

PROSECUTING HUMAN TRAFFICKING AS A CRIME AGAINST HUMANITY
UNDER THE ROME STATUTE

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INTRODUCTION:
PROSECUTING HUMAN TRAFFICKING AS A CRIME AGAINST HUMANITY

Bought and sold, consumed and exploited: human bodies, labor, personhood, and dignity have become the most valuable, reusable, and profitable products in the 2011 world market. Traded and transferred within the second largest and fastest growing criminal industry in the world, humans as merchandise have produced a 32 billion dollar industry¹ and an exponentially growing problem that affects virtually every region of the world.² Despite the global and severe reach of the human trafficking industry, which exploits at least 12.3 million people throughout the world at any given time, human trafficking continues to evade criminal consequence through black market transactions, transnational maneuvering, international indifference, ill-equipped or ill-informed governments, and global inadequacies regarding the complex and diverse contexts of trafficking, identifying trafficked persons, and prosecuting traffickers.

In the early twenty-first century, increased awareness and international concern mobilized several legal mechanisms to combat human trafficking. In 2002, the Rome Statute of the International Criminal Court (Statute) entered into force, with specific reference to

¹ The human trafficking industry is tied with the nuclear arms market and is second only to the narcotics trade. U.S. Department of Health and Human Services, Administration for Children & Families, “About Human Trafficking,” December 4, 2009, available at:

<http://www.acf.hhs.gov/trafficking/about/index.html> (last visited April 14, 2010).

The International Labor Organization (ILO) estimates that there are at least 12.3 million adults and children in forced labor, bonded labor, and commercial sexual servitude at any given time. Moreover, given the global economic crisis, rates of trafficking are likely to further escalate with the demand for cheap labor and human capital. United States Department of State, Trafficking in Persons Report 8, 37, June 2009 (placing analyzed states in tiers based on their efforts towards the TVPA definition of trafficking) [hereinafter TIP Report 2009].

² The human trafficking industry is tied with the nuclear arms market and is second only to the narcotics trade. U.S. Department of Health and Human Services, Administration for Children & Families, “About Human Trafficking,” December 4, 2009. Available at:

<http://www.acf.hhs.gov/trafficking/about/index.html> (last visited March 10, 2010); “UNODC launches Global Initiative to Fight Human Trafficking,” United Nations Office on Drugs and Crime, March 2007. Available at: <http://www.unodc.org/newsletter/en/perspectives/no03/page009.html> (last visited March 21, 2010) [hereinafter UN GIFT].

“trafficking in persons” as a crime against humanity under the Statute’s enslavement provision.³ In 2003, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), entered into force as part of the United Nations Convention against Organized Crime.⁴ In 2004, the Commission on Human Rights (now known as the Human Rights Council) appointed a Special Rapporteur on the thematic issue of trafficking in persons, especially in women and children.⁵ These global initiatives refined existing international instruments that condemn trafficking through broader protections against exploitation.⁶ At the same time, national initiatives such as the United States’ “Trafficking

³ The Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

⁴ Palermo.

⁵ Office of the High Commissioner for Human Rights, 2004/110, Special Rapporteur on trafficking in persons, especially in women and children, April 19, 2004, 55th Mtg, UN Doc. E/CN.4/2004/127, available at : http://ap.ohchr.org/documents/E/CHR/decisions/E-CN_4-DEC-2004-110.doc (last visited May 1, 2010). Until the late 1980s, a Special Rapporteur on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others was employed by the former Commission on Human Rights.

⁶ *See e.g.*, Conventions of the International Labour Organization: Convention concerning Forced or Compulsory Labour, *opened for signature* June 28, 1930, C029 (entered into force May 1, 1932); Convention concerning the Abolition of Forced Labour, *opened for signature* June 25, 1957, C105 (entered into force Jan. 1, 1959); Convention concerning Minimum Age for Admission to Employment (Elimination of Child Labour), *opened for signature* June 26, 1973, C138 (entered into force June 19, 1976); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *opened for signature* June 17, 1999, C182 (entered into force Nov. 19, 2000); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess. U.N. Doc. A/810, art. 4 (Dec. 12, 1948); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 272 (entered into force July 25, 1951) (and the referenced 1904 International Agreement for the Suppression of White Slave Traffic, the 1921 International Convention for the Suppression of Traffic in Women and Children, and the 1933 International Convention on the Suppression of the Traffic in Women of Full Age); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302, art. 8 (entered into force Mar. 23, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 4, Europ. T.S. No. 5, 213 U.N.T.S. 22 (entered into force Sept. 3, 1953); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 6, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force July 18, 1978); Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1248 U.N.T.S. 13 (entered into force Sept. 3, 1981); African Charter on Human and People’s Rights, *adopted* July 28, 1981, art. 5, 144 U.N.T.S. 123 (entered into force Oct. 21, 1986); Convention on Rights of the Child, *opened for signature* Nov. 20 1989, 144 U.N.T.S. 123 (entered into force Sept. 2 1990); Beijing Platform for Action, Fourth World Conference on Women, U.N. Doc. A/CONF.177/20, ¶ 131, Oct. 17, 1995.

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Victims Protection Act of 2000”⁷ contributed to an increase in local legal resources and remedies to combat human trafficking.

Human trafficking, or trafficking in persons, was defined as “a form of modern day slavery”⁸ involving the recruitment, transport, transfer, harboring, or receipt of persons through means of threat, force, fraud, coercion, deception, payment, or abuses of power or vulnerabilities, for the purpose of exploitation.⁹ National and international organizations and local governments have recognized that persons may be trafficked into prostitution, sex exploitation, forced labor, slavery or practices similar to slavery, warfare, child begging, servitude, or organ removal.¹⁰ Traffickers may be affiliated with the government, with organized crime groups, or they may be an informal team of criminals.¹¹ Trafficking does not require a border crossing, nor does it require commercial exchange.¹²

Despite the developments in human trafficking law, awareness, and policy over the past decade, the International Criminal Court’s (ICC) potential treatment of trafficking as a crime against humanity remains a question mark. While the Rome Statute’s reference to human trafficking may seem clear on its face, allegations of human trafficking have not yet been brought to the ICC, nor have they appeared before the International Criminal Tribunal for the

⁷ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 §2 A, 114 Stat. 1464 (2000) [hereinafter TVPA], as supplemented by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 [hereinafter TVPRA 2003], and the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) [hereinafter TVPRA 2005] (codified at 22 U.S.C. §7101).

⁸ United Nations Office on Drugs and Crime, Global Report on Trafficking in Persons 6 (2009) [hereinafter UNODC Report].

⁹ United Nations Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *opened for signature* December 25, 2003, 2225 U.N.T.S. 209, Article 3 (entered into force, September 29, 2003) [hereinafter Palermo].

¹⁰Id.

¹¹ Tom Obokata, Trafficking of Human Beings from a Human Rights Perspective 32 (2006) [hereinafter Obokata].

¹² Polaris Project, “What is Human Trafficking,” available at: http://www.polarisproject.org/index.php?option=com_content&task=view&id=26&Itemid=86 (last visited May 8, 2010).

Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR).

Accordingly, this paper examines the potential of the ICC in prosecuting human trafficking as a crime against humanity, identifying the complex contexts of sex trafficking, the challenges that ICC prosecution will likely face, and approaches that the ICC could take in investigating and prosecuting human trafficking.

Part I of this paper begins with a close reading of the language and intent of the Rome Statute's Article 7(1)(c) trafficking clause, the Statute's *travaux préparatoires*, and definitions of trafficking, noting that the absence of a precise definition of trafficking is the first obstacle to ICC trafficking prosecutions. This Part argues that the Palermo Protocol's international definition of trafficking should be adopted by the ICC to fulfill the Rome Statute's intent of expanding the traditional definition of slavery to incorporate trafficking, and to effectively prosecute human trafficking.

