

Disentangling to Fortify: The Crimes of Slavery, the Slave Trade and Human Trafficking

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Abstract

This article offers a brief background to the crimes of human trafficking, slavery and the slave trade which often take place in and as a result of conflict situations, such as in Ukraine. These crimes are, however, often conflated and misunderstood: not only by the general public, but also by professionals working in this field. Even though these crimes are commonly conflated, each crime has specific requirements or elements, and address egregious conduct. Their legal histories and policy base are distinct yet complementary. Their dual juridical availability could provide meaningful, effective redress for women and men, both adult and child survivors. The article intends to contribute to untying the knots, to disentangle the misconceptions of human trafficking from the slave trade and slavery. The endeavour is not theoretical, but practical. It is done to fortify the pursuit of human trafficking as a transnational crime and the slave trade and slavery as international crimes. In short, this article aims to explore, distinguish, and harmonise the available jurisdictions for human trafficking, slavery and the slave trade.

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I. Introduction

Slavery, the slave trade and human trafficking are crimes that often take place in and as a result of conflict situations. For example, some of the crimes committed in the armed conflict in Ukraine give rise to what could be termed human trafficking, such as, due to Russian presence, the refusal to leave occupied territory and being forced to work in nuclear power plants in the city of Zaporizhzhia, or the transfer of Ukrainian children from occupied zones for 'adoption' in Russia.¹ The current conflict in Ukraine could accelerate such trafficking of persons, a transnational crime, which could also constitute acts of slave trading and slavery, both international crimes. These three crimes are, however, often conflated and misunderstood not only by the general public, but also by professionals working in this field.

Slavery and the slave trade are international crimes enumerated in two international treaties (the 1926 Slavery Convention and the 1956 Supplementary Convention), customary based war crimes (Additional Protocol II to the Geneva Conventions) and most importantly are peremptory norms.² The slave trade and the crime of slavery work in tandem: slave traders, for instance, capture, acquisition or disposal of a person who may subsequently become enslaved by another person who exercises powers of ownership over the enslaved. Trafficking in persons, a transnational crime provided in the 2003 UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children ('Palermo Protocol'), supplementing the UN Convention against Transnational Organized Crime, forms part of the legal framework to respond to cross-border organised criminal activity and criminalises the intent to exploit persons, amongst others, by bringing them in slavery and slavery-like circumstances.³ In addition, the 1998 Rome Statute and 2002 Elements of Crimes (EoC) document of the International Criminal Court (ICC), which deals with international crimes, includes the crimes of enslavement as a crime against humanity and sexual slavery as a crime against humanity and a war

1 Sylvain Keller, 'The Exploitation of Ukrainians: Additional Consequences of an Armed Conflict' (2023) *E-International Relations* <<https://www.e-ir.info/2023/06/15/the-exploitation-of-ukrainians-additional-consequences-of-an-armed-conflict/>> accessed 20 December 2023.

2 *Slavery Convention*, 25 September 1926, 46 Stat 2183, 2191, 60 LNTS 253; *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, 266 UNTS 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977. See further: JG Kestenbaum, 'Disaggregating Slavery and the Slave Trade' (2022) 16(3) *Florida International University Law Review* 522.

3 *The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/45/49 (Vol I) (2001), was adopted by the United Nations General Assembly on 15 November 2000 and entered into force on 25 December 2003.

crime, and refers to human trafficking as an indication to proof the crimes of enslavement and sexual slavery.⁴

Even though these three crimes are – as mentioned – commonly conflated, each one has specific requirements or elements, and address egregious conduct. Their legal histories and policy base are distinct yet complementary. Their dual juridical availability could provide meaningful, effective redress for women and men, both adult and child survivors. This article intends to contribute to untying the knots, to disentangle the misconceptions of human trafficking from the slave trade and slavery. The endeavour is not theoretical, but practical. It is done to fortify the pursuit of human trafficking as a transnational crime and the slave trade and slavery as international crimes. In short, this article aims to explore, distinguish and harmonise the available jurisdictions for human trafficking, slavery and the slave trade.

Accordingly, the first section will set forth the origins and legal framework of slavery and the slave trade as peremptory status international crimes stemming from the Slavery Convention, which can be prosecuted on the international and national level. The second section will subsequently identify the origins and descriptive use of the term human trafficking, as in the Palermo Protocol, and thus, clarify its intended legal use, as a transnational crime to be prosecuted on the national level. The third section will elucidate the misunderstood differences between the three crimes, and, most importantly, emphasise their complementarity jurisdictions to deal with similar pernicious conduct. The fourth section will offer some concluding remarks that aim to ensure the broadest safeguarding against the international crimes of slavery and the slave trade and against the transnational crime of trafficking coherently and simultaneously in national and international judicial systems.

2. The International Crimes of Slavery and the Slave Trade

Enslaving of persons belies an endemic feature of humankind. Greek city-states,⁵ Muslim Caliphates⁶ and Christian republics,⁷ each have erected slave-based societies. From time immemorial, systems of enslavement organised economies, political structures, cultural practices, institutions and social ranking wherein the enslaved clung to the lowest rung. The

4 ICC, *Rome Statute of the International Criminal Court* (1998) <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>> accessed 20 December 2023; ICC, *Elements of Crimes* (2002) <<https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf>> accessed 20 December 2023.

5 O Patterson, *Social Death: Slavery and Sexuality* (Harvard University Press 1982).

6 ER Toledano, 'The Imperial Eunuchs of Istanbul: From Africa to the Heart of Islam' (1984) 20 *Middle Eastern Studies* 379.

7 S Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem* (AltaMira Press 2003) 89.

East African Slave Trade, the Trans-Atlantic Slave Trade, the Barbary Coast slavery,⁸ the trade and enslavement of southeast Asian Malays into South Africa⁹ illustrate historic slaving structures that spared neither females, males, third genders,¹⁰ eunuchs,¹¹ children, adults, individuals or communities of humans. The enslaved toiled agrarian lands, manned sea vessels, staffed armies, laboured in domestic work, plied skilled trades, endured sexual subjugation, and often were made to breed other enslaved person for the economic benefit of slaveholders.¹² Systems of slavery existed and endured because, for the 'non-enslaved' it was functional, lucrative and contributed to a hierarchical societal cohesion.¹³ For the enslaved, resistance to slavery was persistent.¹⁴

By the 1800s, the international slave trade, a precursory institution to enslavement,¹⁵ was dismantled through piecemeal proscriptions. The Trans-Atlantic and East African trades were halted by a series of acts, declarations

8 RC Davis, *Christian Slaves, Muslim Masters: White Slavery in the Mediterranean, The Barbary Coast, and Italy, 1500-1800* (Palgrave Macmillan 2004) 26.

9 G Baderoon, 'Reading the Hidden History of the Cape: Islam and Slavery in the Making of Race and Sex in South Africa: Its Characteristics and Commonality' in MA Fay (ed), *Slavery in the Islamic World: Its Characteristics and Commonality* (Penn State University 2019) 37-50 <https://www.researchgate.net/publication/328252532_Reading_the_Hidden_History_of_the_Cape_Islam_and_Slavery_in_the_Making_of_Race_and_Sex_in_South_Africa_Its_Characteristics_and_Commonality> accessed 20 December 2023.

10 TA Foster, 'The Sexual Abuse of Black Men Under American Slavery' (2001) 20 *Journal of the History of Sexuality* 446-47.

11 ER Toledano, 'The Imperial Eunuchs of Istanbul: From Africa to the Heart of Islam' (1984) 20 *Middle Eastern Studies* 379.

12 PV Sellers and JG Kestenbaum, 'The International Crimes of Slavery and the Slave Trade: A Feminist Critique', (2020) 622 *Cardozo Legal Studies Research Paper* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3741454> accessed 20 December 2023.

