowed with this ability, it should do more.

To date, ICTs have examined crimes against humanity only in the context of conflicts.<sup>15</sup> At the ICC, this may be due to the OTP’s budgetary constraints.<sup>16</sup> As investigations of international crimes involve a gargantuan analysis of hundreds, even thousands of pieces of evidence and witnesses,

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WELFARE 107 (2007) (analyzing how the dynamics of globalization fueled the growth of human trafficking); ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 216 (2010) (giving an overview of the various frameworks that exist in international law to address human trafficking).

13. The Wolters Kluwer Bouvier Law Dictionary provides that “[p]eace as a matter of international law is a condition of stability between states among whom there is no armed conflict or threat of imminent armed conflict.” *Peace*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (2011). Trafficking that occurs in peacetime, *i.e.*, in an atmosphere free of either cross-border or internal conflict, will be referred to as “peacetime trafficking” throughout.

14. *Myths, Facts, and Statistics* (2018), POLARIS PROJECT, <https://polarisproject.org/myths-facts-and-statistics> (last visited Apr. 20, 2020); United Nations Office on Drugs and Crime [UNODC], *Global Report on Trafficking in Persons*, at 11 (2018), [https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP\\_2018\\_BOOK\\_web\\_small.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTiP_2018_BOOK_web_small.pdf) [hereinafter *Global Report on Trafficking in Persons*].

15. Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1258 (2007). For an explanation of international criminal law’s conflict focus, see generally *id.*, at 1260–70 (explaining that international criminal tribunals tend to rely on Nuremberg jurisprudence and international humanitarian law when interpreting the elements of crimes against humanity and that scholarship frequently labels international criminal tribunals as “war crimes tribunals”).

16. For an overview of the ICC’s budget, see generally International Criminal Court Assembly of States Parties, Proposed Programme Budget for 2019 of the International Criminal Court, ICC-ASP/17/10 (Aug. 1, 2018), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP17/ICC-ASP-17-10-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-10-ENG.pdf). Pages 8 to 12 provide a concise list of the budget priorities of the Court as well as its main cost drivers. See also Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 95 (Apr. 12, 2019) [hereinafter Situation in the Islamic Republic of Afghanistan] (declining to open an investigation into crimes committed in Afghanistan due to the significant amount of resources the case would require and the limited financial and human resources of the OTP); Lilian Ochieng & Simon Jennings, International Criminal Court Secures Budget Increase, DAILY NATION (Jan. 17, 2014), <https://www.nation.co.ke/news/International-Criminal-Court-Budget-Increase/-/1056/2150244/-/e7oca3/-/index.html> (“Five of [the OTP’s] cases—three of them in Kenya—have failed to come to trial because of lack of evidence. [. . . The OTP’s] ability to launch successful prosecutions [. . .] has been hampered by a range of factors, but most boil down to lack of money.”); Jonathan O’Donohue, *The International Criminal Court at Risk*, HUMAN RIGHTS WATCH (May 6, 2015, 8:24 AM), <https://www.hrw.org/news/2015/05/06/international-criminal-court-risk> (“The prosecutor, Fatou Bensouda, has stated that she has been obliged to scale down resources for investigations into ongoing crimes in Libya, in order to be trial ready in other cases beyond Libya.”).

the OTP's limited budget forces it to be selective in its prosecutions. It may be that the OTP more readily investigates situations involving war or internal conflict because they emerge as the most egregious ICL violations.

Perhaps as well conflict is more visible, making the elements of these crimes easier to prove. It may be that the OTP has considered charging an individual with trafficking, but ultimately dropped the accusation because of a concern that the Pre-Trial Chamber would not confirm it for insufficient evidence.<sup>17</sup> This is especially important in situations where the state or states in which the crime is to be investigated threaten non-cooperation.<sup>18</sup>

For the purposes of this note, however, the systemic constraints on the Court's ability to consider peacetime trafficking cases will not be considered at length; rather, this piece aims to plant the seeds for prosecuting labor and sex trafficking by envisioning and illustrating the types of peacetime cases that would satisfy the elements of article 7.

As will be shown, the Rome Statute does not contain legal barriers to prosecuting peacetime trafficking,<sup>19</sup> and the ICC can and should do more to combat this crime within its existing framework. Part II begins by discussing the pervasive nature of the crime and some of its root causes, introducing why international responses are necessary to address trafficking. Part III considers the added value that ICC action would bring to trafficking accountability through the lens of the accomplishments and limitations of the Trafficking Protocol and its complementary international anti-trafficking regime. Part IV evaluates the Rome Statute's codification of trafficking as an *actus reus* for crimes against humanity, arguing that the text of article 7 supports the prosecution of trafficking cases in general and presents no facial barriers to bringing peacetime trafficking cases before the Court. Finally, Part V analyzes three archetypal peacetime trafficking situations that are so systemic that they satisfy article 7 and could be charged as cases of trafficking at the Court.

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17. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (entered into force July 1, 2002) [hereinafter Rome Statute]. Before an individual's trial is held, the Pre-Trial Chamber conducts a hearing to confirm the charges. Pursuant to article 61(7) of the Rome Statute, the Pre-Trial Chamber must determine "whether there exists sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged" by the OTP. "The purpose of the pre-trial proceedings, and specifically of the confirmation hearing, is to determine whether the case as presented by the Prosecutor is sufficiently established to warrant a full trial." See also Prosecutor v. Ongwen, Decision on the Confirmation of Charges, *supra* note 9, ¶14.

18. See Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 44.

19. Rome Statute, *supra* note 17, art. 7.

## II. A CRIME OF FAR-REACHING CONSEQUENCES REQUIRING A GLOBAL RESPONSE

Trafficking is a crime worthy of global attention—including attention at the ICC—for at least three reasons. First, trafficking is a pervasive and ever-growing crime. There are an estimated 24.9 million individuals being trafficked worldwide, including victims of both sex and labor trafficking.<sup>20</sup> Between 2007 and 2016, the number of trafficking victims in the world increased by approximately 38%.<sup>21</sup> Even these numbers, shocking as they are, are only conservative estimates, as challenges innate to measuring an often invisible population (*e.g.*, traffickers forcing victims to stay silent, or victims electing to remain silent about their experiences for fear of the stigma they may face from their families or communities) lead to inconsistent or non-reporting of incidents.<sup>22</sup>

Second, trafficking produces a host of grave consequences that contravene many nearly universally-recognized human rights designed to protect one's person that states have pledged to protect,<sup>23</sup> including individuals'

20. *Global Estimates of Modern Slavery*, *supra* note 3, at 9–10.

21. *Global Report on Trafficking in Persons*, *supra* note 14, at 22. Compare ILO 2012 *Global Estimate of Forced Labour Executive Summary*, INTERNATIONAL LABOUR ORGANIZATION (June 2012), [https://www.ilo.org/global/topics/forced-labour/publications/WCMS\\_181953/lang-en/index.htm](https://www.ilo.org/global/topics/forced-labour/publications/WCMS_181953/lang-en/index.htm) (placing the number of global trafficking victims in 2012 at 20.9 million), with *Global Estimates of Modern Slavery*, *supra* note 3, at 9) (placing the number of global trafficking victims at 24.9 million in 2016).

22. See *Global Report on Trafficking in Persons*, *supra* note 14, at 15.

23. The Universal Declaration of Human Rights (“UDHR”) is not a treaty, and therefore the document itself does not have binding effect on the conduct of states. Despite this, some experts consider the document to reflect customary international law on human rights. See, *e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Rep. 16, 76 (June 21) (separate opinion by Ammoun, Vice-President) (“Although the affirmations of the Declaration are not binding *qua* international convention . . . they can bind States on the basis of custom . . . whether because they constituted a codification of customary law . . . or because they have acquired the force of custom through a general practice accepted as law[.]”); South West Africa Cases (Liber. v. S. Afr.), Second Phase, 1966 I.C.J. Rep. 6, at 250, 293 (July 18) (dissenting opinion by Tanaka, J.); *Digital Record of the UDHR*, U.N. HUM. RTS. OFFICE OF THE HIGH COMM’R (Feb. 2009), <https://www.ohchr.org/EN/NEWSEVENTS/Pages/DigitalrecordoftheUDHR.aspx> (“The Universal Declaration was not merely congruent with some customs and foreign to other cultures. It drew its principles from many diverse traditions, and it made them more robust through a uniform codification.”). In any case, the UDHR later became the foundation for the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), both of which contain binding obligations on State Parties. See International Covenant on Civil and Political Rights [ICCPR], Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights [ICESCR], Dec. 16, 1966, 993 U.N.T.S. 3. Both treaties have nearly universal participation: The ICCPR has 74 signatories and 173 parties. UNITED NATIONS TREATY COLLECTION, Status: ICCPR, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en) (last visited May 30, 2020). And the ICESCR has 71 signatories and 170 parties. UNITED NATIONS TREATY COLLECTION, Status: ICCPR, <https://treaties.un.org/>

rights to security of person,<sup>24</sup> freedom from servitude<sup>25</sup> and degrading treatment,<sup>26</sup> and a standard of living that ensures health and well-being.<sup>27</sup> It directly affects security of person because its victims, who are often members of vulnerable populations, are prone to becoming targets of physical, psychological, and emotional violence.<sup>28</sup> Traffickers often use coercive tactics to initiate relationships with their victims and force them to remain in servitude after they have expressed a desire to escape.<sup>29</sup> Victims can also be subjected to egregious, degrading living situations, ranging from poorly kept and even dangerous homes to obliterated privacy, with traffickers monitoring their victims' every move.<sup>30</sup> Often, victims are harmed by excessive or dangerous work conditions.<sup>31</sup> Victims of sex trafficking are prone to serious health risks, including HIV/AIDS<sup>32</sup> and severe mental health issues like anxiety, insecurity, fear, trauma, and PTSD.<sup>33</sup> They rarely, if ever, have free access to basic necessities, like food, sleep, hygiene, and medical care,<sup>34</sup> and their families and communities may socially ostracize them, which prevents them from engaging with society or seeking help.<sup>35</sup>

Third, trafficking also contravenes economic and social rights enshrined in international legal instruments. Both the Universal Declaration of Human Rights and the International Covenant for Economic, Social and Cultural Rights emphasize, for example, every individual's right to free choice of employment<sup>36</sup> and just remuneration.<sup>37</sup> Upon a cursory glance of the situation, it may seem that victims of trafficking receive exactly the compensation the market demands for their work. But the reality is, that unskilled laborers, who are already limited in what jobs they can perform, cannot afford to be selective about their work conditions when workers willing to perform

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Pages/ViewDetails.aspx?src=TREATY&mtdsg\_no=IV-3&chapter=4 (last visited May 30, 2020).

24. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 3 (Dec. 10, 1948) [hereinafter UDHR]; ICCPR, *supra* note 23, art. 9.

25. UDHR, *supra* note 24, art. 4; ICCPR, *supra* note 23, art. 8.

26. UDHR, *supra* note 24, art. 5; ICCPR, *supra* note 23, art. 7.

27. UDHR, *supra* note 24, art. 25; ICESCR, *supra* note 23, art. 7.

28. *Impact of Human Trafficking on Victims and Survivors*, HUMAN TRAFFICKING SEARCH, <http://humantraffickingsearch.org/impact/> (last visited Apr. 20, 2020).

29. *Id.*

30. *Taking a Lesson From Traffickers: Harnessing Technology To Further the Anti-Trafficking Movement's Principal Goals*, U.S. MISSION TO THE OSCE (Apr. 8, 2019), <https://osce.usmission.gov/taking-a-lesson-from-traffickers-harnessing-technology-to-further-the-anti-trafficking-movement>.

31. *Impact of Human Trafficking on Victims and Survivors*, *supra* note 28.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. UDHR *supra* note 24, art. 23(1); ICESCR, *supra* note 23, art. 6.

37. UDHR, *supra* note 24, art. 23(3); ICESCR, *supra* note 23, art. 7(a)(i).

the job in the same conditions for less could readily replace them. As a result, laborers accept jobs no matter how long the hours may be or how degrading the work or conditions are. So by opportunistically decreasing the cost of labor to satisfy the global demand for cheap goods and services, particularly from wealthier countries,<sup>38</sup> trafficking pigeon-holes laborers—especially laborers with few other skills—into a situation of little-to-no economic power, encouraging and exacerbating their poverty. Such wage depreciation allows the rich to maintain and grow their enormous wealth, at the cost of entrapping victims and their progeny in a cycle of poverty. Most will never earn nearly enough to have the buying power to leave these conditions, and they consequently cannot escape trafficking. If one of the international community’s goals is to realize “the ideal of free human beings enjoying freedom from fear and want,” the continued existence of trafficking will make this end unattainable.<sup>39</sup>

Ultimately, trafficking thus cuts against initiatives advanced by the international community to ensure such rights are universally respected by taking advantage of the global desire for cheap products, widely demanded by individuals and states worldwide. The global community is therefore partially responsible, and can only make right if it also initiates a coordinated response. Indeed, it may be difficult for victims to independently discern those wages and relationships that are exploitative, due to the “push”<sup>40</sup> and “pull”<sup>41</sup> factors that drive individuals from countries lacking in economic opportunity into countries with higher levels of prosperity.<sup>42</sup> Traffickers use this push and pull dynamic as a recruitment tool by promising victims a better life and increased opportunity.<sup>43</sup> And given their vulnerability, victims

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38. See Dana Raigrodski, *Economic Migration Gone Wrong: Trafficking in Persons Through the Lens of Gender, Labor, and Globalization*, 25 *IND. INT’L & COMP. L. REV.* 79, 100 (2015).

