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# Prosecuting Human Trafficking for the Purpose of Sexual Exploitation under Article 7 of the Rome Statute: Enslavement or Sexual Slavery?

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## Abstract

*The crime of human trafficking for the purpose of sexual exploitation is yet to be prosecuted before the International Criminal Court (ICC). Having been described as a "modern day form" of slavery, its inclusion in Article 7 of the Rome Statute purports to serve as a reminder that in some instances, human trafficking could constitute a form of slavery. In recent times, human trafficking for the purpose of sexual exploitation has become a core element in the ideological aims of extremist groups, such as Islamic State of Iraq and Syria, and provides the financial means to sustain their criminal activities, feeding into a vicious cycle of further perpetration of conflict-related sexual violence and other crimes. However, despite this entrenched role of human trafficking within conflicts, the prospect of its prosecution before the ICC must be questioned in light of its definitional ambiguity, room for interpretation and overlap with the crimes of enslavement and sexual slavery as defined in the Rome Statute.*

*This article situates the crime of human trafficking for the purpose of sexual exploitation within the Rome Statute, whilst taking precaution so as not to expand the jurisdictional reach of the ICC. In doing so, it argues that while the crimes of enslavement and human trafficking significantly overlap, they do not fully coincide. While this may lead to the temptation to include human trafficking for the purpose of sexual exploitation as a distinct crime within Article 7 of the Rome Statute, it is argued that splintering the crime of enslavement even further will lead to legal uncertainty and belies the complexities of the crime of human trafficking. In this respect, the ICC should also forgo the crime of sexual slavery as a distinct crime from enslavement, leaving the latter as the umbrella provision under which both sexual and non-sexual acts of ownership are prosecuted.*

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## 1. Introduction

Despite its inclusion in the Rome Statute, the crime of human trafficking for the purpose of sexual exploitation,[1] particularly in women and children, has yet to be prosecuted before the International Criminal Court (ICC). Prior to this, the crime was completely left out of the jurisdiction of other international criminal tribunals, keeping the expansion of the concept of enslavement in light of 'modern day forms' of slavery undiscussed. The explicit reference to human trafficking in Article 7(2)(c) of the Rome Statute and its Elements of Crimes (EOC)[2] purports to serve as a reminder that in some instances, human trafficking could constitute a form of slavery. In recent times, human trafficking for the purpose of sexual exploitation has become a core element in the ideological aims of extremist groups, such as Islamic State of Iraq and Syria (ISIS), and provides both the pecuniary and non-pecuniary means to sustain their criminal activities, feeding into a vicious cycle of further perpetration of conflict-related sexual violence and other crimes. However, despite this entrenched role of human trafficking within conflicts, the prospect of its prosecution before the ICC must be questioned in light of its definitional ambiguity, the room it leaves for interpretation and the overlap with the crime of sexual slavery as defined in the Rome Statute.

While the focus remains on human trafficking *for the purpose of sexual exploitation*, assessing the viability of its inclusion in the Rome Statute cannot be done before exploring its relationship with enslavement. This article provides a brief overview of the legal definition of the crime of human trafficking as prescribed in Article 7(2)(c) of the Rome Statute, reviewing, inter alia, the international definition of the crime as found in the United Nations (UN) Trafficking Protocol,[3] the intentions of the drafters of the Rome Statute with respect to the crime against humanity of enslavement, and its interpretation particularly elucidated in the *Kunarac et al.* case.[4] It arrives at the conclusion that while the concepts of enslavement and human trafficking do increasingly overlap, they do not coincide. Due to length limitations, this paper will not address concerns

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1 While only referred to as 'trafficking in persons' in the Rome Statute, given the thematic nature of this journal, human trafficking for the purpose of sexual exploitation shall be focused on in particular here, though, as will be put forward at a later stage, the nature of exploitation in many cases is not mutually exclusive to just one form.

2 Specifically, for this article, Notes 11 and 18 in relation to Article 7(1)(c) Crime against humanity of enslavement and Article 7(1)(g)-2 Crime against humanity of sexual slavery.

3 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), adopted 15 November 2000, entered into force 25 December 2003 (Trafficking Protocol).

4 *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, 'Trial Judgment'*, IT-96-23-T & IT-96-23/1-T, 22 February 2001; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, 'Appeal Judgment'*, IT-96-23 & IT-96-23/1-A, 12 June 2002.

regarding the application of the chapeau requirements of crimes against humanity to the crime of human trafficking. A number of arguments have been made by scholars to support the prosecution of human trafficking as a crime against humanity.[5]

The additional dimension of sexual exploitation attached to human trafficking adds further complications to the debate surrounding the classification of the offence in the Rome Statute. It is thus questioned whether the crime of sexual slavery sufficiently captures the unique character and purpose of human trafficking for the purpose of sexual exploitation or whether a distinct legal category is deserved. In doing so, this article arrives at the conclusion that neither options suffice given that both splinter the sexual and non-sexual manifestations of enslavement, leading to the danger of specific conduct becoming overlooked in the process. Moreover, given the legal uncertainty already created by the additional crime of sexual slavery, the dangers of disbanding the crime of enslavement even further by including separately the crime of human trafficking for the purpose of sexual exploitation are emphasised. Ultimately, to overcome these challenges, the crime of enslavement as an all-encompassing provision should alone be applied by the ICC so as not to lose focus of the specific harms experienced by the victims.

## 2. The Intersections of Enslavement and Human Trafficking

It would be difficult to argue that the crimes of enslavement and human trafficking do not coincide. As will be seen, both involve an exploitative element achieved through some overlapping means, such as the threat or use of force or the abuse of power or a position of vulnerability. References in the Rome Statute to human trafficking indicate an intention of its inclusion within the ICC's jurisdiction, and likewise, both slavery and enslavement are stipulated exploitative 'purposes' of human trafficking. However, the extent of this overlap and the degree to which human trafficking falls within the Rome Statute's legal framework remains unclear.

5 See generally J. Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity Under the Rome Statute', *Columbia Law School Gender and Sexuality Online* (2011): 1-35. C. Moran, 'Human Trafficking and the Rome Statute of the International Criminal Court', *The Age of Human Rights Journal*, 3 (2014): 32; and T. Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System', *International and Comparative Law Quarterly* 54.2 (2005): 445.