13 *ibid*; E Baptiste, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (Basic Books 2014).

14 A Ali, 'Zanji Revolt in the Abbasid Caliphate (Iraq)' (Oxford University Press, 2022) <<https://doi.org/10.1093/acrefore/9780190277734.013.933>> accessed 20 December 2023; TWAILR, by S Ali, 'Quilombolas and the Black Butterfly: An Interview with Siba N'Zatioula Grovogui', TWAILR: Dialogues #10/2021, 3 November 2021 <<https://twailr.com/quilombolas-and-the-black-butterfly-an-interview-with-siba-nzatioula-grovogui/>> accessed 20 December 2023.

15 See section 1.1 below.

and treaties¹⁶ entered into by competing slave trading states.¹⁷ The 1800s also witnessed the staggered outlawing of domestic slavery and the internal slave trading as carried out in Canada, the United States, North and South America, the Caribbean and Africa.¹⁸ Abolitions of slavery by political proclamations occurred upon decolonisation from European countries,¹⁹ or when such colonial powers modified the designation of their economies and the designation of the enslaved. Haiti liberated itself from colonisation and slavery, simultaneously,²⁰ while in the United States, only after a treacherous civil war slavery ended. In 1888, Brazil, the last American country gradually manumitted enslaved persons, firstly by freeing enslaved children, then seven years later, by freeing enslaved adults.²¹

Historically, as well as today, slavery practices extend to armed conflict. Enemy soldiers²² and civilians have been enslaved.²³ Consequently, slavery and the

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- 16 See eg *Declaration Relative to the Universal Abolition of the Slave Trade* ('Congress of Vienna, Act XV') 2 Martens 432 (8 February 1815), reprinted in 63 Parry's 473; *Treaty for the Suppression of the African Slave Trade* ('Treaty of London') 10 Martens 392 (20 December 1841), reprinted in 92 Parry's 437; *Declaration Respecting the Abolition of the Slave Trade* ('Congress of Verona') 16 Martens 139 (1822), reprinted in 772 Parry's 32; *General Act of the Conference Respecting the Congo* ('General Act of Berlin') 10 Martens (2d) 414 (26 February 1885), reprinted in 3 ASIL 7 (1909); *June 5, 1873 Treaty between her Majesty and the Sultan of Zanzibar, Suppression of the Slave Trade* <<https://www.pdavis.nl/FrereTreaty.htm>> accessed 20 December 2023; *Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spirituous Liquors* ('General Act of Brussels') 17 Martens (2d) 345, 27 Stat 886, TS No 383 (2 July 1890), reprinted in 173 Parry's 293; *Treaty between Great Britain and Spain for the Suppression of the African Slave Trade*, 18 Martens (2d) 168 (1890), reprinted in Parliamentary Papers, 1892, vol XCV, 735, TS No 3 (1892); 1919 *Convention Revising the General Act of Berlin*, 26 February 1885, and the *General Act of the Declaration of Brussels* ('Treaty of Saint-Germain-en-Laye') 8 LNTS 25, 49 Stat 3027, TS 877 (10 September 1919), reprinted in 14 Martens (3d) 12. See also JS Martinez, *The Slave Trade and the Origins of International Human Rights* (Oxford University Press 2012).
- 17 Between the 1830s and the 1890s, the East African Slave Trade ceased. See G Campbell, 'The East African Slave Trade: 1861-1895: The "Southern" Complex' (1989) 22 *The International Journal of African Historical Studies* 1, 3, 6, 19. Although the Trans-Atlantic Slave Trade's cessation started late in the 1700s, it was not completed until the middle of the 1800s: see JE Inikori and SL Engerman (eds), *The Atlantic Slave Trade: Effects on Economies, Societies, and Peoples in Africa, the Americas, and Europe* (Duke University Press 1994) 362-90.
- 18 For example, the Abolition of Slavery Act of 1833 outlawed slavery in the United Kingdom's colonies. See 'Key Dates in the Chronology of Abolitions' (Mémorial de l'abolition de l'esclavage – Nantes) <<http://memorial.nantes.fr/en/key-dates-in-the-chronology-of-abolitions/>>.
- 19 *ibid.* For example, Canada abolished slavery in 1834. The Danish West Indies abolished slavery between 1844 and 1848.
- 20 CLR James, 'The Black Jacobins: Toussaint L'Ouverture and the San Domingo Revolution' (Secker and Warburg 1938).
- 21 See, F Seyler and A Silve, 'The End of Slavery in Brazil: Escape and Resistance on the Road to Freedom' (2022) <https://piep.conferences.wcfia.harvard.edu/sites/projects.iq.harvard.edu/files/piep/files/seyder_silve_abolition_of_slavery_in_brazil_202203.pdf> accessed 20 December 2023.
- 22 Office of General Counsel (USA), Department of Defense: Law of War Manual, June 2015 (Updated December 2016), stating 'Before the modern law of war, POWs [prisoners of war] were often put to death, held for ransom or as hostages, or sold into slavery', 534. <<https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf>> accessed 20 December 2023.
- 23 L Oppenheim, *International Law: A Treatise*, Vol II, *War and Neutrality* (Longmans, Green and Co 1912) paras 57, 125 <<https://www.gutenberg.org/files/41047/41047-h/41047-h.htm>> accessed 20 De-

slave trade's international penalisation had important precedents in humanitarian law. A key humanitarian instrument was the Lieber Code, a US-military order issued in 1863 that emphatically prohibited slavery and the slave trade.²⁴ The Lieber Code embodied the divisive politics of the US civil war. Article 58 of the Lieber Code declares: 'if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation (...). The United States cannot retaliate by enslavement (...) [,] this crime against the law of nations.'²⁵ The Lieber Code forbade Union troops and enemy fighters from owning or trading in slaves. Article 42 of the Lieber Code forbade the re-enslaving of persons, affirming, '(...) if a person held in bondage by that belligerent be captured (...) by (...) the United States such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person (...) made free by the law of war is under the shield of the law of nations.'²⁶ These slavery prescriptions derived from 'the laws of nations and usages and customs of war',²⁷ the antecedent to international customary law. The Lieber Code undisputedly presaged the legal eradication of slavery in the United States.

Nonetheless, the acknowledgement of slavery and the slave trade as international crimes, in all circumstances, only arose decades later. In 1925 the

cember 2023; O Paterson, *Slavery and Social Death* (Harvard University Press 1982, 2018) 108-115; O Patterson, *Freedom in the Making of Western Culture* (Basic Books 1991) 50-51 (noting that, circa 700 BC, the Greek city-states would capture enemy females to replenish the overwhelmingly female slave population); O Paterson, 'Trafficking, Gender and Slavery: Past and Present', in J Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (1st edn, Oxford University Press 2012). In the Siete Partidas of King Alfonso the Wise, it was legally recognised that a man could become a slave when captured during war. See H Thomas, *The Slave Trade* (Simon and Schuster 1997) 40. Through the *kul/harem* slavery system, the Ottoman Middle East obtained military commanders and administrators to govern their vast empire. See ER Toledano, *Slavery and Abolition in the Ottoman Middle East* (University of Washington Press 1998) 20-53.

24 General Order No 100 (hereafter the 'Lieber Code') <https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf?locId=bloglaw> accessed 20 December 2023.

25 *ibid*, Art 58.

26 *ibid*, Art 42.