39. ICESCR, *supra* note 23, art. 1(1).

40. Push factors for trafficking, *i.e.*, the conditions leading to an individual’s vulnerability in the first place, include: high unemployment and poverty, with little to no chance of leaving the situation; discriminatory labor markets; lack of opportunity to improve one’s quality of life; gender or ethnic discrimination; internal conflict and persecution, domestic violence or abuse; and the proliferation of human rights violations. See Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 *WIS. INT’L L.J.* 131, 137–38 (2008).

41. Pull factors for trafficking, *i.e.*, the conditions allowing perpetrators to capitalize on victims’ vulnerabilities, include: awareness of a demand for labor, no matter how cheap; the fundamental desire to achieve a better life; the relative frequency and efficiency of transportation structures to support trafficking; a high number of facilitators and consumers benefitting from this exploitation; the existence of weak or no laws against forced servitude; a lack of public awareness that trafficking is occurring; government corruption; weak law enforcement; and entrenched organized crime networks. *Id.* at 138–39.

42. Jones et al., *supra* note 12, at 112.

43. *Id.* at 113.

are often not in a position to discern the gross exaggerations of traffickers. Trafficking victims need another institution to step in.<sup>44</sup>

Such help could come from the government of the state in which they are trafficked, but where national-level initiatives fall short,<sup>45</sup> the international community must provide a fallback. One such response could come from enforcement of the Trafficking Protocol, an anti-transnational organized crime treaty discussed in the next section. Another could come from ICC investigation and prosecution of state officials (or individuals with powers similar thereto) that have become entangled in, or perpetrated, trafficking.<sup>46</sup>

Note that neither the definition of trafficking in Part I nor the reasons trafficking merits global attention, discussed here, suggest that trafficking necessitates violence or a conflict-ridden atmosphere. Rather, these two parts have illustrated that trafficking cases can crop up in coercive situations in times of relative peace and have severe, long lasting effects, both for individuals and economies. This peacetime trafficking, like trafficking more broadly, calls for a response at the international level in addition to the national one. As put by former UN Secretary General Kofi Annan, “If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means.”<sup>47</sup>

### III. THE TRAFFICKING PROTOCOL AND A COMPLEMENTARY ROLE FOR THE COURT

#### A. *The Trafficking Protocol’s Scope*

In an effort to provide an international response to transnational organized crime, in 2000 the General Assembly adopted the Convention Against Transnational Organized Crime, along with three supplemental protocols on trafficking in persons, smuggling of migrants, and illicit manufacturing and trafficking in firearms (known collectively as the “Palermo Protocols”).<sup>48</sup> The Convention’s Trafficking Protocol is the principal international instrument addressing human trafficking and is an important starting point for un-

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44. *Id.*

45. *See infra* notes 66–69.

46. *See* Rome Statute, *supra* note 17, art. 4 (“The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.”), art. 86 (“States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”).

47. U.N. Secretary-General, Address at the Opening of the Signing Conference for the United Nations Convention Against Transnational Organized Crime (Dec. 12, 2000), [https://www.unodc.org/unodc/en/about-unodc/speeches/speech\\_2000-12-12\\_1.html](https://www.unodc.org/unodc/en/about-unodc/speeches/speech_2000-12-12_1.html).

48. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. 13,127, 2225 U.N.T.S. 209.

derstanding how the crime is defined, the parallel accountability system it provides, and how the ICC could step in to provide victims with additional justice and deterrence.<sup>49</sup>

The Trafficking Protocol is the culmination of a global effort to harmonize the concept of trafficking in order to better combat the crime at the international level.<sup>50</sup> The treaty has been ratified by 176 parties and is conceived as providing a common definition of trafficking and its constitutive elements.<sup>51</sup> It has inspired national trafficking laws<sup>52</sup> and has even influenced the European Court of Human Rights' interpretation of its own convention.<sup>53</sup> The ICC's Office of the Prosecutor has also recognized the Protocol as instructive in interpreting article 7 of the Rome Statute.<sup>54</sup>

The Trafficking Protocol's definition of trafficking is particularly noteworthy for its rejection of consent as a potential defense to a trafficking allegation and its treatment of coercion as an element of the crime. First, article 3(b) states that consent is "irrelevant" to the definition.<sup>55</sup> This key feature bars traffickers from using victims' consent—which may, in fact, have been coerced—as a defense to the crime.<sup>56</sup> Second, the Protocol recognizes exploitation, rather than the victim's non-consent, as the defining cri-

49. See Trafficking Protocol, *supra* note 4.

50. Zelalem Shiferaw Woldemichael, *Criminalization and Prosecution of Human Trafficking in Ethiopia*, 4 BRICS L.J. 116 (2017).

51. Trafficking Protocol, *supra* note 4.

52. UNITED NATIONS TREATY COLLECTION, Status: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en) (last visited May 31, 2020). See also Victim of Trafficking and Violence Protection Act of 2000, H.R. 3244, 114 Stat. 1464 (2000); Modern Slavery Act 2015, 63 Eliz. 2, c. 30 (Eng.); INT'L LABOUR ORG., *P029—Protocol of 2014 to the Forced Labour Convention, 1930* (June 11, 2014); Marley S. Weiss, *Human Trafficking and Forced Labor: A Primer*, 31 A.B.A. J. LAB. & EMP. L. 1, 19 (2015) ("The ILO designed the Forced Labour Protocol to complement the UN Palermo Protocol [on trafficking]."); Council of Europe Convention on Action Against Trafficking in Human Beings, *supra* note 11; Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, E.U.-A.U., Nov. 22–23, 2006 (requiring member states to abide by the Trafficking Protocol's anti-trafficking provisions).

53. EUR. CT. OF HUM. RTS., *Guide on Article 4 of the European Convention on Human Rights: Prohibition of Slavery and Forced Labour*, ¶¶ 53–54, (Dec. 31, 2019), [https://www.echr.coe.int/Documents/Guide\\_Art\\_4\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf) (citing *Rantsev v. Cyprus & Russia*, Eur. Ct. H.R. 25965/04, Jan. 7, 2010, ¶ 285).

54. See Int'l Criminal Court, Office of the Prosecutor, Policy on Children 22 n.58 (2016), [https://www.icc-cpi.int/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.pdf).

55. *Id.* at 21.

56. Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 445 (2006).

terion of trafficking.<sup>57</sup> Thus, the definitional phrase “the threat or use of force” is not confined to violent acts. Instead, the force element may be “understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”<sup>58</sup> Together, these features allow the Trafficking Protocol to cover a wide range of acts, from direct, physical threats against victims to the exploitation of a coercive living situation, consistent with the causes and consequences of trafficking identified in Part II.

Another important feature of the Trafficking Protocol is that it requires all States Parties to create or strengthen existing training for law enforcement, immigration officers, and other relevant officials on investigating, prosecuting, and ultimately preventing trafficking.<sup>59</sup> Such measures are key to identifying victims (both directly and through improved evidence collection), which, in turn, will save more victims from their situations, lead to higher accountability of perpetrators, and help states to better understand whether particular anti-trafficking approaches are working or not.

The United Nations Office on Drugs and Crime (“UNODC”), the agency responsible for implementing the Protocol, issues an annual global report on trafficking that summarizes the domestic measures adopted and cases pursued by States Parties.<sup>60</sup> Notably, as the Protocol has been implemented by states over time, data collection of trafficking victims has improved.<sup>61</sup> According to UNODC, in 2009 only twenty-six countries had a government institution charged with systematically collecting and disseminating data on trafficking cases.<sup>62</sup> By 2018, this number had risen to sixty-five.<sup>63</sup>

But while global investigation and prosecution of trafficking has improved, prosecution statistics and an overall increase in trafficking victims indicate that much work can still be done to increase accountability for individual traffickers.<sup>64</sup> While most countries have comprehensive trafficking legislation, many continue to have low numbers of convictions for traffick-

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57. *International Legal Framework—United Nations*, LA STRADA INT’L, <http://lastradainternational.org/human-trafficking/legal-framework/united-nations> (last visited Mar. 14, 2020).

58. U.N. OFFICE OF DRUGS AND CRIME, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, at 347, U.N. Sales No. E.06.V.5 (2006).

59. Trafficking Protocol, *supra* note 4, at 6.

60. *See Trafficking in Persons*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/data-and-analysis/glotip.html> (last visited Mar. 14, 2020).

61. *Global Report on Trafficking in Persons*, *supra* note 14, at 15–16.

62. *Id.* at 16.

63. *Id.*

64. *See Global Estimates of Modern Slavery*, *supra* note 3.

ing.<sup>65</sup> According to the UN Global Report on Trafficking, of the 136 countries that reported data between 2012 and 2014, only 29% had investigated more than fifty cases of trafficking in a year. Twenty-three percent had investigated between eleven and fifty cases per year; 11% had investigated ten or fewer cases per year;<sup>66</sup> and 37% had either investigated no cases or provided no information.<sup>67</sup> Moreover, while some regions have seen an increase in convictions,<sup>68</sup> others have not, despite continuing to identify victims.<sup>69</sup>

There are a number of possible reasons for this gap in accountability. First, many countries have increasingly prioritized national security issues and consequently may have chosen to crack down on illegal migration and terrorism rather than trafficking *per se*.<sup>70</sup> In effect, individuals who would have been identified as victims of trafficking in the past may instead be treated as illegal migrants.<sup>71</sup>

Second, domestic trafficking laws are relatively new.<sup>72</sup> Authorities lack of familiarity with these laws may prompt them to charge trafficking cases under other statutes that they believe are more likely to end in a successful prosecution, such as grievous bodily harm, because the evidence necessary to sustain such convictions is easier to identify and gather.<sup>73</sup> But choice not to engage with the laws, however well-meaning, is cyclical, and it may also lead to authorities not recognizing, and therefore not pursuing, conduct that the Protocol would classify as trafficking.<sup>74</sup>

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65. *Id.* at 23 (questioning whether the lower number of convictions reflects of investigations and prosecutions of trafficking as a relatively low priority, low levels of trafficking activity in particular countries, or a limited ability for countries to detect this crime).

66. Amy Farrell & Brianne Kane, *Criminal Justice System Responses to Human Trafficking*, in THE PALGRAVE INTERNATIONAL HANDBOOK ON HUMAN TRAFFICKING (2019).

67. *Id.*

68. Camilo Carranza, *Human Trafficking Conviction Rates on the Rise in Latin America*, INSIGHT CRIME (Jan. 28, 2019), <https://www.insightcrime.org/news/brief/human-trafficking-conviction-rates-increasing> (noting a 31% increase in conviction rates in Honduras, a 23% increase in Ecuador, a 22% increase in Argentina, and a 21% increase in both Costa Rica and Guatemala. Bolivia, Uruguay, El Salvador, and Venezuela, however, registered conviction rates of less than 5% in 2017. In Argentina, conviction rates rose from 52% in 2014 to 74% in 2017, but overall prosecutions dropped from 138 cases to just 51).

69. Rebecca Ratcliffe, *Trafficking Convictions Fall 25% Despite Rising Number of Victims in Europe*, GUARDIAN (Jan. 8, 2019) (“A report by the UN found that 742 people in Europe were convicted for trafficking offences in 2016, the latest year for which there is available data, compared with 988 in 2011. The number of identified victims increased from 4,248 to 4,429 over the same period.”).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. For example, exploitative forced prison labor, as discussed *infra* Part V, may not be recognized as trafficking *per se* because society has traditionally conceived of it as a fair payment for one’s transgressions or wrongdoings.

Third, some States Parties have chosen to target a narrower scope of conduct in their own domestic trafficking legislation (allowing, for example, victim consent to be a defense). This leads to far fewer cases investigated and prosecuted in those states than in states that have adopted definitions of trafficking that more closely align with the Trafficking Protocol's.<sup>75</sup>

B. *Using the ICC to Expand Prosecution of Trafficking at the International Level*

Under the Trafficking Protocol, a State Party that wishes to bring a trafficking case against another State Party may invoke arbitration, and, if the states fail to agree on how to conduct the arbitration, seize the International Court of Justice to ensure compliance.<sup>76</sup> However, the Protocol does not create its own prosecution office or provide any means to initiate investigation and prosecution of individual perpetrators. Instead, it relies on states to take direct action on their own by conducting domestic prosecutions, with, as discussed above, varying degrees of success.