### 2.1. Defining Human Trafficking

Though there have been several international instruments that have dealt with trafficking in human beings,[6] a legally recognised definition to allow for an internationally coordinated attempt to suppress the crime was for a long time lacking. The 2000 UN Trafficking Protocol has, for the first time under international law, provided a comprehensive legal framework which serves as an authoritative model and tool to empower criminal justice organs in combatting the crime. Under the Palermo Protocol, the definition of human trafficking consists of three elements:

*A.* An *act* – 'recruitment, transportation, transfer, harbouring or receipt of persons';

*B.* The *means* used to secure that action – '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 the giving or receiving of payments or benefits to achieve the consent of a person having control over another person'; and

*C.* The *purpose* of the action for which the means were used – 'Exploitation shall include, at 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'.[7]

Importantly, it is the *cumulative* presence of these three elements which constitutes the crime of human trafficking.[8] A number of observations can be made at first glance with respect to this definition. Firstly, the actions described need not cross national borders, nor do they always require movement; the harbouring and receipt of victims of trafficking, as well as the maintenance of an exploitative situation, could also amount to trafficking. Secondly, the 'means' element accommodates for both direct and indirect means and recognises that the intrinsic inalienability of personal freedom renders consent irrelevant to a situation in which personal freedom is taken away.[9] Thirdly, the *mens rea* requirement stipulates that trafficking will occur if the perpetrator *intended* that the action would lead to one of the exploitative actions listed. However, actual subsequent exploitation is not a necessary element of human trafficking; the phrase 'for the purpose of' requires a special intention of exploitation to be

6 See Chapter 1.1 'History of a Definition' in A. Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010), 13-25.

7 Article 3(a) of the UN Trafficking Protocol.

8 With the exception of trafficking in children whereby the second element of 'means' is irrelevant, Article 3(c) of the UN Trafficking Protocol.

9 OHCHR, *Human Rights and Human Trafficking: Fact sheet no 36* (New York & Geneva, 2014), 3.

present but does not require the intended conduct to actually be achieved. Moreover, significant for the discussion at hand is the absence of specific definitions of 'exploitation' within the Protocol which allows for an open-ended list of potential exploitative conducts to be linked to trafficking.

### 2.2. Human Trafficking in the Rome Statute

The inclusion of human trafficking within the Rome Statute is less explicit and much less elaborated than the above definition. Article 7(1)(c) of the Rome Statute stipulates that enslavement 'when committed as part of a widespread or systematic attack directed against any civilian population' constitutes a crime against humanity. Article 7(2)(c) specifies that enslavement for the purposes of paragraph (1) means 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power *in the course of trafficking in persons*, in particular women and children' (emphasis added).

Despite this reference to human trafficking, the Rome Statute and its EOC shed little light on the definition and parameters of the crime. The EOC provides examples of these 'powers' attached to the right of ownership 'such as by purchasing, selling, landing or bartering such a person or persons, or by imposing on them a similar deprivation of liberty'. It is clear from the particular reference to the importance of the idea of 'ownership' that enslavement is defined as in the 1926 Slavery Convention[10] under Article 1. Further embellishment of this, however, is provided in Note 11 of the EOC which reads:

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

It is important to highlight the reference to the 1956 Supplementary Convention,[11] the central feature of which is its extended application to the institutions and practices held to be similar to slavery *whether or not* they are covered

[10] League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered No. 1414.

[11] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3, adopted 1 April 1957, entered into force 30 April 1957 (Supplementary Slavery Convention).

by the 1926 Convention's definition of slavery.[12] Accordingly, this distinguishes victims of slavery from victims of the institutions and practices referred to as 'slave-like'.[13] The final sentence of Note 11 appears to extend this cautious expansion on the prohibition of slavery to include trafficking in persons. As a result, a plain reading of the text would suggest that certain practices that are not intrinsic to slavery could, under this expansive interpretation, *become* slavery should they include the firm attachment to attributes of ownership.[14]

The *travaux préparatoires* of the Statute is sparse on the issue, though during the negotiations in Rome the Women's Caucus for Gender Justice in the International Criminal Court (Women's Caucus) fought to save a proposal that would make trafficking in women and children a clearly recognised crime against humanity. The Women's Caucus, a group of women from different countries, regions, approaches and disciplines, has often been lauded for the fact that the Rome Statute explicitly codifies for the first time many crimes of sexual and gender violence.[15] A critical aspect of the group's advocacy was to ensure that the Rome Statute moved beyond a limited treatment of the crimes under the Court's jurisdiction, and affirmed the gravity of forms of violence that are committed, predominantly, though not exclusively, against women.[16] Accordingly, the draft proposal which sought to proscribe 'the deprivation of liberty in the course of trafficking in persons, in particular women and children for the purposes of sexual exploitation' was not fully endorsed by the Women's Caucus. In their bid to mainstream gender in the creation of the ICC the group welcomed the specific reference to women and children, however, it was felt that the proposal would be much stronger if it was separated from enslavement and was broader than sexual exploitation.[17] This was particularly down to the view that trafficking included a broad range of slavery and slavery-like practices, including systematic recruitment and forced labour,[18] which may not necessarily fall squarely within the enslavement provision. Moreover, it was felt that trafficking for the purpose of sexual exploitation was far too narrow and that the crime of trafficking in persons ought to be viewed as wider than prostitu-

12 Gallagher, *The International Law of Human Trafficking*, 181; 1956 Supplementary Convention, Art. 1.
13 Ibid.
14 Gallagher, *The International Law of Human Trafficking*, 185.
15 P. Spees, 'Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power', *Journal of Women in Culture and Society* 28.4 (2003): 1233-1234.
16 Ibid., 1239.
17 The Advocacy Project, 'On the Record for a Criminal Court: Issue 14', 7 July 1998, http://www.advocacynet.org/wp-content/uploads/2015/06/Issue-14-ICC.pdf, accessed 19 September 2018, 4-5.
18 Ibid., 5.

tion.[19] The group also objected to the wording 'the right of ownership', possibly because traditional formulations of trafficking and slavery are not necessarily the same.[20] However, despite their significant influence in gender mainstreaming the Rome Statute, the Women's Caucus failed to reopen the debate in separating the crime of trafficking from enslavement, but did succeed in removing the narrow purpose of sexual exploitation. Yet despite this, it is unclear why trafficking is included at all within the definition of enslavement, thus creating confusion surrounding the extent to which the crime of enslavement has been stretched.