27 Lieber's recognition of the slave trade's illegality was rooted in the 19th century legal philosophy of *ubi societas ibi jus*, whereby 'civilized nations have come to constitute (...) a commonwealth of nations, under the restraint and protection of the law of nations.' Lieber viewed that the 'law of nations has its sway in peace and in war.' See F Lieber, *Fragments of Political Science on Nationalism and Inter-Nationalism* (1868), 22-23 <https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Fragments-of-Political-Science.pdf> accessed 20 December 2023. See also Department of Defense Manual (n 22) 1111, text to fnt 195, quoting Abraham Lincoln, General Order No 252, July 31, 1863: 'It is the duty of every government to give protection to its citizens, of whatever class, color, or condition, and especially to those who are duly organized as soldiers in the public service. The law of nations and the usages and customs of war, as carried on by civilized powers, permit no distinction as to color in the treatment of prisoners of war (...). To sell or enslave any captured person on account of his color, and for no offense against the laws of war is a relapse into barbarism and a crime against the civilization of the age.' <<https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf>> accessed 20 December 2023.

League of Nations directed that a convention to ban these institutions be drafted, after, most enslaving and slave trading countries had outlawed such practices and had shifted their slave-based economies.²⁸

In this section the current interpretation and application of the crimes of slavery and the slave trade in international and national jurisdictions will be examined; international crimes with its origins in the Slavery and Supplementary Conventions (section 1.1). The way how these crimes have been brought and interpreted under the ICC's Rome Statute and EoC is subsequently discussed (section 1.2).

2.1. Slavery and the Slave Trade in the 1926 Slavery Convention and the 1956 Supplementary Convention and Its Implementation in National Laws

This section elucidates how slavery and the slave trade have been defined in the 1926 Slavery Convention and the 1956 Supplementary Convention and subsequently been implemented in national laws.

2.1.1. Slavery and the slave trade in the Slavery Convention and Supplementary Convention

In 1926, the League of Nations, promulgated the Convention to Suppress the Slave Trade and Slavery,²⁹ which condemned institutions and practices of *de jure* and *de facto* slave trade and slavery. The Convention's definitions are now codified customary law. Article (1)(1) of the 1926 Slavery Convention defined 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.'³⁰

The 1926 Slavery Convention inclusion of 'status' or 'condition' in the definition of slavery served to enlarge the ambit of illegality to cover *de jure* slavery, wherein legal title is held, and *de facto* slavery, wherein custom or practice is observed, absent legal rights. The original objective of the League of Nations – whose membership included colonial powers – was to craft a restricted definition that only covered *de jure*, or chattel slavery. However, the independent expert-members of the Temporary Slavery Commission recommended a broader definition of slavery³¹ that foresaw debt slavery, the enslaving of persons dis-

28 Ethiopia, a founding member of the League of Nations, only abolished slavery in 1942. Certain slave-based economies, such as Saudi Arabia, Oman and Yemen did not abolish slavery until the 1960s and 1970s. *Mémorial de l'abolition de l'esclavage – Nantes* <<https://memorial.nantes.fr/en/key-dates-in-the-chronology-of-abolitions/#contenu>> accessed 20 December 2023.

29 1926 Slavery Convention (n 2).

30 *ibid*, Art 1(1).

31 League of Nations, *Slavery Convention: Report Presented to the Assembly by the Sixth Committee* [1926] A.104.1926.VI (hereafter Temporary Slavery Commission 1926 Report).

guised as the adoption of children, and the acquisition of girls by purchase disguised as payment of dowry, etc, essentially, whenever the definitional element of slavery – exercising any or all of the powers of ownership – were met.³²

In accordance with the 1925 Temporary Slavery Commission Report, the 1926 Slavery Convention omitted language of the specific types of slavery, such as ‘domestic slavery and similar conditions’ from the text.³³ The Convention’s drafters stressed the outlawing of slavery *in all its forms*³⁴ hence, the scope of the definitional language under Article (1)(a). Far from being vague, it emphatically underscored the drafters’ expansive intent to penalise *de jure* and *de facto* forms of slavery irrespective of their character, descriptions, locations, longevity or other features. The 1956 Supplementary Slavery Convention retained and reiterated the same definition of slavery.³⁵

Less succinct, but as incisively inclusive, was the definition of the slave trade in the 1926 Slavery Convention. Article (1)(2) defined the slave trade as:

(...) all acts involved in the capture, acquisition or disposal of a person with intent to reduce him [or her] to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him [or her]; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.³⁶

Penalisation of the slave trade condemns perpetrators who intend to reduce person(s) into slavery by any means, and, as importantly, who further reduces an enslaved person(s) into another situation of slavery by any means. The 1926 Slavery Convention and the 1956 Supplementary Slavery Convention prohibit reducing and attempting to reduce individuals into slavery regardless of the transport deployed, denying slave traders and their accomplices any safe haven and secure port.³⁷

32 League of Nations, *Annex: Draft Convention, League of Nations Official Journal (Special Supplement 33) Records of the Sixth Assembly: Text of Debates* (1925) 439. See also Temporary Slavery Commission’s Second Session Minutes (1925) para 55 <http://biblio-archive.unog.ch/Dateien/CouncilMS-D/C-426-M-157-1925-VI_EN.pdf> accessed 20 December 2023. For a recounting of the Temporary Slavery Commissions’ role in regard to the definitions in the 1926 Slavery Convention, see P Sellers and JG Kestenbaum, *Sexual Slavery and Customary International Law in Prosecuting the President: The Trial of Hissène Habré*, in S Weill et al (eds) (Oxford University Press 2020), Cardoza Legal Studies Research Paper No 597 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516905>.

33 At the time of the drafting of the 1926 Slavery Convention, drafters used the term ‘domestic slavery’ to refer to ‘non-Western slavery’, ‘African Slavery’, ‘indigenous slavery’, or slavery as practised in the colonies of Africa (as opposed to imported slavery practices of European powers in the trans-Atlantic slave trade). See S Miers, *Britain and the Ending of the Slave Trade* (Africana Publishing Corporation 1975) 118.

34 P Sellers and JG Kestenbaum, *Sexual Slavery and Customary International Law in Prosecuting the President: The Trial of Hissène Habré* (n 32) 10.

35 Art 7(a) of the 1956 Supplementary Slavery Convention (n 2) defines slavery by referring directly to the 1926 Slavery Convention’s definition.

36 1926 Slavery Convention (n 2), Art 1(2).

37 Art 3 of the 1956 Supplementary Slavery Convention (n 2) condemns slave trading: (1) (...) by whatever means of transport, or of being accessory (...)

Significantly, the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention provision craft the intentional legal framework that illustrates the interplay between the slave trade and slavery. Slavery defines who is a slave and who is a slave owner. Slave trade defines how persons are reduced into slavery or maintained in slavery. The slave trade penalises precursory acts, such as abductions, kidnapping or transfer, prior to being enslaved or re-enslaved. A person might transit through a 'supply chain' of slave traders. Even if the eventual enslavement (thankfully) does not occur the act of slave trading has been accomplished. Slavery, usually, is the subsequent condition of a person who is slave traded. Once enslaved, the person might be serially disposed into subsequent situations of slavery. The Slavery Conventions' provisions underscore and penalise the entirety of the 'enchainment' or in tandem framework of the slave trade and of slavery.

These interlinked crimes are distinct yet share important commonalities. Slavery and the slave trade focus on a perpetrator's *mens rea* or knowing commission of acts. The slave trader knowingly intends to reduce or maintain a person in slavery while the slaveholder knowingly exercises powers attaching to any of the rights of ownership over a person. Slave trading, unlike slavery, does not require the exercise of any of the powers attaching to the rights of ownership over persons. Thus, a slave trader need not be a slave owner; however, a slave owner also might trade in enslaved persons. Neither crime requires the consent or lack of consent of the victim. Lack of consent is immaterial to the establishment of slavery or the slave trade. Slavery and the slave trade are unlawful under any circumstance and are not subject to statutes of limitations.