By contrast, the Rome Statute opens an avenue for investigation at the international level: Parties to the Statute, the OTP itself, and the UN Security Council can each initiate proceedings before the ICC against suspected perpetrators.<sup>77</sup> If they begin to do so, the prosecutions would provide a more direct response to trafficking crimes, especially where states have been unable or unwilling to prosecute domestically. Moreover, when it becomes clear that the Court will hear trafficking cases, States Parties will have a particular incentive to pursue these crimes, as non-compliance with their obligations under the Rome Statute may subject their leaders to an investigation by the Court that the Trafficking Protocol cannot replicate.

The Court could serve a dual role in the trafficking space: establishing fact patterns for domestic law enforcement to watch in the future, and holding state officials accountable for permitting or creating the conditions for trafficking to occur. It could also help unify the laws on human trafficking across national jurisdictions, as parties to the Rome Statute are expected to bring their laws and law enforcement into compliance with Court jurisprudence.<sup>78</sup> This role would align with the Court's existing efforts to strengthen domestic jurisdictions' capacities to prosecute other crimes contained in the Rome Statute.<sup>79</sup> Simply, ICC litigation would not replace domestic prosecutions; rather, in hearing trafficking cases, the Court would complement domestic efforts by advising States Parties on the requirements of the Rome

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75. Michelle Madden Dempsey et al., *Defining Sex Trafficking in International and Domestic Law: Mind the Gaps*, 26 EMORY INT'L L. REV. 137, 141 (2012).

76. Trafficking Protocol, *supra* note 4, art. 15.

77. *See generally* Rome Statute, *supra* note 17.

78. *Id.*

79. *See generally* Int'l Criminal Court, Assembly of State Parties, *Report of the Bureau on Complementarity*, ICC-ASP/16/33 (Dec. 4, 2017).

Statute and how to effectively investigate and prosecute the crimes included therein.<sup>80</sup>

The idea that the ICC could prosecute trafficking is not a novel one: Previous scholarship has arrived at the same conclusion,<sup>81</sup> and the OTP agrees that it has the ability to prosecute these cases.<sup>82</sup> The idea that the ICC could complement the Trafficking Protocol framework is equally familiar.<sup>83</sup> Little has been discussed, however, beyond hypothetical fact patterns that fit within the Rome Statute's framework on their face.<sup>84</sup> There has been minimal engagement with how these cases would actually fare in practice in light of ICT jurisprudence, or with how prosecution of certain kinds of trafficking in peacetime, rather than in the context of conflict, could fit within the ambit of the Rome Statute.<sup>85</sup> The rest of this note addresses that deficit.

#### IV. PEACETIME TRAFFICKING COULD BE PROSECUTED UNDER THE ROME STATUTE

This part analyzes the Rome Statute's treatment of trafficking from two angles. First, it assesses the language used to codify the crime, found in the Rome Statute's article 7, and second, it applies those article 7 elements to situations in practice, in light of the Court's case law. As will be shown, neither the Statute's codification of trafficking as a crime with slavery-like elements nor the threshold elements of article 7 prevent the Court from trying peacetime trafficking cases.

##### A. Trafficking Codified in the Rome Statute

While the Rome Statute does not expressly include trafficking as an *actus reus* of crimes against humanity (the crime described by article 7), the text of article 7 and its interpretation by the ICC and other tribunals clarify

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80. *Id.* at 25–26.

81. *See, e.g.*, Julia Crawford, *Could The ICC Address Human Trafficking as an International Crime?*, JUSTICEINFO.NET (June 17, 2019), <https://www.justiceinfo.net/en/tribunals/icc/41684-could-icc-address-human-trafficking-international-crime.html> (explaining that the OTP could demonstrate that a case of human trafficking fulfills the definition of enslavement or torture, and therefore could be pursued by the Court); John Cooper Green, *A Proposal Leading to an International Court to Combat Trafficking in Human Beings 25–26* (unpublished manuscript) (on file with the University of Nebraska-Lincoln Library System); Kenny & Malik, *supra* note 7; Melanie O'Brien, *Prosecuting Peacekeepers in the ICC for Human Trafficking*, 1 INTERCULTURAL HUM. RTS. L. REV. 281 (2006).

82. *See* Int'l Criminal Court, Office of the Prosecutor, *Statement to the U.N. Security Council on the Situation in Libya, Pursuant to UNSCR 1970*, ¶ 38 (May 9, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=180509-otp-stat-UNSC-lib>.

83. U.N. HIGH COMM'R FOR HUMAN RTS., *Human Rights and Human Trafficking Fact Sheet No. 36*, at 58 (2014), [https://www.ohchr.org/Documents/Publications/FS36\\_en.pdf](https://www.ohchr.org/Documents/Publications/FS36_en.pdf).

84. Jane Kim, *Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute*, parts II, III (Feb. 2011) (on file with the Columbia University Law School).

85. *See, e.g.*, Kim, *supra* note 84; Kenny & Malik, *supra* note 7.

that human trafficking—both sex and labor trafficking—falls under the ambit of crimes against humanity.

Textually, the ICC’s jurisdiction over trafficking derives from two article 7 provisions related to slavery. The first is article 7(1)(g), which encompasses trafficking of an exclusively sexual nature,<sup>86</sup> *i.e.*, trafficking involving penetration or other exploitative use of the genitals. Article 7(1)(g) explicitly codifies “rape, *sexual slavery*, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as acts that, meeting the other threshold requirements of this article, would constitute crimes against humanity.<sup>87</sup> The *Elements of Crimes*—the document that assists the Court in interpreting article 7<sup>88</sup>—clarifies that sex trafficking falls within the scope of sexual slavery.<sup>89</sup>

The other relevant provision is article 7(1)(c), which codifies “enslavement” as a crime against humanity.<sup>90</sup> In article 7(2)(c), the Rome Statute goes on to define “enslavement” as the “exercise of any or all of the powers attaching to the right of ownership over a person . . . includ[ing] *the exercise of such power in the course of trafficking in persons*, particularly women and children.”<sup>91</sup> Again, the *Elements of Crimes* establishes that enslavement includes trafficking in persons.<sup>92</sup> Thus, article 7(1)(c) should be understood to encompass all forms of trafficking lacking a sexual element, since sex trafficking is covered by 7(1)(g). Notably, neither provision appears to limit prosecutable trafficking to acts committed in the context of conflict or violence.

The way the Rome Statute addresses trafficking is controversial. The division of slavery (and, consequently, trafficking) into two separate *actus reī* was criticized by some state delegates when the Rome Statute was being negotiated. Those delegates advocated consolidating the two forms of the crime into a single one in order to reduce overlap in the Rome Statute’s coverage.<sup>93</sup> In particular, at the point that article 7(1)(c) categorizes trafficking as slavery, it would seem that *enslavement* would encompass both labor trafficking and sexual trafficking, as *sexual slavery* seems to be but a specific form of slavery. Not only would this seem to be logical, these representatives argued, but it would also avoid confusion and “ensure that the Statute only contained the most serious crimes of concern to the international com-

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86. Int’l Criminal Court, ICC RC/11, *Elements of Crimes* 8 (2010) (requiring that “[t]he perpetrator caused [one or more persons] to engage in one or more acts of a sexual nature” to meet the definition of *sexual slavery*) [hereinafter ICC *Elements of Crimes*].

87. Rome Statute, *supra* note 17, art. 7(1)(g) (emphasis added).

88. *Id.* art. 9.

89. ICC *Elements of Crimes*, *supra* note 86, at 8 n.18.

90. Rome Statute, *supra* note 17, art. 7(1)(c) (emphasis added).

91. *Id.* art. 7(2)(c) (emphasis added).

92. ICC *Elements of Crimes*, *supra* note 86, at 6 n.11.

93. Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT’L L. 605, 622–23 (2004).

munity as a whole.”<sup>94</sup> Otherwise, these representatives feared that expanding the list of prosecutable crimes would dilute their seriousness from the perspective of the international community.<sup>95</sup>

Yet, the two forms of slavery are not the same act, and the violation of a victim’s sexuality adds a dimension of intimacy that cannot be glossed over. Consequently, other states emphasized that there could be instances where the ICC wishes to charge an accused individual of crimes against humanity in the form of both enslavement and sexual slavery.<sup>96</sup> One could envision situations where a defendant is accused of subjecting victims to different forms of slavery, namely sexual versus non-sexual, for example.<sup>97</sup>

That said, the ICC has acknowledged the facial contradiction in separating sexual slavery from the broader category of enslavement, but has noted that “sexual violence violations were considered best to be grouped together.”<sup>98</sup> This makes sense: Given the societal stigma that may be involved with sex crimes, victims of sexual slavery may need different or increased protective measures or redress.<sup>99</sup> The *actus reus* of “sexual slavery” was intended specifically to protect sexual autonomy, whereas “enslavement” is an all-encompassing category for any crime that involves power attaching to the ownership of a person, regardless of the acts that the victims are required to perform.<sup>100</sup> By creating a separate *actus reus* for sexual slavery, the delegates ultimately embraced “the specific nature of the form of enslavement and ensure[d] that it will be given the distinct attention it deserves.”<sup>101</sup>

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94. *Id.* at 623.

95. *Id.* Some delegates believed there was a tension between, on the one hand, the Statute creating accountability for the most serious crimes that one could commit (putting all the codified crimes on equal footing in terms of severity), and, on the other hand, the addition of more (and especially more nuanced) crimes, which could suggest differing degrees of severity between the crimes. Codifying “sexual slavery,” a particular form of slavery, suggests (at least symbolically) that there is something special or unique about this case that puts it on a different footing than slavery or enslavement *per se*.

96. *Id.* at 624.

97. For example, the Nazi state established bordellos catering to male inmates of concentration camps to provide them an incentive to work harder. Female inmates who were forced to work as prostitutes in these bordellos were forced to fulfill a quota of eight men per day. The Nazi government thus forced different subsets of inmates to perform fundamentally different kinds of work—some involving sex and some not. *See* NANDA HERBERMANN, THE BLESSED ABYSS: INMATE #6582 IN RAVENSBRÜCK CONCENTRATION CAMP FOR WOMEN 33–34 (2000).

98. Prosecutor v. Kunarac et al., Case No. IT-96-23-T, Judgment, ¶ 541 n.1333 (Trial Chamber, Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (stating in full, “the setting out of the violations in separate sub-paragraphs of the ICC Statute is not to be interpreted as meaning . . . that sexual slavery is not a form of enslavement. This separation is to be explained by the fact that the sexual violence violations were considered best to be grouped together”)

99. *Id.*

100. *Id.*

101. Oosterveld, *supra* note 93, at 624.

The drafters' choice to categorize trafficking as "slavery" or as a crime involving slavery-like characteristics in the first place suggests that a trafficking crime must exhibit the abuse of power attaching to the ownership of a person in order for the Court to analyze it.<sup>102</sup> But, as mentioned above, many instances of trafficking occur through exploitative or coercive practices without actual ownership.<sup>103</sup> In the ICC's *Elements of Crimes*, both enslavement and sexual slavery are described as requiring the act in question to involve *any or all* of the powers attaching to the right of ownership, and both entries specify that these powers include "purchasing, selling, lending or bartering such a person or persons" or a similar deprivation of liberty.<sup>104</sup> This explanation seems to suggest that, in order to fall under the Rome Statute, trafficking must include some exchange of commerce or similar indicia constituting formal ownership of a person in a manner similar to chattel slavery.

But if the prosecution of enslavement or sexual slavery required a showing of ownership, the scope of prosecutable trafficking cases would be extremely narrow. Chattel slavery of this kind, such as was formerly practiced in the United States, rarely exists anymore, and would face global backlash.<sup>105</sup> This would also be a significant narrowing from the definition

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102. Kevin Bales and Peter Robbins claim that the *Elements of Crimes* codification of "enslavement" simply restates the 1926 Slavery Convention's definition of slavery "with the addition of the practice of trafficking." Kevin Bales & Peter T. Robbins, *No One Shall Be Held in Slavery or Servitude*, 2 HUM. RTS. REV. 18, 26 (2001). Under this view, in effect, where trafficking can be established under the Statute, so too can the behavior required to establish enslavement. *Id.* In contrast, Barbara Bedont argues that the addition of trafficking *altered* the Slavery Convention's definition of enslavement, establishing "a new definition of enslavement which includes trafficking in persons." Barbara Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court*, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 183, 199 (1999) (emphasis added). Jean Allain emphasizes that the Rome Statute codifies *enslavement*—not slavery—and thereby "does not add trafficking as an additional type of slavery [but rather] acknowledges that slavery is but one possible component part of the definition of trafficking." JEAN ALLAIN, *THE SLAVERY CONVENTIONS: THE TRAVAUX PRÉPARATOIRES OF THE 1926 LEAGUE OF NATIONS CONVENTION AND THE 1956 UNITED NATIONS CONVENTION* 231 (2008). In other words, Allain takes the view that the article 7(2)(c) reference to trafficking does not modify the codified crime of enslavement; rather, the elements of enslavement may help contextualize but do not limit what trafficking cases may look like. Finally, Anne Gallagher, taking a self-pronounced "conservative" approach to interpreting article 7(1)(c) asserts the inverse, stating that trafficking is a *vehicle*—akin to buying, selling, and lending—to the "exercise of a power attaching to the right of ownership of the kind required to constitute enslavement" and must satisfy the ownership requirement to be a crime against humanity. GALLAGHER, *supra* note 12, at 216 (2010) (emphasis in original).