Part II presents two contexts of sex trafficking: the sex trafficking of North Korean refugee women in China and the sex trafficking of women for prostitution in the United States (US). These cases are presented to demonstrate the diverse contexts and ranges of sophistication, organization, and reach that constitute trafficking and to highlight the challenges that the ICC may face in prosecuting trafficking as a crime against humanity.

Part III analyzes the elements of crimes against humanity under the Rome Statute, applying the Statute to the North Korean, US, and hypothetical contexts. Through analyzing Article 7's requirements and Article 17's gravity threshold, this section argues that prosecuting human trafficking as a crime against humanity confronts the obstacles of conformity and minimization. Trafficking cases risk being overshadowed by crimes committed in armed conflict and as the

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law's focus on individual criminal responsibility has the potential of disregarding the exceptional and global effects of human trafficking as an economic enterprise.

To prosecute human trafficking cases, the ICC must confront the challenges of defining trafficking, the shadow of armed conflict in the ICC's developing jurisprudence, and the risk of overlooking the gravity of human trafficking. This paper concludes by urging the ICC to look beyond the situations to which international law has traditionally applied. To realize the promise of the Rome Statute, this paper urges the ICC to incorporate the Palermo Protocol, common purpose, and the exceptional and global effects of the trafficking market in approaching human trafficking as a crime against humanity.

I. INTERPRETING THE ROME STATUTE

Article 7(1) of the Rome Statute enumerates acts that, “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,” constitute a “crime against humanity.”¹³ Article 7(1)(c), the “enslavement” provision, is defined under Article 7(2)(c) as the “exercise of any or all 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.*”¹⁴ The Elements of Crimes to the Rome Statute explicate that exercising “any or all powers attaching to the right of ownership over one or more persons” includes, but is not limited to, “purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.”¹⁵ Footnote 11 to the Elements of Crimes additionally notes:

¹³ Rome Statute, Article 7(1).

¹⁴ Rome Statute, Article 7(2)(c) (emphasis added).

¹⁵ Rome Statute, Elements of Crimes, Article 7(1)(c) [hereinafter Elements of Crimes].

“It is understood that such deprivations of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”¹⁶

On its face, “trafficking in persons, in particular women and children,” is clearly included in the text of Article 7(1)(c) of the Rome Statute and in Note 11 of the Elements of Crimes. However, the precise definition of trafficking – beyond the attachment of ownership over a person or similar deprivations of liberty – is not articulated in the Statute.

The absence of a definition of “trafficking” in the Rome Statute creates uncertainty as to the potential prosecution of trafficking as a form of modern day enslavement in two ways. First, the inclusion of trafficking under the Statute’s enslavement provision expands longstanding and traditional formulations of the crime of enslavement. While the phrase “modern day slavery” is colloquially accepted, some jurists challenge the expansive *legal* use of the term “slavery” as rendering it “virtually meaningless” when it covers a wide range of practices.¹⁷ Additionally, the reference to the Convention on the Abolition of Slavery in the Elements of Crimes to the Rome Statute and the inclusion of the phrase “right of ownership over a person”¹⁸ questions whether or not Article 7 of the Statute applies to modern day human trafficking. Second, differing national definitions of trafficking and the relative youth of the Palermo Protocol question whether Article 7 will only address “severe forms of trafficking,”¹⁹ or if the Statute includes all forms of trafficking recognized by the Protocol.

¹⁶ Elements of Crimes, Article 7(1)(c), n.11.

¹⁷ Suzanne Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem* 453 (2003); *see contra* Kevin Bales, *Disposable People: New Slavery in the Global Economy* 8 (1999); Kevin Bales, *The Challenge of Measuring Slavery*, in *Understanding Slavery: A Reader* 87, 103 (2005) (using a broader definition of slavery beyond the 1926 Slavery Convention).

¹⁸ Rome Statute, Article 7(2)(c).

¹⁹ *See* TVPA; TIP Report, 6.

This Part analyzes the Statute's *travaux préparatoires* and leading definitions of trafficking to argue that acceptance of the Palermo Protocol's definition of trafficking would fulfill the Statute's intent of including trafficking as a modern form of slavery and providing for ICC prosecution of trafficking as a crime against humanity.

A. The Travaux Préparatoires to the Rome Statute

Albeit sparse, the *travaux préparatoires* to the Rome Statute indicate that the Statute intended to recognize and prosecute human trafficking as a form of modern day slavery, expanding both the traditional definition of slavery and negating the commercial presumptions often associated with trafficking. Article 7(2)(c) of the Statute borrows the definition of slavery from the 1926 Slavery Convention: “the exercise of any or all the powers attaching to the right of ownership over a person.”²⁰ During the course of drafting the Statute, the Women's Caucus unsuccessfully urged the Drafting Committee to recognize trafficking as an independent crime against humanity, separate from enslavement, in order to recognize the broad range of slavery and slavery like practices that trafficking entails, including systematic recruitment and forced labor.²¹ The Caucus also unsuccessfully challenged the “right of ownership” language within Article 7(2)(c),²² likely because traditional formulations of trafficking and slavery are not necessarily the same. In other words, traditionally, if persons are exploited by those other than

²⁰ Darryl Robinson, The Elements for Crimes Against Humanity, Chapter 4, in The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, Edited by Roy S. Lee 57, 84-85 (2001) [hereinafter Robinson].

²¹ The Women's Caucus was composed of representatives from women's and children's groups. The Advocacy Project, On the Record: Your link to the Rome conference for the establishment of an International Criminal Court, Volume 1, Issue 14, July 7, 1998. Available at: <http://www.advocacynet.org/resource/370> (last visited April 5, 2010) [hereinafter OTR-ICC].

²²Id.

the traffickers, then the continuous exercise of ownership by the traffickers is terminated, ownership may be transferred, and trafficking therefore may not be regarded as slavery.²³

Although trafficking was not established in an independent provision, the explicit inclusion of trafficking demonstrates the Committee's intent to expand the Statute's definition of enslavement beyond the 1926 Slavery Convention to include modern forms of slavery.

According to M. Cherif Bassiouni, Chairman of the Drafting Committee, Article 7's example of trafficking as a form of enslavement is of "essential significance" because it "precludes a perpetrator from claiming that he has not 'enslaved' because he has not literally 'put the person to work.'"²⁴ Additionally, on July 3, 1998, Italy proposed a clarification to the 1926 definition, adding that "enslavement includes the exercise of such power *in the course of* trafficking in persons, in particular women and children."²⁵ Italy's proposal was presumably to highlight and ensure incorporation of the most persistent forms of modern day slavery.²⁶ The proposed addition of "for the purpose of sexual exploitation" following "women and children" was also subsequently removed,²⁷ ensuring the inclusion of non-sexual forms of trafficking and that trafficking was a part of enslavement, rather than a niched form of sexual exploitation. Finally, the Elements of Crimes list purchasing, selling, lending or bartering, or "imposing on them a similar deprivation of liberty."²⁸ "Similar deprivations of liberty" and footnote 11 were inserted to address concerns that enslavement may be misinterpreted to require commercial or pecuniary exchange.²⁹

²³ Id.

²⁴ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 311 (2nd ed., 1999).

²⁵ Robinson, 85; Rome Statute, Article 7(2)(c) (emphasis added).

²⁶ Robinson, 85.

²⁷ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Discussion Paper, A/CONF.183/C.1/L.53 ¶ 2, July 6, 1998.

²⁸ Elements of Crimes, Article 7(1)(c).

²⁹ Robinson, 85.