The precise conduct that slavery and the slave trade condemn is purposely broad. Disposal or slave trading of a person or enslaved person can be accomplished by a myriad of actions such as abductions, gifting, trading, selling or kidnapping. Slavery or exercise of powers of ownership could entail the psychological, physical, sexual or other autonomy of a person. Significantly, the 1926 Slavery Convention's legal framework of the slave trade and slavery was reprised in the 1956 Supplementary Slavery Convention stands ruptured in the Rome Statute that governs the International Criminal Court.

2.1.2. Slavery and the slave trade in national laws

Slavery and the slave trade are thus international crimes and most importantly peremptory norms, from which States cannot derogate from. Not only can these crimes be prosecuted on the international level (see

(2) (a) The States Parties shall take all effective measures to prevent ships and aircraft (...) from conveying slaves

(b) The States Parties shall take all effective measures to ensure that their ports, airfields and coasts are not used for the conveyance of slaves.

next section), but these crimes can also be prosecuted on the national level. Unfortunately, slavery and the slave trade are not always incorporated in national jurisdictions, or only one of both crimes. For example, Austria and Bosnia-Herzegovina have legislation prohibiting both crimes, whereas the Netherlands, Spain, Italy, Poland, Libya, to name a few, have only one of the crimes, such as the slave trade, prohibited.³⁸ Some States do not even provide for the crimes at all, such as Ukraine and Turkey.³⁹ Furthermore, prosecutions based on (one of) the crimes is also not pursued; most of the times, countries use the human trafficking provisions for the underlying conduct (see section 2.1.2), even where slavery or slave trade provisions are included in the national law and the underlying conduct could (also) warrant prosecutions based on slavery and/or slave trade provisions, providing certain protections to victims as discussed above.⁴⁰

2.2. Slavery and the Slave Trade in the Rome Statute of the International Criminal Court (ICC)

The Rome Statute exercises jurisdiction over the crimes of enslavement and sexual slavery. However, it does not exert jurisdiction over the slave trade. Neither Article 7 for crime against humanity, nor Article 8's elongated provisions for war crimes provides for the pursuit of the slave trade under an enumerated provision.⁴¹ This baffling erasure of the slave trade's safe-

38 See upcoming report from the Office of the Special Representative of the Secretary General on Sexual Violence in Conflict, 'The Nexus Between Conflict-Related Sexual Violence and Trafficking in Persons for Sexual Exploitation in (Post) Conflict: Conceptualisation of the Crimes' Nexus and Rule of Law Response. The Case of Ukraine', 2024 (forthcoming) <<https://www.un.org/sexualviolenceinconflict/48352-2/>> accessed 20 December 2023.

39 *ibid.*

40 For example, in the case involving an Ethiopian who extorted and subjected migrants in Libya to brutal violence, including sexual violence. See OM, 'Ethiopia Extradites Trafficker to the Netherlands in Criminal Case on Migration Crime', 5 October 2022 <<https://www.prosecution-service.nl/latest/news/2022/10/5/ethiopia-extradites-trafficker-to-the-netherlands-in-criminal-case-on-migration-crime>> accessed 28 November 2023. The case seems to focus on human smuggling and/or human trafficking related crimes. See also PV Sellers, JG Kestenbaum and AL Kather, 'Including the Slave Trade in the Draft Articles on Prevention and Punishment of Crimes against Humanity', 15 September 2023, 7 <<https://www.globaljusticecenter.net/wp-content/uploads/2023/10/Slavery-and-Slave-Trade-Expert-Legal-Brief-CAH-Treaty.pdf>> accessed 20 December 2023.

41 After the Lieber Code's prohibition of slavery and the slave trade, Additional Protocol II to the Geneva Conventions, under Art 4(2)(f) forbids subjugating persons *hors de combat* or who have laid down their arms to 'slavery and the slave trade in all their forms in non-international armed conflict'. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. See also Rule 94 of the ICRC Study of customary law confirms that the prohibition also pertains to slavery and the slave trade during international armed conflict. International Committee of the Red Cross (ICRC), *Study of Customary Law: Slavery and the Slave Trade*, Rule 94 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule94> accessed 20 December 2023.

guards impacts the totality of the redress that the ICC can provide for slavery crimes. In *Ntaganda*⁴² and in *Katanga*⁴³ acts that clearly would comprise slave trading were deemed unlawful, but not justiciable by their respective presiding trial chambers.

At the negotiations of the Rome Statute, the Women's Caucus for Gender Justice had proposed that the customary and treaty-based recognition of the slave trade be enumerated. Notwithstanding, the lack of discussion is discernible in the preparatory works, concerning the slave trade. Bartels suggests that the omission of slavery and the slave trade, as well as starvation, as war crimes, was 'non-deliberate and non-logical'.⁴⁴

Article 7(2)(c) of the Rome Statute defines enslavement as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'. The definition arguably conflates the legal meaning of slavery and slave trade as contained in the 1926 Slavery Convention and 1956 Supplementary Convention. It fails to provide redress for acts of slave traders who do not exercise powers of ownership over their victim/survivors. The envisioned legal framework of slavery and the slave trade under customary law malfunctions, exerting a lacuna.

Essentially, the Rome Statute excludes the core of the slave trade prohibition — the *mens rea* or intent and the reduction of a person to slavery. An act that normally constitutes the slave trade is reconfigured into an *indicia* of slavery. Hence, Article 7's definitional confusion results in non-coverage of acts of the slave trade as equally as Article 8's blatant omission of any enumeration of the slave trade or slavery as war crimes. Accordingly, the Rome Statute's incomplete addressing of slavery crimes is concomitant with its structural limitations *cum* legal deficiencies.

42 The Ntaganda Trial Chamber noted several instances of the unlawfulness of the precursory conduct of an intent to reduce a child to sexual slavery that was not legally characterised or charged, thus unredressed. Judgment, *Ntaganda* (ICC-01/04-02/06), Trial Chamber, 8 July 2019, at paras 957-958, 977-978.

43 The Katanga Trial Chamber noted that fighters who brought girls to their camps as wives 'harboured the intention to treat the victims as if they owned them and obtain sexual favours from them' was unlawful but characterised or charged. Judgment, *Katanga and Chui* (ICC-01/04-01/07), Trial Chamber, 30 September 2008, at para 1001.

44 The Women's Caucus for Gender Justice's Recommendation 3 stated that 'war crimes should encompass (...) Protocols I and II and the progressive developments in the laws and customs of war'. Recommendation 8 stated that 'enslavement and slavery-like practices as a violation in all war, internal and international'. Women's Caucus for Gender Justice in the International Criminal Court, Recommendations and Commentary for December 1997 Prep. Com., Part III: War Crimes, Recommendation 7 (1-12 December 1997) 44. See EJIL: Talk!, by R Bartels, 'Time to Fix the Rome Statute and Add the Crime of Starvation in Non-International Armed Conflicts!', 3 December 2019 <<https://www.ejiltalk.org/time-to-fix-the-rome-statute-and-add-the-crime-of-starvation-in-non-international-armed-conflicts/>> accessed 20 December 2023.