In this vein, it has been argued, for instance, that the Rome Statute has returned to the original definition of the 1926 Convention 'with the addition of the practice of trafficking'.[21] However, it would appear unusual that such a critical deviation did not appear in the element of the crime itself but rather in the footnote. One explanation could be to draw attention to the many forms of exercising powers attached to the right of ownership. For instance, the inclusion of the word 'trafficking' has been regarded as being 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"'.[22] In other words, enslavement does not necessarily entail the traditional concepts of slavery, such as forced labour, but rather is perpetrated by means of actions which demonstrate powers of ownership.

This consideration looks at the act of trafficking itself, not as a crime, but rather as an action, i.e. trafficking *qua* trafficking. In this respect, Gallagher argues that the Rome Statute does not in fact concern itself at all with the definition of trafficking.[23] This appears correct when considering that the Rome Statute has not incorporated any of the elements of the definition found in the Trafficking Protocol, nor indeed any other instrument specifically dealing with human trafficking.[24] Accordingly, the *undefined* act of trafficking in persons is rather seen as a vehicle for the exercise of power attaching to the right of own-

19 The Advocacy Project, 'On the Record for a Criminal Court: Issue 18', 11 July 1998, www.advocacynet.org/wp-content/uploads/2015/06/Issue-18-ICC.pdf, accessed 19 September 2018, 6.

20 While 'the right to ownership' can be traced back to the 1926 Slavery Convention, earlier international agreements on the prohibition of trafficking were uniformly concerned with the process of recruitment. See Gallagher, *The International Law of Human Trafficking*, 13-25.

21 K. Bales and P. Robbins, 'No One Shall Be Held in Slavery or Servitude: A Critical Analysis of International Slavery Agreements and Concepts of Slavery', 2.2 *Human Rights Review* (2001): 26.

22 M. Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Hague: Kluwer Law International, 1999), 311.

23 Gallagher, *The International Law of Human Trafficking*, 216.

24 That being said, critics could argue that the Trafficking Protocol's relative youth, the fact that it did not come into force after the Rome Statute was drafted and that its national implementation is far from satisfying the Protocol's standards would be sufficient reason for not adopting the definition, see Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity', 12.

ership of the kind required to constitute enslavement. This rationale is also reflected in the drafting process of the Rome Statute's EOC, whereby delegates decided against including the actions of 'recruitment' and 'abduction' in the list of examples or powers attaching to the right of ownership. The reason given was because these acts do not describe directly an exercise of ownership over a person, but rather define the means of obtaining that person.[25]

### 2.3. Is Human Trafficking a Form of Enslavement?

While space limitations restrict a detailed account of the history of the definition of the crime through international law, some key developments must be noted and analysed to shed light on Article 7(2)(c) of the Rome Statute.

The *Kunarac* case before the International Criminal Tribunal for the former Yugoslavia (ICTY) is perhaps the most relevant authority to date for elucidating upon the contours of enslavement as a crime against humanity, whereby the Trial Chamber extensively reviewed the international legal definition of slavery in customary international law. Kunarac and Kovač were charged with enslavement and rape of Muslim women and young girls they had detained first in improvised detention centres and taken away to other locations, raped or kept in servitude by members of the Serb forces between 1992 and 1993.[26] Upon reviewing the judgments of the Tokyo and Nuremberg Tribunals, relevant provisions of the Geneva Conventions, the findings of the UN International Law Commission and human rights instruments, the Trial Chamber arrived at the reaffirmation of the classic definition as found in the 1926 Slavery Convention.[27] Namely, the *actus reus* of enslavement consisted of any or all of the powers attaching to the right of ownership over a person. The Trial Chamber then went on to identify the factors to be considered in properly identifying whether enslavement was committed to include:

*'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.'*[28]

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25 I. Haenen, 'The Parameters of Enslavement and the Act of Forced Marriage', *International Criminal Law Review* 13 (2013): 905.

26 *Kunarac, 'Trial Judgment'*, paras. 574-576.

27 H. van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts', *Chinese Journal of International Law* 13 (2014): 304.

28 *Kunarac* Trial Judgment, paras. 542–543.

Importantly, the Chamber noted that the presence of multiple factors may be required to determine that someone had been enslaved; no single factor alone was necessary or decisive in reaching any such determination.[29] Moreover, the judgment specifically noted that although the buying, selling, trading or inheriting of a person or his or her labours or services could be a relevant factor, the 'mere ability' to engage in such actions was insufficient to constitute enslavement.[30] Such actions actually occurring, however, could be a relevant factor.[31] The Chamber thus focuses on the *actual* exercise of powers attaching to the right of ownership, and not merely the contention that an individual *could* have enslaved a person.[32] This more stringent standard appears to separate lesser forms of trafficking under the Protocol (e.g. the transportation of individuals through one of the stipulated means), which only create the ability to exploit an individual, from serious instances of trafficking which include demonstrable acts indicating enslavement. In doing so, the Chamber rightfully ensures that the degree of severity attached to the conduct in question is consonant with the most serious crimes of concern to the international community. Additionally, the Trial Chamber stressed that the consent or free will of the victim is irrelevant due to the presence of other factors such as the threat or use of force or other forms of coercion.[33]

For its part, the Appeals Chamber accepted the Trial Chamber's definition and sought to distinguish the 'various contemporary forms of slavery' from classic 'chattel slavery',[34] noting that the distinction was a matter of degree and not of substance. The significance of this judgment lies in its acceptance of an evolution of the concept of enslavement, away from highly prescribed notions of property and ownership and toward a more nuanced understanding, blurring the conceptual differences between enslavement and trafficking in human beings. Indeed, the Trial Chamber had also acknowledged Article 7(2)(c) in reference to the general broadening of the traditional definition found in the Slavery Convention.[35] This begs the question as to why the specific inclusion of traffick-

29 Gallagher, *The International Law of Human Trafficking*, 186.

30 Gallagher, *The International Law of Human Trafficking*, 186; *Kunarac, 'Trial Judgment'*, para. 543.

31 Ibid.

32 This is also seen in the Chamber's reasoning that 'detaining or keeping someone in captivity, without more, would, depending on the circumstances of the case, usually not constitute enslavement' – *Kunarac 'Trial Judgment'*, para. 542.