Thus, the drafting process and the inclusion of trafficking in Article 7(2)(c) affirm the Statute's intent to capture modern forms of slavery, including contexts of trafficking and cases that may not involve commercial or pecuniary exchange.³⁰

B. Defining Trafficking

The absence of a definition for “trafficking of persons” in the Rome Statute is potentially problematic because national and international definitions of trafficking differ, and such differences could limit or expand the Statute's scope.³¹ Thus far, there are two leading definitions of trafficking: the international definition advanced by the Palermo Protocol (Palermo),³² and the national definition advanced by the US' Trafficking Victims Protection Act (TVPA), which addresses “severe” forms of trafficking.³³

Palermo and TVPA's definitions of trafficking are distinct in two primary ways.³⁴ First, TVPA's definition of trafficking requires force, fraud, or coercion to satisfy its “means element.”³⁵ In contrast, Palermo's definition of trafficking includes a broader list of potential means, including the “abuse of power or of a position of vulnerability.”³⁶ Unlike TVPA, Palermo's incorporation of power differentials recognizes that traffickers often exploit a trafficked person's vulnerabilities, for example, through threats of violence or fear of harm, starvation, or survival for oneself or for one's family.³⁷ Palermo's means element was purposefully made less restrictive to include “the reality of what happens” to trafficked persons

³⁰ *Id.*

³¹ See Jane Kim, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 51 *V.J.I.L.* 443, 447-454 (2010) (discussing the two primary definitions of trafficking).

³² Palermo, Article 3.

³³ See *supra* note 8.

³⁴ Kim, at 447-454.

³⁵ TVPA.

³⁶ Palermo, Article 3.

³⁷ Kim, at 452.

by including situations where the victim “has no real and acceptable alternative but to submit to the abuse.”³⁸ In effect, Palermo addresses the evidentiary burden imposed by the traditional means standard of force, fraud, and coercion that is often difficult to prove in the contexts of human trafficking.³⁹

Second, Palermo defines trafficking with a broader and inclusively enumerated list of exploitative purposes.⁴⁰ It is worth noting that Palermo intentionally left the contentious definitions of “prostitution” and “sex exploitation” undefined, allowing unprejudiced domestic legal treatment of prostitution by States Parties.⁴¹ Prostitution is therefore not the point of contention between Palermo and TVPA. Rather, Palermo focuses on exploitation rather than coercion, affording protection to all trafficked persons, drawing no distinctions between those who can prove they were forced and those who cannot, and offering no loophole for traffickers to use the alleged consent of the victim in their own defense.⁴² Thus, the differences between Palermo and the US’ definition of trafficking could either expand or limit the scope of the Rome Statute.

³⁸ Kim, at 452 (citing United Nations Office on Drugs and Crime, *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, 347 (2006) (from 1998-2001, published in 2006); Coalition Against Trafficking in Women, *Sex Trafficking in the United States: International and Domestic Trends* 13 (2001) [hereinafter CATW]).

³⁹ See Coalition Against Trafficking in Women, “Testimony of Dorchen A. Leidholdt, to the United States Congress on Anti-Trafficking Programs,” November 1, 2007, available at: <http://action.web.ca/home/catw/readingroom.shtml?x=113289> (last visited April 10, 2010) (explaining the difficulties of proving force, fraud, or coercion); Equality Now, “Statement of Jessica Neuwirth to the New York City Council,” June 11, 2008, available at: http://www.equalitynow.org/english/pressroom/press_releases/presidentstatement_20080613_en.html (last visited May 1, 2010) (same).

⁴⁰ Kim, at 452; Palermo, Article 3.

⁴¹ Interpretative Notes for the Official Records (*Travaux Préparatoires*) of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, U.N. Doc. A/55/383/Add.1, 64 (November 3, 2000).

⁴² CATW, 25.

C. Defining Trafficking Under the Rome Statute

In the absence of a trafficking definition within the Rome Statute, Palermo's definition should be incorporated to fulfill the Statute's intent because Palermo is the primary international instrument on human trafficking and because Palermo's means element has been accepted as customary international law.⁴³ The first global legally binding instrument with an agreed definition of trafficking, the Palermo Protocol has been widely accepted by the international community, despite its relative youth, garnering 117 signatories and 133 parties.⁴⁴ While the Rome Statute was completed before Palermo opened for signature, discussions regarding the definition of trafficking and the inclusion of threats, deception, and abuse of authority, power, or a dominant position were in progress as the Statute was being drafted.⁴⁵

Furthermore, both the ICTY and the United Nations General Assembly (GA) have recognized and affirmed the means elements defined in Palermo.⁴⁶ In 1997, the GA defined trafficking without requiring coercion, finding that a trafficked person could not consent to trafficking because the acts are inherently exploitative.⁴⁷ In *Prosecutor v. Kunarac* (2001), the ICTY found that while there was no definition of enslavement in the ICTY statute, the

⁴³ *Prosecutor v. Kunarac*, Judgment, IT-96-23-T, ¶ 537, 541-42 (ICTR Trial Chamber, February 22, 2001).

⁴⁴ Kim, at 448 (citing United Nations Office on Drugs and Crime, "Signatories to the United Nations Convention against Transnational Crime and its Protocols," available at: <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> (last visited April 23, 2010) [hereinafter Palermo Signatories]).

⁴⁵ See Janie Chuang, "Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Contexts," 11 Harv. Hum. Rts. J. 65, 79 (1998) (discussing 1997 proposals by the Global Alliance Against the Trafficking of Women) [hereinafter Chuang Definitions].

⁴⁶ Kim, at 448-49.

⁴⁷ The GA defined trafficking as: "illicit and clandestine movement of persons across national or international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers, and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment and false adoption." Report of the Special Rapporteur Against Women, its Causes and Consequences, ESCOR, Commission on Human Rights, 53rd Sess., Provisional Agenda Item 9(a), U.N. Doc. E/Cn.4/1999/47, 19 (1997); Chuang Definitions, 87.

International Law Commission's (ILC) definition of enslavement as a crime against humanity constitutes customary international law.⁴⁸ The ICTY stated:

“Under this definition [of enslavement, which includes trafficking], indications of such enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; *the abuse of power; the victim's position of vulnerability*; detention or captivity, psychological oppression or socio-economic conditions.⁴⁹

Thus, *Kunarac* accepts Palermo's means elements as customary international law. Accepting Palermo's definition of trafficking would therefore fulfill the Rome Statute's intent to effectively and functionally target trafficking as a form of enslavement.

Critics of Palermo's definition of trafficking will likely argue that the Protocol is only seven years old, that it entered into force after the Rome Statute was drafted, and that national implementation is far from satisfying Palermo's standards.⁵⁰ As such, critics could argue that Palermo has not yet reached the level of customary international law, a standard delineated by the International Court of Justice as requiring constant and uniform usage that evidences a general practice accepted as law.⁵¹ Strongly rebutted by *Kunarac*, this argument weakens the case for ICC incorporation of TVPA's definition of trafficking as TVPA is not an international treaty and as it is not much older than Palermo. TVPA advocates may even argue that the US' definition of trafficking is closer to customary international law than Palermo because of its unilateral sanctions and tier-based ranking provisions. Under TVPA, the US is authorized to

⁴⁸ *Kunarac*, ¶ 537.

⁴⁹ *Id.* ¶ 541-42 (emphasis added)

⁵⁰ *See* TIP Report, 50.

⁵¹ *See e.g.*, *Asylum Case (Columbia v. Peru)*, 1950 I.C.J. 7, 13-14 (November 20) (constant and uniform usage); *North Sea Continental Shelf Case (Germany v. Denmark)*, 1969 I.C.J. 3, 45 (February 20) (settled practice and evidence that this practice is from obligation to existence of rule requiring it); *Military and Paramilitary Activities (Nicaragua v. US)*, 1986 I.C.J. 14, 98 (June 27) (general practice accepted as law).