Moreover, the definition of enslavement, as identically reprised in the first element of sexual slavery, as a crime against humanity⁴⁵ or as war crimes,⁴⁶ confounds once again due to its reference to trafficking. Trafficking might resemble acts of the slave trade. Neither require the exercise of any powers of ownership over the person being trafficked. Whenever traffickers exercise powers of ownership over a person, they essentially are perpetrating slavery, not the slave trade. The Rome Statute's Article 7(2)(e) reference to trafficking was to exemplify acts of slavery whereby trafficking conduct constitute when powers of ownership are exercised. The Rome Statute's exercise of jurisdiction does not extend to the transnational crime of trafficking⁴⁷ as evinced by the Document of the Elements of Crimes. The OTP understands trafficking among transnational activities and clarifies that trafficking is distinct and not an international crime within the ICC's jurisdiction.⁴⁸

In sum, the Rome Statute contains a compounded legal lacuna. No protection exists from acts of the slave trade as a crime against humanity or as a war crime, nor from slavery as a war crime. Understandably, a call to amend the Rome Statute was launched by Sierra Leone. On April 11, 2023, in a session of the Sixth Committee of the United Nations General Assembly, Sierra Leone observed that the Rome Statute's legal gaps 'result in manifest impunity for slavery and the slave trade crimes (...). Regrettably and critically, the Rome Statute does not contain provisions for the slave trade which governs the intent to bring a person into – or maintain them in – a situation of slavery.'⁴⁹ The call to amend the Rome Statute, procedurally moved from the Assembly of States Parties' Working Group on Amendments to registration with the Secretary General of the United Nations. From there the amendments will be transmitted to the Assembly of State Parties. Thereafter, a vote on their text will be scheduled at the 2024 or 2025 annual meeting of the Assembly of State Parties. Amending the Rome Statute's structural deficiencies regarding slavery crimes will dissolve the impunity gaps by reasserting the interlinked protective legal framework of slavery and the slave trade. Moreover, the amendments will cease the legal conflation between slavery crimes and the transnational crime of trafficking. Survivors merit clear appraisals of all juridical means to redress.

45 Art 7(1)(g)-2, Crime against humanity of sexual slavery, ICC Elements of Crimes (n 4).

46 *ibid.* Arts 8(2)(b) (xxii)-2 and 8(2)(e)(vi)-2, War crime of sexual slavery, Elements of Crimes (n 4).

47 Section 2 below. Note that the Elements of Crimes of the Rome Statute do not include elements of trafficking as a crime under its jurisdiction.

48 N. Siller, "Modern Slavery" Does International Law Distinguish between Slavery, Enslavement and Trafficking? (2016) 14 *Journal of International Criminal Justice* 415.

49 Statement of HE Sowa, Agenda Item 80, Crimes Against Humanity, 12 October 2023, Seventy-eight Session, Permanent Mission of Sierra Leone to the United Nations <https://www.un.org/en/ga/sixth/78/pdfs/statements/cah/i1mtg_sierraleone.pdf> accessed 20 December 2023.

3. The Transnational Crime of Human Trafficking

The international legal framework on the crime of human trafficking finds its origins around the 1900s, starting with several international law treaties to address ‘white slavery’ or the ‘white slave traffic.’⁵⁰ These treaties sought to suppress prostitution and preserve the ‘sexual “purity” of “white women”’ across borders and thus to protect white ethnically European (descended) women and girls from falling victim to organised forced prostitution.⁵¹ International conventions and agreements following World War I and II continued to address human trafficking by combatting forced prostitution through an organised crime lens, with as of the 1950s more focus on both the process (ie procurement, enticement) and the result (ie exploitation of prostitution) of human trafficking.⁵² As of the 1980s it became apparent that men, women and children of all ages and from all backgrounds can become victims of human trafficking, in every region of the world, with traffickers often using violence or fraudulent employment agencies and fake promises of education and job opportunities to trick and coerce their victims. A myriad of human trafficking forms could thus be witnessed, including sexual exploitation, forced labour, debt bondage, domestic servitude, organ removal, forced begging, forced marriage, and forced criminality.⁵³ Therefore, by the end of the 20th century, globalisation across a wide range of economic sectors gave rise to increased migration flows and ample opportunities for exploitation of human beings for profit making, the existing international legal framework addressing human trafficking – with a focus on women and forced prostitution – proved inadequate.⁵⁴ This led to the negotiation by States of a new treaty, ie the 2003 Palermo Protocol, supplementing the UN Convention against Transnational Organized Crime.⁵⁵ With the Palermo Protocol human trafficking was re-examined as a transnational crime, ie a crime that is a violation of law that usual-

50 For more information, see, inter alia, EA Nadelmann, ‘Global Prohibition Regimes: The Evolution of Norms in International Society’ (1990) 44(4) *International Organization* 513-516; J Allain, ‘White Slave Traffic in International Law’ (2017) 1 *Journal of Trafficking and Human Exploitation* 2 (2017).

51 V Stoyanova, ‘United Nations against Slavery: Unravelling Concepts, Institutions and Obligations’ (2017) 38(3) *Michigan Journal of International Law* 374; JG Kestenbaum, ‘Disaggregating Slavery and the Slave Trade’ (2022) 16(3) *Florida International University Law Review* 536-540 (with reference to the 1904 International Agreement for the Suppression of the White Slave Traffic; and the 1910 International Convention on the Suppression of the White Slave Traffic).

52 See, more in depth, Kestenbaum (n 2) 538-540 (with reference to the Covenant of the League of Nations; the 1921 International Convention for the Suppression of Traffic in Women and Children; the 1933 International Convention for the Suppression of the Traffic in Women of Full Age; and the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others).

53 United Nations Office on Drugs and Crime (UNODC) <<https://www.unodc.org/unodc/en/human-trafficking/crime.html>> accessed 20 December 2023.

54 Kestenbaum (n 2) 540.

55 Palermo Protocol (n 3).

ly (but not always) involves more than one country in its planning, execution, or impact, and that can be prosecuted on the national level.⁵⁶ The ratification of the UN Palermo Protocol by 181 States Parties means that the definition is recognised close to universally.⁵⁷ In 1998 and 2002, human trafficking was furthermore referenced to in the international crimes of enslavement and sexual slavery in the ICC's Rome Statute and Elements of Crimes document.⁵⁸ This seems to imply that proof of human trafficking can support the prosecution of enslavement and sexual slavery as international crimes on both the international and national level.

In this section the current interpretation and application of the crime of human trafficking in national jurisdictions will be examined; a transnational crime with its origins in the Palermo Protocol (section 2.1). The way how human trafficking, a transnational crime, can be interpreted under the ICC's Rome Statute and Elements of Crimes, dealing with international crimes, is subsequently discussed (section 2.2).

3.1. Human Trafficking in the Palermo Protocol and Its Implementation in National Laws

How is human trafficking defined in the Palermo Protocol and subsequently implemented in national laws?

3.1.1. Human trafficking in the Palermo Protocol

Article 3(a) of the Palermo Protocol defines 'trafficking in persons' as follows:

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.

Based on this definition, trafficking thus consists of three elements: (1) the act; (2) the means; and (3) the purpose. The first element, the act can be the recruitment, transportation, transfer, harbouring or receipt of a person. The second element, the 'means' refers to the various ways to suppress the free will

⁵⁶ AT Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010).

⁵⁷ See United Nations Treaty Collection <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtsg_no=xviii-12-a&chapter=18> accessed 20 December 2023.