103. See *supra* Part II; see also Trafficking Protocol, *supra* note 4, art. 3(a).

104. ICC *Elements of Crimes*, *supra* note 86, at 6, 8.

105. The prohibition of slavery is generally agreed to be a *jus cogens* norm. See UDHR, *supra* note 24, art. 4; ICCPR, *supra* note 23, art. 8; see also M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 68 (1997); U.N. Sub-Commission on the Promotion and Protection of Hum. Rts., *Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict: Final Report Submitted by*

of the Trafficking Protocol, which shows that ownership is not a necessary element of trafficking (though it may be a sufficient one); rather, *exploitation* is key, regardless of the formal relationship between perpetrator and victim.<sup>106</sup> Consequently, scholars have debated exactly how trafficking fits within the Rome Statute's definition of enslavement and what actually needs to be established to find that trafficking has occurred.<sup>107</sup>

### B. Judicial Interpretations of the Article 7 Slavery Provisions

While the ICC has not yet had the opportunity to clarify the relationship between trafficking and enslavement,<sup>108</sup> the International Criminal Tribunal for the former Yugoslavia ("ICTY") expressed that enslavement encompasses a much wider range of conduct than the traditional conception of chattel slavery in *Prosecutor v. Kunarac*. In that case, the ICTY's prosecutor charged defendants Kunarac and Kovač with the enslavement and rape of Muslim women for the defendants' sexual gratification. The Trial Chamber adopted a definition for enslavement as a crime against humanity similar to that of slavery in the 1926 Slavery Convention and the Rome Statute.<sup>109</sup> Despite the narrowness of that definition, the ICTY nonetheless observed that "enslavement" may be broader than traditional definitions of slavery, the slave trade, servitude, or compulsory labor found in other areas of international law.<sup>110</sup> In other words, the Trial Chamber found "enslavement" re-

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Ms. Gay J. McDougall, Special Rapporteur, ¶ 28, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998), <https://www.refworld.org/docid/3b00f44114.html>.

106. Trafficking Protocol, *supra* note 4, art. 3(a).

107. See *supra* note 102.

108. In the only relevant case before the ICC, the OTP brought charges of enslavement in *Prosecutor v. Ongwen*. The Pre-Trial Chamber, however, did not elaborate on the elements or indicia of enslavement, likely because pre-trial proceedings function as probable cause hearings rather than full analyses on the merits. See *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Pre-Trial Judgment (Mar. 23, 2016). As the Chamber confirmed the charges—including enslavement—against defendant Ongwen, the Trial Chamber will have the opportunity to further elaborate on the elements of enslavement if it so chooses. See ICC Press Release, ICC Pre-Trial Chamber II Confirms the Charges Against Dominic Ongwen and Commits Him to Trial, ICC-CPI-20160323-PR1202 (Mar. 23, 2016). The Trial Chamber heard closing statements in March 2020, and is still in deliberation at the time of the publication of this piece. ICC Press Release, ICC Trial Chamber IX to Deliberate on the Ongwen Case, ICC-CPI-20200312-PR1519 (Mar. 12, 2020).

109. Compare Convention to Suppress the Slave Trade and Slavery art. 1(1), Sept. 25, 1926, 60 L.N.T.S. 253, Registered No. 1414 [hereinafter Slavery Convention] (defining slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised"), with *Prosecutor v. Kunarac et al.*, Judgment, ¶ 539 (defining enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person"), and Rome Statute, *supra* note 17, art. 7(2)(c) (defining enslavement as "exercise of any or all of the powers attaching to the right of ownership over a person . . . includ[ing] the exercise of such power in the course of trafficking in persons, particularly women and children.").

110. *Prosecutor v. Kunarac et al.*, Judgment, ¶ 541.

fers not just to slavery, but rather to a whole host of other conduct that may be exploitative or coercive in one way or another.<sup>111</sup> Critically, the Trial Chamber specifically included compulsory labor without remuneration and human trafficking among the conduct that could constitute enslavement.<sup>112</sup>

To further contextualize the definition of enslavement, the *Kunarac* Trial Chamber elaborated that indicia of this crime include, but are not limited to: (1) control of movement; (2) control of physical environment; (3) control of sexuality; (4) psychological control; (5) forced labor; (6) measures taken to prevent or deter escape; (7) force; (8) threat of force or coercion; (9) duration; (10) assertion of exclusivity; and (11) cruel treatment and abuse.<sup>113</sup> While these powers resemble ownership because they exhibit some level of the perpetrator's control over another, formal ownership of the victim is not required.<sup>114</sup> Likewise, consent of the victim is irrelevant.<sup>115</sup> However, the Trial Chamber did not elaborate on how to weigh these factors comparatively, nor did it state that a hierarchy exists among them.<sup>116</sup>

On appeal, the Appeals Chamber affirmed the Trial Chamber's definition of enslavement, the indicia it highlighted, the absence of a complete ownership requirement, and the definition's overall evolution away from the narrow concept of slavery embodied in the 1926 Slavery Convention.<sup>117</sup> Under the ICTY's reading, then, trafficking does not need to be the equivalent of chattel slavery to constitute enslavement as a crime against humanity. Rather, the prosecutor only needs to demonstrate that a trafficking aggressor wields power (*i.e.*, any of the conduct described by the Trial Chamber) that would contribute to a relationship resembling ownership over the victim.

Only the ICC and the Special Court for Sierra Leone ("SCSL") have codified sexual slavery as an offense separate from enslavement,<sup>118</sup> but those

111. *Id.* ¶ 543.

112. *Id.* ¶ 542 ("Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.").

113. *Id.* ¶ 543.

114. *Id.*

115. *Id.* ¶ 542.

116. *Id.* ¶ 543.

117. In discussing contemporary forms of slavery, the Appellate Chamber explained that typical victims are

not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery,' but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree.

*Prosecutor v. Kunarac*, Appeal Judgment, ¶ 117.

118. See S.C. Res. 1315, Statute of the Special Court for Sierra Leone art. 2 (Aug. 14, 2000). The *ad hoc* tribunals, in contrast, only codify enslavement. See, e.g., S.C. Res. 827, Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5 (May 25,

tribunals have both interpreted the *actus reus* of sexual slavery to share important features with that of enslavement. In *Prosecutor v. Sesay et al.*, the SCSL emphasized that despite sexual slavery's separate codification, it "is a particularized form of slavery or enslavement[,] and acts which could be classified as sexual slavery have been prosecuted as enslavement in the past."<sup>119</sup> Similarly, in *Prosecutor v. Katanga and Ngudjolo*, the ICC Pre-Trial Chamber concluded that sexual slavery "may be regarded as a particular form of enslavement,"<sup>120</sup> such that "what is encompassed with 'sexual slavery' must also be encompassed with 'enslavement.'"<sup>121</sup> Therefore, to the extent that enslavement is understood, as it was in *Kunarac*, to encompass certain coercive acts even in the absence of ownership, so too can sexual slavery be understood.

It is worthwhile to note that this interpretation of enslavement aligns with the aim of a successful coalition of the ICC's drafters, who wanted to create a provision that would attach to modern manifestations of slavery.<sup>122</sup> The drafters specifically rejected the proposal of some delegations—including Costa Rica, Hungary, and Switzerland—to explicitly require "sexual slavery" to include the treatment of the victim or victims as chattel.<sup>123</sup> Several delegations expressed that such a reference—whether in regard to enslavement or sexual slavery—would be "outdated, inappropriate and imprecise" and would improperly confine slavery to the actual ownership (as opposed to the more broad "powers of ownership") of saleable property.<sup>124</sup> Others noted that as modern enslavement often differs from the

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1993). Notably, the *Kunarac* Trial Chamber included the performance of sex and prostitution as indications of enslavement generally, and by including them there suggested that acts of that kind could be prosecuted on the basis of exploitation and not only in the presence of chattel slavery. *Prosecutor v. Kunarac*, Judgment, ¶ 542.

119. *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, ¶ 155 (Mar. 2, 2009).

120. *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 430 (Sept. 30, 2008).

For the war crime of sexual slavery under article 8(2)(b)(xxii)-2 of the Elements of Crimes, the perpetrator must: "(i) exercise any or all of the powers attaching to the right or 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; and (ii) cause such person or persons to engage in one or more acts of a sexual nature.

*Id.* ¶ 343 (emphasis added).

121. COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 42 n.48 (Mark Klamberg ed., 2017).

122. See Roger S. Clark, *Crimes Against Humanity and the Rome Statute of the International Criminal Court*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 75, 83 (Mauro Politi & Guiseppe Nesi eds., 2001).

123. Oosterveld, *supra* note 93, at 629–30.

124. *Id.* (citing Eve La Haye, *Article 8(2)(v)(xxii)—Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, and Sexual Violence*, in *THE*

classic concept of chattel slavery, the Rome Statute needed to have the capacity to capture a broader range of similar behavior,<sup>125</sup> or the crime would have no practical significance in the modern world, thwarting any intention for the Rome Statute to also target trafficking.

Last, it is also notable that this view fits cleanly with the Trafficking Protocol's broad definition of trafficking. A harmonious interpretation of the Rome Statute with the Trafficking Protocol bolsters the complementing aspects of these two regimes: If the definitions of trafficking in these two treaties are in line with each other, it further legitimizes the ICC's role as a court of last resort that investigates and prosecutes cases where officials or authorities of a state party have incited or encouraged trafficking in violation of their state's obligations to the Trafficking Protocol.

Upon review of the definitions of enslavement and sexual slavery found in the Rome Statute and ICT case law, it is clear that article 7 encompasses trafficking. Moreover, it is likely that prosecutable trafficking offenses include a broad range of exploitative behaviors that can occur in both violent and peaceful contexts. Additional limitations on what constitutes article 7 trafficking are discussed in the section that follows.

### C. Human Trafficking and the Article 7 Elements

Not every commission of enslavement or sexual slavery will qualify as a crime against humanity that the ICC can adjudicate. Rather, to be prosecutable, either act must also meet article 7's chapeau elements. The chapeau requires any article 7 *actus reus* to be committed by an individual associated with the state or other organization with state-like control "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."<sup>126</sup> The chapeau is best understood as requiring three elements: (1) that the perpetrator targeted a civilian population (*e.g.*, through a particular policy); (2) that the perpetrator committed the act knowingly; and (3) that the attack of which the act was part had a widespread or systematic nature.

Facially devoid of reference to violence or conflict,<sup>127</sup> the chapeau, like the more specific provisions of article 7 relating to trafficking, appears to capture crimes occurring either in times of war or peace.<sup>128</sup> In reviewing each of the chapeau's three elements, this section demonstrates that the requirements of article 7 do not bar the Court from reviewing peacetime traf-

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INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, 3, 5, 191 (Roy S. Lee et al. eds., 2001).

125. *Id.*

126. Rome Statute, *supra* note 17, art. 7(1).

127. See *infra* Part IV.C.1 for an explanation of why the word "attack" does not necessarily implicate violence.

128. Christopher Hall & Kai Ambos, *Article 7: Crimes Against Humanity*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 155 (Otto Triffterer & Kai Ambos eds., 2016).

ficking cases. At the same time, this section flags possible challenges that past interpretation of the elements—particularly of the widespread or systematic requirement—may create for these cases.

### 1. The Policy Requirement: An Attack Directed Against a Civilian Population

To constitute a crime against humanity, the chapeau requires an “attack,” composed of multiple commissions of the acts listed in article 7, rooted in a policy espoused by the state or a state-like entity. This is known as the “policy requirement,” and it essentially prevents one-off crimes or crime waves (*i.e.*, multiple commissions of a crime that are not connected in an organized sense) from qualifying as crimes against humanity, even if the rest of the chapeau elements are satisfied.<sup>129</sup>

This requirement—and more specifically the word “attack”—poses no barrier in itself to prosecuting trafficking cases of a peacetime nature. In analyzing the policy requirement, ICTs have only dealt with attacks arising in conflict-type situations until now,<sup>130</sup> but the text of article 7 and prior ICT jurisprudence make clear that an “attack” is not confined to military campaigns or other traditional notions.<sup>131</sup> In fact, article 7(2) defines “an attack directed against any civilian population” as “a course of conduct involving the multiple commission of acts referred to in [article 7(1)].”<sup>132</sup> And the ICTY Trial Chamber in *Stakić* emphasized that “an attack . . . is not limited to the use of armed force.”<sup>133</sup> The word “attack” in the Rome Statute thus departs from its common meaning and takes on the meaning of a strategy or plan that does not necessarily require conflict or violence.<sup>134</sup> Accordingly, as the ICTY and ICTR have repeatedly made clear in their jurisprudence, *any*

129. See Darryl Robinson, *Essence of Crimes Against Humanity Raised by Challenges at ICC*, EJIL: TALK! (Sept. 27, 2011), <https://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/> (“Crime waves of unconnected individuals or numerous spontaneous groups are ‘normal’ crime, not engaging in international jurisdiction. But where an organization collectively orchestrates or endorses harm against a civilian population, and the harm reaches the level of ‘widespread’ or ‘systematic’ violence, then it is no longer ‘normal’ crime but something more sinister, coordinated and dangerous, and warrants international concern.”).