33 *Kunarac, 'Trial Judgment'*, para. 542.

34 *Kunarac, 'Appeal Judgment'*, as per para. 117: 'the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as "chattel slavery" has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership'. As defined in footnote 145 of the judgment: '"Chattel slavery" is used to describe slave-like conditions. To be reduced to "chattel" generally refers to a form of movable property as opposed to property in land.'

35 *Kunarac, 'Trial Judgment'*, para. 541, note 1333.

ing within the Statute's definition was needed at all. One possible explanation is to view the inclusion as a legislative technique to draw the attention of the judges to situations of human trafficking which, through lack of explicit reference, may go overlooked. Nevertheless, in stipulating that there are indeed many and varied ways in which individuals can exercise complete and effective control over others,[36] and without affording clarity to the degree of weight attributed to the factors in the determination of enslavement, the judgment raises more questions than it answers in this respect.

What is clear, however, is that both the Rome Statute and the ICTY jurisprudence adhere to the core definition enshrined in the 1926 Slavery Convention while accepting a circumspect expansion of the concept in reference to the 1956 Supplementary Convention.[37] Thus, enslavement requires the exercise of any or all powers attaching to the right of ownership. Here, the exercise of 'any' powers attaching to the right of ownership appears to denote a lower threshold than that stipulated by the Trial Chamber. Namely, the Chamber provided the example whereby 'detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually *not* constitute enslavement'[38] (emphasis added), thus implying that an additional factor may be required. Yet, one must interpret 'any or all' in light of the overall definition of slavery, and assess whether there is 'some destruction of the juridical personality' as a result of the exercise of any or all powers attaching to the right of ownership.[39] What emerges are elements, which, taken separately or together, constitute slavery in law.

Consequently, in distinguishing enslavement from trafficking one must enquire about the situations of trafficking which may fall short of this standard i.e. situations which do not give rise to these powers of ownership. Under the Trafficking Protocol this could encompass the transportation of individuals by fraud or deception for a service amounting to exploitation. While potentially a crime under the Protocol, it is difficult to envisage such conduct falling under the jurisdiction of the ICC. Interestingly, the conduct in question may, to a certain extent, amount to the control of someone's movement and/or psychological control over an individual, yet the difference is a matter of degree and an assessment of a person as another's 'possession'.[40] In this respect, the Secretary-

36 Gallagher, *The International Law of Human Trafficking*, 217.

37 Referenced in Note 11 of the Rome Statute's EOC the Supplementary Convention has enumerated and defined several "institutions and practices similar to slavery" including debt bondage, serfdom, servile marriage and child exploitation.

38 *Kunarac, 'Trial Judgment'*, para. 543.

39 *Kunarac, 'Appeal Judgment'*, para. 117.

40 N. Siller, '"Modern Slavery": Does International Law Distinguish between Slavery, Enslavement and Trafficking?', *Journal of International Criminal Justice* 14.2 (2016): 423.

General's 1953 Memorandum[41] also sheds light on the characteristics of the various powers attaching to the right to ownership, which resonate with the EOC's list under the crime of enslavement.[42]

That is not to say, however, that instances of trafficking cannot also be considered as enslavement. One common 'misconception' is to consider trafficking as the separate crime committed prior to the enslavement of the victim. This is untrue for a number of reasons. Firstly, as has been seen, trafficking also incorporates an exploitative element, such as sexual exploitation. Secondly, it must be observed that the crime of enslavement also focuses on the manner in which slaves or those enslaved have been acquired. The *Kunarac* Trial Judgment, for example, found that while the 'acquisition' or 'disposal' of someone for monetary or other compensation is not a requirement for enslavement, doing so, however, is a prime example of the exercise of the right of ownership over someone.[43] Taking this further, the Trial Chamber also highlighted the inclusion of 'slave trade' within the crime of enslavement as defined in Article 1(2) of the Slavery Convention.[44] Accordingly:

> *The slave trade includes 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 of slaves.*[45]

In light of this exposition, it becomes clear that slave trade comprises of actions related to, if not identical to, the acts of human trafficking as found in the Protocol's definition. Moreover, the widely phrased 'all acts involved in' is broad enough to encompass both the 'acts' and 'means' elements of the Protocol definition. This definition of the slave trade by the Trial Chamber also ensures that the specific intent to enslave the individual is present, further correlating to the Protocol's definition.[46]

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41 UNESC, *Report of the Secretary General on Slavery, the Slave Trade, and Other forms of Servitude* (UN Doc. E/2357), 27 January 1953.

42 Rightful warning has been given to not afford a single and relatively ancient report too much weight. This particularly rings true given the Trial Chamber's reasoning in *Kunarac*: '[w]hat falls to be determined here is what constitutes "enslavement" as a crime against humanity; in particular, the customary international law content of this offence *at the time relevant to the Indictment*'. (emphasis added), para. 515 – Gallagher, *The International Law of Human Trafficking*, 184. However, in the scarcity of guidance, reference is nevertheless deserved.

43 *Kunarac*, '*Trial Judgment*', para. 542.

44 Siller, 'Modern Slavery', 421.

45 *Kunarac*, 'Trial Judgment', para. 519 citing the 1926 Slavery Convention.