⁵⁸ ICC Rome Statute and Elements of Crimes (n 4).

of an adult person, such as the use of force, fraud, deception, abduction, abuse of a position of vulnerability, or coercion.⁵⁹ In this regard, Article 3(b) of the Palermo Protocol states that ‘the consent of a victim of trafficking in persons to the intended exploitation (...) shall be irrelevant where any of the means (...) have been used’, such as force, fraud, abduction, and coercion.⁶⁰ People accused of human trafficking can thus claim a defence of consent. However, as soon as any of the ‘means’ listed have been used and proven, the Palermo Protocol disallows consent as a defence to trafficking.⁶¹ Nevertheless, including the issue of consent in Article 3(b) of the Palermo Protocol allows the defendant to raise a consent defence, even if – in practice – it is often rebutted by evidence of severe exploitation.⁶² Indeed, the UNODC in its case digest on human trafficking cases states that ‘even in jurisdictions which explicitly adopt such a position [if any of the means are present, the victim’s consent is irrelevant], in legislation or case law, the consent of the victim is often a central focus of trials on trafficking and allied crimes. This can clearly be seen in cases.’⁶³ Courts often entertain discussions around consent such that ‘indications of consent can impact on how the victim is perceived and how his or her actions or situation are interpreted.’⁶⁴ Allowing the defendant to raise a consent defence can

59 Siller (n 45) 417; Gallagher (n 53) 30.

60 Because minors are considered to have diminished or no legal capacity, the ‘means’ element is inapplicable to children: Art 3(c) of the Palermo Protocol states that a child is to be understood as anyone under 18 years of age. In other words, a child can never consent to human trafficking and the defence of consent can thus never be raised in the case of a child victim of human trafficking.

61 UNODC, ‘Model Legislative Provisions against Trafficking in Persons’ (2020) 40-41 <https://www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf> accessed 20 December 2023.

62 UNODC, ‘Evidential Issues in Trafficking in Persons Cases: Case Digest’ (2017) 132-139, 141-147 <https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf> accessed 20 December 2023 (listing several cases in which lack of consent was considered relevant in order to convict the accused of human trafficking) (it also includes cases in which courts convicted the accused even when victims said they consented, but where the court ruled that there was no consent in view of, for instance, the totality of the circumstances and especially the victims’ vulnerabilities); See also UNODC, ‘Issue Paper: The Role of “Consent” in the Trafficking in Persons Protocol’ (2014) 36-73 <https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf> accessed 20 December 2023.

63 UNODC ‘Evidential Issues’ (n 59) 132. The fact that the issue of consent is not without controversy becomes clear when one reads the UNODC’s 111-page paper on this topic: UNODC, ‘Issue Paper’ (n 59), which also underlines that consent is often highly relevant in practice, irrespective of the approach taken in law (76).

64 UNODC, ‘Issue Paper’ (n 59) 78: ‘While experiences vary among States, it appears that indications or assertions of consent may operate to prejudice a court (both judge and jury) against an alleged victim. However, the impact of apparent consent will depend on how the issue is handled. Where issues around victim vulnerability are presented, explained and understood (by informed prosecutors, through expert testimony etc.), apparent or asserted consent appears to be less relevant and less likely to present an obstacle to prosecution. Conversely, failure to explain how subtle means can be used by exploiters to manipulate consent will often operate to make apparent consent much more of an issue for the court. For instance, the victim’s consent to elements of the process (e.g., their consent to enter a country irregularly or use fraudulent documents in doing so, or to undertake certain types of work) may be misunderstood as signifying their consent to the exploitation or to

be potentially traumatising to the trafficked victim,⁶⁵ in particular since, as also highlighted by one of the Special Rapporteurs on Trafficking in Persons before, ‘no person willingly consents to the suffering and exploitation that trafficking of persons entails’.⁶⁶

The final and third element, the purpose of exploitation, refers to, at a minimum, exploitation of prostitution or other forms of sexual exploitation, forced labour, slavery or slave-like practices, servitude, or removal of organs: this is a non-exhaustive list. The purpose of human trafficking requires that the perpetrator had the specific intent to exploit (for e.g. forced labour, slavery); the practical results that may come out of it are irrelevant.⁶⁷ Trafficking will occur ‘if the implicated individual or entity intended that the action (which in the case of trafficking in adults must have occurred or been made possible through one of the stipulated means) would lead to exploitation.’⁶⁸ In short, trafficking – as a transnational crime – criminalises how a person is reduced to a form of exploitation, rather than the underlying substantive criminal conduct (eg slavery, forced labour). The underlying exploitation does not necessarily need to take place and can furthermore be due to the acts of another perpetrator.

Of the exploitation examples mentioned in the definition of human trafficking, the one closest to the international crimes of slavery and the slave trade, is exploitation with the intent to put another in a slavery or practices similar to slavery situation. There has been, however, very little discussion of what constitutes ‘slavery’ during negotiations of the Palermo Protocol.⁶⁹ The term ‘slavery’ in the human trafficking definition nevertheless seems to

being trafficked. Practitioners from within systems that provide for juries in criminal trials affirmed that juries are particularly interested in the issue of consent and may not “care enough to convict” if there is evidence that alleged victims were in some kind of voluntary arrangement from which they derived a benefit’

65 Although ‘lack of consent’ is not an element of the crime of human trafficking (but a potential defence of the accused), it can still be raised as a defence, which can be traumatising for victims of human trafficking. In case such a defence would continue to be allowed in human trafficking case, a victim-centered approach would make sure that such defences are first evaluated in closed sessions before being put forward to the victim. Compare the approach in the case of rape in international criminal law, where consent is not considered an element of the crime and such defences are first tested: W Schomburg and I Peterson, ‘Genuine Consent to Sexual Violence under International Criminal Law’ (2007) 101(1) *The American Journal of International Law* 121-140.

66 S Huda, ‘Integration of the Human Rights of Women and the Gender Perspective’ UN Doc E/CN.4/2005/71 (22 December 2004) para 6 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G04/169/28/PDF/G0416928.pdf?OpenElement>> accessed 20 December 2023; UNODC, ‘Issue Paper’ (n 59) 25-26.

67 Siller (n 45) 418: ‘For a situation to be considered as trafficking in persons, the exploitation does not necessarily have to take place. The action taken and the means used must be carried out with the specific intention to exploit.’; UNODC ‘Issue Paper’ (n 59) 24-25: ‘Trafficking is (...) a crime of specific or special intent (*dolus specialis*)’.

68 UNODC ‘Issue Paper’ (n 59) 24-25.

69 UNODC Issue Paper on Exploitation (2015) 33 <https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf> accessed 20 December 2023.

refer to ‘the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised’ and is, like the international crime definition of slavery, thus based on Article 1 of the 1926 Slavery Convention and also follows international interpretations thereof.⁷⁰ As for the inclusion of ‘practices similar to slavery’: this is not explained in the *Travaux Préparatoires* to the Palermo Protocol, but it is a clear reference to the 1956 Supplementary Slavery Convention and would include such practices as debt bondage, serfdom, servile forms of marriage, and sale of children for exploitation.⁷¹ The human trafficking reference to slavery thus seems quite heavily to rely on the interpretations found in international law (see section 1 and 3).

3.1.2. Human trafficking in national laws

Human trafficking being a transnational crime, the Palermo Protocol does not establish an international court or treaty monitoring body; instead, it provides for transnational cooperation of states and relies on domestic jurisdictions to enforce human trafficking crimes. The 181 countries that have ratified the Palermo Protocol are thus required to criminalise the crime of human trafficking in their national jurisdictions; the definition of human trafficking contained in the Palermo Protocol is therefore meant to guide States in criminalising the crime and to provide clarity and consistency around the world. With regard to ‘slavery or practices similar to slavery’ as exploitation forms specifically, most national jurisdictions mention both or one of these forms of exploitation. For example, in France, trafficking is penalised in Article 225-4-1 of the Penal Code and includes enslavement/slavery, while Mali criminalises trafficking in its 2012 Law on the Fight against Trafficking in Persons under Article 7 where it lists slavery or practices similar to slavery among the possible forms of exploitation.⁷² National legislation does, however, not need to precisely follow the definition of ‘trafficking in persons’, but it should be broad and flexible enough to capture the situations described in the Protocol. However, this flexibility leaves room for debate as, for instance, ‘exploitation’ is not very well defined. For example, in the case of labour exploitation, when do bad labour conditions turn into labour exploitation? And for slavery, when can power of ownership be clearly determined? This makes it difficult to prosecute trafficking cases

70 UNODC, ‘Model Legislative Provisions against Trafficking in Persons’ (2020) 25 <https://www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf> accessed 20 December 2023.