130. Starr, *supra* note 15, at 1258.

131. See *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 623 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 581 (Sept. 2, 1998) (“An attack may also be non violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner.”); *Prosecutor v. Kunarac*, Judgment, ¶ 416 (“[An attack] may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention.”); Hall & Ambos, *supra* note 128.

132. Rome Statute, *supra* note 17, art. 7(2)(a).

133. *Prosecutor v. Stakić*, Judgment, ¶ 623.

134. Hall & Ambos, *supra* note 128, at 165.

mistreatment of a civilian population may constitute an attack, and it need not involve armed forces, hostilities, or any violence at all.<sup>135</sup>

The conclusion that the chapeau does not require article 7 crimes against humanity to occur within a context of violence is further bolstered by the fact that article 7 also requires victims to be civilians: Individuals who are not participants of the armed forces or otherwise combatants.<sup>136</sup> By distinguishing civilians from soldiers—and requiring victims to be civilians—the text reveals that it does not require that the act take place in the context of active conflict. On the contrary, if article 7 required the victims to be *combatants*, rather than civilians, then it would require a backdrop of violence.<sup>137</sup> In other words, while an armed struggle *could* be occurring in parallel to an article 7 “attack” against civilians, it is not a necessary circumstance.

There is, of course, more to this first prong of the chapeau—the policy requirement itself. Article 7(2) requires the attack be “directed” by a state or an organization—that is, it must be “pursuant to or in furtherance of a State or organizational policy.”<sup>138</sup> As affirmed by both the ICC and the *ad hoc* tribunals, to constitute the basis of a directed attack “[t]here is no requirement that [a] policy must be adopted formally as the policy of a state [or organization].”<sup>139</sup> Nor must the policy be stated expressly, clearly, or precisely.<sup>140</sup> Rather, it is sufficient to show the existence of an implicit or *de facto* policy that inspired the attack.<sup>141</sup> Additionally, article 7’s allowance that the policy can come from a state *or* an organization makes clear that non-state actors or private individuals exercising *de facto* power over a region can also be prosecuted for their policies.<sup>142</sup>

135. See *supra* note 131.

136. E.g., Prosecutor v. Stanišić, Case No. IT-03-69-T, Judgment, ¶ 965 (Int’l Crim. Trib. for the Former Yugoslavia May 30, 2013) (referencing the definition of “civilian” found in Additional Protocol I of the 1949 Geneva Conventions). The presence of soldiers or other combatants within a targeted group does not deprive it of its civilian character, as a targeted population need only be predominantly, not completely, civilian in nature. Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶ 474 (Mar. 24, 2016).

137. It should be noted, as well, that many (though not all) of the crimes enumerated in article 7 have a *war crimes* equivalent under article 8. See *generally* Rome Statute, *supra* note 17, art. 8.

138. *Id.* art. 7(2)(a).

139. Prosecutor v. Katanga, Decision on the Confirmation of Charges, ¶ 396; Prosecutor v. Bemba, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 81 (Jun. 15, 2009); Prosecutor v. Akayesu, Judgment, ¶ 580; Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 653 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

140. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 204 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

141. Hall & Ambos, *supra* note 128, at 245.

142. *Id.* at 246–50. As Hall and Ambos explain, there is some controversy surrounding the question of which non-state entities may qualify to sponsor a policy.

## 2. *Mens Rea* Requirement: Knowledge of the Attack

Article 7 also requires that the perpetrator committed a qualifying attack with knowledge, *i.e.* with awareness that it fits within a broader campaign against the civilian population. This knowledge requirement adds to the Court's general *mens rea* requirement in article 30.<sup>143</sup> It serves to create a nexus between the perpetrator's acts and the broader widespread or systematic attack,<sup>144</sup> and it excludes coincidental acts from qualifying as crimes against humanity.<sup>145</sup>

Article 7 requires a perpetrator be "aware that a widespread or systematic attack on civilian population is taking place and that his action is part of [it.]"<sup>146</sup> It does not require, however, the perpetrator to know the details of the policy or intend for his acts to support the state or organization carrying out the attack.<sup>147</sup> He does not even need to know that his acts were inhumane or would constitute a crime against humanity.<sup>148</sup> The perpetrator's motives for contributing to the crime are irrelevant.<sup>149</sup> It is not necessary for the perpetrator to share the purpose or goal behind the attack or to intend to harm the same civilian population targeted by the broader attack in addition to his own victim.<sup>150</sup> As explained by the ICTY Appeals Chamber, "[i]t is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof."<sup>151</sup>

Thus, the perpetrator "merely needs to understand the overall context in which his or her acts took place"<sup>152</sup> because it is this context that "increased the dangerousness of his conduct for the victims or turned this conduct into

143. Hall & Ambos, *supra* note 128, at 176. Article 30 (titled "Mental element") reads:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
  - (a) In relation to conduct, that person means to engage in the conduct;
  - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.

144. Hall & Ambos, *supra* note 128, at 176.

145. *Id.*

146. Prosecutor v. Brima et al., Further Amended Consolidated Indictment, ¶¶ 221–22.

147. *Id.*, ¶¶ 221–22; *see also* Hall & Ambos, *supra* note 128.

148. Hall & Ambos, *supra* note 128, at 176.

149. Prosecutor v. Kunarac, Appeal Judgment, ¶ 103.

150. *Id.*

151. *Id.*; Prosecutor v. Blaškić, IT-95-14, Appeal Judgment, ¶ 101 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

152. Hall & Ambos, *supra* note 128, at 176.

a contribution to the crimes of others.”<sup>153</sup> This line of reasoning supposes a sort of risk assessment on the part of the perpetrator: Because he committed the offense despite knowledge of the greater attack, he took a risk that his acts would be part of the overall attack.<sup>154</sup>

Note that the *mens rea* requirement restricts *who* may be indicted, but it does not restrict the kinds of conduct that may qualify for indictment. It does not exclude the possibility of prosecuting peacetime trafficking, as long as the perpetrator acted with knowledge that his act occurred in the context of an attack against civilians.

### 3. The Widespread or Systematic Requirement: Extensiveness of the Crime

The final element of the chapeau requires a perpetrator’s actions to be of a particular magnitude (or to occur in the context of other actions collectively of that magnitude) in order to qualify as a crime against humanity. Yet even this element does not categorically bar peacetime trafficking cases.

Neither the Rome Statute nor the ICC’s accompanying *Elements of Crimes* elaborate on the meaning of the disjunctive “widespread or systematic attack” standard. In general, though, ICTs have interpreted “widespread” to mean an attack of a “large scale” in terms of both its “nature” and the “number of victims,” and they have interpreted “systematic” as referring to “the organised nature of the acts of violence and the improbability of their random occurrence.”<sup>155</sup> Patterns of crimes are therefore evidence of a systematic attack if they are not shown to be events accidentally repeated on a regular basis.<sup>156</sup>

Critically, the widespread or systematic requirement attaches to an attack as a whole and not to the individual acts that a particular perpetrator contributes to the attack.<sup>157</sup> The perpetrator does not have to personally commit a widespread or systematic series of acts in order to incur criminal responsibility; rather, his act or acts must only contribute to the overall context in which a widespread or systematic attack exists.<sup>158</sup> Thus, an individual

153. *Id.*

154. Prosecutor v. Kunarac, Appeal Judgment, ¶ 102.

155. *Id.* ¶ 94; Prosecutor v. Bagosora, ICTR-98-41-A, Appeal Judgment, ¶ 387 (Dec. 14, 2011); Prosecutor v. Nahimana et al., ICTR-99-52-A, Appeal Judgment, ¶ 920 (Nov. 28, 2007); Prosecutor v. Blaškić, Appeal Judgment, ¶ 101.

156. Prosecutor v. Blaškić, Appeal Judgment, ¶ 101 (“Patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence.”).

157. Hall & Ambos, *supra* note 128.

158. As the Ambos and Triffterer commentary to the Rome Statute explains,

If some murders, some rapes, and some beatings take place, each form of conduct need not be widespread or systematic, if together the acts satisfy either of these conditions. It follows that the individual’s actions themselves need not be wide-

defendant can be liable for a wide range of acts that contribute to a crime against humanity—from directing the attack to providing assistance a single time.<sup>159</sup> As trafficking is often linked to a broader campaign against the civilian population and a broad range of other, sometimes inter-related crimes, such as forcible confinement, forced labor, and enslavement,<sup>160</sup> the Court's ability to consider these acts holistically could enable a given instance of trafficking to satisfy the widespread or systematic requirement.<sup>161</sup>

To determine if an attack was widespread or systematic, it must be assessed under the totality of the circumstances.<sup>162</sup> Factors that ICTs have developed to clarify these two standards include: (1) the scale of the attack;<sup>163</sup> (2) the number of its victims;<sup>164</sup> (3) the nature of the acts underlying the attack;<sup>165</sup> (4) the possible participation of officials or authorities in the attack;<sup>166</sup> (5) any identifiable patterns of crimes in the attack;<sup>167</sup> and (6) the

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spread or systematic, providing that they form part of such a widespread or systematic attack.

Hall & Ambos, *supra* note 128. For example, in *Prosecutor v. Ruto et al.*, the ICC Pre-Trial Chamber considered whether the alleged murder, deportation, and persecution could constitute crimes against humanity as a widespread or systematic attack. It answered affirmatively, pointing to a context of frequent, repeated acts of violence committed against the civilian population:

[T]he evidence indicates that in the locations included in the charges presented by the Prosecutor, the amount of burning and destruction of properties, injuries and murders is among the highest in the whole Kenyan territory. . . . [T]he perpetrators erected roadblocks around such locations with a view toward intercepting PNU supporters and attempting to flee, with the aim of eventually killing them . . . [and] used petrol and other inflammable material to systematically burn down the properties belonging to PNU supporters.

*Prosecutor v. Ruto et al.*, ICC-01/09/01/11, Pre-Trial Judgment, ¶ 177, 179 (Jan. 23, 2012).

159. For more information on modes of liability at the ICC, see Rome Statute, *supra* note 17, art. 25.

160. Atak & Simeon, *supra* note 7.

161. Atak & Simeon, *supra* note 7; Hall & Ambos, *supra* note 128, at 167.

162. *Id.*

163. *Id.* ¶ 389; *Prosecutor v. Kunarac*, Appeal Judgment, ¶ 101.

164. *Prosecutor v. Bagosora*, Appeal Judgment, ¶ 389; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2, Appeal Judgment, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004); *Prosecutor v. Blaškić*, Appeal Judgment, ¶ 101; *Prosecutor v. Kunarac*, Appeal Judgment, ¶ 94.

165. *Prosecutor v. Bagosora*, Appeal Judgment, ¶ 389; *Prosecutor v. Kordić & Čerkez*, Appeal Judgment, ¶ 94; *Prosecutor v. Blaškić*, Appeal Judgment, ¶ 101; *Prosecutor v. Kunarac*, Appeal Judgment, ¶ 94.

166. *Prosecutor v. Bagosora*, Appeal Judgment, ¶ 389; *Prosecutor v. Kordić & Čerkez*, Appeal Judgment, ¶ 94; *Prosecutor v. Blaškić*, Appeal Judgment, ¶ 101.

167. *Prosecutor v. Blaškić*, Appeal Judgment, ¶ 101 (citing *Prosecutor v. Kunarac*, Appeal Judgment, ¶ 94).

improbability of the acts' random occurrence.<sup>168</sup> No single factor or absence thereof is dispositive for either standard, so, for example, the numerosity of victims alone does not determine whether an attack was widespread or systematic.<sup>169</sup> Additionally, because the test is disjunctive, a group of factors may satisfy the test even if they only evince either the widespread *or* the systematic nature of the attack.<sup>170</sup>

The effect of the totality test is that the scope of admissible cases under the widespread or systematic requirement is relatively broad—broad enough to cover peacetime trafficking. Indeed, no ICT has cited conflict or the involvement of force as a factor in the totality test. And because the number of victims is neither the sole, nor the most important, factor to consider, trafficking committed against relatively few victims could still be judged by the ICC if enough other factors are implicated.<sup>171</sup> For example, it may be possible to demonstrate the systematic nature of trafficking in some countries by showing the improbability of its random occurrence, as might occur where a trafficker follows a pattern based on a preconceived plan or policy.<sup>172</sup> In practice, then, the Court's review of trafficking need not be limited only to large-scale, exploitative enterprises that plague a substantial portion of the civilian population, or to cases where the government legitimizes a program, such as chattel slavery.<sup>173</sup>

However, although the indicia for a widespread or systematic attack could facially include peacetime trafficking, caselaw on the widespread or systematic requirement suggests a trend among ICTs to find that an attack was widespread or systemic where it occurred in an atmosphere of violence.<sup>174</sup> Is this trend towards wartime or conflict-ridden cases a product of

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168. Prosecutor v. Bagosora, Appeal Judgment, ¶ 389; Prosecutor v. Kunarac, Appeal Judgment, ¶ 94; Prosecutor v. Blaškić, Appeal Judgment, ¶ 101.