46 Such a position has also been reiterated in the more recent decision by the European Court of Human Rights in *Rantsev v. Cyprus and Russia* whereby the Court pronounced: *'trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies*

Conversely, when reading the Protocol's definition plainly, it could be argued that conceptually the definition leaves no room to argue that trafficking is a form of slavery, simply because slavery (and enslavement) are identified as one of many end purposes for the crime of human trafficking itself. Moreover, the fact that human trafficking for the purpose of sexual exploitation is separately identified from slavery could infer that the two are in fact distinct from each other, or simply that this distinction is a drafting error which has not accounted for their significant overlap.[47] That being said, as an instrument specifically designed to address human trafficking, the Protocol must deal with the many manifestations of the crime in all its forms and serves as a reminder that the discussion at hand is solely dealing with prosecuting the crime within an international criminal law framework.

In conclusion, while the expansion of the crime of enslavement has certainly provided room for the inclusion of acts such as human trafficking, in doing so, it has also undeniably blurred the conceptual borders between the two crimes.[48] Nevertheless, the definition of human trafficking as found in the UN Trafficking Protocol *does* differ from its reference in the Rome Statute under the crime of enslavement. The work of the ICC judges will undoubtedly be highly significant in ascertaining the contours of the crime of enslavement in relation to the numerous acts which could constitute human trafficking. Given that the ICC is concerned with the gravest crimes affecting humankind, any acts of human trafficking will have to be measured against the more stringent test of 'powers attaching to the right to ownership' as the undoubtable yardstick with which to ascertain enslavement.

## 3. Human Trafficking for the Purpose of Sexual Exploitation

While it can be argued that human trafficking in its more serious manifestations can be tried before the ICC under Article 7(1)(c), human trafficking for the specific purpose of sexual exploitation attaches an additional dimension to the crime. The most recent United Nations Office on Drugs and Crime (UNODC) Global Report on Trafficking in Persons records that sexual exploitation is the most prominent detected purpose for human trafficking,

*close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions. It is described [...] as the modern form of the old worldwide slave trade'. Rantsev v. Cyprus and Russia (Judgement)*, 25965/04, European Court of Human Rights, 7 January 2010, para. 282.

47 Gallagher, *The International Law of Human Trafficking*, 189.

48 Van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity', 305.

followed by forced labour.[49] It also recognises that conflict can help drive trafficking as victims become particularly vulnerable to exploitation after the outbreak of conflict.[50] This unfortunate reality has been reflected in the development of the distinct crime of sexual slavery as prosecuted before the Special Court for Sierra Leone (SCSL) and as is currently being tried in the *Ntaganda* and *Ongwen* cases before the ICC. The following section assesses whether human trafficking for the purpose of sexual exploitation rightfully falls within the separate crime of sexual slavery as defined in the Rome Statute. In doing so, it also takes a look at the rationale behind differentiating the crime of sexual slavery from the crime of enslavement and attempts to append this logic to the crime of human trafficking for the purpose of sexual exploitation.

### 3.1. Sexual Slavery or Human Trafficking for the Purpose of Sexual Exploitation?

Following a series of negotiations, it was agreed that the offence of sexual slavery would be identical with the EOC for enslavement save for the additional sexual element. That is not to say, however, that sexual slavery is an offence *lex specialis* to enslavement, nor that instances of sexual slavery could not fall under the crime of enslavement. As Ambos and Adams both stated, enslavement does not represent the 'smaller crime' while sexual slavery would be the 'larger crime' that encompasses the smaller crime. Sexual slavery does not require another element that is not part of enslavement.[51] However, there may be circumstances in which enslavement and sexual slavery charges would both be laid, each capturing distinct elements of the violation in question.[52] Thus, sexual slavery comprises of the definition of enslavement as provided above, coupled with the fact that 'the perpetrator caused such person or persons to engage in one or more acts of a sexual nature'.[53]

Taking this into account, it could be possible that instances of human trafficking which include the exercise of powers attaching to the right of ownership, specifically for the purpose of sexual exploitation, are tried under the offence of sexual slavery. The characteristics of human trafficking in conflict-affected settings do indeed share a tangible overlap with the conduct ascribed by international criminal tribunals to the offence of sexual slavery. As reported by sev-

49 UNODC, *Global Report on Trafficking in Persons* (Vienna, 2016), 6.

50 Ibid., 10.

51 A. Adams, 'Sexual Slavery: Do We Need This Crime in Addition to Enslavement?', *Criminal Law Forum* 29.2 (2018): 300; K. Ambos, *Treatise on International Criminal Law*, Vol. I (Oxford: Oxford University Press, 2013), 248.

52 V. Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law', *Michigan Journal of International Law* 25.3 (2004): 624.

53 EOC, 8.

eral human rights organisations for instance, ISIS has systematically abducted and held captive women and girls who are subsequently moved from one location to another in Iraq and Syria.[54] These women and girls are then sold and resold to ISIS fighters, given as gifts, repeatedly raped, sexually abused and are forcibly married.[55] Reviewing the criminal conduct in the *AFRC*,[56] *RUF*[57] and *Charles Taylor*[58] cases before the SCSL, a similar pattern emerges whereby women and girls had no free will and no sexual autonomy from the moment of their kidnaping. They were handed over to a 'rebel husband', were regularly raped, sexually abused and were also forced to carry out domestic work. In all these cases, the victims were transported and transferred through means of abduction, threat, coercion and abuse of sexual and non-sexual vulnerability.[59] Yet interestingly, the term human trafficking was not used to describe the conduct in the mentioned SCSL cases,[60] but has been regularly associated with the conduct of ISIS.[61] Does ISIS therefore employ a different methodology?

The difference perhaps lies in the institutionalisation, bureaucratisation and almost tangible nature of the advantages of the crimes committed by ISIS. This growing threat of human trafficking in conflict has become part and parcel of the many tactics assumed by the organisation and is now enshrined by ideology. ISIS utilises fear, dehumanisation,[62] and violence to oppress women and uses human trafficking as part of its broader 'policy that aims to suppress, permanently cleanse or expel, or in some instances, destroy those communities within

54 Human Rights Watch, 'Iraq: Sunni Women Tell of ISIS Detention, Torture', 20 February 2017; Amnesty International, 'Iraq: Yezidi Women and girls Face Harrowing Sexual Violence', 23 December 2014; The Henry Jackson Society, *Trafficking Terror: How Modern Slavery and Sexual Violence Fund Terrorism* (London, 2017).