71 *ibid.*

72 See the Anti-Slavery website for different countries all over the world, including France (<<https://antislaverylaw.ac.uk/country/france/>> accessed 20 December 2023) and Mali (<<https://antislaverylaw.ac.uk/country/mali/>> accessed 20 December 2023).

and prosecutors are therefore often reluctant to bring these cases before the court.

Of all forms of trafficking in persons, trafficking for sexual exploitation continues to be the most known and therefore detected form of trafficking to date (59%).⁷³ While most countries have trafficking in persons legislation in place today – which at the very least criminalises sexual exploitation and forced labour without restrictions regarding the age or gender of the victim – the number of prosecutions and convictions is sadly still relatively low.⁷⁴ This does not help bringing down the millions of victims of trafficking around the world.⁷⁵ Human trafficking is indeed considered as one of the most lucrative and profitable illicit businesses in the world, exploiting human beings, with figures running into the billions.⁷⁶

3.2. Human Trafficking in the Rome Statute of the International Criminal Court (ICC)

Apart from being recognised as a transnational crime in the Palermo Protocol, the ICC's Rome Statute and its Elements of Crimes document nowadays also references to trafficking in persons within the crimes of enslavement (a crime against humanity) and sexual slavery (both a crime against humanity and a war crime), yet both documents do not give a further definition of human trafficking. According to Article 7(2)(c) of the ICC's Rome Statute, "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons (...).⁷⁷ The Elements of Crimes further explain that the exercise of power attached to the right of ownership includes the 'purchasing, selling, lending or bartering [of] such a person or persons, or by imposing on them a similar deprivation of liberty', and that this conduct includes trafficking in persons, in particular of women and children.⁷⁷

⁷³ See, for example, UNODC, 'Global Report on Trafficking in Persons' (2018) 28.

⁷⁴ *ibid* 8, 23; UNODC, 'Global Report on Trafficking in Persons' (2009) 8; A Farrell and B Kane, 'Criminal Justice System Responses to Human Trafficking' *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan) 641-657.

⁷⁵ The most commonly used and widely recognised prevalence estimate was published in 2017 by the International Labour Organization (ILO). The *Global Estimates of Modern Slavery* estimate how many people are held in forms of human trafficking and forced marriage in all regions of the world.

⁷⁶ International Labour Organization, 'A Global Alliance against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (2005) (indicating that around 2.4 million people are victims of trafficking at any given time and that profits from human trafficking are about \$32 billion per year) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_o81882.pdf> accessed 20 December 2023.

⁷⁷ A footnote furthermore explains that: 'It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institu-

The Elements of Crimes with regard to the crime of sexual slavery are similar to enslavement (and thus may also include trafficking in persons), with the addition that an act of a sexual nature needs to have been committed.⁷⁸

One can wonder why the crime of human trafficking was added to the enslavement and sexual slavery crimes under international criminal law. As pointed out by Sellers, ‘at the Rome Statute drafting conference, many States were alert to the trafficking in persons that accompanies armed conflict or periods when crimes against humanity are committed. Possibly, in order to address this phenomenon, the term trafficking, was inserted into the enslavement explanation without any requisite, in-depth legal consideration.’⁷⁹ The question that has been raised is thus whether ‘trafficking in persons’ (a transnational crime) is either a crime subsumed under the crime of enslavement (an international crime⁸⁰), or whether enslavement is only one of the potential exploitative manifestations of trafficking as laid down in the Palermo Protocol?⁸¹ Special Rapporteur on Trafficking of Persons, Mullally, seems to interpret the Rome Statute as in that trafficking may amount to an international crime.⁸² Siller argues that, seen from an international criminal law perspective, there is a need for judicial clarity and decision in either merging the crimes or distinguishing them.⁸³ This will involve an analysis as to what constitutes ‘powers attaching to the right of ownership’. According to her, the addition of a separate crime against humanity of trafficking in persons may be the only way feasible to hold individuals accountable under international criminal law. Until that time, however, it appears that traffickers who also engage in the enslavement of their victims in the context of a crime against humanity can

tions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children’ (italics added).

- 78 Sexual slavery – Elements of Crimes, Art 7(1)(g)-2: ‘(1) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. (2) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.’
- 79 P Viseur Sellers, ‘Q&A – The Nexus Between Conflict-Related Sexual Violence and Human Trafficking for Sexual Exploitation in Times of Conflict during Court Proceedings: An Insider’s View’ (2019) 3(1) Journal of Trafficking and Human Exploitation 151.
- 80 A similar comparison could be made with regard to the crime of sexual slavery.
- 81 Siller (n 45) 405-427.
- 82 Special Rapporteur on Trafficking in Persons, Especially Women and Children, Siobhán Mullally, ‘Strengthening Accountability for Trafficking in Persons in Conflict Situations’ (A/78/172, 13 July 2023, 8) <<https://documents.un.org/doc/undoc/gen/n23/205/71/pdf/n2320571.pdf?token=kbsAKSZC7O-HeGX5ri&fe=true>> accessed 20 December 2023.
- 83 N Siller, ‘The Prosecution of Human Traffickers?: A Comparative Analysis of Enslavement Judgments among International Courts and Tribunals’ (2015) 2 European Journal of Comparative Law and Governance 260.

be held accountable before international courts and tribunals based on the current interpretation of the crime of enslavement in case law.⁸⁴

On the other hand, as trafficking in persons is considered a transnational crime with different requirements from enslavement being an international crime (eg trafficking does not rely upon the exercise of ownership over a person; trafficking could have a defence of consent; and trafficking does not require the jurisdictional elements of crimes against humanity), it could also be held that trafficking is not slavery and should therefore be removed from the crimes against humanity provision of enslavement. The crime of trafficking does not aim to criminalise the underlying substantive criminal conduct (as in the case of international crimes) that is the basis of the exploitative situation; it centres upon how a person has been reduced to exploitation. According to Sellers and Kestenbaum: 'Notwithstanding Article 7(2)(e)'s description of enslavement, the ICC's Elements of Crimes do not cite any elements of trafficking as a crime. Ostensibly, trafficking is neither a separate crime nor an element of enslavement under the Rome Statute. Rather, it describes conduct.'⁸⁵ In addition, they argue that 'the ICC's Office of the Prosecutor (OTP) affirms this conclusion, noting that the Court has no jurisdiction over trafficking cases. The OTP's strategic plan states that 'ICC crimes usually do not occur in isolation from (...) other types of criminality, transnational organized criminal activity'. The OTP lists trafficking among transnational activities, clarifying that trafficking is distinct and not an international crime within the ICC's jurisdiction.'⁸⁶ Some have furthermore argued that human trafficking, being a transnational crime, is best left to national courts instead of international criminal courts or tribunals.⁸⁷

4. Disentangling Slavery, the Slave Trade and Human Trafficking

It seems that the nexus between slavery, the slave trade and human trafficking has become more obvious and to the forefront in the ICC's Rome Statute and EoC. Here the crimes of 'enslavement' (a crime against humanity) and 'sexual slavery' (both a crime against humanity and a war crime)

⁸⁴ For case law references, see Siller (n 45) 405-427.

⁸⁵ P Viseur Sellers and JG Kestenbaum, 'Missing in Action: The International Crime of the Slave Trade' (2020) 18 *Journal of International Criminal Justice* 533.

⁸⁶ *ibid* (referring to the ICC Office of the Prosecutor's Policy Paper on Sexual and Gender-Based Crimes and Strategic Plan).