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evaluate country performance in combating trafficking and to impose sanctions against countries that do not sufficiently comply with the US government's "minimum standards for the elimination of trafficking."⁵² "Eager to avoid the threat of US sanctions, an unprecedented number of governments worldwide have passed anti-trafficking legislation and developed domestic infrastructure to meet US minimum standards."⁵³ It could thus be argued that TVPA's threat of sanctions elevates US norms over international norms, imposing TVPA's definition of trafficking on other nations.⁵⁴ While creative, this argument is not likely to prevail because sanctions regimes may be distinguished from obligations constituting customary international law and because the US spearheaded the drafting of Palermo⁵⁵ and ratified the Protocol in 2005, albeit with reservations.⁵⁶

In addition, advocates for the TVPA's definition of trafficking may argue that TVPA's focus on severe forms of trafficking aligns with the ICC's mandate to investigate and prosecute "the most serious crimes of international concern."⁵⁷ However, this argument confuses the definition of acts enumerated under Article 7 and the additional elements required of these acts – namely, that crimes against humanity are "committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack."⁵⁸ Thus, gravity or severity is already measured into the Statute through the requisite elements of crimes against humanity; an additional severity threshold as defined by the US would be superfluous. For these

⁵² *See supra* note 8, §108(a).

⁵³ Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 *Mich. J. Int'l L.* 437, 465 (2006) [hereinafter *Chuang TVPA*]; TIP Report, 47.

⁵⁴ *Chuang TVPA*, 439.

⁵⁵ President Clinton was eager to spearhead the drafting of Palermo; however, U.S. Congress had a different view and passed domestic legislation that employed selective and often misleading references to Palermo norms, with a different definition of trafficking. *Chuang TVPA*, 439-40, 449.

⁵⁶ Palermo Signatories.

⁵⁷ Rome Statute, Article 1.

⁵⁸ Rome Statute, Article 7(1).

reasons, Palermo's definition of trafficking should be adopted by the ICC in investigating and prosecuting human trafficking as a crime against humanity.

II. CASES OF SEX TRAFFICKING

Trafficking occurs in numerous contexts that range in scale, sophistication, and purpose.⁵⁹ Despite this diversity and complexity, traffickers adopt similar methods of abuse, domination, violence, and coercion to control and exploit trafficked persons, and traffickers similarly thrive amidst minimal criminal punishment and impunity.⁶⁰ This section presents two cases of the trafficking of women for the purposes of sex exploitation (sex trafficking) in order to demonstrate the complex and diverse range of contexts in which trafficking may arise and to explore how the ICC may approach trafficking contexts. While countless additional contexts could be discussed, the cases of North Korean refugee women in China and of sex trafficking for prostitution in the US have been selected because of data availability and because these cases highlight difficult issues in applying the Rome Statute to trafficking situations, to be discussed in Part IV of this paper.

A. North Korean Refugee Women in China

North Korean refugee women flee North Korea for food, opportunity, and life.⁶¹ Upon crossing North Korea's northern border into China, North Korean refugee women are extremely

⁵⁹ US Government Accountability Office, Human Trafficking: A Strategic Framework Could Help Enhance the Interagency Collaboration Needed to Effectively Combat Trafficking Crimes 56 (2007) [hereinafter GAO].

⁶⁰ CATW, 100-104; ICF International, Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices 16 (2008) (a report submitted to the US Department of Justice and National Institute of Justice) (citing lack of harsh penalties as a TVPA weakness) [hereinafter ICF].

⁶¹ Kim, at 454-65 (examining the case of North Korean refugee women).

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vulnerable to exploitation, deportation, imprisonment, death, and to traffickers who manipulate and profit from these vulnerabilities.⁶² North Korean and Chinese law enforcement patrol the North Korea-China borderlands (Northeast China), shooting North Koreans on sight⁶³ or arresting and deporting North Koreans who subsequently face internment or death in North Korea as punishment for their flight.⁶⁴ China's deportation of North Koreans violates the United Nations Convention Relating to the Status of Refugees (Refugee Convention), which classifies North Koreans as refugees entitled to asylum, safe haven, and protection,⁶⁵ as well as the United Nations Convention Against Torture (CAT), which prohibits deportation when torture is a likely consequence.⁶⁶ Despite China's obligations under international treaty law, China maintains a policy of classifying North Korean refugees as "economic migrants," and continues to deport North Korean refugees because of their alleged threat to China's economy.⁶⁷ Moreover, China continues to deny access to these borderlands, despite the pleas of the UN Refugee Agency (UNHCR) and international relief agencies.⁶⁸

Exploiting China's deportation policy, the fear of torture and internment in North Korea, and the absence of UNHCR presence in Northeast China, traffickers recruit, imprison, transport, transfer, sell, and often recapture and resell North Korean refugee women into forced labor,

⁶² Kim, at 458; Committee for Human Rights in North Korea, *Lives for Sale* 11-17 (2009) [hereinafter *Lives for Sale*].

⁶³ Kim, at 458 (citing JoongAng Daily, "Aid groups say North is heading for major famine," ReliefWeb Online: May 27, 2008, available at: <http://www.reliefweb.int/rw/rwb.nsf/db900sid/KHII-7F27W9?OpenDocument&rc=3&cc=prk> (last visited April 2, 2010)).

⁶⁴ Kim, at 458 (citing Hawk, 10, 26).

⁶⁵ Kim, at 458-59 (citing Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954)).

⁶⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

⁶⁷ Kim, at 458-59 (citing Stephan Haggard and Marcus Noland, *Political Attitudes under Repression: Evidence from North Korean Refugees* 9 (2010); TIP Report, 105, 107; Donald Macintyre Yanji, "Nowhere to Run, Nowhere to Hide." *Time Magazine*: June 18, 2001).

⁶⁸ Kim, at 458-59.

prostitution, and enslaved-marriage.⁶⁹ In one area of Northeast China, the male to female ratio among those of marriageable age is estimated at 14:1, driving insatiable demand for North Korean “bride-slaves” who are sold by traffickers into forced marriages with Chinese men.⁷⁰ In these enslaved-marriages, North Korean refugee women are physically and sexually exploited as domestic laborers, sex slaves, and for their reproductive capacities.⁷¹

The transfer of North Korean refugee women to Chinese men constitutes trafficking under Palermo, and under TVPA.⁷² First, North Korean women are sold or resold to Chinese men, involving the recruitment, transport, harboring, receipt, and transfer of persons.⁷³ Second, Palermo’s means element of trafficking is fulfilled as North Korean refugee women are either physically forced, drugged, or fraudulently told that they will find a “new life” or “nice husband.”⁷⁴ Additionally, the refugee status of North Korean women in China and the consequences of deportation constitute an abuse of a position of extreme vulnerability that further satisfies Palermo’s means element.⁷⁵ Third, the purposes of exploitation are satisfied as trafficked North Korean refugee women face forced labor, prostitution, and sex exploitation in marriage through rape, forced pregnancy, and sexual slavery.⁷⁶

⁶⁹ Kim, at 458-59 (citing *Lives for Sale*, 9, 15-16).

⁷⁰ Kim, at 459 (citing *Lives for Sale*, at 9; Joel R. Charny, *Acts of Betray: The Challenge of Protecting North Koreans in China*, UNHCR Refworld, April 9, 2009, available at: <http://www.unhcr.org/refworld/docid47a6eba50.html> (last visited May 2, 2010)).

⁷¹ Kim, at 454-65 (citing *Lives for Sale*, 50-53; Mike Kim, *Escaping North Korea: Defiance and Hope in the World’s Most Repressive Country*, 83-84, 91 (2008)).

⁷² Kim, at 483-84.

⁷³ Kim, at 483-84 (citing Palermo; TVPA).

⁷⁴ Kim, at 483-84 (citing *Lives for Sale*, 28-49, 53; *see also* Palermo; TVPA).

⁷⁵ Kim, at 484-85; *see also* *Lives for Sale*, 28-49, 52; Palermo.

⁷⁶ Kim, at 454-65; *Lives for Sale* 28-49, 52-53; Palermo.