55 See accounts provided in R. Callimachi, 'ISIS Enshrines a Theology of Rape', *The New York Times*, 13 Aug 2015; Human Rights Watch, Iraq: ISIS Escapees Describe Systematic Rape, 14 April 2015); Amnesty International, ' Iraq: Yezidi Women and Girls Face Harrowing Sexual Violence'.

56 *Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (AFRC), 'Trial Judgement'*, SCSL-04-16-T, 20 June 2007.

57 *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF), 'Trial Judgment'*, SCSL-04-15-T, 2 March 2009.

58 *Prosecutor v. Charles Ghankay Taylor, 'Trial Judgment'*, SCSL-03-1-T, 26 April 2012.

59 See for example *AFRC, 'Trial Judgment'*, paras. 966-1068 (reviewing the evidence offered by prosecution to substantiate Count 6, rape as a crime against humanity); *RUF, 'Trial Judgment'*, paras. 1154-1155; 1178-1179; 1291-1297.

60 While human trafficking was not referenced in the Statute of the SCSL, the Court nevertheless based its interpretation on the EOC of the Rome Statute.

61 That being said, there have been recognitions of sexual violence amounting to terrorism. For instance, the SCSL concluded in the *RUF* Trial Judgment that 'the nature and manner in which the female population was a target of the sexual violence portrays a calculated and concerted pattern on the part of the perpetrators to use sexual violence as a weapon of terror' – para. 1347.

62 Posted on a pro-ISIS Twitter account, for instance, an ISIS pamphlet details in a Q&A format rules which govern the parameters of sexual activity with slaves, and treat captured non-Muslim women as subjects of sexual whims. Excerpts with translation can be found at K. Roth, 'The ISS Slavery Rules', *Human Rights Watch*, 5 September 2015.

areas of its control'.[63] Previously unforeseen, the threat includes the use of sexual violence as a tactic of terrorism to traffic victims internally and across borders for financial gain. Then UN Special Representative Zainab Bangura has described this profit as the lifeblood which sustains the group and the currency by which it operates.[64] ISIS has thus become one of the first organisations to create a sophisticated and public market for human trafficking instituted with a method of cataloguing women from capture and placing them on the market for sale and resale.[65] In the case of the enslavement of Yazidi women, the trade in women and girls 'has created a persistent infrastructure with a network of warehouses where victims are held, viewing rooms where they are inspected and marketed and a dedicated fleet of buses to transport them'.[66] The Special Representative also provided key dimensions of human trafficking by terrorist groups in order to foster conceptual clarity. Important for the discussion at hand, these key dimensions include when it is committed by violent extremists and terrorist groups in a systematic manner integral to the operation; when it is deliberately used to spread terror, inculcate fear and create an atmosphere of insecurity in order to intimidate and suppress opposition; when it is used to finance and sustain the activities of terrorist groups or as part of the systems of punishment and rewards; when it advances a strategy to radicalise, recruit, retain or reward fighters; and when it is committed pursuant to an ideology of controlling women's bodies, sexuality and reproduction.[67]

These particularities attached to the crime of human trafficking in conflict do perhaps differentiate the crime from instances of sexual slavery, yet simultaneously share significant overlaps. While the range of conduct falls within the legal definition of the crime of sexual slavery (exercising powers attaching to the right of ownership and the commission of a sexual act), the alternative question is whether the idiosyncrasies of the institutions and methods established to facilitate the sexual exploitation of victims have been captured under sexual slavery. Just as sexual slavery was introduced in addition to the crime of enslavement, despite it being subsumed definitionally by the latter crime, one could argue that the offence of human trafficking for the purpose of sexual exploitation (in its gravest and most serious forms) might also deserve similar treatment. Here, an insight into the rationale behind introducing a separate offence of sexual slavery in the first place might shed some light.

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63 OHCHR & UNAMI, *Report on the Protection of Civilians in Armed Conflict in Iraq* (Baghdad, 2014).

64 UN Security Council, *Open Debate on Trafficking in Persons in Conflict Situations* (S/PV.7847, 5), 20 December 2016.

65 Callimachi, 'ISIS Enshrines a Theology of Rape'.

66 Ibid.

67 UNSC, *Open Debate on Trafficking in Persons in Conflict Situations*, 7.

### 3.2. The Rationale Behind the Additional Crime of Sexual Slavery

During the negotiations in Rome, some delegates were concerned that the crime of sexual slavery was completely subsumed under the crime of enslavement which therefore rendered its inclusion in the Rome Statute superfluous.[68] The Holy See, for instance, reasoned that if the crime of sexual slavery were instead to be a form of enslavement rather than a distinct crime, it would prevent undue overlap, repetition and room for confusion in the Statute.[69] This would also ensure that the ICC was only concerned with the most serious crimes to the international community as a whole.[70] However, proponents for the inclusion of a distinct crime, such as the Women's Caucus, highlighted the plight of the World War II (WW II) 'comfort women' and the atrocities committed against women in Yugoslavia and Rwanda, referring to instances such as the establishment of rape camps.[71] In this respect it was argued that other crimes within the Statute also inevitably shared a degree of overlap, such as the crimes against humanity of murder and extermination. In such instances it was thus preferable, and indeed more accurate, to include specific listings of the kinds of serious crimes that were being, and would continue to be, committed in the contemporary world.[72]

Moreover, it was decided that the crimes of rape and enslavement that were traditionally used to prosecute instances of sexual slavery did not cover the spectrum of harms caused by sexual slavery. In the opinion of the SCSL and ICC judges, the sexual act is an aggravating feature of slavery which transforms it to the separate crime of sexual slavery.[73] Indeed, it was foreseen that charges of both enslavement and sexual slavery could be brought forward in order to capture the different interests or elements of the violation, particularly where control of sexuality was a factor in the enslavement.[74] These rationales for the

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68 Oosterveld, 'Sexual Slavery and the ICC', 615.

69 UN Preparatory Committee on the Establishment of an International Criminal Court, *Proposal submitted by the Holy See* (UN Doc. A/AC.249/1997/WG.I/DP.12 11), 11 December 1997.