169. Prosecutor's Office of Bosnia and Herzegovina v. Stupar et al., Appellate Verdict, ¶ 376 (Court of Bosnia and Herzegovina, Section for War Crimes Sept. 9, 2009) (“[T]he element of substantiality does not necessarily refer to the quantitative aspect[.]”). A similar approach is taken in determining whether an attack amounts to genocide. There is no quantitative minimum for genocide; rather, a substantial part of the national, ethnic, or racial group must be targeted. See Prosecutor v. Krstić, IT-98-33, Judgment, ¶ 502 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (“[T]he definition of genocide] should be read as meaning the destruction of a numerically significant part of the population concerned.”)

170. Prosecutor v. Brima et al., Further Amended Consolidated Indictment, ¶ 215.

171. See Atak & Simeon, *supra* note 7, at 1036; see also Prosecutor v. Bagosora, Appeal Judgment ¶ 389; Prosecutor v. Kordić & Čerkez, Appeal Judgment, ¶ 94; Prosecutor v. Blaškić, Appeal Judgment, ¶ 101; Prosecutor v. Kunarac, Appeal Judgment, ¶ 94.

172. Atak & Simeon, *supra* note 7, at 1036.

173. See *id.*; see also Prosecutor v. Bagosora, Appeal Judgment, ¶ 389; Prosecutor v. Kordić & Čerkez, Appeal Judgment, ¶ 94; Prosecutor v. Blaškić, Appeal Judgment, ¶ 101; Prosecutor v. Kunarac, Appeal Judgment, ¶ 94.

174. See, e.g., Prosecutor v. Ruto et al., Pre-Trial Judgment, ¶ 177, 179 (evaluating whether the alleged murder, deportation, and persecution were committed in the context of a widespread or systematic attack). Though the Pre-Trial Chamber in *Prosecutor v. Ruto et al.* also considered the scale of the attack and the number of its victims, it primarily reviewed the

the widespread or systematic requirement itself, or have existing ICT cases only interpreted it in violent contexts? Because neither the Rome Statute nor ICT caselaw requires proof of violence as part of the “widespread or systematic” standard, it should not be an obstacle to prosecuting peacetime trafficking in practice.

#### V. STEPS TOWARD ACCOUNTABILITY: TRAFFICKING ARCHETYPES TO CONSIDER

There are three types of peacetime trafficking cases that the OTP should watch closely for the opportunity to bring before the ICC: (1) state agents trafficking civilians themselves; (2) state agents facilitating the trafficking of civilians, but not engaging in the trafficking themselves; and (3) state agents acquiescing to trafficking, particularly through generationally-embedded forms of slavery. This part will show how each of these three cases satisfy the threshold elements of article 7—including the requirements of the chapeau.<sup>175</sup> Discussions for each case archetype will conclude with an overview of the pros and cons of prosecution in practice, with special emphasis on prosecution’s potential to contribute to increased accountability for trafficking.<sup>176</sup>

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frequent, repeated acts of violence committed by the accused against the civilian population, suggesting that the existence of a background of physical violence and destruction formed a key part of its evaluation.

As another example, in *Prosecutor v. Brima et al.*, the SCSL similarly emphasized the violent backdrop upon which an alleged abduction, forced labor, and forced marriage were committed to support its finding of a widespread or systematic attack. *Prosecutor v. Brima, et al.*, Further Amended Consolidated Indictment. Though it concluded that the forced labor and marriages did not constitute crimes against humanity, the Trial Chamber emphasized that during the alleged acts, a military coup had occurred and the military had coordinated “routine direct attacks against civilians suspected of supporting [political opposition], in the course of which civilians were shot and their property looted,” and entire villages were burned on the basis that they harbored political opponents. *Id.* at ¶¶ 224, 227. The Appeals Chamber then relied on “the atmosphere of violence” in which the forced labor and marriages occurred to support overturning the Trial Chamber’s finding that these acts did not constitute crimes against humanity. *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Appeal Judgment, ¶ 200 (Special Court for Sierra Leone Feb. 22, 2008). Specifically, it noted that victims were repeatedly subjected to physical and sexual violence, forced to watch the killing or mutilation of close family members, and ostracized from their communities after perpetrators forced them to become their wives. *Id.* ¶¶ 199, 200.

And last, the ICTR Appeals Chamber ruled in 2006 that the Trial Chambers must take judicial notice that a widespread or systematic attack occurred against a civilian population defined by its Tutsi ethnicity. *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, ¶ 32 (June 16, 2006). This conclusion was based on multiple killings and commissions of serious bodily or mental harm against the Tutsi population, resulting in a large number of deaths. *Id.* ¶ 31.

175. The first two archetypes lend themselves more to charging as enslavement than as sexual slavery, but the third archetype could more readily be charged as either.

176. This section refers to state action, but the ICC could also hear cases involving non-state organizations with effective control over the relevant territory.

### A. State-Imposed Trafficking: Forced Labor in Prisons

State-imposed forced labor is likely the most straightforward form of peacetime trafficking to prosecute as a crime against humanity. Defined broadly as the state taking advantage of an individual's duty or obligation to the government,<sup>177</sup> state-imposed forced labor includes compulsory participation in public works projects, abused conscription, prison labor, and government-ordered work that exceeds normal civil obligations or contracted services.<sup>178</sup> This section uses the U.S. prison system as an example to demonstrate that some cases of state-imposed forced labor could satisfy the threshold elements of enslavement under article 7.<sup>179</sup>

The Thirteenth Amendment of the U.S. Constitution contains a general ban on slavery, but it makes an exception for labor or services performed as a condition of a prison sentence.<sup>180</sup> Indeed, the practice of prison labor is now ubiquitous, and the U.S. federal government advertises its prisoners as a cheap source of labor.<sup>181</sup> Through UNICOR (also known as Federal Prison

177. See *Global Estimates of Modern Slavery*, *supra* note 3, at 41–42; Cazzie Reyes, *State-Imposed Forced Labor: Why It Matters*, END SLAVERY NOW (Feb. 29, 2016), <https://www.endslaverynow.org/blog/articles/state-imposed-forced-labor-why-it-matters>.

178. *Global Estimates of Modern Slavery*, *supra* note 3, at 41; Ruben J. Garcia, *U.S. Prisoners' Strike Is a Reminder How Common Inmate Labor Is*, CBS NEWS (Sept. 3, 2018), <https://www.cbsnews.com/news/u-s-prisoners-strike-is-reminder-how-commonplace-inmate-labor-is>.

179. The United States is only one illustrative example of how, in general, forced labor in prisons satisfy the article 7 requirements. As the United States is not a party to the Rome Statute and because the forced labor it permits occurs in its own territory, the ICC will not be able to commence an investigation into trafficking violations against U.S. personnel. I have selected the U.S. example nonetheless because there is relatively more information available on these crimes and because the logic still applies to States Parties engaging in similar practices. Other States Parties to the Rome Statute employing prison labor include Brazil, see Fabio Teixeira, *Volunteers or Slaves? Brazil Accused of Illegal Jail Labor*, REUTERS (Apr. 11, 2019, 7:08 AM), <https://www.reuters.com/article/us-brazil-slavery/volunteers-or-slaves-brazil-accused-of-illegal-jail-labor-idUSKCN1RN0CN>; Canada, see Justin Ling, *Prison Labour*, NATIONAL (Sept. 16, 2019), <https://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2019/all-work-and-low-pay>; Germany, see Jörg Luyken, *Prisoners Launch Hunger Strike Over Forced Labour*, LOCAL (Dec. 3, 2015), <https://www.thelocal.de/20151203/prisoners-in-forced-labour-go-on-hunger-strike>; Hungary, see Pablo Gorondi and Andras Nagy, *Hungarian Inmates Working Around the Clock on Border Fence*, AP (Sept. 21, 2016), <https://apnews.com/e2e7543ae87145de95a98a2304fe8286/hungarian-inmates-working-around-clock-border-fence>; and Japan, NATIONAL GEOGRAPHIC, *Japanese Prison*, (Apr. 17, 2012), [https://www.youtube.com/watch?time\\_continue=5&v=yiw2NULDjKM](https://www.youtube.com/watch?time_continue=5&v=yiw2NULDjKM).

180. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

181. See generally UNICOR Services Business Group, *A Winning Solution to Your Contact Center Outsourcing Needs*, <https://www.unicor.gov/publications/services/CATMS361.pdf> (strikingly claiming UNICOR is, “[t]he best kept secret in contact centers”—a secret which is now “out”—and, “[a] winning solution to your contact center outsourcing needs” to promote using federal inmates to fill a company’s workforce needs”) (last visited Apr. 22, 2020). See also Alexia Fernández Campbell, *The Federal Government Markets Pris-*

Industries), a government corporation established by executive order,<sup>182</sup> the U.S. federal government enters into contracts with agencies (such as the U.S. Department of Defense, to construct weapons)<sup>183</sup> and private companies.<sup>184</sup> Ostensibly, these contracts provide federal inmates with productive work, aiming to promote their rehabilitation into society upon release.<sup>185</sup> This arrangement, however, gives the federal government control over both the contractual arrangements with labor purchasers and the prisoners' sentencing conditions, enabling it to coerce inmates into performing contract demands or to accept less money in order to keep transaction costs low for UNICOR's customers.

U.S. prisoners repeatedly complain of the government abusing their debt to society.<sup>186</sup> For instance, in 2018, inmates in seventeen U.S. states went on a several week strike to protest maltreatment and slavery-like conditions in prisons, both state and federal.<sup>187</sup> The maltreatment included staff frequently threatening them—sometimes with violence—if they expressed an unwillingness to work in their prison jobs,<sup>188</sup> while the poor conditions included low wages—a few dimes for each hour of work, if anything at all—decrepit living facilities, and no guarantee of safe working conditions.<sup>189</sup> In one federal lawsuit, inmates complained they were exposed to toxic dust and worked without safety equipment, protective gear, air filtration, or masks at a UNICOR computer and electronics recycling factory.<sup>190</sup> In contrast, regulations issued by the U.S. Occupational Safety and Health Administration require employers to provide personal protective equipment wherever employees' work would expose them to hazards capable of causing injury or impairment to any part of the body.<sup>191</sup>

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on Labor to Businesses as the “Best-Kept Secret”, VOX (Aug. 24, 2018), <https://www.vox.com/2018/8/24/17768438/national-prison-strike-factory-labor>.

182. UNICOR Services Business Group, *supra* note 181, at 1.

183. Sara Flounders, *The Pentagon and Slave Labor in U.S. Prisons*, GLOBAL RESEARCH (Sept. 1, 2018), <https://www.globalresearch.ca/the-pentagon-and-slave-labor-in-u-s-prisons/25376>.

184. Fernández Campbell, *supra* note 181.

185. *Id.*

186. Garcia, *supra* note 178.

187. Fernández Campbell, *supra* note 181; Mitch Smith, *Prison Strike Organizers Aim to Improve Conditions and Pay*, N.Y. TIMES (Aug. 26, 2018), <https://www.nytimes.com/2018/08/26/us/national-prison-strike-2018.html>.

188. Flounders, *supra* note 183 (stating that, in the U.S. state of Georgia, inmates refused to leave their cells at six prisons for more than a week to protest being forced to work seven days per week without pay, and that prisoners were beaten if they refused to work).

189. Fernández Campbell, *supra* note 181; Smith, *supra* note 187; Flounders, *supra* note 183.

190. Flounders, *supra* note 183.

191. U.S. OCCUPATIONAL SAFETY AND HEALTH ADMIN., OCCUPATIONAL SAFETY AND HEALTH STANDARDS STANDARD 1910.132(A) (2016).

Such exploitative prison labor practices fall squarely within article 7 of the Rome Statute. The threat of a prolonged sentence or punishment for non-compliance, officials' ability to control the prisoner's movement and physical environment, and the compulsory labor itself are all factors exhibiting an exercise of power similar to the right of ownership and bringing this offense under the ambit of enslavement.<sup>192</sup>

This offense also meets all of the article 7 chapeau elements for a crime against humanity. Forced prison labor satisfies article 7's requirement of an attack directed against a civilian population. It is an attack because it involves forcing prisoners to repeatedly perform labor.<sup>193</sup> It is directed against civilians, namely persons serving sentences for violating domestic laws, rather than imprisoned enemy combatants. Finally, forced prison labor is an official state policy: Prison personnel are a part of a centralized staff hierarchy paid for or monitored by the government, and the government contracts with potential customers for the prisoners' labor.