B. Sex Trafficking for Prostitution in the United States

The United States is a destination country for thousands of men, women, and children trafficked to the US from around the world.⁷⁷ Despite the US State Department's extensive analysis of other countries, data on trafficking within the US is limited, perhaps in part because responsibilities are divided across multiple federal and state agencies.⁷⁸ As of 1999, the US government estimated that 50,000 women and children are trafficked into the US each year,⁷⁹ although this number has fluctuated in past years to estimates as low as 14,000, demonstrating the difficulties of quantifying and monitoring⁸⁰ – never mind prosecuting – trafficking crimes. Like much of the world, the US experiences trafficking in diverse forms, from large, organized-crime units trafficking hundreds to thousands of victims to “small-scale” trafficking rings to single-victim cases.⁸¹ A report by ICF International to the US Department of Justice (DOJ) found that of the trafficking cases surveyed, approximately 20 percent involved single victims, 9 percent involved more than 20 victims, and two cases involved more than 100 victims.⁸²

⁷⁷ TIP Report, 57.

⁷⁸ UNODC Report, 136; GAO, 6. Additionally, trafficking cases are often unpublished.

⁷⁹ CATW, 17; Amy O'Neill Richard. International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime 3 (Center for the Study of Intelligence: November 1999).

⁸⁰ United States Department of Justice, Department of Health & Human Services, Department of Homeland Security, Department of State, Department of Labor, USAID, Assessment of U.S. Government Efforts to Combat Trafficking in Persons 15 (2006).

⁸¹ ICF, 18; CATW, 18 (describing a nation-wide network operated in 14 states that held 500-1000 trafficked women held in prison-like conditions uncovered in March 1998 by the FBI in Atlanta, Georgia (United States v. McCready, Indictment, No. 1-99-CR-409 (N.D. Ga. Jan. 1, 1995) (case is unreported))).

⁸² ICF, 18. However, it should be noted that this survey sample was limited and that the number of victims identified may not be accurate because prosecutors may advance a case with only one victim when there may be additional identified victims. For example, in United States v. Lee, 472 F.3d 638 (9th Cir. 2006) (affirming conviction), a case involving labor trafficking, over 200 workers were recruited to work for the defendant's factory, but only 21 abused workers testified.

Similarly, the number of defendants or traffickers may range from one to hundreds of co-conspirators participating in a “ring,” “gang,” “family operation,” or “business organization.”⁸³

Sex trafficking for prostitution is common in the US. An example of a somewhat typical US trafficking case is *United States v. Mendez*, where the defendant-sex-trafficker and eleven other defendants lured young women and girls to the US from Mexico with false promises of legitimate jobs.⁸⁴ The defendants subsequently forced their victims into prostitution with thousands of men in multiple brothels in Tennessee, Kentucky, and Alabama, confiscating their earnings, threatening to hurt them and their families if they escaped or disobeyed them, and physically, sexually, and emotionally abusing and raping them.⁸⁵ Similarly, in *United States v. Carreto*, a family of six defendant-sex-traffickers seduced poor and uneducated Mexican women to the US and operated a prostitution ring in brothels across New York City for thirteen years.⁸⁶ The defendants sexually assaulted their victims, confiscated all of their earnings, and used threats of physical harm and restraint to force them to commit acts of prostitution.⁸⁷

The facts of *Mendez* and *Careto* are mirrored in countless additional cases: in *United States v. Rugerio*, Rugerio and his co-conspirators were charged with luring young, vulnerable victims from Mexico to Georgia with promises of a better life and using threats, assaults, and psychological coercion to compel the victims into prostitution for the defendant’s profit; in

⁸³ See e.g., *United States v. Lee*, 472 F.3d 638 (9th Cir. 2006) (20 guards); *United States v. Mendez*, No. 08-5846, 1-2 (6th Cir. Jan. 25, 2010) (Slip Copy, 2010 WL 272993) (12 defendants); *United States v. Paris*, No. 03:06-CR-64 (CFD) (D. Conn. Oct. 24, 2007) (2007 WL 3124724) (9 codefendants); *United States v. Carreto*, 583 F.3d 152, 154-55 (2nd Cir. 2009) (*cert denied* 130 S.Ct. 813 (Dec. 2009) and 130 S.Ct. 1555 (Feb. 2010)) (6 defendants); *United States v. Jiminez-Calderon*, US DOJ, Civil Rights Division, Criminal Section, Selected Case Summaries, available at:

<http://www.justice.gov/crt/crim/selcases.php> (last visited May 2, 2010) (4 defendants); *United States v. Norris*, No. 08-10238 (N.D. Ga. Dec. 18, 2009) (Slip Copy, 2009 WL 4894280) (3 defendants); *United States v. Jones*, No. 1:07-cr-285-WSD (N.D. Ga. Jan. 3, 2008) (2008 WL 60414) (1 defendant);

⁸⁴ *Mendez*, No. 08-5846 at 1-2.

⁸⁵ *Id.*

⁸⁶ *Carreto*, 583 F.3d at 154-55.

⁸⁷ *Id.*

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United States v. Zitlalpopoca-Hernandez, the defendant lured Mexican victims to California and coerced them into prostitution; in *United States v. Paris*, ten co-defendants recruited young girls and women and forced them to perform commercial sex acts in Connecticut.⁸⁸ US federal courts held that these cases constitute trafficking under TVPA because the trafficked women were recruited and transported through fraudulent promises and physical force for the purposes of sex exploitation (commercial sex acts).⁸⁹

These cases also demonstrate the range of size and sophistication of trafficking operations in the US. Despite this range of contexts, the tactics of control, manipulation, coercion, and exploitation are mirrored across trafficking contexts worldwide, regardless of differences in local landscape, culture, and law.⁹⁰ These cases also demonstrate the difficulties of prosecuting human trafficking on the national level. The US government has made pronounced efforts to combat trafficking in the US through TVPA's criminalization of trafficking, the US' "three Ps approach" of "prosecution, protection, and prevention,"⁹¹ \$23 million in 2008 on anti-trafficking efforts, and in offering victim protection services.⁹² Even so, in 2008, US federal prosecutors initiated only 183 investigations, charged 82 individuals, and

⁸⁸Many of these decisions are unpublished. Department of Justice, United States Attorney's Office for the Northern District of Georgia, "Citizen of Mexico Sentenced for Role in Federal Sex Trafficking Conspiracy," February 3, 2010, available at: <http://atlanta.fbi.gov/dojpressrel/pressrel10/at020310.htm> (last visited April 18, 2010) (decision unpublished); North County Time, "Two men plead guilty in sex trafficking case," November 25, 2009, available at: http://www.nctimes.com/news/local/sdcounty/article_d7aeb4f-7af5-54e5-a257-f999be1002ae.html (last visited May 1, 2010) (decision unpublished); Paris, No. 03:06-CR-64 at 1-2; *see also* United States v. Mujahid, Department of Justice, United States Attorney's Office for the District of Alaska, December 18, 2009, available at: <http://anchorage.fbi.gov/dojpressrel/pressrel09/ak121809a.htm> (last visited May 12, 2010) (decision unpublished); *see also supra* note 91 (listing only a few of many small-scale trafficking cases in the US).

⁸⁹ *See Mendez* at 1-2; *Carreto* at 154-155; TVPA

⁹⁰ *See generally* TIP Report; UNODC Report; CATW (describing country-based trafficking contexts and common global themes).

⁹¹ TIP Report, 25.

⁹² *Id.* at 57.

obtained 77 convictions in 40 human trafficking cases.⁹³ While these statistics are not insignificant and they reflect an increase in convictions from 2003 (27 trafficking convictions),⁹⁴ the US is by no means the leader in trafficking prosecutions,⁹⁵ perhaps in part because of the high burden of proof required to establish trafficking under TVPA's means elements.