70 Oosterveld, 'Sexual Slavery and the ICC', 662-663.

71 Women's Caucus for Gender Justice in the International Criminal Court, *Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court* (New York, 1997), paras. 5.6-6-5.6-13.

72 Oosterveld, 'Sexual Slavery and the ICC', 623.

73 Adams, 'Sexual Slavery', 295.

74 Argibay, in line with the Caucus' contentions, argues that: "Where control of sexuality is a factor in enslavement, the crime of sexual slavery can also be charged separately. Both sexual slavery and enslavement should be charging options because both crimes may be applicable as their elements and the interests they protect are distinct. Sexual slavery recognizes the specific nature of the form of enslavement and ensures that it will be given the distinct attention it deserves. Moreover, victims of the crime of sexual slavery may need somewhat different forms of protective measures or redress than victims of other forms of slavery." C. Argibay, 'Sexual Slavery and the "Comfort Women" of World War II', *Berkeley Journal of International Law* 21.2 (2003): 386.

inclusion of the crime of sexual slavery as distinct from enslavement have been synopsised efficiently by Oosterveld to include, that sexual slavery is a prevalent contemporary crime warranting express recognition; that the prohibition was sufficiently established in existing law; that listing the crime increases the gender-sensitivity of the Rome Statute; and that sexual slavery is conceptually distinct from certain other forms of enslavement or slavery-like practice.[75]

Considering Oosterveld's observations, one may be inclined to assert that human trafficking for the purpose of sexual exploitation is also distinct from enslavement as well as from sexual slavery. Human trafficking has become a prevalent and contemporary crime entrenched in the practices of groups such as ISIS; its prohibition is sufficiently established in existing law, particularly by virtue of the UN Trafficking Protocol; its recognition would increase the gender-sensitivity of the Rome Statute and; it can be argued that, conceptually, human trafficking differs from other forms of enslavement. This is particularly because enslavement could already occur within the 'act' and 'means' elements of human trafficking, which still leaves a range of intended criminal conduct to be committed in the 'purpose' element of the crime.

To embellish on this last point made, as stated previously, in accordance with the Trafficking Protocol, trafficking will occur if the implicated individual or entity *intended* that the action would lead to the specified end result of sexual exploitation. Trafficking is thus more about the process leading to the intended exploitation and as such is a crime of *dolus specialis*, yet importantly for the discussion at hand, fulfilment of the special intent does not need to be achieved when committing the material acts of the offence.[76] For instance, even if the 'acts' and 'means' of trafficking are carried out with the intention to sexually exploit the individual, given the transnational nature of the crimes in question, tracing the subsequent exploitation of a victim across borders may be a challenging task. While some actions may fall under the crime of enslavement, the absence of an aggravating sexual element of the action – though fully intended – would not suffice to be tried as a sexual slavery offence. Consequently, the complex, organised and lucrative institutions and methods mentioned above may impede the practical realisation of prosecuting such conduct under the offence of sexual slavery.

However, while it may be tempting to formally separate the crime of human trafficking for the purpose of sexual exploitation from both enslavement and sexual slavery, this argument centres on the assumption that the Rome Statute drafters were indeed correct in separating the crime of sexual slavery from enslavement in the first place. A number of arguments exist for the removal of

75 Oosterveld, 'Sexual Slavery and the International Criminal Court', 625.
76 Gallagher, *The International Law of Human Trafficking*, 34; UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners* (Vienna, 2009), 4.

the sexual slavery provision believing enslavement to be an appropriate umbrella provision to capture both the sexual and non-sexual aspects of the conduct in question. Accordingly, the final section considers this possibility together with the risks attached to further splintering Article 7(1) of the Rome Statute with an additional crime of human trafficking for the purpose of sexual exploitation.

### 3.3. The Dangers of a Separate Crime against Humanity of Human Trafficking for the Purpose of Sexual Exploitation

It has already been stated that the terms enslavement and sexual slavery are identical. Enslavement has always incorporated sexual activities, and so long as the offence of sexual slavery did not exist, sexual slavery activities were prosecuted under the crime of enslavement.[77] In this vein it has been argued that sexual slavery did not bring female enslavement to light, but rather converted it with false names into a purely sexual crime and thus transferred it into a legal 'offsite'.[78] Accordingly, the truth of female enslavement becomes alienated from the reality of the non-sexual ordeals, such as work, social roles, torture, persecution and other inhumane acts.[79] The additional offence of sexual slavery consequently fails to capture the complex scenarios of enslavement and ultimately is seen as a step backwards in the development of the prosecution of violence against women.[80]

It is thus argued that splintering the sexual manifestation of enslavement under different enumerated crimes while omitting the non-sexual acts of ownership, the circumstances of slave trading, and forgoing the allegations of enslavement and slavery, is legally unsatisfactory.[81] The legal sustainability of separating sexual slavery from enslavement as well as the contention that forced marriage ought to be recognised as a separate form of sexual slavery are discussions continually at the forefront of conflict-related sexual violence debates. Given the confusing and conflicting jurisprudence from the SCSL,[82] and even the assertion that splintering sexual and non-sexual acts leads to a shortened

77 A. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Antwerp: Intersentia, 2005), 141.

78 P. Sellers, 'Wartime Female Slavery: Enslavement?', *Cornell International Law Journal* 44 (2011): 138-139.

79 Adams, 'Sexual Slavery', 42.

80 Ibid., 43.

81 Sellers, 'Wartime Female Slavery: Enslavement?', 138.

82 Though space does not allow for a dissection of these judgments, in basic terms it can be said that two opposing views exist on the matter. The first opinion believes that all the acts can be adequately pursued as sexual slavery (*AFRC* and *Taylor* Trial Chamber); the second one demands a further conviction under other inhumane acts as necessary to capture the entire wrong of the act (*AFRC* Appeals Chamber and *RUF* Trial and Appeals Chamber) – Adams, 'Sexual Slavery', 305. For a comprehensive critique of this jurisprudence see Sellers, 'Wartime Female Slavery: Enslavement?'.