Whether the chapeau's knowledge requirement is fulfilled depends on which actors the OTP charges. As this element requires perpetrators to commit their act or acts with knowledge of the broader campaign against the civilian population, OTP should target higher-level officials, those analogous to UNICOR personnel with the power to enter into contracts on behalf of the government, or supervisory officials who have the authority to control inmates' workflow, work conditions, and pay scale, or who oversee prisoner complaints. Charged officials should be those who knew or should have known about the existence of the repeated, exploitative interactions between the government and prisoners. Lower-level personnel, such as custodians or guards with little to no management power, would not have the requisite knowledge to incur criminal responsibility for trafficking. These personnel likely would not be aware of the frequent and systematic mistreatment occurring across federal prisons, nor would they have any control over government contracts or prison labor policies.<sup>194</sup>

Finally, forced prison labor can be shown to be widespread or systematic. Prison labor is a commonly used in the United States and other countries to discipline inmates, and there are frequent complaints of labor abuse in

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192. See *supra*, text accompanying note 113 for the relevant factors.

193. Rome Statute, *supra* note 17, art. 7(2)(a).

194. In cases where the accused cannot be proved to have caused trafficking, individual international criminal responsibility should not attach, lest the number of defendants be vast. See Starr, *supra* note 15, at 1280. OTP should also probably not charge lower-level individuals in an organization who have little to zero influence or policy-making power, and therefore no control over a criminal policy. In such cases, it is exceedingly difficult to prove that the accused possessed the requisite mental state—the default requirement in the ICC being knowledge—for direct commission of one of the codified crimes. See Rome Statute, *supra* note 17, art. 30. However, there exist instances where leaders of a state or organization know that trafficking is occurring and either participate in committing the crime or tacitly acquiesce to others engaging in it. These cases, which also involve opportunistic use of vulnerable individuals, may be able to come before the ICC. *Id.*

both public and private U.S. prisons.<sup>195</sup> Thousands of inmates housed in facilities across the country participate in forced labor. It is therefore an attack of a sufficient scale to be widespread. State-forced prison labor is also part of an identifiable, non-random pattern of acts against inmates—namely, acts exploiting sentencing conditions for cheap labor—thereby making the attack systematic as well.

Nevertheless, while this analysis shows that state-imposed labor could be prosecuted as a crime against humanity, information-gathering problems may limit the OTP's ability to bring these cases. Generally, neither the public nor OTP investigators is able to witness prison conditions or interactions between inmates and staff,<sup>196</sup> and inmates are rarely able to relay their accounts in real time to the public.<sup>197</sup> Grievance systems are not always available to prisoners, and even where they are, corrections departments have little incentive to publicize (or respond to) prisoner complaints.<sup>198</sup> Consequently, information on the exact prevalence and form of state-imposed forced labor is not always available, posing a challenge to potential investigations. Where information about prisoner complaints is not easily obtainable, the ICC may have to engage in more aggressive investigation practices to prove the widespread or systematic nature of the exploitation.

B. *The State as a Trafficking Facilitator:  
The Ethiopian-Saudi Kafala System*

A state does not have to traffic civilians itself to commit trafficking. Under the *kafala* (sponsorship) system in Saudi Arabia and other countries in the Middle East,<sup>199</sup> migrant workers must obtain a *kafeel*—a sponsor—to receive legal immigration status and work authorization.<sup>200</sup> State-created processes like these are often abused by workers' sponsors. State officials managing these programs may be prosecuted with crimes against humanity at the ICC if they facilitate and legitimize the sponsors' exercise of powers attaching to the right of ownership and if that facilitation satisfies the threshold requirements of the chapeau.

Consider the *kafala* program pairing Ethiopian migrant workers with Saudi citizens as an example. To match Ethiopian migrant workers with the *kafeel* that they need secure a visa to legally reside and work in Saudi Ara-

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195. Garcia, *supra* note 178; Fernández Campbell, *supra* note 181; Smith, *supra* note 187; Flounders, *supra* note 183.

196. Smith, *supra* note 187.

197. *Id.*

198. *Id.* (quoting a spokeswoman of the California Department of Corrections and Rehabilitation who, in response to being shown a video of an inmate on a hunger strike, declined to identify the inmate or where the video was recorded).

199. Int'l Labour Org.: Migrant Forum in Asia, Policy Brief No. 2: Reform of the Kafala (Sponsorship) System 1, <https://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf> (last visited Apr. 20, 2020) [hereinafter ILO Policy Brief No. 2: Reform of the Kafala System].

200. *Id.*

bia,<sup>201</sup> the Saudi government engages with Saudi citizens interested in the program, while the Ethiopian government drafts employment contracts and *kafala* applications for Ethiopian workers and issues them to registered employment agencies.<sup>202</sup> These agencies recruit Ethiopian domestic workers who sign these contracts and apply for a *kafeel*.<sup>203</sup> The contracts legally bind the workers to their prospective employers and make the legality of their presence in Saudi Arabia dependent on a continued relationship with their employers.<sup>204</sup> In practice, this means that workers must obtain explicit written permission from their sponsors in order to enter the country in the first place, transfer employment, or leave the country before their contracts end.<sup>205</sup> Saudi employers typically require workers to surrender their passports and other travel documents, further ensnaring workers.<sup>206</sup>

The Ethiopian and Saudi governments' pairing of Ethiopian migrant workers with Saudi employers under the *kafala* program meets the criteria for enslavement under the Rome Statute.<sup>207</sup> It is not just that the contracts are abusive. Even protective contract terms contract are exceedingly difficult to enforce once workers travel overseas.<sup>208</sup> In some cases, the contracts

201. See Tesfalem Erago, *Ethiopians Fear Deportation From Saudi Arabia*, DEUTSCHE WELLE (June 30, 2017), <https://www.dw.com/en/ethiopians-fear-deportation-from-saudi-arabia/a-39495113>; Wesley Dockery & Meriem Marghich, *Saudi Arabia: Critics Slam Human Trafficking of Moroccan 'Maids For Sale'*, DEUTSCHE WELLE (Feb. 28, 2018), <https://www.dw.com/en/saudi-arabia-critics-slam-human-trafficking-of-moroccan-maids-for-sale/a-42760030>; see also U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS 2017 REPORT: COUNTRY NARRATIVES—SAUDI ARABIA (2017), <https://www.state.gov/j/tip/rls/tiprpt/countries/2017/271271.htm> [hereinafter TRAFFICKING IN PERSONS 2017 REPORT: COUNTRY NARRATIVES—SAUDI ARABIA] (“Due to Saudi Arabia’s requirement under its sponsorship, or kafala, system that foreign workers obtain permission from their employers for an exit visa to leave the country legally, some are forced to work for months or years beyond their contract term because their employers will not grant them permission for the visa.”).

202. *Ethiopian Women in the Middle East: It's Contract Slavery*, ADDIS STANDARD (Mar. 1, 2012), <https://addisstandard.com/ethiopian-women-in-the-middle-east-its-contract-slavery>.

203. *Id.*; Fassil Demissie, *Ethiopian Female Domestic Workers in the Middle East and Gulf States: An Introduction*, 11 AFR. & BLACK DIASPORA: INT'L J. 1 (2018).

204. *Id.*

205. ILO Policy Brief No. 2: Reform of the Kafala System, *supra* note 199, at 1.

206. Demissie, *supra* note 203.

207. Cf. Zorana Knezevic, *The Kafala Labor-Sponsorship System in the Gulf States*, HUMAN TRAFFICKING CENTER (Apr. 24, 2019), <https://humantraffickingcenter.org/the-kafala-labor-sponsorship-system-in-the-gulf-states>. It may also be possible to bring charges under the sexual slavery provision where there is evidence that such contracts are being used to coerce victims into participating in acts of a sexual nature. In Saudi Arabia, however, where the state strictly controls and showing of sexuality, especially by women, it is unlikely that the *kafala* would sponsor sex work. See generally *What Are Women Banned from Doing in Saudi Arabia*, THE WEEK (Jan. 23, 2020), <https://www.theweek.co.uk/60339/things-women-cant-do-in-saudi-arabia>.

208. Demissie, *supra* note 203; Nick Webster & Anna Zacharias, *UAE Agreement with Ethiopia Will Further Protect Rights of Domestic Workers*, NATIONAL (UAE) (Aug. 14,

to which workers agree in their home country are not the same as those they work under in the destination country,<sup>209</sup> and the *kafeel* has the power to revise the employment contract terms after the contract has been accepted. This gives sponsors the opportunity to force migrant workers to accept lower wages, unfair working conditions, or poorer living situations than originally promised at a time when the workers can no longer leave the country—or seek a new job—without the sponsor’s permission.<sup>210</sup> This means that sponsors inclined to invest as little as possible for the services rendered could do so rather easily, and their employees will feel coerced into accepting new terms.<sup>211</sup> Moreover, as Saudi Arabia lacks robust labor laws and the will to enforce reasonable *kafeel* terms, Ethiopian domestic workers often face overwork and abuse.<sup>212</sup>

Examples of state-sponsored forced labor such as the Ethiopian-Saudi *kafala* program satisfy a number of the indicia of enslavement expressed in the *Kunarac* case.<sup>213</sup> The taking of passports amounts to control of movement and prevention of escape. Employers’ free reign to control victims’ environment, and their ability to coerce additional work under the threat of lower wages or non-renewal of the contract, or by using abuse or false accusations of theft or immigration violations<sup>214</sup> all support a classification of the *kafala* program as enslavement under the Rome Statute.<sup>215</sup>

State-sponsored forced labor also meets all the chapeau elements of a crime against humanity under article 7. To start, the *kafala* program satisfies article 7’s requirement of an attack directed against a civilian population. It involves numerous acts of exploitation against thousands of migrant workers, who are civilians looking to earn a livelihood and a crucial source of income outside of their home countries.<sup>216</sup> The attack is also committed pur-

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2018), <https://www.thenational.ae/uae/uae-agreement-with-ethiopia-will-further-protect-rights-of-domestic-workers-1.759812>; Knezevic, *supra* note 207 (explaining that migrant workers often have difficulties enforcing contracts due to a lack of fluency in Arabic, a lack of familiarity or understanding of the destination country’s laws, and authorities’ frequent dismissal of workers’ complaints when employer-sponsors, who are citizens, offer a differing account).

209. Knezevic, *supra* note 207.

210. ILO Policy Brief No. 2: Reform of the Kafala System, *supra* note 199, at 4; TRAFFICKING IN PERSONS 2017 REPORT: COUNTRY NARRATIVES—SAUDI ARABIA, *supra* note 201 (“Although many migrant workers sign contracts with their employers, some report work conditions substantially different from those described in the contract; other workers never see a work contract at all.”).

211. Cf. ILO Policy Brief No. 2: Reform of the Kafala System, *supra* note 199, at 4; TRAFFICKING IN PERSONS 2017 REPORT: COUNTRY NARRATIVES—SAUDI ARABIA, *supra* note 201.

212. Demissie, *supra* note 203.

213. Prosecutor v. Kunarac et al., Appeal Judgment, ¶ 542.

214. ILO Policy Brief No. 2: Reform of the Kafala System, *supra* note 199, at 4.

215. See *supra*, text accompanying note 113 for the relevant factors.

216. ILO Policy Brief No. 2: Reform of the Kafala System, *supra* note 199, at 1; *supra* note 132.

suant to a state policy, since sponsors' abuses are all realized through the state-sponsored visa-issuing system and contract placement processes.<sup>217</sup>

Whether the *kafala* system satisfies the article 7 knowledge requirement again depends on which officials the OTP charges. Many officials in both destination and departure countries have knowledge that the *kafala* program's contracts and visas facilitate exploitative practices<sup>218</sup> because they have ignored complaints of those practices or are aware of colleagues who dismiss them.<sup>219</sup> Thus, ICC trafficking cases would be more viable against those who oversee immigration or law enforcement policies, or who are responsible for vetting potential employers. However, cases could also be brought against other personnel playing a key role in the *kafala* system's functioning, like ministers of foreign affairs, because they likely are aware of the numerous abuses that have occurred—either from worker complaints or news reports—and have the power to reform the system. It would likely be difficult to show that individual sponsors or officials who commit abuse migrant workers have sufficient knowledge of the broader abuses within the *kafala* system so as to incur criminal responsibility.

Finally, the abuses in state-sponsored migrant labor programs like the *kafala* system are both systematic and widespread. The Saudi and Ethiopian governments jointly created the visa-issuing system and thus participate in recruiting individuals for migrant work. Hundreds of thousands of domestic workers apply for a *kafala*, and thousands of victims complain of abuse of labor or living conditions resulting from their *kafeel's* control over the contract and visa.<sup>220</sup> These abuses are so consistent as to constitute an identifiable pattern of crimes, all linked to the weak protections provided to these workers, and therefore extend beyond the random actions of individual sponsors.

However, because Saudi Arabia and Ethiopia recently entered into an agreement to bolster protection for *kafala* workers,<sup>221</sup> the OTP should carefully weigh whether to bring a case against officials from either state. States should not be deterred from curbing their facilitation of trafficking or faulted for making sincere but incomplete efforts to enhance protections from trafficking, even if they do not completely mitigate the problem. In such cases, a more fact-intensive investigation will be required to determine if states sincerely intend to meet their obligations under the Rome Statute to hold individuals responsible for trafficking accountable.

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217. See *supra* note 142.

218. See ILO Policy Brief No. 2: Reform of the Kafala System, *supra* note 199, at 2 (“Sending countries and recruiters contribute to the Kafala system by providing the workers despite the well-documented reports of abuse and exploitation of migrant workers.”).