III. APPLYING THE ROME STATUTE

In order for the acts enumerated in Article 7 of the Rome Statute to constitute a crime against humanity, the acts must be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁹⁶ Broken down, Article 7 consists of six essential elements:

1. The establishment of the perpetration of the acts enumerated in Article 7(1)(a)-(k);
2. The acts must constitute an attack directed against any civilian population;
3. The acts must be widespread or systematic in nature;
4. The attack must be pursuant to, or in furtherance of, a State or organizational policy to commit such attacks;
5. The acts must be committed *as part of* the attack, meaning a “nexus” between the acts and the attack must be established; and
6. The perpetrator(s) must have known that the conduct was part of or intended the conduct to be a part of such an attack.⁹⁷

Additionally, a case is not admissible if:

1. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution; or
2. The case is not of sufficient gravity to justify further action by the Court.⁹⁸

⁹³ *Id.* at 57.

⁹⁴ UNODC Report, 136.

⁹⁵ *Id.*

⁹⁶ Rome Statute, Article 7(1); Elements of Crimes, Article 7(1)(c)(1)-(3).

⁹⁷ Rome Statute, Article 7(1); Elements of Crimes, Article 7(1)(c); Gerhard Werle, Principles of International Criminal Law 216-31 (2005) [hereinafter Werle]; Situation in the Republic of Kenya, Decision on the Authorisation of an Investigation, ICC-01/09-19, ¶ 77-98 (ICC Pre-Trial Chamber II, March 31, 2010); Prosecutor v. Gombo, Decision on the Confirmation of charges, ICC-01/05-01/08-424, ¶ 73-89 (ICC Pre-Trial Chamber II, June 15, 2009); Prosecutor v. Katanga, Decision on the Confirmation of charges, ICC-01/04-01/07-717, ¶ 389-402 (ICC Pre-Trial Chamber I, September 30, 2008).

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Assuming that the acts of trafficking have been established, the most contentious elements will be discussed in turn (omitting element 1),⁹⁹ in light of hypothetical situations and the trafficking contexts presented in Part III of this paper to examine how the ICC may approach trafficking as a crime against humanity.

Concluding with the gravity threshold analysis, this section will argue that prosecuting human trafficking as a crime against humanity confronts the obstacles of conformity and minimization. First, as all of the cases currently before the ICC involve multiple allegations of both crimes against humanity and war crimes, trafficking cases risk being overshadowed by a Statute and jurisprudence that have been shaped with armed conflict in mind.¹⁰⁰ Thus, in considering cases of trafficking under Article 7, it is important to consider the intentional inclusion of trafficking in the Rome Statute and to distinguish trafficking contexts from those of armed conflict. Second, human trafficking risks minimization and disregard for the exceptional

⁹⁸ Rome Statute, Article 17; Situation in Kenya, ¶ 52-58.

⁹⁹ The nexus and knowledge and intent requirements have been omitted from this analysis because a nexus is easily established in trafficking cases, where the acts committed constitute the attack, and because the knowledge and intent analysis is fact-based, turning on the evidence against a particular defendant's actions and awareness. The analysis of complementarity has been omitted because the parameters of complementarity have not been fully delineated by the Assembly of States Parties to the Rome Statute (ASP). *See* International Criminal Court, Press Release, "Assembly of States Parties concludes the resumed eighth session," March 29, 2010 (noting complementarity as one of three topics under the stocktaking exercise). Moving forward, it is possible that China's continued failure to investigate and prosecute trafficking along the North Korea-China border will enable the ICC to investigate the situation, if all other jurisdictional and Article 7 elements are satisfied. It is also possible that the ASP may comment on whether inadequate national trafficking laws or sentencing guidelines that do not comport with international standards may constitute a State's unwillingness or inability to investigate or prosecute human trafficking. However, until then, the sovereignty and adequacy of national courts and laws is likely to be respected and protected in the interests of local justice, judicial economy, and international politics.

¹⁰⁰ In this analysis, it is important to keep in mind that the ICC has yet to hear a case involving allegations of trafficking as a crime against humanity; in fact, all of the cases currently before the ICC involve multiple allegations of crimes against humanity and war crimes, apart from the decision to authorize investigation into the situation in Kenya. Moreover, the ICTY and ICTR addressed contexts of armed conflict. *See* International Criminal Court, Situations and Cases, available at: <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited May 4, 2010). Multiple counts and the context of armed conflict have shaped the ICC's jurisprudence to-date.

and global reach of human trafficking. Thus, the ICC should consider the exceptional circumstances and possibility of joint criminal enterprise in approaching trafficking cases.¹⁰¹

A. An attack directed against any civilian population

For acts to constitute an attack directed against any civilian population within the meaning of Article 7, two requirements must be satisfied. First, the acts must constitute an “attack,” which is defined broadly and not restricted to a “military attack”; rather, an attack refers to a course of conduct, campaign, mistreatment, or operation involving the multiple commission of the established act carried out against the civilian population.¹⁰² Second, a civilian population must be the primary objective of the attack; this does not mean that an entire population of a state or territory must be affected, but rather, that the crime must have a collective nature, ruling out individual, incidental, and isolated acts of violence.¹⁰³ In *Prosecutor v. Tadic*, the ICTY explained that a single act of intentional killing could constitute a crime against humanity if the single act fits within the overall context; “thus, even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution.”¹⁰⁴

There are several ways to view the trafficking as an attack directed against a civilian population. The most common approach would be to classify cases of trafficking as Article 7 attacks when traffickers traffic multiple persons, constituting multiple commissions within a trafficking operation. Alternatively, a trafficker’s multiple commissions of trafficking may occur over the course of a lifetime, despite the smaller number of persons trafficked at one time. Third,

¹⁰¹ Rome Statute, Article 25; Werle, 120-28.

¹⁰² Elements of Crimes, Introduction to Article 7; Gombo ¶ 75; Situation in Kenya, ¶ 80.

¹⁰³ Gombo, ¶ 75; Katanga, ¶ 384; Situation in Kenya, ¶ 81-82; Werle, 224.

¹⁰⁴ *Prosecutor v. Tadic*, Judgment, IT-94-1-T, ¶ 649 (ICTY Trial Chamber, May 7, 1997); Werle, 224.

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trafficking may constitute an Article 7 attack if one person is trafficked, but the victim is exploited for an extensive period of time or in a continuous manner. For example, a victim may be trafficked into forced labor for decades or a victim may be raped continuously and constantly,¹⁰⁵ either via captivity or prostitution.

Finally, acts of trafficking may be considered as part of a conspiracy or “joint criminal enterprise.”¹⁰⁶ For instance, an organized and influential trafficking ring could be shown to drive and manage a trafficking market, either in supply-sending countries or in demand-receiving countries. Or, intentional cooperation and conspiracy across a region’s trafficking operations may be established. Hypothetically, if the traffickers of North Koreans in China shared information about the location of vulnerable refugees or about police raids and contributed to the commission of trafficking with common purpose, joint criminal enterprise could be established and the attack would include all acts committed by co-conspirators.¹⁰⁷ Under this view, the trafficking of North Korean women in China would not be seen as one-off, isolated instances, but rather, as part of a regional organism that is deeply dependent on the interconnectedness of trafficking operations and local, regional, or global trafficking markets. This view of Article 7 attacks would require intimate knowledge of the economics of trafficking and the trafficking markets in question.

Application of this element requires identification of the defendants and the extent of their operations. Given the available data, the trafficking of North Korean women in China likely constitutes an attack against a civilian population. First, North Korean women are targeted for their particular vulnerabilities and are thus the primary objective of the attack. Second, trafficked North Koreans are continuously sold into prostitution, forced labor, and enslaved-

¹⁰⁵ Kunarac, ¶ 501-02.

¹⁰⁶ Rome Statute, Article 25(3); Werle, 120-28.