description of the suffering of the victim,[83] the introduction of an additional legal option of human trafficking for the purpose of sexual exploitation does not provide any further legal certainty. Also, fear of running afoul of the *ne bis in idem* principle, misinterpreting the *actus reus* of the crimes of enslavement and human trafficking or a failure to distinguish these crimes in practice would lead to similar problems experienced by the SCSL when interpreting the crime of sexual slavery. Particularly, this was the attempt to contort or squeeze the so-called 'forced marriage' phenomenon to fit the crimes of 'other inhumane acts' and 'outrages upon personal dignity' despite the fact that the conduct in question could be completely encompassed by the crime of enslavement.[84]

It also seems unwise to expand the jurisdiction *ratione materiae* of the ICC with this separate crime. Distinguishing human trafficking from enslavement would inevitably require further elucidation of the elements of the crime by the judges of the ICC. This may create the predisposition to apply the widely accepted legal definition of human trafficking as found in the UN Trafficking Protocol, opening the floodgates to incorporate lesser forms of exploitation into the Rome Statute. Borrowing from the Protocol definition would also mean accepting a less stringent standard that no longer requires exercise of powers attached to the right of ownership nor the actual commission of the exploitative act, leading to an endless expansion of the slavery concept. Secondly, and in relation to the first, an expansion of the concept would appear to go against the intention of the drafters of the Rome Statute. As stated earlier, taking the important decision to introduce the crime of human trafficking into the jurisdiction of the Court and deviate from the common understanding of slavery would not logically be placed in a footnote as opposed to the element of the crime itself.[85]

Finally, specifically identifying human trafficking for the purpose of sexual exploitation within the Rome Statute would also, for the sake of consistency, give rise to the identification of human trafficking as a crime in of itself. However, as the ICC is concerned with the most serious crimes affecting mankind, this would run counter to the Court's jurisdiction. In this respect, the exercise of any or all of the powers attaching to the right of ownership remains the *sine qua non* of enslavement, and in doing so ensures that only the most egregious forms of human trafficking would fall under the Court's jurisdiction. Moreover, a consistent judicial focus on the actions and methods used to procure victims, thus encompassing the slave trade into the umbrella offence of enslavement, goes a long way in incorporating the legal concept of trafficking into the crime

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83 Adams, 'Sexual Slavery', 322; Sellers, 'Wartime Female Slavery: Enslavement?', 138.

84 Sellers, 'Wartime Female Slavery: Enslavement?', 139.

85 A more detailed dissection of the precise wording of footnote 11 in the EOC is provided by Adams who also argues that the wording 'may, in some circumstances' was likely to overlooked so that the footnote ought to have read 'may, in some circumstances, include trafficking in persons' – see Adams, 'Sexual Slavery', 296-299.

of enslavement.[86] The Rome Statute's reference to state or organisational policies also reflects this institutionalised perspective of enslavement in the form of human trafficking.

## 4. Conclusion

There is no doubt that the concepts of human trafficking and enslavement are intertwined and the boundaries between the two have been blurred. What is evident, however, is that the ICC has retained the exacting standard of the 1926 Slavery Convention, but in light of the 1956 Supplementary Convention, it has no longer restricted slavery to the classic 'chattel slavery' and has instead encompassed other forms of exploitation in validation of the ICTY Appeals Chamber in *Kunarac*.[87] While international legislators have actively separated the two crimes, and despite being an authoritative definition for human trafficking, the UN Trafficking Protocol does not fully overlap with the Court's jurisdiction. Nevertheless, as a material link exists between human trafficking and enslavement, the ICC must be willing to accept an expansion of the latter term in order to accommodate for the many manifestations of human trafficking found in contemporary conflicts which do satisfy the threshold of exercising powers attached to the right of ownership.

In this respect, the ICC must exercise a great deal of caution when taking stock of its role as a universal, singular international criminal court capable of codifying rules as valid interpretations of international law. Accordingly, when gravitating towards trafficking-related terminology, it becomes necessary to abstain from perpetuating ambiguity in the law, particularly by virtue of comingling the concepts of human trafficking and enslavement to a greater degree than necessary. Borrowing trafficking rhetoric from the Protocol runs the risk of escalation and the acceptance of acts and means of human trafficking which fall short of the Court's mandate to address only the most serious crimes to mankind. The ongoing *Ongwen* case is a good opportunity for the Court to provide legal certainty to the crime of enslavement by applying the narrow *Kunarac* definition and interpreting the EOC in accordance with the legal definition of enslavement in Article 7(2)(c). While the Court must be prepared to attach conduct that includes trafficking in women and children to this provision, an interpretation which equates less restrictive forms of human trafficking with enslavement will lead to a discrepancy with the Statute.

Moreover, with the additional charge of sexual slavery in the indictment, it is suspected that the Court will fall into similar difficulties faced by the SCSL

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86 Siller, 'Modern Slavery', 427.
87 Van der Wilt, 'Trafficking in Human Beings, Enslavement, Crimes Against Humanity', 334.

in attempting to capture the same conduct with two separate crimes. The difficulty of course lies in capturing the unique characteristics of the conduct in question (for instance with the increasingly common, brazen and institutionalised slave markets established by ISIS) whilst refraining from fracturing the conduct into many separate elements, each pertaining to a specific crime. In the case of human trafficking for the purpose of sexual exploitation, splintering the non-sexual 'acts' and 'means' of the crime from the sexual exploitative element is somewhat troubling. For instance, once sexual slavery is charged, all subsequent non-sexual acts of ownership, such as selling and reselling of victims, forced marriage, domestic labour to name a few, are in danger of being overlooked as an interrelated whole set of conduct which share a sexual element.[88] Ideally, the Court should forgo the sexual slavery provision and legally characterise all slavery conduct (which would include human trafficking for the purpose of sexual exploitation) as enslavement so as not to fundamentally deny a victim of enslavement full judicial redress. Ironically, simplification of the provision is in fact a recognition of the complexity of the crime itself. Upholding the importance of the distinctiveness of a crime does not necessarily have to be reflected in the splintering of existing crimes, but can be done so through exhaustive and accurate indictments that do not let any specific forms of conduct go unpunished.

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88 Sellers, 'Wartime Female Slavery: Enslavement?', 139.

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