219. *Id.* at 4.

220. Demissie, *supra* note 203.

221. Webster & Zacharias, *supra* note 208; *President Sheikh Khalifa Issues Labour Law to Support Service Workers*, NATIONAL (UAE) (Sept. 26, 2017), <https://www.thenational.ae/uae/president-sheikh-khalifa-issues-labour-law-to-support-service-workers-1.661763>.

### C. *The State as an Acquiescent: Chattel Slavery in Mauritania*

As discussed in the previous section, a state or organizational official does not always have to act to incur international criminal responsibility for trafficking. In fact, the state does not even have to be a direct facilitator of trafficking, as it is when it knowingly issues visas to migrant workers who are then exploited. A more ambitious—but still plausible—route for prosecution of trafficking is for the ICC to investigate and prosecute heads of state in countries with pervasive, generationally-embedded forms of slavery.<sup>222</sup>

Caste systems can legitimize both labor and sex trafficking and justify them on the basis of class. While a government may not *affirmatively* promote the trafficking that its society's caste systems produce, there is room for the ICC to act where a government refuses to provide protections for victims or to implement laws to combat this crime. Some state actions or omissions, such as the Mauritanian government's complicity in White Moors' enslavement of the Haratine ethnic group, may be prosecuted as crimes against humanity where the actions or omissions aid and abet some individuals' exercise of powers attaching to the right of ownership.

In Mauritania, people of the Haratine ethnic group—historically enslaved by White Moors—are born into slavery and owned by masters.<sup>223</sup> As a result of this practice, an estimated twenty percent of the Mauritanian population (about 600,000 people<sup>224</sup>) is forced into a lifetime of labor exploitation and torture.<sup>225</sup> Many slaves are physically brutalized,<sup>226</sup> and female

222. Inaction in the face of the attack may be an *actus reus* for human trafficking where the accused was found to have a duty to act to protect a population. *See, e.g.*, Prosecutor v. Ntagerura et al., ICTR-99-46-A, Appeal Judgment, ¶¶ 334–35 (July 7, 2006); Prosecutor v. Galić, IT-98-29-A, Appeal Judgment, ¶ 663 (Int'l Crim. Trib. for the Former Yugoslavia 30 Nov. 2006) (citing Prosecutor v. Blaškić, Appeal Judgment); Prosecutor v. Tadić, IT-94-1, Appeal Judgment, ¶ 188 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). Normatively, such omissions are worthy of punishment to deter similar actions, since where a state refuses or fails to investigate or prosecute a crime against humanity, it accepts the crime and tacitly encourages similar, dangerous acts in the future. TERJE EINARSEN & JOSEPH RIKHOF, A THEORY OF PUNISHABLE PARTICIPATION IN UNIVERSAL CRIMES 359 (2018). This view has had little traction—likely because of issues in determining how far this duty should stretch. Nonetheless, it remains possible for an individual to be liable on the basis that he had responsibility to act to prevent past and future abuses.

223. *Mauritania: Descent-Based Slavery*, ANTI-SLAVERY (last visited Apr. 20, 2020), <https://www.antislavery.org/what-we-do/mauritania>; *The Unspeakable Truth About Slavery in Mauritania*, GUARDIAN (June 8, 2018), <https://www.theguardian.com/global-development/2018/jun/08/the-unspeakable-truth-about-slavery-in-mauritania>.

224. *Haratin*, UNREPRESENTED NATIONS & PEOPLES ORG. (Apr. 10, 2017), <https://unpo.org/members/13228>.

225. *The Unspeakable Truth About Slavery in Mauritania*, *supra* note 223.

226. *Mauritania: Descent-Based Slavery*, *supra* note 223; *The Unspeakable Truth About Slavery in Mauritania*, *supra* note 223 (reporting instances including a slave master pouring hot embers over a victim's baby, killing it, and another slave master tying a victim's hands to a tent pole, cutting off one of her fingers).

slaves are often raped by their masters and forced to bear their children, who are also slaves.<sup>227</sup> Even if a slave manages to escape, he is branded as part of the “slave-caste” and is ostracized from the rest of society.<sup>228</sup>

Although Mauritania has criminalized slavery since 2007, the government rarely enforces the law, and slavery remains rampant.<sup>229</sup> Since 2007, Mauritanian anti-slavery courts have convicted and sentenced only four slave masters.<sup>230</sup> This conviction rate is highly disproportionate to the number of complaints: In 2016 alone, anti-slavery courts received forty-seven cases for investigation involving fifty-three suspects.<sup>231</sup> Rather than prosecuting slave masters, the government has denied that slavery still exists in the country,<sup>232</sup> and it has imprisoned anti-slavery activists.<sup>233</sup> These individual complaints, group protests, and even international reporting have repeatedly notified government officials of the continuance of slavery, yet the government has chosen to turn a blind eye instead of taking action.

It is not surprising that Haratine slavery falls under the scope of enslavement—with Moorish owners tautologically having the power of ownership over those they’ve enslaved—and, where sex is involved, sexual slavery. Slaves must perform domestic work, including looking after livestock, preparing meals, or fetching water for no remuneration.<sup>234</sup> In cases of sexual slavery, victims—often women—are subjected to sexual abuse for the gratification of their masters and even for family members or friends of their masters.<sup>235</sup> Moreover, slave owners control their victims’ physical environment, movement, and as explained above, often use force if the slave

227. Sebastian Bouknight & Timothy Hucks, *Slavery Hidden in Plain Sight in Mauritania*, INSIDE ARABIA (Jan. 30, 2019), <https://insidearabia.com/slavery-hidden-plain-sight-mauritania>; *Mauritania: Descent-Based Slavery*, *supra* note 223.

228. *The Unspeakable Truth About Slavery in Mauritania*, *supra* note 223.

229. Bouknight & Hucks, *supra* note 227; *Haratin*, UNREPRESENTED NATIONS & PEOPLES ORG. (Apr. 10, 2017), <https://unpo.org/members/13228>. Mauritania also ratified the Trafficking Protocol in 2005, and therefore it is under a duty to investigate, prosecute, and prevent trafficking offenses from occurring on its territory. Trafficking Protocol, *supra* note 4.

230. Bouknight & Hucks, *supra* note 227.

231. *Id.*

232. *Id.* (quoting Mauritania’s Minister of Rural Development, who stated, “I must tell you that in Mauritania, there is total freedom. . . . Slavery has been abolished. So there is absolutely no more problem of that.”).

233. Anti-Slavery Press Release, *Mauritania: ‘Devastating Blow’ as Activists Jailed*, ANTI-SLAVERY (Nov. 28, 2016), <https://www.antislavery.org/mauritania-activists-sentenced>; John Campbell, *The State of Slavery in Mauritania*, COUNCIL ON FOREIGN RELATIONS (Oct. 14, 2016), <https://www.cfr.org/blog/state-slavery-mauritania> (“A Mauritanian blogger, who had written posts criticizing the country’s caste system, remains on death row after his 2014 conviction for blasphemy.”).

234. *The Unspeakable Truth About Slavery in Mauritania*, *supra* note 223.

235. Johanna Higgs, *Surviving Violence In The Sahara: The Women of Mauritania*, HUFF. POST (Feb. 17, 2017, 10:17 AM), [https://www.huffingtonpost.co.uk/johanna-higgs/surviving-violence-in-the\\_b\\_14807932.html](https://www.huffingtonpost.co.uk/johanna-higgs/surviving-violence-in-the_b_14807932.html).

does not comply.<sup>236</sup> In one account, a Haratine woman explained that two of her babies died because her masters forced her to work instead of taking care of her children.<sup>237</sup>

The Mauritanian government's complicity in the White Moors' enslavement of the Haratine ethnic group meets all of the article 7 chapeau elements of a crime against humanity under article 7. First, it satisfies the chapeau's requirement of an attack directed against a civilian population. Haratine enslavement is an attack against civilians. It entails the commission of a vast number of offenses against civilian slave-caste members: Hundreds of thousands of Haratine individuals are exploited by members of the White Moor caste.<sup>238</sup> This attack is also committed pursuant to state policy, because the Mauritanian government's choice not to enforce its own anti-slavery law amounts to a tacit policy of acquiescence to and approval of continuing slavery. Focus should be on what the government has or has not done to protect the lower classes from enslavement.<sup>239</sup> Where the government has done nothing to functionally end, or has in fact promoted, the caste system, evidence of a state policy to preserve the caste system is more obvious. Where the government has implemented laws against slavery or protections for the exploited instead, then a more fact-intensive inquiry into the extent to which the government has responded to victim complaints and whether continuing abuses are actually a result of one-off, unlinked instances may be necessary.

As for the knowledge requirement, it is inconceivable that individuals in the government—or any other individuals in Mauritania, for that matter—are not aware of the Mauritanian caste system, because it is an integral part of Mauritanian society and affects every citizen's life. An ICC case against an acquiescent state like Mauritania would be most viable against higher-level officials responsible for enforcing laws outlawing slavery or punishing perpetrators of caste-system abuses. To make a case against these individuals, OTP would need to prove that they had knowledge not only of the caste system but also of the way the caste system creates a broad system of abuses against the slave caste, either through actual complaints received<sup>240</sup>—whether formal or not—or from reports, protests, or personal witness.<sup>241</sup> Individual slave owners, in contrast, may not have the same level

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236. See *supra*, text accompanying note 113 for the relevant factors.

237. *Id.*

238. *Supra* note 132.

239. See EINARSEN & RIKHOF, *supra* note 222, at 359 (2018).

240. Bouknight & Hucks, *supra* note 227; see also Hum. Rts. Council, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, on His Mission to Mauritania, at 7, ¶ 21, U.N. Doc. A/HRC/26/49/Add.1 (June 3, 2014).

241. Anti-Slavery Press Release, *Mauritania: 'Devastating Blow' as Activists Jailed*, *supra* note 233; Campbell, *supra* note 233.

of awareness of the way the caste system perpetuates broader harms against the slave caste.

Finally, the White Moors' enslavement of the Haratine ethnic group is widespread and systematic. The caste system is of a sufficient scale and harms enough victims to qualify as a widespread attack, because it pervades everyday life with virtually complete communal participation. It also amounts to a systematic attack, because it methodically subjects particular groups to abusive treatment based on their birth. This pattern of crimes is identifiable and not random: The system repeatedly abuses those born into the lowest caste level and forces them to engage in labor or sexual acts against their will. And, arguably, because Mauritanian officials and authorities—particularly those in policymaking capacities—participate in the crime by either denying its existence or refusing to respond to complaints of abuse, they contribute to the widespread nature of the crime by preserving and perpetuating the system throughout country.

Nonetheless, there may be some hurdles to charging a trafficking offense on the basis of caste-based enslavement. One may be gathering evidence. Victims' complaints and reports would need to be recorded, perhaps with the help of local advocates or an organization dedicated to assisting victims. Showing proof that an officer or other relevant official repeatedly or systematically declined to investigate allegations of slavery would require victims to come forward about their cases—a challenge, as victims may fear that reporting will lead to negative consequences in a society already prejudiced against them and highly dependent on their continuing labor.

Investigators must also determine when a government's efforts are in good faith or reflect apathy. Where a government has implemented measures to combat caste-based trafficking abuses, but it does not actually enforce them, state policy permits the subjugation of lower social classes to abusive treatment against their will. The OTP could begin by only investigating cases of multigenerational government acquiescence to trafficking, where there is demonstrated, long-term government inaction in the face of complaints. In any case, OTP must exercise prudence so as to neither wrongly accuse a government of apathy, nor to wrongly expend the Court's limited resources.

## VI. CONCLUSION

Though the ICC has never issued a decision on trafficking, the Rome Statute contemplates the ICC's jurisdiction over trafficking as an *actus reus* of crimes against humanity. Upon examining how the Rome Statute codifies trafficking and how ICTs have understood similar provisions in the past, it is clear that there are no legal barriers to prosecuting trafficking, even in times of relative peace. Though the ICC's OTP may face challenges in determining how best to classify any given instance of trafficking—whether as enslavement or as sexual slavery—or in establishing that the trafficking in

question was sufficiently extensive to satisfy article 7's "widespread or systematic attack" requirement, the Court has the potential to play a greater role in the international efforts to combat this crime, complementing state action under the Trafficking Protocol. In particular, the Court has the capacity to try certain kinds of systemic, peacetime trafficking cases: Namely, when states engage in, facilitate, or acquiesce to trafficking.

This note has given only illustrative examples of these three kinds of prosecutable peacetime trafficking, leaving open the question of who exactly to indict and how to deal with the evidentiary challenges that investigating these cases may present. While, ideally, the state or organizational officer whose responsibilities are most intertwined with trafficking should be held accountable for it, any indictment and investigation will likely face fierce opposition from the officer's supporters in his home state or even internationally. The prosecution of peacetime trafficking will require discussions about how to balance the countervailing considerations of ending impunity and preserving the legitimacy of the Court. While big questions of what will happen in practice remain open, only with trial and error—rather than inaction—can progress be made.