¹⁰⁷ Rome Statute, Article 25(3)(d).

marriages; some are even recaptured upon flight and resold.¹⁰⁸ It is unlikely that each trafficker traffics one North Korean refugee woman and then ends their operation, never to traffic again. Likewise, the “small-scale” cases of trafficking in the US target vulnerable civilian populations, particularly women and girls. Several of these cases resulted in the sex exploitation (rape) of groups of women, which could constitute multiple commissions of trafficking. Alternatively, over time or over a course of a trafficker’s career, if groups of women are trafficked every few years, these acts would likely accumulate as multiple commissions to constitute an Article 7 attack.

B. Widespread or systematic nature

A widespread act connotes the large-scale nature of the attack, either over a large geographical area or directed against a large number of targeted persons.¹⁰⁹ A systematic act refers to the organized nature, pattern, or policy of the acts of violence and consists of “non-accidental repetition of similar criminal conduct on a regular basis,” improbable of random occurrence.¹¹⁰ The act(s) need only be *either* widespread or systematic.¹¹¹ With regard the systemic requirement, trafficking is a highly organized and strategic business that involves the methodical identification, recruitment, manipulation, coercion, monitoring, and exploitation of trafficked persons to obtain ownership in the form power and control. The systematic process used by traffickers to silence and control trafficked persons is similar to that used by battering partners and torturers. Traffickers repeat their acts by continuously recruiting, obtaining, or

¹⁰⁸ See *supra* Part IIIA.

¹⁰⁹ Rome Statute, Article 7(1); Gombo, ¶ 82-83; Katanga, ¶ 394, 397; Situation in Kenya, ¶ 94-96; Werle, 225.

¹¹⁰ Gombo, ¶ 82-83; Katanga, ¶ 394, 397 (citing cases); Situation in Kenya, ¶ 94-96; Werle, 225.

¹¹¹ Rome Statute, Article 7(1); Gombo, ¶ 82-83; Katanga, ¶ 394, 397; Situation in Kenya, ¶ 94-96; Werle, 225.

harboring trafficked persons, or by continuous exploitation of the same trafficked persons. Once their human product is sold or is no longer profitable, traffickers recruit and exploit new trafficked persons. For this reason, trafficking operations are commonly systematic.

If the ICC were to find that a trafficking operation is not systematic, the ICC could find that the attack was widespread, although these cases may be exceptions. While there are cases of large-scale trafficking operations, small-scale operations that traffic dozens of persons are more common.¹¹² These small-scale operations are not likely “widespread” under Article 7 jurisprudence. However, where an attack is linked to a broader trafficking market or across trafficking operations through conspiracy or joint criminal enterprise, the widespread nature of such attacks would be evidenced by the cumulative number of victims involved and the reach of such operations.¹¹³ Thus, the ICC could consider the relationship between traffickers, other traffickers, and local, regional, or transnational trafficking markets to recognize the economies that incite human trafficking crimes and the widespread reach of these global enterprises.

For the trafficking of North Korean women in China to satisfy the widespread requirement of the Rome Statute, the Court would have to find more information regarding the number of victims and the identities of the traffickers. It is quite possible that the traffickers of North Korean women in China work as one organization. Moreover, given restrictions on the collection of data and given the challenges that North Korean refugees face in successfully reaching asylum, the availability of 53 victim testimonies is significant. Thus, it is possible that further investigation would reveal a larger scale of victims.

¹¹² ICF, 18; *see also supra* notes 87-89.

¹¹³ Rome Statute, Article 25(3); Werle, 120-28;

C. State or organizational policy

To satisfy the Rome Statute, the attack must be “pursuant to or in furtherance of a State or organizational policy to commit such attacks.”¹¹⁴ The “policy criterion” is interpreted in a broad sense as a planned, directed, or organized crime, as opposed to spontaneous, isolated acts of violence.¹¹⁵ The policy does not need to be explicit or precisely stipulated.¹¹⁶ Active State or organizational promotion or encouragement of the crime is evidence of a policy, and in exceptional circumstances, a State or organization’s deliberate failure to take action when such failure is consciously aimed at encouraging an attack satisfies this requirement.¹¹⁷ A “State” includes governments recognized by the United Nations as well as *de facto* forces that control and exercise governmental functions, while an organization includes ultimately “any group” of persons “with the capability to commit a widespread or systematic attack against a civilian population.”¹¹⁸ Examples of policies that have been advanced before the ICC include: a policy of targeting a population and destroying its property; a policy to target the civilian population by searching homes and punishing perceived rebel sympathizers; a policy to gain supremacy over a group; a policy to commit an attack against a civilian population.¹¹⁹ Thus, a policy need not be intricate in design.

Human trafficking, a crime that requires planning and organization, inherently furthers three policies: to recruit, sell, transport, harbor, or transfer humans, to profit off of the exploitation of humans, and to fuel demand for the human trafficking economy. Depending on

¹¹⁴ Rome Statute, Elements of Crimes, Article 7 (Introduction).

¹¹⁵ Gombo, ¶ 81; Katanga, ¶ 396; Werle, 227; D. Robinson, in F. Lattanzi and W.A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* 139, 161 (1999); H. von Hebel and D. Robinson, in R.S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute*, 79, 97 (1999).

¹¹⁶ Gombo, ¶ 81; Katanga, ¶ 396; Werle, 228.

¹¹⁷ Elements of Crimes, Article 7 (Introduction), n6; Situation in Kenya, ¶ 83-84.

¹¹⁸ Gombo, ¶ 81; Katanga, ¶ 396; Werle, 228.

¹¹⁹ Gombo, ¶ 109; Katanga, ¶ 17; Situation in Kenya, ¶ 88; Kunarac, ¶ 579.

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the type of trafficking and intersections with culture, politics, and conflict, human trafficking may be enjoined with policies of using children as human body shields in armed conflict, supplying cheap human labor, supplying female bodies for male sexual pleasure (rape), or dominating a certain ethnic or cultural group. In the case of North Korean refugee women in China, there are two prospective defendants: Chinese government officials and local traffickers. The policy of the Chinese government may be to exploit and benefit from forced North Korean labor, to ensure the generational continuity of Chinese men through forced marriages, or to deter flight from North Korea in order to protect China's economy and relations with North Korea. The policy of local traffickers in China and in the US would be to profit off of selling women for sex and services.

The State or organizational requirements are satisfied in trafficking cases as most trafficking operations enlist more than one person. Such is the nature of human trafficking, where the human products need to be watched and secured, and where the exploitative purposes often involve both the traffickers and external exploiter-clients. Even in the small-scale operations in the US, several co-defendants were often prosecuted together as a ring, sometimes as a family operation.¹²⁰ Testimonies from North Korean trafficking victims indicate that they were trafficked by teams of people,¹²¹ satisfying the organizational requirement of the Statute. Moreover, regarding a State's policy, while prosecutions for failed State action are difficult to prove, the Statute provides that in exceptional circumstances, deliberate failure of a State to take action could satisfy Article 7's policy requirement.¹²² While more information would be needed, it could be argued that China's deliberate policies of excluding UNHCR from Northeast China, of classifying North Koreans as "economic migrants," of deporting North Koreans refugees

¹²⁰ See *supra* note 91.

¹²¹ *Lives for Sale*, 28-49.

¹²² *Elements of Crimes*, Article 7 (Introduction), n6; *Situation in Kenya*, ¶ 83-84.

regardless of the likely consequence of torture,¹²³ and of failing to regulate trafficking within its borders amount to a State policy of deliberate failure to act, thus satisfying Article 7's policy requirement.

D. Nexus between the acts and the attack

Acts constituting crimes against humanity under Article 7 of the Rome Statute must be committed *as part of* the attack, meaning a “nexus” between the acts and the attack must be established.¹²⁴ The nexus requirement for trafficking cases is satisfied as the acts of trafficking constitute the attack against the civilian population.