⁸⁷ See, for example, H van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes against Humanity: Unravelling the Concepts' (2014) 13(2) *Chinese Journal of International Law* 297; A Gallagher and P Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line' (2008) 18(3) *International Criminal Justice Review* 334.

both refer to trafficking in persons. However, while the drafters at the Rome Conference had good intentions to address the fact that trafficking in persons often accompanies conflict situations, the term was incorporated without much legal consideration.⁸⁸ As mentioned, trafficking in persons is considered a transnational crime with different requirements from enslavement or sexual slavery being international crimes: e.g. trafficking does not rely upon the exercise of ownership over a person (rather acts, means and purpose needs to be established) and could have a defence of consent (which is not the case for enslavement and sexual slavery). Moreover, trafficking cannot be seen as a crime under the Rome Statute, because the crime is not listed as a separate crime against humanity and thus the elements of the crime of TIP are not specified in the EoC. Rather the crime of human trafficking must be seen as a description of conduct, not a crime that needs to be proven in order to find an accused guilty of enslavement or sexual slavery. Whenever anyone, including a trafficker, exercises powers of ownership over a person that is an act of enslavement and no longer trafficking.

The crime of the slave trade should arguably have been included in the Rome Statute instead. Both the slave trade and slavery are prohibited under the 1926 Slavery Convention, where slave trade is defined as: ‘all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.’ The slave trade is an international crime working side by side with the international crime of slavery. Now, slave traders who capture, acquire or dispose of a person, but who do not exercise powers of ownership cannot be brought under the enslavement provision in the Rome Statute. These deficits in the Rome Statute have been noticed. In April 2023, Sierra Leone proposed the addition of the slave trade as part of the prohibitive acts of the proposed Convention on Crimes against Humanity in the UN General Assembly’s Sixth Committee and announced a similar proposal to amend the crime against humanity provision in the Rome Statute as well.⁸⁹

The crimes of the slave trade and trafficking in persons resemble each other. Both crimes aim to reduce a person into an exploitive situation, and they overlap if that situation involves slavery. Thus, the slave trader, like the trafficker, is not legally required to exercise powers of ownership over a person prior to their being reduced into slavery. Different from trafficking, the slave trading is never dependent upon the absence or presence of coercive circumstances; it does not legally recognise the consent of an adult victim as a defence to the crime; and the age of the victim is irrelevant. The slave trading is not subject

88 Sellers (n 76).

89 See section 1.2 above.

to domestic statutes of limitations which may create in certain jurisdictions structural barrier to redress under trafficking laws, especially for displaced and stateless persons.⁹⁰ The crime of the slave trade being a peremptory norm in international law, would provide broad protections to victims, including victims who are reduced into slavery which involved sexual violence and exploitation, in national and international courts, if utilised more often in jurisdictions that prohibit the crime in law. Victims of the crime of human trafficking, particularly in European Union and Council of Europe States, can rely on specific protective mechanisms, including the right to a reflection and recovery period (providing for protection independent of the existence of criminal proceedings for a limited time), right to residence during criminal proceedings, right to shelter, right to compensation, the right to legal representation and information, among others.⁹¹ Since the human trafficking framework, including victim protection mechanisms, is much more elaborated at the national level, it might be advantageous to prosecute a crime as human trafficking rather than as the slave trade. This is particularly the case in those countries where the slave trade is not separately criminalised, but only mentioned in the context of human trafficking or not at all. At the same time, the recognition of the crimes in their own right at the national level (human trafficking as a transnational crime and slave trade and slavery as international crimes), allows for the act of slavery and slavery like practices, including the movement, to be prosecuted in various forms of gravity.

In sum, depending on whether the underlying conduct is part of an international crime, (eg, slavery, enslavement, sexual slavery or slave trade as crimes against humanity or war crimes for instance) or transnational crime (eg, slavery as an exploitative practice of human trafficking), the respective frameworks can be used, separately or cumulatively. It is not necessarily one or the other framework; it is about understanding the crimes, its applicable frameworks and how to make optimal use of it, and to amend it where needed.

90 Sellers, Kestenbaum and Kather, 'Including the Slave Trade in the Draft Articles on Prevention and Punishment of Crimes against Humanity' (n 40). It should be noted that in some national jurisdictions there are no statutory limitations for human trafficking. For example, in the Netherlands the prosecution of human trafficking is not restricted in time (Art 70(2) Dutch Criminal Code),

91 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA, 5 April 2011 (OJEU L 101/1); CoE Directive Council of Europe Treaty Series – No. 197; Council of Europe Convention on Action against Trafficking in Human Beings, 3 May 2005 (Council of Europe Treaty Series – No 197).

5. Final Remarks: Ways to Fortify

Exceedingly, armed conflicts generate situations of trafficking and slavery crimes, usually against the civilian populations. The London⁹² and Tokyo Charters⁹³ of the International Military Tribunals proscribed deportation to slave labour as a crime against humanity and a war crime – to redress the egregious slave labour policies that the Axis and the Nazi Powers deployed to wage their total wars. In the aftermath of the armed conflict in the former-Yugoslavia, trafficking surged⁹⁴ and often ensnared victims from the former Soviet Socialist Republic, such as Ukraine. The current armed conflict waged on Ukrainian soil, in turn, has propelled a resurgence of human trafficking that prey upon a vulnerable war-stricken population.⁹⁵ The United Nation's Special Representative for Sexual Violence and Armed Conflict accordingly set up a framework of cooperation with Ukraine addresses trafficking for sexual exploitation and conflict-related sexual violence.⁹⁶

In reality, the throes of the Ukrainian armed conflict have revealed facts or conduct that pertain to slavery crimes and to human trafficking merge, overlap and produce intersecting harms. From the abduction of children to the selection of displaced females at transport centres for exploitation, to the sexual abuse of detained civilians in occupied areas, multiple safeguards are required. Precisely this conjuncture of impunity requires a clearer, more functional understanding of the complementary juridical pathways that the international crimes of slavery and the slave trade, and transnational crime of trafficking could, or more insistently should, offer survivors. Slavery and the slave trade and the transnational crime of trafficking, for too long, unintentionally have bewildered practitioners and survivors alike. They have been a subterfuge instead of a path to redress. This article has endeavoured to journey down those

92 *Charter of the International Military Tribunal, Annexed to the London Agreement*, 8 August 1945, Art 6, 59 Stat 1544, 1547, 82 UNTS 279, 288. Article 6(c) proscribes deportation to slave labour as a crime against humanity and in 6(b) deportation to slave labour as a war crime.

93 *Charter of the International Military Tribunal for the Far East*, 19 January 1946, at Art 5(c) prohibits deportation to slave labour as a crime against humanity.

94 D Anastasijevic observed that 'trading in human beings has one obvious advantage: unlike most other consumer goods, a human being can be sold repeatedly losing much of his/her value. According to police reports, a young woman can be bought for between 500 and 5,000 euros, and once she is forced into prostitution, she can earn her owner as much as 15,000 euros a month; then she can be resold and replaced by another victim'. See Humsec, by D Anastasijevic, *Organized Crime in the Western Balkans*, 2006, 7-8 <https://www.files.ethz.ch/isn/102340/1_Anastasijevic.pdf> accessed 20 December 2023.

95 See International Organization of Migration, *Human Trafficking in Times of Conflict: The Case of Ukraine*, 13 November 2023 <<https://rovienna.iom.int/news/human-trafficking-times-conflict-case-ukraine>> accessed 20 December 2023.

96 See upcoming report from the Office of the Special Representative of the Secretary General on Sexual Violence in Conflict (n 38).

pathways to disempower impunity and to unveil the multiple access roads to justice We trust that you will journey with us.