E. Perpetrator knowledge or intent

In order to satisfy the knowledge or intent requirement of Article 7, the perpetrator(s) must have known that the conduct was part of or intended the conduct to be a part of the attack.¹²⁵ This means that the perpetrator must have been aware of the consequences of his/her conduct, but it does not mean that the perpetrator must have knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State or organization.¹²⁶ Such awareness may be inferred from circumstantial evidence, including the perpetrator's presence at the scene of the crimes and the general historical and political environment in which the act occurred.¹²⁷ Perpetrator knowledge and intent turns on the facts of the particular case. In some instances, the defendant may have enough knowledge to understand that his or her contributions

¹²³ See e.g., Stephan Haggard and Marcus Noland, Political Attitudes under Repression: Evidence from North Korean Refugees 9 (2010); TIP Report, 105, 107; Donald Macintyre Yanji, “Nowhere to Run, Nowhere to Hide.” Time Magazine: June 18, 2001.

¹²⁴ Gombo, ¶ 84-86; Katanga, ¶ 400; Situation in Kenya, ¶ 97-99.

¹²⁵ Rome Statute, Article 7; Elements of Crimes, Article 7(1)(c)(3).

¹²⁶ Gombo, ¶ 87-88; Katanga, ¶ 401.

¹²⁷ Katanga, ¶ 402.

to a trafficking operation would result in the trafficking of persons. In some instances, a defendant may be a driver or play a role that advanced the attack but was separate enough that he or she was not aware of the operation and the consequences of his or her conduct. In terms of joint criminal enterprise, it may be assumed that all perpetrators are aware of the workings and purposes of the human trafficking market.

F. Complementarity

A case is not admissible before the ICC if the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution.¹²⁸ Complementarity is a contentious issue whose parameters have not been fully delineated.¹²⁹ At present, the sovereignty and adequacy of national courts and laws have been respected in the interests of local justice, judicial economy, and international politics. However, as visibility and available information regarding cases of human trafficking increase, States will face growing pressure to locally address and prosecute traffickers. For example, as more information regarding the trafficking of North Koreans in China is collected, if China continues to fail to investigate and prosecute trafficking along the China-North Korea border, the ICC would likely have Article 17 jurisdiction over the case. Furthermore, moving forward, the Assembly of States Parties to the Rome Statute may comment on whether inadequate national trafficking laws or sentencing guidelines that do not comport with international standards may constitute a State's unwillingness or inability to investigate or prosecute human trafficking. Hypothetically, this could challenge the TVPA's definition of

¹²⁸ Rome Statute, Article 17; Katanga Judgment on Appeal, ¶ 78; Situation in Kenya, ¶ 53.

¹²⁹ See International Criminal Court, Press Release, "Assembly of States Parties concludes the resumed eighth session," March 29, 2010 (noting complementarity as one of three topics under the stocktaking exercise).

trafficking and countries that have low rates of trafficking investigations and prosecutions. Like much of the ICC's situations and cases to-date, this question is highly influenced by international politics and the perceived gravity of human trafficking crimes.

G. The gravity threshold

Article 17(1)(d) of the Rome Statute requires that a situation is of “sufficient gravity” to justify ICC action.¹³⁰ The gravity threshold represents a significant obstacle to prosecuting human trafficking cases as crimes against humanity because the gravity analysis risks overlooking the exceptional reach of human trafficking and of insulating and minimizing trafficking as a local problem rather than a global atrocity. Reflected through analysis of Article 7's requirement of a “widespread and systematic attack” involving “multiple commissions of an act,” prosecuting human trafficking as a crime against humanity produces conflicts of intent, scope, individual criminal responsibility, and common enterprise. Available data indicates that crimes of human trafficking are often committed in “small-scale” operations consisting of a handful of trafficked persons and traffickers.¹³¹

However, available data also reveals a thriving human trafficking *market*, an *industry*, recognizing an enterprise or relationships between traffickers who share a common purpose or plan that is economic, programmatic, and political. Broadly, this common plan is to exploit human bodies in crude and violent ways, to profit from an endless supply of vulnerable persons, and to continue inciting demand in an ongoing and largely unchecked course of conduct. In the sex trafficking of women, this common plan is motivated by gender-based discrimination. The law, however, protects individual responsibility and does not easily recognize conspiracy or joint

¹³⁰ Rome Statute, Article 17(1)(d); Situation in Kenya, ¶ 58.

¹³¹ ICF, 18.

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criminal responsibility unless a direct or intentional connection between co-conspirators is established.¹³²

The ICC's recent decision to authorize investigation in Kenya, however, offers a potential solution. Despite the dissent's assertion that the situation of post-election violence did not satisfy the gravity requirement of the Rome Statute and posed the negative "risks of a gradual downscaling of crimes against humanity towards serious ordinary crimes,"¹³³ the ICC found that the violence did satisfy the gravity threshold and was "not a mere accumulation of spontaneous or isolated acts" because there was an association between local leaders, businessmen, and politicians.¹³⁴ While we will have to wait for further investigation of the facts of the situation, the *Kenya case* may offer a relatively new lens for the ICC, which has been submerged in cases involving both war crimes and crimes against humanity within the context of conflict.¹³⁵ Thus, the *Kenya case* may provide a stepping-stone to recognize illicit economic associations or conduct-based affiliation, which would perhaps open the Court to consider the global enterprise and effects of human trafficking in determining the gravity of a particular case.

¹³² See Rome Statute, Article 25(3)(d); Werle, 120-23.

¹³³ Situation in Kenya, Dissenting opinion, ¶ 10.

¹³⁴ Situation in Kenya, ¶ 116-18.

¹³⁵ See *supra* note 105.

CONCLUSION
A GLOBAL CRIME, AN INTERNATIONAL CRIMINAL COURT

Human trafficking has affected more victims than the Holocaust, Rwanda, the War in Iraq, the Korean War, Vietnam, and both World Wars combined. A global crime, the sale and exploitation of persons in one country is deeply integrated with local politics and non-egalitarian practices, and profoundly affects the economics, politics, and sociology of other countries. In China, for example, practices such as selective abortion that led to a 14 to 1 male to female ratio drive the demand for human trafficking and incite neighboring countries to produce the supply.

Fed by globalization and a culture of tolerance from prevalence, systems of sex trafficking, sex tourism, mail-order brides, labor trafficking, international outsourcing to sweatshops, and cheap labor lean on one another¹³⁶ to produce a \$32 billion dollar industry in which at least 12.3 million persons are victimized at any given time.¹³⁷ Just as terrorism represents modern armed warfare, presenting new challenges of identifying unlawful enemy combatants and protecting against intentional attacks on civilian populations, human trafficking constitutes modern day slavery, representing a silent war where both traffickers and the trafficked are difficult to identify, prosecute, and protect. For this reason, there is no better forum to address human trafficking than through the ICC.

The ICC was established to investigate and prosecute the most serious crimes of international concern. Celebrated for its inclusion of gender-based crimes such as trafficking, sexual slavery, and enforced pregnancy, the Rome Statute's recognition of human trafficking as a crime warranting international concern signifies progress and potential. The inclusion of trafficking in the Rome Statute, however, did not fully account for the diverse and complex

¹³⁶ Catharine A. MacKinnon, *Are Women Human?* 13 (2006).

¹³⁷ UN GIFT; *see supra* Introduction.

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contexts in which trafficking can arise and the difficulty that situations of trafficking may confront in establishing the conflict-gearred elements of crimes against humanity.

The ICC faces three primary obstacles in prosecuting trafficking cases: (1) the issue of defining trafficking; (2) the shadow of armed conflict in both the Statute and the Court's jurisprudence; and (3) the risk of overlooking the gravity of human trafficking as an exceptional and global crime. To realize the promise of the Rome Statute and of the ICC and to effectively prosecute grave cases of trafficking, the Court must look outside of the situations to which international law has historically been applied. Otherwise, the vulnerable and invisible victims of human trafficking will have limited standing before the ICC and the inclusion of trafficking in the Rome Statute will prove symbolic, at best.